

Actualizing the Right to a Clean and Healthy Environment

Kariuki Muigua

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Dedication

This book is
dedicated to the idea
that realizing the Right
to a Clean, Healthy
and Sustainable
Environment
is achievable

And that actualizing
the Right
To a clean Healthy &
Sustainable Environment
is an ideal
worth pursuing

Dedicated to the ideal
of protecting human
and Environmental Rights
for a better
Today
and a bright
Tomorrow

Dedicated to the firm
belief
That the Universal Declaration
of Human Rights
and other instruments that
affirm
Human and Environmental Rights
still have value
And are not
Mere
Platitudes

Dedicated to the idea
that Sustainable Development
is a worthwhile goal
That we should all
work Towards

Dedicated to the thought
That we must protect
and conserve
Ecosystems
And biodiversity
And that we must
Combat climate change
As a matter of
urgency

Dedicated to the idea
That the Earth
is
Our Mother
And that we must
Nurture it
For the sake of
this generation
And the future of
the unborn

This book is for those
who rise up
Every morning
watch the sun come up
and remind themselves
That they must pursue
their big dreams
Even when the
winds of
discouragement

continue to blow
This book is for
those who know
that what was once
a thought
will one day
Become a reality

This book is for those
who never ever give up
in the face of
adversity
pain
and Tears

You are the
True Heroes

This book is
Dedicated to those
Who dare stand alone
In a society
that demands
conformity

To those who have
the courage

To go
where others dare not go
And to those who
explore new ideas
And walk towards
the direction
of their dreams

Dedicated

To the mother
who has to bear
the agony
of watching a child
die
in conflict
where the child
is not a combatant
In an environment
where peace is just
a dream

Dedicated
To the peacemakers
who work to restore
the dignity of humankind
And the environment

To those who conserve
the Earth
To make it a better
place
To live in
and thrive

This book is for those
who know
that life is worth
Living
And to those who
Keep hope alive
Knowing
And upholding the thought
That there will
always be
a better tomorrow.
- A tomorrow of beautiful
sunrises

and sunsets
Blue skies
And a Clean
Healthy
and Sustainable
Environment.

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I am sincerely appreciative of those who have encouraged me to continue researching and to contribute to knowledge.

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Finally, I extend my gratitude to my family. Together we have had good times and tragic times. We have endured grief together. Thank you for not giving up on me.

I do believe that in the end, we shall overcome.

May God Bless you all.

Author's Note

This book entails a further collection of papers focusing on the theme of 'Actualizing the Right to a Clean and Healthy Environment.'

The debate on what constitutes the right to a Clean and Healthy Environment has been running for a long time culminating in the adoption by the UN General Assembly of 'The human right to a Clean, Healthy and Sustainable Environment' on 28th July 2022.¹

The resolution re-affirms the Universal Declaration of Human Rights and recalls among others the Declaration on the Right to Development; the Vienna Declaration and programme of action; the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration; the Rio Declaration and noted other Human Rights instruments).²

The Resolution adopted by the General Assembly on 28th July 2022 is also a reaffirmation 'that all rights are universal, indivisible, independent and interrelated.' It also recalls the earlier Human Rights Council Resolution 48/13 of 8th October 2021 entitled "The Human Right to a Clean and Healthy Environment".³ The Resolution touches on other pressing and threats to the ability of the present and future generations to effectively enjoy their human rights.

The papers included in this book bring into focus the contemporary themes associated with these challenges. The author takes the view that states and all persons have a duty to address environmental challenges and protect human and environmental rights. There is a need to recognize the right to a Clean and Healthy Environment.

¹ UN/RES/76/300 on 28th July 2022, available at <https://acrobat.adobe.com/id/urn:aaid:sc:EU:0cc27865-46f5-4153-b8d7-6f0cf7f2be97> (accessed on 10th March 2024)

² RES 217 (A) III; RES 41/128; A CONF 157/24 1972 (A) CONF 48/14 REV I

³ Op. cit UN/RES/76/300 28th July 2022

It will be necessary to (re)conceptualize the right and seek practical ways of enforcing it in different contexts and jurisdictions. While the debate on the right to a Clean, Healthy and Sustainable Environment is now getting settled, the question of how it can be realized or actualized is what is on the table.

The Right to a Clean, Healthy and Sustainable Environment has now been recognized as a human right. It has also been noted that this right is related to other rights and existing International law.¹

This will require full implementation of the multilateral agreements under International Environmental Law. There is a call upon states, International Organizations, business enterprises and other relevant stakeholders to enhance International Cooperation, strengthen capacity building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.²

The themes covered in this book include: Sustainable Development, Environmental Justice; Human rights; Environmental Governance; Conflict Management; the Blue Economy; Climate Diplomacy; Sustainability; Restoring Landscapes; Indigenous knowledge; Climate change; Poverty eradication; Peace building and Actualizing the right to a Clean, Healthy and Sustainable environment.

There is also discussion on Environmental, Social and Governance (ESG). This is relevant in so far as it relates to the theme of actualizing the right to a Clean, Healthy and Sustainable Environment.

The papers in this book have been published in various journals and one or two appear in previous book chapters. It is hoped that bringing them together in one volume under the thematic area of the right to a Clean, Healthy & Sustainable environment will aid the researcher to join the discourse efficiently as we move the discussions forward.

**Hon. Prof. Kariuki Muigua Ph.D, FCIArb, Ch.Arb, OGW.
Nairobi, March 2024.**

¹ UN/RES/76/300, 28th July 2022.

² Ibid.

List of Statutes/Legislation/Official Government Documents

Climate Change Act., No. 11 of 2016., Laws of Kenya., Government Printer, Nairobi

Community Land Act., No. 27 of 2016., Government Printer, Nairobi

Constitution of Kenya, 2010, Government Printer, Nairobi

Energy Act., No. 1 of 2019., Laws of Kenya., Government Printer, Nairobi

Environment and Land Court Act., No. 19 of 2011, Government Printer, Nairobi

Environmental Management and Coordination Act, No. 8 of 1999, Government Printer, Nairobi

Public Health Act, Cap 242, Laws of Kenya

Republic of Kenya., National Food and Nutritional Security Policy, 2011., Government Printer, Nairobi

List of Abbreviations

ABA	Bar Association
ADR	Alternative Dispute Resolution
AfCFTA	Agreement Establishing the African Continental Free Trade
AfDB	Africa Development Bank
AFSA	Arbitration Foundation of Southern Africa Area
CAADP	Comprehensive Africa Agriculture Development Programme
CENSAD	Community of Sahel-Saharan States
CERs	Certified Emission Reductions
COMESA	Common Market for Eastern and Southern Africa) Treaty (1993)
CSR	Corporate Social Responsibility
EAC	East African Community
ECOWAS	Economic Community of the Western African States
EMCA	Environmental Management and Co-ordination Act
ESG	Environmental, Social, and Governance
GDP	Gross Domestic Product
GGA	Global Goal on Adaptation
GHG	Greenhouse Gas
ICT	Information and Communications Technology
ILO	International Labour Organization
LCA	Lagos Court of Arbitration
LPG	Liquefied Petroleum Gas
MARC	Mediation and Arbitration Centre
MNCs	Multinational Corporations (
NCIA	Nairobi Centre for International Arbitration
NDCs	National Determined Contributions
NET	National Environment Tribunal -
OHCHR	United Nations High Commissioner for Human Rights
OIC	Organisation of Islamic Cooperation) Investment Agreement (1981)
RECs	Regional Economic Communities -
SDGs	Sustainable Development Goals
STAJ	Social Transformation through Access to Justice
UMA	Arab Maghreb Union
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change

Realizing the Right to a Clean, Healthy and Sustainable Environment

Abstract

The paper critically discusses realization of the right to a clean, healthy and sustainable environment. It conceptualizes this right and examines competing views on whether it should be considered a human right. The paper further explores attempts to recognize the right to a clean, healthy and sustainable environment as a human right at the global, regional and national levels. It also investigates concerns hindering attainment of this right and proposes interventions geared towards realizing the right to a clean, healthy and sustainable environment as a fundamental human right.

1.0 Introduction

Environment has been defined as all the physical, chemical and biological factors external to a person, and all the related behaviour¹. It has also been defined as the whole complex of climatic, adaptic and biotic factors that act upon an organism or an ecological community and ultimately determine its form or survival; the aggregate of social and cultural conditions that influence the life on an individual or a community². In Kenya, the environment has been defined to include the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment³. The environment is crucial for the survival of human beings since it contains all the ingredients that sustain life including air, water, soil, food among others. As a result, the relationship between human beings and the environment is worth considering.

Since it contains virtually all the ingredients necessary for human survival, the natural environment is often susceptible to human action such the use and exploitation of natural resources including water, minerals and energy⁴. Some

¹ World Health Organization., 'Preventing Disease through Healthy Environments.' (World Health Organization, Geneva, 2006)

² Webster's *New World Dictionary*, 3rd ed (Cleveland College, Cleveland, 1998)

³ Environmental Management and Co-Ordination Act, No. 8 of 1999, Laws of Kenya

⁴ Muigua. K., 'Utilising Science and Technology for Environmental Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf> (Accessed on 22/06/2023)

Realizing the Right to a Clean, Healthy and Sustainable Environment

of these activities result in concerns such as pollution, environmental degradation, destruction of ecosystems and loss of biodiversity which threaten environmental sustainability which threaten the attainment of human rights⁵. It has been pointed out that the destruction of life-sustaining ecosystems, the pollution of the world's water, land, and air, the inability to control the world's wastes, and other related environmental problems prevent people from securing the minimum requisites for health and survival, thereby impeding and even prohibiting the effective exercise and enjoyment of human rights for much of the world's population⁶. As such, environmental protection and human rights are believed to be interrelated, interconnected, and mutually responsive as both of them are directed towards securing the well-being of humanity, with safe and healthy environment being the pre-condition for the enjoyment of fundamental human rights⁷. In order to realize this ideal, the concept of Sustainable Development was born.

Sustainable Development has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs⁸. It combines elements such as environmental protection, economic development and social concerns⁹. The right to a clean, healthy and sustainable environment is a fundamental human right within the Sustainable Development agenda. Indeed, it has been observed that human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature¹⁰. The 2030 Agenda for Sustainable Development which was adopted by member states of

⁵ Ibid

⁶ Muigua. K., 'Reconceptualising the Right to Clean and Healthy Environment in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-7th-september-2015.pdf> (Accessed on 22/06/2023)

⁷ Pathak P, 'Human Rights Approach to Environmental Protection' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197 <https://papers.ssrn.com/abstract=2397197> (Accessed on 22/06/2023)

⁸ World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

⁹ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' International Sustainable Development Law., Vol 1.

¹⁰ Report of the United Nations Conference on Environment and Development., 'Rio Declaration on Environment and Development.' A/CONF.151/26 (Vol. I)

Realizing the Right to a Clean, Healthy and Sustainable Environment

the United Nations in 2015 represents a shared blue print for peace and prosperity for people and the planet in the quest towards the ideal of Sustainable Development¹¹. At the heart of the Sustainable Development Agenda are 17 Sustainable Development Goals which seek to strike a balance between social, economic and environmental sustainability¹².

This paper critically discusses realization of the right to a clean, healthy and sustainable environment as an essential component of the Sustainable Development agenda. It examines the right to a clean, healthy and sustainable environment and explores its essential elements. The paper further analyzes the legal framework governing this right at the global, regional and national levels. It then explores the challenges facing realization of this right and proposes interventions towards realizing the right to a clean, healthy and sustainable environment.

2.0 Defining the Right to a Clean, Healthy and Sustainable Environment

The right to a clean, healthy and sustainable environment encompasses various elements including clean and balanced ecosystems, rich biodiversity and a stable climate¹³. This right recognises that nature is a keystone of a dignified human existence¹⁴. A safe, clean, healthy and sustainable environment is considered to be integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation¹⁵. It has been observed that thriving ecosystems are important for provision of clean water and air, yield seafood and pollinators, and soaking

¹¹ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 22/06/2023)

¹² Ibid

¹³ Zimmer K, 'The Human Right That Benefits Nature' <https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature> (Accessed on 22/06/2023)

¹⁴ Ibid

¹⁵ Muigua. K., 'Recognising a Human Right to Safe, Healthy and Sustainable Environment.' Available at <http://kmco.co.ke/wp-content/uploads/2021/04/Recognising-a-Human-Right-to-Safe-Healthy-and-Sustainable-Environment-Kariuki-Muigua-1st-April-2021.pdf> (Accessed on 22/06/2023)

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up greenhouse gases¹⁶. The right to a clean, healthy and sustainable environment is an essential human rights that has been equated to the right to life¹⁷. Since the environment contains virtually all ingredients required to sustain human beings, a threat to the right to a clean, healthy and sustainable environment could potentially hinder attainment of other rights such as the right to food, water, health and sanitation among others¹⁸.

However, despite the importance of the right to a clean, healthy and sustainable environment, debate has been going on whether, it should be classified as a human right. Critics of the human approach towards this right have argued that it centralises human concerns in the environmental governance agenda to the detriment of non-human elements of nature¹⁹. Further, it has been pointed out that classifying the right as a human right denotes an 'economically charged' idea of the environment as no more than resources that are meant to be exploited, managed and conserved for their instrumental value to humans²⁰. In addition, it has been pointed out that nature and human beings are radically separate entities and there is need to acknowledge this difference in order to promote sound environmental management and conservation through wildlife conservation, pollution control, waste management and climate change mitigation among other measures²¹. Consequently, this approach advocates for an ecological approach towards the right to a clean, healthy and sustainable environment.

On the other hand, it has been argued that there is need to view the environment as an interconnectedness of nature and an integrated whole, with humans being only part thereof in order to embrace the right to a clean, healthy

¹⁶ Ibid

¹⁷ Peter K. Waweru v Republic, Misc. Civil Application No. 118 of 2004, (2006) eKLR

¹⁸ Muigua. K., 'Recognising a Human Right to Safe, Healthy and Sustainable Environment.' Op Cit

¹⁹ C. Gearty, 'Do Human Rights Help or Hinder Environmental Protection?' *Journal of Human Rights and the Environment*, No. 7 of 2010

²⁰ K. Bosselmann, 'Losing the Forest for the Trees: Environmental Reductionism in the Law' *Sustainability*, No. 2 of 2010

²¹ Mwanza. R., 'The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya's legal context: An appraisal.' *Environmental Law Review* 2020, Vol. 22(3)

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and sustainable environment as a human right²². Consequently, the right to a clean, healthy and sustainable environment has been classified under the 'third generation rights' or 'solidarity rights²³.' Thus, just like all other 'third-generation' rights- the right to clean, healthy and sustainable environment calls for collective action and cooperation from all persons in taking care of the environment²⁴. It has been pointed out that the right to a clean, healthy and sustainable environment encapsulates both procedural and substantive elements²⁵. The procedural elements of the right to clean, healthy and sustainable environment are access to information, public participation, and access to justice or effective remedies²⁶. The substantive elements include clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems²⁷. The importance of this right became more recently pronounced when United Nations General Assembly recognized the right to a clean, healthy and sustainable environment as a human right²⁸.

It is thus evident that there is need to embrace the right to a clean, healthy and sustainable environment as a fundamental right and a prerequisite for full enjoyment of all the other rights²⁹. It is a right, crucial for the realisation of the first and second generation rights³⁰. Realizing the right to a clean, healthy and sustainable environment is integral in achieving Sustainable Development.

²² Ibid

²³ McClymonds JT, 'Human Right to a Healthy Environment: An International Legal Perspective, The' (1992) 37 New York Law School Law Review 583.

²⁴ Ibid

²⁵ Muigua. K., 'Recognising a Human Right to Safe, Healthy and Sustainable Environment.' Op Cit

²⁶ Knox JH, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Biodiversity Report' [2017] United Nations Human Rights Council, A/HRC/34/49.

²⁷ Ibid

²⁸ United Nations General Assembly (UNGA)., 'The Human Right to a Clean, Healthy and Sustainable Environment.' UNGA Resolution 'A/76/L.75.'

²⁹ Muigua. K., 'Reconceptualising the Right to Clean and Healthy Environment in Kenya.' Op Cit

³⁰ Ibid

3.0 Legal Framework on the Right to a Clean, Healthy and Sustainable Environment

The right to a clean, healthy and sustainable environment has been captured in various legal instruments at the global, regional and national level. The *International Covenant on Economic, Social and Cultural Rights*³¹ was the first legal instrument to consider the environment as human right issue. The Covenant requires states parties to improve all aspects of environmental and industrial hygiene³². However, the right to a healthy environment was explicitly recognized for the first time vide the *Stockholm Declaration* which declared 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, and he bears a solemn responsibility to protect and improve the environment for present and future generations*³³. The Stockholm Declaration does not just recognise the right to a good quality environment but also places a responsibility on human beings to protect and improve the environment for present and future generations³⁴.

In addition, the 1992 United Nations Conference on Environment and Development recognizes environmental protection and development as complementary objectives³⁵. The *Rio Declaration* stipulates that human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature³⁶. The Declaration further stipulates that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and

³¹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993

³² *Ibid*, Article 12 (2) (b)

³³ Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972, UN Doc.A/CONF.48/14/Rev.1., Principle 1

³⁴ Muigua. K., 'Reconceptualising the Right to Clean and Healthy Environment in Kenya.' Op Cit

³⁵ United Nations General Assembly: Report of the United Nations Conference on Environment and Development., 'Rio Declaration on Environment and Development.' Available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf (Accessed on 23/06/2023)

³⁶ *Ibid*, Principle 1

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cannot be considered in isolation from it³⁷. The Rio Declaration thus envisages the right to a clean, healthy and sustainable environment as important in fostering Sustainable Development.

The right to a clean, healthy and sustainable environment became more recently pronounced when the United Nations General Assembly recognized it as human right³⁸. The resolution by the United Nations General Assembly further affirms the importance of the right a clean, healthy and sustainable environment for the enjoyment of all human rights³⁹. The declaration by the United Nations General Assembly demonstrates global acceptance of the right to a clean, healthy and sustainable environment as a human right and could stimulate global efforts towards attaining this right.

The *2030 Agenda for Sustainable Development* also recognizes the fundamental importance of the right to a clean, healthy and sustainable environment in promoting Sustainable Development⁴⁰. It seek to attain this right by protecting the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations⁴¹. At its core are 17 Sustainable Development Goals which seek to strike a balance between development and environmental conservation through measures such as promoting food security; ensuring good health and well-being for all human beings; fostering the right to clean water and sanitation; promoting access to affordable and clean energy and combating climate change⁴². The Sustainable Development goals thus encapsulate anthropocentric and ecocentric elements of the right to a clean, healthy and sustainable environment by seeking to strike a balance between human development and environmental protection and conservation.

³⁷ Ibid, Principle 4

³⁸ United Nations General Assembly (UNGA)., 'The Human Right to a Clean, Healthy and Sustainable Environment.' Op Cit

³⁹ Ibid

⁴⁰ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Op Cit

⁴¹ Ibid

⁴² Ibid

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Regionally, the *African Charter on Human and Peoples' Rights* provides that all people shall have the right to a general satisfactory environment favourable to their development⁴³. In Kenya, the right has been enshrined under the Constitution which stipulates 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 measures⁴⁴. The Constitution further sets out several obligations in respect of the environment aimed at fostering the right to a clean, healthy and sustainable environment⁴⁵. These include ensuring sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and the equitable sharing of the accruing benefits; encouraging public participation in the management, protection and conservation of the environment; protecting genetic resources and biological diversity and eliminating processes and activities that are likely to endanger the environment⁴⁶. Attaining these obligations is integral in fostering the right to a clean, healthy and sustainable environment in Kenya. The right is further set out under the *Environmental Management and Co-ordination Act* (EMCA) which provides that every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment⁴⁷. The Act establishes institutions, systems and procedures towards attaining this right including establishment of the National Environment Management Authority and County Environment Committees and systems such as environmental planning, Environmental Impact Assessment, Environmental Audit and Monitoring, Environmental Quality Standards, Environmental Restoration Orders among others⁴⁸.

The right to a clean, healthy and sustainable environment is thus well recognized at the global, regional and national levels. However, despite this

⁴³ 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).

⁴⁴ Constitution of Kenya, 2010., Article 42., Government Printer, Nairobi

⁴⁵ *Ibid*, Article 69

⁴⁶ *Ibid*

⁴⁷ *Environmental Management and Co-ordination Act*, No. 8 of 1999., S 3 (1)

⁴⁸ *Ibid*

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recognition, several challenges hinder attainment of this right. Some of these challenges are discussed below.

4.0 Factors Hindering Realization of the Right to a Clean, Healthy and Sustainable Environment

4.1 Climate Change

Climate change has been defined as change of climate which is attributed directly or indirectly to human activities which alter the composition of the global atmosphere and which are in addition to natural climate variability observed over comparable time periods⁴⁹. Climate change has become a global concern in the 21st century and has been a dominant subject in political, economic, legal, social, environmental and scientific discussions⁵⁰. It is majorly caused by human activities that lead to atmospheric concentration of greenhouse gases such as burning of fossil fuels, deforestation and increase in carbon dioxide levels⁵¹. Kenya like the rest of the world is faced with the threat of climate change. It has been observed that countries such as Kenya which have contributed the least to climate change are the ones that are the most affected by its impacts⁵². Climate change hinders the realization of the right to a clean, healthy and sustainable environment since it results food insecurity, water scarcity, depletion of natural resources, displacement of people and health hazards among other concerns⁵³. Owing to the threat of climate change, the global community has come together under the *Paris Agreement* which is aimed at combating climate change and adapting to its effects by holding the

⁴⁹ United Nations Framework Convention on Climate Change (UNFCCC), United Nations, 1992, available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 23/06/2023)

⁵⁰Owusu. P.A., & Asumadu-Sarkodie. S, A Review of Renewable Energy Sources, Sustainability Issues and Climate Change Mitigation, available at <https://www.tandfonline.com/doi/pdf/10.1080/23311916.2016.1167990?needAccess=true> (Accessed on 23/06/2023)

⁵¹ Ibid

⁵² Sultana. F., 'Critical Climate Justice' Available at <https://www.farhanasultana.com/wpcontent/uploads/Sultana-Critical-climate-justice.pdf> (Accessed on 23/06/2023)

⁵³ Muigua.K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

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increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels⁵⁴. There is need to promote effective climate change mitigation and adaptation in order to realize the right to a clean, healthy and sustainable environment.

4.2 Unsustainable Management and Use of Natural Resources

Natural resources such as water, soil, air and forests are essential for survival and livelihood since they provide ingredients that support life⁵⁵. However, increase in human population has resulted in pressure on natural resources, sometimes resulting in their degradation and depletion⁵⁶. This is due to the fact that increase in human population puts pressure on natural resources such as food, water and energy sometimes resulting in their unsustainable use. Poor use of natural resources is a global challenge that poses a threat to sustainability of natural resources and results in serious environmental threats such deforestation and forest degradation, biodiversity loss, ecosystem degradation, reduction in soil quality and fall in available water quantity⁵⁷. This challenge is coupled with poor natural resources management laws, policies and practices in some countries which hinder effective management and use of these resources. Unsustainable management and use of natural resources hinders realization of the right to a clean, healthy and sustainable environment since it affects the Sustainable Development agenda⁵⁸. The 2030 Agenda on Sustainable Development recognizes this challenges and seeks to promote responsible consumption and production through efficient

⁵⁴ United Nations Framework Convention on Climate Change, Paris Agreement, 2015, available at http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf (Accessed on 23/06/2023)

⁵⁵ Muigua. K., Wamukoya. D & Kariuki. F 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

⁵⁶ FAO., 'Natural Resources and the Human Environment for Food and Agriculture.' (FAO, 1980)

⁵⁷ Shivakoti. G et al., 'Challenges of Sustainable Natural Resources Management in Dynamic Asia.' *Sustainable Natural Resources Management in Dynamic Asia*, 2017, Pages 3-12

⁵⁸ Ibid

management of natural resources⁵⁹. There is need to enhance sustainable management and use of natural resources in order to achieve the right to a clean, healthy and sustainable environment.

4.3 Pollution

Pollution has been defined as any direct or indirect alteration of the physical, thermal, chemical, biological, or radio-active properties of any part of the environment by discharging, emitting, or depositing wastes so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants⁶⁰. Environmental pollution has also been defined as the contamination of the physical and biological components of the earth/atmosphere system to such an extent that normal environmental processes are adversely affected⁶¹. Pollution occurs in various forms including air, water and soil⁶². Pollution has been attributed to many factors which include 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 services⁶³. Cases of air, water and soil pollution have been widely reported in Kenya. There have been reports of discharge of untreated industrial waste into

⁵⁹ UNDP., 'Sustainable Goal 12: Responsible Consumption and Production.' Available at https://www.undp.org/sustainable-development-goals/responsible-consumption-and-production?gclid=EAIaIQobChMIidu71LPZ_wIV1vGyCh2q7wFJEAAAYASAAEgIObfD_BwE (Accessed on 23/06/2023)

⁶⁰ Environmental Management and Co-ordination Act., No. 8 of 1999, S 2

⁶¹ Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1 No. 6 June 2013, p.2

⁶² Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2020/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf> (Accessed on 23/06/2023)

⁶³ Coker, A.O., "Environmental Pollution: Types, Causes, Impacts and Management for the Health and SocioEconomic Well-Being of Nigeria," p.1. Available at <https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf> (Accessed on 23/06/2023)

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the atmosphere polluting soil and water resources⁶⁴. Further, there have been reports indicating that raw water in Kenya is too polluted with chemicals and heavy metals to be fit for irrigation or human and livestock consumption⁶⁵.

However, pollution is not a novel problem to Kenya since it's a global concern that affects virtually all nations and threatens environmental sustainability. Human activities through urbanization, industrialization, mining, and exploration are at the forefront of global environmental pollution⁶⁶. Environmental pollution is a threat to not only the sustainable development agenda but also to the very existence of the humankind⁶⁷. It compromises the quality of air, water and soil and could result in concerns such as health hazards and diseases thus hindering the realization of the right to a clean, healthy and sustainable environment. There is need to promote effective pollution control in order to achieve a clean, healthy and sustainable environment.

4.4 Poverty

Poverty can hinder realization of procedural aspects of the right to a clean, healthy and sustainable environment such as access to information, public participation, and access to justice or effective remedies⁶⁸. It can also hinder access to substantive aspects of the right such as access to food and clean water and sanitation⁶⁹. Poverty can also result in overexploitation of natural resources such as forests, water resources and energy sources which could

⁶⁴ Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya.' Op Cit

⁶⁵ Nasike, C., "Enforce measures to curb water pollution," Business Daily, Thursday, August 22, 2019. Available at <https://www.businessdailyafrica.com/analysis/letters/Enforce-measures-to-curb-water-pollution/4307714-5245596-tdpn9y/index.html> (Accessed on 23/06/2023)

⁶⁶ Ukaogo. P., 'Environmental Pollution: Causes, Effects, and the Remedies.' *Microorganisms for Sustainable Environment and Health* ., 2020, pg 419-429

⁶⁷ Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya.' Op Cit

⁶⁸ Knox JH, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Biodiversity Report' Op Cit

⁶⁹ Ibid

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potentially result in their depletion or degradation⁷⁰. This concern has been recognized at the global level by the 2030 Agenda on Sustainable Development which acknowledges that eradicating poverty in all its forms remains one of the greatest challenges facing humanity⁷¹. There is need to combat poverty in order to actualize the right to a clean, healthy and sustainable environment.

5.0 Way Forward

The right to a safe, clean, healthy and sustainable environment is a fundamental right that facilitates full enjoyment of other human rights, including the rights to life, health, food, water and sanitation⁷². Recognition of the right to a clean, healthy and sustainable environment vide a resolution by the United Nations General Assembly represents a key milestone in making this right a reality⁷³. It is thus imperative for states to take measures towards actualizing this right. States should consider recognizing the right to a clean, healthy and sustainable environment as a fundamental human right in their Constitutions and adopt measures towards realizing it⁷⁴. Kenya has taken a step in the right direction by enshrining the right to clean and healthy environment in its Constitution⁷⁵.

There is need to address the concerns which affect the attainment of the right to a clean, healthy and sustainable environment such as climate change, unsustainable management and use of natural resources, pollution and poverty⁷⁶. Global efforts have been made towards combating climate change

⁷⁰ FAO., 'Natural Resources and the Human Environment for Food and Agriculture.' Op Cit

⁷¹ UNDP., 'Sustainable Development Goal 1: No Poverty' Available at https://www.undp.org/sustainable-development-goals/no-poverty?gclid=EAIaIQobChMIInJ6Ezb_Z_wIVvEeRBR2lwQ02EAAYAiAAEgK4TvD_BwE (Accessed on 23/06/2023)

⁷² Muigua. K., 'Recognising a Human Right to Safe, Healthy and Sustainable Environment.' Op Cit

⁷³ United Nations General Assembly (UNGA)., 'The Human Right to a Clean, Healthy and Sustainable Environment.' Op Cit

⁷⁴ IISD., 'UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment.' Available at <https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment/> (Accessed on 23/06/2023)

⁷⁵ Constitution of Kenya, 2010., Article 42., Government Printer, Nairobi

⁷⁶ Sultana. F., 'Critical Climate Justice'

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through measures such as the adoption of the *Paris Agreement*⁷⁷. States should promote the vision of the Paris Agreement in order to combat climate change and promote the right to a clean, healthy and sustainable environment⁷⁸. States should also implement effective programmes and policies towards sustainable use and management of natural resources, effective pollution control and combating poverty in order to achieve full realization of the right to a clean, healthy and sustainable environment⁷⁹.

There is also need to enhance the justiciability of the right to a clean, healthy and safe environment in order to protect victims of violation of this right through malpractices such as environmental pollution, environmental degradation among others⁸⁰. It has been argued that linking human rights with the environment creates a rights-based approach to environmental protection that places the people harmed by environmental degradation at its centre and gives an opportunity to enforce the right to a clean, healthy and sustainable environment through judicial bodies such as courts and tribunals⁸¹. Courts play an important role in realizing the right to a clean, healthy and sustainable environment. In Kenya, the Constitution grants jurisdiction to courts to enforce environmental rights through measures such as orders to prevent, stop or discontinue any act or omission that is harmful to the environment; orders to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; orders to provide compensation for any victim of a violation of the right to a clean and healthy environment among others⁸². There is need for courts to promote the realization of the right to a clean, healthy and sustainable environment by enhancing the principles of Sustainable Development and developing sound jurisprudence in environmental matters⁸³. There is also need to enhance access

⁷⁷ United Nations Framework Convention on Climate Change, Paris Agreement, 2015., Op Cit

⁷⁸ Sultana. F., 'Critical Climate Justice' Op Cit

⁷⁹ Muigua.K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁸⁰ Pathak P, 'Human Rights Approach to Environmental Protection' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197, 17 Available at <https://papers.ssrn.com/abstract=2397197> (Accessed on 23/06/2023)

⁸¹ Ibid

⁸² Constitution of Kenya, 2010, Article 70

⁸³ Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Available at <http://kmco.co.ke/wp->

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to courts in order to achieve environmental justice in Kenya⁸⁴. Other entities such as Multinational Corporations and Non-Governmental Organizations (NGOs) should also play their part in realizing the right to a clean, healthy and sustainable environment by adopting policies and practices that are environmental friendly and enhance human rights⁸⁵.

Finally, there is a need to foster Sustainable Development in order to realize the right to a clean, healthy and sustainable environment. Sustainable Development combines elements such as environmental protection, economic development and social concerns⁸⁶. Sustainable Development has the ability to strike a balance between anthropocentric and ecocentric approaches towards the right to a clean, healthy and sustainable environment by promoting human rights such as the right to food, the right to clean water and sanitation, the right to affordable and clean energy while simultaneously ensuring sound environmental protection and management⁸⁷. Thus, there is a need for states to achieve the ideal of Sustainable Development as set out in the 2030 Agenda on Sustainable Development.⁸⁸ Through these among other measures, the right to a clean, healthy and sustainable environment will be realized.

content/uploads/2019/01/The-Role-of-Courts-in-Safeguarding-Environmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-1.pdf

(Accessed on 23/06/2023)

⁸⁴ Ibid

⁸⁵ Muigua. K., 'Multinational Corporations, Investment and Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/11/Multinational-Corporations-Investment-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-November-2018.pdf> (Accessed on 23/06/2023)

⁸⁶ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' Op Cit

⁸⁷ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁸⁸ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Op Cit

6.0 Conclusion

The right to a clean, healthy and sustainable environment is a fundamental human right that is integral in the attainment of other human rights⁸⁹. The importance of this right has become more pronounced after the United Nations General Assembly declared it to be a human right⁹⁰. In Kenya, the right to a clean and healthy environment has been enshrined as human right under the Constitution⁹¹. However, several concerns hinder the realization of the right to a clean, healthy and sustainable environment. These include climate change, unsustainable use and management of natural resources, pollution and poverty among others⁹². There is need to address these concerns in order to realize the right to a clean, healthy and sustainable environment⁹³. It is also necessary for entities including the state, courts, multinational corporations and Non-Governmental Organizations to play their role in promoting the right to a clean, healthy and sustainable environment⁹⁴. Finally it is imperative that we foster Sustainable Development in order to fully realize the right to a clean, healthy and sustainable environment⁹⁵. Through this among other measures, realization of the fundamental human right to a clean, healthy and sustainable environment will become an achievable endeavour.

⁸⁹ Muigua. K., 'Reconceptualising the Right to Clean and Healthy Environment in Kenya.' Op Cit

⁹⁰ United Nations General Assembly (UNGA)., 'The Human Right to a Clean, Healthy and Sustainable Environment.' Op Cit

⁹¹ Constitution of Kenya., 2010, Article 42

⁹² Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁹³ Ibid

⁹⁴ Muigua. K., 'Reconceptualising the Right to Clean and Healthy Environment in Kenya.' Op Cit

⁹⁵ Ibid

Recognising a Human Right to Safe, Healthy and Sustainable Environment

Abstract

While the international legal instruments on human rights and environmental protection acknowledge the connection between protection and enjoyment of human rights and the need for conservation and protection of environment, there is yet to be reached a consensus by the main stakeholders at the global level to convince the United Nations to crystalize the human right to a safe, healthy and sustainable environment as an independent right. It is currently treated as a means to an end necessary for the realisation of other human rights instead of being treated as an end in itself. This has continually created enforcement challenges as well as making it difficult to demand accountability from states that violate environmental principles, at the international level as well as in those countries where there is no domestic recognition of the right to clean and healthy environment. This paper makes a case for the need to recognise the human right to safe, healthy and sustainable environment as an independent right capable of being enforced without necessarily making reference to the other human rights, as part of laying the ground for achieving the Sustainable Development agenda.

1.0 Introduction

Over the years, human activities have posed a major threat to the earth's natural processes which have been strained beyond limits, causing a major environmental crisis.¹ It is worth pointing out that when humans damage the environment, they diminish the quality of life-most immediately for those directly affected, and in the long term, for everyone.² As such, environmental protection and human rights are believed to be interrelated, interconnected, and mutually responsive as both of them are directed towards securing the well-being of humanity, with safe and healthy environment being the pre-condition for the enjoyment of fundamental human rights.³

¹ McClymonds JT, 'Human Right to a Healthy Environment: An International Legal Perspective, The' (1992) 37 New York Law School Law Review 583.

² Popovic NA, 'In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment' (1995) 27 Colum. Hum. Rts. L. Rev. 487.

³ Pathak P, 'Human Rights Approach to Environmental Protection' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197 <<https://papers.ssrn.com/abstract=2397197>> accessed 31 March 2021.

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The 1992 United Nations Conference on Development and the Environment was one of the first international efforts towards acknowledging development and environmental protection as complementary objectives.⁴ Article 12(2) (b) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁵ requires states parties to improve 'all aspects of environmental and industrial hygiene'. Article 24 of the *African Charter on Human and Peoples' Rights*⁶ provides that 'all peoples shall have the right to a general satisfactory environment favourable to their development.' These are just some of the few international and regional legal instruments on human rights that make reference to the need for a clean and healthy environment as a requisite for the achievement of the other human rights.

A new imperative of Sustainable Development demands that environmental considerations become fully integrated into the mainstream of economic decision-making.⁷

Over the years, many countries around the world have recognised the right to clean and healthy environment in their national constitutions.⁸ Kenya's Constitution recognises this right under Article 42 which 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'.⁹ The constitutionalisation of human right to a clean and healthy environment and the principle of sustainable development under the 2010 Constitution of Kenya has been hailed as an important development

⁴ Mink SD, 'Poverty, Population, and the Environment' [1993] World Bank discussion papers (USA).

⁵ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

⁶ 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).

⁷ Mink SD, 'Poverty, Population, and the Environment' [1993] World Bank discussion papers (USA).

⁸ Boyd DR, 'The Effectiveness of Constitutional Environmental Rights', *Paper for Yale UNITAR Workshop, on April* (2013);

⁹ Article 42, Constitution of Kenya 2010.

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in environmental law in Kenya, representing environmental constitutionalism and sustainability constitutionalism, respectively.¹⁰

The proponents of constitutionalisation of environmental rights argue that the potential benefits of constitutional environmental rights include: stronger environmental laws and policies; improved implementation and enforcement; greater citizen participation in environmental decision-making; increased accountability; reduction in environmental injustices; a level playing field with social and economic rights; and better environmental performance.¹¹ On the other hand, those against the approach argue that constitutional environmental rights are: too vague to be useful; redundant because of existing human rights and environmental laws; a threat to democracy because they shift power from elected legislators to judges; not enforceable; likely to cause a flood of litigation; and likely to be ineffective.¹² Thus, the question is yet to be settled although an impressive number of countries have opted for this approach to environmental rights. It is estimated that since the right's first mention in the Stockholm Declaration in 1972 – a result of the first major environmental conference- more than 100 constitutions across the world have adopted a human right to a healthy environment, often serving as a powerful tool to protect the natural world.¹³

Despite this initiative by several countries, there is still the contention over the actual status of the right to clean and healthy environment under the

¹⁰ Mwanza R, 'The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya's Legal Context: An Appraisal' (2020) 22 *Environmental Law Review* 184.

¹¹ Boyd DR, 'The Effectiveness of Constitutional Environmental Rights', *Paper for Yale UNITAR Workshop, on April* (2013), 5.

¹² *Ibid.*

¹³ Zimmer K, 'The Human Right That Benefits Nature' <<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021; Katarina Zimmer, 'The Human Right That Benefits Nature' <<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

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international legal framework on human rights.¹⁴ Indeed, few international agreements explicitly refer to environmental human rights.¹⁵

The lack of explicit language on environmental rights in any international and/or national legal instrument has been associated with possible environmental degradation and lack of accountability as it may create a legal vacuum which allows the State to engage in a variety of forms of environmental mismanagement within a legal context that lack effective avenues for legal recourse.¹⁶ This paper makes a case for the need for express recognition of the human right to a safe, healthy and sustainable environment as an independent right under the international law, without necessarily tying anchoring it to the rest of the human rights, for ease of enforcement and demanding accountability from states for both international community as well as citizens.

2.0 Safe, Healthy and Sustainable Environment: The Elements

A safe, clean, healthy and sustainable environment is considered to be integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.¹⁷ Arguably, the human right to a healthy environment – encompassing clean and balanced ecosystems, rich biodiversity and a stable climate – recognises that nature is a keystone of a dignified human existence, in line with a wealth of scientific evidence linking human welfare and the natural world.¹⁸ Thriving ecosystems are important for

¹⁴ 'Legal Analysis: The Right to a Healthy Environment in Australia' (*Environmental Defenders Office*, 8 January 2020) <<https://www.edo.org.au/2020/01/09/right-to-healthy-environment-in-australia/>> accessed 31 March 2021.

¹⁵ 'Appalachia Puts Environmental Human Rights to the Test' (*YES! Magazine*) <<https://www.yesmagazine.org/environment/2018/01/17/appalachia-puts-environmental-human-rights-to-the-test>> accessed 31 March 2021.

¹⁶ Mwanza R, 'The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya's Legal Context: An Appraisal' (2020) 22 *Environmental Law Review* 184.

¹⁷ 'Dr. David R. Boyd' (*UN Special Rapporteur | on Human Rights and the Environment*) <<http://srenvironment.org/node/556>> accessed 30 March 2021.

¹⁸ Zimmer K, 'The Human Right That Benefits Nature' <<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

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provision of clean water and air, yield seafood and pollinators, and soaking up greenhouse gases.¹⁹

The procedural elements of the right to clean, safe and healthy environment are access to information, public participation, and access to justice/effective remedies²⁰ while the substantive elements include clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems.²¹

The right to clean and healthy environment which is often classified as part of third-generation “solidarity” rights is seen as an important right for protecting people individually-a characteristic shared by all human rights- by imposing more effective obligations on governments and by providing individual remedies for environmental deprivations.²² Collectively, just like all other ‘third-generation’ rights- the right to clean and healthy environment calls for collective action and cooperation from all persons in taking care of the environment.²³

The right to a healthy environment has been hailed by some scholars as capable of acting as a crucial legal pathway to protecting the natural world, both by encouraging governments to pass stronger environmental laws and allowing courts to hold violators accountable and this is especially so when installed into constitutions, where such rights are taken seriously by many judicial systems and become hard to undo, creating an enduring force counteracting the interests against protecting nature.²⁴ Notably, the right to a

¹⁹ Ibid.

²⁰ Knox JH, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Biodiversity Report’ [2017] United Nations Human Rights Council, A/HRC/34/49.

²¹ Ibid.

²² McClymonds JT, ‘Human Right to a Healthy Environment: An International Legal Perspective, The’ (1992) 37 New York Law School Law Review 583.

²³ Ibid, 583.

²⁴ Katarina Zimmer, ‘The Human Right That Benefits Nature’ <<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

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healthy environment requires governments to carry out the following obligations: to refrain from interfering directly or indirectly with the enjoyment of the right to a healthy environment; to prevent third parties such as corporations from interfering in any way with the enjoyment of the right to a healthy environment; and, to adopt the necessary measures to achieve the full realisation of the human right to a safe and healthy environment.²⁵

3.0 Place of Safe, Healthy and Sustainable Environment in the Sustainable Development Agenda

Arguably, human rights and the environment are intertwined; human rights cannot be enjoyed without a safe, clean and healthy environment; and sustainable environmental governance cannot exist without the establishment of and respect for human rights.²⁶

It has rightly been pointed out that nearly 92 percent of pollution-related deaths occur in low-income and middle-income countries where children face the highest risks because small exposures to chemicals in utero and in early childhood can result in lifelong disease, disability, premature death, as well as reduced learning and earning potential.²⁷

Notably, environmental rule of law is indispensable for ensuring just and sustainable development outcomes, and guaranteeing fundamental rights to a healthy environment, where the concept of environmental law includes the following elements: adequate and implementable laws, access to justice and information, inclusion and equity in public participation, accountability,

²⁵ Ruppel, Oliver C., "Third-generation human rights and the protection of the environment in Namibia." *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia (2008): 101-120, 103.

²⁶ Environment UN, 'What Are Environmental Rights?' (*UNEP - UN Environment Programme*, 2 March 2018) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what>> accessed 30 March 2021.

²⁷ 'Dr. David R. Boyd' (*UN Special Rapporteur | on Human Rights and the Environment*) <<http://srenvironment.org/node/556>> accessed 30 March 2021.

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transparency and liability for environmental damage, fair and just enforcement, and human rights.²⁸

The *United Nations Sustainable Development Goals (SDGs)*²⁹ are a set of 17 goals with 169 targets that all UN Member States have agreed to work towards achieving by the year 2030.³⁰ These goals and targets are all designed around ensuring that the environment is not only well protected but also that the resultant ecosystem services are used in meeting the economic and social needs of the human beings, both current and future generations.³¹ As such, a safe, healthy and sustainable environment is a central element of the sustainable development agenda. The SDGs framework consists of 17 goals for environmental sustainability, social inclusion, economic development, peace, justice, good governance and partnership.³² As such, sustainable development is seen as one of the most important aspects and methods used to conserve natural resources, as it recognizes that growth must be both inclusive and environmentally sound to reduce poverty and also build prosperity for the present population in addition to meeting the needs of future generations.³³

²⁸ 'Climate Change - A Comparative Overview of the Rights Based Approach in the Americas | InforMEA' <<https://www.informea.org/en/literature/climate-change-comparative-overview-rights-based-approach-americas>> accessed 1 April 2021.

²⁹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

³⁰ 'Sustainable Development Goals' <<https://www.who.int/westernpacific/health-topics/sustainable-development-goals>> accessed 1 April 2021.

³¹ Ibid.

³² 'Sustainable Development - an Overview | ScienceDirect Topics' <<https://www.sciencedirect.com/topics/earth-and-planetary-sciences/sustainable-development>> accessed 1 April 2021.

³³ Muralikrishna IV and Manickam V, 'Chapter Two - Sustainable Development' in Iyyanki V Muralikrishna and Valli Manickam (eds), *Environmental Management* (Butterworth-Heinemann 2017) <<https://www.sciencedirect.com/science/article/pii/B9780128119891000026>> accessed 1 April 2021.

4.0 Human Right to Safe, Healthy and Sustainable Environment: Prospects and Challenges

The human right to safe, healthy and sustainable environment is generally considered to be part of the environmental rights. Notably, environmental impacts on health are uneven across age and mostly affect the poor.³⁴ It has rightly been pointed out that although there is clear scientific consensus on the benefits of nature to people, the evolution of nature as a human right has been remarkably patchy around the world with many Latin American countries forging ahead while Europe and North America lag somewhat behind.³⁵

Worth pointing out is the observation that the elements of the right to a healthy environment, such as a safe climate and healthy biodiversity and ecosystems, are facing complex and systemic challenges that affect all people and living beings.³⁶ While there is no doubt on the important role played by the environment in supporting all life on the earth, progress towards recognising the human right to safe, healthy and sustainable development as a fully-fledged right under the international law has been slow and instead has been replaced with the ‘greening’ of human rights, such as the right to life and right to property, as people increasingly recognise how environmental degradation affects the ability to enjoy these rights.³⁷

As things currently stand, the Office of the High Commissioner on Human Rights emphasizes that “while the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the

³⁴ Mink SD, ‘Poverty, Population, and the Environment’ [1993] World Bank discussion papers (USA).

³⁵ Katarina Zimmer, ‘The Human Right That Benefits Nature’ <<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature>> accessed 31 March 2021.

³⁶ Ituarte-Lima C, ‘I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment’, 20 < <https://elearning.rwi.or.id/storage/app/media/uploaded-files/i-ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf>> 30 March 2021.

³⁷ Ituarte-Lima C, ‘I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment’, 27 < <https://elearning.rwi.or.id/storage/app/media/uploaded-files/i-ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf>> 30 March 2021.

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environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing."³⁸

The main contention between those in support and those against the full recognition of the right to safe and healthy environment as an independent human right lies between anthropocentrism and ecocentrism approaches to conservation, where anthropocentrism means that the whole universe revolves around the interests of human-kind and that all human activities are human-centred, while ecocentrism is a collection of views that is theoretically in contrast with anthropocentrism.³⁹ The debate between the two groups is informed by three approaches in relation to the relationship between human rights and environmental protection which are as follows: the first approach is one where environmental protection is seen as a possible means of fulfilling human rights standards, that is, the end is fulfilling human rights, and the route is through environmental law; the second approach states that 'the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection (greening of existing human rights); and the third approach to the question of 'human rights and the environment' is to deny the existence of any formal connection between the two at all, that is, with the growth and development of international environmental law as well as internationalization of domestic environments of states, it is unnecessary to have a separate human right to a decent environment.⁴⁰ Thus, the debate is about either 'greening' of existing human rights law or the addition of new rights to existing treaties.⁴¹ Some scholars, however, believe that environmental law, in absence of hard law documents, appears to be lagging in dealing with emerging environmental problems.⁴²

³⁸ Boyle, Alan, "Human rights and international environmental law: Some current problems," *Электронный ресурс*. – Режим доступа: <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/WorkingGroups/08-03-HumanRights.pdf> (дата обращения: 10.04. 2014 г.) (2011).

³⁹ Leib LH, 'Historical and Philosophical Underpinnings of the Environmental Movement', *Human Rights and the Environment* (Brill 2011), 12 <<https://www.jstor.org/stable/10.1163/j.ctt1w8h1t2.5>> accessed 1 April 2021.

⁴⁰ Pathak P, 'Human Rights Approach to Environmental Protection' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197, 18-19 <<https://papers.ssrn.com/abstract=2397197>> accessed 1 April 2021.

⁴¹ *Ibid*, 19.

⁴² *Ibid*, 19.

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It is worth pointing out that while there are a number of international legal instruments that recognise the need for clean and healthy environment as a prerequisite for enjoyment of other rights, these references relating to the environment are attached to a particular issue and do not recognise the human right to a quality environment as an independent right.⁴³ This lack of consensus among the different stakeholders thus means that the world might have to wait a little longer to attain consensus and move the United Nations to finally recognise the right to a safe, healthy and sustainable environment as an independent right capable of being enforced without necessarily treating its importance as inherently linked to the realisation of other rights. That is, recognising the right would move it from being treated as a means to an end to an end in itself.

5.0 Recognising a Human Right to Safe, Healthy and Sustainable Environment

A safe, clean, healthy and sustainable environment is now treated as an integral element to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.⁴⁴

As already pointed out, while countries around the world have continually acknowledged and entrenched environmental rights into their national constitutions, there are few international legal instruments that expressly recognise the right to clean and healthy environment. As a result, there have been a strong call for the recognition of the right to a healthy environment in a global instrument such as a resolution by the General Assembly by various actors including current UN Special Rapporteur on Human Rights and Environment, although this is yet to be acted upon.⁴⁵

In order to ensure that the victims of environmental degradation are protected by the laws and mechanisms established to address human rights abuses, it has been suggested that efforts aimed at natural resource preservation should

⁴³ Ibid, 20.

⁴⁴ 'Dr. David R. Boyd' (*UN Special Rapporteur | on Human Rights and the Environment*) <<http://srenvironment.org/node/556>> accessed 31 March 2021.

⁴⁵ 'OHCHR | Right to a Healthy and Sustainable Environment' <<https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/HealthYSustainable.aspx>> accessed 1 April 2021.

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also incorporate measures aimed at addressing human impacts of environmental abuse.⁴⁶ In addition, it has been argued that linking human rights with the environment creates a rights-based approach to environmental protection that places the people harmed by environmental degradation at its centre.⁴⁷ Furthermore, it has been suggested that articulating the fundamental rights of peoples with respect to the environment creates the opportunity to secure those rights through human rights bodies in an international forum as well as the national tribunals.⁴⁸ Kenya has notably made steps in the right direction as far as recognising the justiciable nature of the right to clean and healthy environment is concerned.⁴⁹ For now, it seems that the only way to ensure that the right to safe and healthy environment is justiciable is through domestic initiatives, where governments include the right to clean and healthy environment under in their countries' constitutions.⁵⁰ There is a need for stakeholders to continually engage and encourage countries to adopt as a human right a safe, healthy and sustainable environment in their constitutions and/or statutes, as a step towards achieving global consensus on the same for the ultimate goal of an international legal instrument on the same.

6.0 Conclusion

Arguably, recognising the human right to a healthy environment will go a long way in protecting people and nature, as well as ensuring that there are conducive conditions for continued Sustainable Development and

⁴⁶ Pathak P, 'Human Rights Approach to Environmental Protection' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197, 17 <<https://papers.ssrn.com/abstract=2397197>> accessed 31 March 2021.

⁴⁷ Ibid, 17.

⁴⁸ Ibid, 17.

⁴⁹ See *Peter K. Waweru v Republic* [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004; *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012; *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR.

⁵⁰ Mwanza R, 'The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya's Legal Context: An Appraisal' (2020) 22 Environmental Law Review 184; Schiel R, Langford M and Wilson B, 'Does It Matter? Constitutionalisation, Democratic Governance, and the Right to Water' (2020) 12 Water 350; Boyd DR, 'The Status of Constitutional Protection for the Environment in Other Nations' [2014] David Suzuki Foundation 4.

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prosperity, leaving no one behind.⁵¹ While many countries including Kenya, have made impressive steps towards the recognition and enforcement of the human right to a safe, healthy and sustainable environment, there is still no global consensus on the need to recognise it as an independent right without necessarily anchoring it on the other basic human rights. Such recognition will achieve the dual goal of protecting the environment through ecocentric approaches as well as ensuring that enforcement and accountability of governments and private persons are guaranteed.

Time is ripe for the global environmental community to consider taking this bold step as part of moving towards achieving the SDGs.

Recognising the Human Right to a Clean, Healthy and Sustainable Environment is something that should happen now for the sake of the present and future generations.

⁵¹ Ituarte-Lima C, 'I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment', 18 < <https://elearning.rwi.or.id/storage/app/media/uploaded-files/i-ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf>> 30 March 2021.

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Abstract

This paper critically examines the place of human rights in the Environmental, Social and Governance (ESG) agenda. It argues that human rights occupy a central role in all the ESG factors. The paper discusses the progress made towards integrating human rights within the ESG framework. It also highlights some of the challenges related to ESG and human rights. In addition, the paper offers proposals towards embracing human rights in the ESG debate.

1.0 Introduction

Environmental, Social and Governance (ESG) is a framework used to assess an organization's business practices and performance on various sustainability and ethical issues¹. ESG has also been defined as a set of standards measuring a business's impact on society, the environment, and how transparent and accountable it is². ESG can also be understood as a framework that helps stakeholders understand how an organization is managing risks and opportunities related to environmental, social, and governance criteria³. ESG incorporates environmental, social, and governance factors into investment and business decision-making processes⁴. It analyses factors such as carbon emissions, water usage, employee diversity, labor practices, board diversity, executive compensation among others and seeks to integrate them in corporate sustainability practices⁵. ESG criteria therefore provides quantitative

¹ Mathis. S., 'Environmental, Social and Governance (ESG).' Available at <https://www.techtarget.com/whatis/definition/environmental-social-and-governance-ESG> (Accessed on 23/01/2024)

² British Business Bank., 'What is ESG – A Guide for Businesses.' Available at <https://www.british-business-bank.co.uk/finance-hub/business-guidance/sustainability/what-is-esg-a-guide-for-smaller-businesses/> (Accessed on 23/01/2024)

³ Peterdy. K., & Miller. N., 'What is ESG?' Available at <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/> (Accessed on 23/01/2024)

⁴ Barbosa. A et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' *Humanit Soc Sci Commun* 10, 410 (2023). Available at <https://doi.org/10.1057/s41599-023-01919-0> (Accessed on 23/01/2024)

⁵ Ibid

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and qualitative information about a company's sustainability practices and their potential impact on various stakeholders⁶.

It has been asserted that ESG is a function of public accountability and Corporate Social Responsibility (CSR) that can contribute to the economic performance of organizations⁷. Integration of the ESG criteria has become an instrument responsible for defining, planning, operationalizing and executing the actions of corporations directed at environmental prevention and preservation, in addition to social responsibility and the quality performance of their activities⁸. ESG is a concept that is vital in fostering sustainable, responsible or ethical investments⁹. It has been argued that ESG is usually a standard and strategy used by investors to evaluate corporate behavior and future financial performance of organizations¹⁰. Embracing ESG factors can therefore contribute to the environmental and economic performance of organizations in terms of investment and sustainability¹¹.

Human rights are central in the ESG debate¹². It has been pointed out that ESG covers social factors including *human rights*, labour relations, employee welfare, community engagement, diversity and inclusion (Emphasis added)¹³. As a result, it has been argued that human rights issues should be reflected in

⁶ Ibid

⁷ Ahmad. H., Yaqub. M., & Lee. S. H., 'Environmental-, Social-, and Governance-Related Factors for Business Investment and Sustainability: A Scientometric Review of Global Trends.' Available at <https://link.springer.com/article/10.1007/s10668-023-02921-x> (Accessed on 23/01/2024)

⁸ Barbosa. A et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' Op Cit

⁹ Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' *Journal of Corporate Finance* 66 (2021): 101889

¹⁰ Li. T., et al., 'ESG: Research Progress and Future Prospects.' Available at <https://pdfs.semanticscholar.org/0dd4/941ebea33330210daff5f37a1c8cdd0547d7.pdf> (Accessed on 23/01/2024)

¹¹ Ahmad. H., Yaqub. M., & Lee. S. H., 'Environmental-, Social-, and Governance-Related Factors for Business Investment and Sustainability: A Scientometric Review of Global Trends.' Op Cit

¹² Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' Op Cit

¹³ Henisz. W, Koller. T, & Nuttall. R., 'Five Ways that ESG Creates Value.' *McKinsey Quarterly*, 2019

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social criteria, environmental and governance indicators within the ESG framework¹⁴.

This paper critically examines the place of human rights in the ESG agenda. It argues that human rights occupy a central role in all the ESG factors. The paper discusses the progress made towards integrating human rights within the ESG framework. It also highlights some of the challenges related to ESG and human rights. In addition, the paper offers proposals towards embracing human rights in the ESG debate.

2.0 Linking Human Rights and ESG

Human rights have been defined as fundamental universal and inalienable entitlements inherent to all human beings which they should be accorded without any form of discrimination¹⁵. Human rights are inherent to every human being by the virtue of existence and are not granted by any state¹⁶. According to the United Nations, human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status¹⁷. Every person is therefore entitled to fundamental human rights without discrimination based on grounds such as sex, religion, nationality, race, ethnicity, colour, religion among others¹⁸.

The International Human Rights Law framework lays down the obligations of states 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

¹⁴ Office of the High Commissioner for Human Rights., 'Investors, ESG and Human Rights.' Available at <https://www.ohchr.org/en/calls-for-input/2023/investors-esg-and-human-rights> (Accessed on 23/01/2024)

¹⁵ Office of the High Commissioner for Human Rights., 'What are Human Rights.' Available at <https://www.ohchr.org/en/what-are-human-rights> (Accessed on 24/01/2024)

¹⁶ Ibid

¹⁷ United Nations., 'Human Rights.' Available at <https://www.un.org/en/global-issues/human-rights#:~:text=International%20Human%20Rights%20Law&text=The%20United%20Nations%20has%20defined,in%20carrying%20out%20their%20responsibilities.> (Accessed on 24/01/2024)

¹⁸ Ibid

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groups¹⁹. This framework sets out a broad range of internationally accepted rights, including civil, cultural, economic, political and social rights²⁰. It also establishes mechanisms to promote and protect these rights and to assist states in carrying out their responsibilities²¹. The foundation of this framework is the *Charter of the United Nations*²². The Preamble of the Charter reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small²³. The Charter encourages the international community and all states to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion²⁴.

The importance of human rights across the globe received was further strengthened following the adoption of the *Universal Declaration of Human Rights (UDHR)*²⁵ by the General Assembly of the United Nations on 10th December, 1948. The UDHR stipulates fundamental human rights to be universally protected and common standards for achievement of these rights for all people²⁶. According to the UDHR 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 world²⁷. Since adoption of the UDHR many human rights instruments have been enacted at the international, continental, regional and national levels. *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*²⁸ was adopted in order to enhance the protection and fulfillment of economic, social and cultural rights across the globe. Further, the *International Covenant on Civil and*

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

²² United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

²³ Ibid, Preamble

²⁴ Ibid, Article 1 (3)

²⁵ Universal Declaration of Human Rights., Available at <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> (Accessed on 24/01/2024)

²⁶ Ibid

²⁷ Ibid

²⁸ United Nations., 'International Covenant on Economic, Social and Cultural Rights.' Available at https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf (Accessed on 24/01/2024)

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*Political Rights (ICCPR)*²⁹ was adopted in order to foster the realization of civil and political rights in the world. At the Continental level, the *African Charter on Human and Peoples' Rights*³⁰ sets out the duty of African states to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa.

Due to their importance, countries have increasingly adopted the concept of human rights and undertaken measures towards fostering their attainment including embracing human rights in their constitutions³¹. At a national level, the *Constitution of Kenya*³² is devoted towards protection of human rights. It recognizes 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 law³³. It further enshrines human rights as among the national values and principles of governance that bind all persons³⁴. Chapter four of the Constitution contains the Bill of Rights which stipulates fundamental rights and freedoms which all Kenyans are entitled to³⁵.

It has correctly been argued that human rights are applicable in the private sphere³⁶. The concept of horizontal application of the Bill of Rights entails the possibility of private persons being held accountable in constitutional litigation, that is, constitutional rights having application in the private

²⁹ United Nations., 'International Covenant on Civil and Political Rights.' Available at https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf (Accessed on 24/01/2024)

³⁰ African Union., 'African Charter on Human and Peoples' Rights.' Available at https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf (Accessed on 24/01/2024)

³¹ Boyle. A., 'Human Rights and the Environment: Where Next' *The European Journal of International Law*, Vol. 23, No. 3

³² Constitution of Kenya., 2010., Government Printer, Nairobi

³³ Ibid, Preamble

³⁴ Ibid, Article 10 (2) (b)

³⁵ Ibid, Chapter four

³⁶ Matu. D., 'Improving Access to Justice in Kenya through Horizontal Application of the Bill of Rights and Judicial Review' Available at https://press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1_Article_4.pdf (Accessed on 24/01/2024)

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sphere³⁷. This idea marks a shift from the traditional idea of vertical application of human rights where Constitutional rights applied in the public sphere but not in the private sphere³⁸. For example, under the Constitution of Kenya, the Bill of Rights applies to all and binds all state organs and all persons³⁹. The Bill of Rights in Kenya therefore equally applies to the private sphere. It has been argued that horizontal application of human rights is an important safeguard in the protection of socio-economic rights since most these rights are violated by private entities⁴⁰.

Based on the concept of horizontal application of the Bill of Rights, human rights are applicable in the ESG debate to bind corporations in their sustainability practices. The Social 'S' pillar of ESG emphasizes several factors including the need to uphold human rights, diversity, employee relations, and consumer protection⁴¹. As a result, corporations are increasingly required to safeguard human rights as envisaged by 'S' pillar of ESG⁴². It has been argued that the 'S' factor of the ESG framework precisely encompasses the human rights assessments that investors need to conduct prior to investing in specific companies⁴³. It is usually done under the format of a Human Rights Due Diligence (HRDD) process that seeks to evaluate a company's compliance with human rights standards⁴⁴. It has been argued that the scope of human rights

³⁷ Ibid

³⁸ Khobe. W., 'The Horizontal Application of the Bill of the Rights and the Development of the Law to give Effect to Rights and Fundamental Freedoms' (2014) 1, *Journal of Law and Ethics*

³⁹ Constitution of Kenya., 2010., Article 20 (1)

⁴⁰ The East African Centre for Human Rights., 'A compendium on economic and social rights cases under the Constitution of Kenya, 2010' available at https://eachrights.or.ke/wp-content/uploads/2020/07/A_Compendium_On_Economic_And_Social_Rights_Cases_Under_The_Constitution_Of_Kenya_2010.pdf (Accessed on 24/01/2024)

⁴¹ Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' *Utrecht Law Review* 14.2 (2018): 1-5.'

⁴² Ibid

⁴³ Global Campus of Human Rights., 'Rethinking Environmental, Social, and Governance (ESG) Investing for Successful Sustainability and Human Rights.' Available at <https://gchumanrights.org/gc-preparedness/preparedness-development/article-detail/rethinking-environmental-social-and-governance-esg-investing-for-successful-sustainability-and-human-rights-5039.html> (Accessed on 24/01/2024)

⁴⁴ Ibid

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covered by the 'S' tenet of ESG is broad and encompasses the whole framework of human rights enshrined in instruments such as the UDHR, ICESCR, and the ICCPR among other human rights instruments⁴⁵.

Human rights are therefore an integral part of the ESG framework. It has been argued that respect for human rights is not just an ESG factor, but a global standard of expected conduct for all companies, including institutional investors⁴⁶. In addition, it has been asserted that human rights are not a subset of discreet social topics to be addressed, but a globally agreed upon standard of achievement for all people, covering a wide range of interdependent civil, political, economic, social, cultural, and environmental rights⁴⁷. As a result, it has been argued that businesses have a responsibility to adopt a human rights policy, embed respect for human rights throughout the business, and undertake HRDD⁴⁸. In addition, it has been posited that taking action to address human rights risks should not be contingent on their relevance to enterprise value creation and that enterprise value creation should only happen when business can meet its responsibility to respect human rights⁴⁹. Respect for human rights is a global standard of expected conduct whereby businesses, including financial actors, take proactive steps to avoid negative impacts and enable remedy for victims of harm⁵⁰. In particular, human rights are inalienable which means that they should be upheld regardless of their value for business success.

⁴⁵ Simmons & Simmons., 'Human Rights Due Diligence as Part of 'Social' in ESG.' Available at <https://www.simmons-simmons.com/en/publications/ckkce2jhz1nwg09857iumkfpb/human-rights-due-diligence-as-part-of-social-in-esg> (Accessed on 24/01/2024)

⁴⁶ Business & Human Rights Resource Centre., 'Commentary: Human Rights are not Just an ESG Factor' Available at <https://www.business-humanrights.org/en/latest-news/commentary-human-rights-are-not-just-an-esg-factor/> (Accessed on 24/01/2024)

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Munoz. P., 'Bridging the Human Rights Gap in ESG.' Available at <https://www.bsr.org/en/blog/bridging-the-human-rights-gap-in-esg> (Accessed on 24/01/2024)

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ESG is therefore increasingly driving corporate respect for human rights⁵¹. It has been observed that as companies increasingly recognize the reputational and financial risks of adverse human rights impacts, corporate human rights commitments and due diligence practices have become more prevalent⁵².

The relationship between human rights and corporate sustainability practices is recognized under the *United Nations 2030 Agenda for Sustainable Development*⁵³. The Agenda represents a shared blue print for peace and prosperity for people and the planet in the quest towards the ideal of Sustainable Development⁵⁴. It envisions attainment of the ideal of Sustainable Development through 17 Sustainable Development Goals (SDGs) which seek to strike a balance between social, economic and environmental facets of sustainability⁵⁵. It has been argued that human rights and the 2030 Agenda for Sustainable Development are inextricably linked⁵⁶. The 2030 Agenda is explicitly grounded in international human rights⁵⁷. It has been asserted that the 17 SDGs seek to realize the human rights of all, and more than 90% of the targets directly reflect elements of international human rights and labour standards⁵⁸.

⁵¹ Flacks. M., & Norman. H., 'What Does the ESG Backlash Mean for Human Rights?' Available at <https://www.csis.org/analysis/what-does-esg-backlash-mean-human-rights> (Accessed on 24/01/2024)

⁵² Ibid

⁵³ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 24/01/2024)

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ The Danish Institute for Human Rights., 'Integrated Review and Reporting on SDGs and Human Rights.' Available at https://sdghelpdesk.unescap.org/sites/default/files/2019-07/integrated_review.pdf (Accessed on 24/01/2024)

⁵⁷ Ibid

⁵⁸ Ibid

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The *United Nations Guiding Principles on Business and Human Rights*⁵⁹ provide a framework for realizing Environmental, Social and Governance standards within the human rights framework by enshrining the corporate responsibility to respect human rights. They are the world's most authoritative, normative framework guiding responsible business conduct and addressing human rights abuses in business operations and global supply chains⁶⁰. The Principles are grounded in recognition of States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and the need for rights and obligations to be matched to appropriate and effective remedies when breached⁶¹. Among the fundamental principles under the framework is that business enterprises should respect human rights⁶². This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved⁶³. Embracing the United Nations Guiding Principles on Business and Human Rights can therefore promote corporate respect for human rights under the ESG agenda. In addition, *The Hague Rules on Business and Human Rights Arbitration*⁶⁴ flow from the UN Guiding Principles on Business and Human Rights and provide a framework through which business entities can be compelled to comply with ESG standards through arbitration.

Further, the *Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct*⁶⁵ are

⁵⁹ United Nations Guiding Principles on Business and Human Rights., Available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (Accessed on 24/01/2024)

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid, Principle 11

⁶³ Ibid

⁶⁴ The Hague Rules on Business and Human Rights Arbitration., Available at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-HumanRights-Arbitration_CILC-digital-version.pdf (Accessed on 24/01/2024)

⁶⁵ Organization for Economic Cooperation and Development (OECD)., 'Guidelines for Multinational Enterprises on Responsible Business Conduct' Available at <https://www.mofa.go.jp/mofaj/files/100514804.pdf> (Accessed on 24/01/2024)

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recommendations jointly addressed by governments to multinational enterprises to enhance the business contribution to Sustainable Development and address adverse impacts associated with business activities on people, planet, and society. The Guidelines provide that Multinational Enterprises should respect the internationally recognised human rights of those affected by their activities⁶⁶. They further urge Multinational Enterprises to avoid causing or contributing to adverse human rights impacts and address such impacts when they occur;⁶⁷ seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts;⁶⁸ have a publicly available policy commitment to respect human rights;⁶⁹ carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts;⁷⁰ and provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts⁷¹. One of the key goals of ESG is to foster sustainable, responsible or ethical investments⁷². The OECD Guidelines can help Multinational Enterprises achieve this goal by integrating human rights due diligence in their investment practices⁷³.

Further, the *International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work*⁷⁴ seeks to foster respect for fundamental human rights and freedoms at work. The ILO Declaration stipulates that in seeking to maintain the link between social progress and economic growth, the guarantee

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Ibid, Part IV

⁷² Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' Op Cit

⁷³ Simmons & Simmons., 'Human Rights Due Diligence as Part of 'Social' in ESG.' Op Cit

⁷⁴ International Labour Organization., 'Declaration on Fundamental Principles and Rights at Work.' Available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf

(Accessed on 24/01/2024)

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of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential⁷⁵. It sets out fundamental human rights and freedoms that should be upheld by all persons including states and businesses among them being the freedom of association and the effective recognition of the right to collective bargaining;⁷⁶ the elimination of all forms of forced or compulsory labour;⁷⁷ the effective abolition of child labour;⁷⁸ the elimination of discrimination in respect of employment and occupation; and a safe and healthy working environment⁷⁹. The ILO Declaration is an expression of commitment by governments, employers' and workers' organizations to uphold basic human rights and values that are vital to social and economic lives⁸⁰.

At a continental level, the African Commission on Human and Peoples' Rights through its *Resolution on Business and Human Rights in Africa*⁸¹ states that respect for human rights norms and principles by business enterprises in the countries of operation is a prerequisite for the Sustainable Development envisaged in African Union's Agenda 2063⁸². The Resolution seeks to foster effective domestication of applicable regional human rights standards on business and human rights and the development of mechanisms for their effective implementation⁸³. It urges Africa to embrace a human rights-based approach to development⁸⁴.

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ International Labour Organization., 'Business and the Labour Dimension of Human Rights Due Diligence.' Available at https://www.ilo.org/empent/areas/business-helpdesk/WCMS_867782/lang--en/index.htm (Accessed on 24/01/2024)

⁸¹ African Commission on Human and Peoples' Rights., 'Resolution on Business and Human Rights in Africa' -ACHPR/Res.550 (LXXIV), 2023

⁸² Ibid

⁸³ Ibid

⁸⁴ Ibid

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At a national level, the *Nairobi Securities Exchange (NSE) ESG Disclosures Guidance Manual*⁸⁵ encourages listed companies to assess impact of ESG issues to their organisations (such as climate change and *human rights*) in addition to their organisations own ESG impacts to society (such as material resource use and emissions) when determining material ESG impacts for disclosure (Emphasis added)⁸⁶. It requires listed companies to report on several ESG issues including their impacts on human rights, and how they manage these impacts⁸⁷. The NSE Disclosures Guidance Manual is therefore important in enhancing respect for human rights by listed companies in Kenya by requiring them to report on their human rights practices in their ESG Disclosures.

From the foregoing, it emerges that human rights are well placed within the ESG framework at the global, continental and national levels. However, it has been pointed out that some corporations fail to connect human rights standards and processes with ESG criteria and investment practices because of a prevailing lack of understanding on how human rights issues should be reflected in social criteria, environmental and governance indicators⁸⁸. In addition, it has been contended that in most instances where human rights are considered in the ESG framework, they are limited to the 'S' tenet of ESG and not incorporated in other factors⁸⁹. Further, it has been argued that the human rights criteria adopted by most companies is limited to addressing climate change, advancing diversity and safety in the workplace, and striving for ethical supply chains⁹⁰. It has been pointed out that while these issues are critically important, they do not reflect the full spectrum of human rights⁹¹. As a result of the foregoing, it has been contended that ESG as a framework does

⁸⁵ Nairobi Securities Exchange., 'ESG Disclosures Guidance Manual.' Available at <https://www.nse.co.ke/wp-content/uploads/NSE-ESG-Disclosures-Guidance-Manual.pdf> (Accessed on 24/01/2024)

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Office of the High Commissioner for Human Rights., 'Investors, ESG and Human Rights.' Op Cit

⁸⁹ Ibid

⁹⁰ Rydzak. J., 'ESG Data Needs a Human Rights Upgrade.' Available at <https://rankingdigitalrights.org/mini-report/esg-data-needs-a-human-rights-upgrade/#:~:text=ESG%20scores%20ignore%20human%20rights,strive%20for%20ethical%20supply%20chains> (Accessed on 25/01/2024)

⁹¹ Ibid

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not sufficiently capture harms to people (and resulting risk to business) or guide decisions that take human rights into account⁹². Further, it has been argued that ESG can easily fail to identify and address notable human rights harms⁹³.

It is therefore necessary to embrace human rights within the ESG framework in order to foster sustainability.

3.0 Way Forward

In order to integrate human rights within the ESG framework, there is need for corporations to embrace human rights due diligence⁹⁴. Human rights due diligence consists of a process that allows companies to identify, prevent and mitigate their actual and potential adverse impacts on human rights and account for how they address such impacts⁹⁵. Human rights due diligence involves the actions taken by a company to both identify and act upon actual and potential human rights risks for workers in its operations, supply chains and the services it uses⁹⁶. Further, it has been defined as a process for identifying, preventing, mitigating and addressing human rights impacts, including both actual impacts occurring in the present and potential impacts that could occur in the future⁹⁷. The *United Nations Guiding Principles on Business and Human Rights* provide that in order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human right⁹⁸.

⁹² Munoz. P., 'Bridging the Human Rights Gap in ESG.' Op Cit

⁹³ Ibid

⁹⁴ International Labour Organization., 'Business and the Labour Dimension of Human Rights Due Diligence.' Op Cit

⁹⁵ Ibid

⁹⁶ Ethical Trading Initiative., 'Human Rights Due Diligence.' Available at <https://www.ethicaltrade.org/insights/issues/human-rights-due-diligence> (Accessed on 25/01/2024)

⁹⁷ Geneva Centre for Security Sector Governance., 'Human Rights Due Diligence.' Available at <https://www.securityhumanrightshub.org/toolkit/factsheets/human-rights-due-diligence.html> (Accessed on 25/01/2024)

⁹⁸ United Nations Guiding Principles on Business and Human Rights., Op Cit

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Human rights due diligence has been advocated as a key measure for enterprises to proactively manage potential and actual adverse human rights impacts⁹⁹. It has been argued that the prevention of adverse impacts on people is the main purpose of human rights due diligence¹⁰⁰. The process not only identifies impacts a corporation directly causes, but also impacts it contributes to or is directly linked to through its business relationships, operations, products and services¹⁰¹. Further, it has been pointed out that engaging with stakeholders especially affected groups such as workers and communities is a key component of human rights due diligence¹⁰². It is therefore necessary for companies to embrace human rights due diligence in order to effectively embrace human rights within their ESG framework.

In order to effectively embrace human rights due diligence, companies should effectively identify and assess actual or potential adverse human rights impacts that they may cause or contribute to through their own activities, or which may be directly linked to their operations, products or services by their business relationships¹⁰³. In addition, there is need for corporations to integrate findings from impact assessments across relevant company processes and take appropriate action according to their involvement in the impact¹⁰⁴. Further, it is imperative for companies to track the effectiveness of measures and processes adopted to address adverse human rights impacts in order to know if they are working and communicate on how impacts are being addressed and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place¹⁰⁵. Further, it has been

⁹⁹ Office of the High Commissioner for Human Rights., 'Corporate Human Rights Due Diligence – Identifying and Leveraging Emerging Practices.' Available at <https://www.ohchr.org/en/special-procedures/wg-business/corporate-human-rights-due-diligence-identifying-and-leveraging-emerging-practices#:~:text=The%20prevention%20of%20adverse%20impacts,people%2C%20not%20risks%20to%20business> (Accessed on 25/01/2024)

¹⁰⁰ Ibid

¹⁰¹ Geneva Centre for Security Sector Governance., 'Human Rights Due Diligence.' Op Cit

¹⁰² Ibid

¹⁰³ Office of the High Commissioner for Human Rights., 'Corporate Human Rights Due Diligence – Identifying and Leveraging Emerging Practices.' Op Cit

¹⁰⁴ Ibid

¹⁰⁵ Ibid

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suggested in order to be effective, human rights due diligence should take a conflict-sensitive approach which means that the process emphasizes effectively preventing, managing and addressing conflict, including by seeking to understand wider conflict dynamics and related risks in the operating environment especially in complex environments¹⁰⁶.

Human rights due diligence is therefore vital in embedding human rights within the ESG agenda. It has been suggested that human rights due diligence should be embraced by companies as an ongoing risk management process¹⁰⁷. It has been pointed out that companies can conduct effective human rights due diligence through several ways including through conducting a stand-alone human rights impact assessment or by integrating a thorough human rights evaluation into existing environmental and social impact assessment processes¹⁰⁸. In addition, it has been suggested that human rights due diligence can both inform and be informed by the company's other assessments and analyses such as risk assessments, situation analyses, needs assessments¹⁰⁹. Human rights due diligence is therefore a key idea that needs to be embraced in order to entrench human rights within the ESG agenda.

In addition, at a continental level, several measures have been suggested towards embracing human rights in business operations towards fostering sustainable, responsible or ethical investments in the Continent. For example, it has been suggested that there is need to mainstream human rights into trade under the African Continental Free Trade Area (AfCFTA) and ensure that the implementation of the AfCFTA does not have an adverse effect on human rights¹¹⁰. Implementation of the AfCFTA is expected to boost Intra-African trade and investments some which could potentially have negative impacts on

¹⁰⁶ Geneva Centre for Security Sector Governance., 'Human Rights Due Diligence.' Op Cit

¹⁰⁷ Office of the High Commissioner for Human Rights., 'Corporate Human Rights Due Diligence – Identifying and Leveraging Emerging Practices.' Op Cit

¹⁰⁸ Geneva Centre for Security Sector Governance., 'Human Rights Due Diligence.' Op Cit

¹⁰⁹ Ibid

¹¹⁰ Feldman. D., Mkhize. M., & Edmonds-Camara. H., '2023 African Forum on Business and Human Rights: What do companies need to know?.' Available at <https://www.globalpolicywatch.com/2023/09/2023-african-forum-on-business-and-human-rights-what-do-companies-need-to-know/> (Accessed on 25/01/2024)

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human rights in the Continent¹¹¹. Further, it has been suggested that there is need for the African Union to expedite the adoption of its Business and Human Rights Policy Framework (the AU Policy Framework on Business and Human Rights) which is designed to act as a roadmap for regulating the impact of business conduct on human rights in Africa and to encourage cohesive implementation of the United Nations Guiding Principles on Business and Human Rights by African states¹¹². In addition, it has been pointed out that there is need for African countries to develop National Action Plans (NAPs) on Business and Human Rights in order to articulate their priorities, implementation strategies and commitments to human rights¹¹³. Finally, African courts including the African Court on Human and Peoples' Rights, regional courts such as the Common Market for Eastern and Southern Africa (COMESA) Court of Justice, the Court of Justice of the Economic Community of West African States (ECOWAS) along with other regional and national courts have a key role to play in shaping jurisprudence on Business and Human Rights in the Continent¹¹⁴.

Finally, it is necessary to strengthen ESG reporting and enforcement mechanisms on human rights¹¹⁵. It has been observed that recent ESG trends have driven the requirement by businesses to report on human rights as evidenced by emerging legal frameworks requiring companies to report on human rights and environmental issues, emerging mandatory human rights due diligence legislation, and increased legal enforcement and litigation risks¹¹⁶. Global, regional and national ESG frameworks including the *United Nations Guiding Principles on Business and Human Rights*, the *European Union's Corporate Sustainability Reporting Directive*, and the *Nairobi Securities Exchange (NSE) ESG Disclosures Guidance Manual* require companies to report on their

¹¹¹ Ibid

¹¹² African Commission on Human and Peoples' Rights., 'Resolution on Business and Human Rights in Africa' -ACHPR/Res.550 (LXXIV), 2023, Op Cit

¹¹³ Feldman. D., Mkhize. M., & Edmonds-Camara. H., '2023 African Forum on Business and Human Rights: What do companies need to know?.' Op Cit

¹¹⁴ Ibid

¹¹⁵ Mikhaeel. M., 'How Human Rights Due Diligence Affects the 'E' in ESG.' Available at <https://www.financierworldwide.com/how-human-rights-due-diligence-affects-the-e-in-esg> (Accessed on 25/01/2024)

¹¹⁶ Ibid

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human rights standards on either voluntary or mandatory basis¹¹⁷. Further, the United Nations (UN) *Guiding Principles Reporting Framework*¹¹⁸ offers a comprehensive guidance for companies to report on human rights issues in line with their responsibility to respect human rights. It is important for companies to embrace the requirements on reporting in order to strengthen their approaches towards human rights. It is also vital to enhance enforcement of human rights in ESG through approaches such as public enforcement by the state and its agencies such as the capital markets and private enforcement through ESG litigation among other measures¹¹⁹.

Through the foregoing among other approaches, human rights will be firmly entrenched within the ESG agenda.

4.0 Conclusion

Human rights are central in the ESG debate. The 'S' tenet of ESG covers social factors including human rights, labour relations, employee welfare, community engagement, diversity and inclusion¹²⁰. Corporations are increasingly required to safeguard human rights as envisaged by 'S' pillar of ESG¹²¹. ESG frameworks at global, regional and national levels including the *United Nations Guiding Principles on Business and Human Rights*¹²², the *European Union's Corporate Sustainability Reporting Directive*¹²³, and the *Nairobi Securities Exchange (NSE) ESG Disclosures Guidance Manual*¹²⁴ require companies to comply and report on human rights. Despite the recognition of the place of

¹¹⁷ Ibid

¹¹⁸ UN Guiding Principles Reporting Framework., Available at https://www.ungpreporting.org/wp-content/uploads/UNGPRReportingFramework_2017.pdf (Accessed on 25/01/2024)

¹¹⁹ Kemp. B et al., 'The Rise of ESG Litigation and Horizontal Human Rights Enforcement.' Available at <https://www.lexology.com/library/detail.aspx?g=07a94453-f2aa-490a-a7e1-f6c25256cbf9> (Accessed on 25/01/2024)

¹²⁰ Henisz. W, Koller. T, & Nuttall. R., 'Five Ways that ESG Creates Value.' Op Cit

¹²¹ Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' Op Cit

¹²² United Nations Guiding Principles on Business and Human Rights., Op Cit

¹²³ European Union's Corporate Sustainability Reporting Directive., Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464> (Accessed on 25/01/2024)

¹²⁴ Nairobi Securities Exchange., 'ESG Disclosures Guidance Manual.' Op Cit

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human rights in ESG, human rights are yet to be fully entrenched within the ESG framework¹²⁵. ESG can therefore easily fail to identify and address notable human rights harms¹²⁶. It is imperative to embrace human rights in ESG. This calls for fostering human rights due diligence¹²⁷; embracing national and continental approaches towards human rights in ESG¹²⁸; and strengthening ESG reporting and enforcement mechanisms on human rights¹²⁹. Promoting human rights in ESG is an important agenda that needs to be actualized towards Sustainable Development.

¹²⁵ Office of the High Commissioner for Human Rights., 'Investors, ESG and Human Rights.' Op Cit

¹²⁶ Munoz. P., 'Bridging the Human Rights Gap in ESG.' Op Cit

¹²⁷ International Labour Organization., 'Business and the Labour Dimension of Human Rights Due Diligence.' Op Cit

¹²⁸ Feldman. D., Mkhize. M., & Edmonds-Camara. H., '2023 African Forum on Business and Human Rights: What do companies need to know?.' Op Cit

¹²⁹ Mikhaeel. M., 'How Human Rights Due Diligence Affects the 'E' in ESG.' Op Cit

Actualizing Gender Equity for Environmental Sustainability

Actualizing Gender Equity for Environmental Sustainability

Abstract

The paper critically appraises the role of gender equity in fostering environmental sustainability. It examines the disparities between men and women in environmental governance and management and how these differences have hindered realization of environmental sustainability. The paper further evaluates the progress made towards promoting gender equity in environmental matters and challenges thereof. It also proposes reforms towards actualizing gender equity for environmental sustainability towards Sustainable Development.

1.0 Introduction

Environmental sustainability has been defined as a condition of balance, resilience, and interconnectedness that allows human society to satisfy its needs while neither exceeding the capacity of its supporting ecosystems to continue to regenerate the services necessary to meet those needs without diminishing biological diversity¹. It has also been defined as the responsibility to conserve natural resources and protect global ecosystems to support health and wellbeing, now and in the future². This concept received global attention following the release of the Report of the World Commission on Environment and Development (Brundtland Report) which considered it within the context of Sustainable Development³. The Report defined Sustainable Development as development which meets the needs of the present generations without compromising the ability of future generations to meet their own needs⁴. Sustainable Development seeks to foster development that is socially, economically and environmentally sustainable⁵.

¹ Morelli. J., 'Environmental Sustainability: A Definition for Environmental Professionals.' *Journal of Environmental Sustainability*, Volume 1, Issue 1 (2011)

² Sphera., 'What Is Environmental Sustainability?' Available at <https://sphera.com/glossary/what-is-environmental-sustainability/> (Accessed on 11/08/2023)

³ Report of the World Commission on Environment and Development., 'Our Common Future' 1987 (Brundtland Report)

⁴ Ibid

⁵ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1.

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Environmental sustainability thus seeks to promote the various facets of development in a manner that does not harm future generations through loss and damage of global ecosystems⁶. It encapsulates the principle of intergenerational equity which provides that natural resources of the earth must be safeguarded for the benefit of the present and future generations through careful planning and management⁷. The Rio Declaration on Environment and Development further stipulates that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations⁸.

Achieving environmental sustainability has become a pertinent concern in the wake of global environmental challenges⁹. These problems include global warming, loss of biodiversity, pollution, deforestation, ocean acidification, food and water insecurity, soil degradation and depletion of natural resources through overfishing, unsustainable mining among others¹⁰. These environmental problems have been worsened by the threat of climate change which is the most defining challenge of our time¹¹. The impacts of climate change such as warmer temperatures, intense droughts, water scarcity, severe wild fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world¹². These environmental problems including climate change affect environmental

⁶ Goodland. R., 'The Concept of Environmental Sustainability.' *Annual Review of Ecology and Systematics*, Volume 26 (1995), 1-24

⁷ United Nations., 'Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972' Principle 2

⁸ United Nations General Assembly., 'Report of the United Nations Conference On Environment and Development: Rio Declaration on Environment and Development.' A/CONF.151/26 (Vol. I), Principle 3

⁹ Robinson. D., '15 Biggest Environmental Problems of 2023.' Available at <https://earth.org/the-biggest-environmental-problems-of-our-lifetime/> (Accessed on 11/08/2023)

¹⁰ Ibid

¹¹ United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at <https://www.un.org/en/desa/forum-climate-change-and-science-and-technology-innovation> (Accessed on 11/08/2023)

¹² United Nations., 'What is Climate Change?' Available at <https://www.un.org/en/climatechange/what-is-climate-change> (Accessed on 11/08/2023)

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sustainability by affecting natural ecosystems as evidenced by loss of biodiversity and depletion of natural resources¹³. It has been argued that environmental problems including climate change are caused by human activities such as burning of fossil fuels like coal, oil and gas, deforestation and unsustainable agriculture practices¹⁴. Addressing these problems towards fostering environmental sustainability therefore requires a change in human behaviour and practices¹⁵.

Realizing environmental sustainability requires sound environmental governance and management¹⁶. One of the fundamental problems identified in environmental governance and management is the issue of gender disparities between men and women with the latter being disproportionately disadvantaged¹⁷. It has been argued that there is a need for active participation of both men and women in the management of natural resources and environmental governance in order to foster environmental sustainability¹⁸. Achieving gender equity is therefore vital in attaining environmental sustainability¹⁹.

The paper critically appraises the role of gender equity in fostering environmental sustainability. It examines the disparities between men and women in environmental governance and management and how these differences have hindered realization of environmental sustainability. The paper further evaluates the progress made towards promoting gender equity

¹³ UNICEF., 'Climate Change and Environmental Sustainability.' Available at <https://www.unicef.org/india/what-we-do/climate-change> (Accessed on 11/08/2023)

¹⁴ United Nations., 'What is Climate Change?' Op Cit

¹⁵ Ibid

¹⁶ Goodland. R., 'The Concept of Environmental Sustainability.' Op Cit

¹⁷ Geneva Environment Network., 'Gender and the Environment.' Available at <https://www.genevaenvironmentnetwork.org/resources/updates/gender-and-the-environment/> (Accessed on 11/08/2023)

¹⁸ Muigua. K., 'Gender Perspectives in Biodiversity Conservation.' Available at <http://kmco.co.ke/wp-content/uploads/2021/11/Gender-Perspectives-in-Biodiversity-Conservation-Kariuki-Muigua-November-2021.pdf> (Accessed on 11/08/2023)

¹⁹ Ibid

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in environmental matters and challenges thereof. It also proposes reforms towards actualizing gender equity for environmental sustainability.

2.0 The Nexus between Gender Equity and Environmental Sustainability

The term gender refers to the set of social norms, practices and institutions that regulate the relations between women and men in a society²⁰. It has also been defined as a social construct that ascribes different qualities and rights to women and men regardless of individual competence or desires²¹. Further, the term gender is also used to refer to the socially-constructed expectations about the characteristics, aptitudes and behaviours associated with being a woman or a man, and while gender defines what is feminine and masculine, it shapes the social roles that men and women play and the power relations between them, which can have a profound effect on the use and management of natural resources²².

Gender equality entails giving men and women equal treatment when it comes to rights, responsibilities and opportunities²³. It enshrines equal outcomes for women, men and gender-diverse people²⁴. Gender equity on the other hand is about fairness²⁵. In order to ensure everyone has equal opportunities, gender equity considers privilege, bias and other parameters that can limit how

²⁰ United Nations, "The Role of Men and Boys in Achieving Gender Equality," Women 2000 and Beyond, December 2008, p.4. Available at <http://www.unwomen.org/~media/headquarters/media/publications/un/en/w2000menandboyseweb.pdf> (Accessed on 11/08/2023)

²¹ G. J. Latham, "A study on gender equality as a prerequisite for sustainable development," Report to the Environment Advisory Council, Sweden 2007:2, p. 17. Available at http://www.uft.oekologie.unibremen.de/hartmutkoehler_fuer_studierende/MEC/09-MECreading/gender%202007%20EAC%20rapport_engelska.pdf (Accessed on 11/08/2023)

²² 'What Is Gender and Biodiversity?' Available at <https://www.cbd.int/gender/biodiversity/> (Accessed on 11/08/2023)

²³ Crabtree. E., 'Why we Need Gender Equity, Not Just Equality.' Available at <https://iqeq.com/insights/why-we-need-gender-equity-not-just-equality/#:~:text=Gender%20equality%20is%20giving%20all,limit%20how%20people%20access%20opportunities.> (Accessed on 11/08/2023)

²⁴ Ibid

²⁵ Ibid

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people access opportunities²⁶. Gender equity is the process to achieve gender equality²⁷. It recognizes that due to historical and social disadvantages some people especially women are not in the same position as men and thus treating them 'equally' may not be fair hence the need to address these inequalities²⁸.

It has been observed that men and women relate to the environment in different ways, and environmental changes have different impacts on their lives²⁹. Women play a critical role in sustaining communities and managing natural resources, but their contributions are often undervalued and neglected³⁰. For example, women play a central part in the provision, management and safeguarding of freshwater as a natural resource, and they are often responsible for sanitation and maintaining a hygienic home³¹. Women are also more likely than men to live in poverty, and they are more vulnerable to the impacts of climate change and other environmental hazards, especially in developing countries³².

Natural disasters such as erosion and other forms of soil degradation, pollution of freshwaters, shore-line erosion, flooding, loss of wetlands, drought and desertification impact directly on women in their roles as providers of food, water and fuel³³. It has also been observed that climate change can also impact on women's productive roles since its impacts such as rising sea levels, flooding in low-lying delta areas and increased salt-water

²⁶ DCED., 'Gender Equality vs Equity.' Available at <https://www.enterprise-development.org/weegateway/gender-equality-vs-equity/> (Accessed on 11/08/2023)

²⁷ Ibid

²⁸ Ibid

²⁹ United Nations Environment Programme., 'About Gender.' Available at <https://www.unep.org/explore-topics/gender/about-gender> (Accessed on 11/08/2023)

³⁰ Ibid

³¹ SIDA., 'Gender and the Environment.' Available at <https://cdn.sida.se/publications/files/-gender-and-the-environment.pdf> (Accessed on 11/08/2023)

³² United Nations Environment Programme., 'About Gender.' Op Cit

³³ Hannan. C., 'Mainstreaming Gender Perspectives in Environmental Management and Mitigation of Natural Disasters.' Available at https://web.archive.org/web/20180721174301id_/http://www.un.org/womenwatch/osagi/pdf/presnat%20disaster.PDF (Accessed on 12/08/2023)

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intrusion can jeopardize sustainable livelihood strategies³⁴. Further, food security and family well-being are threatened when the resource base on which women rely to carry out their critical roles and obtain supplementary incomes is undermined³⁵. Agriculture is the most important employment sector for women in low and middle income countries and therefore, during periods of drought and erratic rainfall, women, as agricultural workers and primary procurers, work harder to secure income and resources for their families³⁶. This puts added pressure on girls, who often have to [leave school](#) to help their mothers manage the increased burden³⁷. Women also bear a disproportional burden of deteriorating water quality and availability in rural and urban areas due to environmental problems such as pollution and drought and have to travel long distances in search of water to sustain households³⁸. Based on the foregoing, it has been argued that women were more worried about climate change than men and that more women than men felt they could do something to curb climate change and were prepared to take action to that effect³⁹. Actualizing gender equity and giving women a voice in environmental decision making can therefore foster environmental sustainability.

In addition, in the context of corporate governance, it has been observed that women play a more significant role, compared to men, in establishing positive values in terms of social welfare but also toward reducing carbon emissions⁴⁰. Thus, enhancing board gender diversity is vital in enabling firms to 'go

³⁴ Ibid

³⁵ Ibid

³⁶ UN Women., 'Explainer: How Gender Inequality and Climate Change are Interconnected.' Available at https://www.unwomen.org/en/news-stories/explainer/2022/02/explainer-how-gender-inequality-and-climate-change-are-interconnected?gclid=CjwKCAjw29ymBhAKEiwAHJbJ8p-iWBVsiOQq0h8-HiXaObwP7T1nztSxRGPldFcxcRs-flzzRIQIgRoCVrIQAvD_BwE (Accessed on 12/08/2023)

³⁷ Ibid

³⁸ SIDA., 'Gender and the Environment.' Op Cit

³⁹ Kassinis. G et al., 'Gender and Environmental Sustainability: A Longitudinal Analysis.' *Corporate Social Responsibility and Environmental Management* (2016)

⁴⁰ De Silva. DG., & Pownall. RA., 'Going Green: Does it Depend on Education, Gender or Income?' *Applied Economics*, Volume 46, No. 5. (2014) pp573–586.

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green⁴¹.’ Gender board diversity is positively related to a firm’s ‘environmental consciousness and foster environmental sustainability initiatives through Corporate Social Responsibility (CSR) activities⁴². To this extent, it has been argued that women have a lower proclivity for unethical business behavior and are more socially oriented than men, which could mean that more gender diverse boards are less likely to engage in unethical behavior and be more effective in CSR-related decision-making⁴³. Actualizing gender equity in board decision making can thus enhance environmental sustainability.

Based on the foregoing, it has been asserted that Gender equity and environmental sustainability are gaining political momentum as global challenges that require urgent co-ordinated action⁴⁴. Women and men around the world are affected differently by climate change, deforestation, land degradation, desertification, unsustainable infrastructure, growing water scarcity and inadequate sanitation, making the goals of gender equality and environmental sustainability mutually reinforcing⁴⁵. Integrating a gender lens to environmental data collection and policy making can thus foster environmental sustainability⁴⁶.

3.0 Actualizing Gender Equity for Environmental Sustainability: Prospects and Problems

There have been some attempts towards fostering gender equity for environmental sustainability. The Third United Nations Women’s Conference held in Nairobi Kenya in 1985 was among the first international forums that made explicit the linkages between Sustainable Development and women’s

⁴¹ Ibid

⁴² Kassinis. G et al., ‘Gender and Environmental Sustainability: A Longitudinal Analysis.’ Op Cit

⁴³ Ibid

⁴⁴ The Organization for Economic Cooperation and Development., ‘Gender and the Environment.’ Available at <https://www.oecd.org/env/gender-and-the-environment-3d32ca39-en.htm> (Accessed on 12/08/2023)

⁴⁵ Ibid

⁴⁶ Ibid

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involvement and empowerment as well as gender equality and equity⁴⁷. The conference identified the environment as an area of concern for women and called for a gender perspective on Sustainable Development, planning and implementation⁴⁸. The *Rio Declaration* also envisages the participation of all people in environmental management⁴⁹. Principle 10 of the Rio Declaration states as follows:

'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall 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 shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided⁵⁰.'

Principle 10 of the Rio Declaration thus encapsulates several tenets that are vital in actualizing gender equity for environmental sustainability including participation of all citizens, access to information and access to justice⁵¹. Upholding these principles can enhance gender equity for environmental sustainability.

In Africa, the *African Charter on Human and People's Rights*⁵² stipulates that all people shall have the right to a general satisfactory environment favourable to

⁴⁷ United Nations., 'Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace.' A/CONF.116/128/Rev.1

⁴⁸ Ibid

⁴⁹ United Nations General Assembly., 'Report of the United Nations Conference On Environment and Development: Rio Declaration on Environment and Development.' Op Cit

⁵⁰ Ibid

⁵¹ Ibid

⁵² African Charter on Human and People's Rights., Available at https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf (Accessed on 12/08/2023)

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their development⁵³. It also calls upon Africa states to ensure the elimination of every discrimination against women⁵⁴. The *African Charter on Human and People's Rights* therefore envisages the ideas of environmental sustainability and gender equity. Further, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*⁵⁵ states that women shall have the right to live in a healthy and sustainable environment⁵⁶. It implores states to ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels⁵⁷. The Protocol thus envisages the role of gender equity in environmental sustainability.

In Kenya, the Constitution enshrines equity and equality as being among the national values and principles of governance⁵⁸. It further captures the right of every person to a clean and healthy environment⁵⁹. The Constitution also obliges the state to encourage public participation in the management, protection and conservation of the environment⁶⁰. It also states that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources⁶¹. Actualizing these Constitutional provisions will foster gender equity for environmental sustainability in Kenya. In addition, the *National Policy on Gender and Development*⁶² seeks to create a just, fair and transformed society free from gender-based discrimination in all

⁵³ Ibid, Article 24

⁵⁴ Ibid, Article 18 (3)

⁵⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa., Available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf> (Accessed on 12/08/2023)

⁵⁶ Ibid, Article 18 (1)

⁵⁷ Ibid, Article 18 (2) (a)

⁵⁸ Constitution of Kenya, 2010., Article 10 (2) (b)

⁵⁹ Article 42

⁶⁰ Ibid, Article 69 (1) (d)

⁶¹ Ibid, Article 69 (2)

⁶² Republic of Kenya., 'Sessional Paper No. 02 of 2019 on National Policy on Gender and Development.' Available at <http://psyg.go.ke/wp-content/uploads/2019/12/NATIONAL-POLICY-ON-GENDER-AND-DEVELOPMENT.pdf> (Accessed on 12/08/2023)

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spheres of life practices⁶³. The policy is further aimed at integrating gender equality and women's empowerment into sectoral policies, planning and programmes including the environment and natural resources management⁶⁴. The policy acknowledges that access to and control over environmental resources is gender biased⁶⁵. It seeks to promote gender equity for environmental sustainability through measures such as having women well represented in decision-making processes over the environment and natural resources; taking into account women's input into climate change adaptation and mitigation strategies; reducing gender disparities in access to natural resources; providing affordable clean water to reduce health risks related to poor quality of water and providing gender-disaggregated data on the impacts of environmental and natural resources' degradation and climate change⁶⁶. Realizing the vision of this policy is vital in actualizing gender equity for environmental sustainability in Kenya.

From the foregoing, it can be deduced that there have been attempts towards fostering gender equity for environmental sustainability. However, it has also been observed that there are still gender disparities which hinder effective realization of gender equity for sustainable development⁶⁷. It has been observed that men are the main actors in the management of renewable and non-renewable natural resources such as forests, wildlife, minerals and natural gas⁶⁸. This has significant implications on the Gross Domestic Product and the livelihoods of Kenyans dependent on the environment and natural resources⁶⁹. Further, gender disparities are also witnessed through cases of unequal and insecure rights over land with women being disproportionately disadvantaged⁷⁰. In Kenya, it has been stated that there are gender inequalities

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Kassinis. G et al., 'Gender and Environmental Sustainability: A Longitudinal Analysis.' Op Cit

⁶⁸ Republic of Kenya., 'Sessional Paper No. 02 of 2019 on National Policy on Gender and Development.' Op Cit

⁶⁹ Ibid

⁷⁰ IUCN., 'Gender and the Environment: What are the Barriers to Gender Equality in Sustainable Ecosystem Management?' Available at <https://www.iucn.org/news/gender/202001/gender-and-environment-what-are->

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in land ownership and representation⁷¹. The Constitution of Kenya acknowledges this problem and enshrines the elimination of gender discrimination in law, customs and practices related to land and property in land as one of the principles of land policy in Kenya⁷². Access to and secure tenure over land is closely linked to natural resource access and management, such as water and forest resources, with benefits for sustainable ecosystems⁷³. In addition, it has been pointed out that looking at gender aspects of the use of natural resources such as water, forests and land and experiences of environmental degradation through climate change, pollution, chemicals, loss of biodiversity illustrates gender inequalities⁷⁴. Women are severely affected by challenges such as the lack of access to modern energy services, lack of access to safe and clean water and inadequate land rights due to their important role in sustaining households⁷⁵. Furthermore, women have been severely impacted by the effects of climate change as witnessed by inadequate access to natural resources such as water, food insecurity due to drought which hinders farming activities and gender based violence⁷⁶. It has also been noted that inadequate representation by women in environmental governance in areas such as energy, forestry and land has resulted in mismanagement of these sectors contributing to the threat of climate change and adverse effects on women⁷⁷. It is necessary to solve these problems in order to actualize gender equity for environmental sustainability.

[barriers-gender-equality-sustainable-ecosystem-management](#) (Accessed on 12/08/2023)

⁷¹ Kariuki, J., & Birner, R., 'Exploring Gender Equity in Ecological Restoration: The Case of a Market Based Program in Kenya.' Available at <https://er.uwpress.org/content/wper/39/1-2/77.full.pdf> (Accessed on 12/08/2023)

⁷² Constitution of Kenya., Article 60 (1) (f)

⁷³ IUCN., 'Gender and the Environment: What are the Barriers to Gender Equality in Sustainable Ecosystem Management?' Op Cit

⁷⁴ SIDA., 'Gender and the Environment.' Op Cit

⁷⁵ Ibid

⁷⁶ United Nations Framework Convention on Climate Change., 'New Report: Why Climate Change Impacts Women Differently than Men.' Available at https://unfccc.int/news/new-report-why-climate-change-impacts-women-differently-than-men?gclid=CjwKCAjw29ymBhAKEiwAHJbJ8ssIfst99WBehD0DHNpgsbjqaHye6wOiIPq9xBR4ZYRvsL8yf_KNgxoCskUQAvD_BwE (Accessed on 12/08/2023)

⁷⁷ SIDA., 'Gender and the Environment.' Op Cit

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4.0 Way Forward

There is need to actualize gender equity in order to enhance environmental sustainability. It has been stated that gender equality and women's empowerment are matters of fundamental human rights and prerequisites to meeting Sustainable Development goals around the world⁷⁸. This fact is acknowledged by the *United Nation's 2030 Agenda for Sustainable Development*⁷⁹ which asserts that realizing gender equality and empowerment of women will make a crucial contribution towards progress across all the Sustainable Development Goals and targets⁸⁰. Sustainable Development Goal 5 seeks to ensure effective and full participation of women and equal opportunities at all levels of decision making in political, economic and public life including access to ownership and control over land and natural resources⁸¹. Realizing this goal is vital in actualizing gender equity for environmental sustainability.

Further, there is need to foster participation of women in environmental decision making including formulation of laws and policies on the environment and implementation of environmental projects⁸². Public participation is a fundamental principle that can enhance sound management of the environment and natural resources towards environmental sustainability⁸³. The importance of public participation has been enunciated under the Rio Declaration on Environment and Development⁸⁴. Public participation has also been captured as among the national values and

⁷⁸ IUCN., 'Gender and the Environment: What are the Barriers to Gender Equality in Sustainable Ecosystem Management?' Op Cit

⁷⁹ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 12/08/2023)

⁸⁰ Ibid

⁸¹ Ibid

⁸² United Nations Framework Convention on Climate Change., 'New Report: Why Climate Change Impacts Women Differently than Men.' Op Cit

⁸³ Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf> (Accessed on 12/09/2023)

⁸⁴ Rio Declaration on Environment and Development., Principe 10

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principles of governance in Kenya⁸⁵. The Constitution also obliges the state to encourage public participation in the management, protection and conservation of the environment⁸⁶. Public participation can foster the voice of women in environmental decision making and contribute towards the realization of environmental sustainability through sound and effective decisions that incorporate the decision of all concerned citizens including women⁸⁷. Women have always been the custodians of the environment and incorporating their views in environmental decision making will enhance the quality of such decisions thus fostering Sustainable Development⁸⁸. It is imperative to empower women and enhance access to information which are important tenets in fostering effective public participation⁸⁹.

The *National Policy on Gender and Development*⁹⁰ in Kenya also envisages several ways through which gender equity can be realized for environmental sustainability. These include developing and reviewing environment, and other natural resources (including forests, water, mining, petroleum and energy) management laws, policies and programmes to ensure gender and equity compliance; ensuring availability of water for multiple use to women taking into account the gender division of labour that defines women's domestic and productive activities in the household; ensuring that women participate in and benefit equitably from investments in various natural resources development initiatives; Building capacities of development agencies in gender mainstreaming into environment and climate change laws, policies and programmes and ensure that women participate in and contribute to and benefit from climate resilient programmes and projects and supporting

⁸⁵ Constitution of Kenya, 2010., Article 10 (2) (a)

⁸⁶ Ibid, Article 69 (1) (d)

⁸⁷ Shobeiri, S., & Meiboudi, H., 'Women's Participation in Environmental Management and Development Promotion Culture.' Available at https://www.researchgate.net/publication/311533595_Women's_participation_in_environmental_management_and_development_Promotion_Culture#:~:text=Women%20are%20the%20main%20cause,environmental%20management%20are%20so%20obvious. (Accessed on 12/08/2023)

⁸⁸ Ibid

⁸⁹ Muigua, K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Op Cit

⁹⁰ Republic of Kenya., 'Sessional Paper No. 02 of 2019 on National Policy on Gender and Development.' Op Cit

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interventions aimed at equitable participation of women in the sustainable utilization of natural resources for economic benefits including opportunities for carbon trading⁹¹. Realizing the vision of this policy is essential in actualizing gender equity for environmental sustainability in Kenya. It is indeed possible to achieve gender equality and equity if the National Policy on Gender and Development can be implemented and supported by good will from all groups of persons and all levels of government⁹².

It is also imperative embrace the role of women in in environment and natural resource decision making and leadership⁹³. This can be achieved by appointing women in leadership positions in ministries, state departments, environmental management bodies and other positions in environment related sectors⁹⁴. Economic empowerment of women is also vital in actualizing gender equity and environmental sustainability⁹⁵. It can enhance the ability of women to access resources such as land, energy and water a factor that can enhance effective management of these resources towards environmental sustainability⁹⁶.

Though the foregoing among other measures, gender equity can be actualized for environmental sustainability towards Sustainable Development. It has been argued that if countries are to achieve the Sustainable Development goals as well as their national development plans such as the Vision 2030 development blueprint in Kenya, then gender equality and equity must be

⁹¹ Ibid, Part 4.9

⁹² Muigua. K., 'Actualising the National Policy on Gender and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2020/10/Actualising-the-National-Policy-on-Gender-and-Development-in-Kenya-Kariuki-Muigua-Ph.D-October-2020.pdf> (Accessed on 12/08/2023)

⁹³ IUCN., 'Gender and the Environment: What are the Barriers to Gender Equality in Sustainable Ecosystem Management?' Op Cit

⁹⁴ Ibid

⁹⁵ Organization for Security and Co-operation in Europe., 'Gender and the Environment.' Available at <https://www.osce.org/files/f/documents/4/f/36360.pdf> (Accessed on 12/08/2023)

⁹⁶ Ibid

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addressed as a matter of priority since development requires concerted efforts of both men and women⁹⁷.

5.0 Conclusion

Achieving environmental sustainability has become a pertinent concern in the wake of global environmental challenges especially the threat of climate change⁹⁸. Despite efforts being made towards fostering gender equity, it has been observed that gender disparities are evident in the sphere of environmental governance and management a situation that hinders environmental sustainability and realization of Sustainable Development⁹⁹. There is a need for active participation of both men and women in the management of natural resources and environmental governance in order to foster environmental sustainability.¹⁰⁰ This can be achieved through public participation and access to information; embracing the role of women in environment and natural resource decision making and leadership; economic empowerment of women and implementing national policies and programmes on gender such as Kenya's National Policy on Gender and Development¹⁰¹. Actualizing gender equity for environmental sustainability is thus feasible.

⁹⁷ Muigua. K., 'Actualising the National Policy on Gender and Development in Kenya.' Op Cit

⁹⁸ Robinson. D., '15 Biggest Environmental Problems of 2023.' Op Cit

⁹⁹ Geneva Environment Network., 'Gender and the Environment.' Op Cit

¹⁰⁰ Muigua. K., 'Gender Perspectives in Biodiversity Conservation.' Op Cit

¹⁰¹ Muigua. K., 'Actualising the National Policy on Gender and Development in Kenya.' Op Cit

(Re) Establishing Harmony between Nature and Humanity

Abstract

This paper examines the need to (re) establish harmony between nature and humanity. It argues that nature and humanity are interdependent and need each other for survival. The paper highlights some of the factors that are affecting the relationship between nature and humanity. It also suggests solutions towards (re) establishing harmony between nature and humanity towards sustainability.

1.0 Introduction

Humanity is a term that refers to human beings collectively, but at the same time it carries notions of philanthropy and altruism¹. Nature on the other hand has been defined as the phenomena of the physical world collectively, including plants, animals, the landscape, and other features and products of the earth, as opposed to humans or human creations². Nature therefore refers to the natural environment³. The term 'environment' has been defined as all the physical, chemical and biological factors external to a person⁴. According to the *Environmental Management and Co-ordination Act*⁵ of Kenya, environment includes physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment⁶.

It has been pointed out that nature and humanity make up the totality of life on earth⁷. As a result it has been asserted that life on earth is an entanglement

¹ Coupland. R., 'Humanity: What is it and How Does it Influence International Law?' Available at <https://www.icrc.org/en/doc/assets/files/other/irrc-844-coupland.pdf> (Accessed on 08/02/2024)

² Ducarme. F., & Couvet. D., 'What Does 'Nature' Mean.' *Humanities & Social Sciences Communications.*, No. 14 (2020)

³ Ibid

⁴ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

⁵ Environmental Management and Co-ordination Act., No. 8 of 1999, Government Printer, Nairobi

⁶ Ibid, S 2

⁷ The Conservation., 'Humanity and Nature are not Separate – We Must see Them as One to Fix the Climate Crisis.' Available at <https://theconversation.com/humanity->

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with nature and humanity dependent on each other⁸. For example, pollinators such as bees and wasps help produce the food human beings eat, while photosynthetic organisms such as trees provide the oxygen that human beings need in order to live, in turn taking up the carbon dioxide expelled by humanity⁹. As a result, it has correctly been asserted that there is need to emphasize fairness and interdependence between nature and humanity¹⁰. In addition, it has been argued that humanity cannot develop unless our lives become reconnected and in balance, cooperation and harmony with nature¹¹.

This paper examines the need to (re) establish harmony between nature and humanity. It argues that nature and humanity are interdependent and need each other for survival. The paper highlights some of the factors that are affecting the relationship between nature and humanity. It also suggests solutions towards (re) establishing harmony between nature and humanity.

2.0 The Need for Harmony between Nature and Humanity

It has been pointed out that humanity is linked with the natural environment as demonstrated by humans' preference for scenes dominated by natural elements, emphasis on sustainability of natural resources, and the health benefits associated with engaging with nature¹². Indeed nature and especially natural resources play a fundamental role in the life of human beings which may be classified as economic, social and cultural¹³. Economically, natural resources are not only a source of food and raw materials but are also a source

[and-nature-are-not-separate-we-must-see-them-as-one-to-fix-the-climate-crisis-122110](#) (Accessed on 08/02/2024)

⁸ Ibid

⁹ Ibid

¹⁰ International Science Council., 'Sustainable Human Development Means Living in Harmony with Nature.' Available at <https://council.science/current/blog/sustainable-human-development-means-living-in-harmony-with-nature/> (Accessed on 08/02/2024)

¹¹ Ibid

¹² Seymour. V., 'The Human-Nature Relationship and Its Impact on Health: A Critical Review' Available at <https://www.frontiersin.org/journals/public-health/articles/10.3389/fpubh.2016.00260/full> (Accessed on 08/02/2024)

¹³ Muigua. K., Wamukoya. D & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

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of income for individuals and the state¹⁴. Socially, natural resources like water bodies play a recreational role amongst others and also contribute to the improvement of the quality of life of individuals¹⁵. Culturally, many 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 place¹⁶. Humanity therefore largely depends on nature for its well-being. Nature is a direct primary source of food, clean water, and energy for human beings¹⁷. It has also been observed that nature provides people everywhere with multiple benefits that help maintain their quality of life which include food provision, water purification, construction material, and recreation opportunity¹⁸.

Nature is also dependent on humanity. It has been pointed out that people create policies, enforce regulations, and implement incentives and governance arrangements that can serve to protect natural ecosystems and minimize negative impacts of development¹⁹. In addition, humanity must also intervene to keep plastics out of waterways and oceans, to fence off abandoned or degraded lands for natural regeneration, and to prevent catastrophic forest fires by thinning overstocked forestlands²⁰. Nature also depends on humanity to mitigate the effects of invasive species and remove contaminants from soils²¹. Further, degraded ecosystems need human assistance, deliberate planning, and frequent monitoring to be restored to provide better conditions for both people and nature²².

¹⁴ Costanza. R., 'The Ecological, Economic, and Social Importance of the Oceans.' *Ecological Economics*, Volume 31, No. 2 (1999)

¹⁵ Muigua. K., Wamukoya. D & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit

¹⁶ Ibid

¹⁷ Fedele. G., 'Nature-Dependent People: Mapping Human Direct use of Nature for Basic Needs Across the Tropics.' *Global Environmental Change.*, Volume 71, 2021

¹⁸ Ibid

¹⁹ Chadzon. R., 'Nature Needs People and Here's Why' Available at <https://today.uconn.edu/2018/09/nature-needs-people-heres/#> (Accessed on 08/02/2024)

²⁰ Ibid

²¹ Ibid

²² Ibid

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As a result of the foregoing, it has been pointed out that humans and nature are inextricably coupled and therefore there is need to create harmony between them²³. Harmony between nature and humanity demands that the human society needs to preserve and protect nature while developing²⁴. Under this idea, humans recognize that they are an inseparable part of nature and that they cannot damage the planet without severely damaging themselves²⁵.

The need to (re)establish harmony between nature and humanity is enshrined under the United Nation's *2030 Agenda for Sustainable Development*²⁶. The Agenda represents a shared blue print for peace and prosperity for *people and the planet* in the quest towards the ideal of Sustainable Development²⁷ (Emphasis added). It envisages a world where humanity lives in harmony with nature and in which wildlife and other living species are protected²⁸. At the core of the agenda are 17 Sustainable Development Goals (SDGs) which seek to strike a balance between human development and environmental protection²⁹. Realizing the 17 SDGs is therefore vital in the quest to (re) establish harmony between humanity and nature.

²³ International Union for Conservation of Nature., 'In the Spirit of Nature, Everything is Connected' Available at <https://www.iucn.org/news/europe/201801/spirit-nature-everything-connected> (Accessed on 08/02/2024)

²⁴ Song, W., & Cao, H., 'Historical Evolution and Reflections on "Harmony between Man and Nature"' Available at <https://www.scirp.org/journal/paperinformation?paperid=120602#:~:text=Harmony%20between%20man%20and%20nature%20means%20that%20man%20needs%20to%20preserve%20nature%20while%20developing> (Accessed on 08/02/2024)

²⁵ International Council of Environmental Law., 'Recognition of Harmony with Nature' Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/35463/ICEL_NOTE_HarmonyWithNature_March152021.pdf?sequence=1&isAllowed=y (Accessed on 08/02/2024)

²⁶ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 09/02/2024)

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

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In addition, the *Rio Declaration on Environment and Development*³⁰ reaffirms the importance of (re)establishing harmony between humanity and nature. Declaration seeks to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving Sustainable Development³¹. It stipulates that human beings are at the centre of concerns for Sustainable Development and are entitled to a *healthy and productive life in harmony with nature*³²It further states that in order to achieve Sustainable Development, *environmental protection* shall constitute an *integral part of the development process* and cannot be considered in isolation from it³³(Emphasis added). The Rio Declaration upholds key environmental principles that are vital in (re)establishing harmony between nature and humanity. These principles include Sustainable Development, inter and intra generational equity, environmental protection, public participation, the precautionary principle and the principle of state cooperation³⁴. Fostering the principles enshrined under the Rio Declaration is of utmost importance in (re) establishing harmony between humanity and nature.

(Re) establishing harmony between nature and humanity was also a key theme during the United Nations Conference on the Human Environment held in 1972 in Stockholm, Sweden which led to the adoption of the *Stockholm Declaration*³⁵. The Declaration has been hailed as the first global document outlining the general principles for the management of natural resources and the environment for the benefit of present and future generations³⁶. The Declaration states that human beings are both creature and moulder of their environment, which gives them physical sustenance and affords them the opportunity for intellectual, moral, social and spiritual growth³⁷. It also recognizes that the protection and improvement of the human environment is

³⁰ United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

³¹ Ibid, Principle 2

³² Ibid, Principle 1

³³ Ibid, Principle 4

³⁴ Ibid

³⁵ United Nations., United Nations Declaration on the Human Environment., General Assembly Resolutions 2994/XXVII, 2995/UVII and 2996/XXII

³⁶ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

³⁷ Ibid, Preamble

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a major issue which affects the well-being of peoples and economic development throughout the world and that it is an urgent desire of the people of the whole world and the duty of all Governments.³⁸ In addition, the Declaration stipulates that human beings have 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 therefore they bear a *solemn responsibility to protect and improve* the environment for present and future generations³⁹(Empasis added). It also requires natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, to be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate⁴⁰. The Stockholm Declaration therefore recognizes the role of humanity as custodians of nature and calls upon it to embrace use and management of nature in a manner that fosters conservation and protection in order to benefit both the present and future generations⁴¹. The Declaration provides that in order to achieve a more rational management of resources and thus to improve the environment, states should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population⁴².

The *World Charter for Nature*⁴³ is another important document which acknowledges the need to (re)establish harmony between humanity and nature. The Charter acknowledges that humanity is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients⁴⁴. It also acknowledges that human civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievement, and *living in harmony with nature* gives humanity the best opportunities for the development of its

³⁸ Ibid

³⁹ Ibid, Principle 1

⁴⁰ Ibid, Principle 2

⁴¹ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁴² Ibid

⁴³ United Nations General Assemble., World Charter for Nature., A/RES/37/7

⁴⁴ Ibid, Preamble

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creativity, and for rest and recreation⁴⁵(Emphasis added). The Charter also recognizes that humanity can alter nature and exhaust natural resources through its actions or its consequences and, therefore, it must fully recognize the urgency of maintaining the stability and quality of nature and of conserving natural resources⁴⁶. The Charter sets out certain important principles aimed towards (re)establishing harmony between humanity and nature. It provides that nature shall be respected and its essential processes shall not be impaired⁴⁷; in the planning and implementation of social and economic development activities, due account shall be taken of the fact that the conservation of nature is an integral part of those activities⁴⁸; living resources shall not be utilized in excess of their natural capacity for regeneration⁴⁹; and the productivity of soils shall be maintained or enhanced through measures which safeguard their long-term fertility and the process of organic decomposition, and prevent erosion and all other forms of degradation⁵⁰. The foregoing principles among others set out under the Charter are aimed at fostering harmony between nature and humanity through sustainable use and management of natural resources. The Charter aims to promote conservation and protection on nature and natural resources⁵¹. Realizing its ideal is key towards (re)establishing harmony between nature and humanity.

At the continental level, the *African Convention on the Conservation of Nature and Natural Resources*⁵², recognizes that the conservation of the global environment is a common concern of human kind as a whole, and the conservation of the African environment a primary concern of all Africans⁵³. It provides that States are responsible for protecting and conserving their environment and natural resources and for using them in a sustainable manner with the aim to satisfy

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid, Principle 1

⁴⁸ Ibid, Principle 7

⁴⁹ Ibid, Principle 10 (a)

⁵⁰ Ibid, Principle 10 (b)

⁵¹ Ibid

⁵² African Union., *African Convention on the Conservation of Nature and Natural Resources.*, Available at https://au.int/sites/default/files/treaties/41550-treaty-Charter_ConservationNature_NaturalResources.pdf (Accessed on 09/02/2024)

⁵³ Ibid, Preamble

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human needs according to the carrying capacity of the environment⁵⁴. The Convention 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 programmes⁵⁵. In order to ensure harmony between nature and humanity in Africa, the Convention acknowledges the right of all people to a satisfactory environment favourable to their development; the duty of States, individually and collectively to ensure the enjoyment of the right to development; and the duty of States to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner⁵⁶. Actualizing the provisions of the African Convention on the Conservation of Nature and Natural Resources can therefore foster harmony between nature and humanity in Africa.

From the foregoing, it is evident that (re)establishing harmony between nature and humanity is an idea that is embraced in multiple instruments at both global and continental levels. It is imperative to realize this ideal. (Re) establishing harmony between nature and humanity is important since it ensures that nature is conserved and protected in order to sustain both the present and future generations⁵⁷. It ensures the continued availability of natural resources that are necessary for the survival of humanity including food, water and energy⁵⁸. In addition, it ensures that nature benefits from humanity through its role in environmental protection, restoring degraded ecosystems, regeneration, and protecting nature from invasive species⁵⁹. Without this harmony nature is susceptible to threat from human action through pollution, environmental degradation, climate change, and loss of biodiversity⁶⁰. In addition, without this harmony, humanity may face the threat of extinction due to loss of vital resources provided by nature that are

⁵⁴ Ibid

⁵⁵ Ibid, Article II

⁵⁶ Ibid, Article III

⁵⁷ Song. W., & Cao. H., 'Historical Evolution and Reflections on "Harmony between Man and Nature"' Op Cit

⁵⁸ Ibid

⁵⁹ Chadzon. R., 'Nature Needs People and Here's Why' Op Cit

⁶⁰ Ibid

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necessary for its survival including oxygen, food, water, and energy⁶¹. As a result, there is need to recognize that nature and humanity are inseparable and human beings cannot damage the planet without severely damaging themselves⁶².

However, harmony between nature and humanity is not always achieved. It has been pointed out that harmony between nature and humanity is currently affected by the triple planetary crisis of climate change, pollution and biodiversity loss⁶³. The consequences of climate change such as increased intensity and severity of droughts, water scarcity, wildfires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world affecting both nature and humanity⁶⁴. Pollution is also affecting both nature through declining quality of natural resources and ecosystems services and humanity as evidenced by deaths arising from air and water pollution⁶⁵. In addition, it has been observed that biodiversity loss impacts food supplies and access to clean water without it we have no future on the planet⁶⁶. It is imperative to (re)establish harmony between nature and humanity in order to solve the triple planetary crisis among other problems facing nature and humanity. According to the United Nations Environment Programme (UNEP), it is necessary to tackle the Earth's environmental emergencies and human well-being as one indivisible challenge⁶⁷.

⁶¹ International Council of Environmental Law., 'Recognition of Harmony with Nature' Op Cit

⁶² Ibid

⁶³ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Available at <https://unfccc.int/news/what-is-the-triple-planetary-crisis> (Accessed on 09/02/2024)

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ United Nations Environment Programme., 'Sustainability is About Being on the Right Side of History' Available at <https://www.unep.org/news-and-stories/speech/sustainability-about-being-right-side-history> (Accessed on 09/02/2024)

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3.0 Way Forward

In order to (re) establish harmony between humanity and nature, it is necessary to foster sound governance of nature including the environment and natural resources⁶⁸. It has been posited that harmony between nature and humanity demands that human society needs to preserve nature while developing⁶⁹. It has been argued that sound environmental governance can safeguard the environment and human rights and contribute towards the achievement of all 17 United Nations Sustainable Development Goals⁷⁰. According to UNEP, there is need for appropriate legal frameworks on the global, regional, national and local level to pursue good environmental governance that will lead to a healthy and prosperous planet for all living creatures, now and in the future⁷¹. Embracing sound environmental governance can foster harmony between nature and humanity by conserving and preserving nature while simultaneously promoting human development⁷². It is therefore necessary for all countries to enhance sound environmental governance in order to (re)establish harmony between nature and humanity. This can be achieved through measures such as strengthening environmental rule of law at all levels through strong legal and institutional frameworks, embracing civic engagement and public participation in the governance of nature, and fostering the role of indigenous people and indigenous knowledge in environmental conservation and management⁷³.

⁶⁸ Song, W., & Cao, H., 'Historical Evolution and Reflections on "Harmony between Man and Nature' Op Cit

⁶⁹ Ibid

⁷⁰ United Nations Environment Programme., 'About Environmental Rights and Governance.' Available at <https://www.unep.org/explore-topics/environmental-governance/about-environmental-rights-and-governance#:~:text=In%20our%20globalized%20world%2C%20environmental,humans%20interact%20with%20the%20environment> (Accessed on 09/02/2024)

⁷¹ Ibid

⁷² Song, W., & Cao, H., 'Historical Evolution and Reflections on "Harmony between Man and Nature' Op Cit

⁷³ Muigua, K., 'Embracing Sound Environmental Governance in Africa' Available at <https://kmco.co.ke/wp-content/uploads/2024/01/Embracing-Sound-Environmental-Governance-in-Africa-1.pdf> (Accessed on 09/02/2024)

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It is also important to embrace sustainable consumption and production patterns⁷⁴. The 2030 Agenda for Sustainable Development acknowledges that one of the key threats facing the planet is unsustainable consumption and production patterns⁷⁵. It sets out the need to protect the planet from degradation including through sustainable consumption and production⁷⁶. It has been posited that the world is facing the threat of dwindling environmental and natural resources due to unsustainable consumption and production patterns among other factors⁷⁷. The current unsustainable consumption and production patterns affect nature through deforestation, water scarcity, food waste, and high carbon emissions, and cause the degradation of key ecosystems⁷⁸. Therefore, in order to (re)establish harmony between nature and humanity, there is need to promote sustainable consumption and production patterns. This will ensure that humanity is able to meet its needs while nature is not affected through depletion of natural resources and degradation of ecosystems⁷⁹. Sustainable Development Goal 12 seeks to ensure sustainable consumption and production patterns⁸⁰. It is necessary to realize the targets under SDG 12 in order to embrace sustainable consumption and production patterns. These include achieving the sustainable management and efficient use of natural resources⁸¹; and substantially reducing waste generation through prevention, reduction, recycling and reuse⁸².

⁷⁴ Muigua. K., 'Promoting Sustainable Consumption and Production Patterns in Kenya for Development' Available at <https://kmco.co.ke/wp-content/uploads/2020/11/Promoting-Sustainable-Consumption-and-Production-Patterns-in-Kenya-for-Development-Kariuki-Muigua-Ph.D.pdf> (Accessed on 09/02/2024)

⁷⁵ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

⁷⁶ Ibid

⁷⁷ Muigua. K., 'Promoting Sustainable Consumption and Production Patterns in Kenya for Development' Op Cit

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., SDG 12 Op Cit

⁸¹ Ibid

⁸² Ibid

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Further, in instances where nature has been affected by humanity through degradation and loss of biodiversity, there is need to promote its regeneration and restoration⁸³. Regeneration and restoration of nature aims to recover the ecological functionality and enhance human well-being in deforested and degraded landscapes and ecosystems⁸⁴. It has been observed that this process not only returns landscapes and ecosystems to a healthy state, but also increases the amount of carbon sequestered, improves biodiversity and the quality of soil and water in the ecosystem, and provides economic benefits for communities that depend on such landscapes and ecosystems⁸⁵. Regeneration and restoration are key processes in (re)establishing harmony between humanity and nature by ensuring that nature is restored to a desirable and ecologically functional state while humanity continues to benefit from nature⁸⁶. It is therefore necessary for humanity to embrace practices aimed towards regenerating and restoring nature. These include agroforestry, reforestation, afforestation, regenerative agricultural practices, and wetlands restoration⁸⁷.

In addition, it is of utmost importance to combat the triple planetary crisis of climate change, pollution and biodiversity loss⁸⁸. These problems affect both nature and humanity. The impacts of climate change such as droughts, water scarcity, wildfires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity affect both nature and humanity⁸⁹. Pollution also affects both nature and humanity since it degrades and affects the quality of natural resources while also contributing to deaths and health risks to

⁸³ Muigua. K., 'Restoring Landscapes and Ecosystems for Climate Mitigation' Available at <https://kmco.co.ke/wp-content/uploads/2024/02/Restoring-Landscapes-and-Ecosystems-for-Climate-Mitigation.pdf> (Accessed on 09/02/2024)

⁸⁴ Food and Agriculture Organization., 'The Key Role of Forest and Landscape Restoration in Climate Action.' Available at <https://www.fao.org/documents/card/en/c/cc2510en> (Accessed on 09/02/2024)

⁸⁵ World Economic Forum., 'What are Natural Climate Solutions?' Available at <https://www.weforum.org/agenda/2021/09/what-are-natural-climate-solutions-ncsalliance/#:~:text=NCS%20are%20actions%20that%20avoid,forest%20conservation%2C%20restoration%20and%20management> (Accessed on 09/02/2024)

⁸⁶ Muigua. K., 'Restoring Landscapes and Ecosystems for Climate Mitigation' Op Cit

⁸⁷ Ibid

⁸⁸ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Op Cit

⁸⁹ Ibid

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humanity⁹⁰. The problem of biodiversity loss affects nature through the disappearance of some of its key components while it also affects humanity since it impacts food supplies and access to clean water⁹¹. (Re) establishing harmony between nature and humanity calls for tackling these problems in order to ensure the sustainability of humanity and nature. Sustainable Development Goal 13 calls upon all countries to take urgent action to combat climate change and its impacts⁹². It is imperative for all countries to answer this call through measures such as building climate resilient and low carbon economies, enhancing climate change mitigation and adaptation efforts, improving climate education, and unlocking climate finance⁹³. The problem of pollution can be addressed through measures such as effective waste management, efficient monitoring practices, public empowerment and participation, effective regulation through measures such as banning the production and use of non-reusable plastic bags among other polluting materials⁹⁴, and effective enforcement of laws and policies curbing pollution⁹⁵. The problem of biodiversity loss can be mitigated through restoring degraded natural areas and retaining existing intact wilderness areas, implementing a well-connected and effective system of protected areas, recovering and conserving wild species, ensuring sustainable harvesting of wild species, food production and supply chains, reducing pollution from excess nutrients, and mainstreaming biodiversity conservation in development programmes⁹⁶. By addressing the triple planetary crisis, it is possible to (re)establish harmony between nature and humanity.

⁹⁰ Ibid

⁹¹ Ibid

⁹² United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., SDG 13 Op Cit

⁹³ Muigua. K., 'Taking Urgent Action to Combat Climate Change' Available at <https://kmco.co.ke/wp-content/uploads/2023/09/Taking-Urgent-Action-to-Combat-Climate-Change.pdf> (Accessed on 09/02/2024)

⁹⁴ Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Available at <https://kmco.co.ke/wp-content/uploads/2020/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf> (Accessed on 09/02/2024)

⁹⁵ Ibid

⁹⁶ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Op Cit

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Finally, it is necessary to embrace and foster the idea of Sustainable Development⁹⁷. Sustainable Development is viewed as development that meets the needs of the present without compromising the ability of future generations to meet their own needs⁹⁸. The concept of Sustainable Development seeks to foster sustainability by promoting environmental protection, economic development and social progress⁹⁹. Sustainable Development therefore aims to ensure that human welfare is taken care of while also seeking to make certain that environmental resources are utilized in a manner that promotes protection and conservation for the sake of future generations¹⁰⁰. The United Nations 2030 Agenda for Sustainable Development envisions attainment of the ideal of Sustainable Development through 17 Sustainable Development Goals (SDGs) which seek to strike a balance between social, economic and environmental facets of sustainability¹⁰¹. It is therefore necessary to embrace Sustainable Development in order to (re)establish harmony between nature and humanity.

It is necessary to embrace the foregoing among other approaches in order to (re)establish harmony between nature and humanity.

4.0 Conclusion

Nature and humanity are dependent on each other. Nature is a direct primary source of food, clean water, energy, and recreational benefits for human beings¹⁰². Nature also depends on humanity for its restoration, regeneration, and protection from invasive species¹⁰³. Humans and nature are inextricably

⁹⁷ Ibid

⁹⁸ World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

⁹⁹ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1

¹⁰⁰ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2015

¹⁰¹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

¹⁰² Fedele. G., 'Nature-Dependent People: Mapping Human Direct use of Nature for Basic Needs Across the Tropics.' Op Cit

¹⁰³ Chadzon. R., 'Nature Needs People and Here's Why' Op Cit

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coupled and therefore there is need to create harmony between them¹⁰⁴. Without harmony, nature is susceptible to threat from human action through pollution, environmental degradation, climate change, and loss of biodiversity while humanity may face the threat of extinction due to loss of vital resources provided by nature that are necessary for its survival including oxygen, food, water, and energy¹⁰⁵. Harmony between nature and humanity is currently affected by several challenges including the triple planetary crisis of climate change, pollution and biodiversity loss¹⁰⁶. It is imperative to address these among other problems in order to (re)establish harmony between humanity and nature. This can be achieved through fostering sound governance of nature including the environment and natural resources¹⁰⁷; embracing sustainable consumption and production patterns¹⁰⁸; promoting regeneration and restoration of nature in cases where it has been affected by humanity through degradation¹⁰⁹; combating the triple planetary crisis of climate change, pollution and biodiversity loss¹¹⁰; and embracing and fostering the idea of Sustainable Development¹¹¹. (Re) establishing harmony between nature and humanity is the way to go in order to ensure the survival of life on the planet.

¹⁰⁴ International Union for Conservation of Nature., 'In the Spirit of Nature, everything is Connected' Op Cit

¹⁰⁵ International Council of Environmental Law., 'Recognition of Harmony with Nature' Op Cit

¹⁰⁶ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Op Cit

¹⁰⁷ Song, W., & Cao. H., 'Historical Evolution and Reflections on "Harmony between Man and Nature' Op Cit

¹⁰⁸ Muigua. K., 'Promoting Sustainable Consumption and Production Patterns in Kenya for Development' Op Cit

¹⁰⁹ Muigua. K., 'Restoring Landscapes and Ecosystems for Climate Mitigation' Op Cit

¹¹⁰ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Op Cit

¹¹¹ Ibid

(Re) Invigorating Environmental Multilateralism for Sustainability

Abstract

Achieving sustainability has become a clarion call in light of mounting challenges facing the planet including the triple planetary crisis of climate change, biodiversity loss, and pollution. Environmental multilateralism has been advanced as a key tool of addressing these among other challenges facing the planet towards achieving sustainability. This paper critically explores the role of environmental multilateralism in the sustainability debate. It argues that environmental multilateralism can play a key function in unlocking sustainability. It defines environmental multilateralism and discusses the progress made towards fostering this concept. It also examines challenges facing environmental multilateralism. The paper further proposes measures towards (re) invigorating environmental multilateralism for sustainability.

1.0 Introduction

Achieving sustainability has become a matter of urgent global priority in light of environmental challenges facing the planet¹. It has been pointed out that the world is facing mounting problems including environmental challenges such as climate change, together with issues of poverty, increasing disparity between societies and the tensions brought by social inequalities creating the need for sustainability². Further, according to the United Nations Environment Programme (UNEP), the world is facing a triple planetary crisis of climate change, biodiversity loss, and pollution which challenges have heightened the importance of forging a new relationship between people and the planet towards achieving sustainability³.

Sustainability has been defined as creating and maintaining the conditions under which humans and nature can exist in productive harmony to support

¹ Giovannoni, E., & Fabietti, G., 'What Is Sustainability? A Review of the Concept and Its Applications.' In: Busco, C., Frigo, M., Riccaboni, A., Quattrone, P. (eds) Integrated Reporting. Springer, Cham. Available at https://doi.org/10.1007/978-3-319-02168-3_2 (Accessed on 20/02/2024)

² Ibid

³ United Nations Environment Programme., 'The Triple Planetary Crisis: Forging a New Relationship Between People and the Earth' Available at <https://www.unep.org/news-and-stories/speech/triple-planetary-crisis-forging-new-relationship-between-people-and-earth> (Accessed on 20/02/2024)

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present and future generations⁴. The need to strike a balance between the environmental, social and economic facets of development towards sustainability gave rise to the concept of Sustainable Development⁵. The idea of Sustainable Development refers to development that meets the needs of the present without compromising the ability of future generations to meet their own needs⁶. This concept seeks to foster sustainability by promoting environmental protection, economic development and social progress⁷. It has been adopted as the global blueprint for sustainability as envisioned under the *United Nation's 2030 Agenda for Sustainable Development*⁸ which represents a shared blue print for peace and prosperity for people and the planet in the quest towards the ideal of Sustainable Development. The Agenda envisions attainment of the ideal of Sustainable Development through 17 Sustainable Development Goals (SDGs) which seek to strike a balance between social, economic and environmental facets of sustainability⁹.

Various strategies have been embraced towards achieving sustainability and the SDGs at local, national, regional, continental, and global levels¹⁰. One of the key tools that is being advocated towards sustainability is environmental multilateralism¹¹. It has been argued that the global challenges facing the

⁴ United States Environmental Protection Agency., 'What is Sustainability.' Available at <https://www.epa.gov/sustainability/learn-about-sustainability> (Accessed on 20/02/2024)

⁵ Giovannoni. E., & Fabietti. G., 'What Is Sustainability? A Review of the Concept and Its Applications.' Op Cit

⁶ World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

⁷ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1

⁸ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 20/02/2024)

⁹ Ibid

¹⁰ Blincoe. K., 'Achieving Sustainability: The Ultimate Human Challenge' Available at <https://link.springer.com/book/10.1007/978-3-031-10023-9> (Accessed on 20/02/2024)

¹¹ Ivanov. I., 'What Are the Core Benefits of Multilateralism at the Present Stage?' Available at <https://russiancouncil.ru/en/analytics-and-comments/analytics/what-are-the-core-benefits-of-multilateralism-at-the-present->

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planet including climate change can only be addressed through mutual cooperation in the form of environmental multilateralism¹².

This paper critically explores the role of environmental multilateralism in the sustainability debate. It argues that environmental multilateralism can play a key function in unlocking sustainability. It defines environmental multilateralism and discusses the progress made towards fostering this concept. It also examines challenges facing environmental multilateralism. The paper further proposes measures towards (re) invigorating environmental multilateralism for sustainability.

2.0 Defining Environmental Multilateralism

Multilateralism refers to a situation in which different countries collaborate with the main aim of providing solutions for problems facing them¹³. It has also been defined as collaboration between several countries in pursuit of a common goal, where other parties such as civil society or the private sector may also be involved¹⁴. Multilateralism is based on collaboration between several countries to achieve common objectives, involving continuous negotiation and dialog between member states of an international or regional organization with the aim of finding consensual solutions to global challenges¹⁵. It has been asserted that multilateralism plays an essential role in bringing countries together and establishing a common strategy with one goal: safeguarding the planet¹⁶. It has also been pointed out that global challenges facing the planet such as climate change, migration, poverty, inequalities among nations, and opportunities and risks of new technologies can only be addressed through mutual cooperation in form of

[stage/#:~:text=Multilateralism%20is%20a%20mechanism%20for,organizations%20easily%20and%20readily%20available](#) (Accessed on 20/02/2024)

¹² Ibid

¹³ Karlsson-Vinkhuyzen. S., & Dahl. A., 'Building Effective Multilateralism for the Environment' Available at https://iefworld.org/fl/Policybrief_KarlssonVinkhuyzen_Dahl.pdf (Accessed on 20/02/2024)

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

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multilateralism¹⁷. In addition, it has been observed that in an increasingly interconnected world, multilateralism has become a key factor in dealing with transnational problems and guaranteeing global stability and Sustainable Development¹⁸.

Multilateralism is very pertinent in environmental protection¹⁹. It has been asserted that environmental protection has become an urgent global concern and needs a joint effort from all nations to achieve significant changes²⁰. According to UNEP, addressing the triple planetary crisis of climate change, nature and biodiversity loss, and waste and pollution, as well as other global environmental challenges, requires efficient international cooperation through environmental multilateralism²¹. It points out that despite efforts by the international community, environmental degradation is continuing hence the need to unite forces at all levels to address the impacts and drivers of environmental degradation more effectively through strengthening environmental multilateralism²².

It has been pointed out that reinvigorated multilateralism is a vital tool for ensuring that national efforts join up to fix global problems²³. Among these

¹⁷ Ivanov. I., 'What Are the Core Benefits of Multilateralism at the Present Stage?' Op Cit

¹⁸ Morgera. E., 'The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test' Available at https://www.researchgate.net/profile/Elisa-Morgera/publication/267926423_The_EU_and_Environmental_Multilateralism_The_Case_of_Access_and_Benefit-Sharing_and_the_Need_for_a_Good-Faith_Test/links/545d0f690cf27487b44d492d/The-EU-and-Environmental-Multilateralism-The-Case-of-Access-and-Benefit-Sharing-and-the-Need-for-a-Good-Faith-Test.pdf (Accessed on 20/02/2024)

¹⁹ Karlsson-Vinkhuyzen. S., & Dahl. A., 'Building Effective Multilateralism for the Environment' Op Cit

²⁰ Ibid

²¹ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Available at <https://www.unep.org/news-and-stories/story/how-multilateral-environmental-agreements-can-help-mend-planet> (Accessed on 20/02/2024)

²² Ibid

²³ United Nations Environment Programme., 'Multilateral Action for a Green Post-COVID-19 Recovery' Available at <https://www.unep.org/news-and->

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global challenges whose management would be potentially easier through multilateral cooperation, many are environmental²⁴. It has been argued that multilateralism not only represents the most efficient, most effective, and most egalitarian approach to addressing global environmental issues, but it is quite simply the only approach that brings with it the authority, legitimacy, and resources required to tackle so vast and complex environmental problems²⁵. Environmental multilateralism is vital in helping develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources²⁶; and of promoting an international system based on stronger multilateral environmental cooperation and good global environmental governance²⁷. It is therefore necessary to strengthen environmental multilateralism for sustainability.

3.0 Progress and Challenges in Environmental Multilateralism

It has been pointed out that the main instruments available under international law for countries to collaborate on a broad range of global environmental challenges are international conventions and treaties on environment and natural resources also known as Multilateral Environmental Agreements (MEAs)²⁸. These have been defined as agreements between states which may take the form of “soft-law”, setting out non legally-binding principles which parties are obligated to consider when taking actions to address a particular environmental issue, or “hard-law” which specify legally-binding actions to be undertaken toward an environmental objective²⁹. MEAs have also been defined as international agreements that are intended to promote international

[stories/speech/multilateral-action-green-post-covid-19-recovery](#) (Accessed on 20/02/2024)

²⁴ Gomes. F. T., ‘International Relations and the Environment: Practical Examples of Environmental Multilateralism’ Available at <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=aebc354992380e45e32cce62d433adcfba96d038> (Accessed on 20/02/2024)

²⁵ Ibid

²⁶ Morgera. E., ‘The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test’ Op Cit

²⁷ Ibid

²⁸ East African Community., ‘Multilateral Environmental Agreements’ Available at <https://www.eac.int/environment/multilateral-environmental-agreements> (Accessed on 21/02/2024)

²⁹ Ibid

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cooperation to address global environmental challenges that the world is facing today such as climate change, biodiversity loss, pollution and waste³⁰. MEAs are based on the understanding that, just as the causes and the consequences of environmental issues are global in nature, so too must be the solutions³¹. They intend to foster global cooperation in addressing environmental challenges.

It has been pointed out that MEAs are negotiated and agreed upon by member states of the United Nations at the international level, and each country is responsible for implementing such agreements at the national level³². In addition, it has been asserted that MEAs have similar features to other international treaties³³. However, they are also different in that they are intergovernmental documents whose main objective is to prevent or manage human impact on the environment and natural resources³⁴. As a result, MEAs are legally binding to countries that participate in them through ratification or accession, as well as to those who accept them through signing since that in itself assumes an "official agreement" between the States via the MEAs³⁵. It has been contended that since MEAs are not merely declarations of intent but tools of international law, they are viewed as ideal and effective means of implementing policies whose objective is environmental protection and Sustainable Development³⁶.

MEAs have been identified as vital in addressing the most pressing environmental issues of global or regional concern and are critical instruments of international environmental governance and international environmental

³⁰ One Planet Network., 'Multilateral Environmental Agreements' Available at [https://www.oneplanetnetwork.org/SDG-12/multilateral-environmental-agreements#:~:text=Multilateral%20Environmental%20Agreements%20\(MEAs\)%20a re,loss%20and%20pollution%20and%20waste](https://www.oneplanetnetwork.org/SDG-12/multilateral-environmental-agreements#:~:text=Multilateral%20Environmental%20Agreements%20(MEAs)%20a re,loss%20and%20pollution%20and%20waste) (Accessed on 21/02/2024)

³¹ Ibid

³² Ibid

³³ Gomes. F. T., 'International Relations and the Environment: Practical Examples of Environmental Multilateralism' Op Cit

³⁴ Ibid

³⁵ Ibid

³⁶ Ibid

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law³⁷. They cover a wide scope of issues, ranging from the protection of the atmosphere to the sustainable management of chemicals and waste, to halting nature and biodiversity loss³⁸. Amongst the global environmental issues that MEAs are designed to respond to include: loss of biological diversity, adverse impacts of climate change, depletion of the ozone layer, hazardous waste, organic pollutants, marine pollution, trade in endangered species, destruction of wetlands among others³⁹.

Among the key MEAS is the *United Nations Framework Convention on Climate Change*⁴⁰ (UNFCCC) which is an MEA geared towards combating climate change by achieving stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system⁴¹. It entails key principles and commitments by states towards confronting climate change⁴². It has been observed that one of the achievements of the UNFCCC has been to establish a reporting framework which provides information on greenhouse gases emissions and removals using common categorisation and definitions⁴³.

Another key MEA is the *Montreal Protocol on Substances that Deplete the Ozone Layer*⁴⁴. The Protocol sets out a global determination by states to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into

³⁷ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

³⁸ Ibid

³⁹ East African Community., 'Multilateral Environmental Agreements' Op Cit

⁴⁰ United Nations Framework Convention on Climate Change., United Nations, 1992., Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 21/02/2024)

⁴¹ Ibid

⁴² Ibid

⁴³ National Atmospheric Emissions Inventory., 'United Nations Framework Convention on Climate Change (UNFCCC)' Available at <https://naei.beis.gov.uk/about/why-we-estimate?view=unfccc#:~:text=One%20of%20the%20achievements%20of,are%20part%20to%20the%20Convention.> (Accessed on 21/02/2024)

⁴⁴ United Nations., 'Montreal Protocol on Substances that Deplete the Ozone Layer' United Nations Treaty Series, Vol. 1522, 1-26369

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account technical and economic considerations⁴⁵. The Montreal Protocol has been identified as a landmark MEA that regulates the production and consumption of nearly 100 human-made chemicals referred to as ozone depleting substances⁴⁶. It has been hailed as one of the rare treaties to achieve universal ratification⁴⁷. With its universal ratification, the protocol has been extremely successful in its original aim of cutting the production and use of chlorofluorocarbons and other ozone-depleting substances⁴⁸. It has been observed that the protocol has succeeded in eliminating nearly 99 percent of ozone-depleting substances⁴⁹.

The *Convention on Biological Diversity*⁵⁰ is another important MEA. The Convention seeks to foster the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding⁵¹. It identifies key ways of conserving biodiversity including in-situ and ex-situ conservation⁵². The Convention has had some notable successes including increase in protected areas coverage⁵³.

⁴⁵ Ibid

⁴⁶ United Nations Environment Programme., 'About Montreal Protocol' Available at <https://www.unep.org/ozonaction/who-we-are/about-montreal-protocol> (Accessed on 21/02/2024)

⁴⁷ Ibid

⁴⁸ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

⁴⁹ Ibid

⁵⁰ United Nations., 'Convention on Biological Diversity' [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992)

⁵¹ Ibid, article 1

⁵² Ibid, articles 8 & 9

⁵³ Convention on Biological Diversity., '2010 Biodiversity Target' Available at <https://www.cbd.int/2010-target/implementation/achievements.shtml#:~:text=Progress%20in%20achieving%20the%202010%20Biodiversity%20Target&text=Protected%20area%20coverage%20has%20doubled,has%20improved%20since%20the%201980s>. (Accessed on 21/02/2024)

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The *Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)*⁵⁴ is another important MEA that has played a vital role in conserving wetlands. The Convention acknowledges the fundamental ecological functions of wetlands as regulators of water regimes and as habitats supporting a characteristic flora and fauna, especially waterfowl⁵⁵. It requires contracting parties to formulate and implement plans towards promoting the conservation and wise use of the wetlands in their territory⁵⁶. It has been pointed out that the Ramsar Convention has fostered international cooperation in wetland conservation through actions such as establishing wetland restoration projects⁵⁷.

The *Convention on International Trade in Endangered Species of Wild Fauna and Flora*⁵⁸ (CITES) is another pertinent MEA which seeks to foster international co-operation in the protection of certain species of wild fauna and flora against over-exploitation through international trade. It has been pointed out that as a result of effective implementation of CITES by those who harvest, produce, trade, transport, buy and regulate the wildlife species covered by the Convention, new emergency listings of species have become increasingly rare⁵⁹. Moreover, no CITES-listed species has ever become extinct as a result of trade⁶⁰. CITES has made significant progress in preventing more species

⁵⁴ Convention on Wetlands of International Importance especially as Waterfowl Habitat., Available at https://www.ramsar.org/sites/default/files/documents/library/current_convention_text_e.pdf (Accessed on 21/02/2024)

⁵⁵ Ibid

⁵⁶ Ibid, article 3 (1)

⁵⁷ Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands, 7th ed. (previously The Ramsar Convention Manual)' Available at https://www.ramsar.org/sites/default/files/documents/library/handbook1_5ed_introductiontoconvention_final_e.pdf (Accessed on 21/02/2024)

⁵⁸ Convention on International Trade in Endangered Species of Wild Fauna and Flora., Available at <https://cites.org/sites/default/files/eng/disc/CITES-Convention-EN.pdf> (Accessed on 21/02/2024)

⁵⁹ United Nations., 'Wildlife Treaty Comes of Age -- CITES Celebrates 30 Years Of Achievement' Available at <https://press.un.org/en/2005/envdev865.doc.htm#:~:text=Thanks%20to%20the%20effective%20implementation,as%20a%20result%20of%20trade.> (Accessed on 21/02/2024)

⁶⁰ Ibid

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from becoming threatened by trade and enabled the recovery of species that were endangered⁶¹. It currently regulates international trade in over 40,000 species of plants and animals⁶². It has been argued that CITES can help to reverse the precarious situation of high-value species of wild fauna and flora and ensure a sustainable supply⁶³.

Most recently, at COP 21, parties to the UNFCCC adopted the *Paris Agreement*⁶⁴ a legally binding international treaty on climate change. Its overarching goal is to strengthen the global response to the threat of climate change, in the context of Sustainable Development and efforts to eradicate poverty through holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels; increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development⁶⁵. It has been pointed out that the Paris Agreement has strengthened the global response towards climate change by establishing Nationally Determined Contributions (NDCs) which embody efforts by each country to reduce national emissions and adapt to the impacts of climate change⁶⁶. The Paris Agreement requires each Party to prepare, communicate and maintain successive NDCs that it intends to achieve⁶⁷. It also requires

⁶¹ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

⁶² Ibid

⁶³ United Nations., 'Wildlife Treaty Comes of Age -- CITES Celebrates 30 Years Of Achievement' Op Cit

⁶⁴ United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 21/02/2024)

⁶⁵ Ibid, article 2 (1)

⁶⁶ United Nations Climate Change., 'Nationally Determined Contributions (NDCs)' Available at <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributionsndcs> (Accessed on 21/02/2024)

⁶⁷ Paris Agreement., article 4(2)

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parties to pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions⁶⁸.

From the foregoing it is evident that MEAs have played a fundamental role in addressing global environmental challenges. It has been pointed out that MEAs are central to achieving global environmental commitments towards sustainability⁶⁹. According to UNEP, MEAs have emerged as one of the best ways of institutionalizing intergovernmental cooperation and triggering national action in the environmental sector⁷⁰.

In addition to MEAs, environmental multilateralism has been enhanced through institutions, and processes that address environmental concerns at the international level⁷¹. These include the United Nations Environment Assembly (UNEA), composed of all the United Nations (UN) Member States and tasked with providing overarching policy direction for the global environmental agenda⁷². UNEA is the world's highest-level decision-making body for matters related to the environment, with a universal membership of all 193 Member States⁷³. It sets the global environmental agenda, provides overarching policy guidance, and defines policy responses to address emerging environmental challenges⁷⁴. It also undertakes policy review, dialogue and the exchange of experiences, sets the strategic guidance on the future direction of the UN Environment Programme (UNEP), and fosters partnerships for achieving environmental goals and resource mobilization⁷⁵.

⁶⁸ Ibid

⁶⁹ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

⁷⁰ Ibid

⁷¹ Day. A., & Nickel. C., 'Elevating the Environment in the Multilateral System' Available at

https://collections.unu.edu/eserv/UNU:9306/elevating_the_environment.pdf

(Accessed on 21/02/2024)

⁷² Ibid

⁷³ The United Nations Environment Assembly., Available at <https://www.unep.org/environmentassembly/> (Accessed on 21/02/2024)

⁷⁴ Ibid

⁷⁵ Ibid

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In addition, UNEP is a body within the United Nations Systems responsible for coordinating international environmental activities and supporting the implementation of treaty commitments⁷⁶. UNEP is tasked with strengthening environmental standards and practices while helping implement environmental obligations at the country, regional and global levels⁷⁷. UNEP's work is focused on helping countries transition to low-carbon and resource-efficient economies, strengthening environmental governance and law, safeguarding ecosystems, and providing evidence-based data to inform policy decisions⁷⁸. UNEP plays a key role in environmental multilateralism by supporting countries' efforts in the implementation of MEAs⁷⁹.

In addition, the Intergovernmental Panel on Climate Change (IPCC), is a body of the United Nations established to assess the science related to climate change⁸⁰. It prepares comprehensive Assessment Reports about the state of scientific, technical and socio-economic knowledge on climate change, its impacts and future risks, and options for reducing the rate at which climate change is taking place⁸¹. The IPCC has had significant accomplishments including its First and Second Assessment Reports, which led to the development of the UNFCCC and the Kyoto Protocol which are key MEAs on climate change⁸². In addition, its Fifth Assessment Report, finalized in October 2014, informed the negotiations and policy formulation towards the Paris Agreement in 2015⁸³.

Further, there has been growth of regional environmental agreements to address specific environmental challenges⁸⁴. For example, the East African

⁷⁶ United Nations Environment Programme., 'About the United Nations Environment Programme' Available at <https://www.unep.org/who-we-are/about-us> (Accessed on 21/02/2024)

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

⁸⁰ The Intergovernmental Panel on Climate Change., Available at <https://www.ipcc.ch/> (Accessed on 21/02/2024)

⁸¹ Ibid

⁸² Ibid

⁸³ Ibid

⁸⁴ Day. A., & Nickel. C., 'Elevating the Environment in the Multilateral System' Op Cit

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Community (EAC) has adopted *EAC Climate Change Policy*⁸⁵ which is aimed at contributing to Sustainable Development in the EAC region through harmonized and coordinated regional strategies, programmes and actions to respond to climate change⁸⁶. The Policy identifies several ways of confronting climate change in the region which include establishing a regional framework to guide the harmonization, coordination and implementation of climate change initiatives amongst partner states⁸⁷; identifying priority adaptation and mitigation action areas and roles of partner states and other stakeholders to address climate change in the region⁸⁸; promoting public awareness and socio-economic importance of climate change including; vulnerability, impacts, risks, and response measures in the region and promoting capacity building efforts through inter alia education, training, research, technology development and transfer, information and knowledge management⁸⁹. The policy is therefore a key regional instrument geared towards responding to climate change within the EAC region.

From the foregoing, it is evident that environmental multilateralism has been vital in addressing the most pressing environmental issues of global or regional concern including the triple planetary crisis of climate change, nature and biodiversity loss, and pollution and waste⁹⁰. However, it has been pointed out that environmental multilateralism faces several concerns including implementation of and compliance with the MEAs⁹¹. In addition, it has been asserted that the inactions of a state or those of others may affect the cooperation chain in environmental multilateralism⁹². It is necessary to (re) invigorate environmental multilateralism in order to enhance sustainability.

⁸⁵ East African Community., 'East African Community Climate Change Policy.' Available at <https://www.eac.int/environment/climate-change/eac-climate-change-policy-framework> (Accessed on 21/02/2024)

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

⁹¹ Ibid

⁹² Gomes. F. T., 'International Relations and the Environment: Practical Examples of Environmental Multilateralism' Op Cit

4.0 Way Forward

In order to enhance environmental multilateralism, it is important to strengthen implementation of and compliance with the MEAs⁹³. It has been pointed out that these agreements have emerged as one of the best ways of institutionalizing intergovernmental cooperation and triggering national action in the environmental sector⁹⁴. MEAs are vital in responding to global and regional environmental challenges such as loss of biological diversity, adverse impacts of climate change, depletion of the ozone layer, hazardous waste, organic pollutants, marine pollution, trade in endangered species, destruction of wetlands among others⁹⁵. It is therefore vital for all countries to foster implementation and compliance with MEAs. International institutions such as UNEP also have a key role to play in supporting countries' efforts in the implementation of MEAs⁹⁶.

In addition, it is necessary to enhance monitoring of international and regional environmental commitments in order to promote accountability⁹⁷. It has been pointed out that there exists gaps between international commitments and state practices in environmental governance⁹⁸. According to UNEP, despite efforts by the international community, environmental degradation is continuing⁹⁹. It has been suggested that international bodies including UNEP and the UNEA should be provided with a special rapporteur group possessing mandates to investigate and report publicly on environmental violations¹⁰⁰. This will promote public reporting on the gaps between international commitments and current trends, including those related to carbon emissions, pollution, and encroachment on protected sea and land areas among other

⁹³ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

⁹⁴ Ibid

⁹⁵ East African Community., 'Multilateral Environmental Agreements' Op Cit

⁹⁶ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

⁹⁷ Day. A., & Nickel. C., 'Elevating the Environment in the Multilateral System' Op Cit

⁹⁸ Ibid

⁹⁹ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

¹⁰⁰ Day. A., & Nickel. C., 'Elevating the Environment in the Multilateral System' Op Cit

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environmental commitments¹⁰¹. This will strengthen environmental multilateralism by ensuring that states are held accountable for their environmental commitments¹⁰².

It is also important to strengthen the roles of international bodies such as UNEP in order to bolster their role in environmental governance¹⁰³. It has been argued that the mandates of international organizations are too weak to deliver on the environmental goals and actions agreed since 1972, with only one tenth of targets achieved¹⁰⁴. As a result, it has been suggested that there is need to reform UNEP in order to give it the mandate to orchestrate the institutions across the global environmental system, defining a coherent global strategy for enabling and accompany States and other actors to comply with their obligations under MEAs and act towards achieving globally adopted goals¹⁰⁵. Some of the key reforms areas that have been identified in order to strengthen the role of UNEP include improving its ability to: provide or identify sufficient funding and capacity building for countries¹⁰⁶; provide regular reports on country implementation and compliance with their environmental responsibilities and based on this provide reciprocal learning programmes to build trust and mutual understanding for countries environmental management challenges¹⁰⁷; coordinate and continuously evaluate international collaboration in various sectors and forums including public, multistakeholder and public-private partnerships¹⁰⁸; and assist international trade and finance institutions to incorporate environmental responsibilities into their statutes¹⁰⁹. A strong international environmental body such as UNEP is integral in fostering environmental multilateralism due

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

¹⁰⁴ Karlsson-Vinkhuyzen. S., & Dahl. A., 'Building Effective Multilateralism for the Environment' Op Cit

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Day. A., & Nickel. C., 'Elevating the Environment in the Multilateral System' Op Cit

¹⁰⁸ Ibid

¹⁰⁹ Ibid

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to its ability to design, coordinate, and promote the implementation of global environmental commitments¹¹⁰.

There is also need to consolidate the many MEAs into a coherent, coordinated and efficient legal framework to avoid overburdening countries with so many multiple processes and obligations¹¹¹. The great and increasing number of MEAs is identified as an impediment to the efficient and effective functioning of the system¹¹². Problems identified in this respect include in particular: an increasing potential for double-work and conflict between different MEAs¹¹³; a growing demand for co-ordination¹¹⁴; and the amount of resources required from countries and other actors such as inter-governmental organisations, and Non-Governmental Organisations (NGOs for effective participation in the system¹¹⁵. Consolidation of the many MEAs into a coherent, coordinated and efficient legal framework has been identified as a key way of avoiding fragmentation and enhancing compliance and monitoring¹¹⁶.

Finally, it is important to reform the environmental multilateralism system in order to ensure inclusivity and participation of all stakeholders including developing countries, youth, women and other marginalized groups who are often left behind¹¹⁷. It has been asserted that the multilateral system for protecting our planet will not be strengthened unless and until the quality of the preceding negotiation process improves and is open to the voices of all those potentially affected¹¹⁸; transparent in reasoning and process of mutual justification¹¹⁹; and respectful of all participants¹²⁰. It is therefore necessary to

¹¹⁰ Karlsson-Vinkhuyzen. S., & Dahl. A., 'Building Effective Multilateralism for the Environment' Op Cit

¹¹¹ Ibid

¹¹² Oberthur. S., 'Clustering of Multilateral Environmental Agreements: Potentials and Limitations' Available at <https://archive.unu.edu/inter-linkages/docs/IEG/Oberthur.pdf> (Accessed on 21/02/2024)

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Karlsson-Vinkhuyzen. S., & Dahl. A., 'Building Effective Multilateralism for the Environment' Op Cit

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Ibid

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ensure that MEAs take into account inclusive discussion and decision-making through broader participation among other approaches¹²¹. This calls for enhanced education and capacity building in order to ensure effective, inclusive and sustainable multilateral actions to tackle climate change, biodiversity loss and pollution among other environmental challenges¹²².

Through the foregoing among other measures, environmental multilateralism will be (re)invigorated for sustainability.

5.0 Conclusion

Environmental multilateralism is vital in helping develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources¹²³; and of promoting an international system based on stronger multilateral environmental cooperation and good global environmental governance¹²⁴. There has been progress towards strengthening environmental multilateralism through MEAs, regional environmental agreements, and institutions, and processes that address environmental concerns at the international level such as UNEA, UNEP, IPCC¹²⁵. However, environmental multilateralism faces several concerns including implementation of and compliance with the MEAs¹²⁶. As a result, it is necessary to (re) invigorate environmental multilateralism in order to achieve sustainability. This can be realized through strengthening implementation of and compliance with the MEAs¹²⁷; enhancing monitoring of international and regional environmental commitments in order to promote

¹²¹ African Union., 'Multilateral Environmental Agreements (MEAs)' Available at <https://au.int/en/meas> (Accessed on 21/02/2024)

¹²² United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

¹²³ Morgera. E., 'The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test' Op Cit

¹²⁴ Ibid

¹²⁵ Day. A., & Nickel. C., 'Elevating the Environment in the Multilateral System' Op Cit

¹²⁶ Ibid

¹²⁷ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

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accountability¹²⁸; strengthening the roles of international bodies such as UNEP in order to bolster their role in environmental governance¹²⁹; consolidating the many MEAs into a coherent, coordinated and efficient legal framework¹³⁰; and reforming the environmental multilateralism system in order to ensure inclusivity and participation of all stakeholders¹³¹. (Re) invigorating environmental multilateralism for sustainability is an agenda that we must pursue for posterity.

¹²⁸ Day. A., & Nickel. C., 'Elevating the Environment in the Multilateral System' Op Cit

¹²⁹ United Nations Environment Programme., 'How Multilateral Environmental Agreements Can Help Mend the Planet' Op Cit

¹³⁰ Karlsson-Vinkhuyzen. S., & Dahl. A., 'Building Effective Multilateralism for the Environment' Op Cit

¹³¹ Ibid

Actualizing Africa's Green Dream

Abstract

The paper critically discusses the concept of 'green economy' in Africa. It argues that green growth is vital in Africa in the wake of the threat of climate change among other concerns. It further asserts that green growth in Africa can aid in achieving Sustainable Development by striking a balance between human development, environmental conservation and economic development. The paper examines the progress made towards achieving green growth in Africa. It further explores the challenges facing realization of green economy in Africa. The paper also proposes solutions towards actualizing Africa's green dream.

1.0 Introduction

The concept of 'greening' economies has become a pertinent concern in global politics in the wake of challenges facing the planet including the threat of climate change¹. Effects of climate change such as rising temperatures, drought, crop failure, desertification, depletion of natural resources, water scarcity and rising sea levels have had significant impacts on human development, economic development and environmental sustainability². Consequently, climate change mitigation and adaptation are vital in fostering Sustainable Development³. Proponents of green growth view it as an opportunity to strike a balance between human development, environmental conservation and economic development⁴. Greening growth can thus support the realization of Sustainable Development by taking into account environmental protection, economic development and social concerns which are key considerations in the Sustainable Development agenda⁵.

¹ Bergius. M., 'Towards a Green Modernization Development Discourse: The New Green Revolution in Africa.' *Journal of Political Ecology*, 2019

² Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

³ ³ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 03/07/2022)

⁴ Bergius. M., 'Towards a Green Modernization Development Discourse: The New Green Revolution in Africa.' Op Cit

⁵ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1.

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The term 'green economy' has been defined as one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities⁶. It has also been defined as policy focus that emphasizes environmentally sustainable economic progress to foster low-carbon, socially inclusive development⁷. Green Growth is one of the strategies to achieve sustainable development that focuses on greening conventional economic systems and developing a green economy, where economic prosperity can go hand-in-hand with ecological sustainability⁸. Various approaches have been taken towards greening economies. In the global North, the main components in the green economy transition have been technological and market-based solutions to existing industrial sectors as well as fiscal instruments in environmental governance⁹. Further, in the global South, green economy implementation majorly focuses on environmental protection along with modernization and shifts in access to and control over forestry, freshwater, fisheries, energy and agriculture among other natural resources¹⁰.

The paper critically examines actualization of Africa's green dream. It explores the progress made towards greening economies in Africa. The paper further discusses opportunities and challenges facing the attainment of green growth in Africa. It also suggests recommendations towards actualizing Africa's green dream for Sustainable Development.

⁶ United Nations Economic Commission for Europe., 'Greening the Economy: Mainstreaming the Environment into Economic Development.' Available at <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=796&menu=1515> (Accessed on 03/07/2023)

⁷ United Nations Economic and Social Commission for Asia and the Pacific., 'Green Growth Uptake in Asia-Pacific Region.' Available at https://unece.org/fileadmin/DAM/env/cep/CEP-20/ppp/Item10_b_ESCAP_GreenGrowthUptake_e_sm.pdf (Accessed on 03/07/2023)

⁸ Ibid

⁹ Bailey, I & Caprotti, F. 'The Green Economy: Functional Domains and Theoretical Directions of Enquiry.' *Environment and Planning*, No. 46 of 2014.

¹⁰ Ibid

2.0 Green Growth in Africa: Opportunities and Challenges

The concept of 'green economies' has received widespread attention since the Rio+20 conference.¹¹ The outcome of the Conference affirmed the role of green economy in the context of sustainable development and poverty eradication as one of the important tools available for achieving Sustainable Development¹². It calls upon states to embrace green economies as a tool of eradicating poverty as well as sustained economic growth, enhancing social inclusion, improving human welfare and creating opportunities for employment and decent work for all, while maintaining the healthy functioning of the Earth's ecosystems¹³. The outcome of the Rio+20 Conference further recognizes the importance of green economy in enhancing our ability to manage natural resources sustainably and with lower negative environmental impacts, increasing resource efficiency and reduction of waste¹⁴.

Since the outcome of the Rio+ 20 Conference, the concept of green economy has been embraced at the global, regional and national levels. The universal call for green growth is stipulated under the United Nations 2030 Agenda for Sustainable Development which envisions development which balances social, economic and environmental sustainability¹⁵. The Sustainable Development Goals seek to promote green economies through measures such as ensuring access to affordable and clean energy; promoting sustainable industrialization, innovation and infrastructure; promoting the growth of

¹¹ Bergius. M., 'Towards a Green Modernization Development Discourse: The New Green Revolution in Africa.' Op Cit

¹² United Nations., 'The Future we Want: Outcome document of the United Nations Conference on Sustainable Development held in Rio de Janeiro, Brazil, from 20–22 June 2012.' Available at <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf> (Accessed on 03/07/2023)

¹³ Ibid

¹⁴ Ibid

¹⁵ United Nations Development Programme., 'Sustainable Development Goals.' Available at https://www.google.com/search?q=undp&oq=UNDP&gs_lcrp=EgZjaHJvbWUqDwgAEAA YQxjAhixAxiKBTIPCAAQABhDGMCGLEDGIoFMhIIARauGEMYxwEYsQMY0QM YigUyCQgCEAAYQxiKBTIJCAMQABhDGIoFMgYIBBBFGDwyBggFEEUYPDIGCAYQ RRg8MgYIBxBFGDzSAQgyNzM2ajFqN6gCALACAA&sourceid=chrome&ie=UTF-8 (Accessed on 03/07/2023)

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sustainable cities and communities and combating climate change¹⁶. Achieving the Sustainable Development agenda is essential in fostering green economies in Africa.

At the regional level, the *Africa Union's Agenda 2063* sets out the aspirations of prosperous Africa based on inclusive growth and Sustainable Development¹⁷. It seeks to achieve this goal through measures such as promoting sustainable and inclusive economic growth; ensuring sustainable management of natural resources in Africa; fostering sustainable consumption and production patterns; fostering climate resilience and natural disasters preparedness and prevention and embracing renewable energy in Africa¹⁸. Realizing the aspirations of Agenda 2063 is paramount in actualizing Africa's green dream. In addition, the *Agreement Establishing the African Continental Free Trade Area (AfCFTA)*¹⁹ seeks to promote and attain sustainable and inclusive socio-economic development in the region. It recognizes the need to promote sustainable development in accordance with the Sustainable Development Goals as vital in achieving the economic integration of the African continent²⁰. There is need to promote the vision of the AfCFTA in order to actualize Africa's green dream.

In Kenya, the Constitution embraces Sustainable Development as one of the national values and principles of governance²¹. It further encompasses several provisions that are vital in attaining green growth in Kenya including the recognition of the right to a clean and healthy environment²². The Constitution also stipulates certain obligations in respect of the environment which include ensuring sustainable exploitation, utilisation, management and conservation of the environment and natural resources; achieving and maintaining a tree

¹⁶ Ibid

¹⁷ Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 03/07/2023)

¹⁸ Ibid

¹⁹ African Union., 'Agreement Establishing the African Continental Free Trade Area.' Available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (Accessed on 03/07/2023)

²⁰ Ibid

²¹ Constitution of Kenya, 2010., Article 10 (2) (d), Government Printer, Nairobi.

²² Ibid, Article 42

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cover of at least ten per cent of the land area of Kenya; establishing systems of environmental impact assessment, environmental audit and monitoring of the environment and eliminating processes and activities that are likely to endanger the environment²³. Implementing these among other provisions of the Constitution will enhance green growth in Kenya.

Green growth has been embraced in Africa through measures such as promoting the use of clean and renewable sources of energy. There have been increased investments in renewable sources of energy such as solar, wind, hydro, geothermal and green hydrogen²⁴. Clean and renewable sources of energy are essential in climate change mitigation and adaptation and actualizing the green dream²⁵. Agenda 2063 recognizes the importance of renewable sources of energy in ensuring environmental sustainability and climate resilient economies and communities towards attaining Sustainable Development in Africa²⁶. Africa has vast resource potential in wind, solar, hydro, and geothermal energy and falling costs are increasingly bringing renewables within reach²⁷. It has been pointed out that renewable sources of energy can help address many of Africa's social, economic, health and environmental challenges and foster the realization of a climate-safe future in which sustainable development prerogatives are met²⁸. There is need for increased investments in renewable sources of energy in Africa in order to actualize the green dream.

In addition, green revolution is also being witnessed in the agricultural sector in Africa. Technologies such as genetic engineering have been adopted to transfer the nitrogen-fixing capabilities of legumes such as peas and beans into

²³ Ibid, Article 69

²⁴ Hafner. M et al., 'Prospects for Renewable Energy in Africa.' *Energy in Africa*, 2018, pp 47-75

²⁵ Crane. D., 'My Clean-Energy Green Dream.' Available at <https://www.greenbiz.com/article/myclean-energy-green-dream> (Accessed on 03/07/2023)

²⁶ Africa Union., 'Agenda 2063: The Africa we Want.' Op Cit

²⁷ International Renewable Energy Agency., 'Renewable Energy Market Analysis: Africa and its Regions.' Available at <https://www.irena.org/publications/2022/Jan/Renewable-Energy-Market-Analysis-Africa> (Accessed on 03/07/2023)

²⁸ Ibid

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cereal crops²⁹. This has facilitated the attainment of higher yields, without the use of expensive fertilizers³⁰. This approach also aids in the reduction in the use of chemical nitrogen fertilizers, which contribute substantially to both carbon emissions and environmental pollution³¹. Some African countries have also adopted regenerative agricultural practices such as crop rotation, agroforestry, use of drought- and heat-resistant crops, integrated pest control systems, water harvesting and irrigation³². This has helped in fostering high-yielding, resilient, and adaptive practices that constitute an African approach to climate-smart agriculture³³. Greening of the agricultural sector is vital in actualizing Africa's green dream.

Further, there has been progress towards actualizing Africa's green dream through the adoption of sustainable waste management practices. Countries such as Rwanda and Kenya have banned the use of plastic bags due to their negative environmental impacts³⁴. This has promoted improved waste management and environmental conservation in these countries³⁵. In addition there has been growth of sustainability startups aimed at promoting efficient waste management through measures such as treatment, recycling of waste and conversion of waste into useful products such as compost and biofuel briquettes³⁶.

Progress has also been made towards fostering green growth in the African tourism sector through eco-resorts or family villages in countries such as

²⁹ Conrow. J., 'Borlaug's Dream is Being Realized.' Available at <https://allianceforscience.org/blog/2017/04/borlaugs-dream-is-being-realized/> (Accessed on 03/07/2023)

³⁰ Ibid

³¹ Ibid

³² Climate Champions. 'How Regenerative Agriculture Can Increase Africa's Food Production.' Available at <https://climatechampions.unfccc.int/call-to-action-for-climate-resilient-sustainable-food-systems-in-africa/> (Accessed on 03/07/2023)

³³ Ibid

³⁴ Behuria. P., 'Ban the (plastic) Bag? Explaining Variation in the Implementation of Plastic Bag Bans in Rwanda, Kenya and Uganda.' *EPC: Politics and Space*, 2021, P 1-18

³⁵ Ibid

³⁶ Forbes., 'Meet The African Green Entrepreneurs Showing the West How It's Done.' Available at <https://www.forbes.com/sites/davidrvetter/2021/12/14/meet-the-african-green-entrepreneurs-showing-the-west-how-its-done/?sh=6d46b5bf51cb> (Accessed on 03/07/2023)

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Rwanda³⁷. Africa is a continent that is rich in cultural and ecological heritage and recreational development has been identified as one of the measures of promoting green growth in the tourism sector³⁸. This has enhanced sustainability and social growth through a combination of agriculture, the commitment of local businesses and educating and recruitment of local staff in such projects³⁹.

Despite the progress made towards actualizing Africa's green dream, several concerns have hindered the attainment of this ideal. It has been pointed out that the transition towards renewable energy has not been fully embraced due to factors such as insufficient investments with only 2% of global investments in renewable energy in the last two decades being made in Africa, with significant regional disparities⁴⁰. This has significantly affected access to clean cooking fuels and technologies in most parts of Africa⁴¹. Further, it has been asserted that African countries especially those in the North African region which have untapped renewable energy sources including hydrogen have struggled to meet their own renewable energy targets, often as a result of unattractive investment conditions, insufficiently developed legal frameworks for renewable energy development and uneven and inconsistent implementation of regulations⁴². It is necessary to address these challenges in order to actualize Africa's green dream in the energy sector.

³⁷ MTD., 'Green Dream Rwanda.' Available at <https://www.mtdls.nl/en/news/newsarchive/q/nid/337/title/green-dream-rwanda> (Accessed on 03/07/2023)

³⁸ Ibid

³⁹ Ibid

⁴⁰ International Renewable Energy Agency., 'Renewable Energy Market Analysis: Africa and its Regions.' Op Cit

⁴¹ Ibid

⁴² EN: Former., 'North Africa's Hydrogen Potential.' Available at https://www.enformer.com/en/north-africashydrogenpotential/?etcc_med=SEA&etcc_par=Google&etcc_cmp=Energysystem&etcc_grp=135634609600&etcc_bky=hydrogen%20africa&etcc_mty=p&etcc_plc=&etcc_ctv=580888668376&etcc_bde=c&etcc_var=CjwKCAjw44mlBhAQEiwAqP3eViMmP67xkwkqMI4FIRbBPvWOgaNcBckR9BJMhu0bOUf1s-OG4JKuwhoCga4QAvD_BwE&gad=1&gclid=CjwKCAjw44mlBhAQEiwAqP3eViMmP67xkwkqMI4FIRbBPvWOgaNcBckR9BJMhu0bOUf1s-OG4JKuwhoCga4QAvD_BwE (Accessed on 03/07/2023)

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In addition, it has been observed that agricultural practices that supported African communities in the past such as slash-and-burn cultivation and crop rotation are now driving the sector's decline⁴³. These practices combined with long-term ecological impacts of chemical-heavy farming systems contribute to land degradation and crop failure⁴⁴. The situation is worsened by changing weather patterns as result of the threat of climate change and unstable sociopolitical dynamics hindering the attainment of food security⁴⁵. There is need to address concerns in the agricultural sector in order to actualize Africa's green dream.

It also been asserted that despite the abundance of water resources in Africa including lakes, rivers, swamps and underground aquifers, there has been degradation and underutilization of these water resources⁴⁶. Concerns such as pollution, poor agricultural practices and the effects of climate change have affected the quality and quantity of water resources in Africa⁴⁷. This has hindered actualizing Africa's green dream in other areas including agriculture and food production, energy, manufacturing and processing, tourism and health due to the centrality of water in Africa's pursuit of the Sustainable Development Goals⁴⁸. It is imperative that concerns in the water sector be addressed in order to foster Sustainable Development and actualize Africa's green dream.

As a result of the foregoing concerns, it has been observed that Africa continues to lag behind other regions of the world in achieving the Sustainable

⁴³ African Wildlife Foundation., 'Sustainable Agriculture.' Available at <https://www.awf.org/community/sustainable-agriculture> (Accessed on 03/07/2023)

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Mugagga, F, & Nabaasa, B., 'The Centrality of Water Resources to the Realization of Sustainable Development Goals (SDG). A Review of Potentials and Constraints on the African Continent.' *International Soil and Water Conservation Research*, Volume 4, No. 3, 2016

⁴⁷ Ibid

⁴⁸ Ibid

Development agenda⁴⁹. The continent has huge potential to achieve green growth and the transition into green economies. There is need to deal with the above concerns in order to actualize Africa's green dream.

3.0 Way Forward

In order to actualize Africa's green dream, it is necessary to upscale investments in green energy sources as renewable energy⁵⁰. The continent has vast potential for renewable sources for energy which remains untapped⁵¹. Challenges such as unattractive investment conditions, insufficiently developed legal frameworks for renewable energy development and uneven and inconsistent implementation of regulations have hindered attainment of the green dream in the energy sector in Africa⁵². African countries must address these concerns by creating attractive investment environments, developing efficient legal frameworks on renewable energy and implementing effective regulations in order to enhance the uptake of renewable sources of energy.⁵³ Further, there is need for adoption of market liberalization policies in the energy sector such as supporting public-private investment, improved private sector access to electricity generation and issuing of green bonds in order to promote renewable sources of energy in Africa⁵⁴. This will fast track realization of Africa's green dream in the energy sector.

Further, there is need to adopt green agricultural practices such as regenerative agriculture. Regenerative agricultural practices can aid in fostering climate resilient and sustainable green economies in Africa by avoiding the key problems of highly industrialized agriculture production that damage soil health, including vast tracts of mono-cultivated land, chemical runoffs, overexploitation of water resources, and high chemical and hormonal

⁴⁹ Begashaw. B., 'Africa and the Sustainable Development Goals: A long Way to go.' Available at <https://www.brookings.edu/articles/africa-and-the-sustainable-development-goals-a-long-way-to-go/> (Accessed on 03/07/2023)

⁵⁰ Hafner. M et al., 'Prospects for Renewable Energy in Africa.' Op Cit

⁵¹ Ibid

⁵² EN: Former., 'North Africa's Hydrogen Potential.' Op Cit

⁵³ Ibid

⁵⁴ Ibid

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residue levels in food⁵⁵. This will promote the attainment of food security in Africa while also contributing towards climate change mitigation and adaptation in the quest towards Sustainable Development⁵⁶. African countries should thus adopt regenerative agricultural practices such as effective soil systems including no tilling and low tilling, crop rotation, use of drought and heat resistant crops, agroforestry, water harvesting, irrigation and green pest control measures⁵⁷. This will enhance actualization of the green dream in the agricultural sector in Africa.

In addition, it is vital to promote sustainable utilization and management of water resources in Africa. Water plays a fundamental role in the attainment of Sustainable Development. To this extent, it has been observed that there is a clear nexus between properly managed water resources, economic development and social wellbeing which are key pillars of the sustainable development agenda⁵⁸. The importance of water is recognized under the 2030 Agenda for Sustainable Development which seeks to ensure the availability and sustainable management of water and sanitation for all⁵⁹. However, challenges have been witnessed in the water sector in Africa such as degradation and underutilization of these water resources⁶⁰. It has been observed that sustainable management of water resources and access to safe water and sanitation are essential for unlocking economic growth and productivity, and providing significant leverage for existing investments in

⁵⁵ Climate Champions. 'How Regenerative Agriculture Can Increase Africa's Food Production.' Op Cit

⁵⁶ Davis. L.R et al., 'Farmer Led Regenerative Agriculture for Africa.' Available at <https://discovery.ucl.ac.uk/id/eprint/10106717/1/LunnRockcliffe%2C%20Davies%20et%20al.%202020%20RA%20report.pdf> (Accessed on 03/07/2023)

⁵⁷ Ibid

⁵⁸ Koudstaal.R et al., 'Water and Sustainable Development' available at <https://www.ircwash.org/sites/default/files/210-92WA-11000.pdf> (Accessed on 03/07/2023)

⁵⁹ United Nations, Department of Economic and Social Affairs, Sustainable Development goal 6- clean water and sanitation, available at <https://sdgs.un.org/goals/goal6> (Accessed on 03/07/2023)

⁶⁰ Mugagga. F, & Nabaasa. B., 'The Centrality of Water Resources to the Realization of Sustainable Development Goals (SDG). A Review of Potentials and Constraints on the African Continent.' Op Cit

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health and education⁶¹. There is need to improve the management of water and water resources in Africa through measures such pollution control, effective waste management, use of water smart landscaping and irrigation and sustainable utilization of water through reusing among other measures⁶². This will promote the attainment of sustainable development goal 6 geared towards enhancing access to clean water and sanitation for all while also actualizing Africa's green dream in the water sector.

Further, Africa should adopt green value chains for minerals. It has been observed that Africa is endowed with a variety of minerals that are central to decarbonization such as the Democratic Republic of the Congo (DRC) which produces over 70% of the world's cobalt, DRC and Zambia which supply 10% of global copper and Mozambique and South Africa which hold significant reserves of graphite, platinum metals, lithium among other countries⁶³. It has been observed that the opportunities presented by the global green mineral boom and domestic achievements such as the African Continental Free-Trade Area can help facilitate development of regional value chains for green economy products in the mining sector⁶⁴. There is need to tap into these opportunities in order foster green value chains towards actualizing Africa's green dream.

Finally, Africa must fast track the attainment of the Sustainable Development goals and the Sustainable Development agenda. It has been argued that Africa continues to lag behind other regions of the world in achieving the Sustainable

⁶¹ United Nations Environment Programme, 'Goal 6: Clean Water and Sanitation' available at <https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-6> (Accessed on 03/07/2023)

⁶² Mugagga. F, & Nabaasa. B., 'The Centrality of Water Resources to the Realization of Sustainable Development Goals (SDG). A Review of Potentials and Constraints on the African Continent.' Op Cit

⁶³ Economic Commission for Africa., 'African Countries Urged to Prioritize Green Value Chains for Minerals.' Available at <https://www.un.org/africarenewal/magazine/february-2023/african-countries-urged-prioritize-green-value-chains-minerals> (Accessed on 03/07/2023)

⁶⁴ Ibid

Development agenda⁶⁵. The continent has made slow progress in attaining goals such as ending extreme poverty, promoting access to clean water and sanitation, promoting quality education and achieving gender equality⁶⁶. There is need to enhance the attainment of Sustainable Development Goals in Africa through measures such as increased funding, improved public and private partnerships, strengthening domestic legislations, embracing technology and support from the international community⁶⁷. This will accelerate attainment of Sustainable Development in Africa whilst actualizing Africa's green dream.

4.0 Conclusion

The concept of 'green economy' is vital in fostering Sustainable Development at the global, regional and national levels⁶⁸. Green growth has been embraced in Africa through measures such as adoption of renewable sources of energy, regenerative agricultural practices and sustainable waste management⁶⁹. However, despite this progress, several concerns hinder effective attainment of green growth in Africa. These include insufficient investments in renewable energy, underutilization and degradation of water resources, poor agricultural practices in some areas and failure to accelerate attainment of the Sustainable Development Goals⁷⁰. There is need to address these challenges by upscaling investments in green energy sources such as renewable energy, adopting green agricultural practices such as regenerative agriculture, promoting sustainable utilization and management of water resources, adopting green value chains for minerals and fast tracking attainment of the Sustainable

⁶⁵ Begashaw. B., 'Africa and the Sustainable Development Goals: A long Way to go.' Op Cit

⁶⁶ UNDP., 'New Africa SDGs Report shows Slow Progress, Calls for Greater Action to Meet Targets.' Available at <https://www.undp.org/africa/press-releases/new-africa-sdgs-report-shows-slow-progress-calls-greater-action-meet-targets> (Accessed on 03/07/2023)

⁶⁷ Ibid

⁶⁸ Bergius. M., 'Towards a Green Modernization Development Discourse: The New Green Revolution in Africa.' Op Cit

⁶⁹ Climate Champions. 'How Regenerative Agriculture Can Increase Africa's Food Production.' Op Cit

⁷⁰ Begashaw. B., 'Africa and the Sustainable Development Goals: A long Way to go.' Op Cit

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Development Goals⁷¹. This will enhance green growth and attainment of Sustainable Development in Africa. Actualizing Africa's Green Dream is an idea worth implementing.

⁷¹ UNDP., 'New Africa SDGs Report shows Slow Progress, Calls for Greater Action to Meet Targets.' Op Cit

Addressing Noise Pollution for a Clean and Healthy Environment in Kenya

Abstract

This paper discusses the general and specific effects of noise pollution on human health as the basis for addressing noise pollution in Kenya, in line with the constitutional and statutory guarantees on creating a clean and healthy environment for all persons. The author argues that noise pollution is a direct violation of this right and consequently offers recommendations on how the problem can be addressed. The paper generally discusses the legal and institutional framework on noise regulation, with a view to identifying the key players and stakeholders in tackling the vice. The author argues that unless this problem is effectively addressed, realisation of a clean and healthy environment for the Kenyan people will remain a mirage.

1.0 Introduction

Any sound that bothers, irritates, or potentially harm a person's ear is considered noise. Other definitions of noise include undesired, undesirable, and unpleasant sound.¹ Environmental noise, as defined by the World Health Organization (WHO), is all noise, except noise from places of employment. Any unwelcome sound or group of noises that annoys people or could be harmful to their health is considered noise.² EMCA defines “noise” as any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment.³ Notably, EMCA also defines “pollutant” as including any substance whether liquid, solid or gaseous which – (a) may directly or indirectly alter the quality of any element of the receiving environment; (b) is hazardous or potentially hazardous to human health or the environment; and includes objectionable odours, radio-activity,

¹ Hadzi-Nikolova, M., Mirakovski, D., Ristova, E. and Stefanovska Ceravolo, L., ‘Modeling and Mapping of Urban Noise Pollution with SoundPLAN Software’ (2012) 6 International Journal for Science, Technics and Innovations for the Industry MTM (Machines, Tecnologies, Materials) 38, p.38.

² ‘Definition of Environmental Noise’ (Gouvernement du Québec) <<https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/definition-environmental-noise>> accessed 25 March 2023.

³ EMCA, Sec. 2.

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noise, temperature change or physical, chemical or biological change to any segment or element of the environment.⁴

Environmental noise pollution still poses a serious risk to people's health and quality of life on a global scale. Urbanization, along with the accompanying rise in mobility and industrialization, has led to an amplification of noise in densely populated areas, increasing noise exposure. In a city, as the population grows, so does industrial activity to suit the demands of the populace. Hence, noise levels rise.⁵

This paper discusses the general and specific effects of noise pollution on human health as the basis for addressing noise pollution in Kenya, in line with the constitutional and statutory guarantees on creating a clean and healthy environment for all persons. The author argues that noise pollution is a direct violation of this right and consequently offers recommendations on how the problem can be addressed. The paper generally discusses the legal and institutional framework on noise regulation, with a view to identifying the key players and stakeholders in tackling the vice. The author argues that unless this problem is effectively addressed, realisation of a clean and healthy environment for the Kenyan people will remain a mirage. Kenyans have for a while suffered the menace of noise pollution especially after the promulgation of the 2010 Constitution, where there has been conflicting jurisprudence on which level of the Government between national and county governments is mandated to address noise pollution and other nuisances that affect the right to clean and healthy environment as far as noise pollution is concerned.⁶

⁴ EMCA, Sec. 2.

⁵ Wawa EA and Mulaku GC, 'Noise Pollution Mapping Using GIS in Nairobi, Kenya' (2015) 7 *Journal of Geographic Information System* 486, p. 487.

⁶ <https://www.the-star.co.ke/authors/maureen-kinyanjui>, 'Sakaja Thanks Ruto for Support in Curbing "noise Pollution Menace" in City' (*The Star*) <<https://www.the-star.co.ke/news/2022-12-12-sakaja-thanks-ruto-for-support-in-curbing-noise-menace-in-city/>> accessed 24 March 2023; Okoth B, 'Loud Music in Kenya Neighbourhoods Illegal Regardless Nature of Your Business' (*The Standard*) <<https://www.standardmedia.co.ke/article/2001458024/loud-music-in-neighbourhood-illegal-regardless-nature-of-your-business>> accessed 24 March 2023; February 16 2020 S, 'You Have a Right to a Quiet Environment' (*Business Daily*, 19 September 2020) <<https://www.businessdailyafrica.com/bd/lifestyle/personal-finance/you-have-a-right-to-a-quiet-environment-2280534>> accessed 24 March 2023;

2.0 Links Between Noise and Human Health

Building sites or traffic on the roads, trains, and in the air are significant sources of environmental noise exposure. Other sources of noise exposure include wind turbines and leisure activities like playing loud music or other audio content or participating in e-sports (video and computer game competitions). In addition to increasing the risk of ischemic heart disease (IHD), hypertension, sleep disturbance, hearing impairment, tinnitus⁷, and cognitive impairment, research shows that excessive noise can be annoying. There is also mounting evidence that excessive noise can have negative effects on mental health and birth outcomes.⁸

Okafor C, 'Night Clubs in Kenya Face Closure and WhatsApp Groups Could Help Save Them' (*Business Insider Africa*, 55:25 100AD) <<https://africa.businessinsider.com/local/markets/night-clubs-in-kenya-face-closure-and-whatsapp-groups-could-help-save-them/rsv3phk>> accessed 24 March 2023; 'Kisumu Bans Church Crusades over Noise Pollution - Kenya News Agency' (4 November 2022) <<https://www.kenyanews.go.ke/kisumu-bans-church-crusades-over-noise-pollution/>> accessed 24 March 2023; Chepkwony J, 'Churches on the Spot over Noise Pollution, Court Order Them to Cease or Be Prosecuted' (*The Standard*) <<https://www.standardmedia.co.ke/coast/article/2001459278/churches-on-the-spot-over-noise-pollution-court-order-them-to-cease-or-be-prosecuted>> accessed 24 March 2023; WAKWELO V, 'Kileleshwa Bar Operators, Patrons Arrested after Alai's Noise Pollution Complaint» Capital News' (*Capital News*, 2 October 2022) <<https://www.capitalfm.co.ke/news/2022/10/kileleshwa-bar-operators-patrons-arrested-after-alais-noise-pollution-complaint/>> accessed 24 March 2023;

⁷ When a person has tinnitus, their ears or head may hiss, ring, or buzz. These sounds do not originate from an outside source; instead, a person hears them. High noise levels, such as those produced by loud music, can cause tinnitus. Tinnitus may also be brought on by loud or abrupt noises, such as an explosion or gunshot. Hearing loss frequently coexists with the hearing issue of tinnitus. It might be merely passing or permanent. A person's emotional, cognitive, psychological, or physical state is constantly disturbed by debilitating tinnitus.

Around 3% of debilitating tinnitus is caused by environmental noise exposure, primarily noise from leisure activities. <'Effects on Physical Health - The Effects of Environmental Noise on Health' (*Gouvernement du Québec*) <<https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/effects-of-environmental-noise-on-physical-health>> accessed 25 March 2023.

⁸ 'Guidance on Environmental Noise' <<https://www.who.int/tools/compendium-on-health-and-environment/environmental-noise>> accessed 24 March 2023; 'Compendium of WHO and Other UN Guidance on Health and Environment' <<https://www.who.int/publications-detail-redirect/WHO-HEP-ECH-EHD-22.01>> accessed 25 March 2023.

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Decibels are used to measure noise level (dB). Decibel levels increase as noise levels do. To accommodate human hearing, decibels can be changed. Decibels (dBA) is the unit of measurement for noise level. As a person is exposed to different levels of noise, different impacts result. Hearing loss can occur after years of being exposed to loud noises (75 dBA for eight hours each day). The body can react to lower noise levels as well; for example, a 40 dBA outdoor noise can be enough to keep someone awake.⁹

Noise's psychosocial effects on people include annoyance, which is the discomfort and disturbance that the person exposed to the noise experiences, as well as consequences on learning.¹⁰

3.0 Noise Regulation in Kenya: Legal and Institutional Framework

According to the International Covenant on Economic, Social, and Cultural Rights, every person has the right to the best possible level of physical and mental health, and State Parties are required to recognise this right. The actions that must be done by the States Parties to the current Covenant in order to fully realise this right must include those required for: the advancement of all facets of industrial and environmental hygiene.¹¹

3.1 Constitution of Kenya 2010

Article 42 (a) of the 2010 Constitution¹² 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.”

⁹ ‘Noise Measurement - The Effects of Environmental Noise on Health’ (*Gouvernement du Québec*) <<https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/noise-measurement>> accessed 25 March 2023.

¹⁰ ‘Psychosocial Effects - The Effects of Environmental Noise on Health’ (*Gouvernement du Québec*) <<https://www.quebec.ca/en/health/advice-and-prevention/health-and-environment/the-effects-of-environmental-noise-on-health/psychosocial-effects-of-environmental-noise>> accessed 25 March 2023.

¹¹ 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, Article 12 (1)(2)(b).

¹² Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

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Article 70 (1) of the Constitution provides: “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.”

It is also worth pointing out that the Fourth Schedule [Articles 185(2), 186(1) And 187(2) to the Constitution provides for the distribution of functions between the national government and the county governments. The functions and powers of the county governments include, *inter alia*: control of air pollution, noise pollution, other public nuisances and outdoor advertising. The implication of this is that the duty of noise pollution control moved from National Environment Management Authority (NEMA) which is a national government arm, to the county governments. NEMA is just required to play an oversight role in this area, as per the Act. This is on the understanding that county governments are the lead agency in noise pollution control.¹³ EMCA defines “lead agency” to mean any Government ministry, department, parastatal, state corporation or local authority, in which any law vests functions of control or management or any element of the environment or natural resources.¹⁴

3.2. Environmental Management and Co-ordination Act, 1999

The Environmental Management and Co-ordination Act, 1999¹⁵ (EMCA) was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.¹⁶

Section 101 of EMCA gives the Cabinet Secretary the power to set standards for noise and, on the recommendation of the Authority: recommend minimum standards for emissions of noise and vibration pollution into the environment as are necessary to preserve and maintain public health and the environment; determine criteria and procedures for the measurement of noise and vibration

¹³ EMCA, sec. 12.

¹⁴ EMCA, sec. 2.

¹⁵ Environmental Management and Co-ordination Act, No.8 of 1999, Laws of Kenya.

¹⁶ *Ibid*, Preamble.

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pollution into the environment; determine criteria and procedures for the measurement of sub-sonic vibrations; determine standards for the emission of sub-sonic vibrations which are likely to have a significant impact on the environment; issue guidelines for the minimization of sub-sonic vibrations, referred to in paragraph (d) from existing and future sources; determine noise level and noise emission standards applicable to construction sites, plants, machinery, motor vehicles, aircraft including sonic bonus, industrial and commercial activities; determine measures necessary to ensure the abatement and control of noise from sources referred to in paragraph (f); and issue guidelines for the abatement of unreasonable noise and vibration pollution emitted into the environment from any source.¹⁷

Section 102 thereof prohibits noise in excess of established standards by providing that subject to the provisions of the Civil Aviation Act (Cap. 394), any person who emits noise in excess of the noise emission standards established under this Part commits an offence. However, exceptions exist in relation to noise levels.¹⁸

EMCA offers the broad rules and criteria to be followed in the management and conservation of several environmental issues. Hence, it is intended to be put into practice by the adoption of sector-specific laws that should concentrate on the various facets of the environment.

In order to align the Act with the Constitution, EMCA was amended in 2015 by the *Environmental Management and Co-ordination (Amendment) Act* (No 5 of 2015). While EMCA contains provisions on almost all the aspects of the environment, it is worth pointing out that the procedural aspects of the regulation of these aspects heavily depends on regulations and other laws that expound on the EMCA provisions.

¹⁷ EMCA, sec. 101.

¹⁸ EMCA, sec. 103.

3.3. Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009, Legal Notice No. 61 of 2009

The *Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009*¹⁹ defines “noise” to mean any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment. These Regulations prohibit any person from making or causing to be made any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment.²⁰ However, there are some exemptions to these prohibitions.²¹

In the case of *Pastor James Jessie Gitahi and 202 others vs Attorney General*²², the court recognized one of the components of a clean and healthy environment to be the prevention of noise and vibration pollution. Despite the Regulations, noise pollution is however still a major problem in the country because of lack of enforcement of the Regulations and possibly the public’s ignorance on the levels of noise that may be considered as air pollution.

3.4. National Environment Management Authority (NEMA)

In order to implement all environmental policies and to exert general oversight and coordination over all environmental issues, the National Environment Management Authority (NEMA) was established as the main government vehicle under EMCA. NEMA has the authority to create rules, specify requirements and guidelines, and issue directives for the management and preservation of the environment and natural resources in conjunction with the lead agencies. Environmental restoration orders, conservation orders, and easements are just a few of the mechanisms the Act uses to protect the environment. It also calls for environmental impact assessments, audits, and monitoring.²³

¹⁹ Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009, Legal Notice No. 61 of 2009.

²⁰ Ibid, Regulation 3 (1).

²¹ Regulation 7.

²² *Pastor James Jessie Gitahi and 202 others vs Attorney General*, [2013] eKLR, petition No. 683 of 2009.

²³ See EMCA, Part Vi – Integrated Environmental Impact Assessment; Part Vii – Environmental Audit and Monitoring.

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Notably, NEMA can delegate its functions under EMCA to any lead agency, being the oversight authority, and where it carries out a delegated duty, it can recover costs from the relevant body for any of such functions.²⁴

3.5. County Laws

Some counties have already embraced their role under the Constitution to control noise pollution, such as the Nairobi City County Government which has since enacted the Nairobi City County Public Nuisance Act 2021.²⁵

3.5.1. Nairobi City County Public Nuisance Act 2021

Notably, Section 20 thereof provides that: “a person shall not in any street or in any shop, business premises or any other place adjoining any street to which the public are admitted, play, operate, cause or allow to be played or operated, any musical instrument, wireless, gramophone, amplifier or similar instrument thereby making, causing or authorising noise to be made which is loud and continuous, or repeated as to constitute a nuisance to the occupants or dwellers of any premises in the neighbourhood or to passersby on the street.”

There is a need for other county governments to follow suit and put in place laws and regulations aimed at addressing noise pollution within their counties.

4. Getting it Right: Streamlining Noise Regulation Framework in Kenya

This section offers some viable recommendations on how to address the noise pollution in the country.

4.1 Institutional Streamlining and Effective Enforcement of Laws and Regulations on Noise Pollution

As a way of curbing noise pollution, the World Health Organisation (WHO) urges countries to enact and enforce legislation/regulations/policies for limiting sound levels and exposure in entertainment venues and events such

²⁴ Sec. 12, EMCA.

²⁵ ‘The Nairobi City County Public Nuisance Act 2021 Signed into Law. | Nairobi City County’ (20 August 2021) <<https://nairobi.go.ke/nairobi-city-county-public-nuisance-act-2021-signed-law/>> accessed 25 March 2023.

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as clubs, bars, fitness centres, concerts.²⁶ WHO also advises that such legislation should focus on: limiting sounds to 100 dB(A) averaged over 15 minutes; conducting regular sound monitoring to ensure and document compliance; optimizing venue acoustics and sound system design to ascertain optimal listening conditions for all audience members in the venue/event; create quiet zones allowing audience members to rest; ensuring provision of hearing protection (earplugs); and ensuring provision of training on noise reduction strategies and information about noise.²⁷

It is worth pointing that there is still a lot of confusion on who between NEMA and the county governments should substantively deal with the noise pollution menace. This may, therefore, call for some updates and/or amendments to EMCA to capture and clarify the constitutional position on this issue.

Meanwhile, while under the Constitution of Kenya 2010, the national government, has the role of protecting the environment and natural resources,²⁸ and county governments have a role in pollution control²⁹ and implementation of specific national government policies on natural resources and environmental conservation including soil and water conservation and forestry,³⁰ the counties should work closely with the national government and other stakeholders in discharging some of these duties considering that they may traverse various counties and may require some major steps from both national and county levels of government.

²⁶ 'Compendium of WHO and Other UN Guidance on Health and Environment' <<https://www.who.int/publications-detail-redirect/WHO-HEP-ECH-EHD-22.01>> accessed 25 March 2023, p. 152.

²⁷ Ibid, p. 152.

²⁸ Fourth Schedule, S. 22.

²⁹ S. 3 of Part II.

³⁰ Fourth Schedule, S. 10.

4.2. Use of Appropriate Technology for Noise Mapping

One of the most effective methods for identifying the crucial locations in urban, suburban, and rural areas is noise monitoring under various traffic and environmental conditions.³¹

The level of noise in a given area at a given moment is depicted cartographically as a noise map. Aside from general evaluation, noise maps are also used to assess the impact of new roads and highways within metropolitan areas as well as the noise levels during various phases of any development project. As a result, noise maps are a valuable strategic tool for planning metropolitan areas and making environmental management decisions.³²

The idea that it is crucial to gauge the amount of noise coming from particular sources and communicate that information to those who are nearby the source of the noise is well-founded. This will enable the public to understand the noise levels to which they are exposed and to create mechanisms for reducing the noise to acceptable levels.³³ One of the suggested ways of doing this is geographic information system (GIS). A geographic information system (GIS) is a computer-based system that makes it possible to input, manage, analyse, produce, and disseminate geographically referenced, land-related data and information at all scales. Auditory circumstances are well-presented spatially on noise maps. GIS helps in creating a spatial decision support system that can be applied in the decision-making process and offers effective tools for visualising noise propagation. As a result, such analysis and management procedures might leverage noise maps created in GIS.³⁴ GIS offers a potent set of tools for storing and retrieving, processing, and displaying spatial data from the real world for a specific set of uses.³⁵

³¹ Alam, P., Ahmad, K., Afsar, S.S. and Akhtar, N., 'Noise Monitoring, Mapping, and Modelling Studies—a Review' (2020) 21 *Journal of Ecological Engineering*, p.82.

³² Manojkumar N, Basha K and Srimuruganandam B, 'Assessment, Prediction and Mapping of Noise Levels in Vellore City, India' (2019) 6 *Noise Mapping* 38, p.40.

³³ Wawa EA and Mulaku GC, 'Noise Pollution Mapping Using GIS in Nairobi, Kenya' (2015) 7 *Journal of Geographic Information System* 486, pp. 486-87.

³⁴ *Ibid*, p. 487.

³⁵ Hadzi-Nikolova, M., Mirakovski, D., Ristova, E. and Stefanovska Ceravolo, L., 'Modeling and Mapping of Urban Noise Pollution with SoundPLAN Software' (2012)

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In order to create a graphic depiction of the distribution of sound levels over a certain location for a specific time period, noise mapping entails measuring sound levels at predetermined sites and using the generated data. Assessing compliance with permissible noise levels, putting in place noise reduction measures, and tracking the effects of such actions can all be done using noise maps.³⁶

Some authors have praised SoundPLAN Software, a software package offering a wide variety of noise and air pollution evaluation modules, developed by SoundPLAN International LLC and Braunstein + Berndt GmbH. It is perhaps the world's top environmental forecast programme and is used by more than 5,000 users, including governments, consultants, and researchers in more than 40 nations.³⁷

It is suggested that the government of Kenya and/or County Governments should invest in such tools in order to enhance noise mapping in the country.

4.3. Need for Integration of Health in Urban and Territorial Planning

As already pointed, there are various sources of noise especially in urban areas. As a result, there is a need for urban and city planners to take these sources of noise into consideration. Target 3.9 of Sustainable Development Goal (SDG) 3 urges countries to ensure that by 2030, they substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination.³⁸ This is closely related to SDG 11 which provides that countries should ensure that they make cities and human settlements inclusive, safe, resilient and sustainable.³⁹ Target 11.a seeks to

6 International Journal for Science, Technics and Innovations for the Industry MTM (Machines, Tecnologies, Materials) 38, p.38.

³⁶ Wawa EA and Mulaku GC, 'Noise Pollution Mapping Using GIS in Nairobi, Kenya' (2015) 7 Journal of Geographic Information System 486, p. 488.

³⁷ Hadzi-Nikolova, M., Mirakovski, D., Ristova, E. and Stefanovska Ceravolo, L., 'Modeling and Mapping of Urban Noise Pollution with SoundPLAN Software' (2012) 6 International Journal for Science, Technics and Innovations for the Industry MTM (Machines, Tecnologies, Materials) 38, p.38.

³⁸ 'Goal 3 | Department of Economic and Social Affairs' <<https://sdgs.un.org/goals/goal3>> accessed 25 March 2023.

³⁹ 'Goal 11 | Department of Economic and Social Affairs' <<https://sdgs.un.org/goals/goal11>> accessed 25 March 2023.

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support positive economic, social and environmental links between urban, peri-urban and rural areas by strengthening national and regional development planning. In addition, Target 11.b seeks to ensure that by 2020, countries substantially increase the number of cities and human settlements adopting and implementing integrated policies and plans towards inclusion, resource efficiency, mitigation and adaptation to climate change, resilience to disasters, and develop and implement, in line with the Sendai Framework for Disaster Risk Reduction 2015-2030, holistic disaster risk management at all levels.⁴⁰

The Physical and Land Use Planning Act, 2019⁴¹ provides that one of the things that should be considered in the contents of local physical and land use development plans is aspects of housing, unemployment, traffic congestion, pollution, land tenure, lack of services, terrain, soils.⁴²

5. Conclusion

As discussed in this paper, noise pollution has various adverse effects on human health and thus poses a risk to the realisation of Article 42 of the Constitution of Kenya on the right to clean and healthy environment for all. As a result, it is important that all stakeholders join hands in addressing the menace for the sake of all, and promoting public health. It is not the time to point fingers and watch as the general populace suffers; both levels of government should respond to the cry for help from their citizens and address the problem of noise pollution.

⁴⁰ Ibid.

⁴¹ Physical and Land Use Planning Act, No. 13 of 2019, Laws of Kenya.

⁴² Ibid, sec.48; Second Schedule.

Combating Environmental Degradation for Posterity

Abstract

Environmental degradation relates to damage or disturbance of the environment that results in the depletion or deterioration of natural resources. It is a major global challenge in the 21st century that threatens the realization of Sustainable Development. Addressing environmental degradation is therefore vital for sustainability. This paper critically discusses the need to combat environmental degradation. It argues that environmental degradation is a major threat to the attainment of Sustainable Development. The paper posits that combating environmental degradation is vital for posterity of both humanity and nature. It examines some of the measures adopted towards combating environmental degradation at global, regional, and national levels and related challenges. The paper further offers suggestions towards combating environmental degradation for posterity.

1.0 Introduction

Environmental degradation is the deterioration of the environment through depletion or disturbance of natural resources such as air, water and soil; the destruction of ecosystems and the extinction of wildlife and biodiversity¹. It is also defined as any change or disturbance to the environment perceived to be deleterious or undesirable². Environmental degradation can also be understood as the process through which the natural environment is compromised in some way, reducing biological diversity and the general health of the environment³. It has also been asserted that environmental degradation is the deterioration of the environment through depletion of resources which includes all the biotic and abiotic element that form our surrounding including air, water, soil, plants, animals, and all other living and

¹ United Nations Economic and Social Commission for Western Asia., 'Environmental Degradation' Available at <https://archive.unescwa.org/environmental-degradation> (Accessed on 07/03/2024)

² Ibid

³ Environmental Degradation., Available at <https://www.eionet.europa.eu/gemet/en/concept/15154> (Accessed on 07/03/2024)

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non-living element on the planet⁴. From the foregoing definitions, it emerges that environmental degradation relates to damage or disturbance of the environment that results in the depletion or deterioration of natural resources.

It has been noted that environmental degradation can be entirely natural in origin, or it can be accelerated or caused by human activities⁵. Some of the natural causes of environmental degradation include natural floods, typhoons, droughts, rising temperatures, wild fires among others⁶. However, it has been noted that human induced activities are the major cause of environmental degradation⁷. These activities include land misuse, soil erosion and loss, desertification, wildland fires, destruction of biodiversity, deforestation, mangrove destruction, land, water and air pollution⁸. In addition, it has been pointed out that some of the major factors of environmental degradation are human related activities including modern urbanization, industrialization, population growth, and deforestation among others⁹.

Environmental degradation is a major global challenge in the 21st Century¹⁰. It has been identified as an alarming issue that threatens sustainability¹¹. It has been noted that environmental degradation affects multidimensional aspects of a nation in terms of economics, social, and environment development¹². For example, the United Nations Environment Programme (UNEP) points out that

⁴ Maurya. P. K et al., 'An Introduction to Environmental Degradation: Causes, Consequence and Mitigation' Available at <https://www.aesacademy.org/books/edcrs-vol-1/01.pdf> (Accessed on 07/03/2024)

⁵ Ibid

⁶ Ibid

⁷ United Nations Office for Disaster Risk Reduction., 'Environmental Degradation from Conflict' Available at <https://www.undrr.org/understanding-disaster-risk/terminology/hips/so0005> (Accessed on 07/03/2024)

⁸ Ibid

⁹ Maurya. P. K et al., 'An Introduction to Environmental Degradation: Causes, Consequence and Mitigation' Op Cit

¹⁰ Lee. W. H., Husaini. D. H., & Lean. H. H., 'The Renewable Energy-Water-Environment Nexus' *Fundamentals, Technology, and Policy* (2024) pp 177-203

¹¹ Ibid

¹² Ibid

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almost a quarter of the world's total land area has been degraded¹³. UNEP notes that this creates enormous problems not only for the billions of people who directly depend on agriculture, but it has far-reaching impacts affecting every single person on this planet today¹⁴. These impacts include food shortages, volatility and increases in global food prices caused by declines in the productivity of croplands; heightened impacts of climate change globally caused by the release of carbon and nitrous oxide from degrading land; and the threat of social instability from the forced migration that will result¹⁵. UNEP estimates that if current trends continue, 95 per cent of the Earth's land areas could become degraded within the next 30 years¹⁶.

Environmental degradation is also causing or worsening the triple planetary crisis of climate change, loss of biodiversity, and pollution¹⁷. These problems have been identified as the most pressing issues facing humanity today that need to be urgently resolved for the benefit of both humanity and nature¹⁸. Combating environmental degradation is therefore key in addressing the triple planetary crisis¹⁹.

This paper critically discusses the need to combat environmental degradation. It argues that environmental degradation is a major threat to the attainment of Sustainable Development. The paper posits that combating environmental degradation is vital for posterity of both humanity and nature. It examines some of the measures adopted towards combating environmental degradation at global, regional, and national levels and related challenges. The paper

¹³ United Nations Environment Programme., 'Land Degradation' Available at <https://www.unep.org/gef/focal-areas/land-degradation#:~:text=UNEP%20has%20been%20a%20world,best%20to%20restore%20degraded%20lands>. (Accessed on 07/03/2024)

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Available at <https://unfccc.int/news/what-is-the-triple-planetary-crisis> (Accessed on 07/03/2024)

¹⁸ Ibid

¹⁹ Ibid

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further offers suggestions towards combating environmental degradation for posterity.

2.0 Combating Environmental Degradation: Opportunities and Setbacks

Combating environmental degradation is a key theme under the United Nation's *2030 agenda for Sustainable Development*²⁰. It sets out the goal of protecting the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations²¹. The Agenda acknowledges that the world is currently facing environmental problems including natural resource depletion and adverse impacts of environmental degradation including desertification, drought, land degradation, freshwater scarcity and loss of biodiversity which hinder the achievement of Sustainable Development²². The Sustainable Development Goals (SDGs) set out under the agenda further contain targets geared towards combating environmental degradation²³. For example, one of the targets under SDG 8 (promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all) is to decouple economic growth from environmental degradation in order to achieve Sustainable Development²⁴. In addition SDG 15 seeks to Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and biodiversity loss²⁵. Among the specific targets under SDG 15 aimed at addressing the problem of environmental degradation is SDG 15.3 which aims to combat desertification, restore degraded land and soil, including land affected by desertification, drought, and floods, and strive to achieve a land

²⁰ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 08/03/2024)

²¹ Ibid

²² Ibid

²³ Ibid

²⁴ Ibid, Sustainable Development Goal 8.4

²⁵ Ibid, Sustainable Development Goal 15

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degradation- neutral world²⁶; and SDG 15.5 which urges all countries to take urgent and significant action to reduce the degradation of natural habitats, halt the loss of biodiversity, and protect and prevent the extinction of threatened species²⁷.

The 2030 Agenda for Sustainable Development and its SDGs reflect an understanding that Sustainable Development everywhere must integrate economic growth, social well-being and environmental protection²⁸. Combating environmental degradation is therefore vital for the realization of Sustainable Development.

At a continental level, Africa Union's *Agenda 2063*²⁹ acknowledges the problem of environmental degradation in Africa. According to Agenda 2063, Africa's natural resources are facing increasing challenges such as biodiversity loss, land degradation, and desertification³⁰. It notes that land degradation and desertification are impacting over forty three per cent of Africa's land surface with serious environmental and socio-economic consequences³¹. Agenda 2063 further points out that Africa has lost over four million hectares of forests annually over the past two decades due to extensive agricultural practices, unregulated and unsustainable wood harvesting and illegal commercial logging³². In addition, Agenda 2063 further asserts that deforestation results in significantly environmental degradation, diminished earnings with negative social and environmental consequences, including: deterioration of ecological systems with resulting negative impacts on soil fertility, water availability and biological resources and acute shortages of fuel wood and construction

²⁶ Ibid, Sustainable Development Goal 15.3

²⁷ Ibid, Sustainable Development Goal 15.5

²⁸ United Nations., 'The Sustainable Development Agenda' Available at <https://www.un.org/sustainabledevelopment/development-agenda/> (Accessed on 08/03/2024)

²⁹ Africa Union., 'Agenda 2063: The Africa we Want' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 08/03/2024)

³⁰ Ibid

³¹ Ibid

³² Ibid

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material in many parts of Africa³³. Further, Agenda 2063 acknowledges that there has been degradation of Africa's blue economy through dumping of toxic waste, oil spills, degradation of the marine environment³⁴. Agenda 2063 also identifies climate change as a key threat to Africa's blue economy with its effects most notably the rising ocean temperatures and ocean acidification leading to the weakening of the capacity of the ocean carbon sink and loss of fishery resources, and also reduction in the size of water bodies, such as Lake Chad³⁵. Agenda 2063 envisions a continent where land degradation and desertification would have been stopped and then reversed; all agricultural land will be managed in a manner that is environmentally and socially sustainable; all African countries would have reduced loss of biodiversity by at least ninety per cent; and natural habitats conserved³⁶. It is therefore necessary for Africa to implement the goals and aspirations of Agenda 2063 in order to unlock Sustainable Development in the continent and solve pressing environmental challenges such as environmental degradation.

Some of the key Conventions adopted towards combating environmental degradation include the *United Nations Convention to Combat Desertification*³⁷. The Convention seeks to combat desertification which is a problem that arises from environmental degradation³⁸. The Convention defines desertification as land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities³⁹. According to the Convention, combating desertification includes activities which are part of the integrated development of land in arid, semi-arid and dry sub-humid areas for Sustainable Development which are aimed at prevention and/or reduction of land degradation; rehabilitation of partly

³³ Ibid

³⁴ Ibid

³⁵ Ibid

³⁶ Ibid

³⁷ United Nations Convention to Combat Desertification., Available at https://catalogue.unccd.int/936_UNCCD_Convention_ENG.pdf (Accessed on 08/03/2024)

³⁸ Ibid

³⁹ Ibid

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degraded land; and reclamation of desertified land⁴⁰. The Convention therefore envisages combating desertification by restoring degraded and desertified land⁴¹. It requires contracting parties to implement effective strategies aimed at rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at the community level⁴².

In addition, the *Convention on Biological Diversity*⁴³ was adopted to foster the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources⁴⁴. The Convention notes the problem of degradation of biological diversity and acknowledges that biological diversity is being significantly reduced by certain human activities⁴⁵. According to the Convention, the conservation of biological diversity is a common concern of humankind⁴⁶. It identifies several ways of conserving biological diversity including in-situ conservation which refers to the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings⁴⁷; and ex-situ conservation which entails the conservation of components of biological diversity outside their natural habitats⁴⁸. As part of in-situ conservation, the Convention on Biological Diversity urges contracting parties to *rehabilitate and restore degraded ecosystems* and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies (Emphasis added)⁴⁹. It also urges contracting parties to support local populations to develop and implement remedial action in degraded areas

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

⁴³ United Nations., 'Convention on Biological Diversity.' Available at <https://www.cbd.int/doc/legal/cbd-en.pdf>, (Accessed on 08/03/2024)

⁴⁴ Ibid, article 1

⁴⁵ Ibid, Preamble

⁴⁶ Ibid

⁴⁷ Ibid, article 2

⁴⁸ Ibid

⁴⁹ Ibid, article 8 (f)

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where biological diversity has been reduced⁵⁰. Implementing this Convention is therefore necessary in order to combat degradation of biological diversity.

At a continental level, the *African Convention on the Conservation of Nature and Natural Resources*⁵¹ acknowledges the threat of environmental degradation in Africa. According to the Convention, African States are responsible for protecting and conserving their environment and natural resources and for using them in a sustainable manner with the aim to satisfy human needs according to the carrying capacity of the environment⁵². Among the objectives of the Convention is 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 programmes⁵³. The Convention acknowledges the right of all people in Africa to a satisfactory environment favourable to their development; the duty of States, individually and collectively to ensure the enjoyment of the right to development; and the duty of States to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner⁵⁴. In order to achieve its objectives, the Convention urges African states to take effective measures to *prevent land degradation*, and to that effect shall develop long-term integrated strategies for the conservation and sustainable management of land resources, including soil, vegetation and related hydrological processes (Emphasis added)⁵⁵. Further, the Convention requires states to ensure that non-agricultural forms of land use, including public works, mining and the disposal of wastes, do not result in erosion, pollution, or any other form of land degradation⁵⁶. Further, in areas affected by land degradation, the Convention requires states to plan and implement *mitigation*

⁵⁰ Ibid, article 10 (d)

⁵¹ African Union., African Convention on the Conservation of Nature and Natural Resources., Available at https://au.int/sites/default/files/treaties/41550-treatyCharter_ConservationNature_NaturalResources.pdf (Accessed on 08/03/2024)

⁵² Ibid, Preamble

⁵³ Ibid, article II

⁵⁴ Ibid, article III

⁵⁵ Ibid, article VI (1)

⁵⁶ Ibid, article VI (3) (c)

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and rehabilitation measures (*Emphasis added*)⁵⁷. The Convention sets out several ways of combating environmental degradation in Africa including conservation and sustainable use of natural resources, and the restoration and rehabilitation of degraded ecosystems⁵⁸. The African Convention on the Conservation of Nature and Natural Resources is therefore instrumental in combating environmental degradation in Africa. It is necessary to implement it in order to achieve this goal.

Further, at a national level, the *Constitution of Kenya*⁵⁹ enshrines the right of every person to a clean and healthy environment⁶⁰. It has been argued that eliminating practices that contribute to deterioration or degradation of the environment can go a long way in promoting the realisation of the right to clean and healthy environment for all⁶¹. In order to achieve this goal, the Constitution requires the state to undertake several measures which include ensuring sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and the equitable sharing of the accruing benefits; working to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; encouraging public participation in the management, protection and conservation of the environment; protecting genetic resources and biological diversity; establishing systems of environmental impact assessment, environmental audit and monitoring of the environment; and eliminating processes and activities that are likely to endanger the environment⁶². It is therefore necessary for the state to fulfill its obligations in respect of the environment in order to combat environmental degradation in Kenya.

⁵⁷ Ibid, article VI (3) (d)

⁵⁸ Ibid

⁵⁹ Constitution of Kenya., 2010., Government Printer, Nairobi

⁶⁰ Ibid, article 42

⁶¹ Muigua. K., 'Reconceptualising the Right to Clean and Healthy Environment in Kenya' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-7th-september-2015.pdf> (Accessed on 08/03/2024)

⁶² Constitution of Kenya., 2010., article 69 (1)

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In addition, the *Environmental Management and Co-ordination Act (EMCA)*⁶³ of Kenya seeks to foster the realization of a clean, healthy, and sustainable environment in Kenya by addressing environmental challenges including degradation. In order to realize a clean, healthy, and sustainable environment in Kenya, the Act gives powers to the Environment and Land Court (ELC) to compel the persons responsible for the environmental degradation to *restore the degraded environment* as far as practicable to its immediate condition prior to the damage (Emphasis added)⁶⁴. The Act further mandates the National Environment Management Authority (NEMA) to initiate and evolve procedures and safeguards for the prevention of accidents which may cause environmental degradation and evolve remedial measures where accidents occur; and develop, publish and disseminate manuals, codes or guidelines relating to environmental management and prevention or *abatement of environmental degradation* (Emphasis added)⁶⁵. It also establishes a National Environment Restoration Fund as supplementary insurance for the mitigation of environmental degradation where the perpetrator is not identifiable or where exceptional circumstances require NEMA to intervene towards the control or mitigation of environmental degradation⁶⁶. The Act further requires the conservation of specific ecosystems from degradation including river basins, lake basins, wetlands, coastal zones, forests, hilly and mountainous areas, and the ozone layer⁶⁷. Effective implementation of EMCA is thus key in combating environmental degradation in Kenya. NEMA also has a key role to play in combating environmental degradation in Kenya. It has issued several regulations towards achieving this objective such as the *Environmental (Impact Assessment and Audit) Regulations*⁶⁸; *Water Quality Regulations*⁶⁹; *Wetlands*

⁶³ Environmental Management and Co-ordination Act, No. 8 of 1999, Government Printer, Nairobi

⁶⁴ Ibid, S 3 (3) (d)

⁶⁵ Ibid, S 9

⁶⁶ Ibid, S 25

⁶⁷ Ibid

⁶⁸ Environmental (Impact Assessment and Audit) Regulations, Legal Notice No. 101, Government Printer, Nairobi

⁶⁹ Environmental Management and Co-Ordination (Water Quality) Regulations, 2006, Legal Notice No. 120, Government Printer, Nairobi

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*Regulations*⁷⁰; and *Waste Management Regulations*⁷¹. Effective implementation of these Regulations is needed in order to address the challenge of environmental degradation in Kenya.

Despite the foregoing attempts, it has been noted that the problem of environmental degradation continues to mount at the global, continental, and national levels⁷². According to UNEP, destruction of nature has far-reaching consequences⁷³. Damaged and degraded ecosystems worsen climate change, undermine food security and put people and communities at risk⁷⁴. Environmental degradation is a major problem which hinders the realization of SDGs relating to combating poverty, achieving food security, promoting good health and well-being, ensuring access to clean water and sanitation, achieving clean and affordable energy for all, combating climate change, fostering the blue economy, and ensuring sustainable use of terrestrial ecosystems⁷⁵. It is therefore necessary to combat environmental degradation for posterity of both humanity and nature.

3.0 Way Forward

One of the key approaches towards combating environmental degradation is the restoration and rehabilitation of damaged or degraded ecosystems⁷⁶. These are practices aimed at returning ecosystems to a healthy state as was before such ecosystems were degraded⁷⁷. Restoration has been defined as a process of improvement of degraded land and ecosystems on a large scale that

⁷⁰ Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009, Legal Notice No. 19, Government Printer, Nairobi

⁷¹ Environmental Management and Co-Ordination (Waste Management) Regulations 2006, Legal Notice No. 121

⁷² United Nations Environment Programme., 'Facts about the Nature Crisis' Available at <https://www.unep.org/facts-about-nature-crisis> (Accessed on 08/03/2024)

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Mentis. M., 'Environmental Rehabilitation of Damaged Land' *Forest Ecosystems.*, Volume 7, No. 19 (2020)

⁷⁷ Ibid

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rebuilds ecological integrity and enhances people's lives⁷⁸. It aims to recover the ecological functionality and enhance human well-being in deforested and degraded landscapes and ecosystems⁷⁹. Rehabilitation on the other hand seeks to reverse ill effects on the environment and natural resources as a result of ill-effects such as loss of biodiversity, land capability loss, landscape destabilization, nutrient impoverishment, overgrazing, and soil organic carbon loss among others⁸⁰. These processes are essential in the recovery of ecosystems that have been degraded or destroyed, as well as conserving the ecosystems that are still intact⁸¹. It has been noted that healthier ecosystems, with richer biodiversity, yield greater benefits such as more fertile soils, bigger yields of timber and fish, and larger stores of greenhouse gases⁸². It is therefore necessary to restore and rehabilitate degraded ecosystems in order ensure a healthier, cleaner, and safer, and sustainable environment⁸³. This can be achieved through approaches such as restoring forest landscapes through reforestation, agroforestry, embracing regenerative agricultural practices, improved protection and management of landscapes and ecosystems, eliminating invasive species in order to curtail their impact on ecosystems, and planting endangered vegetation⁸⁴.

In addition, it is imperative to transform food systems to become more sustainable and resilient in order to reverse environmental degradation, restore ecosystems and ensure food and nutritional security⁸⁵. It has been noted that agriculture has altered the face of the planet more than any other

⁷⁸ Food and Agriculture Organization., 'The Key Role of Forest and Landscape Restoration in Climate Action.' Available at <https://www.fao.org/documents/card/en/c/cc2510en> (Accessed on 08/03/2024)

⁷⁹ Ibid

⁸⁰ Mentis. M., 'Environmental Rehabilitation of Damaged Land' Op Cit

⁸¹ United Nations Environment Programme., 'Decade on Ecosystem Restoration' Available at <https://www.unep.org/explore-topics/ecosystems-and-biodiversity/what-we-do/decade-ecosystem-restoration> (Accessed on 08/03/2024)

⁸² Ibid

⁸³ Ibid

⁸⁴ United Nations Environment Programme., 'In Africa, Restoring Ecosystems is Central to Green Recovery' Available at <https://www.unep.org/news-and-stories/story/africa-restoring-ecosystems-central-green-recovery>

⁸⁵ United Nations Environment Programme., 'Facts about the Nature Crisis' Op Cit

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human activity⁸⁶. For example, the use of pesticides and fertilizers has resulted in serious air and water pollution⁸⁷. It has been argued that current food systems have been following the “cheaper food paradigm”, with a goal of producing more food at lower costs through increasing inputs such as fertilizers, pesticides, energy, land and water⁸⁸. This approach leads to a vicious circle: the lower cost of food production creates a bigger demand for food that must also be produced at a lower cost through more intensification and further land clearance⁸⁹. This has resulted in environmental degradation due to over cultivation, deforestation in order to acquire more land for farming, loss of biodiversity and the threat of climate change with the global food system estimated to account for nearly thirty per cent of total human-produced emissions⁹⁰. Therefore, it is necessary to change global food systems through measures such as changing global dietary patterns, protecting and setting aside land for nature, and farming in a more nature-friendly and biodiversity-supporting way in order to combat environmental degradation arising from agricultural practices⁹¹.

It is also necessary to combat land degradation and desertification⁹². The phenomenon of desertification has been identified as one of greatest environmental challenges of our time⁹³. It has been noted that desertification is not necessarily the natural expansion of existing deserts but rather the degradation of land over time due to practices such as over- cultivation,

⁸⁶ Ibid

⁸⁷ Food and Agriculture Organization., ‘Agriculture and the Environment: Changing Pressures, Solutions and Trade-Offs’ Available at <https://www.fao.org/3/y4252e/y4252e14.htm> (Accessed on 08/03/2024)

⁸⁸ United Nations Environment Programme., ‘Our Global Food System is the Primary Driver of Biodiversity Loss’ Available at <https://www.unep.org/news-and-stories/press-release/our-global-food-system-primary-driver-biodiversity-loss> (Accessed on 08/03/2024)

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Ibid

⁹² United Nations., ‘World Day to Combat Desertification and Drought, 17 June’ Available at <https://www.un.org/en/observances/desertification-day> (Accessed on 08/03/2024)

⁹³ Ibid

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overgrazing, deforestation and poor irrigation techniques⁹⁴. Further, it has been observed that although desertification is primarily man-made, it is exacerbated by the extreme weather, such as droughts as a result of climate change⁹⁵. Desertification is a major problem that results in environmental degradation through loss of biodiversity, loss of productive land resulting in poverty and hunger, and climate change⁹⁶. It is therefore vital to address the problem of desertification. This calls for rehabilitation of land to restore soil fertility, embracing sustainable water management practices, curbing land degradation through tree-planting efforts, and restoring degraded land⁹⁷.

In addition, it has been observed that there is need to halt and reverse biodiversity loss⁹⁸. The loss of biodiversity has been identified as among the triple planetary crisis alongside pollution and climate change⁹⁹. It has been noted that biodiversity is the baseline for everything on the planet and its loss impacts food supplies and access to clean water therefore impacting the survival of both humanity and nature¹⁰⁰. According to UNEP, species are now disappearing hundreds, or even thousands, of times faster than the natural background rate of extinction¹⁰¹. The loss of biodiversity impacts food security, availability of medicines, fresh air and water, shelter, and a clean and healthy environment in which to live¹⁰². It is therefore critical to halt and reverse the loss of biodiversity¹⁰³. There is an urgent need for all countries to place

⁹⁴ United Nations Environment Programme., 'From Chile to China: The Global Battle against Desertification' Available at <https://www.unep.org/news-and-stories/story/chile-china-global-battle-against-desertification#:~:text=For%20nearly%2050%20years%2C%20UNEP,take%20coordinated%20action%20against%20desertification>. (Accessed on 08/03/2024)

⁹⁵ Ibid

⁹⁶ Earth. Org., 'Desertification: Causes, Effects, And Solutions' Available at <https://earth.org/what-is-desertification/> (Accessed on 08/03/2024)

⁹⁷ Ibid

⁹⁸ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Op Cit

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ United Nations Environment Programme., 'UNEP and Biodiversity' Available at <https://www.unep.org/unep-and-biodiversity> (Accessed on 08/03/2024)

¹⁰² Ibid

¹⁰³ Ibid

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biodiversity at the heart of the environment and development decision-making to enable enlightened choices for people and the planet¹⁰⁴.

There is also need to tackle pollution¹⁰⁵. This problem results in environmental degradation by straining ecosystems and reducing or even eliminating populations of sensitive species¹⁰⁶. Further, it has been noted that contamination as a result of pollution may reverberate along the food chain causing mass environmental destruction. For example, the use herbicides and pesticides in agricultural land may result in these chemicals being absorbed into rivers that flow through protected areas, causing poisoning of wildlife and fish¹⁰⁷. Further, it has been noted that air pollution is already the most significant environmental health risk and a major cause of death and disability, and its future impact is likely to be even worse without adequate measures¹⁰⁸. It is estimated that outdoor air pollution may cause between 6 million and 9 million premature deaths a year worldwide by 2060, and cost 1 per cent of global Gross Domestic Product (GDP) as a result of sick days, medical bills and reduced agricultural output¹⁰⁹. Pollution is therefore a major cause of environmental degradation which affects food security and safety, air and water quality, and the health of humanity and nature¹¹⁰. Addressing pollution is therefore not only an environmental priority, but also a prerequisite for the achievement of the SDGs¹¹¹. It is therefore necessary to tackle pollution through approaches such as effective waste management, enforcement of laws

¹⁰⁴ Ibid

¹⁰⁵ Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Available at <https://kmco.co.ke/wp-content/uploads/2020/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf> (Accessed on 08/03/2024)

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Organisation for Economic Co-operation and Development., 'Air Pollution and Environmental Degradation' Available at <https://www.oecd-ilibrary.org/sites/ede592e3-en/index.html?itemId=/content/component/ede592e3-en> (Accessed on 08/03/2024)

¹⁰⁹ Ibid

¹¹⁰ United Nations Environment Programme., 'Beat Pollution' Available at <https://www.unep.org/beatpollution/> (Accessed on 08/03/2024)

¹¹¹ Ibid

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and policies on pollution, public empowerment and participation, and embracing incentive-based approaches¹¹². Tackling pollution is an important approach in combating environmental degradation.

Finally, there is an urgent need to combat climate change which is the most pressing issue facing humanity today¹¹³. The impacts of climate change are already being manifested all over the world through increased intensity and severity of droughts, water scarcity, wildfires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity¹¹⁴. It has been noted that climate change is likely to exacerbate gradual processes of environmental degradation and the frequency and intensity of natural disasters, both slow-onset (such as desertification, drought, coastal erosion) and sudden onset (including tropical storms, flash floods)¹¹⁵. Further, it has been correctly asserted that climate change and environmental degradation each occur in parallel, as well as the relationship between them becoming a vicious cycle, with climate change inducing environmental degradation and biodiversity loss, which then further exacerbates climate change¹¹⁶. It is therefore necessary to tackle climate change in order to combat environmental degradation¹¹⁷. Further, combating environmental degradation plays a key role in tackling climate change¹¹⁸. SDG 13 urges all countries to take urgent

¹¹² Muigua, K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit

¹¹³ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Op Cit

¹¹⁴ Ibid

¹¹⁵ International Organization for Migration., 'Climate Change, Environmental Degradation, and Migration' Available at https://www.iom.int/sites/g/files/tmzbd1486/files/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/climate-change-2011/background_paper.pdf (Accessed on 08/03/2024)

¹¹⁶ United Nations Development Programme., 'Climate Change, Environmental Degradation, Conflict, and Displacement in the Arab States Region' Available at https://www.undp.org/sites/g/files/zskgke326/files/202306/climate_environmental_security_rbas_policy_brief_may_2023.pdf (Accessed on 08/03/2024)

¹¹⁷ Ibid

¹¹⁸ Ibid

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action to combat climate change and its impacts¹¹⁹. It is therefore necessary for all countries to embrace and strengthen climate change mitigation and adaptation actions in order to combat environmental degradation¹²⁰.

4.0 Conclusion

Environmental degradation is a major global challenge that threatens attainment of Sustainable Development¹²¹. It is causing and also worsening the triple planetary crisis of climate change, loss of biodiversity, and pollution¹²². Environmental degradation is hindering the realization of all SDGs including those relating to combating poverty, achieving food security, promoting good health and well-being, ensuring access to clean water and sanitation, achieving clean and affordable energy for all, combating climate change, fostering the blue economy, and ensuring sustainable use of terrestrial ecosystems¹²³. Environmental degradation is still prevalent all over the world as evidenced by cases of land misuse, soil erosion and loss, desertification, wildland fires, destruction of biodiversity, deforestation, mangrove destruction, land, water and air pollution¹²⁴. It is necessary to combat environmental degradation for posterity of both nature and humankind. In order to achieve this goal, there is need to restore and rehabilitate damaged or degraded ecosystems¹²⁵; transform food systems to become more sustainable and resilient¹²⁶; combat land degradation and desertification¹²⁷; halt and reverse biodiversity loss¹²⁸;

¹¹⁹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1. Sustainable Development Goal 13

¹²⁰ United Nations Development Programme., 'Climate Change, Environmental Degradation, Conflict, and Displacement in the Arab States Region' Op Cit

¹²¹ Lee. W. H., Husaini. D. H., & Lean. H. H., 'The Renewable Energy-Water-Environment Nexus' Op Cit

¹²² United Nations Climate Change., 'What is the Triple Planetary Crisis?' Op Cit

¹²³ United Nations Environment Programme., 'Facts about the Nature Crisis' Op Cit

¹²⁴ United Nations Office for Disaster Risk Reduction., 'Environmental Degradation from Conflict' Op Cit

¹²⁵ Mentis. M., 'Environmental Rehabilitation of Damaged Land' Op Cit

¹²⁶ United Nations Environment Programme., 'Facts about the Nature Crisis' Op Cit

¹²⁷ United Nations., 'World Day to Combat Desertification and Drought, 17 June' Op Cit

¹²⁸ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Op Cit

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tackle pollution¹²⁹; and take urgent action to combat climate change and its impacts¹³⁰. Combating environmental degradation for posterity is an ideal we need to achieve for the benefit of both humanity and nature.

¹²⁹ Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit

¹³⁰ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1. Sustainable Development Goal 13

Enhancing Food Security in Africa

Abstract

This paper critically interrogates the need to enhance food security in Africa. It argues that achieving food security is vital if Africa is to realize the Sustainable Development agenda. The paper explores the progress made towards enhancing food security in Africa. It also examines some of the obstacles facing the realization of food security in Africa. The paper further suggests initiatives which can be adopted towards enhancing food security in Africa.

1.0 Introduction

Food security has been defined as a product of food availability, food access, stability of supplies and biological utilization¹. At the World Food Summit in 1996, it was agreed that food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life². Food security has also been defined to mean access by all people at all times to adequate food for an active healthy life, and entails both the availability of food and the ability of all members to have access to adequate amount of food³. According to the Food and Agriculture Organization (FAO), food security entails several elements including food availability: which refers to the availability of sufficient quantities of food of appropriate quality, supplied through domestic production or imports (including food aid)⁴; food access: which means access by individuals to adequate resources (entitlements) for acquiring appropriate foods for a nutritious diet⁵; utilization: which refers to utilization of food through adequate diet, clean water, sanitation and health care to reach a state of nutritional well-being where all physiological needs are met⁶; and stability: the idea that to be food secure, a population, household or

¹ Gibson. M., 'Food Security – A Commentary: What Is It and Why Is It So Complicated?'

² Food and Agriculture Organization., 'Food Security.' Available at https://www.fao.org/fileadmin/templates/faotaly/documents/pdf/pdf_Food_Security_Cocept_Note.pdf (Accessed on 12/01/2024)

³ Reutlinger, S. and Pellekaan, J.V.H., Poverty and Hunger: Issues and options for food security in developing countries, (The World Bank, 1986)

⁴ Food and Agriculture Organization., 'Food Security.' Op Cit

⁵ Ibid

⁶ Ibid

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individual must have access to adequate food at all times and that they should not risk losing access to food as a consequence of sudden shocks (such as an economic or climatic crisis) or cyclical events including seasonal food insecurity⁷. According to the World Food Programme (WFP), people are considered food secure when they have availability and adequate access at all times to sufficient, safe, nutritious food to maintain a healthy and active life⁸. In addition, it has been asserted that food security is a very important determinant of whether people can lead an active and healthy life, because it determines their access to [foods](#) required to meet nutrient needs⁹.

Achieving food security has been described as a key determinant for the realization of the human right to food towards Sustainable Development¹⁰. The right to food has been defined as the right to have regular, permanent and unrestricted access – either directly or by means of financial purchases – to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear¹¹. This right is enshrined at the international level under the *International Covenant on Economic, Social and Cultural Rights*¹² which recognizes the right of everyone to an adequate standard of living for himself and his family, including *adequate food*, clothing and housing, and to the

⁷ Ibid

⁸ World Food Programme, “What is food security?” available at <https://www.wfp.org/node/359289> (Accessed on 12/01/2024)

⁹ De Pee. S., ‘Food Security.’ *Encyclopedia of Human Nutrition.*, 3rd Edition.,(2013), pp 353-360

¹⁰ Muigua. K., ‘Achieving the Right to Food for Sustainable Development in Kenya.’ Available at <https://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 on 12/01/2024)

¹¹ United Nations Office of the High Commissioner for Human Rights., ‘About the Right to Food and Human Rights.’ Available at <https://www.ohchr.org/en/special-procedures/sr-food/about-right-food-and-human-rights#:~:text=The%20right%20to%20food%20defined&text=The%20Committee%20declared%20that%20%E2%80%9Cthe,or%20means%20for%20its%20procurement.> (Accessed on 12/01/2024)

¹² 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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continuous improvement of living conditions (emphasis added)¹³. It requires all countries recognizing the fundamental right of everyone to be free from hunger, to take, individually and through international co-operation, measures, including specific programmes, which are needed to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge among other measures¹⁴. At a national level, the *Constitution of Kenya*, for example, also recognizes the right of every person to be free from hunger, and to have adequate food of acceptable quality¹⁵.

Food security is at the heart of the Sustainable Development agenda. The United Nation's *2030 Agenda for Sustainable Development* envisions a world where food is sufficient, safe, affordable and nutritious¹⁶. Sustainable Development Goal (SDG) 2 seeks to end hunger, achieve food security, and improved nutrition and promote sustainable agriculture¹⁷. SDG 2 sets out several targets towards enhancing food security which include ensuring access by all people to safe, nutritious and sufficient food all year round; ending all forms of malnutrition; doubling 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;¹⁸ ensuring sustainable food production systems and implementing resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality;¹⁹ increasing investment,

¹³ Ibid, Article 11 (1)

¹⁴ Ibid, Article 11 (2)

¹⁵ Constitution of Kenya., 2010, Article 43 (1) (c)., Government Printer, Nairobi

¹⁶ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 12/01/2024)

¹⁷ Ibid, Sustainable Development Goal 2

¹⁸ Ibid

¹⁹ Ibid

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including through enhanced international cooperation, in rural infrastructure, agricultural research and extension services, technology development and plant and livestock gene banks in order to enhance agricultural productive capacity in developing countries;²⁰ correcting and preventing trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect;²¹ and adopting measures to ensure the proper functioning of food commodity markets and their derivatives and facilitate timely access to market information, including on food reserves, in order to help limit extreme food price volatility²². Achieving the targets of SDG 2 is therefore necessary in order to enhance food security.

Enhancing food security is vital for Sustainable Development in Africa. It has been argued that demand for food across the world is increasing, driven by a range of population and demographic changes including population growth, changes in population structure, consumption growth, and urbanization²³. Meeting the increasing demand for food is potentially constrained by factors such as biological performance, climate change, and the local and planetary boundaries that determine the need for [agriculture](#) to be more sustainable²⁴. Therefore, meeting the challenges associated with food security require more than simply innovating to increase yields, but also demands changes in farming systems to promote the sustainable, and resilient production of food to meet the nutritional requirements of local and global populations²⁵. In light of the foregoing, it has been posited that Africa's food systems must become more resilient and guarantee access to healthy and affordable diets for all²⁶.

²⁰ Ibid

²¹ Ibid

²² Ibid

²³ Benton. T. G., 'Food Security.' Encyclopedia of Applied Sciences., Volume 2, 2nd Edition., (2017), pp 19-22

²⁴ Ibid

²⁵ Ibid

²⁶ Strengthening Africa's Food Systems., Available at https://www.brookings.edu/wp-content/uploads/2023/01/foresightafrica2023_chapter2.pdf (Accessed on 12/01/2024)

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This paper critically interrogates the need to enhance food security in Africa. It argues that achieving food security is vital if Africa is to realize the Sustainable Development agenda. The paper explores the progress made towards enhancing food security in Africa. It also examines some of the obstacles facing the realization of food security in Africa. The paper further suggests initiatives which can be adopted towards enhancing food security in Africa.

2.0 Enhancing Food Security in Africa: Opportunities and Challenges

Enhancing food security is an important agenda in Africa. It has been opined that establishing food security is important for millions of people facing hunger in Africa and is crucial for sustainable economic development and long-term prosperity of the continent²⁷. Enhancing food security is essential to achieving Africa's continental collective development objectives²⁸. It has been posited that increasing food production is key in a context in which food demand in Africa, measured by the growth of its population, is expected to increase by approximately 60% in the year 2030²⁹.

Achieving food security can accelerate socio-economic development in Africa³⁰. It has been estimated that more than two-thirds of Africans depend on agriculture for their income and their basic food needs³¹. Research has shown that countries with higher agricultural growth have lower poverty rates³². Therefore, by improving agriculture and food markets, there is an opportunity to further lift millions of African people out of poverty³³.

²⁷ Munang, R., & Han, Z., 'Food Security: Regional Solutions Key to Solving Africa's Challenges.' Available at <https://www.un.org/africarenewal/web-features/food-security-regional-solutions-key-solving-africa%E2%80%99s-challenges> (Accessed on 12/01/2024)

²⁸ Mendez-Parra, M., & Ayele, Y., 'How African Integration Can Help Achieve Food Security.' Available at <https://odi.org/en/insights/how-african-integration-can-help-to-achieve-food-security/> (Accessed on 12/01/2024)

²⁹ Ibid

³⁰ Ibid

³¹ Australian AID., 'Improving Food Security in Africa.' Available at <https://www.dfat.gov.au/sites/default/files/improving-food-security-africa.pdf> (Accessed on 12/01/2024)

³² Ibid

³³ Ibid

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It has been observed that African countries are making some progress in improving food security³⁴. For example, improvements in democracy and political stability in some countries in Africa have enhanced the prospects for renewed food production, distribution and purchase³⁵. In addition, it has been asserted that markets are freer and private investment in the food sector is growing in some countries³⁶. Further, according to FAO where there has been a restoration of peace and security, people have been able to resume farming and agricultural production has increased³⁷. In addition, it has been pointed out that in some countries, improved food production is allowing farmers to shift to cash crop development in association with private investment in processing and trading³⁸.

The *Africa Agriculture Status Report*³⁹ highlights the progress made towards enhancing food security in Africa. The Report posits that Africa with its vast arable lands and youthful population, holds the potential to not only ensure food security for its people but also play a crucial role in the global food system⁴⁰. According to the Report, specific interventions in some countries have had a significant positive impact on food systems in Africa including promising innovations, initiatives, and policies⁴¹. These interventions include Climate Smart Agriculture practices such as conservation agriculture that includes minimal soil disturbance (no-till farming), permanent soil cover, and crop rotation;⁴² agroforestry which integrates trees into farming systems;⁴³ the adoption of weather based insurance schemes in some African countries;

³⁴ Food and Agriculture Organization., 'Food Security in Africa.' Available at <https://www.fao.org/3/w9290e/w9290e01.htm#:~:text=The%20development%20of%20human%20resources,the%20direct%20causes%20of%20hunger> (Accessed on 12/01/2024)

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

³⁹ Alliance for a Green Revolution in Africa., 'Empowering Africa's Food Systems for the Future.' Issue 11 (2022), Nairobi, Kenya, Available at <https://agra.org/wp-content/uploads/2023/11/AASR-2023.pdf> (Accessed on 12/01/2024)

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

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improved water management practices including rain water harvesting; and irrigation⁴⁴. In addition, the Report notes that practices such as mechanization, adoption of digital technologies, research and development are revolutionizing food systems in Africa, increasing food productivity and enhancing food security⁴⁵.

As a result of the foregoing efforts, it has been pointed out that African countries are making progress towards tackling hunger and poverty by improving food security, nutrition and incomes in their countries⁴⁶. The need to enhance food security in Africa is set out under several legal and policy instruments at the continental, regional and national levels.

Africa Union's *Agenda 2063*⁴⁷ sets out the need to enhance food security in the continent. It states that for Africa, food security is a matter of national security⁴⁸. Agenda 2063 calls for urgent measures for reducing food insecurity and malnutrition in Africa, among them, the need to implement clear and affirmative policies for sustainable food security⁴⁹. Agenda 2063 correctly points out that considerable financial resources are required to finance the socio-economic transformational agenda in key areas including agriculture and food security⁵⁰. It further posits that the implementation of the African Continental Free Trade Area (AfCFTA) will boost food security in Africa through reduction of protection on trade in agricultural produce among African countries⁵¹. Realizing the vision and aspirations of Agenda 2063 can therefore enhance food security in Africa.

In addition, there are a number of continental frameworks and declarations made to combat Africa's food and agriculture problem towards enhancing

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Australian AID., 'Improving Food Security in Africa.' Op Cit

⁴⁷ Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 12/01/2024)

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

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food security. The *Maputo Declaration on Agriculture and Food Security in Africa*⁵² recognizes that it is Africa's responsibility to reinvigorate its food and agriculture sector for the economic prosperity and welfare of its people⁵³. The Declaration sets out certain initiatives geared towards enhancing food security in Africa including revitalizing the agricultural sector including livestock, forestry and fisheries through special policies and strategies targeted at small scale and traditional farmers in rural areas and the creation of enabling conditions for private sector participation, with emphasis on human capacity development and the removal of constraints to agricultural production and marketing, including soil fertility, poor water management, inadequate infrastructure, pests and diseases;⁵⁴ and the establishment of regional food reserve systems, including food stocks, linked to Africa's own production, and the development of policies and strategies under the African Union and the Regional Economic Communities (RECs), to fight hunger and poverty in Africa⁵⁵.

The Maputo Declaration led to the establishment of the Comprehensive Africa Agriculture Development Programme (CAADP) to improve food security and nutrition and increase incomes in Africa's largely agriculture based economies⁵⁶. The CAADP champions reform in the agricultural sector in Africa setting broad targets such as ensuring 6 per cent annual growth in agricultural Gross Domestic Product (GDP), and an allocation of at least 10 per cent of public expenditures to the agricultural sector⁵⁷. It has been pointed out that in the CAADP, Africa as a continent has recognized that enhanced agricultural performance is key to growth and poverty reduction through its direct impact on: job creation and increasing opportunities, especially for

⁵² African Union., 'Declaration on Agriculture and Food Security in Africa.' Assembly/AU/Decl.4- 11 (II)

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Sidler. P., 'Overview on the CAADP, the 2003 Maputo and particularly 2014 Malabo Declarations.' Available at https://www.shareweb.ch/site/Agriculture-and-Food-Security/news/Documents/2018_05_28_overview_caadp_malabo_declaration.pdf

(Accessed on 12/01/2024)

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women and youth; food security and improved nutrition; and strengthening resilience of food systems in Africa⁵⁸.

In addition, the *Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods*⁵⁹ sets out key strategies aimed at enhancing food security in Africa which include, among others: the pursuit of agriculture-led growth as a main strategy to achieve targets on food and nutrition security and shared prosperity;⁶⁰ the exploitation of regional complementarities and cooperation to boost growth;* the application of principles of evidence-based planning, policy efficiency, dialogue, review, and accountability, shared by all New Partnership for Africa's Development (NEPAD) programs;* the use of partnerships and alliances including farmers, agribusiness, and civil society;⁶¹ and supporting implementation at countries levels, and regional coordination and harmonisation⁶². The Declaration sets out several commitments aimed at enhancing food security in Africa among them being enhancing investment finance in agriculture, ending hunger in Africa by 2025, halving poverty by the year 2025, through inclusive agricultural growth and transformation, boosting Intra-African trade in agricultural commodities and services, and enhancing resilience of livelihoods and production systems to climate variability and other related risks⁶³.

Further, at a national level, Kenya's *National Food and Nutrition Security Policy 2011*⁶⁴ was formulated to add value, build synergies and assist with the implementation of existing national and sectoral policies and strategies to effectively address issues of food insecurity and malnutrition in Kenya⁶⁵. The

⁵⁸ Ibid

⁵⁹ Africa Union., 'Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods.' Available at <https://www.resakss.org/sites/default/files/Malabo%20Declaration%20on%20Agriculture%2014%2026-.pdf> (Accessed on 12/01/2024)

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

⁶⁴ Republic of Kenya., *National Food and Nutritional Security Policy*, 2011., Government Printer, Nairobi

⁶⁵ Ibid

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Policy seeks to ensure that all Kenyans, throughout their life-cycle enjoy at all times safe food in sufficient quantity and quality to satisfy their nutritional needs for optimal health⁶⁶. It aims to achieve certain objectives which include achieving good nutrition for optimum health of all Kenyans; increasing the quantity and quality of food available, accessible and affordable to all Kenyans at all times;⁶⁷ and protecting vulnerable populations using innovative and cost-effective safety nets linked to long-term development⁶⁸. Among the key priority areas under the Policy geared towards enhancing food security in Kenya include ensuring food availability and access, promoting food safety, standards and quality control, nutrition improvement, fostering school nutrition and nutrition awareness, enhancing access to food security and nutrition information, promoting early warning and emergency management in the food sector and financing of programmes geared towards enhancing food security⁶⁹.

The foregoing initiatives have played a key role in enhancing food security in Africa. However, several factors are hindering the achievement of food security in Africa. It has been opined that climate change is reversing the downward trend in food insecurity after many years of improvements associated with the economic development of the continent⁷⁰. Climate change impacts food security in Africa by turning areas once perfectly suitable for agriculture production into deserts and modifying rain patterns, increasing uncertainty and reducing yields⁷¹. For example, it has been pointed out that approximately 37 million people in the Greater Horn of Africa are facing acute hunger in one of the region's worst droughts in decades⁷². It has been argued that food supplies and prices are especially vulnerable to climate change in

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Mendez-Parra. M., & Ayele. Y., 'How African Integration Can Help Achieve Food Security.' Op Cit

⁷¹ Ibid

⁷² Mabaya. E., & Richardson. R., & Jayne. T., 'Towards Zero Hunger in Africa: 5 Steps to Achieve Food Security.' Available at

<https://www.preventionweb.net/news/towards-zero-hunger-africa-5-steps-achieve-food-security> (Accessed on 12/01/2024)

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sub-Saharan Africa because of a lack of resilience to climatic events, food import dependence, and excessive government intervention⁷³. Further, most people in Africa live in rural agricultural and fishing communities that cannot afford infrastructure to protect them from adverse weather⁷⁴. For example, they depend on rain to water their crops, and less than 1 percent of arable land is equipped with irrigation⁷⁵. It has also been pointed out that global geopolitics such as the Russian invasion of Ukraine has worsened the food situation in Africa by increasing prices of commodities and key inputs⁷⁶.

According to FAO, African countries confront many significant political, economic, social and environmental constraints to increased food production⁷⁷. It points out that many of Africa's agricultural and rural development problems have been related to misguided policies, weak institutions and a lack of well-trained human resources⁷⁸. In addition, FAO posits that food insecurity in Africa due to factors such as low yields is a result of poverty since many African farmers lack access to improved seeds, fertilizers and pesticides as well as the knowledge and information to use them effectively and efficiently⁷⁹.

The African Union succinctly captures the challenges the achievement of food security in Africa⁸⁰. It points out that the continent has approximately 60 percent of the world's available arable land and agriculture is the source of livelihood for 70 percent of the population yet it generates only 10 percent of global agricultural output⁸¹. According to the African Union, African agriculture is plagued by challenges such as low productivity, under-

⁷³ Kemoe. L et al., 'How Africa Can Escape Chronic Food Insecurity Amid Climate Change.' Available at <https://www.imf.org/en/Blogs/Articles/2022/09/14/how-africa-can-escape-chronic-food-insecurity-amid-climate-change> (Accessed on 12/01/2024)

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Mendez-Parra. M., & Ayele. Y., 'How African Integration Can Help Achieve Food Security.' Op Cit

⁷⁷ Food and Agriculture Organization., 'Food Security in Africa.' Op Cit

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ African Union., 'Food Security.' Available at <https://au.int/en/auc/priorities/food-security> (Accessed on 12/01/2024)

⁸¹ Ibid

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investment, urban-biased policies and bottlenecks preventing women's access to productive capital, including secure land tenure⁸². In addition, it asserts that African agriculture also has low value addition and poor rural infrastructure⁸³. According to the African Union, as a result of poor performance, the famine menace that has disappeared from other parts of the world still persists in Africa⁸⁴.

It has also been observed that achieving food security in Africa is threatened by factors such as rapid population growth, prevalence of conflicts, and the continued underinvestment in and marginalization of pastoral areas⁸⁵. In addition, it is estimated that 82 percent of the nearly 149 million Africans facing acute food insecurity are in conflict-affected countries underscoring that conflict continues to be one of the primary driver of Africa's food crisis⁸⁶. For example, 8 of the top 10 African countries experiencing acute food insecurity are facing conflicts⁸⁷.

As a result of the foregoing challenges, it has been observed that Africa is facing a food security crisis⁸⁸. For example, it is estimated that nearly 282 million people in Africa (about 20 percent of the population) are undernourished, more than a billion people are unable to afford a healthy diet and around 30 percent of children are stunted because of malnutrition⁸⁹. The World Bank further estimates that at least one in five Africans goes to bed hungry and an estimated 140 million people in Africa face acute food

⁸² Ibid

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Muigua. K., 'Food Security and Environmental Sustainability in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/FOOD-SECURITY-AND-ENVIRONMENTAL-SUSTAINABILITY-IN-KENYA.pdf> (Accessed on 12/01/2024)

⁸⁶ Africa Center for Strategic Studies., 'Unresolved Conflicts Continue to Drive Africa's Food Crisis.' Available at <https://africacenter.org/spotlight/unresolved-conflicts-continue-to-drive-africas-food-crisis/> (Accessed on 12/01/2024)

⁸⁷ Ibid

⁸⁸ Food and Agriculture Organization., 'Africa Regional Overview of Food Security and Nutrition: Statistics and Trends' Available at <https://www.fao.org/3/cc8743en/online/cc8743en.html> (Accessed on 12/01/2024)

⁸⁹ Ibid

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insecurity⁹⁰. Africa has therefore been classified as the most food insecure region in the world⁹¹. As a result of these challenges, it has been pointed out that Africa remains off-track to meet the food security and nutrition targets of the Sustainable Development Goals by 2030, and the Malabo targets of ending hunger and all forms of malnutrition by 2025⁹².

It is therefore important to enhance food security in Africa if the continent is to realize the Sustainable Development agenda.

3.0 Way Forward

In order to enhance food security in Africa, it is vital to confront climate change⁹³. Climate change has been identified as a major cause of food insecurity in Africa⁹⁴. Climate change impacts food security in Africa by turning areas once perfectly suitable for agriculture production into deserts and modifying rain patterns, increasing uncertainty and reducing yields⁹⁵. In addition, climate change leads to a breakdown of food systems, resulting in loss of rural livelihoods, income, and ecosystems⁹⁶. According to FAO, climate change affects food security in all its dimensions: access, availability, utilization and stability⁹⁷. It affects food production, and thus food

⁹⁰ The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Available at <https://www.worldbank.org/en/news/immersive-story/2022/10/17/putting-africans-at-the-heart-of-food-security-and-climate-resilience> (Accessed on 12/01/2024)

⁹¹ Ibid

⁹² Food and Agriculture Organization., 'Africa Regional Overview of Food Security and Nutrition: Statistics and Trends' Op Cit

⁹³ The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Op Cit

⁹⁴ Ibid

⁹⁵ Mendez-Parra. M., & Ayele. Y., 'How African Integration Can Help Achieve Food Security.' Op Cit

⁹⁶ Relief Web., 'Championing Climate Actions to Avert Food Crises and Malnutrition in Eastern Africa.' Available at <https://reliefweb.int/report/world/championing-climate-actions-avert-food-crises-and-malnutrition-eastern-africa#:~:text=Climate%20change%20leads%20to%20a,people%20in%20sub%2DSaharan%20Africa>. (Accessed on 13/01/2024)

⁹⁷ Food and Agriculture Organization., 'Climate Change and Food Security: Risks and Responses.' Available at <https://www.fao.org/3/i5188e/I5188E.pdf> (Accessed on 13/01/2024)

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availability⁹⁸. Climate change also impacts the livelihoods and income of small-scale food producers and also, through food price increases and volatility, the livelihoods of poor net food buyers, restricting access to food⁹⁹. In addition, climate change also impacts on the quality of drinking water, which is key to the good absorption of nutrients¹⁰⁰. Africa is already experiencing the impacts of climate change on its food systems. For example, the Horn of Africa region is currently facing a severe drought following the worst performing rains in many years and successive failed rainy seasons¹⁰¹. Further, it has been pointed out that the frequency and severity of the drought is likely to increase affecting more than 36 million people due to food insecurity, with women and girls disproportionately affected by the direct and indirect impacts of the drought¹⁰². It is therefore necessary for African countries to take urgent action to confront climate change and its impacts in order to enhance food security in the region¹⁰³. There is need to embrace climate smart agriculture in order to enhance food security in Africa¹⁰⁴. It has been proved that traditional agricultural 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 in Africa¹⁰⁵. In addition, it has been suggested that adoption of regenerative agricultural practices such as crop rotation, agroforestry, use of drought- and heat-resistant crops, integrated pest

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ United Nations Development Programme., 'Can Groundwater act as a Catalyst for Sustainable Development in Africa's borderlands?' Available at https://www.undp.org/africa/africa-borderlandscentre/blog/can-groundwater-act-catalyst-sustainable-developmentafricasborderlands?gclid=EAIaIQobChMIpM6GnoGxgAMV1uZ3Ch0bKAP0EAMYAyAAEgLKG_D_BwE (Accessed on 13/01/2024)

¹⁰² Ibid

¹⁰³ Muigua. K., 'Reflections on Confronting Climate Change in Africa.' Available at <https://kmco.co.ke/wp-content/uploads/2023/08/Reflections-on-Confronting-Climate-Change-in-Africa.pdf> (Accessed on 13/01/2024)

¹⁰⁴ Diagana. O., '3 key Fronts on Which Africa Must Combat Climate Change.' Available at <https://blogs.worldbank.org/africacan/3-key-fronts-which-africa-must-combat-climate-change> (Accessed on 13/01/2024)

¹⁰⁵ Rinku . S & Singh. G., 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' *Energy, Ecology and Environment*, No. 2 of 2017, 296

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control systems, water harvesting and irrigation can foster high-yielding, climate resilient, and adaptive practices¹⁰⁶. Embracing climate smart agriculture is therefore essential in fostering climate-resilient food systems and enhancing food security in Africa¹⁰⁷.

There is also need to boost Intra-African trade in order to enhance food security in Africa¹⁰⁸. It has been argued that the strengthening of trade links between African countries may make it possible to decrease the risk of food insecurity in the long term through diversification of supply sources and increased ease of access for all farmers to a larger market¹⁰⁹. African countries have been urged to make the most out of the most out of the AfCFTA in order to enhance food security in the region¹¹⁰. AfCFTA aims to strengthen Intra-African trade in food through measures such as phasing out tariffs¹¹¹. It has been asserted that tariffs and, in many cases, Value Added Tax (VAT) and excise duties applied on food are a major culprit of high food prices in Africa which can result in food insecurity¹¹². Implementation of the AfCFTA can therefore strengthen Intra-African trade in food and enhance food security in the region. According to the African Union, the implementation of the AfCFTA will boost food security in Africa through reduction of protection on trade in agricultural produce among African countries¹¹³. AfCFTA has the potential to spur the development of regional food value chains and reinforce

¹⁰⁶ Climate Champions. 'How Regenerative Agriculture Can Increase Africa's Food Production.' Available at <https://climatechampions.unfccc.int/call-to-action-for-climate-resilient-sustainable-food-systemsinafrica/> (Accessed on 13/01/2024)

¹⁰⁷ The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Op Cit

¹⁰⁸ Ancharaz. V., 'Intra-African Trade Can Boost Food Security for Millions of People.' Available at <https://blogs.lse.ac.uk/africaatlse/2023/02/01/intra-african-trade-can-boost-food-security-for-millions-of-people/> (Accessed on 13/01/2024)

¹⁰⁹ Badiane. O., '2022, A Year of Crisis: What Does it Mean for African Trade and Food Security?' Available at <https://www.foodfortransformation.org/full-article/2022-a-year-of-crisis-what-does-it-mean-for-african-trade-and-food-security.html> (Accessed on 13/01/2024)

¹¹⁰ Ibid

¹¹¹ Mendez-Parra. M., & Ayele. Y., 'How African Integration Can Help Achieve Food Security.' Op Cit

¹¹² Ibid

¹¹³ Africa Union., 'Agenda 2063: The Africa we Want. Op Cit

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trade among African economies¹¹⁴. It is therefore important to accelerate the implementation of the AfCFTA in order to increase intra-African trade, including in food, and therefore enhance regional food security¹¹⁵.

In addition, it is necessary to strengthen human resources through capacity development in order to enhance food security in Africa¹¹⁶. The lack of well-trained human resources has been pointed out to a major cause of food insecurity in Africa¹¹⁷. It has been argued that the development of human resources is essential for food security in Africa since an educated and informed populace is fundamental to any policies and strategies to reduce poverty, excessive population growth, environmental degradation and other factors that are most often the direct causes of hunger¹¹⁸. According to FAO, there is an urgent need for human capacity development and for increased knowledge and information about food production in order to achieve food security in Africa¹¹⁹. It has been argued that human resource development contributes to food security by enhancing agricultural production and improving human well-being¹²⁰. In addition, it has been correctly observed that efforts to enhance agricultural production, especially among low-income small holders and women farmers, can increase food availability and accessibility, leading to improved food security and human development¹²¹. Human resource development therefore plays a crucial role in promoting food security by empowering individuals and communities to enhance food productivity and improve their overall well-being¹²². Human resource development is therefore a key component of sustainable agricultural

¹¹⁴ Ancharaz. V., 'Intra-African Trade Can Boost Food Security for Millions of People.' Op Cit

¹¹⁵ Ibid

¹¹⁶ Food and Agriculture Organization., 'Food Security in Africa.' Op Cit

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Burchi. F., 'A Human Development and Capability Approach to Food Security: Conceptual Framework and Informational Basis.' Available at <https://typeset.io/papers/a-human-development-and-capability-approach-to-food-security-2w91109jrl> (Accessed on 13/01/2024)

¹²¹ Ibid

¹²² Ibid

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production and improved food security in Africa¹²³. It is therefore vital to enhance human capacities in order to strengthen food security in Africa. It has been argued that Africa must invest in domestic human, institutional and system-wide capacities and capabilities in order to achieve food security¹²⁴.

Further, there is need to enhance investments in in food systems in order to achieve food security in Africa. The CAADP urges African countries to enhance investments in food systems by allocating at least 10 per cent of public expenditures to the agricultural sector¹²⁵. It has been argued that through investments, Africa can build resilience in its food systems and enhance food security¹²⁶. For example, investing in irrigation can minimise dependence on rain-fed agriculture so that food can be produced year-round even when rains fail¹²⁷. In addition, investing in research and development can lead to the adoption of drought-resistant and water-efficient varieties of crops that can enhance food security in Africa.¹²⁸ It is therefore necessary for African countries to increase investments in agri-food systems in order to achieve food security¹²⁹. In addition, it is vital for African countries to invest in research and development on food systems in order to enhance food security¹³⁰. This can lead to the adoption of higher yielding seed varieties, mechanisation, improved soil management and conservation practices and profitable and efficient fertiliser use towards enhancing food security in the region¹³¹.

¹²³ Food and Agriculture Organization., 'Food Security in Africa.' Op Cit

¹²⁴ Mabaya. E., & Richardson. R., & Jayne. T., 'Towards Zero Hunger in Africa: 5 Steps to Achieve Food Security.' Op Cit

¹²⁵ Sidler. P., 'Overview on the CAADP, the 2003 Maputo and particularly 2014 Malabo Declarations.' Op Cit

¹²⁶ Nwafor. A., 'Investment for Resilience in African Food Systems.' Available at <https://farmingfirst.org/2023/03/investment-for-resilience-in-african-food-systems/#:~:text=Building%20resilience&text=This%20means%20investment%20in%20irrigation,them%20in%20times%20of%20loss.> (Accessed on 13/01/2024)

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Ibid

¹³⁰ Traub. L. N., Jayne. T., & Sihlobo. W., 'Research and Development are Key to Resilient Food Systems in Africa.' Available at <https://theconversation.com/research-and-development-are-key-to-resilient-food-systems-in-africa-165251> (Accessed on 13/01/2024)

¹³¹ Ibid

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It is also vital to address conflicts in the continent. Evidence points out to a relationship between conflicts and food insecurity in Africa¹³². Most Africans facing acute food insecurity are in conflict-affected countries underscoring that conflict continues to be one of the primary driver of Africa's food crisis¹³³.

African countries such as Sudan, Somalia, Democratic Republic of the Congo, and Central African Republic which have been characterized by conflicts for many decades are some of the most food insecure countries on the continent¹³⁴. According to FAO, armed conflict, both within and between countries, is another central factor contributing to food insecurity in Africa¹³⁵. FAO posits that conflict and food insecurity are inextricably linked, each triggering and reinforcing the other¹³⁶. Some people living in food-insecure communities feel they have been marginalized by central governments¹³⁷. At the same time, conflict itself almost always intensifies hunger, since it drives people from their homes and disrupts marketing and distribution systems¹³⁸. Addressing conflicts and fostering peace is therefore necessary in enhancing food security in Africa.

Finally, there is need for African countries to embrace sustainable management of natural resources in order to enhance food security in the region¹³⁹. The African Union correctly points out that the continent has an abundance of natural resources that can enhance food security in the region including arable land, fresh water resources comprising of large rivers and lakes such as the Congo, Nile, Zambezi and Niger and Lake Victoria, forests and the blue/ocean economy¹⁴⁰. However, despite the presence of these

¹³² Africa Center for Strategic Studies., 'Unresolved Conflicts Continue to Drive Africa's Food Crisis.' Op Cit

¹³³ Ibid

¹³⁴ Ibid

¹³⁵ Food and Agriculture Organization., 'Food Insecurity in the Horn of Africa.' Available at <https://www.fao.org/3/x8530e/x8530e02.htm> (Accessed on 13/01/2024)

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Ibid

¹³⁹ Africa Union., 'Agenda 2063: The Africa we Want. Op Cit

¹⁴⁰ Ibid

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resources, food insecurity continues to be a major challenge in the continent¹⁴¹. This has been attributed to unsustainable practices including poor cultivation practices including over cultivation, over grazing, deforestation, overfishing among others¹⁴². It has been posited that well managed natural resources can contribute to income and food security improvement especially in rural populations¹⁴³. African countries should therefore embrace sustainable and sound management of their natural resources including land, forests, water resources, fisheries and the blue economy in order to enhance food security¹⁴⁴. The foregoing among other measures are necessary in order to enhance food security in Africa.

4.0 Conclusion

Achieving food security is a key determinant for the realization of the human right to food towards Sustainable Development¹⁴⁵. SDG 2 seeks to end hunger, achieve food security, and improved nutrition and promote sustainable agriculture¹⁴⁶. Enhancing food security is important for millions of people facing hunger in Africa and is crucial for sustainable economic development and long-term prosperity of the continent¹⁴⁷. There has been some progress towards enhancing food security in Africa¹⁴⁸. However, achieving food security continues to be a major challenge in Africa. Africa has been classified as the most food insecure region in the world a situation that has been attributed to factors such as climate change, prevalence of conflicts and weak human capacities among others¹⁴⁹. It is necessary to enhance food security in

¹⁴¹ Ibid

¹⁴² Bouda. Z., 'Natural Resource Management and Food Security in Africa.' Available at https://link.springer.com/referenceworkentry/10.1007/978-3-319-69626-3_75-1 (Accessed on 13/01/2024)

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ Muigua. K., 'Achieving the Right to Food for Sustainable Development in Kenya.' Op Cit

¹⁴⁶ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., SDG 2

¹⁴⁷ Munang. R., & Han. Z., 'Food Security: Regional Solutions Key to Solving Africa's Challenges.' Op Cit

¹⁴⁸ Australian AID., 'Improving Food Security in Africa.' Op Cit

¹⁴⁹ Food and Agriculture Organization., 'Africa Regional Overview of Food Security and Nutrition: Statistics and Trends' Op Cit

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Africa in order to achieve Sustainable Development. This can be fostered through measures such as confronting climate change¹⁵⁰; boosting Intra-African trade¹⁵¹; strengthening human resources through capacity development¹⁵²; enhancing investments in in food systems¹⁵³; addressing conflicts in the continent¹⁵⁴; and embracing sustainable management of natural resources¹⁵⁵. Enhancing food security in Africa is an agenda that needs to be fast-tracked in order to achieve Sustainable Development.

¹⁵⁰ The World Bank., 'Putting Africans at the Heart of Food Security and Climate Resilience.' Op Cit

¹⁵¹ Ancharaz. V., 'Intra-African Trade Can Boost Food Security for Millions of People.' Op Cit

¹⁵² Food and Agriculture Organization., 'Food Security in Africa.' Op Cit

¹⁵³ Ibid

¹⁵⁴ Africa Center for Strategic Studies., 'Unresolved Conflicts Continue to Drive Africa's Food Crisis.' Op

¹⁵⁵ Africa Union., 'Agenda 2063: The Africa we Want. Op Cit

Conserving Ecosystems for Our Health and Well-Being

Abstract

This paper critically discusses the need to conserve ecosystems. It argues that conserving ecosystems is vital for our health and well-being since it ensures the sustainable and continuous supply of ecosystem services. The paper interrogates the efficacy of measures adopted towards conserving ecosystems at the global, continental, and national levels. It also examines some of the ecosystem conservation challenges and their impact on human health and well-being. Finally, the paper offers proposals towards effective and efficient conservation of ecosystems for our health and well-being.

1.0 Introduction

Ecosystems have been defined as a community of organisms and their physical environment interacting as an ecological unit¹. An Ecosystem has also been defined as a system comprising all living organisms existing with one another in a unit of space interacting with abiotic components². The *Convention on Biological Diversity*³ defines an ecosystem as a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

There is widespread consensus that ecosystems are the foundation of life on Earth⁴. For example, they provide humanity with clean air, fresh water, and food⁵. In addition, ecosystems regulate the climate, protect against natural disasters, and support biodiversity⁶. The benefits that humanity obtains from

¹ United Nations Environment Programme., 'Ecosystem' Available at <https://leap.unep.org/en/knowledge/glossary/ecosystem> (Accessed on 28/02/2024)

² Daily. G., 'What Are Ecosystem Services?' Available at https://www.regenpreneur.com/uploads/3/9/4/8/39486393/what_are_ecosystem_services_1.pdf (Accessed on 28/02/2024)

³ United Nations., 'Convention on Biological Diversity.' Available at <https://www.cbd.int/doc/legal/cbd-en.pdf> (Accessed on 28/02/2024)

⁴ Murphy. M., 'The Importance of Ecosystem Conservation for Human Well-being' Available at <https://www.linkedin.com/pulse/importance-ecosystem-conservation-human-well-being-maurice-murphy> (Accessed on 28/02/2024)

⁵ Ibid

⁶ Ibid

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ecosystems have been referred to as ecosystem services⁷. These services have been defined as the condition and processes through which natural ecosystems, and the species that make them up, sustain and fulfil human life⁸. According to the United Nations Environment Programme (UNEP), ecosystem services include products obtained from ecosystems (such as freshwater, food, fuel, genetic resources, natural medicines among others); benefits obtained from the regulation of ecosystem processes (such as water erosion, waste, climate and natural hazards); cultural services (including cultural diversity, educational values, social relations, heritage); and services that are necessary for the production of other ecosystem services (including primary production, nutrient cycling, and water cycling)⁹.

It has further been pointed out that ecosystem services maintain biodiversity and the production of ecosystems goods which include seafood, forage, timber, biomass fuels, natural fiber, and many pharmaceutical and industrial products¹⁰. Further, the harvest and trade in ecosystem goods represents an important part of the human economy¹¹. Ecosystem services also provide many intangible aesthetic and cultural benefits¹². Ecosystems are thus vital for survival of life on earth.

Despite their importance, it has been pointed out that human induced activities such as deforestation, pollution, and climate change are threatening the health and stability of ecosystems worldwide¹³. It is therefore necessary to conserve ecosystems in order to ensure the continued supply of ecosystem services which are key to the survival of life on earth¹⁴. Conservation has been defined as the active management of the earth's natural resources and

⁷ Daily. G., 'What Are Ecosystem Services?' Op Cit

⁸ Ibid

⁹ United Nations Environment Programme., 'Ecosystem Service' Available at <https://leap.unep.org/en/knowledge/glossary/ecosystem-service> (Accessed on 28/02/2024)

¹⁰ Daily. G., 'What Are Ecosystem Services?' Op Cit

¹¹ Ibid

¹² Ibid

¹³ Murphy. M., 'The Importance of Ecosystem Conservation for Human Well-being' Op Cit

¹⁴ Ibid

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environment to ensure their quality is maintained and that they are wisely used¹⁵. It has been pointed out that the concept of conservation is used in the context of biodiversity, environment, and natural resources, including protection and management¹⁶. It refers to the act of preserving, guarding or protecting, meanwhile keeping in mind the sustainable character and wise use of the environment and natural resources¹⁷. The idea of conservation is wider in scope than preservation¹⁸. It has been pointed out that conservation is a form of environmental protection that allows humans to use natural resources but encourages sustainability and minimal ecological impact¹⁹. It ensures that resources persist for future generations while protecting ecosystems and species²⁰. Preservation on the other hand involves the environment and natural resources not being consumed by humans and instead being maintained in their pristine form²¹. Conservation therefore seeks to protect the environment through sustainable and responsible use of the environment and natural resources whereas preservation seeks to protect the environment and natural resources from harmful human activities²². Conservation is the ideal form of protection since it ensures that human-beings are able to benefit from ecosystem services while also ensuring that ecosystems are sustainably managed for the benefit of future generations²³.

This paper critically discusses the need to conserve ecosystems. It argues that conserving ecosystems is vital for our health and well-being since it ensures

¹⁵United Nations Environment Programme., 'Conservation' Available at <https://leap.unep.org/en/knowledge/glossary/conservation> (Accessed on 28/02/2024)

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Conservation vs. Preservation | Definition & History., Available at <https://study.com/academy/lesson/conservationists-vs-preservationists-definition-differences.html#:~:text=On%20one%20side%2C%20we%20have,maintained%20in%20their%20pristine%20form.> (Accessed on 28/02/2024)

²⁰ Ibid

²¹ Ibid

²² National Geographic., 'Preservation' Available at <https://education.nationalgeographic.org/resource/preservation/> (Accessed on 28/02/2024)

²³ United Nations Environment Programme., 'Conservation' Op Cit

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the sustainable and continuous supply of ecosystem services. The paper interrogates the efficacy of measures adopted towards conserving ecosystems at the global, continental, and national levels. It also examines some of the ecosystem conservation challenges and their impact on human health and well-being. Finally, the paper offers proposals towards effective and efficient conservation of ecosystems for our health and well-being.

2.0 Conserving Ecosystems: Progress and Setbacks

It has been pointed out that conserving ecosystems is essential for maintaining the balance of nature and ensuring the sustainability of our planet²⁴. Conservation of ecosystems is also crucial for human well-being since it directly affects human health²⁵. It has correctly been pointed out that ecosystem services are indispensable to the well-being of all people, everywhere in the world²⁶. Ecosystems provide us with clean air and water, which are essential for our survival²⁷. For example, it has been observed that forests act as natural filters, absorbing pollutants and producing oxygen²⁸. Further, wetlands also play a vital role in purifying water and preventing floods²⁹. It has been argued that without these natural systems, human beings would be exposed to harmful pollutants and diseases³⁰. Conserving ecosystems is therefore vital for human health and well-being.

Where ecosystems are not efficiently conserved, human-beings are at risk of health impacts³¹. For example, it has been observed that in poor countries, especially in rural areas, the health of human populations is highly dependent upon the services of local productive ecosystems for food³². Chronic

²⁴ Murphy. M., 'The Importance of Ecosystem Conservation for Human Well-being' Op Cit

²⁵ Ibid

²⁶ Millennium Ecosystem Assessment., 'Ecosystems and Human Health' Available at <https://www.millenniumassessment.org/documents/document.763.aspx.pdf> (Accessed on 28/02/2024)

²⁷ Murphy. M., 'The Importance of Ecosystem Conservation for Human Well-being' Op Cit

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ Millennium Ecosystem Assessment., 'Ecosystems and Human Health' Op Cit

³² Ibid

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micronutrient deficiency is rampant in areas where such ecosystems are not properly conserved³³. It has also been pointed out that there are high incidences of water-associated infectious diseases which claim up to 3.2 million lives each year and approximately 6% of all deaths globally in places where fresh water ecosystems are not appropriately conserved³⁴. In addition, ineffective conservation of ecosystems could cause or worsen the threat of climate change with direct impacts on human health such as increased mortality from heat waves and scarcity of food, water, and energy supplies³⁵. Conserving ecosystems is therefore vital in ensuring human health and well-being. It has been asserted that damaged ecosystems only worsen the climate crisis, place communities and people at risk, and undermine food and energy security³⁶.

It has also been correctly observed that conservation of ecosystems also helps to protect biodiversity, which is the variety of life on Earth³⁷. It has been observed that biodiversity is essential for maintaining the health and resilience of ecosystems³⁸. Biodiversity provides humanity with food, medicine, and other resources and also supports ecosystem services such as pollination, soil fertility, and pest control³⁹. It has been argued that conserving biodiversity ensures the continuing existence of a wide range of crops that could be able to withstand disease, and potentially useful biochemicals like those used in healthcare⁴⁰. It also ensures the availability of species for pest control and pollination which are vital processes in the provision of ecosystem services

³³ Ibid

³⁴ Ibid

³⁵ Muigua. K., 'Placing Health at the Centre of Climate Action' Available <https://kmco.co.ke/wp-content/uploads/2023/12/Placing-Health-at-the-Centre-of-Climate-Action-x.pdf> (Accessed on 28/02/2024)

³⁶ Institute of Sustainability Studies., 'Exploring the Urgency of Conserving Ecosystems' Available at <https://instituteofsustainabilitystudies.com/insights/guides/exploring-the-urgency-of-conserving-ecosystems/> (Accessed on 28/02/2024)

³⁷ Murphy. M., 'The Importance of Ecosystem Conservation for Human Well-being' Op Cit

³⁸ Ibid

³⁹ Ibid

⁴⁰ Institute of Sustainability Studies., 'Exploring the Urgency of Conserving Ecosystems' Op Cit

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such as food⁴¹. Conserving biodiversity therefore maintains the many advantages that this diversity offers for both humanity and nature⁴².

Conserving ecosystems is also essential in confronting climate change. For example, it has been asserted that terrestrial and marine ecosystems play an important role in regulating climate since they currently absorb roughly half of man-made carbon emissions⁴³. Ecosystems such as forests and oceans play a crucial role in absorbing and storing carbon dioxide, helping to reduce the impacts of climate change⁴⁴. In addition, biodiversity and ecosystem services help human-beings to adapt to and mitigate climate change and are therefore a crucial part of global efforts to combat climate change⁴⁵. Therefore, by conserving nature and restoring ecosystems human beings can reduce vulnerability and increase resilience to climate change⁴⁶. As a result, it has been correctly observed that conservation and restoration of ecosystems is a major, cost-efficient ally in our fight against climate change⁴⁷. Tackling climate change is important in ensuring good health and well-being and conservation of ecosystems can be humanity's key ally in this fight⁴⁸.

The need to conserve ecosystems is enshrined under the United *Nations 2030 Agenda for Sustainable Development*⁴⁹. The Agenda represents a shared blue print for peace and prosperity for *people* and *the planet* in the quest towards the ideal of Sustainable Development⁵⁰ (Emphasis added). It envisages a world

⁴¹ Ibid

⁴² Ibid

⁴³ European Commission., 'Nature's Role in Climate Change' Available at https://climate.ec.europa.eu/system/files/2016-11/nature_and_climate_change_en.pdf (Accessed on 28/02/2024)

⁴⁴ Murphy. M., 'The Importance of Ecosystem Conservation for Human Well-being' Op Cit

⁴⁵ European Commission., 'Nature's Role in Climate Change' Op Cit

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 09/02/2024)

⁵⁰ Ibid

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where humanity lives in harmony with nature and in which wildlife and other living species are protected⁵¹. At the core of the agenda are 17 Sustainable Development Goals (SDGs) which seek to strike a balance between human development and environmental protection⁵². The Agenda recognizes that social and economic development depends on the sustainable management of our planet and natural resources⁵³. In addition, the Agenda represents a global determination to *conserve* and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, *ecosystems* and wildlife(Emphasis added)⁵⁴. In addition, some of the SDGs contain targets towards conserving ecosystems. For example, SDG 14.2 seeks to enhance the conservation and sustainable management of marine and coastal ecosystems in order to avoid significant adverse impacts⁵⁵. In addition, SDG 15.1 seeks to ensure the conservation, restoration, and sustainable use of terrestrial and inland freshwater ecosystems and their services in particular forests, wetland, mountains and drylands⁵⁶. Realizing the SDGs as envisaged under the 2030 Agenda for Sustainable Development is therefore key in enhancing the conservation of ecosystems.

Conserving ecosystems is also a key agenda under the *Rio Declaration on Environment and Development*⁵⁷. The Declaration seeks to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving Sustainable Development⁵⁸. It stipulates that human beings are at the centre of concerns for Sustainable Development and are entitled to a *healthy and productive life in harmony with nature*⁵⁹. It further states that in order to achieve Sustainable Development, *environmental conservation* shall constitute an *integral part of the*

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Ibid, SDG 14.2

⁵⁶ Ibid

⁵⁷ United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

⁵⁸ Ibid, Principle 2

⁵⁹ Ibid, Principle 1

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development process and cannot be considered in isolation from it⁶⁰(Emphasis added). The Rio Declaration upholds key environmental principles that are vital in conserving ecosystems. These principles include Sustainable Development, inter and intra generational equity, environmental protection, public participation, the precautionary principle and the principle of state cooperation⁶¹. Fostering the principles enshrined under the Rio Declaration is of utmost importance if we are to effectively conserve ecosystems.

The *World Charter for Nature*⁶² also sets out the importance of conserving ecosystems. According to the Charter, human beings must acquire the knowledge to maintain and enhance their ability to use natural resources in a manner which ensures the preservation of the species and *ecosystems* for the benefit of present and future generations.⁶³ Further, in order to effectively conserve ecosystems, the Charter requires special protection to be given to unique areas, to representative samples of all the different types of ecosystems and to the habitats of rare or endangered species⁶⁴. It also requires ecosystems and organisms, as well as the land, marine and atmospheric resources that are utilized by humanity to be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they coexist⁶⁵. Of vital importance, the Charter requires the status of natural processes, *ecosystems* and species to be closely monitored to enable early detection of degradation or threat, in order to ensure timely intervention and facilitate the evaluation of *conservation* policies and methods⁶⁶. The World Charter for Nature is therefore a vital instrument geared towards conserving ecosystems.

In addition, to the foregoing, several legal instruments have been adopted at the global, continental, and national levels towards conserving specific types of ecosystems. For example, at the global level, the *Convention on Biological*

⁶⁰ Ibid, Principle 4

⁶¹ Ibid

⁶² United Nations General Assembly., World Charter for Nature., A/RES/37/7

⁶³ Ibid, Preamble

⁶⁴ Ibid, Principle 3

⁶⁵ Ibid, Principle 4

⁶⁶ Ibid, Principle 19

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*Diversity*⁶⁷ was adopted with the objective of fostering the *conservation* of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding⁶⁸. The Convention sets out key biodiversity conservation strategies which are: in-situ and ex-situ conservation⁶⁹. According to the Convention, in-situ conservation means the *conservation of ecosystems* and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings⁷⁰. On the other hand ex-situ conservation means the conservation of components of biological diversity outside their natural habitats⁷¹. In addition, there has been the adoption of legal instruments such as the *Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)*⁷² geared towards conserving wetlands.

At a continental level, the *African Convention on the Conservation of Nature and Natural Resources*⁷³, recognizes that the *conservation of the global environment is a common concern of human kind as a whole, and the conservation of the African environment a primary concern of all Africans*⁷⁴ (Emphasis added). It provides that States are responsible for protecting and conserving their environment and natural resources and for using them in a sustainable manner with the aim to satisfy human needs according to the carrying capacity of the environment⁷⁵. The Convention seeks to enhance environmental protection; to

⁶⁷ United Nations., 'Convention on Biological Diversity.' Op Cit

⁶⁸ Ibid, article 1

⁶⁹ Ibid

⁷⁰ Ibid, article 2

⁷¹ Ibid

⁷² Convention on Wetlands of International Importance especially as Waterfowl Habitat., Available at https://www.ramsar.org/sites/default/files/documents/library/current_convention_text_e.pdf (Accessed on 29/02/2024)

⁷³ African Union., African Convention on the Conservation of Nature and Natural Resources., Available at https://au.int/sites/default/files/treaties/41550-treaty-Charter_ConservationNature_NaturalResources.pdf (Accessed on 09/02/2024)

⁷⁴ Ibid, Preamble

⁷⁵ Ibid

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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 programmes⁷⁶ (Emphasis added). The Convention acknowledges the right of all people to a satisfactory environment favourable to their development; the duty of States, individually and collectively to ensure the enjoyment of the right to development; and the duty of States to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner⁷⁷. It requires states to ensure effective conservation of those ecosystems which are most representative of and peculiar to areas under their jurisdiction, or are characterized by a high degree of biological diversity⁷⁸. The Convention also requires states to ensure that policies, plans, programmes, strategies, projects and activities likely to affect natural resources, *ecosystems* and the environment in general are the subject of adequate impact assessment at the earliest possible stage and that regular environmental monitoring and audit are conducted⁷⁹. Further, in order to ensure effective conservation of transboundary ecosystems in Africa, the Convention stipulates that whenever a natural resource or an ecosystem is transboundary, the parties concerned shall undertake to cooperate in the conservation, development and management of such resource or ecosystem and if the need arises, set up interstate commissions for their conservation and sustainable use⁸⁰. There is need to effectively implement this Convention in order to strengthen the conservation of ecosystems in Africa.

At a national level, several laws have been enacted towards ensuring the conservation of particular ecosystems. For example, in Kenya, the *Wildlife Conservation and Management Act*⁸¹ aims to ensure the protection, *conservation*, sustainable use and management of wildlife in Kenya; *the Fisheries Management and Development Act*⁸² provides the legal framework for the conservation,

⁷⁶ Ibid, Article II

⁷⁷ Ibid, Article III

⁷⁸ Ibid, XII

⁷⁹ Ibid, article XIV (2) (b)

⁸⁰ Ibid, article XXII (2) (e)

⁸¹ Wildlife Conservation and Management Act, Cap 376, Laws of Kenya, Government Printer, Nairobi

⁸² Fisheries Management and Development Act., Cap 378, Laws of Kenya, Government Printer, Nairobi

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management and development of fisheries and other aquatic resources; and the *Forest Conservation and Management Act*⁸³ provides the legal framework for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country. In addition, the *Environmental Management and Co-ordination Act* establishes the legal and institutional framework for the management of the environment in Kenya⁸⁴. The Act requires the state to adopt adequate measures to promote the conservation of the various terrestrial and aquatic ecosystems under the jurisdiction of Kenya⁸⁵. It also requires special arrangements to be adopted towards the protection of species, ecosystems and habitats threatened with extinction⁸⁶.

Despite the enactment of laws at the global, continental, and national levels towards conserving ecosystems, it has been pointed out that human activities such as deforestation, pollution, and climate change are threatening the health and stability of ecosystems worldwide⁸⁷. It has also been pointed out that conservation efforts are facing many challenges, including habitat destruction, pollution, and climate change⁸⁸. According to the United Nations, the triple planetary crisis of climate change, pollution and loss of biodiversity is a major threat to the stability of ecosystems⁸⁹. It has also been pointed out that human encroachment is a key threat to ecosystems conservation⁹⁰. It is necessary to address these challenges in order to foster effective conservation of ecosystems.

⁸³ Forest Conservation and Management Act, Cap 385, Laws of Kenya, Government Printer, Nairobi

⁸⁴ Environmental Management and Co-ordination Act., Cap 387, Laws of Kenya, Government Printer, Nairobi

⁸⁵ Ibid, S 51 (b)

⁸⁶ Ibid, S 51 (d)

⁸⁷ Murphy. M., 'The Importance of Ecosystem Conservation for Human Well-being' Op Cit

⁸⁸ Ibid

⁸⁹ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Available at <https://unfccc.int/news/what-is-the-triple-planetary-crisis> (Accessed on 29/02/2024)

⁹⁰ Tsavo Trust., 'What is Ecosystem Conservation, and Why is it so Important?' Available at <https://tsavotrust.org/what-is-ecosystem-conservation-and-why-is-it-so-important/> (Accessed on 29/02/2024)

3.0 Way Forward

In order to ensure effective conservation of ecosystems, it is necessary to maintain critical ecosystem processes and functions⁹¹. It has correctly been pointed out that by protecting biodiversity, conserving water, managing waste responsibly, supporting local environmental organisations, engaging in restoration projects, educating and raising awareness, protecting wildlife, and practising sustainable land use, it becomes possible to conserve and enhance ecosystems⁹². It has also been posited that there is need to maintain critical ecosystem processes such as water cycling, nutrient cycling (which include the carbon and nitrogen cycle), energy flow, and community dynamics in order to ensure efficient conservation of ecosystems⁹³. These processes are vital for the health and stability of ecosystems⁹⁴.

It is also necessary to minimize and control external threats to ecosystems⁹⁵. Ecosystems are being affected by external threats including pollution, large-scale human disturbances, overharvesting, and habitat destruction⁹⁶. In addition, ecosystems are also being affected by invasive species which degrade and destroy natural ecosystems by outcompeting native species, disturbing ecosystem processes, and altering the physical environment⁹⁷. It is therefore necessary to conserve ecosystems by controlling external threats through such as pollution, large-scale human disturbances, overharvesting, and habitat destruction⁹⁸. This calls for the sustainable use and management

⁹¹ DGB Group., 'How Can You Maintain the Ecosystems in your Surrounding Area?' Available at <https://www.green.earth/blog/how-can-you-maintain-the-ecosystems-in-your-surrounding-area#:~:text=By%20promoting%20biodiversity%2C%20conserving%20water,preserving%20and%20enhancing%20local%20ecosystems>. (Accessed on 29/02/2024)

⁹² Ibid

⁹³ Ibid

⁹⁴ Ibid

⁹⁵ Wilson. J., & Primack. R., 'Conserving Ecosystems' Available at <https://books.openbookpublishers.com/10.11647/obp.0177/ch10.xhtml#:~:text=1%20Maintaining%20critical%20ecosystem%20processes,energy%20flow%2C%20and%20community%20dynamics>. (Accessed on 29/02/2024)

⁹⁶ Ibid

⁹⁷ Ibid

⁹⁸ Ibid

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of natural resources and ecosystems⁹⁹. It is also necessary to control invasive species in order to minimize their threat to native species in ecosystems¹⁰⁰.

There is also need to restore damaged ecosystems¹⁰¹. Restoration is a process that aims to recover the ecological functionality and enhance human well-being in deforested and degraded landscapes and ecosystems¹⁰². It is an important approach that not only returns landscapes and ecosystems to a healthy state, but also increases the amount of carbon sequestered, improves biodiversity and the quality of soil and water in the ecosystem, and provides economic benefits for communities that depend on such landscapes and ecosystems¹⁰³. Restoration is therefore vital in returning ecosystems to a healthy state and combating climate change¹⁰⁴. Some of the approaches that can be adopted towards restoring ecosystems include restoring farmlands through reducing tillage, using more natural fertilizer and pest control, and growing more diverse crops, including trees¹⁰⁵; restoring forest ecosystems through replanting and reducing the pressure on forests so that trees re-grow naturally¹⁰⁶; restoring rivers and lakes by halting pollution, reducing and treating waste, managing demand for water and fish, and reviving vegetation

⁹⁹ Muigua. K., 'Nurturing Our Environment for Sustainable Development' Glenwood Publishers Limited, 2016

¹⁰⁰ Wilson. J., & Primack. R., 'Conserving Ecosystems' Op Cit

¹⁰¹ Muigua. K., 'Restoring Landscapes and Ecosystems for Climate Mitigation' Available at <https://kmco.co.ke/wp-content/uploads/2024/02/Restoring-Landscapes-and-Ecosystems-for-Climate-Mitigation.pdf> (Accessed on 29/02/2024)

¹⁰² Food and Agriculture Organization., 'The Key Role of Forest and Landscape Restoration in Climate Action.' Available at <https://www.fao.org/documents/card/en/c/cc2510en> (Accessed on 29/02/2024)

¹⁰³ World Economic Forum., 'What are Natural Climate Solutions?' Available at <https://www.weforum.org/agenda/2021/09/what-are-natural-climate-solutions-ncsalliance/#:~:text=NCS%20are%20actions%20that%20avoid,forest%20conservatio n%2C%20restoration%20and%20management> (Accessed on 29/02/2024)

¹⁰⁴ Muigua. K., 'Restoring Landscapes and Ecosystems for Climate Mitigation' Op Cit

¹⁰⁵ United Nations Environment Programme., 'A Beginner's Guide to Ecosystem Restoration' Available at <https://www.unep.org/news-and-stories/story/beginners-guide-ecosystem-restoration#:~:text=Restoration%20means%20halting%20pollution%2C%20reducing,plants%20grow%20on%20their%20banks.> (Accessed on 29/02/2024)

¹⁰⁶ Ibid

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above and below the surface¹⁰⁷; restoring grasslands and savannah through clearing woody vegetation and re-seeding native grasses, and the reintroduction and protection of lost plants and animals until they are established¹⁰⁸; and ensuring that marine ecosystems such as coral reefs, mangroves and seagrasses are carefully managed and actively restored so that oceans can continue to support billions of livelihoods globally¹⁰⁹.

Further, it is imperative to ensure monitoring of ecosystems¹¹⁰. Monitoring is vital in detecting disturbances to ecosystems such as loss of biodiversity, destruction of forests, and pollution of freshwater and marine ecosystems¹¹¹. According to UNEP, the capacity to monitor ecosystems and ensure that this information continuously feeds into collaborative structures is critical for ecosystem management¹¹². Monitoring can aid in the formulation of effective conservation strategies depending on the disturbances done to a particular ecosystem¹¹³. It is therefore necessary to embrace monitoring of ecosystems in order to ensure their effective conservation.

Finally, it is vital to combat climate change¹¹⁴. It has been pointed out that climate change is altering ecosystem productivity, exacerbating the spread of invasive species, and changing how species interact with each other and with their environment¹¹⁵. Impacts of climate change such as intense droughts may force species to migrate to higher latitudes or higher elevations where temperatures are more conducive to their survival¹¹⁶. In addition, sea level

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Wilson. J., & Primack. R., 'Conserving Ecosystems' Op Cit

¹¹¹ Ibid

¹¹² United Nations Environment Programme., 'Preserving our Ecosystems' Available at <https://www.unep.org/explore-topics/ecosystems-and-biodiversity/what-we-do/preserving-our-ecosystems> (Accessed on 29/02/2024)

¹¹³ Ibid

¹¹⁴ Malhi. Y et al., 'Climate Change and Ecosystems: Threats, Opportunities and Solutions' Available at <https://royalsocietypublishing.org/doi/10.1098/rstb.2019.0104> (Accessed on 29/02/2024)

¹¹⁵ Ibid

¹¹⁶ Ibid

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risers can result in saltwater intrusion into a freshwater system a situation that may force some key species to relocate or die, thus removing predators or prey that are critical in the existing food chains¹¹⁷. Climate change also affects ecosystem services such as carbon capture and storage¹¹⁸. For example, forest ecosystems play a critical role in the carbon cycle, helping to absorb carbon dioxide from the atmosphere and store it in roots, soil, and the forest floor¹¹⁹. However, climate change-driven increases in wildfires, flooding, pests, and diseases can limit the ability of an ecosystem to provide this important service¹²⁰. Climate change is therefore a major challenge in the conservation of ecosystems. It is therefore necessary for all countries to take urgent action and combat climate change and its impacts in order to enhance the conservation of ecosystems¹²¹.

The foregoing among other measures are vital in ensuring that ecosystems are conserved appropriately for our health and well-being.

4.0 Conclusion

Ecosystems are the foundation of life on Earth¹²². Ecosystems services such as freshwater, food, fuel, genetic resources, natural medicines among others are necessary for the survival of humanity¹²³. Conserving ecosystems is therefore vital for human health and well-being since it ensures the continued supply of ecosystem services¹²⁴. Despite the importance of ecosystems, conservation efforts are facing many challenges, including habitat destruction, pollution, and climate change¹²⁵. It is necessary to address these challenges in order to enhance the conservation of ecosystems for our health and well-being. In order to achieve this goal, it is important to maintain critical ecosystem processes

¹¹⁷ Ibid

¹¹⁸ United States Environmental Protection Agency., 'Climate Change Impacts on Ecosystems' Available at <https://www.epa.gov/climateimpacts/climate-change-impacts-ecosystems> (Accessed on 29/02/2024)

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ Ibid

¹²² Murphy. M., 'The Importance of Ecosystem Conservation for Human Well-being' Op Cit

¹²³ Ibid

¹²⁴ Millennium Ecosystem Assessment., 'Ecosystems and Human Health' Op Cit

¹²⁵ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Op Cit

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and functions¹²⁶; minimize and control external threats to ecosystems such as invasive species¹²⁷; restore damaged ecosystems¹²⁸; ensure monitoring of ecosystems¹²⁹; and combat climate change¹³⁰. Conserving ecosystems for our health and well-being is the way to go for the benefit of both nature and humanity.

¹²⁶ DGB Group., 'How Can You Maintain the Ecosystems in your Surrounding Area?' Op Cit

¹²⁷ Wilson. J., & Primack. R., 'Conserving Ecosystems' Op Cit

¹²⁸ Muigua. K., 'Restoring Landscapes and Ecosystems for Climate Mitigation' Op Cit

¹²⁹ Wilson. J., & Primack. R., 'Conserving Ecosystems' Op Cit

¹³⁰ Malhi. Y et al., 'Climate Change and Ecosystems: Threats, Opportunities and Solutions' Op Cit

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Abstract

The paper critically examines the extent to which Environmental, Social and Governance (ESG) principles have been embraced in Kenya. It argues that ESG has emerged as arguably the most important tool of corporate governance. ESG seeks to shape corporate decision making by advocating for sustainable, responsible and ethical investments. It analyses each of the ESG principles and the progress made towards embracing this concept in Kenya. The paper further addresses some of the ESG challenges in Kenya and suggests the way forward towards embracing ESG principles for sustainable development in Kenya.

1.0 Introduction

The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making¹. At the same time, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever². The growth of social media has also increased the public risks associated with socially irresponsible behavior due to more scrutiny on companies and the emergence of socially conscious consumers³. Further, there has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies⁴.

¹ De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008).

² Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' *Utrecht Law Review* 14.2 (2018): 1-5.'

³ Mariarosaria. S & Scarpato. D 'Sustainable Consumption: How Does Social Media Affect Food Choices?' *Journal of Cleaner Production* 277 (2020): 124036.

⁴ Martin.C et al., 'Corporate governance and the 2008-09 Financial Crisis.' *Corporate Governance: An International Review* 19.5 (2011): 399-404; See also Erkens. D.H, et al

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Consequently, how companies handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. ESG is an acronym for Environmental, Social and (Corporate) Governance, the key aspects of sustainable, responsible or ethical investment⁵. It has been defined as “a generic term used in capital markets and used by investors to evaluate corporate behaviour and to determine the future financial performance of companies⁶. ESG “is a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing a company’s carbon footprint and ensuring there are systems in place to ensure accountability⁷.” ESG has also been defined as standing for the three broad categories, or areas, of interest for “socially responsible investors” who consider it important to incorporate their values and concerns (such as environmental concerns) into their selection of investments instead of simply considering the potential profitability and/or risk presented by an investment opportunity.⁸

Globally, the importance of Environmental, Social and Governance (ESG) issues is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders. Increasingly, the investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from

Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide." *Journal of corporate finance* 18.2 (2012): 389-411.

⁵ Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' *Journal of Corporate Finance* 66 (2021): 101889.

⁶ The Financial Times Lexicon, Available at:

<https://markets.ft.com/glossary/searchLetter.asp?letter=E> (accessed on 21/07/2022)

⁷ Ibid

⁸ CFI, ESG (Environmental, Social and Governance), Available at: <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/> (accessed on 21/07/2022)

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investors⁹. Issues touching on climate change and sustainability dominate current ESG focus. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention¹⁰. Many projects investors and sponsors are also demanding more detailed identification and mitigation of environmental and social impacts of investment projects before making commitment or funding¹¹. According to the Organisation for Economic Co-operation and Development (OECD), the growth of ESG approaches by investors has been driven by private and public sector initiatives to reach the objectives of the Paris Agreement and the Sustainable Development Goals (SDGs)¹². This has seen the incorporation of climate transition factors into investment decisions and the growth of what has come to be known as ESG investing as a leading form of sustainable finance for long-term value and alignment with societal values. OECD defines ECG investing as generally referring to the process of considering Environmental, Social and Governance (ESG) factors when making investment decisions. Bloomberg estimates that the value of ESG investing around the world has risen to almost USD 40 trillion in 2021¹³. At the same time, as at 2020 ESG ratings were being applied to companies representing around 80% of market capitalization¹⁴.

This paper seeks to critically examine the extent to which ESG principles have been embraced in Kenya. It analyses each of the ESG principles and the progress made towards embracing this concept in Kenya. The paper further addresses some of the ESG challenges in Kenya and suggests the way forward towards realising ESG tenets for sustainable development in Kenya.

⁹ Muigua.K., 'Introduction to ESG (Environmental, Social and Governance) available at <https://thelawyer.africa/2022/02/04/esg-environmental-social-and-governance/> (accessed on 22/07/2022)

¹⁰ Ibid

¹¹ Norton Rose Fulbright, "Environmental, Social and Governance," Available at: <https://www.nortonrosefulbright.com/en/services/203f40d1/environmental-social-and-governance-esg> (accessed on 21/07/2022)

¹² OECD., 'Environmental Social and Governance (ESG) Investing' available at <https://www.oecd.org/finance/esg-investing.htm> (accessed on 21/07/2022)

¹³ Ibid

¹⁴ Ibid

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2.0 Environment Social and Governance (ESG) Principles

The Environmental 'E' pillar of ESG is being increasingly used as a tool to align investments and capital flows with a low-carbon transition and to unlock valuable forward-looking information on firms' climate transition risks and opportunities¹⁵. The environmental considerations in areas such as climate risk, water scarcity, extreme temperatures and carbon emissions are now considered as key issues that can impact competitive positioning for businesses. Companies are expected to appreciate their role as stewards of the natural or physical environment and to take into account the utilisation of natural resources and the impact of their overall operations on the environment, both locally and across its global supply chains¹⁶. Companies are now required to take precautions against environmental incidents such as oil spills or pollution from mining operations as safeguards against damage to their reputation and shareholder value¹⁷. At the same time, more than 13,000 companies and 3,000 non-business signatories in 160 countries that are signatories of the United Nations Global Compact (UNGC), which helps businesses contribute positively toward some or all of the 17 United Nations (UN) sustainable development goals (SDGs) by 2030¹⁸.

The COVID-19 pandemic, and its diverse implications including healthcare access, workplace safety, cybersecurity and other issues related to the communities that businesses , have proven to be a watershed moment for the often-underappreciated 'S' pillar of environmental, social and governance (ESG) considerations with the need to tackle the inequalities exposed and exacerbated by the pandemic becoming a key reason for investors to make allocations for socially conscious investments despite intangibility of social

¹⁵ OECD (2021), ESG Investing and Climate Transition: Market Practices, Issues and Policy Considerations, OECD Paris, <https://www.oecd.org/finance/ESG-investing-and-climatetransition-Market-practices-issues-and-policy-considerations.pdf> (accessed on 21/07/2022)

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ojiambo, S., "Leadership of the UN Global Compact: Message of CEO and Executive Director," Available at: <https://www.unglobalcompact.org/about/governance/executive-director> (accessed on 21/07/2022)

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facts¹⁹. Companies are beginning to appreciate the role taking social responsibility can play in mitigating issues such data theft, worker strikes, litigation, workplace accidents and other people-related disruptions that can hurt a business reputation and finances. The repercussions of work-related injuries and deaths on families including on their financial security are also acknowledged as having a bearing on the United Nations Sustainable Development Goals (SDGs) of no poverty, zero hunger, good health and well-being, decent work and economic growth even as many investors are aligned with these goals²⁰.

The “G” Pillar in ESG is the oldest as governance has been an integral part of robust investment for ages²¹. However, what is considered effective governance keeps evolving and the speed of evolution has quickened as institutional investors’ definition of stakeholders continues to broaden beyond shareholders²². While older forms of Governance focused on serving and protecting shareholders, the newer approaches stretch beyond basic dimensions related to financial and accounting misconduct as well as legal and regulatory non-compliance, such as transparency, corporate structures and ethics²³. Investors are also aligning Governance with the 17 United Nations Sustainability Development Goals (SDGs), where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)²⁴.

¹⁹ Create Research, “Passive Investing 2021: Rise of the social pillar of ESG,” Available at: <https://cdn.e-fundresearch.com/files/RcfPdrQdAaVI9tiBgrgLq4baO7Wciz6eepZTODEO.pdf> (accessed on 21/07/2022)

²⁰ Standard Chartered Singapore, “The S in ESG,” Available at: <https://www.sc.com/sg/wealth/insights/the-s-in-esg/> (accessed on 21/07/2022)

²¹ Muigua.K., ‘Introduction to ESG (Environmental, Social and Governance) Op Cit

²² RL360, “Governance-The G in ESG,” Available at: <https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm> (accessed on 21/07/2022)

²³ Ibid

²⁴ United Nations, Department of Economic and Social Affairs, ‘Sustainable Development’ available at <https://sdgs.un.org/goals> (accessed on 21/07/2022)

3.0 Environment, Social and Governance (ESG) Disclosure and Reporting Requirements in Kenya

The Nairobi Securities Exchange has developed an ESG Disclosure Manual to guide listed companies in Kenya on ESG reporting. The Manual (ESG Manual) provides that ESG reporting should be on a materiality basis²⁵. In financial reporting, materiality is the threshold for influencing the economic decisions of those using an Organisation's financial statements²⁶. A similar concept is also important in ESG reporting. In ESG reporting, "materiality is the principle that determines which relevant topics are sufficiently important that it is essential to report on them²⁷." It is necessary to undertake materiality analysis because not all ESG topics are of equal importance to an organization and an ESG report has to reflect their relative priority of the various topics²⁸.

The ESG Manual requires that listed companies have a structured, documented process on assessment of materiality for ESG disclosure topics²⁹. It is recommended that a materiality assessment exercise be conducted at least on an annual basis and as part of every new ESG reporting season. The ESG Manual also requires that every organization discloses its approach to materiality within the ESG report³⁰. The Global Reporting Initiative (GRI) gives guideline for what is material by providing that the ESG report should cover topics that Reflect the reporting organisation's significant economic, environmental, and social impacts; or substantively influence the assessments

²⁵ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual', available at <https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf> (accessed on 21/07/2022)

²⁶ Ruth.J., 'The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream.' *American Business Law Journal* 56.3 (2019): 645-702.'

²⁷ Muigua. K., 'What are the Material Issues for ESG Reporting in Kenya?' available at <https://thelawyer.africa/2022/06/05/material-issues-for-esg-reporting-in-kenya/> (accessed on 21/07/2022)

²⁸ Ibid

²⁹ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

³⁰ Ibid

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and decisions of stakeholders. In other words, for a topic to be relevant and potentially material, it should be based on only one of these dimensions³¹.

It is recommended that a materiality assessment grid be used as a structured guide in prioritizing ESG topics to report on³². That way, by applying an internally developed rating criteria, organisations can plot ESG topics on a grid or heat map indicating the assessed level of importance considering both dimensions of materiality³³. In that regard, materiality is dependent on whether a topic is of low or high importance to the stakeholders and the significance of ESG impacts on economy, environment and/or society. GRI gives detailed guidance that listed companies can refer to when identifying material topics³⁴. The starting point is using the sector standards to understand the sector's content and then deduce the organization content from it³⁵.

The next step is to consider the topics and impact as described in the sector standard and then identify the actual and potential impact to the organization stakeholders, economy, environment and society³⁶. It takes the engagement of the relevant stakeholders and experts on ongoing basis to achieve assessment of the impact of the topics. In the aftermath, the material topics should be tested against the sector standard to prioritize the most significant impacts for reporting³⁷. After this, the material topics should be tested with experts and information users to determine and come up with a comprehensive list of material topics for ESG reporting for the respective organization.

³¹ Global Reporting Initiative., 'ESG Standards, Frameworks and Everything in Between' available at <https://www.globalreporting.org/media/jxkgrrgd/gri-perspective-esg-standards-frameworks.pdf> (accessed on 21/07/2022)

³² Ibid

³³ Ibid

³⁴ GRI., 'The Global Standards for Sustainability Reporting' available at <https://www.globalreporting.org/standards/> (accessed on 21/07/2022)

³⁵ Ibid; See also Fonseca.A et al., 'Sustainability reporting among mining corporations: a constructive critique of the GRI approach.' *Journal of cleaner production* 84 (2014): 70-83.'

³⁶ Ibid

³⁷ Ibid

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The approach applied for each step will vary according to the specific circumstances of the organisation, such as its business model; sector; geographic, cultural and legal operating context; ownership structure; and the nature of its impacts³⁸. Given these specific circumstances, the steps should be systematic, documented, replicable, and used consistently in each reporting period. The organisation should document any changes in its approach together with the rationale for those changes and their implications. The organisation's highest governance body should oversee the process and review and approve the material topics³⁹.

The ESG Manual proposes mandatory ESG disclosures for NSE listed companies to help achieve comparability and to facilitate compliance with the CMA Code, relevant international treaties, ESG standards and local regulations⁴⁰. Further, the Capital Markets Authority (CMA) Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 provides examples of topics that the Boards of listed companies should treat as material⁴¹. As per CMA code, material information means any information that may affect the price of an issuer's securities or influence investment decisions⁴². Listed firms are advised to refer to the Code when selecting material topics for disclosure⁴³. The ESG Manual also recommends the Sustainable Development Goals (SDGs) as helpful guide in the identification of material topics and or impact as by aligning organisational objectives with the SDGs, organisations can identify significant impact areas that affect their contribution to the SDGs⁴⁴.

The concept of double-materiality is the latest introduction in the discussions around assessment of materiality in ESG reporting. According to the European

³⁸ Muigua. K., 'What are the Material Issues for ESG Reporting in Kenya?' Op Cit

³⁹ Ibid

⁴⁰ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁴¹ Capital Markets Authority., Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 , Legal Notice No. 1420

⁴² Ibid

⁴³ Ibid

⁴⁴ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

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Commission Guidelines on Non-financial Reporting, “double-materiality refers to assessing materiality from two perspectives, namely, the extent necessary for an understanding of the company’s development, performance and position” and “in the broad sense of affecting the value of the company”; and environmental and social impact of the company’s activities on a broad range of stakeholders⁴⁵. The concept of double-materiality implies the need to assess the interconnectivity of the two.

A GRI research on how double-materiality is implemented in ESG reporting, and the benefits and challenges found that identification of financially materiality issues are incomplete if companies do not first assess their impacts on sustainable development⁴⁶. The GRI white paper also revealed that reporting material sustainable development issues can enhance financial performance, improve stakeholder engagement and enable more robust disclosure⁴⁷. Further, it was established that focusing on the impacts of organisations on people and planet, rather than financial materiality, increases engagement with the Sustainable Development Goals (SDGs)⁴⁸. The ESG Manual thus encourages listed companies to assess impact of ESG issues to their organisations (such as climate change and human rights) in addition to their organisations own ESG impacts to society (such as material resource use and emissions) when determining material ESG impacts for disclosure. ESG reporting is thus essential in promoting sustainable development.

4.0 The ESG Reporting Frameworks Applicable in Kenya

In addition to the ESG Disclosure Manual formulated by the Nairobi Securities Exchange, there are several other organizations that have adopted ESG

⁴⁵ European Commission ‘Guidelines on Non-Financial Reporting’, available at https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en (accessed on 21/07/2022)

⁴⁶ Adams, C.A., Alhamood, A., He, X., Tian, J., Wang, L. and Wang, Y. (2021) The Double-Materiality Concept: Application and Issues, published by the Global Reporting Initiative (GRI) as a White Paper, Available at: <https://www.globalreporting.org/media/jrbntbyv/griwhitepaper-publications.pdf> (accessed on 21/07/2022)

⁴⁷ Ibid

⁴⁸ Ibid

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reporting requirements relevant to listed companies in Kenya⁴⁹. These include the Capital Markets Authority, the United Nations Global Compact, various investment groups, the Carbon Disclosure Programme (CDP) and industry level reporting requirements like those imposed by the Central Bank of Kenya touching on the operations of licensed Banks⁵⁰. This part explores the basics of each of these ESG reporting requirements and how listed companies in Kenya comply with them.

4.1 The Capital Markets Authority

The Capital Markets Authority (CMA) published the Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015⁵¹. It requires listed companies to explain in their annual reports how they have applied the recommendations contained in the Code⁵². Within the Code, the CMA also provides examples of topics that the Boards of listed companies should treat as material⁵³. The ESG Manual gives guidelines on how the ESG reporting approach suggested in it can be used to meet the reporting requirements of the CMA code⁵⁴. These include by identifying the CMA as a key stakeholder for listed companies within the situational analysis and stakeholder engagement phases⁵⁵. Second, it involves analysing the CMA's expectations of the organisation and the reporting requirements contained in the CMA Code⁵⁶. Third, complying with the CMA code under the ESG Manual means including disclosures requirements on the Code as part of the assessed material ESG

⁴⁹ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' available at <https://thelawyer.africa/2022/06/05/esg-reporting-frameworks-applicable-in-kenya/> (accessed on 21/07/2022)

⁵⁰ Ibid

⁵¹ Capital Markets Authority., Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015, Legal Notice No. 1420

⁵² Ibid

⁵³ Ibid

⁵⁴ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁵⁵ Ibid; See also Magale. E., 'Developing a green bond market in Kenya: perspectives from practitioners and lessons from developing markets.' *Journal of Sustainable Finance & Investment* (2021): 1-18.

⁵⁶ Ibid

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topics for disclosure⁵⁷. These have been proposed as a mandatory disclosure topic for all listed companies, that is, governance under general disclosure topics. In addition, it takes generating content on the organisation's performance around these topics using the guide proposed in this manual and reference to the GRI Standards on governance disclosures. It also entails submitting extracts or the full ESG report discussing performance on these indicators to the CMA within the agreed timelines with the CMA. In this case, the ESG report should be published within the reporting timelines required for CMA submissions.

4.2 Investor groups

As a way of managing assessed environmental and social risk in debt and equity investments, some institutional investors typically require the implementation of an environmental and social management system⁵⁸. Thus, depending on the assessed risk profile, beneficiary organisations are required to report at least annually on performance on several pre-identified environmental and social performance metrics⁵⁹. Through such reporting process, investors should be able to develop content around the organisation's approach to these topics and demonstrate performance during the reporting period⁶⁰. It is noteworthy that environmental and social risk management is one of the mandatory ESG topics proposed for all listed companies. The International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability is one example of ESG indicators and metrics that investors commonly refer to when evaluating investments⁶¹.

⁵⁷ Ibid

⁵⁸ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' available at <https://thelawyer.africa/2022/06/05/esg-reporting-frameworks-applicable-in-kenya/> (accessed on 21/07/2022)

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ International Finance Corporation., 'Performance Standards on Environmental and Social Sustainability' available at https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk (accessed on 21/07/2022)

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4.3 United Nations Global Compact

There are more than 200 Organisations in Kenya, including some listed companies, that are participants of the Global Compact Network Kenya, the local arm of the United Nations Global Compact (UNGC)⁶². The UNGC has developed a set of 10 principles that organisations can voluntarily adopt and integrate into their own strategies and operations⁶³. These principles cover four issue areas including Human Rights, Labour, Environment and Anti-corruption⁶⁴. In turn, the Ten Principles of the United Nations Global Compact is a key guideline in that regard.

The UNGC encourages participants to self-assess, prepare, and submit a Communication on Progress report to the UNGC on their performance around these four topical areas⁶⁵. According to the UNGC, the Communication on Progress report should be fully integrated into a company's main stakeholder communications, most often the annual or sustainability report⁶⁶. By developing an annual ESG report discussing organisational performance around these topics, listed companies can submit an extract of the ESG report to fulfil the requirements of the annual Communication on Progress report submissions to the UNGC. Further, applying the Global Reporting Initiative standards ensures compliance to the Communication on Progress reporting requirements⁶⁷. Organisations can also refer to the UNGC guidance document on Using GRI's Guidelines to Create a CoP.

⁶² United Nations Global Compact: available at <https://www.unglobalcompact.org/engage-locally/africa/kenya> (accessed on 21/07/2022)

⁶³ Ibid

⁶⁴ Ibid; See also Global Compact Network Kenya., 'The Ten Principles of the United Nations Global Compact' available at <https://www.globalcompactkenya.org/what-we-do/ten-principles> (accessed on 22/07/2022)

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

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4.4 The Carbon Disclosure Project (CDP)

The CDP is a non-profit charity helps in promoting transparency in environmental reporting by cities and companies around the world⁶⁸. Signatory companies provide performance data on climate change, water security and deforestation on a self-disclosure basis⁶⁹. This self-reported data is then used by investors and other stakeholders to make informed data driven decisions with regards to the reporting company's environmental impacts⁷⁰. For example, investors can use data in the CDP database to calculate the carbon intensity of their portfolio⁷¹. Investors can also select entities that demonstrate climate resilience by evidenced implementation of strategies that future proof their organisations against climate related policies and regulations⁷². There is need to consider that the CDP and GRI use common metrics on reporting on carbon emissions. ESG reporting can be used to collect and report data to the CDP. Organisations can select any or all the disclosure topics as part of their materiality assessment exercise and build reporting content within the ESG report that meets the CDP self-disclosure requirements.

4.5 Industry level reporting

Certain industry groups in Kenya have developed voluntary ESG related guidelines for consideration by member organisations. For example, in the banking sector in Kenya, the Kenya Bankers Association, the trade association for banks in Kenya, has developed the Sustainable Finance Initiative (SFI) industry principles for the banking sector⁷³. Further, recently the Central Bank of Kenya (CBK) has developed Guidance on Climate Related Risk

⁶⁸ Carbon Disclosure Project, available at <https://www.cdp.net/en> (accessed on 21/07/2022)

⁶⁹ Ibid; See also Matisoff.D et al., 'Convergence in environmental reporting: assessing the Carbon Disclosure Project.' *Business Strategy and the Environment* 22.5 (2013): 285-305.'

⁷⁰ Ibid

⁷¹ Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

⁷² Ibid

⁷³ Sustainable Finance Initiative, available at <https://sfi.kba.co.ke/> (accessed on 22/07/2022)

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Management for the banking sector⁷⁴. The aim of the Guidance is to sensitize the banking sector on mitigation of climate-related risks and harnessing of opportunities⁷⁵. It also offers guidance on the development and implementation of appropriate climate-related strategies and policies⁷⁶. Given the current trajectory of ESG and emphasis placed by investors on ESG integration, it is expected that more trade associations and industry groupings in Kenya will develop specific ESG guidelines for adoption by their members. Industry guidelines provide relevant insights on ESG issues impacting the industry and listed companies can refer to such guidelines when identifying material ESG topics for disclosure using the framework proposed in this manual.

5.0 ESG Concerns in Kenya

The concept of ESG acknowledges some of the Environmental, Social and Governance concerns that arise from the activities of corporations. From an environmental perspective, the activities of corporations have resulted in direct and indirect greenhouse gas emissions contributing to the climate change menace⁷⁷. Further, the activities of multinational corporations especially those involved in the exploration of natural resources have resulted in environmental concerns such as environmental degradation, extinction of biodiversity, contamination and destruction of soil and air pollution affecting the socio-economic lives of indigenous populations⁷⁸.

⁷⁴ Central Bank of Kenya., 'Guidance on Climate-Related Risk Management' October 2021, available at <https://www.centralbank.go.ke/wp-content/uploads/2021/10/Guidance-on-Climate-Related-Risk-Management.pdf> (accessed on 22/07/2022)

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Peterdy.K., 'ESG (Environment, Social and Governance): A Framework for Understanding and Measuring How Sustainably an Organization is Operating' available at <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/> (accessed on 21/07/2022)

⁷⁸ Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review Vol. 3 (1), 2009. Pp. 111-124*

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In the social context, ESG acknowledges some of the challenges that organization's face in their relationship with stakeholders. Some of these challenges include unfair labour practices and standards. In Kenya, there have been accusations of human right abuses such as killings, rape, and other forms of sexual and gender-based violence, bad labour practices and land injustices against the neighbouring communities perpetrated by certain multinational corporations⁷⁹. The activities of an organization can also impact the communities where such an organization operates resulting in social concerns such as land injustices and displacement of people.

Governance challenges have also impacted the profitability and sustainability of organizations. These challenges include mismanagement of organizations, lack of transparency, accountability by the board of directors, conflict of interest and poor internal controls⁸⁰. These challenges have resulted in failure of some of the leading organizations in Kenya. ESG acknowledges these challenges and seek to integrate good governance practices in the affairs of organizations.

6.0 Way Forward

There is need for corporations to embrace the concept of ESG in Kenya in order to promote sustainable development. According to the Nairobi Securities Exchange, listed companies in Kenya have a general awareness of ESG issues and corporate sustainability but there is need for capacity building on how to integrate ESG into business strategies of listed companies and how to report ESG performance in a consistent, transparent and principle-based approach that meets stakeholder expectations⁸¹. The ESG Disclosures Guidance Manual (ESG Manual) is thus designed to guide listed companies in Kenya and other organizations interested in ESG reporting on how to collect, analyse, and

⁷⁹ Kenya Human Rights Commission., 'Heavy price for Kakuzi's egregious human rights violations' available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html> (accessed on 21/07/2022)

⁸⁰ Seth.A., 'Corporate governance challenges in emerging economies." *Corporate Governance: An International Review, Forthcoming* (2017).

⁸¹ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

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publicly disclose important ESG information in a way that meets international sustainability reporting standards⁸².

The ESG Manual is proposed to act as a guide on how to progressively integrate ESG in strategy, operations, and performance management. It recommends the adoption of the Global Reporting Initiatives (GRI) Standards as the common framework for ESG Reporting for listed companies in Kenya to help reduce uncertainties⁸³. For an organization to claim that it has prepared information in accordance with the GRI Standards, it is required to have applied the GRI Reporting Principles. This is a set of reporting principles which guide organizations in ensuring the quality and proper presentation of the reported information⁸⁴. The principles include accuracy, balance, clarity, comparability, completeness, sustainability context, timeliness and verifiability⁸⁵.

According to a 2020 Global Survey on Sustainability reporting conducted by KPMG, the GRI Standards are the most widely used framework for sustainability reporting⁸⁶. The listed companies on the NSE that were reporting on ESG performance had already settled on and were using the GRI standards as their preferred framework for ESG Reporting even before the ESG Manual⁸⁷. The ESG Manual proceeds to propose a common set of ESG metrics for reporting by all listed companies to help facilitate comparability of ESG performance of listed companies in Kenya. It is also projected that over time, upon maturity of the ESG disclosures, it will become possible for stakeholders to correlate financial performance with specific ESG indicators such as diversity and air emissions⁸⁸.

⁸² Ibid

⁸³ Ibid

⁸⁴ GRI, 'The Global Standards for Sustainability Reporting' Op Cit

⁸⁵ Ibid

⁸⁶ KPMG, "The Time has Come: The KPMG Survey on Sustainability Reporting 2020," Available at: https://assets.kpmg/content/dam/kpmg/be/pdf/2020/12/The_Time_Has_Come_KPMG_Survey_o (accessed on 22/07/2022)

⁸⁷ Ibid

⁸⁸ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

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Further, applying the ESG Manual is expected to assist listed companies comply with reporting requirements for other organizations such as the Carbon Disclosure Project (CDP) and UN Global Compact (UNGC). The manual also includes a guide on how to meet corporate governance reporting requirements contained in the Capital Markets Authority (CMA) Corporate Governance Code. The ESG Manual also includes examples of sector specific ESG disclosures for reference by listed companies in its Annex 6⁸⁹. The ESG Manual is expected, with time, to make it possible to compare the ESG performance of organizations reporting within the same sectors including adopting common reporting framework for the respective sectors. The ESG Manual also seeks to support future plans for a responsible investment index by the Nairobi Securities Exchange (NSE).

The ESG criteria proposed in the Manual is also anticipated to be applied in investment selection given the momentum the trend has gained in recent years which is expected to continue in the future⁹⁰. According to the Manual, along with national policies and directives, ESG considerations in investments have become the most important driving force for ESG integration and disclosure in capital markets. As such, companies seeking to attract responsible investors are incentivized to ensure that they adopt the top ESG metrics commonly sought by investors⁹¹. These include having an overarching ESG policy, assigning ESG management responsibility, having a Corporate code of ethics, presence of litigation on matters touching on environmental, social and ethical affairs, the presence or absence of People diversity among employees, Board and management, net employee composition including ratio of part-time and full-time employees, having formal environmental policy and estimation of carbon footprint, data and cybersecurity incidents if any that can put the

⁸⁹ Ibid

⁹⁰ Muigua.K., 'The Need and Benefits of ESG Reporting in Kenya' available at <https://thelawyer.africa/2022/06/04/benefits-of-esg-reporting-in-kenya/> (accessed on 22/07/2022)

⁹¹ Ibid

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company at risk and health and safety events that affect ability to provide safe working environments for employees, contractors and the wider value chain⁹².

The expected benefits for Listed Companies adopting the ESG Manual include ensuring transparency in ESG disclosures which helps in building integrity and trust in the capital markets thus enhancing competitiveness to attract investment to the capital markets. The adoption and promotion of ESG reporting by the NSE is expected to enhance trust and integrity of the capital markets in Kenya by providing valuable information that is of increasing importance to investors, thus contributing to more efficient capital allocation⁹³. Other key benefits of integrating and disclosing ESG performance by listed companies in Kenya include the fact that it ensures investors can assess and preferentially invest in issuers that demonstrate better ESG linked financial performance, resulting in more efficient capital allocation⁹⁴. Further, implementation of the ESG Manual is geared to ensure that organisations that demonstrate responsible investment practices are able to access new sources of capital from sustainability conscious investors such as Development Finance Institutions (DFIs) and Private Equity firms⁹⁵.

In addition, a holistic view of corporate value facilitates product innovation by enabling consideration and management of the embodied environmental and social impacts of products and services. Measuring and reporting ESG performance also enables organisations embed circularity in their operating models and achieve operational efficiencies by optimizing energy and raw costs in production⁹⁶. By adding and demonstrating ESG integration into their supply chains, production systems and service delivery, the listed companies applying the manual will benefit from preferential access to new markets. ESG value creation framework also helps organisations to proactively address non-

⁹² Broderick, S., "The Top 10 ESG Metrics Private Equity Funds Should Collect," IHS Markit, 2019; Available at: <https://cdn.ihsmarkit.com/www/pdf/0720/ESGTop10-Digital-Final-HiRes.pdf> (accessed on 22/07/2022)

⁹³ Muigua.K., 'The Need and Benefits of ESG Reporting in Kenya' Op Cit

⁹⁴ Ibid

⁹⁵ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

⁹⁶ Ibid

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financial but critical environmental and social risks, thereby preserving and creating long term value for stakeholders. ESG integration enhances regulatory compliance and helps anticipate the impact of future ESG related regulations and policies. Finally, organizations are perceived as responsible corporate citizens and achieve brand value enhancement by systematically identifying and responding to stakeholder needs and expectations⁹⁷.

The implementation timelines of the ESG Manual for listed companies on the NSE includes the requirement of issuing a public report on their ESG performance at least annually⁹⁸. The steps outlined in the ESG Disclosures Guidance Manual are expected to guide such reporting. In addition, the manual is also made available as a public good for other organisations in Kenya that would be interested in ESG reporting. On their part, listed companies have been given a grace period of one year from the date of issuance of the guidelines (29th November 2021) to interact and familiarize themselves with the ESG reporting steps contained in these guidelines for implementation⁹⁹. Thus, listed companies will after 29th November 2022 be expected to include a sustainability/ESG report in their annual integrated reports¹⁰⁰. The Sustainability/ESG Report under the NSE ESG Manual must at minimum contain the mandatory ESG disclosures discussed in Chapter 6 of the manual. Issuers can also choose to publish a separate ESG/sustainability report. Adopting and adhering to the ESG manual will thus be an important step in promoting ESG in Kenya.

7.0 Conclusion

Environment, Social and Governance (ESG) has emerged as arguably the most important tool of corporate governance in the current era. It acknowledges the environmental, social and governance concerns faced by corporations and seeks to integrate these concerns in corporate decision making in order to

⁹⁷ Ibid; See also Africa Sustainability Matters., 'What do ESG guidelines mean for corporates?' available at <https://africasustainabilitymatters.com/what-do-esg-guidelines-mean-for-corporates/> (accessed on 22/07/2022)

⁹⁸ Ibid

⁹⁹ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

¹⁰⁰ Ibid

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promote sustainable, responsible and ethical investments. There is need for organizations to continue embracing ESG in order to promote corporate sustainability. Embracing ESG as a pillar of sustainable development is an ideal whose time has come.

Achieving Net Zero Emissions- A Reflection

Abstract

Achieving net zero emissions has been advocated as a key strategy with the potential to accelerate the global climate agenda. It has been pointed out that the world needs to embrace net zero transition in order to accelerate climate action. This paper critically discusses the need to achieve net zero emissions. It argues that achieving net zero emissions is vital in confronting climate change and fostering Sustainable Development. The paper defines the idea of net zero emissions. It also examines the progress made towards achieving net zero emissions at the global, continental and national levels. The paper further discusses some of the challenges facing the attainment of net zero emissions. It also proposes measures towards achieving net zero emissions.

1.0 Introduction

Climate change has been described as the most defining challenge of our time¹. It has been identified as one of the main global challenges that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda². Climate change is an undesirable phenomenon that affects realization of the Sustainable Development agenda across the world by affecting the sustainability of the planet's ecosystems, the stability of the global economy and the future of humankind³. The consequences of climate change such as intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world affecting the realization of Sustainable Development⁴. It has been argued that if left unchecked, climate change will undo a lot of the development progress made

¹ United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at <https://www.un.org/en/desa/forum-climate-change-and-science-and-technology-innovation> (Accessed on 26/02/2024)

² Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

³ Climate Change., 'Meaning, Definition, Causes, Examples and Consequences.' Available at <https://youmatter.world/en/definition/climate-change-meaning-definition-causes-and-consequences/> (Accessed on 26/02/2024)

⁴ Ibid

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over the past years and will also provoke mass migrations that will lead to instability and wars⁵.

As a result of the foregoing concerns, it has been asserted that the climate time-bomb is ticking⁶. In addition, it has been argued that the world needs a greater climate ambition⁷. There is need to massively fast-track climate efforts by every country and every sector and on every timeframe⁸. Sustainable Development Goal 13 calls upon all countries to take urgent actions towards combating climate change and its impacts⁹.

One of the key mechanisms that has been advocated with the potential to accelerate the global climate agenda is achieving net zero emissions¹⁰. It has been argued that achieving net-zero carbon emissions is a goal for the world to mitigate the worst impacts of climate change¹¹. In addition, it has been pointed out that the world needs to embrace net zero transition in order to accelerate climate action¹².

⁵ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at <https://www.un.org/sustainabledevelopment/climate-change/> (Accessed on 26/02/2024)

⁶ United Nations., 'Secretary-General Calls on States to Tackle Climate Change 'Time Bomb' through New Solidarity Pact, Acceleration Agenda, at Launch of Intergovernmental Panel Report' Available at <https://press.un.org/en/2023/sgsm21730.doc.htm> (Accessed on 26/02/2024)

⁷ Ibid

⁸ Ibid

⁹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 26/02/2024)

¹⁰ Nordloh. D., 'The Challenges to Achieving Net Zero Carbon Emissions' Available at <https://energybyentech.com/blog/the-challenges-to-achieving-net-zero-carbon-emissions/> (Accessed on 26/02/2024)

¹¹ Ibid

¹² Nwokolo. S et al., 'Introduction: Africa's Net Zero Transition' Available at https://www.researchgate.net/publication/376294551_Introduction_Africa's_Net_Zero_Transition (Accessed on 26/02/2024)

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This paper critically discusses the need to achieve net zero emissions. It argues that achieving net zero emissions is vital in confronting climate change and fostering Sustainable Development. The paper defines the idea of net zero emissions. It also examines the progress made towards achieving net zero emissions at the global, continental and national levels. The paper further discusses some of the challenges facing the attainment of net zero emissions. It also proposes measures towards achieving net zero emissions.

2.0 Conceptualizing Net Zero Emissions

With the world facing an urgent climate crisis, the need for sustainable solutions has never been greater¹³. It has been observed that one of the most ambitious targets that countries and organisations have set is achieving net-zero emissions¹⁴. According to the Intergovernmental Panel on Climate Change (IPCC) net zero emissions are achieved when anthropogenic carbon dioxide emissions are balanced globally by anthropogenic carbon dioxide removals over a specified period¹⁵. Further, it has been pointed out that the term net zero refers to the target of reducing the greenhouse gas emissions that cause global warming to zero by balancing the amount released into the atmosphere with the amount removed and stored by carbon sinks¹⁶. Net zero carbon dioxide emissions can also be referred to as carbon neutrality¹⁷. According to the Organisation for Economic Co-operation and Development (OECD), net-zero carbon dioxide emissions is also sometimes referred to as carbon neutrality and at a global scale, the two terms are equivalent¹⁸.

¹³ DGB Group., 'Net Zero: Benefits, Challenges, Strategies, and the Power of Nature-Based Solutions' Available at <https://www.green.earth/blog/net-zero-benefits-challenges-strategies-and-the-power-of-nature-based-solutions> (Accessed on 26/01/2024)

¹⁴ Ibid

¹⁵ Intergovernmental Panel on Climate Change., 'Glossary' Available at https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_AnnexI.pdf (Accessed on 26/02/2024)

¹⁶ Kyriacou, G., & Burke, J., 'Why is Net Zero so Important in the Fight Against Climate Change?' Available at <https://www.lse.ac.uk/granthaminstitute/explainers/why-is-net-zero-so-important-in-the-fight-against-climate-change/> (Accessed on 27/02/2024)

¹⁷ Intergovernmental Panel on Climate Change., 'Glossary' Op Cit

¹⁸ Organisation for Economic Co-operation and Development., 'Understanding Countries' Net-Zero Emissions Targets' Available at <https://www.oecd->

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However, OECD points out that at regional, national and sub-national level, the term net-zero carbon dioxide emissions is generally applied to emissions and removals under direct responsibility of the reporting entity, whereas the term carbon neutrality generally includes emissions and removals within and beyond direct responsibility of the reporting entity¹⁹. The term net-zero emissions is understood to cover all anthropogenic greenhouse gas emissions covered by the United Nations Framework Convention on Climate Change (UNFCCC)²⁰. These gases include carbon dioxide, methane, nitrous oxide, and chlorofluorocarbons²¹. It has been pointed out that achieving net zero emissions or carbon neutrality requires striking a balance between the amount of emissions put into the atmosphere with the amount taken out²².

Achieving net zero requires removing carbon emissions from the atmosphere equal to the amount produced by human activities through various measures which include carbon capture and storage, afforestation, and the use of renewable energy sources²³. Further, it has been observed that net-zero emissions will be achieved when all emissions released by human activities are counterbalanced by removing carbon from the atmosphere in a process known as carbon removal²⁴. Achieving net zero requires a two-pronged approach²⁵. On the first part, it requires human-caused emissions (such as

ilibrary.org/docserver/8d25a20c-en.pdf?expires=1708951187&id=id&acname=guest&checksum=440237330830E3DE611AA54BC67A4665 (Accessed on 26/02/2024)

¹⁹ Ibid

²⁰ Ibid

²¹ United States Environmental Protection Agency 'Sources of Greenhouse Gas Emissions' Available at <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (Accessed on 26/02/2024)

²² United Nations Climate Change., 'Get Net Zero Right' Available at <https://racetozero.unfccc.int/wp-content/uploads/2021/07/Get-Net-Zero-right-2.pdf> (Accessed on 26/02/2024)

²³ DGB Group., 'Net Zero: Benefits, Challenges, Strategies, and the Power of Nature-Based Solutions' Op Cit

²⁴ Levin. K et al., 'What Does "Net-Zero Emissions" Mean? 8 Common Questions, Answered' Available at <https://www.wri.org/insights/net-zero-ghg-emissions-questions-answered> (Accessed on 26/02/2024)

²⁵ Ibid

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those from fossil-fueled vehicles and factories) to be reduced as close to zero as possible²⁶. Secondly, it requires that any remaining emissions be balanced with an equivalent amount of carbon removal, which can happen through natural approaches like restoring forests or through technologies like direct air capture and storage which scrubs carbon directly from the atmosphere²⁷.

It has been argued that the goal of achieving net zero carbon emissions has become a central paradigm in global climate policy, and increasingly drives both analysis and action²⁸. In addition, it has been pointed out that achieving a net zero future remains the only way to stop a rise in global temperatures and presents many opportunities for development, economic diversification, and growth²⁹. Achieving net zero emissions has numerous benefits for both nature and humanity³⁰. It has been correctly pointed out that investing in nature-based solutions, transitioning to sustainable practices and clean energy sources, and reducing carbon emissions can help alleviate the negative effects of climatic emergencies, including higher temperatures and sea levels, more extreme weather events, and limited access to food and water³¹. In addition, it has been argued that reducing our carbon footprint also creates economic opportunities by developing new industries and jobs in various sectors such as energy, transport, and agriculture³². Additionally, adopting nature-based solutions and reducing the reliance on fossil fuels can contribute to better public health outcomes and improved environmental justice³³. It has also been argued that achieving net zero can foster a healthy, resilient, zero carbon recovery that prevents future threats, creates decent jobs, and unlocks

²⁶ Ibid

²⁷ Ibid

²⁸ Energy for Growth Hub., 'Who Decides Africa's Net Zero Pathways?' Available at https://energyforgrowth.org/wp-content/uploads/2022/10/Who-Decides-Africas-Net-Zero-Pathways_-2.pdf (Accessed on 26/02/2024)

²⁹ Ibid

³⁰ DGB Group., 'Net Zero: Benefits, Challenges, Strategies, and the Power of Nature-Based Solutions' Op Cit

³¹ Ibid

³² Ibid

³³ Ibid

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inclusive, sustainable growth³⁴. It is therefore necessary to achieve net zero in order to effectively combat climate change and realize a sustainable future³⁵.

3.0 Achieving Net Zero: Promises and Pitfalls

The need to reduce emissions from greenhouse gases is set out under the *United Nations Framework Convention for Climate Change* (UNFCCC)³⁶. The Convention seeks to achieve the *stabilization of greenhouse gas concentrations* in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system (Emphasis added)³⁷. It further urges countries to undertake several measures in order to reduce greenhouse gas emissions such as implementing national and regional measures aimed at mitigating climate change by addressing anthropogenic emissions³⁸; and promoting and cooperating in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases³⁹.

Further, the *Kyoto Protocol*⁴⁰ commits industrialized countries and economies in transition to *limit and reduce* greenhouse gases emissions in accordance with agreed individual targets (Emphasis added). It requires these countries to implement measures and policies geared towards achieving their emission limitation and reduction commitments towards combating climate change⁴¹. These measures include enhancement of energy efficiency⁴²; promotion of

³⁴ United Nations Climate Change., 'Race To Zero Campaign' available at <https://unfccc.int/climate-action/race-to-zero-campaign> (Accessed on 27/02/2024)

³⁵ Ibid

³⁶ United Nations Framework Convention for Climate Change., United Nations, 1992., Available at https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf (Accessed on 27/02/2024)

³⁷ Ibid, Article 2

³⁸ Ibid, article 4 (1) (b)

³⁹ Ibid, Article 4 (1) (c)

⁴⁰ United Nations Framework Convention on Climate Change., 'Kyoto Protocol to the United Nations Framework Convention on Climate Change.' Available at <https://unfccc.int/resource/docs/convkp/kpeng.pdf> (Accessed on 27/02/2024)

⁴¹ Ibid, article 2

⁴² Ibid

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sustainable forms of agriculture in light of climate change considerations⁴³; fostering research on, and promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies and cooperation between states to enhance the individual and combined effectiveness of their policies and measures adopted towards confronting climate change⁴⁴.

The idea of achieving net zero is enshrined under the *Paris Agreement*⁴⁵. The objective of the Agreement is to strengthen the global response to the threat of climate change, in the context of Sustainable Development and efforts to eradicate poverty through holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels; increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development⁴⁶. The Paris Agreement provides that in order to achieve the long-term temperature goal set out in Article 2, Parties shall aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of the 21st century, on the basis of equity, and in the context of Sustainable Development and efforts to eradicate poverty⁴⁷. It has been argued that in order to achieve the target set out under the Paris Climate agreement to limit global warming to no more than 1.5°C, greenhouse gas emissions need to be cut in half by the year 2030,

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 27/02/2024)

⁴⁶ Ibid

⁴⁷ Ibid, article 4 (1)

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and to reach net-zero, by the year 2050⁴⁸. IPCC further points out that the world needs to reach net zero by around 2050 if it is to meet the Paris Agreement target of limiting global warming to 1.5°C⁴⁹.

Achieving net zero is envisaged under the *Glasgow Climate Pact*⁵⁰ which was adopted at COP 26. Under the Pact, Parties recognize that limiting global warming to 1.5 °C requires rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to *net zero* around midcentury as well as deep reductions in other greenhouse gases⁵¹. The Pact also requires Parties to implement and communicate long term low greenhouse gas emission development strategies referred to in Article 4, paragraph 19, of the Paris Agreement towards just transitions to net zero emissions by or around midcentury, taking into account different national circumstances⁵². Actualizing the aspirations of the Glasgow Climate Pact is vital in achieving net zero emissions.

At a regional level, the *East African Community (EAC) Climate Change Policy*⁵³ recognizes the adverse impacts of climate change as a major challenge to socio-economic development globally. The Policy's overall climate change mitigation objective is to promote Sustainable Development in the region while contributing to the global efforts of reducing emissions of greenhouse

⁴⁸ Renne. D., 'Progress, Opportunities and Challenges of Achieving Net-Zero Emissions and 100% Renewables' *Solar Compass*, Volume 1, 2022

⁴⁹ The Intergovernmental Panel on Climate Change., 'Special Report: Global Warming of 1.5 °C' Available at <https://www.ipcc.ch/sr15/> (Accessed on 27/02/2024)

⁵⁰ United Nations., 'United Nations Framework Convention on Climate Change: Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its third session, held in Glasgow from 31 October to 13 November 2021' FCCC/PA/CMA/2021/10/Add.1, Available at https://unfccc.int/sites/default/files/resource/cma2021_10_add1_adv.pdf (Accessed on 27/02/2024)

⁵¹ Ibid

⁵² Ibid

⁵³ East African Community., 'East African Community Climate Change Policy.' Available at <https://www.eac.int/environment/climate-change/eac-climate-change-policy-framework> (Accessed on 27/02/2024)

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gases through the Clean Development Mechanisms, Nationally Appropriate Mitigation Actions, Reducing Emissions from Deforestation and Forest Degradation or through any other future agreements⁵⁴. The Policy notes that although the EAC region has negligible contribution to global greenhouse gases emissions, it is still important for the region to contribute to the reduction of greenhouse gases through the preparation of Nationally Appropriate Mitigation Actions (NAMAs) for sectors with potentially high emission factors and take other relevant measures⁵⁵. These include sectors such as energy, transport, agriculture, waste management and industry⁵⁶. Implementing this Policy can accelerate the race towards net zero emissions within the EAC.

At a national level, the *Climate Change Act*⁵⁷ of Kenya seeks to enhance the national response to climate change and achieve low carbon climate development for Sustainable Development. The Act sets out several ways of achieving this goal which include reducing emissions intensity by facilitating approaches and uptake of technologies that support low carbon, and climate resilient development⁵⁸. The Climate Change Act has since been amended by the *Climate Change (Amendment) Act*⁵⁹ of 2023 in order to enhance climate change mitigation and adaption measures in Kenya through the concept of carbon markets. It has been argued that carbon markets can play a vital role in achieving net zero⁶⁰. For example, by purchasing permits or credits generated from emissions-reduction projects, emitting companies can unlock funding for the net-zero transition⁶¹. It is therefore necessary to actualize carbon markets in Kenya as envisaged under the Climate Change (Amendment) Act in order to accelerate the journey towards net zero emissions.

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Climate Change Act., No. 11 of 2016, Government Printer, Nairobi

⁵⁸ Ibid, S (3) (2)

⁵⁹ Climate Change (Amendment) Act, 2023, Government Printer, Nairobi

⁶⁰ United Nations Development Programme., 'Africa Holds the Key to Many Global Climate Solutions' Available at <https://climatepromise.undp.org/news-and-stories/africa-holds-key-many-global-climate-solutions> (Accessed on 27/02/2024)

⁶¹ Ibid

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The need to achieve net zero is therefore well captured at the global, regional, and national levels. There has been some progress towards embracing the idea of net zero and implementing measures towards net zero transition. It has been observed that governments are increasingly accepting that net zero targets need to be included in their Nationally Determined Contributions (NDCs), and a growing number are legislating for net zero⁶². For example, China which is one of the biggest emitters of greenhouse gases has committed to achieving 'climate neutrality' by 2060 – a crucial pledge for enabling the world as a whole to limit temperature rise to 1.5 or 2°C⁶³. In addition, the European Union set out its bloc-wide net zero target for 2050 in its European Green Deal⁶⁴. Under the Deal, the European Union seeks to be the first climate-neutral continent in the world⁶⁵. Further, the United States of America (USA) has also committed to net zero emissions by 2050 at the latest⁶⁶. It has been pointed out that many countries with net zero targets are beginning to incorporate them directly into their NDCs, particularly now that the Glasgow Climate Pact “notes the importance of aligning nationally determined contributions with long-term low greenhouse gas emission development strategies⁶⁷.”

It has been pointed out that there are several opportunities that can be unlocked in order to achieve net zero emissions⁶⁸. These include accelerating the energy transition and embracing renewable sources of energy⁶⁹; investing

⁶² Kyriacou. G., & Burke. J., 'Why is Net Zero so Important in the Fight Against Climate Change?' Op Cit

⁶³ Ibid

⁶⁴ European Commission., 'The European Green Deal' Available at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en (Accessed on 27/02/2024)

⁶⁵ Ibid

⁶⁶ Kyriacou. G., & Burke. J., 'Why is Net Zero so Important in the Fight Against Climate Change?' Op Cit

⁶⁷ Levin. K et al., 'What Does "Net-Zero Emissions" Mean? 8 Common Questions, Answered' Op Cit

⁶⁸ Ibid

⁶⁹ Renne. D., 'Progress, Opportunities and Challenges of Achieving Net-Zero Emissions and 100% Renewables' Op Cit

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in nature based solutions⁷⁰; and embracing the use of sustainable materials and reducing waste⁷¹. However, despite the importance and opportunities available for achieving net zero, several challenges are hindering the transition towards net zero emissions. It has been argued that the primary challenge of achieving a zero-carbon future is the cost involved⁷². Achieving net zero requires transformation in key sectors including energy, agriculture, and transport which entails significant costs that may overburden or be out of reach for developing countries⁷³. In addition, it has been argued that from a political perspective, achieving net-zero carbon emissions requires strong policies and regulations that incentivize the transition to clean energy sources⁷⁴. As a result, governments must set clear targets and provide financial support to drive investment in clean energy technologies⁷⁵. However, it has been correctly pointed out that political will is often constrained by competing interests such as economic growth, staid policy influence and social welfare⁷⁶. Further, organisations face several barriers in achieving net zero emissions such as creating realistic carbon targets, making carbon reduction a reality, supporting and streamlining supply chains, and choosing the right offsetting method⁷⁷. OECD, further points out that there is a growing gap between the various net-zero commitments put forward and concrete actions being implemented in the near-term⁷⁸. It is therefore necessary to implement net zero commitments and address the underlying challenges in order to effectively confront the problem of climate change.

⁷⁰ DGB Group., 'Net Zero: Benefits, Challenges, Strategies, and the Power of Nature-Based Solutions' Op Cit

⁷¹ Ibid

⁷² Levin. K et al., 'What Does "Net-Zero Emissions" Mean? 8 Common Questions, Answered' Op Cit

⁷³ Ibid

⁷⁴ Nordloh. D., 'The Challenges to Achieving Net Zero Carbon Emissions' Op Cit

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Organisation for Economic Co-operation and Development., 'Understanding Countries' Net-Zero Emissions Targets' Op Cit

4.0 Way Forward

In order to achieve net zero emissions, it is necessary to accelerate the energy transition by embracing clean and green sources of energy such as renewable energy⁷⁹. The energy sector has been identified as a major contributor to climate change⁸⁰. For example, the extraction and burning of fossil fuels which are the major source of global energy supply has serious environmental consequences including climate change⁸¹. It has been pointed out that when fossil fuels are burned, the stored carbon and other greenhouse gases are released into the atmosphere⁸². An excess buildup of greenhouse gases in the atmosphere as a result of burning of fossil fuels has resulted in dramatic changes to Earth's climate—a trend that will worsen as more fossil fuels are burned⁸³. It has been observed that fossil fuels including coal, oil and natural gas are by far the largest contributor to global climate change, accounting for over 75 per cent of global greenhouse gas emissions and nearly 90 per cent of all carbon dioxide emissions⁸⁴. According to the International Energy Agency (IEA), as the major source of global emissions, the energy sector holds the key to responding to climate change⁸⁵. Achieving net zero therefore demands transitioning from fossil fuels to clean sources of energy such as renewable energy. IEA points out that achieving net zero emissions by 2050 will require nothing short of the complete transformation of the global energy system towards renewable sources of energy⁸⁶. These sources of energy which include wind and solar are vital in achieving net zero since they emit little to no

⁷⁹ Renne. D., 'Progress, Opportunities and Challenges of Achieving Net-Zero Emissions and 100% Renewables' Op Cit

⁸⁰ Muigua. K., 'Transitioning from Fossil Fuels to Clean Energy' Available at <https://kmco.co.ke/wp-content/uploads/2023/12/Transitioning-from-Fossil-Fuels-to-Clean-Energy.pdf> (Accessed on 27/02/2024)

⁸¹ Yildiz. I., 'Fossil Fuels.' *Comprehensive Energy Systems.*, (2018), Volume 1., pp 521-567

⁸² Environmental and Energy Study Institute., 'Fossil Fuels.' Available at <https://www.eesi.org/topics/fossil-fuels/description> (Accessed on 27/02/2024)

⁸³ Ibid

⁸⁴ United Nations., 'Causes and Effects of Climate Change.' Available at <https://www.un.org/en/climatechange/science/causes-effects-climate-change> (Accessed on 27/02/2024)

⁸⁵ International Energy Agency., 'Net Zero by 2050' Available at <https://www.iea.org/reports/net-zero-by-2050> (Accessed on 27/02/2024)

⁸⁶ Ibid

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greenhouse gases⁸⁷. Further, these sources of energy are readily available and in most cases cheaper than coal, oil or gas⁸⁸. For example, it has been pointed out that Africa has an abundance of renewable energy (including wind, solar, hydro, bioenergy, ocean tidal waves, geothermal and other renewables) which can be vital in confronting climate change if well harnessed⁸⁹. According to the African Union, the availability of abundant renewable energy resources on the continent such as hydropower, solar, wind, geothermal and bio-energy can transform Africa's energy sector to modern and sustainable energy through both grid and off-grid systems and contribute to the fight against climate change⁹⁰. It is therefore necessary for Africa and the rest of the world to embrace renewable sources of energy in order to achieve net zero emissions.

Further, it is important to embrace nature based solutions towards climate change⁹¹. Nature-based Solutions have been defined as actions to protect, sustainably manage and restore natural or modified ecosystems, which address societal challenges such as climate change, food and water security and natural disasters effectively and adaptively, while simultaneously providing human well-being and biodiversity benefits⁹². They adopt the use of ecosystems and their services towards addressing societal challenges such

⁸⁷ United Nations., 'Renewable Energy - Powering a Safer Future' Available at <https://www.un.org/en/climatechange/raising-ambition/renewable-energy> (Accessed on 27/02/2024)

⁸⁸ Ibid

⁸⁹ Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 27/02/2024)

⁹⁰ African Union., 'Is Energy Transition the Answer to Africa's Climate Change and Socio-Economic Development? What will it Take for Africa to Reach Net-Zero Emissions?' Available at <https://au.int/en/pressreleases/20211109/energy-transition-answer-africas-climate-change-and-socio-economic> (Accessed on 27/02/2024)

⁹¹ Carbon Brief., 'Can 'Nature-Based Solutions' Help Address Climate Change?' Available at <https://www.carbonbrief.org/qa-can-nature-based-solutions-help-address-climate-change/> (Accessed on 27/02/2024)

⁹² International Union for Conservation of Nature, 'Nature-Based Solutions' available at <https://www.iucn.org/our-work/nature-based-solutions> (Accessed on 27/02/2024)

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as climate change⁹³. It has been asserted that nature based solutions have significant yet underutilized potential to address global threats including climate change, loss of biodiversity, food and water security, human health and natural disasters⁹⁴. It has further been argued that nature based solutions are key to many countries' and companies' plans to achieve net-zero in the coming decades⁹⁵. For example, nature based solutions play a crucial role in achieving net-zero emissions by sequestering carbon and mitigating the effects of climate change⁹⁶. One key nature based solution that is vital in achieving net zero is regrowing natural forests, which can help to sequester and store carbon dioxide in their biomass⁹⁷. It has been observed that this approach involves restoring degraded or deforested areas with native species, increasing biodiversity, improving soil health, and enhancing the community's resilience to climate change⁹⁸. Further, embracing other nature based solutions such as the sustainable management of ecosystems, improving soil health, and using agroforestry practices, can help to sequester carbon, protect biodiversity, and improve the resilience of communities in the face of climate change⁹⁹. Further, it has been pointed out that projects that embrace nature based solutions help to generate carbon credits that provide an income stream for local communities, incentivise environmental protection, provide an opportunity for investors, and help organisations and governments reach net zero¹⁰⁰. It is thus essential to embrace nature based solutions in order to achieve net zero emissions¹⁰¹.

Achieving net zero emissions also requires implementing and fostering effective utilization of carbon markets¹⁰². It has been observed that by

⁹³ Ibid

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ DGB Group., 'Net Zero: Benefits, Challenges, Strategies, and the Power of Nature-Based Solutions' Op Cit

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰² United Nations Development Programme., 'Africa Holds the Key to Many Global Climate Solutions' Op Cit

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purchasing permits or credits generated from emissions-reduction projects, emitting companies can unlock funding for the net-zero transition through carbon markets¹⁰³. According to OECD, international carbon markets could potentially help countries enhance the ambition of their climate commitments and achieve their net-zero targets with greater economic efficiency, complementing domestic emission reduction efforts while providing other sustainable development co-benefits¹⁰⁴. In particular, international carbon markets could be useful for countries that are not able to achieve net-zero emissions through domestic mitigation actions alone¹⁰⁵. Carbon markets are increasingly being seen as an essential part of efforts to reach net zero emissions by around 2050¹⁰⁶. It is therefore necessary to effectively utilize carbon markets in order to achieve net zero emissions.

It is also imperative for all countries to promote low carbon development strategies across all sectors¹⁰⁷. The concept of low carbon development which is also expressed using the term Low-Emission Development Strategies (LEDS) also known as low-carbon development strategies, or low-carbon growth plans refers to forward-looking national economic development plans or strategies that encompass low-emission and/or climate-resilient economic growth¹⁰⁸. Low carbon development has also been defined as forward-looking, climate-friendly growth strategies that can highlight a country's priority actions for climate mitigation and adaptation, and a country's role in the global

¹⁰³ Ibid

¹⁰⁴ Organisation for Economic Co-operation and Development., 'Understanding Countries' Net-Zero Emissions Targets' Op Cit

¹⁰⁵ Ibid

¹⁰⁶ Murray. S., 'Can Carbon Markets Accelerate Progress Towards Net Zero?' Available at <https://www.ft.com/content/5349cb46-4c33-4a2e-840a-b8fc94de7254> (Accessed on 27/02/2024)

¹⁰⁷ Muigua. K., 'Enhancing Low Carbon Development for Sustainability' Available at <https://kmco.co.ke/wp-content/uploads/2023/09/Enhancing-Low-Carbon-Development-for-Sustainability-.pdf> (Accessed on 27/02/2024)

¹⁰⁸ United Nations., 'Low Carbon Development.' Available at <https://sustainabledevelopment.un.org/index.php?menu=1448#:~:text=The%20concept%20of%20low%20carbon,low%2Dcarbon%20growth%20plans> (Accessed on 27/02/2024)

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effort against climate change¹⁰⁹. The idea of low-carbon development aims to achieve the goals of reducing greenhouse gas emissions, exploiting low-carbon energy, and ensuring economic growth¹¹⁰. Low carbon development strategies can help achieve net zero by reducing greenhouse gas emissions¹¹¹. It has been pointed out that reducing emissions at the source is the most effective way to achieve net zero¹¹². It is therefore necessary for countries to embrace low carbon development strategies such as embracing renewable sources of energy including solar, wind and hydropower, adopting climate smart agricultural techniques, fostering sustainable cities, transport and infrastructure and adoption of sustainable waste management techniques in order to achieve net zero¹¹³.

Further, in order to achieve net zero, it is crucial to invest in carbon removal technologies¹¹⁴. It has been suggested that the deployment of greenhouse gas removal technologies can help to achieve net zero across an economy¹¹⁵. For example, technologies like Direct Air Capture and Storage (DACs) can help achieve net zero by scrubbing carbon directly from the atmosphere¹¹⁶. However, it has also been noted that the technologies in question, which

¹⁰⁹ United Nations Economic and Social Commission for Asia and the Pacific., 'Low-Carbon Development Plan.' Available at <https://www.unescap.org/sites/default/files/45.%20FS-Low-Carbon-DevelopmentPlan.pdf> (Accessed on 27/02/2024)

¹¹⁰ Yuan. H, Zhou. P, & Zhou. D., 'What is Low-Carbon Development? A Conceptual Analysis.' *Energy Procedia*, 5 (2011) 1706–1712

¹¹¹ International Organization for Standardization., 'Embracing Net Zero: A Crucial Step Towards a Sustainable Future' Available at <https://www.iso.org/climate-change/embracing-net-zero#:~:text=Emission%20reductions%3A%20Reducing%20emissions%20at,innovating%20processes%20to%20reduce%20waste>. (Accessed on 27/02/2024)

¹¹² Ibid

¹¹³ Muigua. K., 'Actualizing Africa's Green Dream.' Available at <http://kmco.co.ke/wpcontent/uploads/2023/07/Actualizing-Africas-Green-Dream.pdf> (Accessed on 27/02/2024)

¹¹⁴ Levin. K et al., 'What Does "Net-Zero Emissions" Mean? 8 Common Questions, Answered' Op Cit

¹¹⁵ Kyriacou. G., & Burke. J., 'Why is Net Zero so Important in the Fight Against Climate Change?' Op Cit

¹¹⁶ Ibid

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include DACS and Bioenergy with Carbon Capture and Storage (BECCS), are not yet proven at scale, can be expensive and energy-intensive, and have their own unwanted negative impacts¹¹⁷. It is therefore necessary to embrace technology with caution and give priority to abating domestic emissions as the primary way to bring emissions to net zero¹¹⁸.

Finally, it has correctly been pointed out that in addition to governments, other entities including organisations, cities, and regions have a role to play in achieving net zero¹¹⁹. It has been argued that businesses and organizations are vital in achieving net zero since the private sector development is the anchor that facilitates the knowledge, skills and infrastructure needed for sustainable practices within developing economies¹²⁰. It has been correctly observed that many companies rely heavily on fossil fuels for their energy needs, and the transition to clean energy may require significant changes to their supply chains and business models¹²¹. However, there are also significant opportunities for businesses that embrace the transition to net zero such as new markets, reduced regulatory risks and more reliable energy¹²². It is therefore necessary for organizations to play their role towards achieving net zero. Further, it has been pointed out that cities have a crucial role to play in achieving net zero since more than half of the global population live in cities, consuming 78% of the world's primary energy and generating more than 70% of global carbon emissions¹²³. It is therefore necessary to catalyze urban decarbonization and resilience by improving energy efficiency, enhancing clean electrification and promoting resource circularity solutions¹²⁴.

¹¹⁷ Levin. K et al., 'What Does "Net-Zero Emissions" Mean? 8 Common Questions, Answered' Op Cit

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ PwC Kenya., 'Private Sector Development – Catalyst of a Sustainable Africa?' Available at <https://www.pwc.com/ke/en/blog/private-sector-development.html#:~:text=As%20the%20world%20looks%20to,sustainable%20practices%20within%20developing%20economies>. (Accessed on 27/02/2024)

¹²¹ Nordloh. D., 'The Challenges to Achieving Net Zero Carbon Emissions' Op Cit

¹²² Ibid

¹²³ World Economic Forum., 'Net Zero Carbon Cities' Available at <https://www.weforum.org/nzcc/> (Accessed on 27/02/2024)

¹²⁴ Ibid

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The foregoing among other measures are vital in achieving net zero emissions.

5.0 Conclusion

Achieving net zero carbon emissions has become a central paradigm in global climate policy, and increasingly drives both analysis and action¹²⁵. It has been identified as the only way to stop a rise in global temperatures and presents many opportunities for development, economic diversification, and growth¹²⁶. Achieving net zero creates economic opportunities by developing new industries and jobs in various sectors such as energy, transport, and agriculture¹²⁷. Achieving net zero emissions has numerous benefits for both nature and humanity¹²⁸. There have been commitments and some progress made towards achieving net zero emissions¹²⁹. However, achieving net zero is hindered by challenges such as costs, inadequate political will, and unsustainable business practices¹³⁰. Achieving net zero calls for acceleration of the energy transition by embracing clean and green sources of energy such as renewable energy¹³¹; embracing nature based solutions towards climate change¹³²; implementing and fostering effective utilization of carbon markets¹³³; promoting low carbon development strategies across all sectors including agriculture, energy, infrastructure, transport, and waste management¹³⁴; and investing in carbon removal technologies¹³⁵. Achieving net zero is the way to go in our fight against climate change

¹²⁵ Energy for Growth Hub., 'Who Decides Africa's Net Zero Pathways?' Op Cit

¹²⁶ Ibid

¹²⁷ DGB Group., 'Net Zero: Benefits, Challenges, Strategies, and the Power of Nature-Based Solutions' Op Cit

¹²⁸ Ibid

¹²⁹ Nordloh. D., 'The Challenges to Achieving Net Zero Carbon Emissions' Op Cit

¹³⁰ Ibid

¹³¹ Renne. D., 'Progress, Opportunities and Challenges of Achieving Net-Zero Emissions and 100% Renewables' Op Cit

¹³² Carbon Brief., 'Can 'Nature-Based Solutions' Help Address Climate Change?' Op Cit

¹³³ United Nations Development Programme., 'Africa Holds the Key to Many Global Climate Solutions' Op Cit

¹³⁴ Muigua. K., 'Enhancing Low Carbon Development for Sustainability' Op Cit

¹³⁵ Levin. K et al., 'What Does "Net-Zero Emissions" Mean? 8 Common Questions, Answered' Op Cit

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Abstract

This paper examines the concept of sustainability audit as a means of increasing the percentage of businesses that comply with environmental regulations in Kenya. This is an activity that would be carried out as a follow-up to the environmental impact assessment and as a component of the process of environmental auditing, both of which are specifically envisaged under the provisions of the Constitution of Kenya, 2010, as well as the Environmental Management and Co-Ordination Act, 1999. The author explores the topic of environmental compliance by corporations, discusses the challenges that are associated with it, and argues that a sustainability audit is one of the approaches that may be used to address these difficulties. The framework known as Environmental, Social, and Governance (ESG), which is used to evaluate an organization's business practises and performance on a variety of different ethical and sustainable challenges, serves as the foundation for the discussion.

1.0 Introduction

This paper discusses the concept of sustainability audit as a means of increasing the percentage of businesses that comply with environmental regulations in Kenya. This is an activity that would be carried out as a follow-up to the environmental impact assessment and as a component of the process of environmental auditing, both of which are specifically envisaged under the provisions of the Constitution of Kenya, 2010, as well as the Environmental Management and Co-Ordination Act, 1999¹ (EMCA). In most cases, there is little evidence that most entities stick to ensuring that their activities are environmentally sustainable after the EIA process and NEMA's occasional audits for the most critical industries with higher chances of serious pollution of the environment. The author explores the topic of environmental compliance by corporations, discusses the challenges that are associated with it, and argues that a sustainability audit is one of the approaches that may be used to address these difficulties. The framework known as Environmental, Social, and Governance (ESG) will serve as the foundation for the discussion.

¹ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya, Revised Edition 2019 [1999].

2.0 Environmental Impact Assessment, Audit and Monitoring Framework in Kenya

The Environmental Management Coordination Act² (EMCA) includes provisions for environmental impact assessments (EIA) as a regulatory instrument for the purpose of protecting the environment from the effects of anthropocentric activities. Indeed, EMCA includes a variety of requirements that pertain to the execution of Environmental Impact Assessments (EIA), Strategic Environmental Assessments (SEA), Environmental Audits (EA), and management activities for air, water, wastes, and noise. Additional obligations in relation to environmental issues include the protection of wildlife, the administration of forests and water resources, and the guaranteeing of the health and safety of workers.

EIA is provided for in EMCA Section 58, which states that "notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, should before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a preliminary environmental impact assessment report.³ EMCA defines "Environmental Impact Assessment" (EIA) as a systematic examination that is carried out to establish whether or not a programme, activity, or project will have any adverse impacts on the surrounding environment.⁴

The contents of the reports from environmental impact assessment are provided for the *Environmental (Impact Assessment and Audit) Regulations, 2003*⁵. On the other hand, it is important to point out that the CBD COP 6 Decision VI/7 acknowledges that the essential components of an environmental impact assessment would inevitably comprise the following

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

³ S. 58(1), EMCA.

⁴ S. 2, EMCA.

⁵ Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003, Laws of Kenya.

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steps notwithstanding the fact that law and practice in different countries might differ significantly from one another. Initial assessment to evaluate whether proposed projects or developments needs to be followed up with a complete or partial impact study; The first step in conducting an impact assessment is called scoping, and its purpose is to determine which possible implications are important to evaluate and then to develop terms of reference for the evaluation. Impact assessment is the process of attempting to forecast and identify the possible environmental repercussions of a proposed project or development while taking into consideration the inter-related consequences of the project proposal as well as the socio-economic implications; Identifying potential mitigation methods (which may include refraining from moving through with the development, searching for alternative designs or locations that circumvent the effects, building safeguards into the design of the project, or offering financial compensation for unintended consequences); Choosing whether or not to approve the project; monitoring and analysing the development activities, projected effects, and proposed mitigation measures to ensure that unanticipated consequences or failed mitigation measures are detected and handled in a timely manner; deciding whether or not to approve the project.⁶

In order to fulfil the responsibilities that are owed to the environment, Kenya's Constitution and the EMCA both mandate that environmental audits and monitoring be carried out at regular intervals.⁷ EMCA provides the definition of environmental audit as the methodical, recorded, periodic, and objective examination of how effectively environmental organisation, management, and equipment are doing in conserving or protecting the environment.⁸ Environmental audits and monitoring serve as follow-up instruments to establish the degree to which activities currently being carried out adhere to

⁶ Unit B, 'COP Decision' <<https://www.cbd.int/decision/cop/?id=7181>> accessed 9 November 2022.

⁷ Constitution of Kenya, 2010, Article 69 (1) (f), Government Printer, Nairobi.

⁸ EMCA, s. 2.

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the environmental impact assessment study report concerns that are relevant to the specific project in question.⁹

The purpose of this procedure is to ensure that the assessment report is not deviated from in any way, since this might have negative repercussions for the surrounding environment. In accordance with EMCA, the National Environment Management Authority (NEMA) is required to perform environmental audits on all activities that are likely to have a significant effect on the environment. Additionally, NEMA is required to monitor all environmental phenomena in consultation with lead agencies with the intention of performing an assessment of any potential changes in the environment and their potential impacts.¹⁰

As per EMCA, “environmental audit” means the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment while “environmental monitoring” means the continuous or periodic determination of actual and potential effects of any activity or phenomenon on the environment whether short-term or long term.¹¹ The Authority or its designated agents is responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment.¹² The owner of the premises or the operator of a project for which an environmental impact assessment study report has been made is required to keep accurate records and make annual reports to the Authority describing how far the project conforms in operation with the statements made in the environmental impact assessment study report submitted under section 58(2).¹³

While the Act is silent on sustainability audit, it provides that one of the general principles towards guaranteeing the right to clean and healthy

⁹ National Environment Management Authority (NEMA) - Environmental Audit (EA). https://www.nema.go.ke/index.php?option=com_content&view=article&id=155&Itemid=274 (accessed 2023-06-16).

¹⁰ EMCA, s. 68 & 69.

¹¹ EMCA, s.2.

¹² Ibid, s. 68(1).

¹³ Ibid, s. 68(3).

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environment is that every person should cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.¹⁴ Such audits and monitoring can be expanded to include sustainability audit of companies as a way of enhancing sustainability of their operations.

3.0 Environmental, Social and Governance (ESG)

The Environmental, Social, and Governance (ESG) framework is a tool utilised by stakeholders to gain insight into an organization's management of risks and opportunities associated with ESG criteria. These criteria encompass environmental, social, and governance factors. The ESG framework adopts a comprehensive perspective that recognises the broad scope of sustainability, encompassing not only ecological concerns but also social and governance considerations.¹⁵

The international framework for corporate environmental compliance is comprised of a variety of treaties, standards, and principles. These were created with the intention of making it easier to enforce environmental laws and regulations and ensure that businesses complied with them. Although such conventions, principles, and norms in most cases bind states, they are directly relevant to corporations due to the fact that a state is able to regulate the actions of a company within its jurisdiction in order to ensure that such activities are in line with its responsibilities under international law.¹⁶

¹⁴ Ibid, s. 3(2A).

¹⁵ ESG (*Environmental, Social, & Governance*). Corporate Finance Institute. <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/> (accessed 2023-06-11).

¹⁶ Escobar-Pemberthy, N.; Ivanova, M. Implementation of Multilateral Environmental Agreements: Rationale and Design of the Environmental Conventions Index. *Sustainability* 2020, 12 (17), 7098; Andresen, S.; Boasson, E. L.; Hønneland, G. *International Environmental Agreements: An Introduction*; Routledge, 2012; Brown Weiss, E. The Evolution of International Environmental Law. 2011; *Framework Principles on Human Rights and the Environment* (2018). OHCHR. <https://www.ohchr.org/en/special-procedures/sr-environment/framework-principles-human-rights-and-environment-2018> (accessed 2023-06-11).

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Collective action may most effectively be accomplished via the establishment of global environmental agreements. They "are rarely the end product, but rather create the framework and the process that guide responses to the environmental problem in question," according to some authors.¹⁷ Agreements not only facilitate contacts between nations but also encourage reciprocity and demand that governments put in place the regulations essential to addressing environmental issues. In the end, the purpose of all of these roles, outputs, and substantive measurements is to work towards enhancing the health of the environment.¹⁸

As environmental problems, such as climate change, become more widespread, it is no longer acceptable to let companies' actions and inactions go unchecked. As a means of preventing environmental harm caused by businesses on a national and international scale, the principle of environmental liability has just come into existence. In addition, concepts of corporate governance such as corporate social responsibility demand that businesses take into account the repercussions that their economic activities will have on society when making decisions.¹⁹ There is a school of thought that contends the idea of environmental governance is an essential component of what is known as corporate social and environmental responsibility.²⁰

While discharging their responsibility to promote the success of a company, directors are required under the Companies Act to take into consideration the effects that the firm's activities will have on the local community as well as the natural environment.²¹ In addition, the Act requires that directors, while they are compiling their reports, include information regarding issues pertaining to

¹⁷ Escobar-Pemberthy, N.; Ivanova, M. Implementation of Multilateral Environmental Agreements: Rationale and Design of the Environmental Conventions Index. *Sustainability* 2020, 12 (17), 7098. <https://doi.org/10.3390/su12177098>.

¹⁸ Ibid.

¹⁹ Buckley, P 'Can Corporations Contribute directly to society or only through regulated behaviour' *Journal of the British Academy*, 6 (sl), p. 323-374.

²⁰ MSV. Prasad, 'Corporate Environmental Governance: A Perception of Indian Stakeholder', available at https://ecoinsee.org/conference/conf_papers/conf_paper_18.pdf, (accessed on 28/11/2019).

²¹ Companies Act, No. 17 of 2015, s. 143 (1) (d), Government Printer, Nairobi.

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the environment and take into account the effect that the operations of the firm have on the surrounding environment.²²

The Climate Change Act of 2016 establishes a legal framework for a more robust response to climate change, as well as policies and processes designed to realise low-carbon climatic development.²³ The Act applies to all aspects of the economy and mandates the implementation of measures aimed at incorporating responses to climate change into the process of development planning, as well as the provision of incentives and obligations for the contribution of the private sector towards the achievement of low carbon climate development and the promotion of low carbon technologies.²⁴ Additionally, it places climate change responsibilities on commercial businesses, which may also be compelled to submit reports on the status of the fulfilment of such commitments.²⁵ NEMA has been given the authority under the Act to monitor, investigate, and report on whether or not both private and public entities are complying with their responsibilities as outlined in the Act.²⁶ When carrying out their operations, corporations have a responsibility to keep in mind the provisions of the Climate Change Act of 2016, since this legislation is crucial to the corporate environmental compliance process.

It is, therefore, important for the stakeholders in environmental and corporate management and governance to work together towards ensuring that the activities of these companies promote or at least do not adversely contribute to environmental degradation and climate change.

4.0 Sustainability Audit: Scope and Indicators

In 2015, the member states of the United Nations unanimously agreed to adopt the 2030 Agenda for Sustainable Development. This agenda includes 169 objectives and 17 goals related to sustainable development. The United Nations General Assembly announced in resolution 70/1 that the Sustainable

²² Ibid, s. 655 (4) (b).

²³ Climate Change Act, No. 11 of 2016, Government Printer, Nairobi.

²⁴ Ibid, s. 3.

²⁵ Ibid, s. 16.

²⁶ Ibid, s. 17.

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Development Goals and Targets would be monitored and evaluated using a set of global indicators that would concentrate on quantifiable results.²⁷ Therefore, the reporting done by companies is a significant data source for the framework used to track progress towards the Sustainable Development Goals. Reporting, which serves as a primary source of information on company performance, has the potential to enrich and enhance the monitoring mechanisms for the Sustainable Development Goals. It does this by providing stakeholders, such as governments and providers of capital, with the means to evaluate the economic, environmental, and social impact that companies have on sustainable development.²⁸

Risk assessment based on sustainability from the perspectives of all stakeholders, including financial, social, environmental, and technical ones, and risk management are the main areas of attention for sustainability accounting and auditing.²⁹ The technocratic paradigm, which places an emphasis on hard data and its potential to give comprehensive control over persons, institutions, and systems, predominates in contemporary sustainability auditing.³⁰

The use of indicators may enhance the quality of decisions and trigger more effective actions by simplifying, clarifying, and making aggregate information more available to decision-makers. This can lead to improvements in both choice quality and action effectiveness. In this particular setting, the SI have been used as instruments with the purpose of assisting in gaining an understanding of the idea of sustainability. This awareness has been achieved via the utilisation of a methodological approach that is tied to the new

²⁷ United Nations Conference on Trade and Development. *Guidance on Core Indicators for Sustainability and SDG Impact Reporting*; 2022, p. 1.

²⁸ Ibid, p.1.

²⁹ Fagerström, A.; Hartwig, G. *Accounting and Auditing of Sustainability: A Model Inter Title*; 2016.

³⁰ Reid, J.; Rout, M. Developing Sustainability Indicators–The Need for Radical Transparency. *Ecological Indicators* 2020, *110*, 105941.

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paradigms of Sustainable Development.³¹ Indicators of Sustainability (SI) are metrics that aim to quantify the degree of sustainability and gather information for improved decision-making about policies, programmes, initiatives, and activities linked to sustainability. The SI looks to be a vital instrument for assessing development objectives as a sustainable proposition now that its significance has been shown with regard to public policy.³²

Indicators of sustainability are an important tool for businesses to have. Concerns over the environment have been more prevalent throughout the years. These companies have a lot to offer, particularly in the area of minimising the negative externalities they cause. This must be accomplished via their plans and tactics, but it is very necessary that there be a technique that is adequate for judging how effective these measures have been.³³ These are the techniques that may be used to evaluate how well a company's strategy has been implemented. These actions are tied to certain goals and are outlined in a strategy for the corporate sustainability of the organisation. For instance, cutting down on waste or one's carbon impact throughout the manufacturing process. Implementation of these standards is used to determine whether or not progress is being achieved in the desired direction.³⁴ The use of these indicators is done mostly for the purpose of determining whether or not the organisation is successful in achieving its goals. In the event that there is a deviation, appropriate remedial actions may be taken. Therefore, sustainability indicators are used to assess not only the profitability of the organisation but also how well it carries out its aims.³⁵

The process of developing indicators is always a two-way affair. Indicators are not only sought by policy goals, but they also serve to concretize and shape

³¹ Batalhao, A., de Fatima Martins, M., van Bellen, H.M., Ferreira Caldana, A.C. and Teixeira, D., 'Sustainability Indicators: Relevance, Public Policy Support and Challenges' (2019) 9 *Journal of Management and Sustainability* 173, p.174.

³² *Ibid*, 173.

³³ APLANET. *Sustainability indicators: definition, types of KPIs and their use in the sustainability plan*. APLANET. <https://aplanet.org/resources/sustainability-indicators/> (accessed 2023-06-28).

³⁴ *Ibid*.

³⁵ *Ibid*.

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those goals in many ways. As a result, the process of producing indicators cannot be limited to a strictly technical or scientific scope; rather, it needs to be characterized by open communication and a focus on policy.³⁶ Indicators that are acceptable for this function need to be straightforward and unambiguous about their purpose: a) the number of indicators should be kept to a minimum, and the process of calculating them should be made public; b) the indicators should be directionally clear, which means that they should point out items and trends that are obviously relevant in terms of their importance for sustainability, and they should be sensitive, which means that they should be able to signal either progress or the absence of progress.³⁷

While there may be challenges in development of these indicators, stakeholders from different sectors can work together to develop a set of indicators that are both relevant to the country and easy to follow up on.³⁸ Thus, such challenges should not be used as a hindrance to not promoting development of the SI for promoting sustainability audit in the country.

It has been pointed out, and properly so, that sustainability consists of environmental, economic, and social aspects (occasionally institutions are mentioned as the fourth dimension), each of which contains a lot of components that make it up. Therefore, indications of sustainability may be as varied as the components of the system, and they can also differ with respect to worldviews, objectives, and scales of time and space. There are a lot of indicators, but most of them only reflect some elements of human-environmental systems. Some of them are more integrative than others, but none of them are sufficient to measure all of the characteristics of sustainability by itself.³⁹ In addition, it is becoming more widely acknowledged that the most significant value of the terms "sustainability" and "sustainable development"

³⁶ Valentin A and Spangenberg JH, 'A Guide to Community Sustainability Indicators' (2000) 20 *Environmental impact assessment review* 381, p.381.

³⁷ *Ibid*, pp. 381-82.

³⁸ See Batalhao, A., de Fatima Martins, M., van Bellen, H.M., Ferreira Caldana, A.C. and Teixeira, D., 'Sustainability Indicators: Relevance, Public Policy Support and Challenges' (2019) 9 *Journal of Management and Sustainability* 173.

³⁹ Wu J and Wu T, "Sustainability indicators and indices: an overview." *Handbook of sustainability management* (2012): 65-86.

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rests in their focus on uniting the various aspects, the most prevalent classifications of which are environmental, economic, and social. In light of this, efforts to promote sustainability need to centre on the holistic, integrated totality of human and environmental systems. Sustainability indicators must be more than environmental indicators; they must be about time and/or thresholds.⁴⁰ Development indicators should be more than growth indicators; they should be about efficiency, sufficiency, equity, and quality of life. Development indicators should be more than growth indicators; they should be about efficiency, sufficiency, equity, and quality of life. When it comes to our attempts to make sustainable development a reality, indicators and indices are very necessary for developing a scientific knowledge and formulating effective policies.⁴¹ These measurements will need to continue to increase in complexity and sophistication as time goes on in order for them to keep up with the demands placed on them by the ever-worsening state of environmental and socioeconomic issues. The process of discovering suitable and efficient indicators of sustainability is one that involves evolution as well as learning new things.⁴²

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It has been suggested that conceptualizing sustainable development as a decision-making strategy enables for it to truly be "used," therefore going beyond the rhetoric and converting sustainability and its "action-guiding" capacity into a notion that can "action-generate." At a minimum, the three issues listed below need to be taken into consideration if one wishes to get an understanding of the connections that exist between sustainability and decision-making, and as a result, the actualization of sustainable development as a method for making decisions: The term "sustainability" should be understood with consideration given to its organising principles, which should then be applied to a particular socio-environmental setting;

⁴⁰ Ibid, 84.

⁴¹ Ibid, 84; see also Farrell, A. and Hart, M., What does sustainability really mean? The search for useful indicators. *Environment: science and policy for sustainable development*, 40(9), pp.4-31.

⁴² Ibid, 84.

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information-structuring (the inherent multi-dimensional complexity of sustainability should be organized into operational information units, such as indicators, and correctly presented in order to feed the decision-making process); and Impact (the knowledge on sustainability ought to have a significant impact both on the process of making decisions and on the process of actually implementing sustainable development).⁴³

In Kenya, reporting on the economic, environmental, and social elements of a company's activity, in addition to the company's engagement with various stakeholders, is not a regular practice. There is a need for the country to entrench reporting especially on sustainability in its corporate and environmental laws, if sustainability goals are to be achieved in the country. This should be enforced in line with the provisions of section 655 of the Companies Act⁴⁴ which requires that unless the company is subject to the small companies regime, the directors shall include in their report a business review that complies with subsection (3), so far as relevant to the company.⁴⁵ The purpose of the business review is to inform members of the company and assist them to assess how the directors have performed their duty under section 144.⁴⁶ In the case of a quoted company, the directors are required to specify in the business review (to the extent necessary for an understanding of the development, performance or position of the company) – (a) the main trends and factors likely to affect the future development, performance and position of the business of the company; (b) information about – (i) environmental matters (including the impact of the business of the company on the environment); (ii) the employees of the company; and (iii) social and community issues, including information on any policies of the company in relation to those matters and the effectiveness of those policies; and (c) information about persons with whom the company has contractual or other

⁴³ Waas, T.; Hugé, J.; Block, T.; Wright, T.; Benitez-Capistros, F.; Verbruggen, A. Sustainability Assessment and Indicators: Tools in a Decision-Making Strategy for Sustainable Development. *Sustainability* **2014**, *6* (9), 5512–5534. <https://doi.org/10.3390/su6095512>.

⁴⁴ Companies Act. No. 17 Of 2015, Laws of Kenya. Revised Edition 2021 [2015]

⁴⁵ *Ibid*, s.655(1).

⁴⁶ *Ibid*, s.655(2).

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arrangements that are essential to the business of the company.⁴⁷ There is a need for stricter enforcement of these provisions coupled with sustainability audit to ensure that both quoted and unquoted companies' activities promote the Government's efforts towards achieving sustainability in the country. The Brundtland Commission's definition of sustainability is a complex and multifaceted concept, making it an aspirational goal for public policy. It gives equal weight to environmental, economic, social, and institutional considerations as it does to other factors.⁴⁸ The Office of the Registrar of companies should work closely the NEMA in order to enhance the effectiveness of non-financial reporting through promoting sustainability audit to ensure transmission of verifiable data on economic, social, environmental and governance data, as a way of promoting sustainable development based on true data.

6.0 Conclusion

There is a pressing need for the development of well-thought-out sustainability assessment systems that involve governments, industries, and non-governmental organisations. These systems need to be able to provide certainty and assurance to either consumers or the general public regarding the sustainability of particular industry practices and activities. This would go a long way towards generating increased understanding of environmental and social concerns while encouraging the development of sustainable practices across organisations and businesses. It would also go a long way towards assessing and communicating sustainability attributes. This should be done in a way that is open, honest, and critical as we go forward with the creation of the sustainability assessment systems.⁴⁹ Embracing Sustainability Audit for enhanced corporate environmental compliance is the way to go as we seek to attain true Sustainable Development.

⁴⁷ Ibid, s.655(4).

⁴⁸ Valentin A and Spangenberg JH, 'A Guide to Community Sustainability Indicators' (2000) 20 Environmental impact assessment review 381, p. 381.

⁴⁹ Reid, J.; Rout, M. Developing Sustainability Indicators-The Need for Radical Transparency. *Ecological Indicators* 2020, 110, 105941.

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Abstract

This paper makes a case for the enforcement of the right to clean and healthy environment in Kenya through the internationally recognised polluter pays principle. The author argues that though this right has been legally recognised, placing the obligation to enforce it solely on the state agencies may delay the full realisation of this right for all persons. Effective enforcement of this principle is also important in reducing the economic cost of environmental restoration on the state agencies and acting as an incentive for inculcating a sense of environmental ethics through the precautionary principle.

1.0 Introduction

The main goal of the environmental law is to ensure the sustainable use of natural resources in accordance with a set of fundamental principles that have been established through time via both local and global procedures. The use of land and resources derived from it should, in an ideal situation, abide by a number of rules. They include intergenerational equity, the precautionary principle, the polluter pays principle, and public engagement. They also include the principles of sustainability and prevention.¹ This paper is mainly concerned with the polluter pays principle. The polluter pays principle was the main topic of debate during a symposium on environmental economics sponsored by the Organization for Economic Co-operation and Development in Paris in 1971. This was the first time the polluter pays notion had been brought up in a global setting. The polluter pays concept was formally recommended by the Organization for Economic Co-operation and Development to be the "Guiding Principle Concerning the International Economic Aspects of Environmental Policy" on May 26, 1972.²

¹ *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR, ELC Civil Case 283 of 2016, para. 17.

² Nanodkar S, 'Polluter Pays Principle: Essential Element of Environmental Law and Policy' (2018) 1 Int'l JL Mgmt. & Human. 77.

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An important era in the evolution of Kenya's environmental policy was opened with the proclamation of the Constitution in 2010. There are complex provisions in the Constitution that have a big impact on sustainable development. They include the Bill of Rights' guarantee of the right to a clean, safe environment as well as environmental ethics. Land and the environment are the only topics covered in Chapter V of the Constitution. The right to water, food, and shelter are only a few of the many social and economic rights that the Constitution incorporates that are also of an environmental nature.³

The preamble of the Constitution states that "We, the People of Kenya... Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations..." This acknowledges the necessity for cautious handling of environmental issues. Clearly implying respect for sustainable development are these lines from the Constitution's preamble.⁴ Today's international environmental law encompasses the idea that whomever pollutes the environment and wastes natural resources is to blame for the harm done and must shoulder the cost. Every producer or consumer who harms a third party is subject to this kind of "social tax."⁵

It is certain that Article 42 of the Constitution, which declares that everyone has the right to a clean and healthy environment, contains a specific environmental right. This includes the rights to: (a) the environment being safeguarded for the benefit of current and future generations by legislative and other actions, including those envisioned in Article 69; and (b) the environment-related duties under Article 70 to be met.⁶

As per Article 69 of the Constitution of Kenya, all persons must work in collaboration with State agencies in upholding environmental rights for all.

³ *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012, para. 272.

⁴ *Ibid*, para. 273.

⁵ 'The Polluter Pays, a Pillar Principle of Stockholm | Green Growth Knowledge Partnership' <<https://www.greengrowthknowledge.org/blog/polluter-pays-pillar-principle-stockholm>> accessed 22 February 2023.

⁶ *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012, para. 274.

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This paper makes a case for the enforcement of the right to clean and healthy environment in Kenya through effectively putting into practice the internationally recognised principle of polluter pays. The author argues that though this right has been legally recognised both domestically and internationally, placing the obligation to enforce it solely on the state agencies may delay the full realisation of this right for all persons. It thus explores how the polluter pays principle can be used to advance the realisation of the right to clean and healthy environment. This is in recognition of the fact that most developing countries have limited financial resources which are necessary in implementation of the right to clean and healthy environment and hence, the need for tapping into resources from the private sector and other persons who interact with the environment and subsequently cause harm to the environment.

2.0 The Right to Clean and Healthy Environment: Legal Foundation

Kenya's main environmental regulating statute is called the Environmental Management and Coordination Act (EMCA). The law contains general requirements (such as environmental management principles) that apply to all environmental sectors and all public and private acts that may have an impact on the environment. The Act defines the "environment" as follows:⁷

"environment" includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.

This definition goes beyond purely ecological concerns. It expressly takes into account components of the environment that go beyond the biophysical ones, such as the relationships between people, the natural environment, and the socioeconomic and cultural foundations of such relationships.⁸

⁷ *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012, para. 275.

⁸ *Ibid*, para. 276.

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A person who asserts that their rights to a clean and healthy environment have been violated has standing under Article 70 of the Constitution. This means that "the environmental right is sufficiently extensive and all-encompassing to provide 'everyone' with the prospect of seeking legal remedy in the event that any of many conceivable components relating to the right or guarantee derived therefrom is breached. It is undeniable that Kenya's constitution protects environmental preservation.⁹

The State is subject to environmental commitments under Article 69 of the Constitution. The duty to guarantee sustainable exploitation, utilisation, management, and conservation of the environment and natural resources is one of the duties imposed on the State. The State must also make sure that the benefits are distributed fairly. Encouragement of public involvement in environmental management, preservation, and protection is also necessary. Lastly, the State must prevent using processes and engaging in activities that might threaten the environment.¹⁰

Article 42 states; "Every person has the right to a clean and healthy environment which includes the right;

“(a) 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 obligations relating to the environment fulfilled under Article 70”.

The Constitution confers standing upon a person who alleges that a right to a clean and healthy environment has been violated. It provides: -

70. (1) If a person alleges that a right to a clean and healthy environment recognized 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

⁹ Ibid, para. 277.

¹⁰ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012, para. 278.

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redress in addition to any other legal remedies that are available in respect to the same matter.

(2) 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.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

Section 13 of the Environment and Land Court Act outlines the jurisdiction of the court, stating that it has both original and appellate jurisdictions to hear and resolve all environmental and land-related disputes in accordance with Article 162(2)(b) of the Constitution, the provisions of this Act, and any other Kenyan laws that may be applicable. Subsection (2) provides that in exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.

The ELC also has powers to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

Regionally and internationally, there are legal instruments that also recognise the right to clean and healthy environment.

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Article 12(2)(b) of the *International Covenant on Economic, Social and Cultural Rights (ICESR)*¹¹ is to the effect that 'The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right (the right of everyone to the enjoyment of the highest attainable standard of physical and mental health) shall include those necessary for: the improvement of all aspects of environmental and industrial hygiene.

Article 24 of the *African Charter on Humans and People's Rights (ACHPR)*¹² states that 'All peoples shall have the right to a general satisfactory environment favourable to their development'.

Article 24(1) of the *Convention on the Rights of the Child*¹³ is to the effect that '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 strive to ensure that no child is deprived of his or her right of access to such health care services'. Article 24 (2) requires that 'States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures, *inter alia*:(c) 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; (e) to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, *hygiene and environmental sanitation* and the prevention of accidents (emphasis added).

¹¹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

¹² 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).

¹³ UN Commission on Human Rights, *Convention on the Rights of the Child.*, 7 March 1990, E/CN.4/RES/1990/74.

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The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*¹⁴ under Article 4(2) (c) states that ‘each Party shall take the appropriate measures to: ensure that persons involved in the management of hazardous wastes or other wastes within it take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment’. Article 4(4) also requires that ‘Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention’.

Article 25 (1) of the *Universal Declaration on Human Rights*¹⁵ states 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’.

Principle 1 of the 1992 *Rio Declaration on the Environment and Development*¹⁶ states that “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”.

It is worth pointing out that most of these international legal instruments captured the right to clean and healthy environment in a very generic manner and was mostly to be implied. However, in 2022, the United Nations General Assembly (UNGA) adopted a resolution declaring a clean, healthy &

¹⁴ United Nations, *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Basel, 22 March 1989, United Nations, Treaty Series, vol. 1673, p. 57.

¹⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁶ UN General Assembly, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992. Volume 1, Resolutions adopted by the Conference: corrigendum*, A/CONF.151/26/Rev.1(Vol.I)/Corr.1.

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sustainable environment as a human right.¹⁷ The General Assembly noted that the right to a clean, healthy and sustainable environment is related to other rights and existing international law.¹⁸ It also affirmed that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law.¹⁹ Finally, the UNGA called upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.²⁰ It has been noted that some scientists believe that the "triple planetary catastrophe" of human-caused climate change, widespread biodiversity loss, and unchecked pollution currently threatens to cross the planetary boundaries necessary to live securely on Earth. These dangers, as well as air pollution, polluted water, pollution from plastics, and chemical pollutants, can jeopardise the right to life, dignity, and health. Advocates urged that the U.N. should establish a right to a clean, healthy, and sustainable environment as a result.²¹ Notwithstanding eight nations' abstentions—Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russia, and Syria—the resolution on the

¹⁷ United Nations General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment: resolution / adopted by the General Assembly, UN. General Assembly (76th sess.: 2021-2022)*; 'In Historic Move, UN Declares Healthy Environment a Human Right' (UNEP, 28 July 2022) <<http://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>> accessed 22 February 2023; 'UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right | UN News' (28 July 2022) <<https://news.un.org/en/story/2022/07/1123482>> accessed 22 February 2023.

¹⁸ United Nations General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment: resolution / adopted by the General Assembly, UN. General Assembly (76th sess.: 2021-2022)*, para. 2.

¹⁹ *Ibid*, para. 3.

²⁰ *Ibid*, para. 4.

²¹ 'The UN Just Declared a New Human Right' (*World Economic Forum*, 9 August 2022) <<https://www.weforum.org/agenda/2022/08/the-un-just-declared-a-universal-human-right-to-a-healthy-sustainable-environment-here-s-where-resolutions-like-this-can-lead/>> accessed 22 February 2023.

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right to a clean, healthy, and sustainable environment was accepted unanimously.²²

For the 193 UN Member States, the resolution has no official force. Advocates, however, are optimistic that it will have a domino effect, pushing nations to codify the right to a healthy environment in national constitutions and regional accords and incentivizing governments to put such laws into action. Advocates claim it would offer environmental activists greater tools to fight against laws and initiatives that harm the environment.²³

3.0 The Polluter Pays Principle: The Scope

The Polluter Pays Principle is part of the customary law and general principles relating to the environment. Before the Organization for Economic Co-operation and Development (OECD) formally recognised it as a fundamental tenet of environmental law in 1972, the notion of polluter pays already existed.²⁴ According to OECD, the so-called "Polluter-Pays Principle" should be applied when determining how to distribute the costs of pollution prevention and control measures in order to promote the wise use of finite environmental resources and prevent distortions in global commerce and investment. According to this concept, the cost of implementing the aforementioned actions determined upon by public authorities to guarantee that the environment is in an acceptable state should be borne by the polluter. In other words, the price of goods and services that contribute to pollution through production and/or consumption should reflect the cost of these actions. Subsidies that would significantly distort global commerce and investment should not be used in conjunction with such policies.²⁵

²² Ibid.

²³ 'In Historic Move, UN Declares Healthy Environment a Human Right' (UNEP, 28 July 2022) <<http://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>> accessed 22 February 2023.

²⁴ Nanodkar S, 'Polluter Pays Principle: Essential Element of Environmental Law and Policy' (2018) 1 Int'l JL Mgmt. & Human. 77; Misra S and Nanda H, 'A Complete Perusal of Polluter Pays Principle "Incorporation and Application in India"' (2020) 14 *Indian Journal of Forensic Medicine & Toxicology* 419.

²⁵ OECD, *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*, OECD/LEGAL/0102 (OECD 1972).

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The polluter pays concept is a foundational economic tenet that requires the incorporation of environmental costs into decision-making for economic and other development plans, programmes, and initiatives that are likely to have an impact on the environment. Hence, the idea is a mechanism to distribute the costs of pollution. It has received a lot of attention in international law and is now recognised as one of the fundamental concepts of that body of law.²⁶ By including the cost of waste disposal into the price of the product, the "polluter pays" principle, also known as "Extended Polluter Responsibility" (EPR), aims to transfer the burden of dealing with pollutants from governments to the organisations that produce them. In order to reduce waste and increase opportunities for reuse and recycling, manufacturers will be encouraged to enhance the waste management profile of their businesses.²⁷

The *Rio Declaration* passed 27 principles to guide the protection of the environment for the present and future generations. *Inter alia*, principle 8 and 18 states thus; *Principle 8: To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.*" The duty is explained in principle 13 which provides thus; "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction".

According to the EMCA, the "polluter-pays concept" states that the person found guilty of polluting under the Act or any other relevant legislation should pay or bear the expense of restoring any aspect of the environment that has been harmed by pollution. The polluter should essentially pay the costs

²⁶ Elvis-Imo G, 'An Analysis of The Polluter Pays Principle In Nigeria' (2017) 1 *Ajayi Crowther University Law Journal* <<https://aculj.acu.edu.ng/index.php/lj/article/view/4>> accessed 22 February 2023.

²⁷ *Ibid*, p. 3.

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associated with preventing pollution or covering any harm it does. This is what the "polluter pays" idea says.²⁸

In the case of *Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impresa Construzioni Giuseppe Maltauro SPA & 2 others* [2019] eKLR, Constitutional Petition 1 of 2012, the Court stated as follows:

64. *On the issue, as to who is liable to pay, this court is called upon to apply environmental law principles under Kenyan Law jurisprudence. Environmental law is principally concerned with ensuring sustainable utilization of natural resources according to a number of fundamental principles developed over the years through both domestic and international processes. Ideally, the utilization of land and land-based resources should adhere to the principles of sustainability, intergeneration equity, prevention, precautionary, polluter pays and public participation.*

65. *The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the Rio Declaration on Environment and Development (1992) which reads at principle 16 as national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account the that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter.*

In the Kenyan case of *Dobs Entertainment Limited v National Environment Management Authority* [2021] eKLR, Tribunal Appeal 016 of 2019, the National Environment Tribunal quoted a Ugandan case as follows:

²⁸ *Kenya Association of Manufacturers & 3 others v Cabinet secretary, Ministry of Environment and Natural Resources & 3 others* [2018] eKLR, Petition 32 & 35 of 2017 & Judicial Review Application 30 of 2017 (Consolidated), para. 150.

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33. In the Supreme Court of Uganda, at Kampala Constitutional Appeal No. 05 Of 2011 Amooti Godfrey Nyakaana and National Environment Management Authority & Attorney General, Advocates Coalition for Development & Environment Alert Vs Greenwatch, Uganda Wildlife Authority Quoting the Environmental Action Network & Attorney General -Vs- Salvatori Abuki Supreme Court Const. App. No. 1/98,

“The principle applicable is that in determining the Constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining Constitutionality of either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, the sense of the legislation’s object and ultimate impact are clearly linked if not indivisible. Intended and actual effect has been looked up for guidance in assessing the legislation’s object and thus its validity. See THE QUEEN –Vs- BIG DRUG MARK LTD 1996 CLR 332.”

The Petitioner is not challenging the Constitutionality of these restrictions. In my view, it is these restrictions which gave the first respondent power to carry out inspection on the petitioner’s property to ascertain whether the activities he was carrying out on the land was in conformity with the provisions of the section – hence the service of the Restoration Order. The restoration order is like a charge sheet that commences the prosecution of a person who is charged with a criminal offence. Normally a Police Officer does not give a hearing to a suspect before charging him or her. The purpose of the Act is to give the first Respondent power to deal with and protect the environment for the benefit of all including the Petitioner. The impugned sections in my view have in built mechanisms for fair hearing as enshrined in Article 28.”

In the same case the court went on and stated that; “The Petitioner failed to show that the safeguards contained in the impugned sections are insufficient to accord him or anyone else a fair hearing. I have not been persuaded that the Petitioner’s proprietary rights were infringed

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*by the acts of the first respondent. What was taken away from him was misuse of the land and this was done to protect the environment.” The Court discussed the concept of sustainable development as it has evolved in international law and adopted the definition contained in the report of the **WORLD COMMISSION ON ENVIRONMENT and DEVELOPMENT** (the “Brundtland Report”). That Report defined “Sustainable Development” as “Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.” The Court stated thus: -*

“We have no hesitation in holding that “sustainable Development” as a balancing concept between ecology and development has been accepted as part of the customary international law though its salient features have yet to be finalized by the international law jurists.....

We are, however, of the view that “The Precautionary Principle” and “The Polluter Pays Principle” are essential features of “Sustainable Development.” The “Precautionary Principle” – in the context of municipal law – means:

(i) The Environmental measures – by the State Government and the Statutory authorities must anticipate, prevent, and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The “Onus of proof” is on the actor or the developer/industrialist to show that his action is environmentally benign.”

34. In the same case, on “the Polluter Pays Principle” the court had this to say: -

“The “Polluter Pays Principle” as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of “sustainable Development” and as such the

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Polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.”.

According to the OECD, there are four aspects that must be considered in the enforcement of the polluter-pays principle, which are: First, is the issue of identifying the polluter. This is crucial to the allocation of costs and making the polluter take responsibility for his pollution, as stipulated by the OECD definition given above; It is necessary to ascertain the extent of damage done to the environment and establish the extent of the polluter’s liability so that precise monetary value can be attached to the degradation; Pollution caused must be identifiable. This is necessary to prove that the polluter is responsible for that resulting pollution; and, there must be a damage that must be compensated. The damage caused must be real and identifiable as compensable under a compensatory regime provided by the relevant laws.²⁹

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Section 3(3) of the Environmental Management and Coordination Act 1999, gives any party who alleges that his right to a clean and healthy environment has been or is likely to be violated to apply to the Environment and Land court for redress.

According to Article 70 of the Constitution, anybody who believes that their right to a clean environment is being denied, violated, threatened, or infringed upon in violation of Article 42 may seek recourse from the court. Kenyans have recourse to the courts under the Constitution even when there are merely implied violations.³⁰

In *Waweru v. Republic* (2006) eKLR, the applicants – property owners – were accused of violating the Public Health Act's regulations by dumping raw sewage into a public water source. The court agreed with the petitioners, but it then began to consider how the applicants' conduct would affect sustainable

²⁹ Elvis-Imo G, "An analysis of the polluter pays principle in Nigeria," *Ajayi Crowther University Law Journal* 1, no. 1 (2017), pp. 4-5.

³⁰ *KM & 9 others v Attorney General & 7 others* [2020] eKLR, *Petition 1 of 2016*, para. 134.

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development and environmental management on its own. The court determined that Section 71 of the Kenyan Constitution contains the right to life, which also includes the right to a clean and healthy environment.³¹

In the LAPSSET case, also known as the case of Mohamed Ali Baadi and others vs. A.G. & 11 others (2018) eKLR, the project proponent agreed to pay Kshs. 1,760,424,000 in monetary compensation to the individuals who were impacted. The petitioners and the other residents of Lamu Island were to be consulted regarding how the LAPSSET project might affect their culture as a district indigenous community and how to mitigate any negative effects on culture. Because this project was still in progress, the court ordered the project proponent to include a demonstrably specific consultation plan.³²

The Court in *KM & 9 others v Attorney General & 7 others [2020] eKLR, Petition 1 of 2016*, cited *Rylands Vs Fletcher (1861-73) ALL ER REPI* case on strict liability as follows:

165. Further the rule of strict liability on the owner of land for damage caused by the escape of substances to his neighbour's land set in the Case of *Rylands Vs Fletcher (1861-73) ALL ER REPI* is in favour of the petitioners' case. The court held thus, **"We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's own default, or, perhaps that the escape was a consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by**

³¹ *KM & 9 others v Attorney General & 7 others [2020] eKLR, Petition 1 of 2016, para. 163.*

³² *KM & 9 others v Attorney General & 7 others [2020] eKLR, Petition 1 of 2016, para. 164.*

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the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his reasonable and just that the neighbour who has brought something on his own property but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief would have accrued, and it seems just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences."

"If it does escape and cause damage, he is responsible, however careful he may have taken to prevent the damage. In considering whether a defendant is liable to a plaintiff for the damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage."

166. The Supreme Court of India in *M C Mehta Vs Union of India* (1987) 1 SCC 395 introduced the concept of absolute liability where the defendant is engaged in industrial activities resulting in pollution. The court stated thus,

"The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of the substance of any other related element that caused the harm, the enterprise must be held strictly liable for causing such harm as part of the social cost of carrying on the

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hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item for its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of carrying on such hazardous or inherently dangerous activity regardless of whether it is carried out carefully or not ... we would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity, resulting for example in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in Rylands Vs. Fletcher (1866) LR 3 HL 330, (1861 - 73)."

In the case of *National Environment Management Authority & 3 others v Maraba Lwatingu Residents Association & 505 others* [2020] eKLR³³, the Environment and Land Court at Kakamega, while making a determination on whether orders for costs and restoration of the environment issued by the National Environment Tribunal were inordinately too high, harsh and punitive for a public project funded by donors, made the following observation:

In this case it is the 2nd appellant who undertook the project and the Tribunal used its discretion judiciously in this matter. In the case of *Michael Kibui & 2 others* (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v *Impressa Construzioni Giuseppe Maltauro SPA & 2 others* (2019) eKLR the court held that;

³³ *National Environment Management Authority & 3 others v Maraba Lwatingu Residents Association & 505 others* [2020] eKLR, Environment and Land Appeal 5 of 2019.

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“The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the Rio Declaration on Environment and Development (1992) which reads at principle 16 as national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account the that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter.

Similarly, in the case of *Mohamed Ali Baadi and others v Attorney General & 11 others*[2018] eKLR³⁴, the case underscored the importance of public participation as follows:

227. The involvement of the public in environmental decision and policy making must be regarded as important for various reasons. First, the utilization of the views gathered from the public in governmental decision-making on environmental issues results in better implementation of the goals of environmental protection and sustainable development. This is because the resultant decisions raise an expanded knowledge base on the nature of environmental problems that are to be met by the decision. The decisions help to enrich and cross-fertilize environmental rights.

228. Secondly, developing environmental laws and policies is a very resource-intensive area. Hence, the public input comes in handy, especially in developing countries, in supplementing scarce government resources for developing laws and policies. In addition, at

³⁴ Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, Petition 22 of 2012.

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the implementation stage, public vigilance is critical for monitoring, inspection and enforcement of environmental laws and policies by identifying and raising with appropriate authorities, environmental threats and violations.

229. Thirdly, public participation can help identify and address environmental problems at an early stage. This helps to save reaction-time, energy and the scarce financial resources, at least in the long run. In addition, it improves the reactive and, often, adversarial nature of government action which operates by promising solutions to environmental problems mostly *post-facto*, and only following an actual complaint by a citizen.

254. The importance of being informed of basic facts about the quality of their environment is, therefore, well established in different international conventions. Increasing access to environmental information also allows for competing interests to be balanced. Access to information permits all relevant factors to be taken into account as part of decision making process. Environmental information is a self-standing regulatory instrument and serves to inform the public of environments risks. Citizens must not only have access to information but must also be entitled to participate in decision-making and have access to justice in environmental matters. Only this way will they be able to assert their right to live in a safe environment, and fulfil their duty to protect, and improve the environment for the benefit of future generations. In addition to enhancing the quality and implementation of decisions, improved access to information and public participation contributes to public awareness of environmental issues and provides more opportunities for the public to express their concerns to relevant authorities.

256. In addition, if rights are to be effective, the public must have a way of seeking justice when those rights are accidentally, or deliberately, denied. For purposes of enforcement of environmental rights, Article 70 of the Constitution provides a framework to meet this

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need. It highlights rights of a citizen to move to Court citing violation of rights to clean and healthy environment. For a citizen to exercise these rights, access to environmental information is a necessity.

Under EMCA, any individual who has harmed the environment or who is still doing so may be subject to an environmental restoration order from the court.³⁵

EMCA stipulates various environmental offences which including offences related to *inspection*, offences related to *Environmental Impact Assessment*, offences related to records and *standards and offences related to hazardous wastes* (emphasis added).³⁶ The Act also prescribes penalties for these offences.³⁷ Offences under EMCA relate among other things, failing to submit to inspection³⁸, offences relating to Environmental Impact Assessment³⁹; offences relating to records⁴⁰; offences relating to standards⁴¹; offences relating to hazardous waste⁴²; offences relating to pollution⁴³; and offences relating to restoration orders⁴⁴.

The effectiveness of the polluter pays principle is also captured under Section 108 of EMCA which provides for restoration orders to be issued by the National Environment Management Authority (NEMA) to violators under the Act. Notably, the command and control mechanism involves the 'command' of the law and the legal authority of the State. This entails regulatory law, backed by criminal sanctions.⁴⁵ It is based on potential coercion rather than

³⁵ S. 111(1), Act No. 8 of 1999.

³⁶ EMCA, s. 137-146.

³⁷ *Ibid.*

³⁸ Sec. 137, EMCA.

³⁹ Sec. 138, EMCA.

⁴⁰ Sec. 139, EMCA.

⁴¹ Sec. 140, EMCA.

⁴² Sec. 141, EMCA.

⁴³ Sec. 142, EMCA.

⁴⁴ Sec. 143, EMCA.

⁴⁵ *Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' op. cit., pp.3 & 5.*

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voluntary goodwill and on penalties rather than positive incentives.⁴⁶ The command and control mechanism is what has predominantly informed the development of Kenya's natural resources protection regime.⁴⁷

The criminality component of regulation is what makes command and control methods successful.⁴⁸ It establishes a form of societal control over the use of natural resources.

Under command and control approaches, criminal law is used as a preventative tool by use of punitive sanction.⁴⁹ This is because from an economic perspective, criminal sanctions when effectively enforced raise the cost of certain conduct and therefore encourages compliance with laws.⁵⁰ The EMCA proposes further sanctions in addition to fines, including the seizure of used products and the cancellation of licences.⁵¹

The nexus between sustainable development and the right to clean and healthy environment, as well as the place of the polluter pays principle in enhancing this connection, was captured in the case of *John Muthui & 19 others v County Government of Kitui & 7 others* [2020] eKLR⁵² in the following excerpt:

83. Indeed, Section 18 of the Environment and Land Court Act and Section 3(5) of the Environmental Management and Co-ordination Act provides that this court should be guided by the principle of

⁴⁶ Davies J.C. & Mazurek, J., *Pollution Control in the United States: Evaluating the System*, *op. cit.*, p.15.

⁴⁷ Ochieng', B.O., 'Institutional Arrangements for Environmental Management in Kenya,' in Okidi C.O., et al, *Environmental Governance in Kenya: Implementing the Framework Law*, (East African Educational Publishers Ltd, 2008), p.200.

⁴⁸ Hutter, B.M., 'Socio-Legal Perspectives on Environmental Law: An Overview,' *op. cit.*, pp. 3 & 5; cf. Ashworth, A., 'Conceptions of Over criminalization,' *Ohio State Journal of Criminal Law*, Vol. 5, 2008. pp. 407-425.

⁴⁹ Mbote, P.K. 'The Use of Criminal Law in Enforcing Environmental Law' in Okidi, C.O., et al, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers Ltd, 2008) 110, p.112.

⁵⁰ *Ibid*, p. 110.

⁵¹ S.146, Act No. 8 of 1999.

⁵² *John Muthui & 19 others v County Government of Kitui & 7 others* [2020] eKLR, ELC. Petition No. E06 of 2020.

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intergenerational equity while resolving environmental disputes. Section 2 of the Environmental Management and Co-ordination Act defines *intergenerational equity* as follows:

“intergenerational equity” means that the present generation should ensure that in exercising its rights to beneficial use of the environment the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.”

84. The quality of life for the future generation depends on our decisions today. The need for change in human development for them to lead happy lives has been debated for decades. The sustainability discourse started in the 1970s, and the 1992 UN Conference on the Environment and Development recognized intergenerational equity as central for policymaking that safeguards the future - this principle is now found in the constitutions of many countries, including Kenya.

85. Indeed, the World Commission on Environment and Development noted as follows: *“We borrow environmental capital from future generations with no intention or prospect of repaying.... We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.”*

86. Some countries, most notably Israel and Hungary, have created their own guardian or commissioner for future generations, independent voices for the long term that act as temporal checks and balances. Based on the human right to a healthy environment (*Hungary*) and on a basic law concerning sustainable development (*Israel*), the Commissioners in each country have unrestrained access to the information behind policymaking; respond to citizens' concerns; and publicly expose the long-term implications of current decisions.

105. The right to a clean and healthy environment is bestowed on every person, and has been considered by the courts and eminent

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authors to be essential for the existence of mankind. In *Adrian Kamotho Njenga vs. Council of Governors & 3 others* [2020] eKLR, it was held that:

“18. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.

19. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.”

107. This position was elaborately considered in the case of *Martin Osano Rabera & Another vs. Municipal Council of Nakuru & 2 others* [2018] eKLR where the court adopted the decision in *Communication No.155/96: The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria* where the African Commission on Human and People’s Rights stated as follows:

“These rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life

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and safety of the individual. As has been rightly observed by Alexander Kiss, "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."

The right to general satisfactory environment, as guaranteed under article 24 of the Africa Charter or the right to healthy environment, as it is widely known therefore imposes clear obligations upon a government. It requires the State to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."

123. *Sustainable Development is one of the national values and principles of governance in the Constitution that bind all State organs, State officers, public officers and all persons. In its report, Our Common Future, the Brundtland Commission defined Sustainable as development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.*

124. Under Section 2 of the Environmental and Management Co-ordination Act, sustainable development is defined as follows:

"sustainable development" means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems."

125. In the Case Concerning the Gabcikovo-Nagymaros Project, (*Hungary v Slovakia*), 1997 WL 1168556 (ICJ), it was held as follows:

"Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a

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growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed [and] set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities, but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular, they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river."

126. Essentially, sustainable development seeks to address *intra-generational equity*, that is equity among the present generation and *inter-generation equity*, that is equity between generations. As opined in *Gabcikovo* case (*supra*), sustainable development reaffirms the need for both development and environmental protection, and neither can be neglected at the expense of the other.

127. The four (4) recurring elements that comprise the concept of '*sustainable development*' is the need to preserve natural resources for the benefit of future generations (*the principle of intergenerational equity*); exploiting natural resources in a manner which is '*sustainable*', '*prudent*', '*rational*', '*wise*' or '*appropriate*' (*the principle of sustainable use*); the '*equitable*' use of natural resources, and the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, (*the principle of integration*).

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128. The principle of sustainable development seeks to limit environmental damage arising from anthropogenic activities and lessen the depletion of natural resources and pollution of the environment (See Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law* (Aldershot: Ashgate, 2003) pp 8-9).

129. Sustainable development is a principle with a normative value, demanding a balance between development and environmental protection, and as a principle of reconciliation in the context of conflicting human rights, that is the right to development and the right to protecting the environment.

In the case of *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR⁵³, the Court stated as follows:

48. I have considered the petition, the evidence both in support and opposition to it and the submissions. That a clean and healthy environment is a fundamental prerequisite for life is not a matter that needs belabouring. It is for this reason that the drafters of the Constitution of Kenya, 2010 saw it fit to provide for the right to a clean and healthy environment at **Article 42** within the Bill of Rights. Needless to state, Kenyans voted overwhelmingly in favour of the draft, thus giving their seal of approval to its provisions. **Article 42** states as follows:

Every person has the right to a clean and healthy environment, which includes the right—
(a) 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 obligations relating to the environment fulfilled under Article 70.

⁵³ *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR, Petition No. 53 of 2012.

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49. A duty to have the environment protected for the benefit of present and future generations is imposed on both the State and every person under Article 69 which among others requires 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; to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment. Under the same article, every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. In short, the obligation to ensure a clean and healthy environment imposed on everybody – from the state to all persons be they natural, juridical, association or other group of persons whether incorporated or not.

50. So as to further safeguard environmental rights and to facilitate access to court for purposes of enforcing the right secured by Article 42, Article 70 of the constitution 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 court for redress in addition to any other legal remedies that are available in respect to the same matter and that he does not have to demonstrate that any person has incurred loss or suffered injury.

51. Provisions similar to those at **Article 42** are found at **Section 3** of the **Environmental Management and Co-ordination Act, 1999** (EMCA). Under **Section 3 (3)** of EMCA, if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to this court and this court may make such orders, among

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others, to prevent, stop or discontinue any act or omission deleterious to the environment; to compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other connected losses.

52. I have outlined all these provisions to underscore the importance placed by the constitution and statute law on protection of the right to a clean and healthy environment and conservation of the environment generally.

It is thus recommended that the country and courts actively enforces the polluter-pays principle as a way to not only restore the environmental areas that have been degraded but also as an incentive to curb environmental degradation.

5.0 Conclusion

While the Rio Declaration which in Principle 16 embodies the polluter pays principle, does not impose any obligation on states to enforce those principles, Kenya, under section 3 (5) of EMCA and other various laws have incorporated this principle as part of the guiding principles that must be considered in enforcement of environmental law in Kenya. What is now required is for the Courts to strictly enforce it and hold more violators of environmental law culpable in order to enforce positive change towards environmental protection and conservation. Making violators bear the cost of environmental restoration will go a long way in not only guaranteeing the right to clean environment but also in achieving sustainable development.

Enhancing Access to Justice for Sustainable Development in Kenya

Abstract

This paper critically discusses the role of access to justice in the Sustainable Development agenda. It argues that access to justice is vital in achieving Sustainable Development. The paper explores how access justice can foster the Sustainable Development agenda in Kenya. It highlights some of the challenges facing the attainment of access to justice and offers suggestions towards enhancing access to justice for Sustainable Development in Kenya.

1.0 Introduction

Access to justice has been described as a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favor and a greater role for Alternative Dispute Resolution¹. It can also refer to a fair and equitable legal framework that protects human rights and ensures delivery of justice². Access to Justice has also been defined as judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue³. In addition, access to justice may also be understood as the ability of an individual who seeks justice to access legal information, legal advice, legal assistance and legal representation⁴.

Access to Justice is a Constitutional right in Kenya⁵. The Constitution of Kenya provides that the state shall ensure access to justice for all persons and, if any

¹ Ladan, M. T., 'Access to Justice as a Human Right Under the ECOWAS Community Law.'

https://www.researchgate.net/publication/272246292_Access_to_Justice_as_a_Human_Right_Under_the_Ecowas_Community_Law (Accessed on 04/01/2024)

² Ibid

³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice.' Glenwood Publishers Limited, 2015

⁴ Dereymaeker, G., 'Formalising the Role of Paralegals in Africa: A Review of Legislative and Policy Developments. Cape Town: Dullah Omar Institute (CSPRI), Open Society Justice Initiative and Paralegal Advisory Service Institute, (2016) pp.1-32.

⁵ Constitution of Kenya, 2010., Article 48, Government Printer, Nairobi

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fee is required, it shall be reasonable and shall not impede access to justice⁶. The United Nations points out that access to justice is a basic principle of the rule of law⁷. It further points out that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable⁸.

Realizing access to justice is vital in achieving Sustainable Development. According to the International Development Law Organization (IDLO), access to justice is a critical pillar for poverty reduction and Sustainable Development⁹.

This paper critically discusses the role of access to justice in the Sustainable Development agenda. It argues that access to justice is vital in achieving Sustainable Development. The paper explores how access justice can foster the Sustainable Development agenda in Kenya. It highlights some of the challenges facing the attainment of access to justice and offers suggestions towards enhancing access to justice for Sustainable Development in Kenya.

2.0 Access to Justice and the Sustainable Development Agenda

It has correctly been observed that access to justice is a fundamental component of the Sustainable Development Agenda¹⁰. Access to justice ensures that legal systems are equitable, responsive, and accessible to all, therefore playing a critical role in achieving various aspects of Sustainable Development¹¹. This could be in the context of gender equality, reducing inequalities, labour rights, or environmental protection among other various targets envisaged under the Sustainable Development Goals (SDGs)¹².

⁶ Ibid

⁷ United Nations., 'Access to Justice.' Available at <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (Accessed on 04/01/2024)

⁸ Ibid

⁹ International Development Law Organization., 'Access to Justice in Kenya.' Available at <https://www.idlo.int/what-we-do/initiatives/access-justice-kenya> (Accessed on 04/01/2024)

¹⁰ SDG Resource Centre., 'Access to Justice.' Available at <https://sdgresources.relx.com/tags/access-justice> (Accessed on 04/01/2023)

¹¹ Ibid

¹² Ibid

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Access to Justice is at the heart of the United Nation's 2030 Agenda for Sustainable Development¹³. The Agenda envisages a world of universal respect for human rights and human dignity, the rule of law, justice, equality and nondiscrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity¹⁴. SDG 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 levels¹⁵. Among the targets under SDG 16 is to promote the rule of law at the national and international levels and ensure equal access to justice for all; develop effective, accountable and transparent institutions at all levels; and ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements¹⁶. Realizing the targets under SDG 16 is vital in enhancing access to justice for Sustainable Development. It has been argued that SDG 16's emphasis on access to justice is critical in ensuring fairness and legal protection for all persons, and especially the most vulnerable since it calls for the establishment and strengthening of institutions at all levels to deliver justice effectively, transparently, and without undue delay¹⁷.

In addition, access to justice is vital in realizing other SDGs including SDG 5, which focuses on gender equality since it plays a crucial role in addressing issues like gender-based violence, discrimination, and unequal power dynamics; SDG 8 which aims to foster decent work and economic growth by upholding labour rights including fair treatment in the workplace, protecting workers' rights, and providing avenues for redress in cases of labor violations; SDG 10, which aims at reducing inequalities within and among nations by

¹³ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 04/01/2023)

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ SDG Resource Centre., 'Access to Justice.' Op Cit

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protecting marginalized and disadvantaged communities; and SDG 13 on climate action by enforcing environmental rights¹⁸.

According to the Organisation for Economic Co-operation and Development (OECD), access to justice is integral to achieving the SDGs and inclusive growth¹⁹. It asserts that access to justice is an important tool for implementing most of the SDGs, such as eradicating poverty and hunger (SDG 1 and SDG 2) by giving farmers and other agrarian communities the tools they need to improve their tenure security; SDG 5 by helping to translate legal guarantees of gender equality into real improvements in the daily lives of women and supporting women in protecting themselves from domestic violence; and helping preserve the environment as envisaged under SDGs 14 and SDG 15²⁰. Further, OECD points out that providing access to justice enables traditionally marginalized populations including the youth, the elderly, women, migrants to participate in legal processes that promote inclusive growth in sectors such as health, employment, education, housing, and entrepreneurship towards Sustainable Development²¹. Access to Justice is therefore integral in realizing the Sustainable Development agenda.

3.0 Access to Justice and Sustainable Development in Kenya

Access to justice is a fundamental pillar for poverty reduction and Sustainable Development, and the Constitution of Kenya makes it the responsibility of the government to facilitate access to justice for its citizens²². It has been argued that enhancing access to justice in Kenya can ensure strong legal frameworks and effective institutions, coupled with greater levels of legal empowerment for the poor and marginalized, which ensures that the Sustainable Development objectives are achieved²³. Access to justice is at the core of the

¹⁸ Ibid

¹⁹ Organisation for Economic Co-operation and Development., 'Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All.' Available at <https://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf> (Accessed on 04/01/2023)

²⁰ Ibid

²¹ Ibid

²² International Development Law Organization., 'Access to Justice in Kenya.' Op Cit

²³ International Development Law Organization., 'Doing Justice to Sustainable Development: Integrating The Rule of Law into the Post-2015 Development Agenda.'

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Sustainable Development paradigm, driving efforts to correct artificial and harmful imbalances in economic growth, to remedy the miseries of lives lived in extreme poverty, and to ensure that natural resources and habitats are preserved for present and future generations²⁴.

Enhancing access to justice in Kenya can foster the realization of all three dimensions of Sustainable Development being economic growth, social progress and environmental protection²⁵. Access to justice ensures effective legislative frameworks and enhanced institutional capacity to adjudicate commercial disputes which is vital in helping to level the playing field for economic actors, and promote the growth of entrepreneurship, small and medium sized enterprises, and innovation therefore promoting economic growth²⁶. In addition, access to justice can foster social progress by ensuring the presence of transparent and participatory dispute resolution mechanisms that allow individuals and groups to claim their rights to equal opportunity, education, health, land and other economic and social rights towards combating poverty and marginalization²⁷. Further, access to justice ensures environmental protection through initiatives such as public participation and access to information in environmental and sustainability decision-making and legal redress in case of breach of environmental rights²⁸.

The Constitution of Kenya sets out constitutional safeguards that are important in realizing the right of access to justice in Kenya²⁹. In addition to article 48 which sets out the right of access to justice in Kenya, the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened³⁰. The Constitution also

Available at
<https://www.idlo.int/sites/default/files/pdfs/publications/Doing%20Justice%20o%20Sustainable%20Development.pdf> (Accessed on 05/01/2023)

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Constitution of Kenya, 2010., Government Printer, Nairobi

³⁰ Ibid, Article 22 (1)

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embraces the right of equality and freedom from discrimination which is vital in realizing access to justice and provides that every person is equal before the law and has the right to equal protection and equal benefit of the law³¹. In addition, the Constitution of Kenya envisages access to justice in environmental matters and stipulates 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 matter³². Another fundamental provision of the Constitution geared towards enhancing access to justice is chapter ten which sets out judicial authority³³. Article 159 sets out several principles that are supposed to guide the administration of justice in Kenya. These principles are to the effect that justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted; justice shall be administered without undue regard to procedural technicalities; and that the purpose and principles of the Constitution shall be protected and promoted³⁴.

There have been efforts towards enhancing access to Kenya as envisaged by the foregoing provisions of the Constitution towards fostering Sustainable Development. The Judiciary notes that access to justice is vital for Sustainable Development since it is essential in realizing the Social Transformation through Access to Justice (STAJ) vision particularly for the poor, marginalized, and vulnerable³⁵. According to the Judiciary, several initiatives have been undertaken towards promoting access to justice in Kenya for Sustainable Development³⁶. These include improving physical access through construction of more court infrastructure, operationalizing mobile courts in remote areas to enhance access to justice for the marginalized and vulnerable

³¹ Ibid, article 27 (1)

³² Ibid, article 70 (1)

³³ Ibid, Chapter ten

³⁴ Ibid, Article 159 (2)

³⁵ Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice Annual Report 2022/2023' Available at <https://judiciary.go.ke/sojar-2022-2023-2/> (Accessed on 05/01/2023)

³⁶ Ibid

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groups, embracing court circuits aimed at deploying judges and judicial officers to specific court stations with high caseloads in order to accelerate the determination of disputes, administration of pro-bono schemes, simplification of court procedures, embracing electronic filing (e-filing) of court documents, and the establishment of specialized courts including tribunals and small claims courts³⁷.

In addition, enhancing access to justice for Sustainable Development in Kenya is being realized through Alternative Justice Systems(AJS)³⁸. Alternative Justice Systems refer to the administration of justice by the people using their culture, customary law, practices and beliefs to resolve disputes³⁹. They are a form of restorative justice that aims to ensure social inclusion, and are generally more affordable, participatory and more expeditious than court processes⁴⁰. They have been described as a useful avenue of responding to the challenge of backlog of court cases⁴¹. The idea of Alternative Justice Systems embraces Alternative Dispute Resolution (ADR) mechanisms in the quest towards access to justice⁴². ADR denotes a wide range of dispute management techniques that function outside but may be linked to formal court processes⁴³. ADR has also been defined as a set of processes that are used to manage conflicts without resort to courts⁴⁴. The term ADR encompasses many dispute resolution techniques including negotiation, mediation, arbitration,

³⁷ Ibid

³⁸ Muigua. K., 'Mainstreaming Alternative Justice Systems in Africa.' Available at <https://kmco.co.ke/wp-content/uploads/2023/11/Mainstreaming-Alternative-Justice-Systems-in-Africa.pdf> (Accessed on 05/01/2023)

³⁹ United Nations Office on Drugs and Crime., 'Partners Welcome move to Mainstream Alternative Justice Systems in Kenya.' Available at <https://www.unodc.org/easternafrika/en/Stories/partnerswelcome-move-to-mainstream-alternative-justice-systems-inkenya.html#:~:text=AJS%20may%20be%20defined%20as,more%20expeditious%20than%20court%20proc%20esses> (Accessed on 05/01/2024)

⁴⁰ Ibid

⁴¹ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Available at <https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/> (Accessed on 05/01/2024)

⁴² Muigua. K., 'Mainstreaming Alternative Justice Systems in Africa.' Op Cit

⁴³ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁴⁴ Muigua. K., 'Alternative Dispute Resolution and Access to Justice.' Op Cit

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conciliation, adjudication, early neutral evaluation, expert determination, minitrials, traditional justice systems among others⁴⁵.

ADR mechanisms play a fundamental role in enhancing access to justice for Sustainable Development⁴⁶. These mechanisms are rooted in the culture and values of Kenyan people and emphasize harmony, humanness and togetherness over individual interests therefore creating a conducive environment for economic, social, cultural and political development towards realizing the Sustainable Development agenda⁴⁷. Promoting ADR mechanisms is therefore necessary in enhancing access to justice for Sustainable Development in Kenya. The Constitution of Kenya requires the Judiciary to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms⁴⁸. The Judiciary notes that progress has been made towards embracing Alternative Justice Systems and ADR mechanisms in Kenya through measures such as the adoption of the Alternative Justice Systems Policy, capacity building on Alternative Justice Systems through training, and the continued implementation of the Court-Annexed Mediation programme⁴⁹. There is need to widely embrace Alternative Justice Systems in Kenya in order to enhance access to justice for Sustainable Development in Kenya.

Further, progress has been made towards enhancing access to justice for Sustainable Development in Kenya by promoting Environmental Justice⁵⁰. Environmental Justice entails the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and

⁴⁵ Ibid

⁴⁶ Muigua. K., & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf> (Accessed on 05/01/2023)

⁴⁷ Ibid

⁴⁸ Constitution of Kenya., 2010., Article 159 (2) (c)

⁴⁹ Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice Annual Report 2022/2023' Op Cit

⁵⁰ Muigua. K., Kariuki. F., 'Towards Environmental Justice in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/Towards-Environmental-Justice-in-Kenya-January-2015.pdf> (Accessed on 05/01/2023)

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involvement in decision-making⁵¹. Environmental justice can be fostered through measures such as public participation, access to information and access to justice⁵². Courts and tribunals including the Environment and Land Court and the National Environment Tribunal are playing a pivotal role in enhancing access to justice in environmental matters for Sustainable Development in Kenya⁵³. It has rightly been pointed out that the Environment and Land Court and the National Environment Tribunal are key actors in the Sustainable Development discourse in terms of developing environmental jurisprudence geared towards environmental protection and conservation⁵⁴. These judicial entities have discharged this mandate through orders aimed at enhancing Sustainable Development and promoting environmental conservation in Kenya⁵⁵. In particular, it has been pointed out that the National Environment Tribunal (NET) facilitates both distributive and procedural justice by providing a framework through which the right to a clean and healthy environment can be enforced⁵⁶. Through some of its decisions, the Tribunal has ensured that the state's obligations in respect of the environment enshrined under the Constitution have been undertaken⁵⁷. The tribunal further promotes access to justice by providing an avenue through which persons who are aggrieved by some of the decisions of the National Environment Management Authority (NEMA) can seek recourse⁵⁸. NET and the

⁵¹ Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in F.N. Botchway (ed), *Natural Resource Investment and Africa's Development*, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74- 76.

⁵² Muigua. K., Kariuki. F., 'Towards Environmental Justice in Kenya.' Op Cit

⁵³ Muigua. K., 'National Environment Tribunal, Sustainable Development and Access to Justice in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2020/03/National-Environment-Tribunal-Sustainable-Development-and-Access-to-Justice-in-Kenya-1.pdf> (Accessed on 05/01/2023)

⁵⁴ 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*

⁵⁵ Muigua. K., 'National Environment Tribunal, Sustainable Development and Access to Justice in Kenya.' Op Cit

⁵⁶ Ibid

⁵⁷ 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*,

⁵⁸ Environmental Management and Coordination Act, No. 8 of 1999, S 129 (1), Government Printer, Nairobi

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Environment and Land Court therefore play an important role in enhancing access to justice in environmental matters for Sustainable Development.

Despite the progress made towards enhancing access to justice for Sustainable Development in Kenya, realizing this ideal is hindered by several challenges. The right of access to justice in Kenya has hitherto been hampered by many unfavourable factors such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow⁵⁹. In addition, it has been pointed out that access to justice in Kenya, especially by the marginalized, poor, uneducated and underprivileged in the society, is hindered by several factors including lack of infrastructure, high advocacy fees, illiteracy, lack of information, long distance to the courts and the long durations of time it takes to resolve disputes in courts⁶⁰. It is vital to address these concerns in order to enhance access to justice for Sustainable Development in Kenya.

4.0 Way Forward

In order to enhance access to justice for Sustainable Development in Kenya, it is imperative to promote access to information. Access to information has been described as pivotal component in the quest towards access to justice⁶¹. It has rightly been informed that access to information is critical for the achievement of the SDGs⁶². Through access to information, the public is empowered to

⁵⁹ 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: 29

⁶⁰ Muigua. K., 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' Available at <https://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf> (Accessed on 05/01/2023)

⁶¹ United Nations Development Programme., 'Strengthening Judicial Integrity through Enhanced Access to Justice.' Available at <https://www.undp.org/sites/g/files/zskgke326/files/migration/eurasia/Access-to-justice.pdf> (Accessed on 05/01/2023)

⁶² The United Nations Educational, Scientific and Cultural Organization (UNESCO)., 'From Promise to Practice: Access to Information for Sustainable Development.' Available at [https://www.unesco.org/en/articles/promise-practice-access-information-sustainable-development#:~:text=Access%20to%20information%20\(ATI\)%20is,about%20decisions%20affecting%20their%20lives.](https://www.unesco.org/en/articles/promise-practice-access-information-sustainable-development#:~:text=Access%20to%20information%20(ATI)%20is,about%20decisions%20affecting%20their%20lives.) (Accessed on 05/01/2023)

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make informed choices, to effectively monitor and hold their government to account, and to be able to know about decisions affecting their lives⁶³. It has been argued that Sustainable Development is undermined when people are unable to access information, express their views and participate freely in decisions that affect their lives and livelihoods⁶⁴. Access to information for citizens, civil society and private sector groups is critical to ensuring effective use of government resources towards sustainable growth⁶⁵. It is also vital for strengthening access to justice making citizens informed about their environmental, economic and social rights and the available legal and administrative remedies for fulfilling these rights towards Sustainable Development⁶⁶. Making information available and accessible to any person in an affordable, effective and timely manner without proving a legal or other interest is also key⁶⁷. *The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*⁶⁸ recognizes the importance of access to information in environmental matters towards realizing access to justice and Sustainable Development and urges all countries to promote access to information. It is therefore necessary to promote access to information in order to enhance access to justice for Sustainable Development in Kenya.

In addition, it is essential to enhance public participation in order to enhance access to justice for Sustainable Development in Kenya. Public participation has been identified as key pillar of access to justice across all dimensions

⁶³ Ibid

⁶⁴ International Development Law Organization., 'Doing Justice to Sustainable Development: Integrating The Rule of Law into the Post-2015 Development Agenda.' Op Cit

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters., Available at <https://unece.org/DAM/env/pp/documents/cep43e.pdf> (Accessed on 05/01/2023)

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including environmental justice⁶⁹. This is succinctly captured in the Rio Declaration on Environment and Development which stipulates that:

'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall 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 shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided (Emphasis added))⁷⁰.

Public participation can promote Sustainable Development and improve the quality of decision-making by providing decision-makers with additional, unique information on local conditions in the context of social, environmental and economic decision making⁷¹. In addition, public participation can also improve policy implementation and foster peace and sustainability by increasing the legitimacy of the decision-making process and, in so doing, reducing instances of conflict⁷². It has been asserted that citizen involvement in environmental decision making has been associated with several benefits which include: information and ideas on public issues; public support for planning decisions; avoidance of protracted conflicts and costly delays; reservoir of good will which can carry over to future decisions; and spirit of cooperation and trust between decision makers and the public⁷³. In addition,

⁶⁹ Muigua. K., 'Realizing Environmental Justice through Litigation.' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Realizing-Environmental-Justice-through-Litigation.pdf> (Accessed on 05/01/2023)

⁷⁰ United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1), Principle 10

⁷¹ Cerezo. L, & Garcia. G., 'Lay Knowledge and Public Participation in Technological and Environmental Policy.' Available at <https://scholar.lib.vt.edu/ejournals/SPT/v2n1/pdf/CEREZO.PDF> (Accessed on 05/01/2023)

⁷² Ibid

⁷³ Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp->

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public participation strengthens procedural access to justice across various facets including environmental justice⁷⁴. It has been pointed out that public participation in environmental and sustainability decision-making often needs to be supported by legally protected access to information and access to justice measures⁷⁵. It is therefore imperative to embrace public participation in order to enhance access to justice for Sustainable Development in Kenya.

Further, it is necessary to address the challenges facing access to justice through courts in Kenya. It has correctly been pointed out that the right of access to justice in Kenya has hitherto been hampered by many unfavourable factors such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow⁷⁶. Addressing these challenges calls for the adoption of measures such as making court fees affordable for all persons, enhanced legal aid and awareness programmes, improving physical access to courts through construction of more court infrastructure, operationalizing mobile courts in remote areas to enhance access to justice for the marginalized and vulnerable groups, embracing court circuits aimed at deploying judges and judicial officers to specific court stations with high caseloads in order to accelerate the determination of disputes, promoting pro-bono schemes, simplification of court procedures, embracing electronic filing (e-filing) of court documents and virtual court sessions to reduce the need of physically accessing courts, and the establishment of specialized courts including tribunals and small claims courts to improve the ease of managing disputes⁷⁷. These measures will improve access to justice and enable citizens exercise their economic, social and environmental rights towards Sustainable Development in Kenya.

<content/uploads/2018/08/TOWARDSMEANINGFUL-PUBLICPARTICIPATION-IN-NATURAL-RESOURCEMANAGEMENT-IN-KENYA.pdf> (Accessed on 05/01/2023)

⁷⁴ Muigua. K., 'Realizing Environmental Justice through Litigation.' Op Cit

⁷⁵ International Development Law Organization., 'Doing Justice to Sustainable Development: Integrating The Rule of Law into the Post-2015 Development Agenda.' Op Cit

⁷⁶ Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development'' Op Cit

⁷⁷ Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice Annual Report 2022/2023' Op Cit

Finally, there is need to embrace Alternative Justice Systems including ADR mechanisms in order to enhance access to justice for Sustainable Development in Kenya. ADR mechanisms contain certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes which makes them viable in enhancing access to justice⁷⁸. In addition, ADR mechanisms have been practiced in Africa for many centuries and are well embedded in the culture and customary practices of the Kenyan people⁷⁹. These mechanisms emphasize harmony, humanness and togetherness over individual interests therefore creating a conducive environment for economic, social, cultural and political development towards realizing the Sustainable Development agenda⁸⁰. Promoting ADR mechanisms is therefore necessary in enhancing access to justice for Sustainable Development in Kenya.

Through the foregoing among other approaches, enhancing access to justice for Sustainable Development in Kenya will become a reality.

5.0 Conclusion

Access to justice is a fundamental component of the Sustainable Development Agenda⁸¹. Access to justice ensures that legal systems are equitable, responsive, and accessible to all, therefore playing a critical role in achieving various aspects of Sustainable Development⁸². SDG 16 seeks to promote the rule of law at the national and international levels and ensure equal access to justice for all towards Sustainable Development⁸³. There has been some progress towards promoting access to justice for Sustainable Development in Kenya. However, the right of access to justice in Kenya continues to be hampered by many unfavourable factors such as high court filing fees,

⁷⁸ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁷⁹ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

⁸⁰ Muigua. K., & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Op Cit

⁸¹ SDG Resource Centre., 'Access to Justice.' Op Cit

⁸² Ibid

⁸³ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1' Op Cit

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bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow⁸⁴. It is imperative to address these challenges in order to enhance access to justice for Sustainable Development in Kenya. This can be achieved through promoting access to information, embracing public participation, addressing the physical, structural, capacity and technical challenges hindering access to justice through courts in Kenya and embracing Alternative Justice Systems including ADR mechanisms⁸⁵. Enhancing Access to Justice for Sustainable Development in Kenya is an ideal that needs to be realized.

⁸⁴ Ojwang. J.B , “The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development,” Op Cit

⁸⁵ Judiciary of Kenya., ‘State of the Judiciary and the Administration of Justice Annual Report 2022/2023’ Op Cit

Fostering Environmental, Social and Governance (ESG) Litigation for Sustainability

Abstract

Attaining sustainability has become a global agenda in recent decades in light of mounting problems including environmental challenges such as climate change, together with issues of poverty, increasing disparity between societies and the tensions brought by social inequalities. Various approaches have been embraced at local, national, regional, continental and global levels towards fostering sustainability. Environmental, Social, and Governance (ESG) litigation has recently emerged as a vital tool aimed at fostering sustainability. This paper critically discusses the role of ESG litigation in promoting sustainability. It conceptualizes ESG and defines ESG litigation. The paper further examines the emerging trends and practices in ESG litigation and their place in the sustainability agenda. It also explores some of the concerns in ESG litigation. The paper further offers proposals towards fostering ESG litigation for sustainability.

1.0 Introduction

Sustainability refers to creating and maintaining the conditions under which humans and nature can exist in productive harmony to support present and future generations¹. Sustainability is often thought of as composed of three overlapping, mutually dependent goals: to live in a way that is environmentally sustainable, or viable over the very long-term; to live in a way that is economically sustainable, maintaining living standards over the long-term; and to live in a way that is socially sustainable, now and in the future². Attaining sustainability has become a global agenda in recent decades in light of mounting problems including environmental challenges such as climate change, together with issues of poverty, increasing disparity between societies and the tensions brought by social inequalities³. This has led to then rise of the concept of Sustainable Development.

¹ United States Environmental Protection Agency., 'What is Sustainability.' Available at <https://www.epa.gov/sustainability/learn-about-sustainability> (Accessed on 03/02/2024)

² Heinberg. R., 'What Is Sustainability?.' Available at <https://cdn.auckland.ac.nz/assets/arts/documents/What%20is%20Sustainability.pdf> (Accessed on 03/02/2024)

³ Giovannoni. E., & Fabietti. G., 'What Is Sustainability? A Review of the Concept and Its Applications.' In: Busco, C., Frigo, M., Riccaboni, A., Quattrone, P. (eds) Integrated

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Sustainable Development refers to development that meets the needs of the present without compromising the ability of future generations to meet their own needs⁴. The concept of Sustainable Development seeks to foster sustainability by promoting environmental protection, economic development and social progress⁵. This idea has been embraced as the global blueprint for sustainability as envisioned under the United Nation's *2030 Agenda for Sustainable Development*⁶. The Agenda represents a shared blue print for peace and prosperity for people and the planet in the quest towards the ideal of Sustainable Development⁷. It envisions attainment of the ideal of Sustainable Development through 17 Sustainable Development Goals (SDGs) which seek to strike a balance between social, economic and environmental facets of sustainability⁸.

Various approaches have been embraced at local, national, regional, continental and global levels towards fostering sustainability. Environmental, Social, and Governance (ESG) litigation has recently emerged as a vital tool aimed at fostering sustainability⁹.

This paper critically discusses the role of ESG litigation in promoting sustainability. It conceptualizes ESG and defines ESG litigation. The paper further examines the emerging trends and practices in ESG litigation and their place in the sustainability agenda. It also explores some of the concerns in ESG

Reporting. Springer, Cham. Available at https://doi.org/10.1007/978-3-319-02168-3_2 (Accessed on 03/02/2024)

⁴ World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

⁵ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1

⁶ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 03/02/2024)

⁷ Ibid

⁸ Ibid

⁹ Norton. C., 'Growing ESG Litigation Is Advancing Thinking on New Practices Needed.' Available at https://www.linkedin.com/pulse/growing-esg-litigation-advancing-thinking-new-practices-norton?utm_source=share&utm_medium=member_android&utm_campaign=share_via (Accessed on 03/02/2024)

litigation. The paper further offers proposals towards fostering ESG litigation for sustainability.

2.0 An Overview of ESG

ESG is an acronym for Environmental, Social and Governance, which has been described as a framework that helps stakeholders understand how an organization manages risks and opportunities around sustainability issues¹⁰. ESG is a framework used to assess an organization's business practices and performance on various sustainability and ethical issues¹¹. It also provides a way to measure business risks and opportunities in sustainability and ethical areas¹². ESG has also been defined as a set of standards measuring a business's impact on society, the environment, and how transparent and accountable it is¹³. It can also be understood as a framework that helps stakeholders understand how an organization is managing risks and opportunities related to environmental, social, and governance criteria¹⁴. ESG incorporates environmental, social, and governance factors into investment and business decision-making processes¹⁵. ESG integrates environmental factors including environmental sustainability and climate change concerns such as climate resilience and low carbon development; social tenets such as improving social welfare and fostering inclusive participation with stakeholders; and governance factors including fostering good governance practices internally

¹⁰ Peterdy. K., & Miller. N., 'What is ESG?' Available at <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance> (Accessed on 03/02/2024)

¹¹ Mathis. S., & Stedman. C., 'Environmental, Social and Governance (ESG).' Available at [https://www.techtarget.com/whatis/definition/environmental-social-and-governance-ESG#:~:text=Environmental%2C%20social%20and%20governance%20\(ESG\)%20is%20a%20framework%20used,and%20opportunities%20in%20those%20areas](https://www.techtarget.com/whatis/definition/environmental-social-and-governance-ESG#:~:text=Environmental%2C%20social%20and%20governance%20(ESG)%20is%20a%20framework%20used,and%20opportunities%20in%20those%20areas) (Accessed on 03/02/2024)

¹² Ibid

¹³ British Business Bank., 'What is ESG – A Guide for Businesses.' Available at <https://www.britishbusiness-bank.co.uk/finance-hub/business-guidance/sustainability/what-is-esg-a-guide-for-smallerbusinesses/> (Accessed on 03/02/2024)

¹⁴ Peterdy. K., & Miller. N., 'What is ESG?' Op Cit

¹⁵ Barbosa. A et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' *Humanit Soc Sci Commun* 10, 410 (2023). Available at <https://doi.org/10.1057/s41599-023-01919-0> (Accessed on 03/02/2024)

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and externally in order to realize sustainability¹⁶. In addition, it has been pointed out that ESG involves monitoring and reporting environmental concerns such as carbon emissions, water consumption and waste generation; social concerns such as human rights, employee, product and customer related data and governance concerns such as political lobbying, anticorruption initiatives and board diversity¹⁷.

ESG is a concept that is vital in fostering sustainable, responsible or ethical investments¹⁸. It has been argued that ESG is usually a standard and strategy used by investors to evaluate corporate behavior and future financial performance of organizations¹⁹. It uses non-financial indicators to evaluate the performance of businesses and organizations²⁰. ESG involves gathering information on a company's policies, practices, and performance related to environmental issues (such as environmental impact and resource use), social issues (such as employee and community relations management), and governance issues (such as governance structure and transparency) and integrating them in corporate decision making²¹. The goal of ESG is to promote sustainable investments that generate long-term financial returns, taking into account the social and environmental impacts of economic activities and promoting transparency and corporate responsibility²². In addition, ESG seeks to integrate Environmental, Social and Governance factors in corporate activities in order to enhance the sustainability and social impact of business activities²³. Embracing ESG factors can therefore contribute to the

¹⁶ African Development Bank Group., 'Environmental, Social and Governance (ESG).' Available at <https://www.afdb.org/en/topics-and-sectors/topics/environmental-social-and-governance-esg> (Accessed on 05/02/2024)

¹⁷ Li. T., et al., 'ESG: Research Progress and Future Prospects.' Available at <https://pdfs.semanticscholar.org/0dd4/941ebea33330210daff5f37a1c8cdd0547d7.pdf> (Accessed on 03/02/2024)

¹⁸ Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' *Journal of Corporate Finance* 66 (2021): 101889

¹⁹ Li. T., et al., 'ESG: Research Progress and Future Prospects.' Op Cit

²⁰ The 3 pillars of Sustainability: Environmental, Social and Economic., Available at <https://www.enel.com/company/stories/articles/2023/06/three-pillars-sustainability> (Accessed on 03/02/2024)

²¹ Ibid

²² Ibid

²³ Li. T., et al., 'ESG: Research Progress and Future Prospects.' Op Cit

environmental and economic performance of organizations in terms of investment and sustainability²⁴.

3.0 ESG Litigation: Opportunities and Challenges

It has correctly been observed that companies have historically viewed sustainability performance and statements as a voluntary undertaking, largely devoid of legal or market risk²⁵. As a result, management and oversight of a company's ESG and other sustainability issues including Corporate Social Responsibility CSR programs and reports often operated free from legal department oversight or interference²⁶. However, recent years have witnessed a proliferation of voluntary frameworks that have given rise to growing pressure on companies to adopt and report on rapidly evolving and expanding ESG standards²⁷. The growth of mandatory disclosure requirements on sustainability issues including ESG factors has led to the rise of ESG related litigation where plaintiffs have pursued with growing success legal challenges to company claims and disclosures related to ESG performance²⁸. It has been pointed out that ESG-related legal and regulatory developments are maturing from soft law recommendations to hard law obligations in multiple jurisdictions²⁹. As a result, there is increasing liability and risks associated with ESG factors that often results in disputes³⁰. It has been observed that ESG disputes continue to be on the rise globally often as a tool to push organisations to engage with the net zero transition with greater

²⁴ Ahmad. H., Yaqub. M., & Lee. S. H., 'Environmental-, Social-, and Governance-Related Factors for Business Investment and Sustainability: A Scientometric Review of Global Trends.' Available at <https://link.springer.com/article/10.1007/s10668-023-02921> (Accessed on 03/02/2024)

²⁵ Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Available at https://www.bakermckenzie.com/-/media/files/insight/publications/2020/10/growing_esg_risks_the_rise_of_litigation.pdf (Accessed on 05/02/2024)

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ McKenzie. S., Philippides. M., & De. Meyer., 'A Look to the Future: Litigation Risks Faced by the Financial Sector in Relation to ESG Statements.' Available at <https://www.investafrica.com/insights-/a-look-to-the-future-litigation-risks-faced-by-the-financial-sector-in-relation-to-esg-statements> (Accessed on 05/03/2024)

³⁰ Ibid

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ambition, and to improve their ESG performance (including in relation to human rights) but also to challenge how ESG issues are being addressed³¹.

ESG related legal actions can either involve claims challenging the veracity of ESG statements based largely on a company's ESG conduct or suits directly contesting the propriety of company activities and performance³². The first category majorly deals with ESG disclosure and reporting standards and such suits are majorly concerned with ESG misstatements and omissions³³. The second category is concerned about a company's performance on various ESG tenets and such suits can involve a company's alleged impacts or misconduct related to climate and human rights³⁴.

Claims challenging the veracity of ESG statements based largely on a company's ESG conduct mostly take the form of misrepresentation and "greenwashing" litigation³⁵. Greenwashing has been described as a phenomenon wherein corporations may strategically disclose environmental performance data in a manner that deceives both the general public and potential investors³⁶. It is often used as a strategy used by companies to create the impression that they are compliant with ESG requirements while hiding the true level of compliance, through marketing³⁷. Through greenwashing, firms exhibit an appearance of transparency and disseminate substantial volumes of ESG data but demonstrate inadequate results in many dimensions of their ESG endeavours³⁸. Greenwashing often results in ESG misrepresentation and is a major threat to sustainability³⁹. Greenwashing

³¹ Ibid

³² Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

³³ Ibid

³⁴ Ibid

³⁵ Ibid

³⁶ Xia, F., Chen, J., Yang, X., Li, X. and Zhang, B., 'Financial Constraints and Corporate Greenwashing Strategies in China' (2023) 30 *Corporate Social Responsibility and Environmental Management* 1770

³⁷ Ibid

³⁸ Ibid

³⁹ Muigua. K., 'Greenwashing: A Hindrance to Achieving Sustainability?' Available at <https://kmco.co.ke/wp-content/uploads/2023/08/Greenwashing-A-hindrance-to-Achieving-Sustainability-Kariuki-Muigua-August-2023.pdf> (Accessed on 05/02/2024)

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practices may result in a situation of information asymmetry, thereby causing detrimental effects on the financial interests of investors⁴⁰. Through greenwashing, it is plausible for corporations to conceal instances of pollution and even breaches of environmental legislation by engaging in symbolic compliance⁴¹. It has been observed that corporations are increasingly facing private lawsuits related to greenwashing on various grounds, including misrepresentation in their marketing materials or corporate disclosure⁴². ESG litigation related to misrepresentation and greenwashing is majorly grounded in consumer protection and unfair competition claims⁴³. Under this framework, companies can be sued on grounds that their products and services contain false or misleading affirmative statements or omit material information on ESG factors⁴⁴. In addition, there have been an increase of ESG suits challenging ESG Statements in company reports, websites, and other marketing materials⁴⁵.

ESG litigation is also being widely embraced through suits directly contesting the propriety of company activities and performance⁴⁶. It has been pointed out that such claims can take the form of private law claims seeking monetary compensation (damages)⁴⁷; private/public law claims seeking to change companies' behaviour and/or bring about alternative outcomes such as compliance with ESG tenets⁴⁸; and public law claims directed at administrative decision-making, for instance judicial review cases on ESG⁴⁹. Under this category, there has been growth of ESG suits on issues such as climate

⁴⁰ Ibid

⁴¹ Ibid

⁴² Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ McKenzie. S., Philippides. M., & De. Meyer., 'A Look to the Future: Litigation Risks Faced by the Financial Sector in Relation to ESG Statements.' Op Cit

⁴⁷ Ahurst., 'ESG Litigation - Get Ready Respond and Resolve.' Available at <https://www.ashurst.com/en/insights/esg-litigation---get-ready-respond-and-resolve/> (Accessed on 05/02/2024)

⁴⁸ Ibid

⁴⁹ Ibid

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change⁵⁰. It has been observed that as governments increasingly implement net-zero carbon targets and companies establish their own carbon-neutral or carbon-negative pledges, climate change related disputes are growing throughout the world⁵¹. Such disputes focus on issues such as infrastructure projects and whether these projects are aligned with the Paris Agreement⁵², contribution by companies towards the effects of climate change, and commercial disputes arising out of climate change events such as insurance claims and claims related to potential force majeure events⁵³. It has been asserted that the practice of taking legal action over climate change has been on the rise in national courts all around the world, with the majority of cases being claimed as breaches of human rights⁵⁴. Such cases are concerned with themes such as climate rights, domestic enforcement, keeping fossil fuels in the ground, corporate accountability and responsibility, failure to adapt and the implications of adaptation, climate disclosures and greenwashing⁵⁵. Climate litigation is thus a vital tool towards sustainability.

In addition, human rights have emerged as key theme under ESG litigation⁵⁶. It has been correctly asserted that companies can face liability for human rights violations committed abroad by entities in their supply chain⁵⁷. In addition, it has been observed that the focus on supply chains has brought much greater scrutiny to the working conditions of those in the supply chain⁵⁸. Concerns of human rights of employees and the communities that are impacted by the activities of the supply chains have become paramount⁵⁹. In addition there is

⁵⁰ Latham & Watkins LLP., 'ESG Litigation Roadmap.' Available at <https://www.lw.com/admin/upload/SiteAttachments/ESG-Litigation-Roadmap.pdf> (Accessed on 05/02/2024)

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Muigua. K., 'Promoting Climate Litigation in Kenya for Sustainability.' Available at <https://kmco.co.ke/wp-content/uploads/2023/08/Promoting-Climate-litigation-in-Kenya-for-Sustainability-Kariuki-Muigua-August-2023.pdf> (Accessed on 05/02/2024)

⁵⁵ Ibid

⁵⁶ Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

⁵⁷ Ibid

⁵⁸ Latham & Watkins LLP., 'ESG Litigation Roadmap.' Op Cit

⁵⁹ Ibid

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an increased recognition of the link between climate change and human rights and as a result, claims have been made against companies for poor health and safety conditions in their supply chain, particularly in cases of significant industrial accidents⁶⁰. Human rights are therefore central in ESG⁶¹. The 'S' tenet in ESG covers social factors including human rights, labour relations, employee welfare, community engagement, diversity and inclusion⁶². Companies are now increasingly required to embrace Human Rights Due Diligence (HRDD) in order to demonstrate compliance with human rights standards⁶³. In addition, there has been rise of private enforcement of human rights against companies through ESG litigation⁶⁴.

ESG litigation is therefore an essential tool aimed at fostering sustainability. Despite its efficacy, several hurdles may be experienced in ESG litigation. For example, in the field of climate litigation, some of the key challenges that may be experienced include determining whether or not the court has the jurisdiction to settle a dispute; locating the origin of an enforceable climate-related right or obligation; formulating a remedy that will lessen the plaintiffs' injuries; and marshalling the science of climate attribution⁶⁵. In addition, it has been pointed out that challenges may arise in the quantification of damages in

⁶⁰ Ibid

⁶¹ Muigua. K., '(Re) Examining Environmental, Social and Governance (ESG) and Human Rights.' Available at <https://kmco.co.ke/wp-content/uploads/2024/01/Re-Examining-Environmental-Social-and-Governance-ESG-and-Human-Rights.pdf> (Accessed on 05/02/2024)

⁶² Ibid

⁶³ Global Campus of Human Rights., 'Rethinking Environmental, Social, and Governance (ESG) Investing for Successful Sustainability and Human Rights.' Available at <https://gchumanrights.org/gcpreparedness/preparedness-development/article-detail/rethinking-environmental-social-and-governance-esg-investing-for-successful-sustainability-and-human-rights-5039.html> (Accessed on 05/03/2024)

⁶⁴ Kemp. B et al., 'The Rise of ESG Litigation and Horizontal Human Rights Enforcement.' Available at <https://www.lexology.com/library/detail.aspx?g=07a94453-f2aa-490a-a7e1-f6c25256cbf9> (Accessed on 05/02/2024)

⁶⁵ Banda ML and Fulton CS, 'Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law' (2017) 47 Environmental Law Reporter

ESG litigation⁶⁶. It is imperative to navigate these among other challenges in order to effectively cover the landscape of ESG litigation.

4.0 Way Forward

In order for companies to manage the risk and liability associated with ESG litigation, it is imperative for them to strengthen their ESG reporting and disclosure requirements⁶⁷. It has been observed that recent ESG trends have driven the requirement by businesses to report on ESG aspects such as human rights and environmental standards as evidenced by emerging legal frameworks requiring companies to report on human rights and environmental issues, emerging mandatory human rights due diligence legislation, and increased legal enforcement and litigation risks⁶⁸. As a result, it is important for companies to treat public disclosures in relation to ESG matters seriously and consider taking independent auditing and verification steps, particularly for annual ESG-related reports and/or other material ESG disclosures⁶⁹. Such an approach can help companies effectively manage and reduce the risk of ESG related litigation⁷⁰.

In addition, it has been argued that there is need for companies to embrace best practices in order to mitigate the risks of ESG litigation and also address such litigation when it arises⁷¹. For example it has been suggested that companies should conduct risk assessments in order to determine the likelihood of ESG related suits and deal with such concerns immediately⁷²; undertake public engagement to order to ensure openness and transparency in ESG matters⁷³; build knowledge on ESG issues in order to be well equipped

⁶⁶ May. S., & Radcliffe. M., 'The Evolving ESG litigation Landscape.' Available at <https://www.grantthornton.co.uk/insights/the-evolving-esg-litigation-landscape/> (Accessed on 05/02/2024)

⁶⁷ Ibid

⁶⁸ Mikhael. M., 'How Human Rights Due Diligence Affects the 'E' in ESG.' Available at <https://www.financierworldwide.com/how-human-rights-due-diligence-affects-the-e-in-esg> (Accessed on 05/02/2024)

⁶⁹ Latham & Watkins LLP., 'ESG Litigation Roadmap.' Op Cit

⁷⁰ Ibid

⁷¹ Ibid

⁷² Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

⁷³ Ibid

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to handle ESG claims when they arise⁷⁴; and strengthen their management systems and internal practices in order to enhance compliance with ESG standards⁷⁵. It has been observed that ESG litigation is associated with several risks to companies including regulatory and enforcement risk, reputational risk, damage to brand, potential disruption by activists and financial risks such as loss of access to capital and financial losses as a result of damages, fines and other forms of monetary compensation⁷⁶.

It is also imperative to strengthen access to justice in ESG matters⁷⁷. It has been pointed out that in order for litigants to be given the right of access to courts in ESG matters, whether individually, collectively, or as a third party or amicus curiae, the criteria pertaining to standing, which differ from jurisdiction to jurisdiction, must be followed⁷⁸. It is also necessary to widen and strengthen the jurisdiction of courts on ESG issues such as climate change⁷⁹. Further, it has been pointed out that there is need to embrace techniques such as litigation funding in order to provide the financial stability and support needed to pursue legal action without compromising on the quality of representation or legal strategy in ESG matters⁸⁰. It has been argued that litigation funding can be an effective strategy for needy claimants to pursue claims against a company that they may ordinarily not be able to afford, enabling them to ultimately hold companies to account for ESG failures⁸¹.

Finally, it is imperative for companies to think creatively and strategically in order to effectively resolve ESG claims⁸². It has been pointed out that ESG

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ May, S., & Radcliffe, M., 'The Evolving ESG litigation Landscape.' Op Cit

⁷⁷ Muigua, K., 'Promoting Climate Litigation in Kenya for Sustainability.' Op Cit

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Runyon, N., 'How Litigation Funding Drives Progress in the ESG Agenda.' Available at <https://www.thomsonreuters.com/en-us/posts/esg/litigation-funding-esg-agenda/#:~:text=A%20driving%20force%20in%20access%20to%20justice&text=Litigation%20funding%20also%20provides%20the,of%20representation%20or%20legal%20strategy.> (Accessed on 05/02/2024)

⁸¹ Ibid

⁸² Latham & Watkins LLP., 'ESG Litigation Roadmap.' Op Cit

claims may significantly differ from other types of litigation companies have previously faced, hence the need for creative solutions towards these claims⁸³. For example, in ESG claims, there is need to bear in mind both the litigation aspects of a dispute, and broader ESG concerns including those around reputation and access to capital⁸⁴. As a result, it has been suggested that there is need for companies to be alive to the potential for resolving ESG claims outside the court room, and what mitigation strategies could be deployed to avoid litigation⁸⁵. It has been argued that Alternative Dispute Resolution (ADR) mechanisms can be ideal in managing ESG disputes by fostering privacy, cost effective and expeditious management of disputes while also allowing parties to select experts to hear and determine contentious ESG matters⁸⁶. In addition, it has correctly been observed that businesses would normally prefer to have their disputes managed in a private manner in order to prevent ruining their image in public and also in an expeditious and cost effective manner in order to protect business interests⁸⁷. It has also been pointed out that the use of ADR mechanisms such as mediation in managing ESG related disputes is a practical demonstration of a sustainability-oriented business culture since mediation can offer a quick, flexible, consensual and win-win solution based on the mutually accepted interests of the parties⁸⁸. ADR mechanisms can therefore be an effective tool to enable companies manage the risks associated with ESG litigation⁸⁹.

5.0 Conclusion

ESG litigation is an essential tool aimed at fostering sustainability. Through ESG litigation, claims can be filed challenging the veracity of ESG statements based largely on a company's ESG conduct⁹⁰. In addition, suits can be filed

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

⁸⁶ Thailand Arbitration Center., 'Alternative Dispute Resolution: Significance of ESG in Arbitration.' Available at <https://thac.or.th/alternative-dispute-resolution-significance-esg-arbitration/> (Accessed on 05/02/2024)

⁸⁷ Ibid

⁸⁸ Gramatidis.B & Emvalomenos. D., 'Sustainability in Dispute Resolution -Mediation as an ESG Practice.' Available at <https://www.bahagram.com/sustainability-in-dispute-resolution-mediation-as-an-esgpractice/> (Accessed on 05/02/2024)

⁸⁹ Ibid

⁹⁰ Hackett. D et al., 'Growing ESG Risks: The Rise of Litigation.' Op Cit

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directly contesting the propriety of company activities and performance⁹¹. There has been a global increase in ESG litigation on issues such as greenwashing, climate change and human rights⁹². Through litigation, companies are being obliged to comply with ESG standards including environmental protection, respect for human rights and good governance practices⁹³. Despite its efficacy, the landscape of ESG litigation faces problems such as jurisdictional challenges, quantification of damages and access to justice⁹⁴. It is imperative to address such concerns in order to strengthen the enforcement of ESG standards. This calls for strengthening of ESG disclosure and reporting standards⁹⁵; embracing best practices in order to mitigate the risks of ESG litigation⁹⁶; strengthening access to justice in ESG matters⁹⁷; and embracing ADR mechanisms in managing ESG claims⁹⁸. Fostering ESG litigation for sustainability is an agenda that needs to be realized.

⁹¹ Ibid

⁹² Latham & Watkins LLP., 'ESG Litigation Roadmap.' Op Cit

⁹³ Ibid

⁹⁴ May. S., & Radcliffe. M., 'The Evolving ESG litigation Landscape.' Op Cit

⁹⁵ Ibid

⁹⁶ Latham & Watkins LLP., 'ESG Litigation Roadmap.' Op Cit

⁹⁷ Muigua. K., 'Promoting Climate Litigation in Kenya for Sustainability.' Op Cit

⁹⁸ Gramatidis.B & Emvalomenos. D., 'Sustainability in Dispute Resolution -Mediation as an ESG Practice.' Op Cit

Fostering the Blue Economy for Sustainability

Abstract

The blue economy is a concept that envisages the sustainable use of aquatic resources for economic growth, improved livelihoods, and job creation while preserving the health of the ocean ecosystems. The blue economy is vital for Sustainable Development. It brings human well-being, social equity and environmental sustainability into harmony. The blue economy also prioritizes all three pillars of sustainability: environmental, economic, and social. Fostering the blue economy is therefore necessary for sustainability. This paper critically discusses the role of the blue economy in the sustainability agenda. It argues that the blue economy has the potential to unlock Sustainable Development throughout the world. The paper examines specific ways through which the blue economy contributes to Sustainable Development. It also examines some of the challenges facing the blue economy. The paper also suggests measures aimed at fostering the blue economy for sustainability.

1.0 Introduction

The blue economy is an emerging concept that encourages sustainable exploitation, innovation and stewardship of oceans and their life-giving 'blue' resources¹. According to the World Bank, blue economy refers to the sustainable use of aquatic resources for economic growth, improved livelihoods, and job creation while preserving the health of the ocean ecosystems². The blue economy has further been defined by the European Commission as all economic activities related to oceans, seas and coasts³. It has further been pointed out that the blue economy describes the sustainable use and conservation of aquatic resources in both marine and freshwater

¹ Commonwealth Blue Economy., 'Sustainable Blue Economy' Available at <https://thecommonwealth.org/bluecharter/sustainable-blue-economy#:~:text=The%20blue%20economy%20embraces%20economic,of%20poverty%20and%20climate%20change> (Accessed on 04/03/2024)

² World Bank Group., 'The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries' Available at <https://openknowledge.worldbank.org/server/api/core/bitstreams/cee24b6c-2e2f-5579-b1a4-457011419425/content> (Accessed on 04/03/2024)

³ European Commission., 'Sustainable Blue Economy' Available at https://oceans-and-fisheries.ec.europa.eu/ocean/blue-economy/sustainable-blue-economy_en (Accessed on 04/03/2024)

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environments⁴. These resources include oceans and seas, coastlines and banks, lakes, rivers and groundwater⁵. It has been asserted that the blue economy comprises activities that exploit aquatic resources (fisheries, mining, petroleum, biotechnologies, among others) or use aquatic environments (maritime transport, coastal tourism, among others), once they are done in an integrated, fair and circular manner⁶. Further, it has been correctly observed that the idea of blue economy has three related but distinct meanings- the overall contribution of the oceans to economies, the need to address the environmental and ecological sustainability of the oceans, and the ocean economy as a growth opportunity for both developed and developing countries⁷.

It has been argued that the concept of blue economy employs environmentally-sound and innovative infrastructure, technologies and practices, including institutional and financing arrangements, for meeting the goals of: (a) sustainable and inclusive development; (b) protecting the coasts and oceans, and reducing environmental risks and ecological scarcities; (c) addressing water, energy and food security; (d) protecting the health, livelihoods and welfare of the people in the coastal zone; and (e) fostering an ecosystem-based climate change mitigation and adaptation measures⁸. In addition, it has been observed that the blue economy emphasizes protecting and sustainably developing oceans, and implementing policies that ensure better stewardship of marine ecosystems, wildlife and other resources⁹. It is a

⁴ East African Community., 'Blue Economy' Available at <https://www.eac.int/environment/aquatic-ecosystems/blue-economy#:~:text=The%20Blue%20Economy%20describes%20the,%2C%20lakes%2C%20rivers%20and%20groundwater> (Accessed on 04/03/2024)

⁵ Ibid

⁶ Ibid

⁷ United Nations., 'Blue Economy Definitions' Available at https://www.un.org/regularprocess/sites/www.un.org.regularprocess/files/rok_part_2.pdf (Accessed on 04/03/2024)

⁸ United Nations Development Programme., 'Leveraging the Blue Economy for Inclusive and Sustainable Growth.' Policy Brief, Issue No 6/2018., Available at <https://www.undp.org/sites/g/files/zskgke326/files/migration/ke/Policy-Brief-2018---6---Blue-Economy-for-Inclusive-and-Sustainable-Growth.pdf> (Accessed on 04/03/2024)

⁹ Bove. T., 'What are the Promises of a Blue Economy?' Available at <https://earth.org/blue-economy/#> (Accessed on 04/03/2024)

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concept that aims to harmonize economic growth with environmental conservation of aquatic resources through sustainable practices¹⁰. In addition, blue economy includes the recognition that the productivity of healthy freshwater and ocean ecosystems is a pathway for aquatic and maritime-based economies and can ensure that islands and other coastal countries, as well as land-locked States, benefit from their resources¹¹. It also requires an integrated, holistic and participatory approach that includes sustainable use and management of blue economy resources for societal progress¹².

The blue economy is vital for Sustainable Development. It has been observed that the blue economy brings human well-being, social equity and environmental sustainability into harmony¹³. Further, it has been observed that the blue economy prioritizes all three pillars of sustainability: environmental, economic, and social¹⁴. Fostering the blue economy is therefore necessary for sustainability¹⁵.

This paper critically discusses the role of the blue economy in the sustainability agenda. It argues that the blue economy has the potential to unlock Sustainable Development throughout the world. The paper examines specific ways through which the blue economy contributes to Sustainable Development. It also examines some of the challenges facing the blue economy. The paper also suggests measures aimed at fostering the blue economy for sustainability.

¹⁰ Purcell. N., 'What is the Blue Economy?' Available at <https://bluerobotics.com/what-is-the-blueeconomy/#:~:text=The%20blue%20economy%20encourages%20the,reduce%20fuel%20consumption%20and%20emissions> (Accessed on 04/03/2024)

¹¹ East African Community., 'Blue Economy' Op Cit

¹² Ibid

¹³ Commonwealth Blue Economy., 'Sustainable Blue Economy' Op Cit

¹⁴ United Nations., 'Sustainable Blue Economy Vital for Small Countries and Coastal Populations' Available at <https://www.un.org/en/desa/sustainable-blue-economy-vital-small-countries-and-coastal-populations#:~:text=A%20blue%20economy%20prioritizes%20all,environmental%20C%20economic%20and%20social> (Accessed on 04/03/2024)

¹⁵ Ibid

2.0 The Role of the Blue Economy in Sustainability

Sustainability refers to creating and maintaining the conditions under which humans and nature can exist in productive harmony to support present and future generations¹⁶. The need to strike a balance between the environmental, social and economic facets of development towards sustainability gave rise to the concept of Sustainable Development¹⁷. The idea of Sustainable Development refers to development that meets the needs of the present without compromising the ability of future generations to meet their own needs¹⁸. This concept seeks to foster sustainability by promoting environmental protection, economic development and social progress¹⁹. It has been adopted as the global blueprint for sustainability as envisioned under the United Nation's *2030 Agenda for Sustainable Development*²⁰ which represents a shared blue print for peace and prosperity for people and the planet in the quest towards the ideal of Sustainable Development. The Agenda envisions attainment of the ideal of Sustainable Development through 17 Sustainable Development Goals (SDGs) which seek to strike a balance between social, economic and environmental facets of sustainability²¹.

The blue economy is vital in the sustainability agenda²². It has been correctly observed that the idea of blue economy recognizes that the oceans, which cover approximately 71% of the Earth's surface, possess untapped potential to

¹⁶ United States Environmental Protection Agency., 'What is Sustainability.' Available at <https://www.epa.gov/sustainability/learn-about-sustainability> (Accessed on 04/03/2024)

¹⁷ Giovannoni. E., & Fabietti. G., 'What Is Sustainability? A Review of the Concept and Its Applications.' In: Busco, C., Frigo, M., Riccaboni, A., Quattrone, P. (eds) *Integrated Reporting*. Springer, Cham. Available at https://doi.org/10.1007/978-3-319-02168-3_2 (Accessed on 04/03/2024)

¹⁸ World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

¹⁹ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1

²⁰ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 04/03/2024)

²¹ Ibid

²² Commonwealth Blue Economy., 'Sustainable Blue Economy' Op Cit

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unlock Sustainable Development in various sectors²³. It has been argued that sustainable utilization of the blue economy can unlock development through in areas such as smart shipping, ports, transportation and global connectivity²⁴; employment, job creation and poverty eradication; cities, tourism, resilient coasts and infrastructure²⁵; sustainable energy, mineral resources and innovative industries²⁶; managing and sustaining marine life, conservation and sustainable economic activities²⁷; ending hunger, securing food supplies and promoting good health and sustainable fisheries²⁸; climate action, agriculture waste management and pollution-free oceans²⁹; maritime security, safety and regulatory enforcement and people, culture, communities and societies³⁰. It has further been observed that oceans play a key role in the economic development of nations through the exploitation of maritime and marine resources – for example, through shipping, commercial fishing, and oil, gas, and mineral development³¹.

According to the World Bank, marine and freshwater ecosystems play a significant contribution in achieving sustainability in areas such as food security, nutrition and health, tourism, climate change mitigation, provisions of homes and shelter, sustainable economic growth, and trade³². For example,

²³ Purcell. N., 'What is the Blue Economy?' Available at <https://bluerobotics.com/what-is-the-blueeconomy/#:~:text=The%20blue%20economy%20encourages%20the,reduce%20fuel%20consumption%20and%20emissions.> (Accessed on 04/03/2024)

²⁴ Kenya Maritime Authority., 'Report on the Global Sustainable Blue Economy Conference 26th-28th November 2018 Nairobi, Kenya.' Available at <http://kenyaforimo.kma.go.ke/wpcontent/uploads/2019/11/SBEC-FINAL-REPORT-8-DECEMBER-2018-rev-2-1-2-PDF2-3-compressed.pdf> (Accessed on 04/03/2024)

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ Commonwealth Blue Economy., 'Sustainable Blue Economy' Op Cit

³² World Bank Group., 'Growing the Blue Economy to Combat Poverty and Accelerate Prosperity' Available at <https://thedocs.worldbank.org/en/doc/446441473349079068->

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it has been observed that the fisheries and aquaculture sector is a vital source of livelihoods, nutritious food and economic opportunities, and has a key role to play in meeting one of the world's greatest challenges: feeding a population set to rise to 9.6 billion people by 2050³³. In addition, it has been asserted that fisheries and aquaculture play a significant role in eliminating hunger, promoting health and reducing poverty³⁴. It is estimated that fish contributes over 16 percent of the animal protein consumed by the world's population and 6.5 percent of all protein consumed, with 1 billion people relying on this source of protein³⁵. Fish is also a particularly critical source of nutrition³⁶.

In addition, the blue economy is an important source of coastal and marine tourism³⁷. It has been observed that maritime or ocean related tourism, as well as coastal tourism, are vital sectors of the economy in many countries, including Small Island Developing States (SIDs) and coastal Least Developed Countries (LDCs)³⁸. Coastal and ocean-related tourism comes in various forms and includes dive tourism, maritime archaeology, surfing, cruises, ecotourism, and recreational fishing operations³⁹. It has been argued that sustainable tourism can be part of the blue economy, promote conservation and sustainable use of marine environments and species, generate income for local communities (thus alleviating poverty), and maintain and respect local cultures, traditions, and heritage⁴⁰.

[0010022016/original/AMCOECCBlueEconomyDevelopmentFramework.pdf](https://www.cbd.int/article/waterforbiodiversity-2)

(Accessed on 04/03/2024)

³³ Convention on Biological Diversity., 'The Blue Economy is Critical to Food Security and the Fight Against Poverty' Available at <https://www.cbd.int/article/waterforbiodiversity-2> (Accessed on 04/03/2024)

³⁴ Ibid

³⁵ World Bank Group., 'Growing the Blue Economy to Combat Poverty and Accelerate Prosperity' Op Cit

³⁶ Ibid

³⁷ World Bank Group., 'The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries' Op Cit

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

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The blue economy also plays a key role in the transport sector⁴¹. It has been observed that the blue economy is an important source of transport through maritime transport which includes passenger transport: sea, coastal and inland passenger water transport; freight transport: sea, coastal freight and inland freight water transport; and services for transport: renting and leasing water transport equipment⁴². Further, it has been argued that inland transport is considered part of the blue economy because it includes the transportation of passengers and freight via rivers, canals, lakes and other inland waterways, including within harbours and ports⁴³. It has been also observed that shipping has for many centuries been the major form of transportation, as well as an essential communication link connecting coastal cities, countries and continents⁴⁴. The blue economy is therefore vital in the transport sector.

The blue economy also plays a crucial role in trade⁴⁵. The World Trade Organization points out that although seafood has long been traded internationally, trade has increased dramatically in recent decades such that fish and fishery products now constitute the most highly traded food commodity internationally⁴⁶. Further, it is estimated that 90% of globally traded goods are carried by sea⁴⁷. The blue economy therefore plays a key role in facilitating international trade.

⁴¹ European Commission., 'Maritime Transport' Available at https://blue-economy-observatory.ec.europa.eu/eu-blue-economy-sectors/maritime-transport_en#:~:text=Inland%20transport%20is%20considered%20part,including%20within%20harbours%20and%20ports. (Accessed on 04/03/2024)

⁴² Ibid

⁴³ Ibid

⁴⁴ Maritime Sector., Available at <https://www.windrosenetwork.com/Maritime-Sector> (Accessed on 04/03/2024)

⁴⁵ World Bank Group., 'Growing the Blue Economy to Combat Poverty and Accelerate Prosperity' Op Cit

⁴⁶ World Trade Organization., 'Trade and Fisheries: Key Issues for the World Trade Organization' Available at https://www.wto.org/english/res_e/reser_e/ersd201003_e.htm (Accessed on 04/03/2024)

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In addition, the blue economy is a major source of energy⁴⁸. It has been observed that oceans play a key role in extraction of energy sources such as oil and gas which are vital in the global energy supply⁴⁹. Further, according to the International Renewable Energy Agency (IRENA), oceans are a source of abundant renewable energy potential, capable of driving a blue economy based on sustainable use of ocean resources⁵⁰. IRENA points out that energy harnessed from the oceans, through offshore renewables, can contribute to the decarbonisation of the power sector and to other end-use applications that are relevant for a blue economy (for example, shipping, cooling and water desalination)⁵¹. Further, it has been contended that the blue economy has made it possible to tap into emerging ocean energy technologies – including wave, tidal, ocean thermal energy conversion and salinity gradient energy which have the potential to unlock clean and sustainable energy and economic development⁵². In addition, it has been pointed out that renewable energies in the blue economy also contribute to wealth and jobs creation, in addition to the diversification, development and growth of local economies, especially in coastal areas and in developing countries⁵³.

The blue economy is also vital in climate change mitigation⁵⁴. It has been pointed out that coral reefs, mangroves, seagrass meadows and wetlands deliver critical ecosystem services such as coastal protection and carbon sequestration⁵⁵. Oceans constitute a major sink for anthropogenic emissions, absorbing nearly 25 percent of the extra carbon dioxide added to Earth's

⁴⁸ World Bank Group., 'Growing the Blue Economy to Combat Poverty and Accelerate Prosperity'

⁴⁹ Ibid

⁵⁰ International Renewable Energy Agency., 'Fostering a Blue Economy: Offshore Renewable Energy' Available at https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2020/Dec/IRENA_Fostering_Blue_Economy_2020.pdf (Accessed on 04/03/2024)

⁵¹ Ibid

⁵² Ibid

⁵³ Manso. J., et al., 'Renewable Energies and Blue Economy: New Trends in Global Research' *Energies*, Volume 16, No. 10 (2023)

⁵⁴ United Nations., 'Sustainable Blue Economy Vital for Small Countries and Coastal Populations.' Available at <https://news.un.org/en/story/2022/06/1121562> (Accessed on 04/03/2024)

⁵⁵ Ibid

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atmosphere by burning fossil fuels⁵⁶. Further, it has been pointed out that blue carbon' sinks like mangrove forests, sea grass beds and other vegetated ocean habitats are up to five times as effective as tropical forests at sequestering carbon⁵⁷. It has been argued that ocean-based mitigation has the potential to reduce emissions by more than 11 billion tonnes of greenhouse gasses per annum in 2050, which could close the global emissions gap by up to 25 per cent⁵⁸. It is therefore necessary to tap into the blue economy in order to enhance the global response to climate change.

From the foregoing, it is evident that the blue economy plays a key role in Sustainable Development. It has been argued that a healthy blue economy is key for a sustainable future both for people and the planet⁵⁹. It has been pointed out that the world's oceans – their temperature, chemistry, currents and life – drive global systems that make the Earth habitable for humankind⁶⁰. The blue economy offers the possibilities of improved efficiency in our land and ocean management, better treatment and governance of marine ecosystems, a more equitable model of global health standards, lower emissions and resilience against climate change⁶¹. It has further been asserted that the blue economy in Africa provides numerous advantages such as habitat for fish and marine life; carbon sequestration; shoreline protection; waste recycling and storing; ocean processes that influence climate and biodiversity and new emerging activities such as desalination; marine

⁵⁶ World Bank Group., 'Growing the Blue Economy to Combat Poverty and Accelerate Prosperity' Op Cit

⁵⁷ Ibid

⁵⁸ International Institute for Environment and Development., 'Climate change and the Blue Economy: A Sustainable and Equitable Blue Economy Can Support Climate Action' Available at <https://www.iiied.org/sites/default/files/pdfs/2023-11/22171g.pdf> (Accessed on 04/03/2024)

⁵⁹ United Nations Environment Programme., 'Enabling Sustainable, Resilient and Inclusive Blue Economies.' Available at <https://www.unep.org/explore-topics/oceans-seas/what-we-do/enablingsustainable-resilient-and-inclusive-blue-economies> (Accessed on 04/03/2024)

⁶⁰ United Nations Development Programme., 'Goal 14: Life Below Water.' Available at https://www.undp.org/sustainable-development-goals/belowwater?gclid=Cj0KCQjwzdOIBhCNARIsAPMwjbyodp8PZIkguJb9OPW9JcJz2fPWPOOvlgrRnGolWtE86-55pcSV5saAqJCEALw_wcB (Accessed on 04/03/2024)

⁶¹ Bove. T., 'What are the Promises of a Blue Economy?' Op Cit

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biotechnologies, ocean energy and seabed mining⁶². Fostering the blue economy is thus vital in order to achieve sustainability.

The role of the blue economy in sustainability is recognized under the United Nation's *2030 Agenda for Sustainable Development*⁶³. SDG 14 seeks to conserve and sustainably use the oceans, seas and marine resources for Sustainable Development⁶⁴. SDG 14 seeks to foster the blue economy through targets such as preventing and significantly reducing marine pollution of all kinds, in particular from land-based activities, including marine debris and nutrient pollution⁶⁵; sustainably managing and protecting marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and taking action for their restoration in order to achieve healthy and productive oceans⁶⁶; minimizing and addressing the impacts of ocean acidification, including through enhanced scientific cooperation at all levels; regulating harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implementing science-based management plans, in order to restore fish stocks⁶⁷; and increasing scientific knowledge, developing research capacity and transfer of marine technology⁶⁸. Realizing the targets under SDG 14 is necessary in fostering the blue economy for sustainability.

At a continental level, Africa Union's *Agenda 2063*⁶⁹ recognizes the potential of the blue economy to trigger Sustainable Development in Africa through marine resources, fishing, tourism, energy, port operations, mining and

⁶² United Nations Development Programme., 'Leveraging the Blue Economy for Inclusive and Sustainable Growth.' Policy Brief, Issue No 6/2018., Op Cit

⁶³ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

⁶⁴ Ibid, Sustainable Development Goal 14

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 04/03/2024)

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marine transport⁷⁰. Agenda 2063 calls for the sustainable utilization and management of the Blue Economy in Africa in order to realize its potential⁷¹.

In addition, the Africa Blue Economy Strategy seeks to achieve an inclusive and sustainable blue economy that significantly contributes to Africa's transformation and growth⁷². It aims to guide the development of an inclusive and sustainable blue economy that becomes a significant contributor to Africa's transformation and growth, through advancing knowledge on marine and aquatic biotechnology, environmental sustainability, the growth of an Africa-wide shipping industry, the development of sea, river and lake transport, the management of fishing activities on these aquatic spaces, and the exploitation and beneficiation of deep sea mineral and other resources⁷³. The strategy outlines the key drivers of change that are shaping Africa blue economy development; strategic and technical challenges to blue economy development and identifies priority areas of intervention for sustainable blue economy development in Africa⁷⁴. This strategy is therefore key in fostering the blue economy for sustainability in Africa.

Despite its promises, several problems are affecting the sustainability of the blue economy.

3.0 Challenges facing the Blue Economy

Despite its key role in sustainability, several challenges undermine the potential of the blue economy. Among the key challenges is overfishing⁷⁵. This challenge has emerged as a result of technological improvements coupled with poorly managed access to fish stocks and rising demand⁷⁶. According to the

⁷⁰ Ibid

⁷¹ Ibid

⁷² Africa Union., 'Africa Blue Economy Strategy.' Available at https://www.auibar.org/sites/default/files/202010/sd_20200313_africa_blue_economy_strategy_en.pdf (Accessed on 04/03/2024)

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Muigua. K., 'Fostering Africa's Blue Economy: Problems and Promises' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Fostering-Africas-Blue-Economy-Problems-and-Promises-.pdf> (Accessed on 05/03/2024)

⁷⁶ World Bank Group., 'Growing the Blue Economy to Combat Poverty and Accelerate Prosperity' Op Cit

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Food and Agriculture Organization (FAO), nearly all of the major fishery resources of the world are either overharvested or are fully utilized⁷⁷. It has further been pointed out that fish stocks are also exploited by illegal, unreported and unregulated fishing⁷⁸. In addition, it has been observed that unsustainable fishing practices driven by inadequate fisheries management mechanisms have resulted in rapidly decreasing fish habitats⁷⁹.

Another problem facing the blue economy is habitat degradation⁸⁰. This problem occurs as a result of coastal development, deforestation, mining, and unsustainable fishing practices as well as pollution, in the form of excess nutrients from untreated sewerage, agricultural run-off and marine debris such as plastics⁸¹. According to the United Nations Development Programme,(UNEP) there has been an increase in degradation of marine ecosystems through discharge of oil, the dumping of toxic waste, illegal sand harvesting and the destruction of coral reefs and coastal forests⁸². Loss of aquatic habitats, bio-diversity and shrinking water levels have been identified as key threats to the sustainability of the blue economy⁸³. It is necessary to address these problems in order to foster the blue economy for sustainability.

In addition, it has been correctly observed that the blue economy has been exploited to facilitate harmful and illegal practices such as illicit trade in crude oil, arms, drug and human trafficking and smuggling of contraband goods⁸⁴. Further, it has been observed that illicit trading in fisheries results in

⁷⁷ Food and Agriculture Organization., 'Introduction' Available at <https://www.fao.org/3/X2250E/x2250e06.htm> (Accessed on 05/03/2024)

⁷⁸ World Bank Group., 'Growing the Blue Economy to Combat Poverty and Accelerate Prosperity' Op Cit

⁷⁹ Kenya Maritime Authority., 'Report on the Global Sustainable Blue Economy Conference 26th-28th November 2018 Nairobi, Kenya.' Op Cit

⁸⁰ World Bank Group., 'Growing the Blue Economy to Combat Poverty and Accelerate Prosperity' Op Cit

⁸¹ Ibid

⁸² United Nations Development Programme., 'Leveraging the Blue Economy for Inclusive and Sustainable Growth.' Policy Brief, Issue No 6/2018., Op Cit

⁸³ Kenya Maritime Authority., 'Report on the Global Sustainable Blue Economy Conference 26th-28th November 2018 Nairobi, Kenya.' Op Cit

⁸⁴ United Nations Development Programme., 'Leveraging the Blue Economy for Inclusive and Sustainable Growth.' Policy Brief, Issue No 6/2018., Op Cit

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significant economic loss for many countries⁸⁵. The African Union further notes that sea piracy and illegal drug trafficking are serious challenges in the blue economy sector as these incidences of piracy pose a real threat not only to the safety of vessels and their crew but also to the economies of affected countries⁸⁶. Maritime terrorism has also been identified as key challenge in the blue economy⁸⁷. Maritime terrorism is a major problem since it poses a serious threat to international peace and security⁸⁸.

Climate change is also a major problem facing the blue economy. It has been observed that climate change is already affecting the blue economy in various ways⁸⁹. For example, Sea-level rise is causing havoc on shorelines⁹⁰; changes in precipitation is causing floods and droughts in unpredictable patterns⁹¹; and rising sea temperatures is starting to change patterns of ecosystem productivity, which will, in turn, reduce the availability of fish for human consumption⁹². Further, it has been pointed out that climate change is already having wide-ranging and severe negative impacts on crucial sectors of the blue economy such as fisheries, aquaculture, and tourism⁹³. It has been asserted that if climate change continues unchecked, extreme weather such as storm

⁸⁵ African Development Bank Group., 'Illicit Trade in Natural Resources in Africa – A Forthcoming Report from the African Natural Resources Center' Available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Events/IFF/Documents/IFF/ANRC_ILLICIT_TRADE_IN_NATURAL_RESOURCES.pdf (Accessed on 05/03/2024)

⁸⁶ Africa Union., 'Africa Blue Economy Strategy.' Op Cit

⁸⁷ United Nations Office on Drugs and Crime., 'Terrorism and Transport' Available at <https://www.unodc.org/unodc/en/terrorism/expertise/terrorism-and-transport.html> (Accessed on 05/03/2024)

⁸⁸ Ibid

⁸⁹ World Bank Group., 'Climate Change and the Blue Economy in Africa' Available at <https://thedocs.worldbank.org/en/doc/4659697df287ba5e0dcfcf41efdb3f8a-0320012022/original/Climate-Change-and-the-Blue-Economy-in-Africa.pdf> (Accessed on 05/03/2024)

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

⁹³ International Institute for Environment and Development., 'Climate Change and the Blue Economy' Available at <https://www.iied.org/sites/default/files/pdfs/2023-11/22171g.pdf> (Accessed on 05/03/2024)

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surges could conceivably combine with normal lunar tides to overwhelm the ability of coastal countries to safeguard their citizens and infrastructure⁹⁴.

In addition to the foregoing, other key challenges facing the blue economy include inadequate management of natural habitats and resources, inadequate capacity (human skills and technology) to tap into the energy and mineral resources within the blue economy sustainably, and inadequate inclusion of local communities and peoples in blue economy⁹⁵. It is necessary to address these among other challenges in order to foster the blue economy for sustainability.

4.0 Way Forward

In order to foster the blue economy for sustainability, it is necessary to enhance its good governance⁹⁶. It has been argued that good governance and strong policies can facilitate the implementation of changes throughout the blue economy⁹⁷. In order to achieve this goal, it is necessary to strengthen science and research to generate and disseminate evidence-based knowledge and information as well to inform policy and decision making⁹⁸; strengthening governance mechanisms and institutions⁹⁹; and promote synergies within and between different levels of governments¹⁰⁰. Some of the key governance approaches that have been suggested include integrated coastal zone management which can enhance the protection of coastal and near shore resources while increasing the efficiency of their uses¹⁰¹; marine and coastal

⁹⁴ World Bank Group., 'Climate Change and the Blue Economy in Africa' Op Cit

⁹⁵ Muigua. K., 'Fostering Africa's Blue Economy: Problems and Promises' Op Cit

⁹⁶ Food and Agriculture Organization., 'Achieving Blue Growth through implementation of the Code of Conduct for Responsible Fisheries' Available at <https://www.fao.org/3/i4999e/i4999e.pdf> (Accessed on 05/03/2024)

⁹⁷ Ibid

⁹⁸ United Nations Economic Commission for Africa., 'The Nairobi Statement of Intent on Advancing the Global Sustainable Blue Economy.' Available at <https://archive.uneca.org/sites/default/files/uploadeddocuments/SROs/EA/HIG-H-LEVEL-SUSTAINABLE-BLUE-ECONOMY-CONFERENCE-2018/nairobistatement-of-intent-advancing-global-sustainable-blue-economy.pdf> (Accessed on 05/03/2024)

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ World Bank Group., 'Growing the Blue Economy to Combat Poverty and Accelerate Prosperity' Op Cit

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spatial planning and integrated maritime surveillance which can inform better decision making¹⁰²; and digital mapping of maritime and coastal space and natural assets which can form the basis for cross-sector analysis and planning in order to prevent conflicts and avoid externalities¹⁰³.

It is also vital to embrace regional and global cooperation for effective management of the blue economy¹⁰⁴. Blue economy assets such as oceans are shared by many countries¹⁰⁵. Therefore, the acts or omissions of one country in respect of such resources could end up affecting many other countries¹⁰⁶. As a result, enhanced regional and global cooperation would, in turn, contribute to better responses and common efforts at all levels towards the sustainable use and management of the blue economy¹⁰⁷. Regional and global cooperation is also vital in enhancing safety and security of the blue economy by combating problems such as piracy, maritime terrorism, human and drug trafficking¹⁰⁸.

Further, it is important to embrace inclusive participation in order to realize sustainable management of the blue economy¹⁰⁹. It has been suggested that

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ United Nations Economic Commission for Africa., 'Harnessing the Blue Economy for Regional Integration' Available at https://archive.uneca.org/sites/default/files/uploaded-documents/SROs/EA/ICSOE/Concept-Notes/cn_harnessing_the_blue_economy_for_regional_integration_-_23rd_icsoe.pdf (Accessed on 05/03/2024)

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Roy. A., 'Blue Economy in the Indian Ocean: Governance Perspectives for Sustainable Development in the Region.' Available at https://www.orfonline.org/wpcontent/uploads/2019/01/ORF_Occasional_Paper_181_Blue_Economy.pdf (Accessed on 05/03/2024)

¹⁰⁹ United Nations Economic Commission for Africa., 'The Nairobi Statement of Intent on Advancing the Global Sustainable Blue Economy.' Available at <https://archive.uneca.org/sites/default/files/uploadeddocuments/SROs/EA/HIGH-LEVEL-SUSTAINABLE-BLUE-ECONOMY-CONFERENCE-2018/nairobistatement-of-intent-advancing-global-sustainable-blue-economy.pdf> (Accessed on 05/02/2024)

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promoting gender equality and the role and participation of women and youth is vital in improving management of the blue economy¹¹⁰. According to the World Bank, realizing the full potential of the blue economy also requires the effective inclusion and active participation of all societal groups, especially women, young people, local communities, indigenous peoples, and marginalized or underrepresented groups¹¹¹. Further, it has been suggested that traditional knowledge and practices can also provide culturally appropriate approaches for supporting improved governance¹¹². It is therefore necessary to embrace inclusive participation for enhanced management of the blue economy.

There is also need to tackle the human and environmental challenges affecting the blue economy especially overfishing, pollution, and climate change¹¹³. These problems affect the sustainability and viability of the blue economy¹¹⁴. In the fisheries sector, there is need to optimize conservation and sustainable fisheries and aquaculture resources use while minimizing conflicts in order to achieve full wealth-generating potential for fisheries and aquaculture sector¹¹⁵. This will enhance the sustainability of the fisheries and aquaculture sector while enabling all countries reap from the benefits of the blue economy in this sector¹¹⁶. It is also critical to curb pollution of blue economy resources such as oceans and lakes¹¹⁷. Further, it is imperative to confront climate change¹¹⁸. It has been pointed out that the future of the blue economy depends on ambitious and urgent global actions to build the capacity of natural and human systems to cope with and adapt to the impacts of climate change, and to mitigate further climate change by reducing greenhouse gas emissions¹¹⁹.

¹¹⁰ Ibid

¹¹¹ World Bank Group., 'The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries' Op Cit

¹¹² Ibid

¹¹³ Muigua. K., 'Fostering Africa's Blue Economy: Problems and Promises' Op Cit

¹¹⁴ Ibid

¹¹⁵ Africa Union., 'Africa Blue Economy Strategy.' Op Cit

¹¹⁶ Ibid

¹¹⁷ Muigua. K., 'Fostering Africa's Blue Economy: Problems and Promises' Op Cit

¹¹⁸ Ibid

¹¹⁹ International Institute for Environment and Development., 'Climate Change and the Blue Economy' Op Cit

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As a result, there is need to promote the integration of blue economy and ecosystem services into climate change policies and coastal and aquatic policies¹²⁰. It has further been suggested that countries should consider embracing nature based solution for the enhancement of coastal and aquatic ecosystems contribution to biodiversity and climate change objectives¹²¹.

Finally, capacity building is vital in fostering the blue economy for sustainability¹²². It has been observed that some countries especially those in the global south often lack sufficient capacity, skills and financial support to better develop their blue economy¹²³. Enhancing the human, institutional, and technical capacity of such countries is therefore key towards unlocking the potential of the blue economy¹²⁴. It is therefore necessary for these countries to enhance their capacity for developing the blue economy through measures such as improving access to maritime education, embracing partnerships between the private and public in management of the blue economy, and enhancing science, research and innovation in the blue economy¹²⁵. Developed countries should also support capacity building efforts in developing countries through financial support, technology development and transfer, and cooperation in science, research, and innovation.

Embracing the foregoing measures can foster the blue economy for sustainability.

¹²⁰ Techera..E., 'Supporting Blue Economy Agenda: Fisheries, Food Security and Climate Change in the Indian Ocean.' *Journal of the Indian Ocean Region*, Volume 14, No. 1, 2018

¹²¹ Ibid

¹²² World Bank Group., 'The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries' Op Cit

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ United Nations Conference on Trade and Development., 'Capacity Building: Impacts and Prospects for the Blue Economy' Available at <https://unctad.org/system/files/non-official-document/ditc-ted-04062020-OceansWebinar-UNITAR-haddad.pdf> (Accessed on 05/03/2024)

5.0 Conclusion

The blue economy is vital in the sustainability agenda¹²⁶. Blue economy resources such as oceans play a key role in the economic development of nations through the exploitation of maritime and marine resources – for example, through shipping, commercial fishing, and oil, gas, and mineral development¹²⁷. Further, marine and freshwater ecosystems play a significant contribution in achieving sustainability in areas such as food security, nutrition and health, tourism, climate change mitigation, provisions of homes and shelter, sustainable economic growth, and trade¹²⁸. Despite its key role in sustainability, the blue economy faces several challenges such as overfishing, habitat degradation, harmful and illegal practices such as illicit trade in crude oil, arms, drug and human trafficking and smuggling of contraband goods, and climate change¹²⁹. These problems affect the sustainability of the blue economy and need to be urgently addressed. This can be achieved through enhancing good governance of the blue economy¹³⁰; embracing regional and global cooperation for effective management of the blue economy¹³¹; promoting inclusive participation in order to realize sustainable management of the blue economy¹³²; tackling the human and environmental challenges affecting the blue economy especially overfishing, pollution, and climate change¹³³; and capacity building in order to strengthen the ability of countries to develop and manage the blue economy¹³⁴. Fostering the blue economy for sustainability is an ideal that needs to be pursued by all countries.

¹²⁶ Commonwealth Blue Economy., ‘Sustainable Blue Economy’ Op Cit

¹²⁷ Ibid

¹²⁸ World Bank Group., ‘Growing the Blue Economy to Combat Poverty and Accelerate Prosperity’ Op Cit

¹²⁹ Muigua. K., ‘Fostering Africa’s Blue Economy: Problems and Promises’ Op Cit

¹³⁰ Food and Agriculture Organization., ‘Achieving Blue Growth through implementation of the Code of Conduct for Responsible Fisheries’ Op Cit

¹³¹ United Nations Economic Commission for Africa., ‘Harnessing the Blue Economy for Regional Integration’ Op Cit

¹³² United Nations Economic Commission for Africa., ‘The Nairobi Statement of Intent on Advancing the Global Sustainable Blue Economy.’ Op Cit

¹³³ Muigua. K., ‘Fostering Africa’s Blue Economy: Problems and Promises’ Op Cit

¹³⁴ World Bank Group., ‘The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries’ Op Cit

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Abstract

Africa is a continent that is highly vulnerable to climate change. Most African countries are already experiencing effects of climate change such as drought, water scarcity, flooding among others which affect the attainment of Sustainable Development. Responding to climate change is an urgent concern in Africa. Africa has the potential to adopt innovative approaches in addressing climate change including the use of indigenous knowledge. This paper critically discusses the role of indigenous knowledge in addressing the impacts of climate change in Africa. The paper defines indigenous knowledge. It argues that Africa is endowed with indigenous knowledge which can be effective in responding to climate change. The paper examines the progress made towards utilizing indigenous knowledge for climate action in Africa and challenges thereof. It also offers suggestions towards harnessing indigenous knowledge for climate action in Africa.

1.0 Introduction

Africa is a continent that is highly vulnerable to climate change¹. This has been attributed to several reasons including endemic poverty and high dependence on rain-fed agriculture, complex governance and institutional dimensions, limited access to capital including markets and technology, weak infrastructure, ecosystem degradation and poor management of natural resources, disasters both natural and man-made and conflicts². This vulnerability is worsened by strong dependence of African economies on climate sensitive natural resources³. According to the United Nations Environment Programme (UNEP), while Africa has contributed negligibly to the changing climate, with just about two to three percent of global emissions, it stands out disproportionately as the most vulnerable region in the world⁴.

¹ Kimaro. Didas et al., 'Climate Change Mitigation and Adaptation in ECA/SADC/COMESA Region: Opportunities and Challenges.' Available at https://www.researchgate.net/publication/346628199_Climate_Change_Mitigation_and_Adaptation_in_ECASADCCOMESA_region_Opportunities_and_Challenges (Accessed on 15/02/2024)

² Ibid

³ Ibid

⁴ United Nations Environment Programme., 'Responding to Climate Change' Available at <https://www.unep.org/regions/africa/regional-initiatives/responding-climate-change> (Accessed on 15/02/2024)

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This vulnerability is driven by the prevailing low levels of socioeconomic growth in the continent⁵. UNEP further points out that while climate change is global, the poor are disproportionately vulnerable to its effects since they lack the resources to afford goods and services they need to buffer themselves and recover from the worst of the changing climate effects⁶.

Responding to climate change is an urgent concern in Africa. Most African countries are already experiencing effects of climate change such as drought, water scarcity, flooding among others⁷. Climate change is having a devastating impact on the African continent creating food insecurity, stressing water resources, depleting human health, displacing populations and impeding socio-economic development⁸. It has been observed that in Africa, approximately 50 million people are on the brink of falling below the poverty line for reasons connected to climate change while 100 million people are at risk of being displaced by climate change⁹. Climate change is therefore a major threat to Sustainable Development in Africa¹⁰.

Sustainable Development Goal 13 under the United Nations 2030 Agenda for Sustainable Development urges all countries to take urgent action to combat climate change and its impacts¹¹. In addition, Africa Union's Agenda 2063 seeks to reduce the vulnerability of the continent to climate change through building environmentally sustainable and climate resilient economies and

⁵ Ibid

⁶ Ibid

⁷ Kimaro. Didas et al., 'Climate Change Mitigation and Adaptation in ECA/SADC/COMESA Region: Opportunities and Challenges.' Op Cit

⁸ Rao. V., & Yadav. P., 'Confronting Climate Change in Africa.' Available at <https://knowledge.insead.edu/responsibility/confronting-climate-change-africa> (Accessed on 15/02/2024)

⁹ African Development Bank Group., 'Climate Change in Africa.' Available at <https://www.afdb.org/en/cop25/climate-change-africa> (Accessed on 15/02/2024)

¹⁰ Ibid

¹¹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 15/02/2024)

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communities in Africa¹². It has been pointed out that Africa has the potential to adopt innovative approaches in addressing climate change¹³. To this end, indigenous knowledge has been advocated as a key tool for climate action in Africa¹⁴.

This paper critically discusses the role of indigenous knowledge in addressing the impacts of climate change in Africa. The paper defines indigenous knowledge. It argues that Africa is endowed with indigenous knowledge which can be effective in responding to climate change. The paper examines the progress made towards utilizing indigenous knowledge for climate action in Africa and challenges thereof. It also offers suggestions towards harnessing indigenous knowledge for climate action in Africa.

2.0 Defining Indigenous Knowledge

Indigenous Peoples have been defined as distinct social and cultural groups that share collective ancestral ties to the lands and natural resources where they live, occupy or from which they have been displaced¹⁵. The land and natural resources on which they depend are inextricably linked to their identities, cultures, livelihoods, as well as their physical and spiritual well-being¹⁶. In addition, it has been pointed out that indigenous peoples often subscribe to their customary leaders and organizations for representation that

¹² Africa Union., 'Agenda 2063: The Africa we Want' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 15/02/2024)

¹³ United Nations Environment Programme., 'Africa Offers Creative Solutions to Climate Change - Here are 3 of Them' Available at [https://climatepromise.undp.org/news-and-stories/africa-offers-creative-solutions-climate-change-here-are-3-](https://climatepromise.undp.org/news-and-stories/africa-offers-creative-solutions-climate-change-here-are-3-them#:~:text=It%20has%20increased%20its%20ambition,implementing%20more%20robust%20adaptation%20actions.)

[them#:~:text=It%20has%20increased%20its%20ambition,implementing%20more%20robust%20adaptation%20actions.](https://climatepromise.undp.org/news-and-stories/africa-offers-creative-solutions-climate-change-here-are-3-them#:~:text=It%20has%20increased%20its%20ambition,implementing%20more%20robust%20adaptation%20actions.) (Accessed on 15/02/2024)

¹⁴ Attoh. E., & Ajayi. O., 'Indigenous Knowledge and Climate Change Adaptation in Africa: A Systematic Review' Available at <http://www.cabi.org/cabreviews> (Accessed on 15/02/2024)

¹⁵ The World Bank., 'Indigenous Peoples' Available at <https://www.worldbank.org/en/topic/indigenouspeoples#:~:text=Indigenous%20Peoples%20are%20distinct%20social,which%20they%20have%20been%20displaced> (Accessed on 15/02/2024)

¹⁶ Ibid

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are distinct or separate from those of the mainstream society or culture¹⁷. It has been observed that over time, indigenous peoples around the world have preserved distinctive understandings, rooted in cultural experience, that guide relations among human, nonhuman, and other-than-human beings in specific ecosystems¹⁸. These understandings and relations constitute a system broadly identified as indigenous knowledge, also called traditional knowledge or aboriginal knowledge¹⁹. It has been asserted that indigenous knowledge is the vehicle through which the principles of indigenous worldviews, beliefs, traditions, practices, and institutions are transmitted and put into practice²⁰. This knowledge is characteristically local in scale, transmitted orally, collectively owned, holistic in perspective, and adaptive in nature²¹.

Indigenous knowledge also referred to as traditional knowledge or aboriginal knowledge has been broadly defined as a cumulative, collective body of knowledge, experience, and values held by societies with a history of subsistence²². It has also been defined as any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another²³. According to the United Nations Educational, Scientific and Cultural Organization (UNESCO), local and indigenous knowledge refers to the understandings, skills and philosophies developed by societies with long histories of interaction with their natural

¹⁷ Ibid

¹⁸ Bruchac. M., 'Indigenous Knowledge and Traditional Knowledge' Available at https://link.springer.com/referenceworkentry/10.1007/978-1-4419-0465-2_10 (Accessed on 15/02/2024)

¹⁹ Ibid

²⁰ Mistry. J et al., 'Indigenous Knowledge' *International Encyclopedia of Human Geography.*, (2020) pp 211-215

²¹ Ibid

²² Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p. 66.

²³ African Regional Intellectual Property Organization (ARIPO), *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010.

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surroundings²⁴. UNESCO further points out that for rural and indigenous peoples, local knowledge informs decision-making about fundamental aspects of day-to-day life²⁵. It has been pointed out that the term indigenous knowledge is not limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources among other forms of knowledge²⁶.

Indigenous knowledge can also be understood as the wisdom, techniques, approaches, skills, practices, philosophies, and uniqueness of knowledge within a given culture, which is developed by local communities over years through the accumulation of experiences and informal experiments, and based on an intimate understanding of local contexts²⁷. Indigenous knowledge is rooted in the deep connection that communities have with their land, resources and environment²⁸. This knowledge is usually transmitted via oral and practiced traditions from one generation to another²⁹. It has been pointed out that indigenous knowledge has been developed and nurtured by communities around the world for generations³⁰. Indigenous knowledge encompasses a deep understanding of local ecosystems, the behavior of wildlife, the medicinal properties of plants, weather patterns, and the complex interconnections between nature and human society among other phenomena³¹. It is not only an accumulation of practical knowledge but also a

²⁴ United Nations Educational, Scientific and Cultural Organization., 'Local and Indigenous Knowledge Systems (LINKS)' Available at <https://en.unesco.org/links> (Accessed on 15/02/2024)

²⁵ Ibid

²⁶ African Regional Intellectual Property Organization (ARIPO), *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, Op Cit

²⁷ Filho. W et al., 'The Role of Indigenous Knowledge in Climate Change Adaptation in Africa' Available at <https://doi.org/10.1016/j.envsci.2022.06.004> (Accessed on 15/02/2024)

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ EurAsia Carbon., 'The Role of Indigenous Knowledge in Environmental Conservation' Available at https://www.linkedin.com/pulse/role-indigenous-knowledge-environmental-conservation-eurasia-carbon?utm_source=share&utm_medium=member_android&utm_campaign=share_via (Accessed on 15/02/2024)

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way of life, deeply intertwined with cultural traditions, rituals, and beliefs³². Indigenous knowledge can therefore be understood as know-how that is unique to a given society³³.

It has been observed that indigenous knowledge and practices have many benefits to humanity and the environment³⁴. It has been argued that as the world grapples with escalating environmental challenges including as climate change, deforestation, habitat loss, and biodiversity depletion, there is a growing recognition of the invaluable contributions that indigenous knowledge systems can make to environmental conservation³⁵. In addition, it has been correctly observed that indigenous people, who have lived in harmony with their natural surroundings for generations, possess a wealth of knowledge about their local ecosystems, sustainable resource management practices, and unique cultural perspectives that can play a pivotal role in shaping effective conservation strategies³⁶. As a result, it has been opined that traditional ecological knowledge is believed to represent experience acquired over thousands of years of direct human contact with the environment³⁷. Indigenous knowledge has been effectively utilized to foster environmental conservation through sustainable resource management, biodiversity conservation, and climate change mitigation and adaptation³⁸.

³² Ibid

³³ Sergon, P., Akoth, S., & Dzinekou, J., 'The Role of Indigenous Knowledge: Practices and Values in Promoting Socio-Economic Well-Being and Equity Among Endorois Community of Kenya' Available at <https://doi.org/10.1177/11771801221086724> (Accessed on 15/02/2024)

³⁴ EurAsia Carbon., 'The Role of Indigenous Knowledge in Environmental Conservation' Op Cit

³⁵ Ibid

³⁶ Ibid

³⁷ Muigua, K., 'Mainstreaming Traditional Ecological Knowledge in Kenya for Sustainable Development' Available at <https://kmco.co.ke/wp-content/uploads/2019/08/Mainstreaming-Traditional-Ecological-Knowledge-in-Kenya-for-Sustainable-Development-Kariuki-Muigua-23rd-August-2019.pdf> (Accessed on 15/02/2024)

³⁸ EurAsia Carbon., 'The Role of Indigenous Knowledge in Environmental Conservation' Op Cit

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The role of indigenous knowledge in environmental conservation is recognized under the *Convention on Biological Diversity*³⁹. The Convention requires each contracting party to as far as possible and as appropriate respect, 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 (Emphasis added)⁴⁰. In addition, the Convention requires parties to as far as possible and as appropriate protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements⁴¹. The Convention on Biological Diversity has been hailed as being the only international treaty that specifically acknowledges the role of indigenous knowledge, innovations, and practices in biodiversity conservation and Sustainable Development, as well as the need to guarantee their protection, whether through intellectual property rights (IPRs) or other means⁴².

In addition, the *United Nations Declaration on the Rights of Indigenous Peoples*⁴³ recognizes that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment⁴⁴. The Convention provides that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including

³⁹ United Nations., 'Convention on Biological Diversity' [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).

⁴⁰ Ibid, article 8 (j)

⁴¹ Ibid, article 10 (c)

⁴² Muigua. K., 'Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/TRADITIONAL-KNOWLEDGE-AND-CONFLICT-MANAGEMENT-29-SEPTEMBER-2016.pdf> (Accessed on 15/02/2024)

⁴³ United Nations., 'United Nations Declaration on the Rights of Indigenous People.' Available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (Accessed on 15/02/2024)

⁴⁴ Ibid, Preamble

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human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts⁴⁵. In addition, it also provides that indigenous peoples also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions⁴⁶. The Declaration requires states in conjunction with indigenous peoples, to take effective measures to recognize and protect the exercise of these rights⁴⁷.

At a national level, the Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation⁴⁸. It requires the state to inter alia recognise the role of science and indigenous technologies in the development of the nation⁴⁹; and promote the intellectual property rights of the people of Kenya⁵⁰. Further, with respect to the environment, the state is obligated to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities⁵¹. The Constitution of Kenya therefore requires the state to not only protect the indigenous knowledge of the people of Kenya but to also actively promote the use of this knowledge for environmental protection and conservation for Sustainable Development.

In addition, the *Protection of Traditional Knowledge and Cultural Expressions Act*⁵² was enacted to provide a framework for the protection and promotion of traditional knowledge and cultural expressions in Kenya. The Act defines traditional knowledge as any knowledge originating from an individual, local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, embodied in the traditional lifestyle of a community; or contained in

⁴⁵ Ibid, Article 31 (1)

⁴⁶ Ibid

⁴⁷ Ibid, Article 31 (2)

⁴⁸ Constitution of Kenya, 2010., Article 11 (1), Government Printer, Nairobi

⁴⁹ Ibid, article 11 (b)

⁵⁰ Ibid, article 11 (c)

⁵¹ Ibid, article 69 (1) (c)

⁵² Protection of Traditional Knowledge and Cultural Expressions Act., Cap 218A Laws of Kenya

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the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indications⁵³. The Act requires both national and county governments to promote the protection of traditional knowledge and cultural expressions from misuse and misappropriation⁵⁴.

Indigenous knowledge is therefore a concept that is well embedded at international and national levels. There is need to effectively harness this knowledge for climate action.

3.0 Indigenous Knowledge and Climate Action in Africa: Promises and Pitfalls

It has been noted that Africa is particularly affected by climate change due to its exposure to climate hazards, high vulnerability, and low adaptive capacity⁵⁵. Yet, Africa is also a continent rich in indigenous and local knowledge that has a long history of informing responses to climatic variability and change⁵⁶. Indigenous knowledge can therefore be effectively harnessed for enhanced climate action in Africa⁵⁷.

It has been pointed out that indigenous people in Africa like those in other parts of the world have proved to be good custodians of their environment⁵⁸. Over a long period, indigenous people in Africa and other parts of the world have assimilated detailed knowledge about the functionality of their immediate environment through experiences, insights into nature and society relationship, and communal and institutional practices developed by keen observations, monitoring, innovation, practice, and experimentation⁵⁹. It has

⁵³ Ibid, S 2

⁵⁴ Ibid, S 4 & 5

⁵⁵ Filho. W et al., 'The Role of Indigenous Knowledge in Climate Change Adaptation in Africa' Op Cit

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Attoh. E., & Ajayi. O., 'Indigenous Knowledge and Climate Change Adaptation in Africa: A Systematic Review' Op Cit

⁵⁹ Ibid

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been argued that over the years, indigenous people in Africa have developed deep and sophisticated indigenous knowledge systems, based on their observations and interactions with the environment over generations, that have enabled them to harness ecosystem services to support their livelihoods and survive socioecological changes including climate change⁶⁰. It has further been asserted that as climate change became a prominent global priority, understanding the importance and effectiveness of indigenous knowledge systems has also increased, especially how indigenous knowledge and practices can be harnessed to foster effective adaptation and mitigation actions⁶¹.

Climate change and climatic extremes adversely affect the adaptive capacity of indigenous communities in Africa and across the world, particularly those who rely on rainfed agriculture for their livelihoods⁶². It has been correctly asserted that indigenous peoples depend on natural resources for their livelihood and they often inhabit diverse but fragile ecosystems⁶³. Therefore, for indigenous peoples around the world, climate change brings different kinds of risks and opportunities, threatens cultural survival and undermines indigenous human rights⁶⁴. The consequences of ecosystem changes have implications for the use, protection and management of water, wildlife, fisheries and forests among other natural resources, affecting the customary uses of culturally and economically important species and resources⁶⁵. It has been pointed out that despite having contributed the least to greenhouse gas emissions, indigenous peoples are the ones most at risk from its consequences due to their dependence upon and close relationship with the environment and its resources⁶⁶.

⁶⁰ Zougmore. R., Segnon. A., & Thornton. P., 'Harnessing Indigenous Knowledge and Practices for Effective Adaptation in the Sahel' Available at <https://doi.org/10.1016/j.cosust.2023.101389> (Accessed on 16/02/2024)

⁶¹ Ibid

⁶² Filho. W et al., 'The Role of Indigenous Knowledge in Climate Change Adaptation in Africa' Op Cit

⁶³ Nilsson. C., 'Climate Change from an Indigenous Perspective: Key Issues and Challenges' Available at https://www.iwgia.org/images/publications/IA%201-2_08_Climate_Change_from_ind_perspective.pdf (Accessed on 16/02/2024)

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Ibid

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In light of the threat of climate change to indigenous communities, it has been pointed out that the communities, particularly those in hazard-prone areas, have developed a good understanding and knowledge of disaster prevention and mitigation, early warning, preparedness and response, and post disaster recovery⁶⁷. This knowledge is often based on facts that are known or learnt from experience or acquired through observation and practice, and is handed down from generation to generation⁶⁸. Indigenous knowledge is therefore recognised for its potential to play a key role in climate change adaptation, resources governance, conservation, and sustainable use of biodiversity and ecosystems⁶⁹. Indigenous and local knowledge can thus make an important contribution to climate change policy and Sustainable Development Goal 13 on climate action; by observing changing climates, evolving methods to convert observation and knowledge into relevant data, adapting to impacts and contributing to global mitigation efforts⁷⁰. It has been pointed out that indigenous communities in Africa easily identify with indigenous knowledge systems, which have enabled them to live sustainably with their environments for generations⁷¹. These indigenous knowledge systems also function as essential tools in environmental conservation and natural disaster management⁷².

Indigenous knowledge has been to a certain extent harnessed for climate action in Africa. For example, it has been observed that Nganyi rainmakers in western Kenya are one of the most renowned indigenous forecasters, with the consistency in the accuracy of their weather predictions⁷³. It has been pointed

⁶⁷ United Nations Educational, Scientific, and Cultural Organization., 'Harnessing Indigenous Knowledge for Climate Risk Management' Available at <https://www.unesco.org/en/articles/harnessing-indigenous-knowledge-climate-risk-management> (Accessed on 16/02/2024)

⁶⁸ Ibid

⁶⁹ Filho. W et al., 'The Role of Indigenous Knowledge in Climate Change Adaptation in Africa' Op Cit

⁷⁰ United Nations Educational, Scientific, and Cultural Organization., 'Harnessing Indigenous Knowledge for Climate Risk Management' Op Cit

⁷¹ Africa Policy Research Institute., 'Harnessing Local Knowledge through Community-Based Interventions' Available at <https://afripoli.org/harnessing-local-knowledge-through-community-based-interventions> (Accessed on 16/02/2024)

⁷² Ibid

⁷³ Ibid

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out that the rainmakers observe the flora and fauna in the Nganyi forest shrine to predict weather conditions which predictions have proved as accurate as forecasts made through scientific equipment⁷⁴. The community preserves the local forest which is used as a shrine by rainmakers that serves as a means of rainfall observations and prediction, with the knowledge passed down the generations through select families who take the community role of rainmakers⁷⁵. This forecast would then be disseminated in the local language through a community-based radio station⁷⁶. This knowledge is vital in climate action since it prepares it enables the community to prepare adequately for planting and harvesting seasons and serve as a safeguard against unpredictable weather patterns⁷⁷.

In addition, it has been pointed out that indigenous knowledge has been effectively used for climate adaptation in the Sahel region⁷⁸. The Sahel region which is a semiarid and transitional zone between the Sahara desert and the Sudanian savannas has been identified as a 'hotspot' not only of climate change exposure but also climate change impacts and is considered as one of the most vulnerable regions in Africa⁷⁹. As a result local communities in the Sahel have developed extensive knowledge and understanding of their environment and climate that enables them to harness ecosystem services to support their livelihoods and survive environmental changes⁸⁰. They have adopted practices that are based on indigenous knowledge such as traditional integrated soil and water management practices to combat land degradation and improve soil productivity, farmer-managed natural tree regeneration

⁷⁴ Esipisu. I., 'Nganyi: The Tiny Forest in Kenya that Predicts the Weather' Available at <https://news.mongabay.com/2016/02/nganyi-the-tiny-forest-in-kenya-that-can-predict-the-weather/#:~:text=%E2%80%9CRainmakers%E2%80%9D%20in%20the%20Bunyore%20community,forecasts%20made%20through%20scientific%20equipment>. (Accessed on 16/02/2024)

⁷⁵ Africa Policy Research Institute., 'Harnessing Local Knowledge through Community-Based Interventions'

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Zougmore. R., Segnon. A., & Thornton. P., 'Harnessing Indigenous Knowledge and Practices for Effective Adaptation in the Sahel' Op Cit

⁷⁹ Ibid

⁸⁰ Ibid

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practices, tailored shrub-based conservation agriculture system, effective mobility-based adaptation strategies by pastoralists, and modification of the variety of crops and crop varieties to respond to climate change⁸¹.

Indigenous knowledge has also been effectively utilized for conserving biodiversity in Africa⁸². It has been pointed out that indigenous peoples' traditional ecological knowledge, traditional systems of control, use and management of lands and resources, and traditional institutions for self-governance contribute substantially to conservation of biodiversity⁸³. For example, trees which were traditionally regarded as housing spirits or sacred were not be felled without performing rituals, thus achieving a protective effect on conservation of trees such as the mugumo tree among the Gikuyu community of Kenya⁸⁴; animals in a particular habitat may be regarded as sacred and are therefore protected from hunting⁸⁵; sacred groves or forests are pieces of land set aside for spiritual purposes, as shrines thus protected from encroachment⁸⁶; and indigenous plants are used in preventing and curing diseases in plants, animals and humans thus guaranteeing their protection and conservation⁸⁷. It has been pointed out that throughout Africa, the regular use of different but interrelated forms of indigenous and traditional ecological knowledge in conservation of biodiversity is significant⁸⁸. These include taboos and totems, customs and rituals, rules and regulations, metaphors and proverbs, traditional protected areas (social institutions), local knowledge of

⁸¹ Ibid

⁸² Muigua. K., 'Fostering a Human Rights Approach to Biodiversity Conservation in Kenya' Available at <https://kmco.co.ke/wp-content/uploads/2021/11/Fostering-a-Human-Rights-Approach-to-Biodiversity-Conservation-in-Kenya-Kariuki-Muigua-November-2021.pdf> (Accessed on 16/02/2024)

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Hens L, 'Indigenous Knowledge and Biodiversity Conservation and Management in Ghana' (2006) 20 *Journal of Human Ecology* 21, 24; Brown, C., Tacio, H. D., & Ishikawa, M. (eds), *In Search of Excellence: Exemplary Forest Management in Asia and the Pacific* (FAO, Regional Office for Asia and the Pacific 2005).

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Sinthumule. N., 'Traditional Ecological Knowledge and its Role in Biodiversity Conservation: A Systematic Review' *Frontiers in Environmental Science.*, Volume 11 (2023)

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plants, animals and landscapes, and resource management systems⁸⁹. These forms of indigenous knowledge play a significant role in biodiversity conservation and protection of indigenous communities from the impacts of climate change⁹⁰. Indigenous people in Africa therefore serve as stewards of biodiversity-rich areas⁹¹. Their knowledge of sustainable resource management is invaluable for preserving ecosystems and combating habitat loss⁹².

Indigenous knowledge has also enabled African communities to embrace climate resilient agricultural practices⁹³. It has been pointed out that traditional agricultural practices like agro forestry, intercropping, crop rotation, cover cropping, traditional organic composting and integrated crop-animal farming are practiced throughout Africa and have the potential for enhancing crop productivity and mitigating the impacts of climate change⁹⁴. Indigenous people in Africa practise mixed farming where organic manure in the form of plant remains, cow dung and urine, and chicken droppings is applied to gardens to improve soil fertility as they are good sources of organic fertilizer which tends to promote organic farming⁹⁵; and the use of nitrogen fixing pulses in mixed cropping, growing of plants of different patterns, maturity and duration which assists significantly in stabilizing soil fertility and prevention of soil erosion⁹⁶. It has been pointed out that such practices are an effective way to biologically manage pests and diseases⁹⁷. In addition, they

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Latief. A., 'Harnessing Indigenous Knowledge for Climate Change Resilience in Africa' Available at https://www.linkedin.com/pulse/harnessing-indigenous-knowledge-climate-change-africa-aatifah-latief/?utm_source=share&utm_medium=member_android&utm_campaign=share_via (Accessed on 16/02/2024)

⁹² Ibid

⁹³ Rinku . S & Singh. G., 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' *Energy, Ecology and Environment*, No. 2 of 2017, 296

⁹⁴ Ibid

⁹⁵ Gathogo J, 'Environmental Management and African Indigenous Resources: Echoes from Mutira Mission, Kenya (1912-2012)' (2013) 39 *Studia Historiae Ecclesiasticae* 33, at 37.

⁹⁶ Ibid

⁹⁷ Ibid

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also conserve biodiversity of animal and biannual crops and plants while reducing labour costs⁹⁸. Further, trees are planted in gardens to provide shade for the plants, to act as wind breaks, and also to demarcate people's farmlands and homes⁹⁹. Indigenous communities in Africa have also developed sophisticated water management systems, from rainwater harvesting to aquifer management among others¹⁰⁰. As a result, harnessing such indigenous knowledge would help in achieving food security throughout Africa, conserving water, mitigating climate change and ensuring biodiversity conservation¹⁰¹.

It has also been pointed out that throughout the continent, the integration of community-based forecasting and scientific forecasting has been successfully demonstrated to provide early warning weather and climate information for local communities in Malawi, Kenya, Ghana, Ethiopia, Uganda, South Africa, Swaziland and Tanzania among other countries¹⁰². In addition, it has been noted that for early warning systems, farmers have developed special techniques for gathering, predicting, and interpreting certain indicators to anticipate the weather or seasonal climatic conditions for farm decision-making¹⁰³. This is as a result of the long-term experiences of indigenous communities in Africa through the interaction with their immediate environment has enabled them to identify certain indigenous ecological indicators that are explored to predict the weather and seasonal climate¹⁰⁴. Indigenous communities in Africa have therefore developed the ability to read natural signs and predict weather patterns¹⁰⁵. Integrating this knowledge into

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Latief. A., 'Harnessing Indigenous Knowledge for Climate Change Resilience in Africa' Op Cit

¹⁰¹ Ibid

¹⁰² Africa Policy Research Institute., 'Harnessing Local Knowledge through Community-Based Interventions' Op Cit

¹⁰³ Attoh. E., & Ajayi. O., 'Indigenous Knowledge and Climate Change Adaptation in Africa: A Systematic Review' Op Cit

¹⁰⁴ Ibid

¹⁰⁵ Latief. A., 'Harnessing Indigenous Knowledge for Climate Change Resilience in Africa' Op Cit

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climate forecasting systems can enhance preparedness for extreme weather events¹⁰⁶.

From the foregoing, it is evident that harnessing indigenous knowledge can enhance climate action in Africa. However, it has been noted that indigenous knowledge is often marginalized or dismissed by mainstream scientific and governmental institutions¹⁰⁷. In addition, it has been asserted that indigenous communities in Africa often face threats to their lands and traditional territories, undermining their ability to practice sustainable resource management¹⁰⁸. It has also been pointed out that climate change brings additional vulnerabilities to indigenous peoples, which add to existing challenges, including political and economic marginalization, land and resource encroachments, human rights violations and discrimination¹⁰⁹. The potential threat of climate change to their very existence, combined with various legal and institutional barriers that affect their ability to cope with and adapt to climate change, makes climate change an issue of human rights and inequality to indigenous peoples and not merely an environmental issue¹¹⁰. It is therefore vital to harness indigenous knowledge in order to enhance climate action in Africa and foster the human rights of indigenous people¹¹¹.

4.0 Way Forward

In order to effectively harness indigenous knowledge for climate action in Africa, there is need to respect traditional ecological practices in Africa¹¹². Such practices have been carried out by indigenous communities in African for many centuries and remain a valued asset in many societies of the world and

¹⁰⁶ Ibid

¹⁰⁷ EurAsia Carbon., 'The Role of Indigenous Knowledge in Environmental Conservation' Op Cit

¹⁰⁸ Ibid

¹⁰⁹ Nilsson. C., 'Climate Change from an Indigenous Perspective: Key Issues and Challenges' Op Cit

¹¹⁰ Ibid

¹¹¹ Ibid

¹¹² Latief. A., 'Harnessing Indigenous Knowledge for Climate Change Resilience in Africa' Op Cit

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Africa in particular¹¹³. It has been pointed out that for centuries, this accumulated knowledge gave the community a sense of relevance and self-esteem, sustained indigenous innovation, endogenous technological growth and employment¹¹⁴. In addition, indigenous knowledge strongly roots the foundation of the community's livelihoods by connecting the people to their land and natural resources¹¹⁵. As a result, it has been pointed out that one of key characteristic and core function of indigenous knowledge is the promotion of the sense of well-being of the community¹¹⁶. Indigenous knowledge has been effective in environmental conservation in Africa for many centuries through sustainable resource management, biodiversity conservation, and climate resilient agriculture among other ways¹¹⁷. However indigenous knowledge is often marginalized or dismissed by mainstream scientific and governmental institutions¹¹⁸. Therefore, in order to harness its potential, it is essential to recognize and respect indigenous knowledge¹¹⁹.

In addition, it is necessary to protect and safeguard the rights of indigenous people especially the right to land¹²⁰. It has been argued that indigenous communities often face threats to their lands and traditional territories, undermining their ability to practice sustainable resource management and other forms of indigenous knowledge vital for climate action¹²¹. It has been observed that government projects in many parts of the world often involve removing indigenous peoples from their traditional lands and territories¹²². Land and resource encroachments has been identified as a key threat to indigenous people threatening their human rights violations and resulting in

¹¹³ Sergon. P., Akoth. S., & Dzinekou. J., 'The Role of Indigenous Knowledge: Practices and Values in Promoting Socio-Economic Well-Being and Equity Among Endorois Community of Kenya' Op Cit

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ EurAsia Carbon., 'The Role of Indigenous Knowledge in Environmental Conservation' Op Cit

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ Ibid

¹²² Nilsson. C., 'Climate Change from an Indigenous Perspective: Key Issues and Challenges' Op Cit

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discrimination¹²³. Some government policies and initiatives in Africa often lead to the eviction of indigenous peoples from their traditional lands¹²⁴. For example, the Endorois community, an indigenous community in Kenya was a victim of land injustices after the government of Kenya created Lake Hannington Game Reserve renamed Lake Bogoria Game Reserve, gazetted and declared it a game park in 1973¹²⁵. This action denied the property and land rights of Endorois community with families being forcefully ejected from their ancestral land¹²⁶. This resulted in a suit before the African Commission on Human and Peoples' Rights that found the government of Kenya guilty of violating the rights of the Endorois community¹²⁷. Such actions are threat to indigenous knowledge since they deny them access to ecological, cultural and spiritual resources which are vital in nurturing indigenous knowledge¹²⁸. It is therefore vital to ensure that the land rights of indigenous people are protected through measures such as participation in determining priorities and strategies for the development or use of their lands¹²⁹; obtaining the free and informed consent of the respective communities, prior to the approval of any project affecting their lands and resources¹³⁰; and ensuring that indigenous people benefit directly and equitably from the conservation and ecologically sustainable use of natural resources through mechanisms such as equitable benefit sharing arrangements¹³¹. It has been pointed out that protecting indigenous lands is a matter of justice and a way to safeguard invaluable ecological knowledge¹³².

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ Sergon. P., Akoth. S., & Dzinekou. J., 'The Role of Indigenous Knowledge: Practices and Values in Promoting Socio-Economic Well-Being and Equity Among Endorois Community of Kenya' Op Cit

¹²⁶ Ibid

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Muigua. K., 'Fostering a Human Rights Approach to Biodiversity Conservation in Kenya' Op Cit

¹³⁰ Ibid

¹³¹ Ibid

¹³² EurAsia Carbon., 'The Role of Indigenous Knowledge in Environmental Conservation' Op Cit

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There is also need to integrate indigenous knowledge into climate action efforts in Africa¹³³. It has been argued that by combining traditional wisdom with modern science and technology, Africa can build resilient, sustainable, and equitable societies¹³⁴. Indigenous and local knowledge can provide valuable insights into climate adaptation strategies in Africa including rainwater harvesting, sustainable farming practices, and biodiversity conservation¹³⁵. It has been argued that by integrating indigenous knowledge with modern climate adaptation strategies, African countries can tap into a wealth of knowledge to address the science-policy-society interfaces and lead to sustainable results to address climate change¹³⁶. This calls for collaboration between states and indigenous communities in order to enhance climate action in Africa¹³⁷. It has been pointed out that collaboration with indigenous communities should be guided by ethical principles, including informed consent, fair compensation, and the recognition of intellectual property rights in order to effectively harness indigenous knowledge while safeguarding the rights and interests of indigenous communities¹³⁸.

Finally, it is necessary for governments to support cultural preservation through investing in efforts to preserve and transmit indigenous knowledge to future generations¹³⁹. Cultural preservation is a key measure of ensuring that indigenous knowledge is not lost and can be passed to future generations for utilization in ecological conservation¹⁴⁰. According to the United Nations,

¹³³ Latief. A., 'Harnessing Indigenous Knowledge for Climate Change Resilience in Africa' Op Cit

¹³⁴ Ibid

¹³⁵ Brown. C., 'Sustainable Solutions for Climate Change Adaptation in Africa: Combining Indigenous Knowledge and Modern Technology' Available at <https://sdgs.un.org/sites/default/files/2023-05/B38%20-%20Brown%20-%20Assessing%20African%20Led%20Science-Technological%20Innovation%20Approaches%20to%20Climate%20Change%20Adaptation.pdf> (Accessed on 16/02/2024)

¹³⁶ Ibid

¹³⁷ EurAsia Carbon., 'The Role of Indigenous Knowledge in Environmental Conservation' Op Cit

¹³⁸ Ibid

¹³⁹ Latief. A., 'Harnessing Indigenous Knowledge for Climate Change Resilience in Africa' Op Cit

¹⁴⁰ Ibid

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indigenous and traditional knowledge is at the core of indigenous identity, culture, languages, heritage and livelihoods, and its transmission from one generation to the next must be protected, preserved and encouraged¹⁴¹. It is therefore necessary for governments to promote preservation and transmission of indigenous knowledge through strengthening indigenous education and documenting oral traditions and cultural practices¹⁴². This will enable future generations to utilize indigenous knowledge to address their environmental needs among other challenges¹⁴³.

Through the foregoing among other measures, indigenous knowledge will be effectively harnessed for climate action in Africa.

5.0 Conclusion

Africa is a continent that is rich in indigenous and local knowledge that has a long history of informing responses to climatic variability and change¹⁴⁴. Indigenous knowledge has been effectively utilized in Africa for many decades in responding to climate change and other environmental needs and challenges¹⁴⁵. It has been utilized in rainmaking, climate adaptation, biodiversity conservation, fostering climate resilient agriculture, and weather forecasting¹⁴⁶. Indigenous knowledge can therefore be effectively harnessed for enhanced climate action in Africa¹⁴⁷. However, the role of indigenous knowledge in climate action in Africa is hindered by challenges such as its marginalization or dismissal by mainstream scientific and governmental

¹⁴¹ United Nations., 'Indigenous People's Traditional Knowledge Must Be Preserved, Valued Globally, Speakers Stress as Permanent Forum Opens Annual Session' Available at <https://press.un.org/en/2019/hr5431.doc.htm> (Accessed on 16/02/2024)

¹⁴² Ibid

¹⁴³ Latief. A., 'Harnessing Indigenous Knowledge for Climate Change Resilience in Africa' Op Cit

¹⁴⁴ Filho. W et al., 'The Role of Indigenous Knowledge in Climate Change Adaptation in Africa' Op Cit

¹⁴⁵ Attoh. E., & Ajayi. O., 'Indigenous Knowledge and Climate Change Adaptation in Africa: A Systematic Review' Op Cit

¹⁴⁶ Ibid

¹⁴⁷ Filho. W et al., 'The Role of Indigenous Knowledge in Climate Change Adaptation in Africa' Op Cit

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institutions and land injustices against indigenous people¹⁴⁸. It is necessary to harness indigenous knowledge in order to strengthen climate action in Africa. To achieve this, there is need to respect traditional ecological practices in Africa, protect and safeguard the rights of indigenous people especially the right to land, integrate indigenous knowledge into climate action efforts in Africa, and support cultural preservation through investing in efforts to preserve and transmit indigenous knowledge to future generations¹⁴⁹. Harnessing indigenous knowledge for climate action in Africa is a quest worth pursuing.

¹⁴⁸ EurAsia Carbon., 'The Role of Indigenous Knowledge in Environmental Conservation' Op Cit

¹⁴⁹ Ibid

Managing Disputes in Carbon Markets

Abstract

This paper critically discusses the need for effective management of disputes in carbon markets. The paper analyses the nature and causes of disputes in carbon markets. It argues that these disputes can hinder the fight against climate change and the attainment of Sustainable Development hence the need to effectively manage them. The paper explores some of the available mechanisms for managing disputes in carbon markets and their efficacy. It also proposes measures towards effective management of disputes in carbon markets for enhance climate action.

1.0 Introduction

There is widespread consensus that the carbon market is an important means to address the problem of climate change¹. Carbon markets have been defined as a trading system in which carbon credits are sold and bought². Carbon markets have also been defined as a trading system through which countries may buy or sell units of greenhouse-gas emissions in an effort to meet their national limits on emission³. Carbon markets can also refer to a mechanism that enables and allows public and private entities to transfer and transact emission reduction units, mitigation outcomes or offsets generated through carbon initiatives, programmes and projects subject to compliance of national and international laws⁴. Companies or individuals can use carbon markets to compensate for their greenhouse gas emissions by purchasing carbon credits from entities that remove or reduce greenhouse gas emissions.

¹ Chen. B., Yuan. K., & Wen. X., 'The Legal Governance of the Carbon Market: Challenges and Application of Private Law in China' Available at <https://www.tandfonline.com/doi/full/10.1080/17583004.2023.2288591> (Accessed on 22/02/2024)

² United Nations Development Programme., 'What are Carbon Markets and Why are They Important?' Available at <https://climatepromise.undp.org/news-and-stories/what-are-carbon-markets-and-why-are-they-important> (Accessed on 22/02/2024)

³ UN-REDD Programme., 'Carbon Market' Available at <https://www.un-redd.org/glossary/carbon-market> (Accessed on 22/02/2024)

⁴ Climate Change (Amendment) Act, 2023., Laws of Kenya, Government Printer, Nairobi

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The idea of carbon markets was introduced by the *Kyoto Protocol*⁵ which envisages the use of emissions trading in the global response towards climate change. The Protocol allows countries that have emission units to spare - emissions permitted them but not "used" - to sell this excess capacity to countries that are over their targets⁶. It has been pointed out that since carbon dioxide is the principal greenhouse gas, emissions trading as envisaged under the Kyoto Protocol mainly involves trading in carbon⁷. As a result, carbon is now tracked and traded like any other commodity through carbon markets⁸.

Carbon markets have since been widely embraced at global, continental, and national levels. The *Paris Agreement*⁹ envisages the development of carbon markets through internationally transferred mitigation outcomes and voluntary cooperation between countries among other measures. The United Nations has developed a *Carbon Offset Platform*¹⁰ which is an e-commerce platform where a company, an organization or a regular citizen can purchase units (carbon credits) to compensate greenhouse gas emissions or to simply support action on climate. The platform features United Nations Framework Convention for Climate Change (UNFCCC) certified projects that reduce, avoid or remove greenhouse gas emissions from the atmosphere¹¹. At the regional level, the African Carbon Markets Initiative (ACMI) has been developed in order to unlock the potential of voluntary carbon markets for financing Africa's energy, climate and development goals¹². The ACMI was

⁵ United Nations Framework Convention on Climate Change., 'Kyoto Protocol to the United Nations Framework Convention on Climate Change.' Available at <https://unfccc.int/resource/docs/convkp/kpeng.pdf> (Accessed on 22/02/2024)

⁶ Ibid, article 17

⁷ United Nations Climate Change., 'Emissions Trading' Available at <https://unfccc.int/process/the-kyoto-protocol/mechanisms/emissions-trading> (Accessed on 22/02/2024)

⁸ Ibid

⁹ United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 22/02/2024)

¹⁰ United Nations., 'Carbon Offset Platform' Available at <https://offset.climateneutralnow.org/> (Accessed on 22/02/2024)

¹¹ Ibid

¹² Sustainable Energy for All., 'Africa Carbon Markets Initiative (ACMI).' Available at <https://www.seforall.org/our-work/initiatives-projects/ACMI> (Accessed on 22/02/2024)

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inaugurated at COP 27 and aims to support the growth of carbon credit production and create jobs in Africa¹³.

At a national level, the *Climate Change (Amendment) Act*¹⁴ of Kenya introduces the idea of carbon trading. The Amended Act requires national and county governments to provide guidance in the development and implementation of carbon markets and nonmarket approaches in compliance with international obligations¹⁵. Part IV A of the Amended Act provides the framework for the regulation of carbon markets in Kenya¹⁶. It requires the state to formulate a policy direction on carbon markets which should prescribe carbon reduction credits that aim to reduce emissions from current sources through projects, removal or sequestration credits that take carbon dioxide out of the atmosphere and either use or store it via afforestation, reforestation, nature-based solutions or technology-based removal and technologies and projects towards this end¹⁷. The Act also requires the trade in carbon markets in Kenya to ensure that transactions in carbon trading aim towards a reduction of greenhouse gas emissions as per the prescribed carbon standards¹⁸. The Act envisions the participation in carbon markets through bilateral or multilateral trading agreements, trading with private entities and voluntary carbon markets¹⁹. In pursuance of the principles of Sustainable Development, the Act requires every carbon trading project authorized to undergo an Environmental and Social Impact Assessment in accordance *Environmental Management and Coordination Act, 1999*²⁰. It also requires every carbon project undertaken pursuant to the Act to take into consideration and aim to improve the economic, social and cultural wellbeing of the community around the project²¹.

¹³ Ibid

¹⁴ Climate Change (Amendment) Act, 2023., Laws of Kenya, S 2, Government Printer, Nairobi

¹⁵ Ibid, S 3

¹⁶ Ibid, Part IV A

¹⁷ Ibid, S 23 A

¹⁸ Ibid, S 23 B

¹⁹ Ibid, S 23 C (1)

²⁰ Ibid, S 23 D (1)

²¹ Ibid, S 23 E (7)

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Carbon markets can play a key role in the fight against climate change. It has been pointed out that if well designed, carbon markets can be an effective, credible and transparent tool for helping to achieve low-cost emissions reductions in ways that mobilize private sector actors, attract investment, and encourage international cooperation²². A price on carbon makes clean energy more profitable, allows energy efficiency to earn a greater return, makes low carbon products more competitive, and values the carbon stored in forests²³. Despite the efficacy of carbon markets, it has been observed that there has been rise in disputes in carbon markets²⁴. If not well managed, these disputes can hinder effective carbon trading and therefore affect the fight against climate change²⁵. It is therefore necessary to effectively manage disputes in carbon markets.

This paper critically discusses the need for effective management of disputes in carbon markets. The paper analyses the nature and causes of disputes in carbon markets. It argues that these disputes can hinder the fight against climate change and the attainment of Sustainable Development hence the need to effectively manage them. The paper explores some of the available mechanisms for managing disputes in carbon markets and their efficacy. It also proposes measures towards effective management of disputes in carbon markets for enhanced climate action.

2.0 Disputes in Carbon Markets

It has been pointed out that the growth of carbon markets has resulted in several disputes²⁶. For example, disputes in carbon markets can arise because of non-compliance of rules for carbon market cooperation and greenhouse gas

²² Natural Justice., 'Kenya's Climate Change Bill: Paving the Way for Sustainable Development and Carbon Markets.' Available at <https://naturaljustice.org/kenyas-climate-change-bill-paving-the-way-for-sustainable-development-and-carbon-markets/> (Accessed on 22/02/2024)

²³ Ibid

²⁴ Darne. A., 'International Carbon Disputes - How can they be resolved through Arbitration?' Available at <https://www.pslchambers.com/article/international-carbon-disputes-how-can-they-be-resolved-through-arbitration/#:~:text=Arbitration%20has%20played%20a%20vital,issues%20be%20resolved%20through%20ADR> (Accessed on 22/02/2024)

²⁵ Ibid

²⁶ Ibid

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emissions by developed nations²⁷. Further, it has been contended that the integrity of carbon markets depends in large part on the reliability of carbon accounting and this requires information about an entity's emissions and offsets to be genuine, precise and accurate²⁸. However, there are several challenges that make carbon accounting a difficult exercise, which contributes to increased risk of disputes²⁹. It has been noted that such challenges include the lack of a credible and consistent method of calculating both emissions produced by a business, and emissions avoided or stored by an abatement project³⁰; the lack of a standardised emissions data collection procedure across entities and sectors, which is often done manually and is error-prone³¹; inconsistencies in defining the scope of carbon accounting for example whether and how much upstream and downstream supply chain emissions are included³²; and the complex and heterogenous taxonomy of carbon accounting where the terminology commonly used to describe emissions and offsets lacks a universally recognised set of definitions³³.

It has been contended that the lack of clarity in carbon accounting practices is ripe for disputes³⁴. Carbon accounting practices lack a universally accepted standard, leading to a fragmented landscape of methodologies and reporting frameworks³⁵. This lack of clarity may lead to exposure to claims of greenwashing, misleading or deceptive conduct and, contractual disputes regarding the proper value and/or veracity of carbon allowances and carbon

²⁷ Ibid

²⁸ Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Available at <https://arbitrationblog.kluwerarbitration.com/2023/09/16/dispute-resolution-in-carbon-markets/> (Accessed on 22/02/2024)

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

³² Ibid

³³ Ibid

³⁴ ESG., 'Understanding the Challenges and Risks of Carbon Accounting: Implications for Organizations' Available at <https://empoweredsystems.com/blog/understanding-the-challenges-and-risks-of-carbon-accounting-implications-for-organizations/#:~:text=Carbon%20accounting%20practices%20lack%20a,between%20organizations%20or%20across%20industries.> (Accessed on 22/02/2024)

³⁵ Ibid

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offsets³⁶. It has been noted that the absence of credible standardization creates confusion, making it challenging to compare emissions data between organizations or across industries³⁷. Additionally, it increases the risk of greenwashing, where organizations may engage in misleading or exaggerated claims about their environmental performance³⁸. Such actions could result in disputes in carbon markets.

It has also been noted that carbon markets are associated with certain risks which could potentially result in disputes³⁹. These risks include the integrity risk which refers to possibilities that investors are influenced by misleading information when buying and selling carbon products, which also occur when companies abandon honest and credible trading strategies under imperfect regulation⁴⁰; the vulnerability risk which means incomplete infrastructures and imperfect systems, which make carbon markets susceptible to internal and external shocks⁴¹; market abuse risk where dominant or influential institutions engage in practices such as insider trading, price manipulation, and other unethical practices⁴²; and liquidity risk which reflects certain factors including the number of carbon products and marketization degree that affect confidences of market participants⁴³. It has been asserted that some of these risks are already being transmitted to participants, including compliance entities, institutions, and individuals creating the likelihood of disputes in carbon markets⁴⁴.

In addition, it has been opined that while the growth in carbon markets and market participants generates opportunities for much needed emissions reductions, it also requires participants to navigate regulatory and political

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

³⁹ Chen. B., Yuan. K., & Wen. X., 'The Legal Governance of the Carbon Market: Challenges and Application of Private Law in China' Op Cit

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

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risks⁴⁵. For example, a participant seeking to take advantage of cross-border trading opportunities may be subject to regulatory action by multiple states as well as inter-state bodies⁴⁶. It has been observed that some governments have decided to cancel emissions markets without notice following a change in administration, while others have limited the use of certain types of compliance units in their jurisdiction, or taken other measures that affect the value of compliance units, potentially with the aim of enhancing environmental integrity⁴⁷. Such actions by states could result in disputes with investors trading in carbon markets since they transform what was once a freely tradable commodity into a stranded asset⁴⁸.

From the foregoing, it is evident that carbon markets are susceptible to disputes. It has been pointed out that carbon disputes often turn on issues common to other contractual disputes⁴⁹. These issues include commodity non-delivery, breach of covenants or warranties, failure to fulfil conditions precedent, disputes over title or security among others⁵⁰. Further, it has been pointed out that distinctive elements of such disputes include the nature of the commodity, the carbon crediting project cycle, and the application of international climate standards⁵¹. In addition, the project cycle itself can also generate disputes such as those concerning project registration or credit issuance⁵². It has also been noted that carbon disputes are not limited to carbon contracts themselves but extend to the full scope of disputes concerning the underlying infrastructure projects undertaken to generate emission

⁴⁵ Green Arbitrations., 'Emissions Trading: What Role will Arbitration Play?' Available at <https://www.greenerarbitrations.com/news/emissions-trading-what-role-will-arbitration-play> (Accessed on 22/02/2024)

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Minas. S., 'COP26 Created New Carbon Market Rules: How Will Arbitration Respond?' Available at <https://arbitrationblog.kluwerarbitration.com/2022/01/23/cop26-created-new-carbon-market-rules-how-will-arbitration-respond/> (Accessed on 22/02/2024)

⁵⁰ Ibid

⁵¹ Ibid

⁵² Ibid

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reductions, potentially resulting in commercial or investment arbitration proceedings⁵³.

Disputes are undesirable in carbon markets. Such disputes can hinder the effective functioning of carbon markets and slow down the progress towards confronting climate change⁵⁴. It has been argued that carbon markets can be a powerful tool to help advance carbon justice⁵⁵. By entering carbon markets, all countries can advance their socio-economic development while transitioning to a low-carbon economy in a cost-effective way that puts a price on carbon, allows for carbon trading, and stimulates new market opportunities for companies⁵⁶. It is therefore necessary to effectively manage disputes in carbon markets in order to strengthen the global response towards climate change and foster Sustainable Development.

3.0 Managing Disputes in Carbon Markets

Various climate change instruments contain dispute resolution mechanisms for management of climate change disputes including those in carbon markets. For example, the *United Nations Framework Convention on Climate Change (UNFCCC)*⁵⁷, allows parties to seek settlement of disputes through negotiation or any other peaceful means of their own choice⁵⁸. The UNFCCC also allows parties to submit their parties to the International Court of Justice (ICJ) or to arbitration in accordance with procedures to be adopted by the Conference of the Parties (COP)⁵⁹. The UNFCCC also envisages the management of climate change disputes via a conciliation commission which shall be created upon the

⁵³ Ibid

⁵⁴ Chen. B., Yuan. K., & Wen. X., 'The Legal Governance of the Carbon Market: Challenges and Application of Private Law in China' Op Cit

⁵⁵ United Nations Development Programme., 'Carbon Justice for All: How Carbon Markets Can Advance Equitable Climate Action Globally' Available at <https://www.undp.org/africa/blog/carbon-justice-all-how-carbon-markets-can-advance-equitable-climate-action-globally> (Accessed on 23/02/2024)

⁵⁶ Ibid

⁵⁷ United Nations Framework Convention on Climate Change., United Nations, 1992., Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 23/02/2024)

⁵⁸ Ibid, article 14 (1)

⁵⁹ Ibid, article 14 (2)

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request of one of the parties to the dispute⁶⁰. According to the UNFCCC, the commission shall be composed of an equal number of members appointed by each party concerned and a chairperson chosen jointly by the members appointed by each party⁶¹. The UNFCCC provides that the commission shall render a recommendatory award, which the parties shall consider in good faith⁶².

The *Kyoto Protocol* embraces the dispute management mechanisms set out under the UNFCCC⁶³. It thus envisages the management of climate change disputes including those in carbon markets through arbitration, litigation at the ICJ and conciliation through a conciliation commission⁶⁴. The *Paris Agreement* also embraces the dispute management mechanisms stipulated under the UNFCCC which are arbitration, submissions of disputes to the ICJ and conciliation⁶⁵.

At a national level, the *Climate Change (Amendment) Act*⁶⁶ provides for management of disputes in carbon markets. The Act provides that any dispute arising under a land-based project shall be subjected to the dispute resolution mechanism set out in the Community Development Agreement in the first instance and be resolved within thirty days from the date the dispute is lodged⁶⁷. In addition, the Act provides that any dispute that is not land based and is not subjected to a Community Development Agreement shall be resolved through Alternative Dispute Resolution in the first instance⁶⁸. The Act therefore envisages the use of Alternative Dispute Resolution (ADR) mechanisms in managing disputes in carbon markets. These mechanisms include negotiation, mediation, arbitration, and conciliation⁶⁹. Further, where

⁶⁰ Ibid, article 14 (6)

⁶¹ Ibid

⁶² Ibid

⁶³ Kyoto Protocol, article 19

⁶⁴ Ibid

⁶⁵ Paris Agreement., article 24

⁶⁶ Climate Change (Amendment) Act, 2023, Laws of Kenya, Government Printer, Nairobi

⁶⁷ Ibid, s 23 (H) 1

⁶⁸ Ibid, s 23 (H) 2

⁶⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Glenwood Publishers Limited, 2015

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any dispute is not managed within thirty days, the Act provides that such dispute shall be referred to the National Environment Tribunal⁷⁰. The Tribunal is established under the Environmental Management and Co-ordination Act with the jurisdiction to *inter alia* make orders to enhance the principles of Sustainable Development in Kenya⁷¹.

In addition to the foregoing dispute management mechanisms set out under climate change instruments, it has been pointed out that dispute management in carbon markets is also governed by carbon contracts⁷². While some of these contracts provide for litigation, most of them envisage the use of arbitration in managing disputes in carbon markets. For example, the International Emissions Trading Association's Emissions Trading Master Agreement for the European Union Emissions Trading Scheme (EU ETS) allows for the use of arbitration in managing disputes in carbon markets with the option to choose among the International Chamber of Commerce (ICC) Rules, United Nations Commission on International Trade Law (UNCITRAL) Rules or The Permanent Court of Arbitration (PCA) Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment⁷³. In addition the World Bank's Forest Carbon Partnership Facility *General Conditions Applicable to Emissions Reduction Payment Agreements*⁷⁴ allows the use of conciliation and arbitration under the UNCITRAL Rules for managing disputes in carbon markets⁷⁵. The use of arbitration in managing disputes in

⁷⁰ Climate Change (Amendment) Act, 2023, Laws of Kenya, S 23 H (3), Government Printer, Nairobi.

⁷¹ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya S 125 & 129 (3) (c) Government Printer, Nairobi

⁷² Minas. S., 'COP26 Created New Carbon Market Rules: How Will Arbitration Respond?' Op Cit

⁷³ International Emissions Trading Association., 'European Union Emissions Trading Scheme (EU ETS)' Available at https://ieta.b-cdn.net/wp-content/uploads/2023/09/IETA_TradingDocuments_ETMA_Sched23A3B_v4.0.pdf (Accessed on 23/02/2024)

⁷⁴ World Bank., 'General Conditions Applicable to Emission Reductions Payment Agreements for Forest Carbon Partnership Facility Emission Reductions Programs' Available at <https://www.forestcarbonpartnership.org/sites/fcp/files/2019/Sep/6.%20Emission%20Reductions%20Payment%20Agreement%20%28ERPA%29%20General%20Terms%20and%20Conditions%20%28English%29.pdf> (Accessed on 23/02/2024)

⁷⁵ Ibid, s 18.03

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carbon markets is also envisaged under Norway's *Certified Emission Reduction Purchase Agreement*⁷⁶. The Agreement provides that if a dispute has not been resolved by negotiation within twenty days of delivery of the Dispute Notice, the complaining Party may, at any time thereafter, submit the dispute to be resolved by arbitration in accordance with the Rules of Arbitration of the London Court of International Arbitration (LCIA) for the time being in force⁷⁷.

From the foregoing, it emerges that arbitration is a preferred mechanism for managing disputes in carbon markets. Arbitration refers to a private consensual process where parties in dispute agree to present their grievances to a third party for resolution⁷⁸. It has also been defined as a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who make a binding decision on the dispute⁷⁹. Arbitration has emerged as the preferred mechanism for managing disputes especially those that are transnational in nature⁸⁰. It has a transnational applicability which means that it applies across different jurisdictions and therefore guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems⁸¹. It also guarantees enforcement of decisions through the *New York Convention*⁸² which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration.

⁷⁶ The Norwegian Ministry of Climate and Environment, 'Certified Emission Reduction Purchase Agreement' Available at <https://www.regjeringen.no/contentassets/86680864084e47118f0086fccc0855fd/template-nmoce-erpa-2016-2020.pdf> (Accessed on 23/02/2024)

⁷⁷ Ibid, s 19.4

⁷⁸ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

⁷⁹ World Intellectual Property Organization, 'What is Arbitration' Available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (Accessed on 23/02/2024)

⁸⁰ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTINGINTERNATIONALCOMMERCIALARBITRATION-IN-AFRICA.pdf> (Accessed on 23/02/2024)

⁸¹ Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

⁸² United Nations Commission on International Trade Law., 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards.' (New York, 1958)

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The attributes of arbitration makes it a viable mechanism for managing disputes in carbon markets. These attributes include party autonomy, flexibility, confidentiality, ease of enforcement of outcomes, and the ability to foster neutral, expeditious and cost effective management of disputes⁸³. For example, it has been pointed out that arbitration gives parties freedom in selecting arbitrators which allows them to pick tribunals with sufficient expertise of the regulatory and technical problems at stake in carbon disputes⁸⁴. Furthermore, it has been pointed out that commercial arbitration also provides the option of choosing a neutral tribunal for resolving sensitive disputes, as well as seamless enforcement of awards since majority of country states are signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁸⁵. Investment arbitration also allows for the management of disputes in carbon markets between investors and states⁸⁶. It has been observed that there is growing appreciation of the suitability of arbitration for resolving carbon market disputes, including in the field of investment arbitration⁸⁷. It has correctly been observed that government regulation or intervention in carbon offset projects may lead to investor-state arbitration claims against states under applicable investment treaties, where investments in such carbon offset projects are foreign-owned⁸⁸. Actions by states such as cancellation of carbon markets or projects could result in disputes with investors trading in carbon markets since they transform what was once a freely tradable commodity into a stranded asset⁸⁹. Investment arbitration is therefore a key tool in managing disputes in carbon markets.

Arbitration is therefore a vital tool in managing disputes in carbon markets. It offers several advantages in managing disputes in carbon markets such as the ability of parties to select arbitrators and experts with relevant scientific,

⁸³ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

⁸⁴ Darne. A., 'International Carbon Disputes - How can they be resolved through Arbitration?' Op Cit

⁸⁵ Ibid

⁸⁶ Green Arbitrations., 'Emissions Trading: What Role will Arbitration Play?' Op Cit

⁸⁷ Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Op Cit

⁸⁸ Ibid

⁸⁹ Ibid

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environmental and regulatory knowledge⁹⁰; neutrality especially in international carbon disputes since local courts of the jurisdiction where carbon offset projects are situated may be perceived to lack independence⁹¹; universal enforceability of arbitral awards and procedural flexibility to accommodate for the legal traditions of culturally diverse counsel, parties and arbitrators⁹²; and confidentiality by restricting public access to certain documents containing commercially sensitive information or matters concerning national security while opening proceedings or taking other measures to improve transparency⁹³.

However, the use of arbitration in managing disputes in carbon markets could raise certain challenges. For example, since climate change is a matter of public concern, the privacy of arbitration may result in certain stakeholders being left out of the dispute management process⁹⁴. A limited number of stakeholders in such disputes may ultimately lead to future disagreements given the public interest in such matters, requiring all parties to return to the negotiating table or face litigation⁹⁵. It has also been argued that the confidential nature of arbitral proceedings may also be of limited assistance to claimants seeking a more public forum for the ventilation and resolution of their dispute⁹⁶. Further, the use of arbitration in managing disputes in carbon markets could result in problems of costs and delays especially in cases of complex disputes⁹⁷. Despite these challenges, arbitration is a more viable forum for managing disputes in carbon markets when compared to other mechanisms such as litigation. Litigating disputes in carbon markets can result in concerns such as lack of independence and bias in favour of host states, lack of flexibility, enforcement challenges in cross border carbon disputes, costs and delays⁹⁸. It is therefore

⁹⁰ Green Arbitrations., 'Emissions Trading: What Role will Arbitration Play?' Op Cit

⁹¹ Ibid

⁹² Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Op Cit

⁹³ Ibid

⁹⁴ Darne. A., 'International Carbon Disputes - How can they be resolved through Arbitration?' Op Cit

⁹⁵ Ibid

⁹⁶ Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Op Cit

⁹⁷ Ibid

⁹⁸ Ibid

necessary to embrace arbitration and other ADR mechanisms in order to foster the effective management of disputes in carbon markets.

4.0 Way Forward

Arbitration has been identified as a vital mechanism for managing disputes in carbon markets⁹⁹. It has been observed that there is growing appreciation of the suitability of arbitration for resolving carbon market disputes, including in the field of investment arbitration¹⁰⁰. For example, carbon credit standard bodies have incorporated arbitration into their standard templates for disputes with validation and verification bodies¹⁰¹. In addition, many institutions that publish standard form contracts for the production and delivery of carbon credits are also beginning to include arbitration as a method of dispute resolution¹⁰². As a result, it has been argued that international arbitration will continue to be considered as an appropriate dispute resolution mechanism to meet the challenges of uncertainty in carbon market disputes¹⁰³. It is therefore necessary to embrace arbitration for effective management of disputes in carbon markets.

It has been argued that there is need to strengthen the attributes of arbitration which makes it viable in managing disputes in carbon markets¹⁰⁴. These include the parties capacity to select arbitrators and experts with adequate scientific and environmental skills¹⁰⁵; the capacity to accelerate legal processes and impose interim and conservatory remedies, particularly in situations involving potential permanent environmental harm¹⁰⁶; the capacity to apply certain governing or applicable law, including relevant environmental statutes¹⁰⁷; maintaining confidentiality while also taking efforts toward improved transparency in line with the parties' requirements and considering

⁹⁹ Green Arbitrations., 'Emissions Trading: What Role will Arbitration Play?' Op Cit

¹⁰⁰ Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Op Cit

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Darne. A., 'International Carbon Disputes - How can they be resolved through Arbitration?' Op Cit

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Ibid

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the public interest concerned¹⁰⁸; and the availability of arbitral rules that are sufficiently flexible to be applied to specific scenarios¹⁰⁹. It is therefore necessary to build capacity and awareness among arbitration practitioners regarding dispute settlement in carbon markets¹¹⁰. This includes developing familiarity with the unique regulatory context for carbon credits. In addition, arbitral institutions should also consider measures such as the adoption of specialised rules tailored to carbon markets, the establishment of a panel of arbitrators with relevant expertise and the creation of a list of technical experts¹¹¹. These measures will enhance the role of arbitration in managing disputes in carbon markets.

It is also necessary to embrace other ADR mechanisms including negotiation and mediation in managing disputes in carbon markets. These mechanisms contain certain key attributes which include privacy, confidentiality, flexibility, informality, party autonomy and the ability to foster expeditious and cost effective management of disputes¹¹². Mediation has been advanced as an ideal mechanism for managing climate change disputes including those in carbon markets¹¹³. It has been argued that climate-informed mediation can provide platforms to engage and better support the efforts of parties to a dispute to find a peaceful and sustainable solution to their dispute¹¹⁴. It can also enhance the chances that an agreement will stand the “climate test” over time¹¹⁵. In addition, it has been pointed out that mediation can be an ideal dispute resolution mechanism for carbon markets particularly for voluntary

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Minas. S., ‘COP26 Created New Carbon Market Rules: How Will Arbitration Respond?’ Op Cit

¹¹¹ Ibid

¹¹² Muigua. K., ‘Alternative Dispute Resolution and Access to Justice in Kenya.’ Op Cit

¹¹³ United Nations Department of Political and Peacebuilding Affairs., ‘The Implications of Climate Change for Mediation and Peace Processes’ Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/DPPAPracticeNote-TheImplicationsofClimateChangeforMediationandPeaceProcesses.pdf> (Accessed on 23/02/2024)

¹¹⁴ Ibid

¹¹⁵ Ibid

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carbon markets¹¹⁶. It is therefore necessary to embrace mediation for management of disputes in carbon markets. In addition, international climate change instruments including the UNFCCC, Kyoto Protocol and Paris Agreement, allow parties to seek settlement of climate change disputes through *negotiation* or any other peaceful means of their own choice (Emphasis added)¹¹⁷. Further, the Climate Change (Amendment) Act of Kenya provides for the management of disputes in carbon markets through ADR mechanisms¹¹⁸. It is therefore necessary to embrace ADR mechanisms including mediation and negotiation for effective management of disputes in carbon markets.

Finally, it is imperative to promote proper functioning of carbon markets¹¹⁹. Carbon markets are associated with certain risks and challenges such as greenwashing, information asymmetry among participants, misleading or deceptive conduct, lack of clarity over the proper value and/or veracity of carbon allowances and carbon offsets, insider trading, and price manipulation among other unethical practices¹²⁰. Such practices often result in disputes in carbon markets. It is therefore necessary to promote proper functioning of carbon markets by addressing the risks and challenges involved¹²¹. This calls for enhancing transparency in carbon markets, avoiding conflict of interest, and fostering oversight and monitoring in order to minimize fraud, insider trading and price manipulation among other unethical practices¹²². This will

¹¹⁶ ESG Investor., 'Greater Scope for Carbon Markets Legal Action in Asia' Available at <https://www.esginvestor.net/greater-scope-for-carbon-markets-legal-action-in-asia/> (Accessed on 23/02/2024)

¹¹⁷ United Nations Framework Convention on Climate Change article 14 (1); Kyoto Protocol, article 19; Paris Agreement, article 24

¹¹⁸ Climate Change (Amendment) Act, 2023, Laws of Kenya, s 23 (H) 2

¹¹⁹ ESG., 'Understanding the Challenges and Risks of Carbon Accounting: Implications for Organizations' Op Cit

¹²⁰ Ibid

¹²¹ Ibid

¹²² The International Organization of Securities Commissions., 'Compliance Carbon Markets' Available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD719.pdf> (Accessed on 23/02/2024)

promote proper functioning of carbon markets and minimize the likelihood of disputes¹²³.

The foregoing among other measures are key in managing disputes in carbon markets.

5.0 Conclusion

Carbon markets are an effective tool in the global response to climate change¹²⁴. If well designed, carbon markets can be an effective, credible and transparent tool for helping to achieve low-cost emissions reductions in ways that mobilize private sector actors, attract investment, and encourage international cooperation¹²⁵. Carbon markets can also be a powerful tool to help advance carbon justice¹²⁶. By entering carbon markets, all countries can advance their socio-economic development while transitioning to a low-carbon economy in a cost-effective way that puts a price on carbon, allows for carbon trading, and stimulates new market opportunities for companies¹²⁷. Despite their efficacy, risks and challenges such as greenwashing, information asymmetry among participants, misleading or deceptive conduct, lack of clarity over the proper value and/or veracity of carbon allowances and carbon offsets, insider trading, and price manipulation among other unethical practices make carbon markets susceptible to disputes¹²⁸. Such disputes are undesirable since they can hinder the effective functioning of carbon markets and slow down the progress towards confronting climate change¹²⁹. It is therefore necessary to effectively manage disputes in carbon markets. This can be achieved through approaches such as embracing ADR mechanisms

¹²³ Ibid

¹²⁴ ¹²⁴ Chen. B., Yuan. K., & Wen. X., 'The Legal Governance of the Carbon Market: Challenges and Application of Private Law in China' Op Cit

¹²⁵ Natural Justice., 'Kenya's Climate Change Bill: Paving the Way for Sustainable Development and Carbon Markets.' Op Cit

¹²⁶ United Nations Development Programme., 'Carbon Justice for All: How Carbon Markets Can Advance Equitable Climate Action Globally' Op Cit

¹²⁷ Ibid

¹²⁸ ESG., 'Understanding the Challenges and Risks of Carbon Accounting: Implications for Organizations' Op Cit

¹²⁹ Chen. B., Yuan. K., & Wen. X., 'The Legal Governance of the Carbon Market: Challenges and Application of Private Law in China' Op Cit

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including arbitration, mediation and negotiation¹³⁰; and promoting the proper functioning of carbon markets by addressing the underlying risks and challenges¹³¹. It is imperative to deal with disputes in carbon markets effectively in order to strengthen the fight against climate change. Managing disputes in carbon markets is a key imperative that cannot be ignored.

¹³⁰ Kwan. E., Nagra. S., Zou. A., 'Dispute Resolution in Carbon Markets' Op Cit

¹³¹ ESG., 'Understanding the Challenges and Risks of Carbon Accounting: Implications for Organizations' Op Cit

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Abstract

Conflicts in any given society can be an undesirable occurrence which affect peace, sustainability and development. Effective, efficient and expeditious conflict management is therefore desirable in order to spur peace, development and sustainability. Conflict management involves the use of several approaches including collaborating, competing, avoiding, accommodating, and compromising. Collaborative approaches towards conflict management have been hailed as the most ideal due to their potential to produce satisfactory and long term results. This paper critically examines collaborative approaches towards conflict management. It argues that these techniques can ensure efficient and effective management of conflicts towards peace and sustainability. The paper highlights and discusses some of the collaborative approaches towards conflict management. It also interrogates the advantages of these approaches. The paper further explores some of the concerns with these approaches and suggests measures towards applying collaborative approaches towards conflict management.

1.0 Introduction

Conflicts are a common phenomenon in human relationships and interactions¹. They are an inevitable part of living because they are related to situations of scarce resources, division of functions, power relations and role-differentiation². The term conflict generally refers to a situation in which two or more parties perceive that they possess mutually incompatible goals³. Conflicts can also occur due to misalignment of goals, actions or motivations

¹ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <https://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-CommunityMoving-from-Alternative-to-Appropriate-Dispute-Resolution> (Accessed on 01/03/2024)

² Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Available at <https://ocd.lcwu.edu.pk/cfiles/International%20Relations/EC/IR403/Conflict.ConflictManagementinOrganizations.pdf> (Accessed on 01/03/2024)

³ Demmers. J., 'Theories of Violent Conflict: An Introduction' (Routledge, New York, 2012)

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which can be real or only perceived to exist⁴. It has been argued that conflict is not in itself a negative phenomenon⁵. For example, non-violent conflict can be an essential component of social change and development, and is a necessary component of human interaction⁶. Non-violent resolution of conflict is possible when individuals and groups have trust in their governing structures, society and institutions to manage incompatible interests⁷.

Conflicts become problematic when societal mechanisms and institutions for managing and resolving them break down, giving way to violence⁸. Societies with weak institutions, fragile political systems and divisive social relations can be drawn into cycles of conflict and violence⁹. In such situations, conflicts are an undesirable occurrence since they affect peace, sustainability and development¹⁰. It has rightly been pointed out that development is not feasible in a conflict situation¹¹. Effective, efficient and expeditious conflict management is therefore a desirable ideal in order to spur peace, development and sustainability¹².

Conflict management generally refers to the processes and techniques adopted towards stopping or preventing overt conflicts and aiding the parties involved to reach a durable and peaceful solution to their differences¹³. Conflict

⁴ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

⁵ United Nations., 'Land and Conflict' Available at https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_ExeS_Land%20and%20Conflict.pdf (Accessed on 01/03/2024)

⁶ Ibid

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' *Op Cit*

¹¹ Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-inKenyaRevised-version-of-20.10.14.pdf> (Accessed on 01/03/2024)

¹² Ibid

¹³ Leeds. C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners.' *International Journal of Peace Studies*, Volume 2, No. 2, 1997

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management therefore involves handling all stages of a conflict as well as the mechanisms used in the management of conflicts¹⁴. The goal of conflict management is to affect the entire structure of a conflict so as to contain the destructive components in the conflict process (such as hostility and use of violence) and help the parties possessing incompatible goals to find some solution to their conflict¹⁵. Various approaches and techniques can be adopted towards managing conflicts ranging from the most informal negotiations between the parties themselves through increasing formality and more directive interventions from external sources to a full court hearing with strict rules of procedure¹⁶. Effective conflict management succeeds in minimizing disruption stemming from the existence of a conflict, and providing a solution that is satisfactory and acceptable¹⁷.

Conflict management can either result in settlement or resolution of the underlying conflict¹⁸. Settlement refers to an agreement over the issues in a conflict which often involves a compromise¹⁹. It involves the use of mechanisms such as litigation and arbitration which are highly coercive, power based²⁰. Settlement can be effective in providing an immediate solution to a conflict but fail to address underlying issues in a conflict leaving the likelihood of conflicts reemerging in future²¹. Resolution on the other hand refers to a conflict management process where the outcome is based on mutual problem-sharing whereby parties to a conflict cooperate in order to redefine their conflict and relationships²². It generally involves the use of Alternative Dispute Resolution (ADR) processes such as mediation, negotiation and

¹⁴ Ibid

¹⁵ Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Op Cit

¹⁶ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

¹⁷ Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Op Cit

¹⁸ Ibid

¹⁹ Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland,' *Journal of Peace Research.*, Volume 32, Issue 2

²⁰ Ibid

²¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²² Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland,' Op Cit

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facilitation which are non-coercive, non-power based and focus on the needs and interest of parties²³. Resolution mechanisms result in mutually satisfying outcomes that address the root causes of conflicts therefore creating long lasting outcomes²⁴.

Conflict management can involve different approaches. These techniques include collaborating, competing, avoiding, accommodating, and compromising²⁵. Collaborative approaches towards conflict management have been hailed as the most ideal due to their potential to produce satisfactory and long term results²⁶.

This paper critically examines collaborative approaches towards conflict management. It argues that these techniques can ensure efficient and effective management of conflicts towards peace and sustainability. The paper highlights and discusses some of the collaborative approaches towards conflict management. It also interrogates the advantages of these approaches. The paper further explores some of the concerns with these approaches and suggests measures towards applying collaborative approaches towards conflict management.

2.0 Interrogating Collaborative Approaches towards Conflict Management

Collaborative conflict management refers to the use of a wide range of informal approaches where competing or opposing stakeholder groups work together to reach an agreement on a controversial issue²⁷. In addition, it has been pointed out that collaborative conflict resolution encourages teams to work through disagreements through empathy, listening, and mutually

²³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²⁴ Ibid

²⁵ Samuel. A., 'Is the Collaborative Style of Conflict Management the Best Approach?' Available at <https://www.linkedin.com/pulse/collaborative-style-conflict-management-best-approach-samuel-ansah> (Accessed on 01/03/2024)

²⁶ Ibid

²⁷ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Available at <https://www.fao.org/3/i2604e/i2604e00.pdf> (Accessed on 01/03/2024)

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beneficial solutions²⁸. Collaboration, unlike compromise, does not focus on both sides making sacrifices²⁹. Instead, in collaborative approaches, both parties come up with mutually beneficial solutions³⁰. Collaborating has been identified as a powerful approach to conflict resolution built on cooperation, open communication, and finding win-win outcomes³¹. It has been argued that among all conflict management techniques, collaborative approaches are the most likely to identify the root cause of a conflict, pinpoint the underlying needs of the parties involved, and come to a win-win outcome for everyone³². Through collaboration, all parties to a conflict come together to openly discuss the issue causing tension, actively listen to each other, and work towards a solution that is mutually satisfactory and acceptable to everyone³³.

It has been pointed out that collaborative conflict management aims to achieve several objectives which include: promoting the participation of diverse or competing stakeholder groups in order to reach agreement on a controversial issue³⁴; assisting stakeholders in adopting an attitude that is oriented towards cooperation rather than pursuit of individual interests³⁵; establishing new forms of communication and decision making on important issues, and raising awareness of the importance of equity and accountability in stakeholder communication³⁶; developing partnerships and strengthening stakeholder networks³⁷; creating space for stakeholders to communicate in order to bring about future agreements so that concrete action can be taken³⁸; and producing

²⁸ Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Available at <https://www.officernd.com/blog/collaborating-conflict-style/#:~:text=It's%20one%20of%20the%20strategies,their%20underlying%20needs%20and%20interests>. (Accessed on 01/03/2024)

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

³² May. E., 'Collaborating Conflict Style Explained In 4 Minutes' Available at <https://www.niagarainstitute.com/blog/collaborating-conflict-style/> (Accessed on 01/03/2024)

³³ Ibid

³⁴ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Op Cit

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

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decisions that have a strong base of support³⁹. In addition, it has been observed that collaborative approaches towards conflict management aim to preserve relationships, build trust, and promote long term positive change⁴⁰. Collaborative conflict management is based on certain principles key among them being ensuring open communication, finding common ground, and creating a culture of trust⁴¹.

Collaborative approaches towards conflict management has been hailed as the “win-win” strategy to conflict management⁴². It is an effective means of restoring peace⁴³. It has been argued that collaborative approaches are a better way to conflict management since they encourage freedom of expression, where the conflicting parties express their thoughts and concerns verbally, which makes all parties involved in the dispute feel valued and be aware of each other’s concern⁴⁴. In addition, it has been argued that collaborating sets the tone for future conflict resolution and gives those involved the shared responsibility to manage conflicts prior to escalation⁴⁵. Further, it has been argued that managing conflicts in a collaborative way helps to develop trust and strengthen communication channels between the various parties⁴⁶. For example, it has been pointed out that in conflicts related to natural resources, collaborative approaches help in generating inclusive solutions that arise from wider stakeholders’ views, and therefore helps clarify policies, institutions and processes that regulate access to – or control over – natural resources⁴⁷.

It has been observed that collaborating entails all parties to a conflict sitting down together, discussing the conflict, and working towards a solution

³⁹ Ibid

⁴⁰ Miroslavov. M., ‘Mastering the Collaborating Conflict Style In 2024’ Op Cit

⁴¹ Ibid

⁴² Samuel. A., ‘Is the Collaborative Style of Conflict Management the Best Approach?’ Op Cit

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Food and Agriculture Organization., ‘Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)’ Op Cit

⁴⁷ Ibid

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together⁴⁸. Collaborative approaches towards conflict management have been identified as vital when it is necessary to maintain all parties' relationships or when the solution itself will have a significant impact on large group of people⁴⁹. In such situations, collaborating ensures a win-win solution is found so that everyone is satisfied which creates the condition for peace and sustainability⁵⁰. It has been pointed out that for collaborative approaches to be effective, it is necessary for all parties to have collaborating skills such as the ability to use active or effective listening, confront situations in a non-threatening way, analyze input, and identify underlying concerns⁵¹. Collaborative approaches towards conflict management are important in fostering effective and long lasting outcomes⁵². It is therefore necessary to apply collaborative approaches in order to ensure effective and efficient management of conflicts.

3.0 Applying Collaborative Approaches towards Conflict Management: Opportunities and Challenges

One of the key collaborative approaches that can be applied in conflict management is mediation⁵³. Mediation has been defined as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussions and the flow of information, and thus aiding in the process of reaching an agreement⁵⁴. Mediation is usually a continuation of the negotiation process since it arises where parties to a conflict have attempted negotiations, but have reached a

⁴⁸ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict"' Available at <https://www.beyondintractability.org/bksum/isenhardt-collaborative> (Accessed on 01/03/2024)

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Burrell. B., 'The Five Conflict Styles' Available at <https://web.mit.edu/collaboration/mainsite/modules/module1/1.11.5.html> (Accessed on 01/03/2024)

⁵² Ibid

⁵³ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict"' Op Cit

⁵⁴ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017

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deadlock⁵⁵. Parties therefore involve a third party known as a mediator to assist them continue with the negotiations and ultimately break the deadlock⁵⁶. A mediator does not have the power to impose a solution upon the parties but rather facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem solving to enable the parties to reach their own agreement⁵⁷.

Some of the core values and principles guiding mediation as a collaborative approach towards conflict management include impartiality, empathy, valued reputation, and confidentiality⁵⁸. It has also been pointed out that mediation has certain attributes which include informality, flexibility, efficiency, confidentiality, party autonomy and the ability to promote expeditious and cost effective management of dispute which makes it an ideal mechanism for managing disputes⁵⁹. Mediation is an effective mechanism that can foster collaboration due to its potential to build peace and bring people together, binding them towards a common goal⁶⁰. Mediation can also foster effective management of conflicts by building consensus and collaboration⁶¹. It has been argued that mediation can enhance collaboration towards conflict management due to its emphasis on the need for a mediator who listen to the wants, needs, fears, and concerns of all sides⁶². Therefore, for mediation to be effective in fostering collaboration, the approach must be mild and non-

⁵⁵ Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict" ' Op Cit

⁵⁹ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

⁶⁰ International Organization for Peace Building., 'Natural Resources and Conflict: A Path to Mediation.' Available at <https://www.interpeace.org/2015/11/natural-resources-and-conflict-a-path-to-mediation/> (Accessed on 01/03/2024)

⁶¹ Ibid

⁶² Quain. S., 'The Advantages & Disadvantages of Collaborating Conflict Management' Available at <https://smallbusiness.chron.com/advantages-disadvantages-collaborating-conflict-management-36052.html> (Accessed on 01/03/2024)

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confrontational because the goal is to make all parties feel comfortable expressing their views and opinions⁶³.

Another key collaborative approach towards conflict management is negotiation⁶⁴. It has been defined as an informal process that involves parties to a conflict meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party⁶⁵. Negotiation is one of the most fundamental methods of managing conflicts which offers parties maximum control over the process⁶⁶. It aims at harmonizing the interests of the parties concerned amicably⁶⁷. Negotiation has been described as the process that creates and fuels collaboration⁶⁸. Negotiation fosters collaboration since it involves all parties sitting down together, talking through the conflict and working towards a solution together⁶⁹. Negotiation has been described as the most effective collaborative approach towards conflict management since it starts with an understanding by both parties that they must search for solutions that satisfy everyone⁷⁰. It enables parties to a dispute to come together to openly discuss the issue causing tension, actively listen to each other, and come up with mutually satisfactory solutions⁷¹. If negotiation fails, parties may resort to other collaborative approaches such as mediation and facilitation where they attempt to manage the conflict with the help of a third party⁷².

⁶³ Ibid

⁶⁴ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict" ' Op Cit

⁶⁵ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict" ' Op Cit

⁶⁹ Ibid

⁷⁰ Verma. V. K., 'Conflict Management' Available at http://www.communicationcache.com/uploads/1/0/8/8/10887248/conflict_management.pdf (Accessed on 01/03/2024)

⁷¹ May. E., 'Collaborating Conflict Style Explained In 4 Minutes' Op Cit

⁷² Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict" ' Op Cit

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Facilitation is another key collaborative approach towards conflict management⁷³. Facilitation entails a third party known as a facilitator who helps parties to a conflict to understand their common objectives and achieve them without while remaining objective in the discussion⁷⁴. A facilitator assists conflicting parties in achieving consensus on any disagreements so that they have a strong basis for future action⁷⁵. It has been pointed out that facilitation is effective in fostering collaboration in conflict management particularly in conflicts which are complex in nature or those that involve multiple parties⁷⁶. In such conflicts, it is necessary to seek outside help from a neutral third party to facilitate the discussion as parties work towards mutually acceptable outcomes⁷⁷.

Applying collaborative approaches towards conflict management offers several advantages. It has been pointed out that collaborating results in mutually acceptable solutions⁷⁸. Such solutions can therefore be effective and long lasting negating the likelihood of conflicts reemerging in future⁷⁹. Collaborating signifies joint efforts, gain for both parties and integrated solutions arrived at by consensual decisions⁸⁰. Collaborating is also very effective when it is necessary to build or maintain relationships since it focuses on the needs and interests of all parties in a dispute⁸¹. It has been observed that collaborative approaches emphasize trust-building, open communication, and empathizing with each other's perspectives which goes beyond resolving conflicts to facilitate deeper understandings of each other⁸². Collaborative approaches can therefore lead to better interpersonal connections⁸³.

⁷³ Ibid

⁷⁴ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Op Cit

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict"' Op Cit

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Samuel. A., 'Is the Collaborative Style of Conflict Management the Best Approach?' Op Cit

⁸² Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Op Cit

⁸³ Ibid

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Collaborating can also result in constructive decision-making since encouraging active engagement and open dialogue helps others think outside of the box and explore innovative paths towards conflict management⁸⁴. Further, by encouraging the participation and involvement of all stakeholders, collaboration ensures that everyone feels heard, valued and understood which is very essential in managing conflicts⁸⁵. In addition, collaborating sets the tone for future conflict resolutions since it gives those involved the shared responsibility to resolve their problems⁸⁶.

However, collaborative approaches towards conflict management have also been associated with several drawbacks. For example, it has been observed that collaborative approaches may not be easy to implement since they involve a lot of effort to get an actionable solution⁸⁷. In addition, it has been observed that thorough discussions, active participation, and exploring multiple perspectives as envisaged by collaborative approaches take time⁸⁸. Collaborating may therefore require patience and dedication to ensure all voices are heard and meaningful resolutions are reached⁸⁹. Achieving consensus through collaborative approaches can also be difficult since conflicting opinions, varying conflict goals, and emotional variables can make the consensus-building process challenging and time-consuming⁹⁰. As a result of these challenges, it has been asserted that collaborative approaches towards conflict management are frequently the most difficult and time-consuming to achieve⁹¹. Further, it has been argued that over use of collaboration and consensual decision-making may reflect risk aversion tendencies or an inclination to defuse responsibility⁹². Despite these challenges, collaborative approaches towards conflict management are ideal in ensuring win-win and

⁸⁴ Ibid

⁸⁵ May. E., 'Collaborating Conflict Style Explained In 4 Minutes' Op Cit

⁸⁶ Quain. S., 'The Advantages & Disadvantages of Collaborating Conflict Management' Op Cit

⁸⁷ Samuel. A., 'Is the Collaborative Style of Conflict Management the Best Approach?' Op Cit

⁸⁸ Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Op Cit

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Ibid

⁹² Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict"' Op Cit

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long lasting outcomes⁹³. It is therefore necessary to embrace and apply collaborative approaches towards conflict management.

4.0 Way Forward

It is necessary to embrace and utilize collaborative approaches in managing conflicts. These techniques include mediation, negotiation, and facilitation⁹⁴. These mechanisms are effective in managing conflicts since they encourage parties to embrace and address disagreements through empathy and listening towards mutually beneficial solutions⁹⁵. Collaborative approaches also have the potential to preserve relationships, build trust, and promote long term positive change⁹⁶. They also ensure a win-win solution is found so that everyone is satisfied which creates the condition for peace and sustainability⁹⁷. These approaches are therefore ideal in managing conflicts⁹⁸. It is therefore important to embrace collaborative approaches in order to ensure effective management of conflicts.

In addition, it is necessary for third parties including mediators and facilitators to develop their skills and techniques in order to enhance the effectiveness of collaborative approaches towards conflict management⁹⁹. For example, it has correctly been observed that mediators and facilitators should listen actively and empathetically in order to assist parties to collaborate towards managing their dispute¹⁰⁰. Therefore, when a dispute arises, the first step should involve listening to all parties involved with an open mind and without judgment¹⁰¹. This should entail active listening, which means paying attention to both verbal and nonverbal cues and acknowledging the emotions and perceptions

⁹³ Ibid

⁹⁴ Ibid

⁹⁵ Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Ibid

⁹⁶ Ibid

⁹⁷ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict" ' Op Cit

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Weiss. J., & Hughes. J., 'Want Collaboration?: Accept—and Actively Manage—Conflict' Available at <https://hbr.org/2005/03/want-collaboration-accept-and-actively-manage-conflict> (Accessed on 01/03/2024)

¹⁰¹ Ibid

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involved¹⁰². It has been observed that by listening empathetically, a third party such as a mediator or facilitator can understand each person's perspective and start to build a foundation for resolving the conflict through collaboration¹⁰³.

In addition, while collaborating towards conflict management, it is necessary to encourage and help parties to focus on interests and not positions¹⁰⁴. It has been pointed out that focusing positions can result in a standstill which can delay or even defeat the conflict management process¹⁰⁵. However, by identifying and addressing the underlying interests parties can find common ground and collaborate towards coming up with creative solutions towards their conflict¹⁰⁶. Mediators and facilitators should also assist parties to look for areas of agreement or shared goals¹⁰⁷. Identifying a common ground can build momentum and create a positive environment for resolving the conflict¹⁰⁸.

Further, in order to ensure the effectiveness of collaborative approaches in conflict management, it is necessary to build strong collaboration¹⁰⁹. It has been asserted that strong collaboration can be achieved by establishing a shared purpose, cultivating trust among parties, encouraging active participation by all parties, and promoting effective communication¹¹⁰. Strong collaboration enables parties to develop trust between and among themselves and strengthen communication channels between the various parties¹¹¹. It also helps to generate inclusive solutions that arise from wider stakeholders' views¹¹². Therefore while applying collaborative approaches, it is necessary for

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict"' Op Cit

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Diana. M., 'From Conflict to Collaboration' Available at <https://www.pmi.org/learning/library/conflict-collaboration-beyond-project-success-1899> (Accessed on 01/03/2024)

¹⁰⁸ Ibid

¹⁰⁹ Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Op Cit

¹¹⁰ Ibid

¹¹¹ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Op Cit

¹¹² Ibid

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parties to foster strong collaboration by identifying common goals, building trust, ensuring that all stakeholders are involved, and communicating effectively in order to come up with win-win outcomes¹¹³.

Finally, while embracing collaborative approaches in conflict management, it is necessary for parties to consider seeking help from third parties if need arises¹¹⁴. For example, negotiation is always the first point of call whenever a conflict arises whereby parties attempt to manage their conflict without the involvement of third parties¹¹⁵. It has been described as the most effective collaborative approach towards conflict management since it starts with an understanding by both parties that they must search for solutions that satisfy everyone¹¹⁶. It enables parties to a dispute to come together to openly discuss the issue causing tension, actively listen to each other, and come up with mutually satisfactory solutions¹¹⁷. However, it has been correctly observed that negotiation may fail especially if the conflict is particularly complex or involves multiple parties due to challenges in collaborating¹¹⁸. In such circumstances, where negotiation fails, parties should consider resorting to other collaborative approaches such as mediation and facilitation where they attempt to manage the conflict with the help of a third party¹¹⁹. A mediator or facilitator can assist parties to collaborate and continue with the negotiations and ultimately break the deadlock¹²⁰.

The foregoing techniques among others are vital in applying collaborative approaches towards conflict management.

¹¹³ Ibid

¹¹⁴ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict" ' Op Cit

¹¹⁴ Ibid

¹¹⁵ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹¹⁶ Verma. V. K., 'Conflict Management' Op Cit

¹¹⁷ May. E., 'Collaborating Conflict Style Explained In 4 Minutes' Op Cit

¹¹⁸ Ibid

¹¹⁹ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict" ' Op Cit

¹²⁰ Ibid

5.0 Conclusion

Collaborative techniques are a powerful approach to conflict management built on cooperation, open communication, and finding win-win outcomes¹²¹. They aim to preserve relationships, build trust, and promote long term positive change¹²². Some of the key collaborative approaches towards conflict management include negotiation, mediation, and facilitation¹²³. Collaborative approaches are ideal in managing conflicts since they build and maintain relationships, foster mutually acceptable and long lasting outcomes, and sets the tone for future conflict resolutions¹²⁴. However, these methods have been associated with certain challenges such as delays due to difficulties in building consensus and collaboration in conflict situations¹²⁵. However, these processes are ideal and need to effectively applied in managing conflicts. It is therefore necessary to embrace collaborative approaches such as mediation, negotiation, and facilitation¹²⁶; develop necessary skills such as active and empathetic listening¹²⁷; encourage parties to focus on interests and not positions in order to establish common ground for collaboration¹²⁸; build strong collaboration¹²⁹; and encourage parties to seek help from third parties such mediators and facilitators where collaborative approaches such as negotiation fail¹³⁰. It is vital

¹²¹ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Op Cit

¹²² Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Op Cit

¹²³ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict"' Op Cit

¹²⁴ Quain. S., 'The Advantages & Disadvantages of Collaborating Conflict Management' Op Cit

¹²⁵ Ibid

¹²⁶ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict"' Op Cit

¹²⁷ Weiss. J., & Hughes. J., 'Want Collaboration?: Accept—and Actively Manage—Conflict'

¹²⁸ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict"' Op Cit

¹²⁹ Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Op Cit

¹³⁰ Isenhardt. M.W., & Spangle. M., 'Summary of "Collaborative Approaches to Resolving Conflict"' Op Cit

¹³⁰ Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Op Cit

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to apply collaborative approaches in order to achieve effective and efficient management of conflicts.

Nurturing our Wetlands for Biodiversity Conservation

Abstract

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

1.0 Introduction

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

The United Nations Charter for Nature (1982) promotes an ecocentric approach to biodiversity protection, stating that "every form of life is unique, deserving of respect regardless of its value to man....In accordance with national legislation, all persons shall have the opportunity to participate, individually or in groups, in the formulation of decisions directly affecting their environment, and shall have access to measures of redress if their environment has been damaged or degraded."⁴ This paper adopts both ecocentric and anthropocentric reasons for nurturing our wetlands as a step

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

² *Ibid.*

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

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

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towards biodiversity conservation and this is justified by the notion that ‘where mutually beneficial relationships between biodiversity and ecosystem services exist (win-win), there will be much larger and more powerful sets of potential partners in conservation’.⁵

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

1.1 Wetlands, Biodiversity Conservation and Sustainable Development Agenda

Wetlands play an important role in hydrological and biogeochemical cycles because they provide a wide range of ecosystem goods and services to humans, including the ability to retain water during the dry season and keep the water table high and moderately stable, the ability to regulate a microclimate, and many ecosystem services that are critical to reducing community vulnerability to climate change and extreme weather events in particular.⁶ As a result, they serve a key ecological function that is essential for biological survival and human development.⁷ They also offer a wide range of leisure activities, including fishing, hunting, photography, and animal observation.⁸

The *Convention on Wetlands of International Importance especially as Waterfowl Habitat*⁹ (Ramsar Convention on Wetlands) acknowledges the fundamental

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

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

⁷ Ibid.

⁸ ‘Why Are Wetlands Important? - Wetlands (U.S. National Park Service)’ <<https://www.nps.gov/subjects/wetlands/why.htm>> accessed 30 December 2021.

⁹ United Nations, *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, Ramsar, Iran, 2.2.1971 as amended by the Protocol of 3.12.1982 and the Amendments of 28.5.1987.

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ecological functions of wetlands as regulators of water regimes and as habitats supporting a characteristic flora and fauna, especially waterfowl in its preamble.

Biodiversity is an important part of the efforts towards achieving Sustainable Development agenda as it is the source of all life and all raw materials required to meet human needs. Any efforts to secure human life for both the present and future generations must, therefore, include conservation of biodiversity as a matter of necessity. Conserving Biodiversity for a Better Future is thus an idea that we must deeply reflect on as a matter of urgency. Apart from the moral and legal grounds for respect for human rights in conservation efforts, it has been opined that practically, conservation will often be more effective if people's rights are respected and fulfilled: Local people who benefit from conservation and who are better able to meet their needs and achieve their development objectives are more likely to change any behaviour that may damage the environment through overexploitation; local and indigenous people often have knowledge, skills and organisational capacities that are useful and relevant in resource management; people are more likely to follow resource management agreements and rules if they have had input into these agreements. Participation in decision-making makes it more likely that the agreements will meet their needs and will reflect what is achievable.¹⁰ It is imperative that all stakeholders join hands in conservation of biodiversity. It is also important to point out that in addition to mitigation, biodiversity and ecosystem services play an important role in adapting to the impacts of climate change, and reducing the risk of climate-related and non-climate-related disasters.¹¹

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

¹⁰ BirdLife International, International B, 'An Introduction to Conservation and Human Rights for BirdLife Partners', 11.

¹¹ OECD (2019), *Biodiversity: Finance and the Economic and Business Case for Action*, report prepared for the G7 Environment Ministers' Meeting, 5-6 May 2019, 31.

2.0 Threats to Wetlands Conservation

Human development, urbanization, and poor management have all been blamed for the disappearance of wetlands.¹² Due to changes in land-use patterns, such as conversion of wetlands into farmlands, human settlements, urban centers, and infrastructure development, it is estimated that the area of wetlands has decreased by more than half since 1900.¹³

These are exacerbated by current challenges to biodiversity protection, such as habitat loss and degradation, climate change, chemical and biochemical pollution, logging and poaching, invasive species, illness, and the loss of plant pollinators, among others.¹⁴ That wetlands in Kenya also suffer from over-exploitation of their natural resources is one major threat. Others are encroachment, habitat degradation and biodiversity loss.¹⁵

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

¹² 'Wetland Conservation and Its Impact on Biodiversity' (Planet Forward) <<https://www.planetforward.org/idea/wetland-conservation-biodiversity>> accessed 28 December 2021.

¹³ Mwangi B, "Threats of Land Use Changes on Wetland and Water Areas of Murang'a County, Kenya." *Applied Ecology and Environmental Sciences*, vol. 9, no. 6 (2021): 585-590. doi: 10.12691/aees-9-6-2.

¹⁴ Ralf C Buckley, 'Grand Challenges in Conservation Research' (2015) 3 *Frontiers in Ecology and Evolution* 128 <<https://www.frontiersin.org/article/10.3389/fevo.2015.00128>> accessed 28 December 2021.

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

jeopardy, especially if the value of the resources is unknown or undervalued by the stakeholders.¹⁶

3.0 Looking into the Future: Nurturing Wetlands and Biodiversity Conservation

Wetlands are ecologically diverse and highly productive ecosystems that improve water quality, regulate erosion, sustain stream flows, store carbon, and offer habitat for at least one-third of all threatened and endangered species.¹⁷ Kenyan wetlands are believed to cover up to 4% of the entire landmass, approximately 14,000 km² of the land surface, with a peak of roughly 6% during the rainy season.¹⁸

The High Court correctly pointed out in *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR that access to information is a key pillar in our Constitution's environmental governance scheme because effective Public Participation in decision-making requires full, accurate, and up-to-date information.¹⁹ With enhanced literacy levels, it is possible to carry out civic education regarding various challenges that arise from given projects and also for communities to fully appreciate the merits and demerits of certain projects and environmental resources, including wetlands, and also appreciate the compromises that they need to make, if any.²⁰ There is a need for a more active and meaningful involvement of communities living around wetlands to help them appreciate the importance of wetlands to both their livelihoods and

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

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

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

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

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

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biodiversity conservation. It has been suggested that in order to enhance effective public participation, the duty bearers should do the following: ensuring that as duty bearers (leaders) they are accessible to and represent citizens; ensuring existence of forums and opportunities for citizens to participate and engage in matters affecting their lives; providing civic education; developing effective communication channels with citizens; providing timely information to citizens on critical and emerging issues; and providing resources to facilitate public participation.²¹

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

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

SDG Goal 1 seeks to ensure that State Parties end poverty in all its forms everywhere by the year 2030.²⁴ "More than one billion people in the globe live

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

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

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

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

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

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

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

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

²⁶ 'Poverty in Africa Is Now Falling—but Not Fast Enough' <<https://www.brookings.edu/blog/future-development/2019/03/28/poverty-in->

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alia, population growth, war and crises, climate change, illnesses, inadequate agricultural infrastructure, and unjust trade structures.²⁷ These need to be addressed as a step towards protecting wetlands as poverty arguably contributes to environmental degradation.²⁸

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

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

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

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

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rights; and the need for rights and obligations to be matched to appropriate and effective remedial measures.²⁹

One way of ensuring that all human activities foster biodiversity conservation is introducing pricing of biodiversity and actively assessing biodiversity's contribution to economic growth. However, it has been pointed out that while establishing the value of biodiversity to economies is important, as it may partly help policymakers in all countries to appreciate that there is a cost to losing nature, at the same time, an economic assessment must take into account the perspectives of the humanities, of developing countries and of members of indigenous communities.³⁰ Notably, undervaluing the economic and societal values of biodiversity is believed to pose a threat to biodiversity and investment in conservation, and while the value of conventional natural resources such as forestry, fisheries, and wildlife is well appreciated the wider ecological services that biodiversity provides which include water catchments, a natural cleansing of the air, water and soils we pollute, carbon sequestration and, in developing economies such as Kenya, the biomass energy that fuels the lives of most Kenyans in the form of wood and charcoal, are seldom valued.³¹

The government should continue to establish effective systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA), Environmental Audit and Monitoring, and Environmental Security Assessment (ESA), and ensure that they are reviewed on a regular basis to ensure that they remain effective. Without extensive environmental evaluation processes, development initiatives targeting wetland areas should be avoided. There is a need to ensure

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

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

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

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that these EIA processes are not only formal but also reflective of what is happening on the ground, and that there is a follow-up mechanism in place to ensure that companies engage with communities throughout and continue to carry out their obligations in accordance with the law and assessment reports.³²

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

On a global level, the inclusion of BIA in EIA activities is also supported by Article 14 of the Convention on Biological Diversity, which states that each Contracting Party shall: (a) Introduce appropriate procedures requiring

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

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

³⁴ *Ibid*, 3.

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environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures; (b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account; (c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate; (d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; and (e) Promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans.³⁵ The Conference of the Parties is to examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.³⁶

It is, therefore, worth pointing out that Article 14 does not impose a direct obligation that is enforceable by other states to conduct EIAs before undertaking activities that pose risks to biological diversity.³⁷ This is also

³⁵ Article 14(1), Convention on biological Diversity; see also generally, Craik N, 'Biodiversity-Inclusive Impact Assessment', *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing Limited 2017).

³⁶ Convention on biological Diversity, Article 14 (2).

³⁷ Craik N, 'Biodiversity-Inclusive Impact Assessment', *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing Limited 2017), 2.

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captured in *COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* which 'emphasizes that the voluntary guidelines on biodiversity-inclusive environmental impact assessment are intended to serve as guidance for Parties and other Governments, subject to their national legislation, and for regional authorities or international agencies, as appropriate, in the development and implementation of their impact assessment instruments and procedures'.³⁸

It has been acknowledged that natural habitat loss and fragmentation, as a result of development projects, are major causes of biodiversity erosion, and while Environmental impact assessment (EIA) is the most commonly used site-specific planning tool that takes into account the effects of development projects on biodiversity by integrating potential impacts into the mitigation hierarchy of avoidance, reduction, and offset measures, the extent to which EIA fully address the identification of impacts and conservation stakes associated with biodiversity loss has been criticized as inadequate.³⁹

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

³⁸ Unit B, 'Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment' <<https://www.cbd.int/decision/cop/?id=11042>> accessed 10 September 2021.

³⁹ Bigard C, Pioch S and Thompson JD, 'The Inclusion of Biodiversity in Environmental Impact Assessment: Policy-Related Progress Limited by Gaps and Semantic Confusion' (2017) 200 *Journal of environmental management* 35, 35.

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Executive Secretary on voluntary guidelines on biodiversity-inclusive impact assessment.⁴⁰

The *Voluntary Guidelines On Biodiversity-Inclusive Environmental Impact Assessment* identifies some biodiversity issues at different stages of environmental impact assessment.⁴¹ The guidelines identify different stages in this process: *Screening*- used to determine which proposals should be subject to EIA, to exclude those unlikely to have harmful environmental impacts and to indicate the level of assessment required. Screening criteria have to include biodiversity measures, or else there is a risk that proposals with potentially significant impacts on biodiversity will be screened out; *Scoping*: used to define the focus of the impact assessment study and to identify key issues, which should be studied in more detail. It is used to derive terms of reference (sometimes referred to as guidelines) for the EIA study and to set out the proposed approach and methodology. Scoping also enables the competent authority (or EIA professionals in countries where scoping is voluntary) to: (a) Guide study teams on significant issues and alternatives to be assessed, clarify how they should be examined (methods of prediction and analysis, depth of analysis), and according to which guidelines and criteria; (b) Provide an opportunity for stakeholders to have their interests taken into account in the EIA; and (c) Ensure that the resulting Environmental Impact Statement is useful to the decision maker and is understandable to the public⁴²; *Assessment and evaluation of impacts, and development of alternatives*; *Reporting: the environmental impact statement (EIS)*; *Review of the environmental impact statement*; *Decision-making*; and, *Monitoring, compliance, enforcement and environmental auditing*.⁴³

COP 8 Decision suggests that, taking into account the three objectives of the Convention, fundamental questions which need to be answered in an EIA study include: (a) *Would the intended activity affect the biophysical environment*

⁴⁰ Unit B, 'Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment' <<https://www.cbd.int/decision/cop/?id=11042>> accessed 10 September 2021.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

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directly or indirectly in such a manner or cause such biological changes that it will increase risks of extinction of genotypes, cultivars, varieties, populations of species, or the chance of loss of habitats or ecosystems? (b) Would the intended activity surpass the maximum sustainable yield, the carrying capacity of a habitat/ecosystem or the maximum allowable disturbance level of a resource, population, or ecosystem, taking into account the full spectrum of values of that resource, population or ecosystem? And, (c) Would the intended activity result in changes to the access to, and/or rights over biological resources?⁴⁴

It may be important for stakeholders in environmental law in Kenya to review the requirements and process of EIA in biodiversity rich areas to include BIA as envisaged under Article 69(1) of the Constitution of Kenya. Notably, effective impact assessments and management plans largely rely on a solid foundation of: a) Information on biodiversity (e.g., taxonomic descriptions of species, conservation status assessments of species, conservation status assessments of ecosystems, distribution maps of species and habitats at a scale that is appropriate for project planning, understanding of sensitivity to stressors); b) Understanding of direct, indirect, and where feasible, cumulative impacts (i.e., placing the project in the context of land/resource use trends to ascertain how it contributes to landscape-scale impacts); c) Identification of priorities for biodiversity conservation (e.g., existing and planned protected areas, National Biodiversity Strategies and Action Plans); and d) Demonstrated methods to manage impacts.⁴⁵

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

⁴⁴ Ibid.

⁴⁵ Hardner, J., Gullison, R.E., Anstee, S. and Meyer, M., 'Good Practices for Biodiversity Inclusive Impact Assessment and Management Planning' [2015] Prepared for the Multilateral Financing Institutions Biodiversity Working Group, 4.

⁴⁶ Ibid, 7.

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stakeholders may have a greater appreciation than external technical experts of the biodiversity values in the area and their sensitivity to impacts.⁴⁷

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

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

It has rightly been pointed out that, ironically, indigenous and traditional communities – the very groups which have contributed least to the imminent threats of catastrophic anthropogenic climate change and biodiversity collapse, and whose practices are actually based on a sustainable bio-cultural paradigm – constitute most of those who are at greatest risk.⁵⁰ This is partly attributable to existing social and economic marginalization: globally the indigenous population, estimated at around 370 million, comprises 5 per cent

⁴⁷ Ibid, 6.

⁴⁸ OECD (2019), *Biodiversity: Finance and the Economic and Business Case for Action*, report prepared for the G7 Environment Ministers' Meeting, 5-6 May 2019, 35.

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

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

of the world's population but 15 per cent of its poorest people, where climate change, colonialism and economic globalization have also left a legacy of other issues, such as environmental damage, land loss and lack of access to basic services, that have not only resulted in ill health and lower life expectancy but also devastated their complex cultural systems.⁵¹

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

4.0 Conclusion

Wetlands provide a variety of key ecosystem services, such as fresh water, nutrient cycling, food and fiber production, carbon fixation and storage, flood control and water storage, water treatment and purification, and biodiversity habitats, as mentioned in this paper.⁵² It has rightly been pointed out that the world's biodiversity is dwindling, and it is becoming clear that freshwater habitats are deteriorating at a quicker rate than terrestrial and marine ecosystems.⁵³

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

⁵¹ Ibid, 49.

⁵² Richard T Kingsford, Alberto Basset and Leland Jackson, 'Wetlands: Conservation's Poor Cousins' (2016) 26 *Aquatic Conservation: Marine and Freshwater Ecosystems* 892, 892 <<https://onlinelibrary.wiley.com/doi/abs/10.1002/aqc.2709>> accessed 28 December 2021.

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

⁵⁴ Ibid, 5.

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Urgent measures that involve all stakeholders meaningfully need to be taken towards nurturing wetlands as a step towards conservation of biodiversity resources.

Nurturing our Wetlands for Biodiversity Conservation is clearly the way to go.

Promoting Human Rights Impact Assessment in Environmental Governance for Sustainable Development

Promoting Human Rights Impact Assessment in Environmental Governance for Sustainable Development

Abstract

The paper critically discusses the place of human rights in environmental governance. It gives an overview of the concept of environmental governance and examines various approaches adopted towards achieving it. The paper argues that human rights are integral in sound environmental governance towards Sustainable Development. It explores the concept of Human Rights Impact Assessment (HRIA) as a tool of environmental governance in Kenya. The paper highlights some of the challenges facing HRIA in Kenya and proposes interventions towards integrating the place of human rights in environmental governance in Kenya for purposes of fostering Sustainable Development.

1.0 Introduction

Environmental governance refers to the laws, customs, guidelines, and institutions that influence how people interact with the environment¹. It has also been defined as a set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes². It entails the institutions, structures and processes involved in environmental decision making³. The goal of environmental governance is to achieve sound, effective, equitable and responsive management of the environment for Sustainable Development⁴.

The Constitution of Kenya recognizes the importance of the environment as the heritage of the Kenyan people and sets out mechanisms to sustain it for the

¹ Environment UN, 'Why Does Environmental Rights and Governance Matter?' (UNEP - UN Environment Programme, 4 September 2017) <http://www.unep.org/explore-topics/environmental-governance/why-doesenvironmental-governance-matter> (Accessed on 20/06/2023)

² Lemos. C & Agrawal. A., 'Environmental Governance.' *Ann. Rev. Environ. Resourc.* 31 (2006): 297-325

³ Bennett. N., 'Environmental Governance: A Practical Framework to guide Design, Evaluation, and Analysis.' *Society for Conservation Biology Journal*, 2018

⁴ Ibid

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benefit of future generations⁵. It further captures Sustainable Development as one of the national values and principles of governance⁶. In addition, the Constitution sets out the right to a clean and healthy environment and stipulates certain obligations in respect of the environment aimed at protecting and conserving the environment in order to foster Sustainable Development⁷. Environmental governance is thus a fundamental concern in Kenya.

Various approaches have been adopted towards fostering environmental governance for purposes of Sustainable Development. An anthropocentric approach to environmental governance focuses on themes such as poverty eradication, food security, environmental democracy, environmental justice, environmental security, public participation, gender equity, access to information and conflict management among others⁸. It takes a human centered approach towards environmental governance⁹. An ecocentric approach dwells on themes such as combating climate change, impact of resource extraction, environmental health and environmental conservation¹⁰. This approach takes an ecological dimension towards environmental governance¹¹.

This paper critically discusses the place of human rights in environmental governance. The paper argues that human rights are integral in sound environmental governance towards Sustainable Development. It explores the concept of Human Rights Impact Assessment (HRIA) as a tool of environmental governance in Kenya. The paper highlights some of the challenges facing HRIA in Kenya and proposes interventions towards

⁵ Constitution of Kenya 2010, Preamble, Government Printer, Nairobi

⁶ Ibid, Article 10 (2) (d)

⁷ Ibid, Articles 42 & 69

⁸ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

⁹ Kopnina. H., 'Anthropocentrism: More than Just a Misunderstood Problem.' *Journal of Agricultural and Environmental Ethics*, No. 31, 2018

¹⁰ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

¹¹ Kopnina. H., 'Anthropocentrism: More than Just a Misunderstood Problem.' Op Cit

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integrating the place of human rights in environmental governance in Kenya for purposes of fostering Sustainable Development.

2.0 The Nexus between Human Rights and Environmental Governance

Human rights have been defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination¹². They are inherent to every human being by the virtue of existence and are not granted by any state¹³. Every person is thus entitled to human rights without discrimination based on grounds such as sex, religion, nationality, race, ethnicity, colour, religion among others. The place of human rights across the globe received widespread attention following the adoption of the *Universal Declaration of Human Rights*¹⁴ (UDHR) by the General Assembly of the United Nations on 10th December, 1948. The UDHR stipulates fundamental human rights to be universally protection and common standards for achievement of these rights for all people in all nations. According to the UDHR 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 world¹⁵.

Since adoption of the UDHR the concept of human rights has become increasingly important both in academic debate and in political decision-making¹⁶. Human rights continue to shape the political, economic, social, environmental and legal agendas across the globe¹⁷. Human rights occupy a central place in environmental governance. Indeed, it has been argued that

¹² The Office of the High Commissioner for Human Rights., 'What are Human Rights.' Available at <https://www.ohchr.org/en/what-are-human-rights> (Accessed on 19/06/2023)

¹³ Ibid

¹⁴ Universal Declaration of Human Rights., Available at <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> (Accessed on 19/06/2023)

¹⁵ Ibid

¹⁶ Hannam. M., 'On Human Rights.' Available at <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=4f2fdd2bf949c6521b433897da4e1f169eba9e90> (Accessed on 19/06/2023)

¹⁷ Ibid

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environmental governance should be treated as a human rights issue since a human rights perspective to the environment directly addresses environmental impacts on the life, health and property of human beings thereby securing higher standards of environmental quality based on the obligation of the state to control environmental concerns such as pollution which affect human life and health¹⁸.

The relationship between human rights and the environment can be considered from three perspectives¹⁹. On the first part, the environment can be considered as the precondition to the enjoyment of human rights such as the right to food, the right to clean and safe water in adequate quantities, the right to reasonable standards of sanitation, the right to housing among others²⁰. In Kenya, the Constitution specifically enshrines the human right to a clean and healthy environment²¹. This demonstrates the special relationship between human rights and the environment in Kenya. The second perspective views human rights as tools to promote environmental governance both procedurally and substantively²². Consequently, Environmental governance can be achieved through promoting human rights such as the right to food, right to health, the right to a clean and healthy environment, the right to clean water and sanitation, the right to clean and affordable energy among others²³. Finally, human rights can also be integrated with the environment under the concept of Sustainable Development²⁴. Sustainable Development has been defined as the development which meets the needs of the present generations without compromising the ability of future generations to meet their own needs²⁵. It combines elements such as environmental protection, economic

¹⁸ Boyle. A., 'Human Rights and the Environment: Where Next' *The European Journal of International Law* Vol. 23 no. 3

¹⁹ Ibid

²⁰ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

²¹ Constitution of Kenya 2010., Article 42

²² Boyle. A., 'Human Rights and the Environment: Where Next' Op Cit

²³ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

²⁴ Ibid

²⁵ Report of the World Commission on Environment and Development., '*Our Common Future*' 1987 (Brundtland Report)

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development and social concerns²⁶. Human rights are integral in the Sustainable Development agenda. Indeed, it has been observed that human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature²⁷. Further, the *United Nations 2030 Agenda for Sustainable Development* recognizes realization of human rights as crucial in the attainment of Sustainable Development²⁸. The Sustainable Development goals seek to realize the United Nations vision on Sustainable Development by achieving several human rights across the globe such as the right to food, the right to good health and well-being, the right to quality education, the right to clean water and sanitation, the right to affordable and clean energy among others²⁹. In Kenya, Sustainable Development has been captured as one of the national values and principles of governance that is supposed to influence all decision making including decisions on human rights and environmental governance³⁰. Human rights thus occupy a very important place in environmental governance.

3.0 Conceptualizing Human Rights Impact Assessment

The human rights framework draws attention to the importance of addressing environment and development policies, measured by overall human rights objectives, including through assessing possible effects of such policies and measures on human rights³¹. In the context of environmental governance,

²⁶ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1.

²⁷ Report of the United Nations Conference on Environment and Development., 'Rio Declaration on Environment and Development.' A/CONF.151/26 (Vol. I)

²⁸ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at

<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 19/06/2023)

²⁹ United Nations Development Programme., 'Sustainable Development Goals.' Available at

https://www.undp.org/sustainable-development-goals?gclid=CjwKCAjw-b-kBhB-EiwA4fvKrPUgLSjuH3S1nlqYCF4fkaIXWQ5yubzINfX2A9seUbRGisgHsS7OBhOC0IYQAvD_BwE (Accessed on 19/06/2023)

³⁰ Constitution of Kenya, 2010., Article 10 (2) (d)

³¹ United Nations Environment Programme., 'Factsheet on Human Rights and the Environment.' Available at

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Human Rights Impact Assessment (HRIA) is a framework for examining policies, legislation, programs and projects to identify and measure their effects on human rights³². HRIA has emerged as a promising tool for protecting human rights and achieving Sustainable Development³³.

HRIA has developed out of the concerns raised by Environmental Impact Assessment (EIA) which has been the major tool of integrating environmental and social concerns in decision making processes³⁴. Environmental impact assessment is the process of identifying potential environmental effects of proposed development and the required mitigation measures³⁵. EIA has also been defined as a procedure for evaluating the likely impact of a proposed activity on the environment³⁶. Its object is to provide decision makers with information about the possible effects of a project before authorizing it to proceed³⁷. It is also aimed at identifying, predicting, evaluating and mitigating the biophysical, social and other relevant environmental effects of development proposals prior to major decisions being taken and commitments being made³⁸. Despite its important role in environmental governance, the EIA framework in most countries has often been faced with challenges such as lack

<https://wedocs.unep.org/bitstream/handle/20.500.11822/9933/factsheet-human-rights-environment.pdf?sequence=1&isAllowed> (Accessed on 19/06/2023)

³² The World Bank., 'Human Rights Impact Assessment: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development.' Available at <https://documents1.worldbank.org/curated/en/834611524474505865/pdf/125557-WP-PUBLIC-HRIA-Web.pdf> (Accessed on 19/06/2023)

³³ CIEL., 'EIAs In Practice: Potential Lessons for Human Rights Impact Assessment.' Available at https://www.ciel.org/Publications/EIA_Brief_Jun10.pdf (Accessed on 19/06/2023)

³⁴ Ibid

³⁵ Mandelik. Y et al., 'Planning for Biodiversity: the Role of Ecological Impact Assessment' available at https://www.researchgate.net/publication/227495149_Planning_for_Biodiversity_the_Role_of_Ecological_Impact_Assessment (Accessed on 19/06/2023)

³⁶ Muigua. K., 'Environmental Impact Assessment (EIA) in Kenya' available at <http://kmco.co.ke/wpcontent/uploads/2018/08/A-Paper-on-Environmental-impact-assessment.pdf> (Accessed on 19/06/2023)

³⁷ Ibid

³⁸ Ibid

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of effective public participation, failure to enhance access to information and failure to implement mitigation measures which could potentially affect human rights such as the right to a clean and healthy environment, right to health and the right to water³⁹. The concept of HRIA has emerged out of these concerns in order to entrench the place of human rights in environmental decision making⁴⁰.

HRIA requires projects and policies to be evaluated to the extent to which they comply with human rights both in substance and process⁴¹. It focuses on the impacts of such policies and projects on the fulfillment and progressive realization of international human rights standards⁴². HRIA aims at preventing negative effects and maximizing positive effects of projects, programmes and policies on the attainment of fundamental human rights and freedoms⁴³. It encapsulates certain key elements including public participation, equality and non-discrimination, transparency and access to information and accountability in decision making which have a bearing on the achievement of human rights⁴⁴. The concept is thus an important tool for protecting human rights and promoting Sustainable Development.

4.0 Human Rights Impact Assessment in Kenya: Opportunities and Challenges

The Constitution of Kenya enshrines human rights as among the national values and principles that is supposed to guide decision making by all persons in matters including environmental governance⁴⁵. The Constitution further requires the state to encourage public participation in the management,

³⁹ CIEL., 'EIAs In Practice: Potential Lessons for Human Rights Impact Assessment.' Op Cit

⁴⁰ Ibid

⁴¹ The World Bank., 'Human Rights Impact Assessment: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development.' Op Cit

⁴² Maassarani. T et al., 'Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment.' *Cornell International Law Journal* Vol. 40

⁴³ The World Bank., 'Human Rights Impact Assessment: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development.' Op Cit

⁴⁴ Ibid

⁴⁵ Constitution of Kenya, 2010., Article 10 (2) (b)

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protection and conservation of the environment⁴⁶. Public participation is among the key elements of HRIA⁴⁷. The Constitution also requires the state to establish systems of environmental impact assessment, environmental audit and monitoring of the environment which systems are required to consider human rights⁴⁸. The concept of HRIA in Kenya is thus anchored in the Constitution.

The *Environmental Management and Co-ordination Act*⁴⁹ sets out the requirement for EIA in Kenya. Under the Act, all policies, plans and programmes in respect of the environment shall be subject to EIA⁵⁰. The Act requires a project proponent to submit an EIA study report for evaluation and report before an EIA licence is issued allowing the project to commence on such terms and conditions as may be appropriate and necessary to facilitate Sustainable Development and sound environmental management⁵¹. The process of EIA in Kenya is stipulated under the *Environmental (Impact Assessment and Audit) Regulations*⁵². The regulations envisage human rights considerations in the EIA process. Under the regulations a project report should state a plan to ensure the health and safety of the workers and neighbouring communities and the economic and socio-cultural impacts to the local community and the nation in general among other factors⁵³. These considerations involve a human rights approach. The regulations further set out the need for public participation in the EIA process which is a key concern in HRIA⁵⁴. The need for HRIA is thus firmly set out under the EIA process in Kenya.

⁴⁶ Ibid, Article 69 (1) (d)

⁴⁷ The World Bank., 'Human Rights Impact Assessment: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development.' Op Cit

⁴⁸ Constitution of Kenya, 2010., Article 69 (1) (f)

⁴⁹ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya

⁵⁰ Ibid, S 57 A (1)

⁵¹ Ibid, S 63

⁵² The Environmental (Impact Assessment and Audit) Regulations, 2003., Legal Notice No. 101

⁵³ Ibid, Regulation 7 (1) (h) & (i)

⁵⁴ Ibid, Regulation 17

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HRIA has the potential to be a sound tool for environmental management by striking a balance between anthropocentric and ecocentric approaches towards environmental governance⁵⁵. It can ensure attainment of human rights while simultaneously promoting sound management of the environment⁵⁶. However, despite its efficaciousness, several factors have hindered effective implementation of HRIA in Kenya. The process requires implementation of the concept of Free, Prior and Informed Consent (FPIC) in order to ensure that people are adequately informed about projects in a timely manner and given the opportunity to approve (or reject) a project before operations begin⁵⁷. However, concerns have always emerged during implementation of development projects in Kenya about how FPIC considerations such as public participation should be embraced⁵⁸. Consequently, some of these projects have been stopped through cancellation of EIA licences for failure to adhere to the requirements of public participation. Further, human rights violations have been well documented in environmental projects such as mining and resource extraction by multinational corporations⁵⁹. Multinational corporations operating in most developing countries have been accused of gross human rights violations, such as killings and land injustices⁶⁰. These challenges demonstrate that more

⁵⁵ Kemp. D & Vanclay. F., 'Human Rights and Impact Assessment: Clarifying the Connections in Practice.' *Impact Assessment and Project Appraisal*, 31:2, 86-96

⁵⁶ Ibid

⁵⁷ Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2019/03/Maximising-the-Right-to-FPIC-in-Kenya-Kariuki-Muigua-29th-March-2019.pdf> (Accessed on 21/06/2023)

⁵⁸ Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf> (Accessed on 21/06/2023)

⁵⁹ Muigua. K., 'Multinational Corporations, Investment and Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/11/Multinational-Corporations-Investment-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-November-2018.pdf>

⁶⁰ Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' *Share the*

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still needs to be done in order to fully embrace the place of human rights in environmental governance. Promoting HRIA is thus essential in order to foster Sustainable Development.

5.0 Way Forward

Promoting human rights in environmental governance is essential towards fostering Sustainable Development. It has been observed that human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature⁶¹. HRIA is an important tool in promoting the place of human rights in environmental governance.

In order to fully promote HRIA, the state and non-state entities such as multinational corporations have an obligation to respect, protect and fulfill human rights at all times in their policies, programmes and projects⁶². Thus in addition to environmental concerns, the state and non-state entities should ensure that policies, projects and programmes adhere to human rights standards as envisaged in instruments such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights⁶³. This approach will entrench the place of human rights in environmental governance.

Further, there is need for a more systematic and integrated approach towards the EIA process in order to fully capture the concept of HRIA⁶⁴. Both processes

World Resources, 3rd October 2006, available at <http://www.stwr.org/multinationalcorporations/multinational-corporations-mnccs-beyond-the-profit-motive.html#legalrights> (accessed on 21/06/2023)

⁶¹ Report of the United Nations Conference on Environment and Development., 'Rio Declaration on Environment and Development.' Op Cit

⁶² Office of the High Commissioner on Human Rights., 'Guiding Principles on Human Rights Impact Assessment of Economic Reforms.' Available at https://www.ohchr.org/sites/default/files/GuidePrinciples_EN.pdf (Accessed on 21/06/2023)

⁶³ Ibid

⁶⁴ Gotzmann. N et al., 'Social and Human Rights Impact Assessments: What Can They Learn From Each Other?' *Impact Assessment and Project Appraisal*, Volume 34, 2016

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have similarities in terms of their objective to identify and address adverse impacts; their focus on process as well as outcomes; and their consideration of how to ensure the meaningful inclusion of vulnerable individuals and groups⁶⁵. The EIA process in Kenya puts into account human right considerations⁶⁶. The two processes can be integrated or conducted alongside each other in order to ensure sound environmental governance. In addition, there is need to put in place a governing legal framework in order to ensure effective implementation of HRIA in Kenya.

The place of human rights in environmental governance can also be realized by maximizing the right to Free, Prior, and Informed Consent (FPIC) in Kenya⁶⁷. It has been argued that the right to FPIC is a fundamental right of self-determination that ensures participation by indigenous communities in development projects in order to ensure that they are conducted in a sustainable manner taking into account their economic, social and cultural impacts⁶⁸. FPIC can thus guarantee human rights such as the right to participation and economic rights whilst promoting environmental protection and conservation⁶⁹. There is need to realize FPIC requirements such as public participation and access to information in order to fully enhance the role of HRIA as a tool of environmental governance in Kenya⁷⁰.

Finally, there is need to foster Sustainable Development in order to enhance the role of human rights in environmental governance. Sustainable Development combines elements such as environmental protection, economic

⁶⁵ Ibid

⁶⁶ The Environmental (Impact Assessment and Audit) Regulations, 2003., Op Cit, Regulation 7 (1) (h) & (i)

⁶⁷ Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Op Cit

⁶⁸ Owen, J.R. and Kemp, D., "Free Prior and Informed Consent', Social Complexity and the Mining Industry: Establishing A Knowledge Base," *Resources Policy*, Vol.41 (2014): 91-100

⁶⁹ Ibid

⁷⁰ Muigua. K., 'Maximising the Right to Free, Prior, and Informed Consent for Enhanced Environmental Justice in Kenya.' Op Cit

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development and social concerns⁷¹. Human rights are central to the Sustainable Development agenda. Indeed, the Sustainable Development Goals envisage attainment of the ideal of Sustainable Development by promoting human rights such as the right to food, the right to good health and wellbeing, the right to quality education, the right to clean water and sanitation, the right to affordable and clean energy among others⁷². Sustainable Development has the ability to strike a balance between anthropocentric and ecocentric approaches towards environmental governance by promoting human rights and ensuring sound environmental management⁷³. Fostering Sustainable Development is thus critical in promoting HRIA in environmental governance.

6.0 Conclusion

Human rights play an important role in promoting sound environmental governance towards Sustainable Development⁷⁴. However, human rights have often been neglected or abused by entities such as the state and multinational corporations in development programmes, projects and policies⁷⁵. This hinders attainment of human rights and the Sustainable Development agenda⁷⁶. HRIA is a concept that has the ability to strike a balance between anthropocentric and ecocentric approaches towards environmental governance by promoting human rights while simultaneously ensuring sound environmental management⁷⁷. There is need to fully embrace and promote HRIA in order to fast-track the journey towards Sustainable Development in Kenya.

⁷¹ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' Op Cit

⁷² United Nations Development Programme., 'Sustainable Development Goals.' Op Cit

⁷³ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁷⁴ Ibid

⁷⁵ Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' Op Cit

⁷⁶ Ibid

⁷⁷ Kemp. D & Vanclay. F., 'Human Rights and Impact Assessment: Clarifying the Connections in Practice.' Op Cit

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Abstract

This paper discusses the Environmental, Social and Governance (ESG) aspects of sustainable development agenda and how the same affect sustainability. The paper looks at the best practices as far as these tenets are concerned. The author argues that unless countries and stakeholders ensure that there is convergence of efforts in pursuit of environmental, social and governance aspects of sustainability, then the struggle for achievement of the 2030 Agenda for Sustainable Development will remain a mirage.

1.0 Introduction

The Sustainable Development Goals (SDGs) adopted by the United Nations (UN) in 2015 are widely hailed as a huge success: they represent a global agreement on a comprehensive strategy to address the social and environmental issues that are affecting people all over the world.¹ Instead of relying on nature for survival, as we have done for ages, sustainable development offers a framework for people to coexist with and thrive in harmony with the natural world.²

The main principles of sustainable development agenda as captured in the *2030 Agenda for Sustainable Development*³ include the economic, social and environmental sustainability. These are encapsulated in the 17 Sustainable Development Goals and 169 targets, which are meant to lay out a plan of action for people, planet, and prosperity that will strengthen universal peace in larger freedom. They also identify eradicating poverty in all of its manifestations, including extreme poverty, as the greatest global challenge and a crucial

¹ Higgs, Kerryn. "How sustainable are the SDGs?" (2020): 109-130, 109 <<https://anzsee.org.au/wp-content/uploads/2020/07/EESolutionsFutureRoyalDraftJuly2ndFINALEbook.pdf#page=109>> accessed 13 July 2022.

² Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." *Sustainability* 3, no. 3 (2011): 531-540, 531.

³ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

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prerequisite for sustainable development.⁴ The Sustainable Development Goals (SDGs) also envisage a world in which democracy, good governance and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.⁵ The term "governance" is used to describe "steering" in this context, which includes both processes and institutions and involves an element of authority. Process relates to how decisions are made on priorities, how conflicts are addressed and maybe handled, and how coordination of people's actions with regard to resource usage is made easier. On the other hand, the structural aspect relates to how these procedures are set up and 'managed'.⁶

It has been observed that COVID-19 has tremendously disrupted the world's economy where the pandemic left the world's informal employees, especially young workers and women, on their own with no support or protection against financial and health issues. This was as a result of massive job losses, enlarged market gender gap, informal workers' lack of social safety, and decreased work and education opportunities for youth.⁷

Despite having adopted the SDGs into its domestic laws and planning, Kenya still faces the risk of widespread poverty, natural resources and biodiversity degradation, lack of access to safe water for all, escalating climate change, desertification, land degradation, soil erosion, flooding and drought; and increased natural disaster risks.⁸ This paper argues that these challenges

⁴ 'Transforming Our World: The 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs' <<https://sdgs.un.org/2030agenda>> accessed 13 July 2022.

⁵ Ibid.

⁶ Vatn, Arild, *Environmental governance: institutions, policies and actions*, Edward Elgar Publishing, 2015, p. 133.

⁷ Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social Responsibility (CSR)' (2022) 14 Sustainability 1222, 8 <<https://www.mdpi.com/2071-1050/14/3/1222>> accessed 13 July 2022.

⁸ National Environment Management Authority, *Kenya State of Environment Report 2019-2021* <https://www.nema.go.ke/images/Docs/EIA_1840-384>

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cannot and should not be addressed in a disjointed manner, if any real progress is to be made.

This paper seeks to analyze the aspects of governance as well as how they interact with the environmental and social tenets of sustainable development with the aim of ensuring that the SDGs are achieved, especially post the COVID-19 pandemic. Arguably, sustainable development as a process of transformation of the economy must, in consequence, also result in a transformation of society and its governance structures for a sustainable future.⁹ All this must also be accomplished in a way that takes into account environmental sustainability.

The paper discusses the Environmental, Social, and Governance (ESG) approach to sustainability and how different players, including governments, communities and businesses can participate in promoting and achieving sustainability through ESG approach.

2.0 Environmental Aspect of Sustainable Development Agenda

The world leaders who signed the 2030 Agenda stated in the preamble that they are "Determined to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources, and taking urgent action on climate change, so that it can support the needs of the present and future generations."¹⁰ A number of SDGs are dependent on the health of the environment for their realisation. These include but are noted limited to: Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 6 seeks to ensure availability and sustainable management of water and

1849/Kenya%20State%20of%20Environment%20Report%202019-2021%20final-min.pdf accessed 17 July 2022.

⁹ Ketschau, T.J., "Social sustainable development or sustainable social development- two sides of the same coin? the structure of social justice as a normative basis for the social dimension of sustainability." *International Journal of Design & Nature and Ecodynamics* 12, no. 3 (2017): 338-347, 338.

¹⁰ Environment UN, 'Sustainable Development Goals' (*UNEP - UN Environment Programme*, 19 October 2017) <<http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals>> accessed 17 July 2022.

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sanitation for all; Goal 12 seeks to ensure sustainable consumption and production patterns; Goal 13 urges State parties to take urgent action to combat climate change and its impacts; Goal 14 calls for conservation and sustainable use of the oceans, seas and marine resources for sustainable development; and Goal 15 urges State parties to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.¹¹

In order to achieve environmental sustainability, natural resources management and disaster risk management, there is also a need for improved management of natural resources and biodiversity; access to safe water for all; climate change; desertification, land degradation, soil erosion, flooding and drought; and natural disaster risk reduction and management.¹² It is thus arguable that unless the environmental problems facing the planet are addressed, the other SDGs will remain a mirage.

3.0 Economic Aspect of Sustainable Development Agenda

The SDGs envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all.¹³ The economic aspect is to be achieved through ensuring that every State has, and shall freely exercise, full permanent sovereignty over all its wealth, natural resources and economic activity.¹⁴

¹¹ 'List of the 17 Sustainable Development Goals | Agora' <<https://agora-parl.org/resources/aoe/list-17-sustainable-development-goals>> accessed 17 July 2022.

¹² Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," *SDplanNet Africa Regional Workshop, March 3-5, 2014*, 3.

¹³ 'Transforming Our World: The 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs' <<https://sdgs.un.org/2030agenda>> accessed 13 July 2022.

¹⁴ *Ibid.*

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SDG 8 seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.¹⁵ Some of the related relevant targets include: Sustain per capita economic growth in accordance with national circumstances and, in particular, at least 7 per cent gross domestic product growth per annum in the least developed countries;¹⁶ achieve higher levels of economic productivity through diversification, technological upgrading and innovation, including through a focus on high-value added and labour-intensive sectors;¹⁷ promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro, small- and medium-sized enterprises, including through access to financial services;¹⁸ improve progressively, through 2030, global resource efficiency in consumption and production and endeavour to decouple economic growth from environmental degradation, in accordance with the 10-year framework of programmes on sustainable consumption and production, with developed countries taking the lead;¹⁹ by 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value;²⁰ by 2020, substantially reduce the proportion of youth not in employment, education or training;²¹ take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms;²² protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment;²³ by 2030,

¹⁵ SDG 8, UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

¹⁶ Target 8.1.

¹⁷ Target 8.2.

¹⁸ Target 8.3.

¹⁹ Target 8.4.

²⁰ Target 8.5.

²¹ Target 8.6.

²² Target 8.7.

²³ Target 8.8.

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devise and implement policies to promote sustainable tourism that creates jobs and promotes local culture and products;²⁴ strengthen the capacity of domestic financial institutions to encourage and expand access to banking, insurance and financial services for all;²⁵ increase Aid for Trade support for developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries;²⁶ and by 2020, develop and operationalize a global strategy for youth employment and implement the Global Jobs Pact of the International Labour Organization.²⁷

The underlying affirmation of these targets are that “economic, social, and technological progress” must occur “in harmony with nature,” envisaging “a world in which ... consumption and production patterns and use of all natural resources – from air to land, from rivers, lakes and aquifers to oceans and seas – are sustainable ... One in which humanity lives in harmony with nature and in which wildlife and other living species are protected,” but the SDGs fail to offer any quantified target for resource efficiency, and do not specify what a sustainable level of material footprint might be.²⁸

It has been noted that in the economic debate, sustainable development is most frequently defined as the requirement to maintain a continuous flow of income for humanity, produced from non-declining capital stocks. In this perception, at least, steady stocks of human, man-made, natural, and social capital are seen as necessary and frequently sufficient criteria for sustainable development.²⁹ Economic sustainability has been defined as the meeting the economic needs

²⁴ Target 8.9.

²⁵ Target 8.10.

²⁶ Target 8.A.

²⁷ Target 8.B.

²⁸ Hickel, J., "The contradiction of the sustainable development goals: Growth versus ecology on a finite planet." *Sustainable Development* 27, no. 5 (2019): 873-884, at 874 & 875.

²⁹ Joachim H Spangenberg, 'Economic Sustainability of the Economy: Concepts and Indicators' (2005) 8 *International Journal of Sustainable Development* 47, 48 <<http://www.inderscience.com/link.php?id=7374>> accessed 14 July 2022.

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of the present without diminishing the economic needs of the future.³⁰ Although intergenerational equity is frequently viewed as a factor in economic sustainability, it is not always clear what exactly needs to be perpetuated.³¹ The question that has, therefore, been frequently asked is whether the world be able to sustain economic growth indefinitely without running into resource constraints or despoiling the environment beyond repair.³² Thus, the relationship between economic growth and the environment is, and always remains, controversial.³³

However, what may be universally accepted is that increased private earnings are only one aspect of economic growth; it may also make a substantial contribution to the production of resources that can be mobilised to enhance social services (such as public healthcare, epidemiological protection, basic education, safe drinking water, among others).³⁴ These are ultimately important in realisation of SDGs. Economic empowerment of individuals as well as investing in social services that will benefit the current wider citizenry as well as future generations is thus an important step towards achieving sustainability.

4.0 Social Aspect of Sustainable Development Agenda

Social sustainability entails robust, inclusive communities where people may voice their opinions and governments act on them. In order to achieve social sustainability, opportunities must be increased for everyone, both now and in

³⁰ Solin, J., "Principles for Economic Sustainability: Summary," (a summary of John Ikerd's *Principles of Economic Sustainability*. It was developed based on attendance a 5-day workshop taught by John and John's Essentials of Economic Sustainability book) < <https://www3.uwsp.edu/cnr-ap/wcee/Documents/Principles%20for%20Economic%20Sustainability%205%20page%20summary.pdf>> accessed 14 July 2022.

³¹ Sudhir Anand and Amartya Sen, 'Human Development and Economic Sustainability' (2000) 28 *World Development* 2029, 2029 <<https://linkinghub.elsevier.com/retrieve/pii/S0305750X00000711>> accessed 14 July 2022.

³² Panayotou, T., "Economic Growth and the Environment." *CID Working Paper Series* (2000), 1.

³³ Brock, W.A. and Taylor, M.S., "Economic growth and the environment: a review of theory and empirics." *Handbook of economic growth* 1 (2005): 1749-1821.

³⁴ *Ibid*, 2032.

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the future. It is essential for eradicating poverty and promoting shared wealth, together with economic and environmental sustainability.³⁵

Social problems, in particular, prohibit individuals from living healthy lifestyles, disturb communities, and interfere with businesses. While most of these problems are universal, some are particular to particular regions or populations. These problems may include, but are not limited to, discrimination (based on race, colour, and gender), poverty, homelessness, hunger, malnutrition, and obesity, a lack of basic freedoms, the unemployment crisis, pandemics and epidemics, disabilities and chronic diseases, violence, crime, and insecurity as well as wars and political conflicts, gender inequality, and a lack of education and opportunities.³⁶

The distribution of economic opportunities and social services while resolving power disparities constitutes the process of social development, which involves institutions at all levels, from national governments to various civil society groups.³⁷ Social development has also been defined as "a process of planned social change designed to promote people's welfare within the context of a comprehensive process of economic development".³⁸ The emphasis of social sustainability and inclusion is on the requirement to "put people first" throughout the development process. By empowering individuals, creating cohesive and resilient societies, and making institutions accessible and answerable to citizens, it fosters social inclusion of the

³⁵ 'Overview' (World Bank)

<<https://www.worldbank.org/en/topic/socialsustainability/overview>> accessed 14 July 2022.

³⁶ Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social Responsibility (CSR)' (2022) 14 Sustainability 1222, 14 <<https://www.mdpi.com/2071-1050/14/3/1222>> accessed 13 July 2022.

³⁷ Julie L Drolet, 'Chapter 14 - Societal Adaptation to Climate Change' in Trevor M Letcher (ed), *The Impacts of Climate Change* (Elsevier 2021) <<https://www.sciencedirect.com/science/article/pii/B9780128223734000112>> accessed 14 July 2022.

³⁸ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 79.

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underprivileged and vulnerable.³⁹ Efforts towards sustainability must thus take note of these aspects of social sustainability for creation of an inclusive society.

5.0 Role of Law in Promoting Environmental, Social, and Governance (ESG) Approach: Governance Aspect of Sustainable Development Agenda

The environmental rule of law is crucial to sustainable development because it combines environmental requirements with the fundamental components of the legal system and lays the groundwork for better environmental governance.⁴⁰ In addition, by linking environmental sustainability to fundamental rights and responsibilities, it draws attention to environmental sustainability, reflects universal moral principles and ethical standards of conduct, and establishes a basis for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and responsibilities, it is possible to argue that environmental governance will be arbitrary, that is, discretionary, subjective, and unpredictable.⁴¹

The rule of law fosters equality of treatment, increases personal and property security, and offers a fair and amicable means of resolving conflicts.⁴² The rule of law was defined by United Nations Secretary-General Kofi Anan in 2004 as follows:

The rule of law . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the

³⁹ 'Social Sustainability and Inclusion' (World Bank) <<https://www.worldbank.org/en/topic/socialsustainability>> accessed 14 July 2022.

⁴⁰ Environment UN, 'Promoting Environmental Rule of Law' (*UNEP - UN Environment Programme*, 5 October 2017) <<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law>> accessed 17 July 2022.

⁴¹ Ibid.

⁴² Michel J, *The Rule of Law and Sustainable Development*. Center for Strategic & International Studies, 2020, 5 <https://www.researchgate.net/profile/James-Michel-3/publication/342881527_The_Rule_of_Law_and_Sustainable_Development/links/5f0b3464a6fdcc4ca46389c5/The-Rule-of-Law-and-Sustainable-Development.pdf> accessed 17 July 2022.

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State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁴³

The place of rule of law in promoting sustainability is well captured under SDG 16 which seeks to promote just, peaceful and inclusive societies.⁴⁴ The law is important as it provides essential tools and institutions for governing resources sustainably.⁴⁵ In addition to being critical (and frequently last) stages in itself for effectively adopting sustainability solutions, laws and governance are also vital elements to assist technological and economic progress.⁴⁶

It has been emphasised that the presence of robust, well-resourced public institutions at the national and international levels is essential for the execution of the 2030 Agenda's necessary policy reforms.⁴⁷ It has been observed that the SDGs have thus far mostly been implemented through a top-down, government-led strategy, with goals and initiatives determined at the global (and increasingly, national) level.⁴⁸ To achieve the SDGs, grassroots action for

⁴³ Ibid, 8.

⁴⁴ Martin, 'Peace, Justice and Strong Institutions' (*United Nations Sustainable Development*) <<https://www.un.org/sustainabledevelopment/peace-justice/>> accessed 17 July 2022.

⁴⁵ Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." *Sustainability* 3, no. 3 (2011): 531-540, 532.

⁴⁶ Clune WH and Zehnder AJB, 'The Three Pillars of Sustainability Framework: Approaches for Laws and Governance' (2018) 9 *Journal of Environmental Protection* 211.

⁴⁷ Martens, Jens. "Redefining policies for sustainable development." *Exploring* (2018): 11, 20 <https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf> accessed 13 July 2022.

⁴⁸ Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development

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sustainable development, also known as "solutions that react to the local context and the interests of the communities concerned," is necessary.⁴⁹ The SDGs' localization is based on Local Agenda 21, a bottom-up, participatory initiative allowing local governments to interact with their citizens on sustainable development.⁵⁰

To co-create locally relevant sustainability routes, communities, stakeholders, and academics must collaborate, and participatory approaches are crucial for fostering this cooperation in governance issues.⁵¹ Notably, the 2010 Constitution of Kenya provides that 'all State organs, State officials, public offices, and all individuals are bound by the national values and principles of governance whenever any of them: apply or interpret this Constitution; enact, apply, or interpret any legislation; or make or implement public policy choices'.⁵² Good governance, integrity, transparency, accountability, sharing and devolution of power, the rule of law, democracy, and public participation are among the national values and guiding principles of governance. Other national values and guiding principles include good governance, integrity, transparency, and accountability, patriotism, national unity, as well as sustainable development.⁵³ "Social Development is based on positive, humane, people oriented development in society....The basic principles... are human dignity, equality, social justice, and equitable distribution of resources.... People's participation and empowerment are necessary conditions...."⁵⁴

These principles are especially relevant in light of the spirit of devolution, where the Constitution states that 'the objects of the devolution of government

Goals' (2021) 16 Sustainability Science 1251, 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ See Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

⁵² Article 10 (1), Constitution of Kenya 2010.

⁵³ Ibid, Article 10 (2).

⁵⁴ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 79.

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are, among other things – to promote democratic and accountable exercise of power; to give powers of self-governance to the people and enhance their involvement in the exercise of State authority and in making decisions that affect them; to acknowledge 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’.⁵⁵

There is a need for efforts geared towards achievement of the principle of sustainable development to be molded around the foregoing national values and principles of governance to ensure that there is an inclusive approach to governance matters in the country, for the benefit of all.

6.0 Realising Environmental, Social and Governance Tenets for Sustainable Development: Moving Forward

Integrated decision-making, or the process of incorporating environmental, social, and economic goals and factors into choices, is the key action principle of sustainable development.⁵⁶ It has rightly been pointed out that despite the fact that all countries, regardless of their economic, social, or environmental contexts, can benefit from the Sustainable Development Goals (SDGs) framework, norms, and principles, translating global objectives into specific national contexts is difficult because of varying starting points, capacities, and priorities, among other factors.⁵⁷ Global goals will be transformed into targets and indicators that take into account the specific national settings of each country in order to be relevant to all nations (and to foster national ownership). Keeping broad global aims and very different national settings coherent will be a problem.⁵⁸

⁵⁵ Article 174, Constitution of Kenya 2010.

⁵⁶ Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: an introduction. *Sustainability*, 3 (3), 531-540." (2011), 532.

⁵⁷ Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," *SDplanNet Africa Regional Workshop, March 3-5, 2014*, 2 <https://www.iisd.org/system/files/publications/sdplannet_africa.pdf> Accessed on 25 June 2022.

⁵⁸ *Ibid*, 2.

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Economic, social and governance aspects of sustainable development must take into account the environmental aspect of sustainable development. This is because environmental protection is essential to promoting sustainable economic growth because the natural environment supports economic activity both directly and indirectly through ecosystem services like carbon sequestration, water purification, managing flood risks, and nutrient cycling. Directly, the natural environment provides resources and raw materials such as water, timber, and minerals that are required as inputs for the production of goods and services.⁵⁹

In the institutional arrangements of governments and parliaments, scholars have argued that it is crucial to reflect the encompassing nature of the 2030 Agenda and the SDGs. If competent national equivalents do not reflect and "own" the new, more cogent global government, the effort will be in vain.⁶⁰ To make the UN system "fit for purpose" on a global scale, it is necessary to reform already-existing institutions and establish new bodies in regions where there are governance gaps. This can only be done by making a commitment to address the unequal distribution of resources as well as access to participation and decision-making.⁶¹ This is especially important considering that the SDG index, which displays each country's compliance with the SDGs and breaks down each score by SDG, reflects the fact that governments have varying degrees of commitment to the SDGs.⁶²

⁵⁹ UN Environment, 'GOAL 8: Decent Work and Economic Growth' (UNEP - UN Environment Programme, 2 June 2021) <<http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-8>> accessed 13 July 2022.

⁶⁰ Martens, Jens. "Redefining policies for sustainable development." *Exploring* (2018): 11, 20 <https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf> accessed 13 July 2022.

⁶¹ Ibid.

⁶² Del-Aguila-Arcntales, S., Alvarez-Risco, A., Jaramillo-Arévalo, M., De-la-Cruz-Diaz, M. and Anderson-Seminario, M.D.L.M., 'Influence of Social, Environmental and Economic Sustainable Development Goals (SDGs) over Continuation of Entrepreneurship and Competitiveness' (2022) 8 *Journal of Open Innovation: Technology, Market, and Complexity* 73, 1 <<https://www.mdpi.com/2199-8531/8/2/73>> accessed 13 July 2022.

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The 2030 Agenda presents a challenge to UN Environment to create and improve integrated approaches to sustainable development, methods that will show how enhancing environmental health would have positive social and economic effects. UN Environment's initiatives support the environmental component of sustainable development and promote socio-economic development by aiming to lower environmental hazards and boost society's and the environment's overall resilience.⁶³

The Sustainable Development Goals (SDGs) are global, multifaceted, and ambitious, and it is arguable that in order to fulfil them, we need an integrated framework that encourages a growth path that protects the environment and whose benefits are shared by everyone, not just by the fortunate few.⁶⁴ Thus, the idea of sustainable development forces us to reconsider how we interact with the world and how we anticipate that governments would implement policies that promote that worldview.⁶⁵ Local communities need to concentrate on a locally relevant subset of goals and comprehend potential future pathways for key drivers which influence local sustainability because the Sustainable Development Goals (SDGs) recognise the importance of action across all scales to achieve a sustainable future.⁶⁶ There is need for continuous creation of public awareness, civic education and creating avenues for public participation among the communities because to guide long-term local planning and decision-making to achieve the SDGs, local communities also need to understand the range of potential future pathways for their region and how they align with local sustainability objectives.⁶⁷

⁶³ Environment UN, 'Sustainable Development Goals' (*UNEP - UN Environment Programme*, 19 October 2017) <<http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals>> accessed 17 July 2022.

⁶⁴ Ramos, G., "The Sustainable Development Goals: A duty and an opportunity." (2016): 17-21, in Love, P. (ed.), *Debate the Issues: New Approaches to Economic Challenges*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264264687-3-en>.

⁶⁵ Ibid.

⁶⁶ Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) *16 Sustainability Science* 1251, 1251 <<https://doi.org/10.1007/s11625-021-00921-2>> accessed 13 July 2022.

⁶⁷ Ibid, 1251.

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It has rightly been pointed out that 'since the world's poor understand scarcity and live "closer to nature," they have a better understanding of the finite nature of natural resources than the world's powerful and affluent elite, and they have a much greater immediate and vested interest in promoting change in the way that the world does business. As a result, they have a better understanding of the need to focus social development strategies on empowering the poor. They must thus be given the authority and influence to actively shape economic policy rather than just responding to circumstances outside their control'.⁶⁸

This calls for adoption of participatory and inclusive governance approaches that give all members of society and/or their representatives to air their views and actively participate in governance matters, in a meaningful way that impacts their lives positively. It has also been pointed out that while environmental law is essential to attaining sustainability, we also need to acknowledge that there is a need for a wide range of other pertinent laws, such as those governing land use and property, taxes, our governmental system, and other issues.⁶⁹ This is important in ensuring that sustainability is achieved in environmental, economic, social and governance aspects of development.

Corporations, through following ESG frameworks or guidelines, such as the *Nairobi Securities Exchange ESG – Disclosures Guidance Manual, 2021*, can also play a huge role in promoting sustainability within the localities that they operate in and the country at large. ESG Reporting should be encouraged and used as a tool of promoting sustainability within the companies, communities and country. Under this, organisations make it part of their operational procedures to report publicly on their economic, environmental, and/or social impacts, and hence its contributions – positive or negative – towards the goal of sustainable development.⁷⁰ As the business community seeks to invest in

⁶⁸ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 84.

⁶⁹ Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction," *Sustainability* 3, no. 3 (2011): 531-540, 532.

⁷⁰ *Nairobi Securities Exchange ESG – Disclosures Guidance Manual, November 2021* <<https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf>> accessed 17 July 2022.

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various sectors, there is a need for them to take into account ESG requirements under SDGs. The law (government) and other policy makers should work towards supporting businesses in their efforts to transition to more sustainable business models, through using various legal, policy and other effective incentives. The law should move towards ensuring that non-financial reporting on ESG becomes the standard mode of operation for ease of enforcing such principles as “the polluter pays principle”, among others. This is especially important as it has been pointed out that ‘previous literature, which attempted to investigate the link between sustainability and investment performance, found that a critical barrier to ESG integration is that investors lack reliable and non-manipulated information’, at least in other jurisdictions, practices which may also take place in Kenya.⁷¹ While it may not be disputed that institutional investors vary in their approaches to integrating ESG factors into their investment decisions, the end game should at least show some tangible and verifiable positive results.⁷²

It has also been suggested that businesses and companies should embrace technology and innovation in engineering and product development as well as with regard to management structures and entrepreneurship, which will arguably continue to be crucial to overall sustainability strategy. Doing more with less may be a challenge that technology may help solve since it can reduce the strict ecological limitations while also relieving political and economic pressures (thereby allowing space and opportunity for more sustainability solutions from all quarters).⁷³

⁷¹ Roy, P.P., Rao, S., Marshall, A.P. and Thapa, C., ‘Mandatory Corporate Social Responsibility and Foreign Institutional Investor Preferences’ (2020).

⁷² OECD, *OECD Business and Finance Outlook 2020: Sustainable and Resilient Finance* (OECD 2020) <https://www.oecd-ilibrary.org/finance-and-investment/oecd-business-and-finance-outlook-2020_eb61fd29-en> accessed 17 July 2022.

⁷³ Clune WH and Zehnder AJB, ‘The Three Pillars of Sustainability Framework: Approaches for Laws and Governance’ (2018) 9 *Journal of Environmental Protection* 211.

7.0 Conclusion

According to stakeholders, the primary pillars of economic transformation and inclusive growth are: inclusive growth that reduces inequality; sustainable agriculture, food self-sufficiency and nutrition; diversification, industrialization and value addition; developing the service sector; and infrastructure development.⁷⁴ These focus on the economic growth as well as social aspects of development. The main goal of Social Sustainability and Inclusion's work is to support people in overcoming barriers that prevent them from fully participating in society, regardless of their gender, race, religion, ethnicity, age, sexual orientation, or disability, by collaborating with governments, communities, civil society, the private sector, and other stakeholders to create more inclusive societies, empower citizens, and foster more sustainable communities.⁷⁵

It has rightly been pointed out that 'every objective and target in the SDG framework is implied to depend on and impact one another, although the precise nature of these connections is yet unknown at this time. Due to the goals' and targets' integrated structure, advancements made toward one objective or another are connected to other goals and targets via causal chains and feedback loops. For these reasons, an integrated and systems-based approach to the SDGs is required to guarantee that these feedbacks are understood and handled. Countries will be better positioned to realise the transformational potential of the 2030 Agenda if mutually reinforcing activities are implemented and target trade-offs are minimised'.⁷⁶ As already pointed out, achieving sustainable development agenda requires an integrated

⁷⁴ Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," *SDplanNet Africa Regional Workshop, March 3-5, 2014, 3* <https://www.iisd.org/system/files/publications/sdplannet_africa.pdf> Accessed on 25 June 2022.

⁷⁵ 'Social Sustainability and Inclusion: Overview' (World Bank) <<https://www.worldbank.org/en/topic/socialsustainability/overview>> accessed 14 July 2022.

⁷⁶ Cameron, A., Metternicht, G. and Wiedmann, T., "Initial progress in implementing the Sustainable Development Goals (SDGs): a review of evidence from countries." *Sustainability Science* 13, no. 5 (2018): 1453-1467, 1453.

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approach that looks at the economic welfare of the people and the nation at large, while adopting a socially inclusive approach in all governance matters. Economically and socially empowered people are more likely to participate in governance matters objectively, without being distracted by poverty and other social ills, in order to also on the intergenerational aspect of sustainable development agenda for the sake of future generations. Thus, it is necessary at the local level, to support the economic and social self-determination of oppressed individuals and groups by enlisting the help of community leaders and the general public in creating locally tailored institutional responses to issues (such as fostering environmentally friendly industries as a means of combating unemployment) and encouraging communication between local interest groups regarding issues of sustainable development, and at the national level, for the government to offer all necessary support in promoting sustainability.⁷⁷ There is a need to adopt innovative governance approaches which integrate economic, social development and sustainable development principles at multiple levels of social organization in addressing the serious challenges facing our globe and achievement of the 2030 Agenda on Sustainable Development Goals.⁷⁸

What can be deduced from the foregoing discussion is that it is not enough to achieve sustainable development, as conceptualized by the ruling class and those in positions of decision-making; communities must actively be involved in decision-making to come up with strategies and approaches that take into account the unique economic, social and governance needs of particular group or class of people. The fundamental principles and values have already been captured under Article 10 of the 2010 Constitution of Kenya and if fully adopted and implemented within the development agenda, they can go a long way in ensuring that Kenya achieves satisfactory results as far as implementation and localization of the 2030 Agenda for Sustainable Development, and the SDGs are concerned. This is the only way that sustainability can be truly achieved and appreciated by all the people affected, while leaving a positive mark on their lives and the country in general.

⁷⁷ Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." *Sustainable Development* (1996), 85.

⁷⁸ *Ibid*, 89.

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Development*

Realising Environmental, Social and Governance (ESG) tenets of Sustainable Development is an imperative whose time is ripe.

Reconceptualising the Right to Clean and Healthy Environment in Kenya

Abstract

This paper examines the right to clean and healthy environment as envisaged in the Constitution of Kenya 2010, its legal underpinnings and the extent to which the same has been realised for the Kenyan people. It traces the legal foundations of this right in the international environmental discourse as well as its place in the Kenyan law. The paper argues that there is need to redefine the right to clean and healthy environment as a fundamental right, classify it with the other basic rights as opposed to the existing notion that it is a third generation right. The writer asserts that this right to a clean and healthy environment can be equated to the right to life. Therefore, there is need to reconceptualise and enhance the same in our legal framework so as to make it a reality.

1.0 Introduction

This paper examines the right to clean and healthy environment as envisaged in the Constitution of Kenya 2010, its legal underpinnings and the extent to which the same has been realised for the Kenyan people. It traces the legal foundations of this right in the international environmental law discourse as well as its place in the Kenyan law. The paper also argues that there is need to reconceptualise the concept of right to clean and healthy environment with a view to enhancing its protection and enforcement for the Kenyan people. The writer proffers the view that there is a need to clarify and define this right so as to make it realisable.

2.0 Defining the Right to Clean and Healthy Environment

Environment is defined as all the physical, chemical and biological factors external to a person, and all the related behaviours.¹ The *Environmental Management and Coordination Act, 1999* (EMCA), defines “environment” to include the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the

¹ World Health Organization, “Preventing disease through healthy environments,” (World Health Organization, Geneva, 2006).

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natural and the built environment.² Environment has also been defined as “...the whole complex of climatic, adaptic and biotic factors that act upon an organism or an ecological community and ultimately determine its form or survival; the aggregate of social and cultural conditions that influence the life of an individual or a community...”³ The *Draft International Covenant on Environment and Development*⁴ defines environment to mean “the totality of nature and natural resources, including the cultural heritage and infrastructure essential for social-economic activities.”⁵

It has been argued that the problem in declaring a *right to a clean and healthy environment* (emphasis added) as is found in various documents is that there is yet no clear definition of this right nor is its content clearly demarcated. Pertinent questions abound: what is the measure for a clean and healthy environment? At what point can one say this right has been violated - is it after a single oil spill, or continuously with or without an immediate clean up or after a refusal to return the contaminated environment to status quo ante?⁶ For instance, in the Kenyan case of *Pastor James Jessie Gitahi & 202 others v Attorney General*,⁷ the Court observed that “...prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment. Noise pollution covers sound which can result in hearing impairment while vibrations pollution covers vibration transmitted to the human body through solid structures. Both excessive noise and vibration can cause injury to the body hence the need to regulate the level of noise through

² Act No. 8 of 1999, Laws of Kenya, s.2.

³ Webster’s *New World Dictionary* 3rd ed (Cleveland College, Cleveland, 1998) p.454; P. Birnie & A. Boyle, *International Law & the Environment*, 3rd ed. (Oxford University Press, Oxford, 2009), p. 3.

⁴ International Union for Conservation of Nature and Natural Resources Environmental Policy and Law, Paper No. 31 Rev. 3, *Draft of the Joint Working Group convened by the Commission on Environmental Law (CEL) of the World Conservation Union (IUCN) and the International Council on Environmental Law (ICEL)*, 4th Ed., 2010.

⁵ Draft of the Joint Working Group convened by the Commission on Environmental Law (CEL) of the World Conservation Union (IUCN) and the International Council on Environmental Law (ICEL), 1991; *The Environment and Land Court Act, 2011*, No 19 of 2011, Laws of Kenya, s.2.

⁶ C. I., Okpara, ‘Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,’ *Journal of Politics and Law*, Vol. 5, No. 1; March 2012, pp. 3-8, p.6.

⁷[2013] eKLR, Petition No. 683 of 2009.

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the Regulations".⁸ The Court also stated that "Part II of the *Regulations*⁹ has a general prohibition against, "loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment. In determining whether the noise is loud several factors are considered including the time of the day, the proximity to a residential neighbourhood, whether the noise is recurrent intermittent or constant, the level or intensity of the noise, whether the noise has been enhanced by any electronic or mechanical means or whether the noise can be controlled without effort or expense to the person making the noise." According to the Court, "a violation of the general prohibition is an offence and attracts a penalty under the Act and the Regulations."

Although there is no single universally accepted definition of what entails the environment, it is clear from the foregoing definitions that environment goes beyond the physical surroundings to incorporate such issues as social and cultural conditions that influence the life of an individual or a community. It is, however, important to point out that the foregoing definitions of the right to a clean and healthy environment are now falling by the wayside in view of the fact that this right has been equated to life itself. It has been observed that while a number of States still refuse to recognize the human right to a clean environment, the international jurisprudence developed around numerous universally-recognized substantive rights, such as the right to life, health, food and housing, offers robust legal and conceptual bridges between the social, economic and environmental dimensions of sustainable development, and could shift priorities in the political economy of resource allocation and distribution.¹⁰ At the international level, it has been held that 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.'¹¹

⁸ Para. 28.

⁹ Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009, Legal Notice No. 61 of 2009.

¹⁰ United Nations Non-Governmental Liaison Service, *Human Rights Approaches to Sustainable Development*, NGLS Roundup 90, May 2002, p. 1. Available at <http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf> [Accessed on 28/08/2015].

¹¹ ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 241, para. 29.

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The right to a clean environment openly became an international concern first in 1968 when the UN General Assembly passed a resolution identifying the relationship between the quality of the environment and the enjoyment of basic rights.¹² However, it was not until the Stockholm conference in 1972 that the right to a healthy environment was explicitly recognized in an international environmental law document (Stockholm Declaration, 1972)¹³. It declared 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, and he bears a solemn responsibility to protect and improve the environment for present and future generations* (Emphasis added).¹⁴ It is noteworthy that the Declaration did not just recognise the right to a good quality environment but also placed a responsibility on human beings to protect and improve the environment for present and future generations. This position of rights and responsibility towards the environment is now widely accepted and it goes to the core of the sustainable development discourse.¹⁵

Some human rights lawyers opine that the recognition of third generation rights will devalue the concept of human rights and divert attention from the already recognised first and second-generation rights.¹⁶ The right to a clean and healthy environment, as is with all environmental rights, has for a long time been grouped under the 'third generation rights' or 'solidarity rights'. However, it is arguable that the right to clean and healthy environment is not a 'third generation right' but a *fundamental right*, (Emphasis added) a prerequisite for full enjoyment of all the other rights. It is a right, crucial for the realisation of the so-called first and second generation rights. Indeed, it has rightly been argued that when people must struggle to obtain the basic

¹² United Nations General Assembly, *Problems of the Human Environment*, UNGA Res 2398(XXII) 3 December 1968.

¹³ Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972, UN Doc.A/CONF.48/14/Rev.1.

¹⁴ *Ibid*, Principle 1.

¹⁵ For instance, see Art. 69, Constitution of Kenya, 2010 (Government Printer, Nairobi).

¹⁶ See W.T., Olenasha, 'The Enforcement Of Environmental Rights: A Case Study Of The New South African Constitutional Dispensation,' *Thesis (LLM (Human Rights and Democratisation in Africa))* (University of Pretoria, 2001), available at http://repository.up.ac.za/bitstream/handle/2263/969/olenasha_wt_1.pdf?sequence=1&isAllowed=y [Accessed on 28/08/2015].

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necessities of life, political freedoms and other human rights may appear meaningless to them.¹⁷ This is because the destruction of life-sustaining ecosystems, the pollution of the world's water, land, and air, the inability to control the world's wastes, and other related environmental problems prevent people from securing the minimum requisites for health and survival, thereby impeding and even prohibiting the effective exercise and enjoyment of human rights for much of the world's population.¹⁸

It is against this background that there emerged recognition of the right to a clean and healthy environment, as a distinct right, owing to the importance of the environment to realisation of the other human rights especially the socio-economic rights.

2.1 Scope of the Right to Clean and Healthy Environment

The Constitution of Kenya¹⁹ guarantees 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

¹⁷ J.A. Downs, 'A Healthy and Ecologically Balanced Environment: An Argument for A Third Generation Right,' *Duke Journal of Comparative & International Law*, Vol. 3, 1993, pp. 351-385 at p. 351.

¹⁸ *Ibid.*

¹⁹ Article 42, Constitution of Kenya 2010.

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and other measures, particularly those contemplated in Article 69²⁰; and to have obligations relating to the environment fulfilled under Article 70²¹.

These constitutional provisions do not clearly define what constitutes the right to clean and healthy environment. However, *Environmental Management and Coordination Act* (EMCA) defines the entitlement to a clean and healthy environment to include 'access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes'.²² While the definition is broad, it may present a challenge in determining the mode of its enforcement. This is because of its main focus seems to be on 'access' to the environment as against concentration on the 'status' of the environment.

²⁰ Art. 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.

²¹ Art. 70(1) 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. 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.

²² S. 3(2), No. 8 of 1999, Laws of Kenya.

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It is important to take cognisance of *Draft Principles on Human Rights and the Environment of 1994*,²³ an international instrument that comprehensively addresses the linkage between human rights and the environment. The *1994 Draft Principles on Human Rights and the Environment* recognise 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.

Principle 5 thereof declares that all persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries. This is a broader description of the right to clean and healthy environment, which includes such aspects as elimination of environmental threats to life, health, livelihood, well-being or sustainable development. Indeed, this Declaration expressly states that such right must be recognised within and outside the national boundaries.

Principle 1 of the *Stockholm Declaration* refers to an 'environment of a quality that permits a life of dignity and well-being', while article 24 of the *African Charter on Human and Peoples' Rights* (the African Charter)²⁴ refers to a 'general satisfactory environment favourable for their development'. The broad definitions as offered by these legal instruments are important to ensure that the policy makers and other stakeholders consider all the important aspects of the environment. It is perhaps also on such broad definitions that courts and tribunals have declined to give narrow interpretation to the right to clean and healthy environment, even ruling that the right is equivalent to right to life.

The close link between economic and social rights and the environment was also affirmed in the Kenyan case of *Friends of Lake Turkana Trust v Attorney General & 2 others*²⁵ where the Learned Judge stated, *inter alia*, that the right to

²³ Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

²⁴ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

²⁵ [2014] eKLR, ELC Suit No. 825 of 2012.

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life, dignity and economic and social rights are all connected and indivisible, and it cannot be said that “one set of rights is more important than another. All these rights of necessity need to be observed for a person to attain a reasonable livelihood.”²⁶

According to the World Health Organization (WHO), environmental health is concerned with all the physical, chemical, and biological factors external to a person, and all the related factors impacting behaviours. It encompasses the assessment and control of those environmental factors that can potentially affect health.²⁷ Health is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. WHO has reported that more than three million children under five die each year from environment-related causes and conditions. This, thus, makes the environment one of the most critical contributors to the global toll of more than ten million child deaths annually-as well as a very important factor in the health and well-being of their mothers.²⁸ WHO observes that polluted indoor and outdoor air, contaminated water, lack of adequate sanitation, toxic hazards, disease vectors, ultraviolet radiation, and degraded ecosystems are all important environmental risk factors for children, and in most cases for their mothers as well.²⁹

On a general scale, it is believed that environmental hazards are responsible for an estimated 25% of the total burden of disease worldwide, and nearly 35% in regions such as sub-Saharan Africa.³⁰ In this regard, it has been argued that addressing the effects of the environment on human health is essential if we

²⁶ Ibid, p.11.

²⁷ World Health Organization, *Environmental Health*, available at http://www.who.int/topics/environmental_health/en/ [Accessed on 1/09/2015].

²⁸World Health Organization, Children's environmental health: The environment and health for children and their mothers,' available at <http://www.who.int/ceh/publications/factsheets/fs284/en/> [Accessed on 1/09/2015].

²⁹ World Health Organization, Children's environmental health: The environment and health for children and their mothers,' op cit.

³⁰ Health and Environment Linkages Initiative - HELI, *Health and Environment Linkages Initiative*, available at <http://www.who.int/heli/en/> [Accessed on 1/09/2015].

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are to achieve the goal of health for all.³¹ Human health is believed to be connected to environmental health and that the two are mutually dependent.³²

The right to a clean and healthy environment is so interwoven with the realisation and enjoyment of other fundamental rights that any attempt to classify it as an inferior right sabotages the realisation of all the other basic rights, including life, health, livelihood and well-being, amongst others.³³ This right advocates for a healthy human habitat, including clean water, air and soil that are free from toxins or hazards that threaten human health.³⁴

Human rights and the environment are said to be inherently interlinked, as the life and the personal integrity of each human being depends on protecting the environment as the resource base for all life.³⁵ It is noteworthy that the environment is the main reservoir for most of the resources necessary for realisation of economic and social rights. Therefore, efforts towards addressing threats to a clean and healthy environment must adopt an integrated approach that brings on board all actors, drawn from all the sectors especially those that address socio-economic needs of the society. For instance, with regard to health, it is rightly observed that the scope for creating a healthy environment is clearly not limited to hospitals and doctor's surgeries, but includes the myriad factors that influence health, agriculture and food,

³¹ N. Higenbottam, 'Nurse's Role as an Environmental Activist,' p.2. Available at <http://www.theluminaryproject.org/downloads/Essay%20Contest%20Higenbottam.pdf> [Accessed on 1/09/2015].

³² World Health Organization, *Human health under threat from ecosystem degradation*, 9 December 2005, available at <http://www.who.int/mediacentre/news/releases/2005/pr67/en/> [Accessed on 1/09/2015].

³³ See generally Y., Lador, 'The challenges of human environmental rights,' in *Human Rights and the Environment: Proceedings of a Geneva Environment Network roundtable*, (United Nations Environment Programme for the Geneva Environment Network, 2004).

³⁴ C. I., Okpara, 'Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,' *op cit*, p. 5.

³⁵ F.X., Perrez, 'Key questions concerning the human rights and environment debate: An introduction,' in *Human Rights and the Environment: Proceedings of a Geneva Environment Network roundtable*, (United Nations Environment Programme for the Geneva Environment Network, 2004), p.4.

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education, housing, employment status and working environment, water and sanitation, and health care services.³⁶ Further, clean environment indicates freedom from dirt, noise, sound pollution, pollution, garbage, insanitary toilets, and improper disposal of animal waste, improper solid waste management systems.³⁷ These issues normally fall under the mandates of different authorities, as defined by law. This therefore calls for concerted efforts from various sectors to address the potential challenges that may arise in actualizing the right to clean and healthy environment.

The broad scope of the right to clean and healthy environment was affirmed by the Kenyan Courts in the case of *Peter K. Waweru v Republic*,³⁸ where the Court stated, *inter alia*, that 'the right of life is not just a matter of keeping body and soul together because in this modern age, that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man; it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.'³⁹ This right and the other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.⁴⁰

The Supreme Court of India held in *Subhash Kumar v. State of Bihar*,⁴¹ that the "right to life guaranteed by article 21 of the Constitution includes the right of enjoyment of pollution-free water and air for full enjoyment of life." Further, in the case of *Dr. Mohiuddin Farooque v. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others*⁴², the Supreme Court interpreted the right to life to include the protection and

³⁶ N. Mohammad, 'Environmental Rights for Administering Clean and Healthy Environment towards Sustainable Development in Malaysia: A Case Study,' *International Journal of Business and Management*; Vol. 9, No. 8; 2014, pp. 191-198 at p.192.

³⁷ *Ibid*, p.193.

³⁸[2006] eKLR.

³⁹ *Ibid*, p.8.

⁴⁰ Principle 2.

⁴¹ AIR 1991 SC 420, 1991 (1) SCC 598.

⁴² 48 DLR 1996 (SC Bangladesh, 1996).

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preservation of the environment and ecological balance free from pollution of air and water.

In the Indian case of *K. Ramakrishnan and Others Versus State of Kerala and Others* (smoking case), the Court stated that “*The word ‘life’ in the Constitution has not been used in a limited manner. A wide meaning should be given to the expression ‘life’ to enable a man not only to sustain life but also to enjoy it in a full measure. The sweep of right to life conferred by Article 21 of the Constitution is wide and far-reaching so as to bring within its scope the right to pollution free air and the “right to decent environment.”* (Emphasis added)⁴³

In the case of *Peter K. Waweru v Republic*, the Court observed that “...environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman...” It went further to state, “...In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.”⁴⁴

In light of the foregoing case law, and in enforcement of other Constitutional rights such as economic and social rights and the right to life under the Constitution, courts should accord such provisions broad interpretations so as to address any environmental factors that impede access to the resources necessary for enjoyment of the right in question. These include the right, *inter alia*: 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; and to clean and safe water in adequate quantities.⁴⁵ Adequate fulfillment of these rights depends on proper and efficient mechanisms for protection of the right to clean and healthy environment.

⁴³ AIR 1999 Ker 385, p.11.

⁴⁴ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.14.

⁴⁵ Constitution of Kenya, Art. 43(1).

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The right to clean and healthy environment is inherently connected to the realisation of the other fundamental rights. Such broad approaches to realisation of other rights can go a long way in the protection of the right to clean and healthy environment, considering the central role played by the environment in meeting most the basic rights.

This is a demonstration of the broad definition that can be afforded the right to clean and healthy environment. It however remains a fluid concept that is largely determined or interpreted as per the prevailing law. There is a need to clearly and sharply define it in legal instruments so as to ensure its exercise.

2.2 National Courts and the Right to a Clean and Healthy Environment

It has been argued that while international law plays a vital role in establishing norms and offering a court of last resort for human rights violations, the reality is that most of the action to protect and fulfill rights occurs at the national level.⁴⁶ This is because, within countries, a constitution is the highest and strongest law, as all laws, regulations, and policies must be consistent with it. A constitution protects human rights, sets forth the obligations of the state, and restricts government powers. On a deeper level, constitutions are believed to reflect the most deeply held and cherished values of a society.⁴⁷

It has been pointed out that, whereas the right to a clean and healthy environment has rapidly gained constitutional protection around the world, in some countries, recognition of the right first occurred through court decisions determining that it is implicit in other constitutional provisions, primarily the right to life.⁴⁸ Currently, a number of countries have devoted constitutional provisions to an enforceable right to a clean and healthy

⁴⁶ D.R. Boyd, 'The Constitutional Right to a Healthy Environment,' *Environment: Science and Policy for Sustainable Development*, July-August 2012, available at <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html> [Accessed on 1/09/2015].

⁴⁷ Ibid.

⁴⁸ D.R. Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment,' *Review of European Community & International Environmental Law*, Vol. 20, No. 2, 2011, pp. 171-179 at p. 171.

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environment including, *inter alia*: Uganda⁴⁹, South Africa⁵⁰, Congo⁵¹ and Ecuador⁵². These provisions however mean little, because they cannot be enforced in the courts, which regard them as insufficient to provide legal standing to anyone who cannot give evidence of personal and direct environmental harm.⁵³

Where the requirement for *locus standi* has been dispensed with, the other impediment that comes in is the prerequisite that one must prove how their right to clean and healthy environment is likely to be denied, violated, infringed or threatened.⁵⁴ It seems that it would not suffice that the particular activity in question poses environmental threat, without necessarily proving direct threat to this right. Arguably, all one should be able to prove is likelihood of pollution or degradation of the environment. For example, in the Ugandan case of *The Environmental Action Network Ltd v Attorney General & NEMA*⁵⁵, the court held that the applicant, a public interest litigation group which had filed the application in its own behalf and on behalf of the non-smoking members of the public under Article 50 (2) of the Constitution, to

⁴⁹ *Constitution of The Republic of Uganda*, 1995-S.39 provides that every Ugandan has a right to a clean and healthy environment.

⁵⁰ *Constitution of the Republic of South Africa*, 1996 -s. 24 provides that everyone has the right - to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -(i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

⁵¹ *Constitution of the Democratic Republic Of The Congo-Article 53* provides that all persons have the right to a healthy environment that is favorable to their development; they have the duty to defend it; The State ensures the protection of the environment and the health of the population.

⁵² Republic of Ecuador, Constitution of 2008- Article 14 provides that the right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (*sumak kawsay*), is recognized; Environmental conservation, the protection of ecosystems, biodiversity and the integrity of the country's genetic assets, the prevention of environmental damage, and the recovery of degraded natural spaces are declared matters of public interest.

⁵³ C. I., Okpara, 'Right to a Clean and Healthy Environment: The Panacea to the Niger Delta Struggle,' *op cit*, p.6.

⁵⁴ See Constitution of Kenya, Art. 70(1).

⁵⁵ Misc. Application No. 39 of 2001 (High Court of Uganda).

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protect their right to a clean and healthy environment, their right to life and the general good of public health in Uganda, could bring a public interest action on behalf of groups or individual members of the public although the applying organisation had no direct individual interest in the infringing acts it sought to have addressed. This is also to be found under Article 22(2) of the Constitution of Kenya.

The Court should be able to step in and protect the environment without necessarily looking for immediate proof of likely violation of the right to clean and healthy environment. To facilitate the same, the Constitution gives courts the power to 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, or to 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.⁵⁶ An applicant seeking such orders from courts does not have to demonstrate that any person has incurred loss or suffered injury. The Constitution provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.⁵⁷ However, to succeed in their plea one must demonstrate that their Right under Article 42 has been or is likely to be denied, violated, infringed or threatened.⁵⁸

The implication of the foregoing is that if a party is unable to prove the denial, violation, infringement or threat for one reason or the other, then their guarantee to right to clean and healthy environment is likely to be defeated. Indeed, this was demonstrated in the case of *Republic v Lake Victoria South Water Services Board & another*⁵⁹ where the learned Judge observed that the

⁵⁶ Art. 70(2).

⁵⁷ Art. 70(3); See also section 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA)

⁵⁸ *Joseph Owino Muchesia & another v Joseph Owino Muchesia & another* [2014] eKLR, para. 34.

⁵⁹ [2013] eKLR, Miscellaneous Civil Application 47 of 2012; See also *John Kamau Kenneth I Mpapale v City Council of Nairobi & 7 others* [2014] eKLR, Formerly Petition No. 63 of 2012 Now ELC No. 867 OF 2012, where the Learned Judge stated that the Petitioners had not made any submissions to the effect that the projects undertaken by the Respondents, being expansion of a road/construction to a link road, would result to

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applicants who claimed that their right to clean and healthy environment was likely to be contravened by the respondents if they were allowed to proceed with the implementation of a project, did not indicate clearly how their right to clean and healthy environment was likely to be infringed. However, the Judge went on to state that from the possible impacts set out in the Environmental Impact Assessment (EIA) Report that he had referred to in the case, there was no doubt that the applicants' right to clean and healthy environment would be breached unless adequate mitigation measures are put in place to meet these impacts.⁶⁰ The enforcement of the Constitutional provisions on the right to clean and healthy environment thus seems to be left to the discretion of the presiding Judge.

Recent decisions from the Kenyan Courts confirm this position. In *Said Tahir & 2 others v County Government of Mombasa & 5 others*,⁶¹ the Learned Judge was of the opinion that although the right to a clean and healthy environment is a right under the Bill of Rights (Chapter 4 of the Constitution), the determination of which is conferred upon the High Court under Article 23(1) of the Constitution, there is a duality of jurisdiction between the High Court and the Environment and Land Court by virtue of Article 162 (2) of the Constitution, and by virtue of the jurisdiction conferred upon the latter court by section 13(7) of the *Environment and Land Act*⁶². The Court went further to state that the balance of convenience of jurisdiction lies with the Environment and Land Court by virtue of Article 70 of the Constitution which confers upon the court the power to 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, or to 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.⁶³

environmental degradation or in any way create unclean and unhealthy environment to the Petitioners. In the absence of specificity of the manner in which Arts 42, 69 and 70 had been violated, the Court found that there is no violation of the Petitioner's rights to a clean and healthy environment (p.13).

⁶⁰ Para. 14.

⁶¹ [2015] eKLR, Petition No. 6 of 2015.

⁶² No 19 of 2011, Laws of Kenya.

⁶³ Para 15.

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In *Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others*, the Court stated that the Constitution designates the High Court as the only court to address questions on violation of the Bill of Rights. The only right under the Bill of Rights which the Environment and Land Court can hear is the right to clean and healthy environment and thus it has jurisdiction to entertain matters relating to violation of this right.⁶⁴ This case does not however seem to have settled the issue of jurisdiction.⁶⁵

Lack of clarity on which Court should handle matters relating to violation of the clean and healthy environment is, arguably, likely to affect efforts to realise the same for the Kenyan people.

To overcome such likely challenges, it is important to adopt a broader approach to protection of the right to clean and healthy environment. This should be an approach that does not only rely on proof by the complainant of actual or likely denial, violation, infringement or threat by the respondent, but one that also incorporates ecocentric values. It is also important to point out that the Courts are under a constitutional obligation under Article 10 to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations, who may not be able to prove the likelihood of denial, violation, infringement or threat to the right. Courts have a duty to protect the right of such future generations.⁶⁶ The Court should,

⁶⁴*Timothy Otuya Afubwa & another v County Government of Trans-Nzoia & 3 others* [2015] eKLR, para.8.

⁶⁵ See also *Leisure Lodges Ltd v Commissioner of Lands And 767 others* [2016] eKLR; *Mohammed Said vs. County Council of Nandi* [2013] eKLR.

⁶⁶ See *Edgar Kipsase Choge, Harry Jumbati Mbiti, Fred Ombiri, Colleta Inzayi (Suing on behalf of Kamobon Village Residents) v China Overseas Engineering Group Co. Ltd & 3 others* [2017] eKLR where the learned Judge stated, inter alia:

As to irreparable loss which cannot be adequately compensated by an award of damages, I find the damage to the environment has far reaching effects which are not only confined to the current generation but to intrageneration. Even if individuals are compensated it can never be the same once the damage has been done. (Per M.A. Odeny, J., p.7).

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like in the case of *Peter K. Waweru (supra)*, be proactive in promoting environmental protection and conservation for sustainable development.⁶⁷

The proposed approach was adopted in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another*⁶⁸ where the Learned Judge observed that "...in my view, any person is free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate, that the issues being raised, concern him personally, or indeed, demonstrate that he stands to suffer individually. Any interference with the environment affects every person in his individual capacity, but even if there cannot be demonstration of personal injury, such person is not precluded from raising a matter touching on the management and conservation of the environment....Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The

⁶⁷ See also the case of *African Centre for Rights And Governance (ACRAG) & 3 others v Municipal Council of Naivasha* [2017] eKLR, where the Learned Judge stated, inter alia:

16. *I have considered the matter. This is an important if not welcomed public interest suit. It is vital that all persons be vigilant about the protection of the environment and any person litigating for the sustainability of the environment deserves applause. Of course, each case must be considered in light of the facts tabled and the applicable law.*

20. *It will be observed from Article 70 (3) above, that it is not necessary for one to demonstrate that they have suffered loss or injury, for them to move the court when claiming that the right to a clean and healthy environment has been violated or is under threat of violation. It is not therefore a requirement for the petitioners to show that they have personally suffered or that the presence of the dumpsite has directly caused them any direct harm. It is sufficient for the petitioners to point out, that there is an ongoing, or imminent threat of harm, to the environment.*

33. *I have no doubt in my mind that the facility in issue is a threat to a clean and healthy environment. Its operations are indeed illegal. The operation of the facility by the respondent and its successor, the County Government of Nakuru, violates the rights of the petitioners and indeed the rights of the residents of Naivasha, and of all persons resident in Kenya, to a clean and healthy environment as provided for in Article 42 of the Constitution. I do find that there has been a violation of this right by the respondent and now the County Government of Nakuru.*

⁶⁸ [2013] eKLR, Environment and Land No. 273 of 2013.

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community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest that would not have been important, as any person *who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment....*⁶⁹ (emphasis added)

As stated by the Judges in *Peter K. Waweru* case, “in the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.” Courts ought to protect this right, for all and going by the above decisions, it is arguable that courts have not done enough in playing this role. An approach that does not emphasize on the likely denial, violation, infringement or threat to the right to clean and healthy environment but one that focuses on the protection and conservation of the environment and its resources, is what is required if the Courts are to ensure that all persons including those who cannot access justice through courts, enjoy the above right.

3.0 Reconceptualising the Right to Clean and Healthy Environment in Kenya

It is no longer in dispute, at least in Kenya, that there exists a human right to a clean and healthy environment recognised even by the Constitution. Ensuring full enjoyment of a clean and healthy environment, through effective environmental management, will provide multiple benefits to society and the economy.⁷⁰ This calls for a holistic, comprehensive and integrated approach to health and environment to protect both the environment and public health.⁷¹

⁶⁹ Paras 25 & 28.

⁷⁰ United Nations Environmental Programme, “Human Health and the Environment,” *UNEP Post 2015 Note No. 3*, available at <http://www.unep.org/roap/Portals/96/UNEP-Post-2015-Note-3.pdf> [Accessed on 2/09/2015].

⁷¹ J.P. Narain, “The challenge of health & environment: Profiling risks & strategic priorities for now & the future,” *Indian Journal of Medical Research*, Vol. 136, No.2, August, 2012, pp. 185–191 at p. 186.

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Notable is the *European Charter on Environment and Health*⁷² which provides for both entitlements and responsibilities. Article 2 thereof provides that every individual has a responsibility to contribute to the protection of the environment, in the interests of his or her own health and the health of others. The Charter's provisions on principles for public policy are relevant to this discourse. It provides that, *inter alia*: Good health and wellbeing require a clean and harmonious environment in which physical, psychological, social and aesthetic factors are all given their due importance. The environment should be regarded as a resource for improving living conditions and increasing wellbeing; and that Governments, public authorities and private bodies should aim at both preventing and reducing adverse effects caused by potentially hazardous agents and degraded urban and rural environments.

The foregoing provisions, although not territorially applicable to Kenya, offer a stark reminder for the country on the special relationship between human health and environment and the best approaches to dealing with them. There is need for strengthening multisectoral cooperation, integrating environmental health concerns into all national and county environmental and health-related policies. Under the Fourth Schedule of the Constitution of Kenya, the National and County Governments have shared responsibilities when it comes to environment and natural resources. The National Government is tasked with protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular—fishing, hunting and gathering; protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and energy policy.⁷³ It is also to come up with health policy; agricultural policy; and the energy policy including electricity and gas reticulation and energy regulation.⁷⁴ On the other hand, the functions and powers of the county are, *inter alia*: agriculture, including—crop and animal husbandry; livestock sale yards; plant and animal disease control; and fisheries.⁷⁵ They are also tasked with County health services, including, in particular— county health facilities

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73 Fourth Schedule to the Constitution, Part I clause 22.

74 Clauses 28, 29, 31.

75 Fourth Schedule to the Constitution, Part II, Clause 1

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and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; and refuse removal, refuse dumps and solid waste disposal.⁷⁶ The other function of county governments is control of air pollution, noise pollution, other public nuisances and outdoor advertising.⁷⁷ The foregoing functions all contribute in one way or the other to creation of a clean and healthy environment. The two government levels should work together to facilitate a coordinated, multisectoral approach for effectiveness in the efforts to ensure realisation of the constitutional right to clean and healthy environment, for all.⁷⁸

⁷⁶ Ibid, clause 2.

⁷⁷ Ibid, clause 3.

⁷⁸ This was well articulated by the Learned Judge (Sila Munyao, J) in *African Centre for Rights And Governance (ACRAG) & 3 others v Municipal Council of Naivasha* [2017] eKLR, who ruled as follows:

44. *This case has brought forth an important element touching on the management and conservation of our environment. I honestly do not know whether NEMA has conducted an audit of the manner in which all County Governments manage solid waste. I however doubt if NEMA has done so given what has revealed itself in this suit. I believe it is time that NEMA considered a countrywide audit and proceed to embark on measures to ensure that only licenced dumping facilities operate as required by law. NEMA also needs to introduce rules and regulations on the operation of such facilities and have mechanisms to ensure that these rules are followed. The aspect of licencing of transporters of waste also has to be considered. Rules need to be made and to be followed. The National Government also needs to get involved and work together with County Governments and NEMA so that solid wastes are properly managed. Funding will always be an issue and this should be looked at by both County and National Governments. We cannot continue risking the health and lives of Kenyans by failing to have properly managed solid waste management systems.*

45. *The time to act is now if we have to safeguard a good future for this and the future generations.*

46. *I therefore order that this judgment be served upon NEMA so that they can proceed to ensure compliance with the orders issued herein, and to report to this court as earlier directed.*

47. *I also order that this judgment be served upon the Cabinet Secretary of the Ministry of Environment and Natural Resources and the Council of Governors to consider issues of policy, compliance with EMCA on the subject of solid waste management, cooperation, funding, and all other matters touching on this topic, so that countrywide and in the shortest time possible, we will have waste management systems that we can all be proud of.*

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Kenya's *Vision 2030* is the long-term development blueprint for the country, with various pillars that include economic, social and political pillars. The social pillar seeks to build a just and cohesive society that enjoys equitable social development in a clean and secure environment.⁷⁹ The transformation targets key social sectors, which include *inter alia*: water and Sanitation; the Environment and Housing and Urbanisation. Concerning the environment, the Blueprint seeks to ensure that Kenya becomes a nation that has a clean, secure and sustainable environment by 2030. This is to be achieved through: (i) promoting environmental conservation to better support the economic pillar's aspirations; (ii) improving pollution and waste management through the application of the right economic incentives; (iii) commissioning of public-private partnerships (PPPs) for improved efficiency in water and sanitation delivery; (iv) enhancing disaster preparedness in all disaster-prone areas and improving the capacity for adaptation to global climatic change.⁸⁰ It is important that these aspirations are achieved as they go to the core of the right to clean and healthy environment. Joint efforts from all the relevant stakeholders including private citizens, coupled with collaborative approach by all the Government authorities can enhance the country's efforts for a prosperous nation.

The *Sessional Paper on Vision 2030* notes that growth will be dependent on agriculture, tourism, manufacturing and the energy sector, which heavily rely on exploitation of natural resources and the environment.⁸¹ Further, major developments, anticipated by Vision 2030 will affect pollution levels and generate larger quantities of solid waste than at present. Anticipated growth in manufacturing activities will also give rise to an increase in effluents discharged, which will require effective disposal management. The Arid and Semi-Arid Lands (ASALs), which constitute approximately 80 per cent of the total land mass and support some 10 million people and more than 70 per cent livestock, will also undergo major changes as a result of new towns, better infrastructure and livestock based industries. All these changes will consequently exert immense pressure on the already declining natural

⁷⁹Sessional paper No. 10 of 2012, On Kenya Vision 2030,

⁸⁰ Ibid.

⁸¹ Ibid, p.123.

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resources base and on the country's fragile environment. The *Sessional Paper on Vision 2030* advocates for a strong policy on the environment in order to sustain economic growth while mitigating the impacts of rapid industrialisation.⁸²

The Blueprint also points out that Kenya's current institutional framework to manage the environment, which is characterised by fragmentation, has various aspects of the environment policy cutting across different institutions. Accordingly, policy and institutional reform for stricter enforcement, therefore, poses a big challenge that must be overcome by Vision 2030. However, policy and legal measures require determination and political goodwill from the citizenry and leadership, for their successful enforcement and compliance. Realising the right to clean and healthy environment requires an integrated approach that incorporates social, cultural and political measures from all.

The environment should be accorded some right, independent of the human beings. Indeed, the Constitution of Kenya elevates the environment as worthy of protection by stating in the preamble that the People of Kenya are respectful of the environment, which is their heritage, and are determined to sustain it for the benefit of future generations. The constitutional recognition of this position in Kenya should give the law makers, courts and other stakeholders an incentive and clear authority to take strong action to protect the environment.

3.1 Traditional Knowledge for Clean and Healthy Environment

"Traditional knowledge" is defined as any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another.⁸³ The term is not to be limited to a specific technical

⁸² *Sessional Paper on Vision 2030*, p.123.

⁸³ African Regional Intellectual Property Organization (ARIPO), *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010.

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field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.⁸⁴

Africa is believed to be endowed with rich and highly diverse biological resources and traditional knowledge which have been practised centuries before the advent of colonialization.⁸⁵ This knowledge reflects the cumulative body of knowledge and beliefs handed down through generations by cultural transmission and the relationship of the local people with their environment.⁸⁶ Traditional knowledge also encompasses belief systems that play a fundamental role in a people's livelihood, maintaining their health, and protecting and replenishing the environment.⁸⁷

The Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.⁸⁸ Particularly, it obligates the State to, *inter alia*, recognise the role of science and indigenous technologies in the development of the nation, and, recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.⁸⁹ Further, with respect to the environment, the State is obligated to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.⁹⁰ The State should not just protect the indigenous knowledge but should also actively promote the use of this knowledge for environmental protection and conservation for a clean and healthy environment.

It has been argued that traditional knowledge may contribute to improved development strategies in several ways such as by helping identify cost-effective and sustainable mechanisms for poverty alleviation that are locally manageable and locally meaningful; by a better understanding of the complexities of sustainable development in its ecological and social diversity,

⁸⁴ Ibid.

⁸⁵ African Regional Intellectual Property Organization, available at <http://www.aripo.org/index.php/services/traditional-knowledge> [Accessed on 1/09/2015].

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Constitution of Kenya, Art. 11(1).

⁸⁹ Ibid, Art. 11(2) (b) & (3) (b).

⁹⁰ Ibid, Art. 69(1) (c).

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and helping to identify innovative pathways to sustainable human developmental that enhance local communities and their environment.⁹¹

Utilizing the traditional knowledge and avoiding or eliminating practices that contribute to deterioration or degradation of the environment can go a long way in promoting the realisation of the right to clean and healthy environment for all.

3.2 Scientific Knowledge for Clean and Healthy Environment

The Constitution of Kenya protects the right of every person to freedom of expression, which includes: freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.⁹² Further, as already pointed, the Constitution also obligates the State to recognise the role of science and indigenous technologies in the development of the nation.⁹³ 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.

Adoption of cleaner technologies in such areas as transport, energy production and food production can be an effective preventive measure. Scientific knowledge is also useful in helping the citizenry adopt healthy lifestyles for a better, cleaner and healthier environment. It is common knowledge that the public, mostly around urban areas, also greatly contribute to the violation of the right to clean and healthy environment mainly through pollution and other activities that lead to degradation of the environment.⁹⁴ This does not however mean that the rural folk is excluded. They also

⁹¹African Regional Intellectual Property Organization, *op cit*.

⁹² Constitution of Kenya, Art. 33(1).

⁹³ *Ibid*, Art. 11(2) (b).

⁹⁴ See T. Egondi, *et al*, 'Community Perceptions of Air Pollution and Related Health Risks in Nairobi Slums,' *International Journal of Environmental Research and Public Health*, Vol. 10, 2013, pp. 4851-4868; See also S.M., Kithiia, 'Water Quality Degradation Trends in Kenya over the Last Decade, Water Quality Monitoring and Assessment, 2012. Available at <http://www.intechopen.com/books/water-quality-monitoring-and-assessment/water-quality-degradation-trends-in-kenya-over-the-last-decade> [Accessed on 02/09/2015].

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contribute to degradation through such means as production methods that lead to degradation, over-exploitation of the limited resources, deforestation, overstocking, amongst others.⁹⁵

Scientific knowledge can play a great role in dealing with the above problems through, *inter alia*, cleaner production methods, sustainable housing and effective treatment and disposal of wastes.⁹⁶

3.3 Poverty Eradication for Clean and Healthy Environment

It has been argued that conservation can contribute to poverty reduction, particularly through restoring ecosystems and by improving access by the poor to ecosystem services, thus contributing to secure livelihoods for the people who depend on them.⁹⁷ These two concepts are however mutually dependent in that if the State puts effective measures in place to address poverty, some of the contributing factors to violation of the right to clean and healthy environment can arguably be dealt with. Such include deforestation, unsustainable production methods and giving the people a voice to deal with any likely violation through ensuring that they have the means to seek redress from Courts.⁹⁸ Effective natural resources management, along with

⁹⁵ FAO, 'Land and environmental degradation and desertification in Africa,' available at <http://www.fao.org/docrep/X5318E/x5318e02.htm> [Accessed on 02/09/2015].

⁹⁶ See also 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:

The Agenda calls upon all countries to ensure that by the year 2030 they upgrade infrastructure and retrofit industries to make them sustainable, with increased resource use efficiency and greater adoption of clean and environmentally sound technologies and industrial processes, all countries taking action in accordance with their respective capabilities.

⁹⁷ IUCN - The World Conservation Union, *Depend on Nature: Ecosystem Services supporting Human Livelihoods*, 2005, *op cit*, p.13.

⁹⁸ Examples of unsustainable production methods and infringement on the environment include pollution especially by slum-dwellers, some of who have no sense of responsibility with regard to protection of the environment, and the people who cultivate along rivers and other water sources thus causing degradation of these resources.

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conservation and restoration, can protect and enhance biodiversity and ecosystem services.⁹⁹ The environment and the ecosystem services are so connected to the human wellbeing that it has been argued that the Millennium Development Goals (MDGs) reflect the relationship between the environment and sustainable development. This is because the targets and indicators are based on delivery of ecosystem services to the poor.¹⁰⁰ Where people engage in unsustainable production activities due to poverty, the State together with other relevant stakeholders can put in place measures that eradicate poverty but at the same time educating the concerned people on the best alternatives that can enhance their livelihoods while still conserving the environment.

3.4 Public Awareness and Participation for Clean and Healthy Environment

The 1994 Draft Declaration on Human Rights and Environment describes the procedural rights, such as the right to participation, necessary for realization of the substantive rights.¹⁰¹ It has been argued that procedural rights, such as rights to information, participation and access to justice, have the potential to empower civil society groups to make social and environmental claims and to hold State bodies and private sector actors accountable for their actions or omissions, while exercising basic civil and political rights to be free from harassment and abuse.¹⁰² This is reiterated under Article 1 of the Aarhus Convention “in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party should guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this

⁹⁹ United Nations Environmental Programme, “Human Health and the Environment,” *UNEP Post 2015 Note No. 3, op cit.*

¹⁰⁰ IUCN - The World Conservation Union, *Depend on Nature: Ecosystem Services supporting Human Livelihoods*, 2005, p.5. Available at <https://portals.iucn.org/library/efiles/documents/2005-009.pdf> [Accessed on 1/09/2015].

¹⁰¹ Part 3 (Principles 15-24).

¹⁰² United Nations Non-Governmental Liaison Service, *Human Rights Approaches to Sustainable Development*, NGLS Roundup 90, May 2002, p. 1. Available at <http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf> [Accessed on 28/08/2015]

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Convention.”¹⁰³ It believed that environmental procedural rights such as the access to information, public participation and access to justice may be one of the ways and means to a realistic way for attaining the sustainable development.¹⁰⁴

Kenyans have a role to play in achieving the ideal of a clean and healthy environment. There is need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same. The citizenry should be able to practise preventive measures while allowing the courts to come in only in cases of violation of environmental standards. Developing environmental ethics and consciousness can be enhanced through adopting participatory approaches to conservation and management of environment and its resources. Dissemination of information and knowledge in meaningful forms can also enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment.

It has been argued that when the environment is destroyed, plundered, or mismanaged, we undermine our quality of life and that of our future generations. A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.¹⁰⁵

The citizenry efforts can go a long way in creating a clean and healthy environment. There is therefore a need to encourage voluntary compliance

¹⁰³ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN Doc. Sales No. E/F/R.98.II.E.27.

¹⁰⁴ N. Mohammad, ‘Environmental Rights for Administering Clean and Healthy Environment towards Sustainable Development in Malaysia: A Case Study,’ *International Journal of Business and Management*; Vol. 9, No. 8; 2014, pp. 191-198 at p.192; See Goal 16 of the Proposed Targets of the *United Nations Agenda 2030 on the Sustainable Development Goals 2015 – 2030* 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.

¹⁰⁵ ‘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 01/09/2015].

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with environmental regulations, by the general public. This can be achieved through creating public awareness on the impacts of unsustainable and environment-degrading production and social activities, while providing sustainable alternatives. Such awareness can include organizing public forums, use of media to disseminate information and environmental campaigns and introducing comprehensive and up-to date environmental studies in learning institutions, at all levels. Incentives and disincentives can also be offered to encourage people to discard unsustainable methods of production and other activities that contribute to the degradation of the environment. Environmental rules that reward environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.¹⁰⁶

3.5 Enforcement and Compliance

It has rightly been observed that enforcing environmental standards and regulations is one of the surest ways governments can use to checkmate the negative impacts of corporation's activities (and even individuals) on the environment and on the lives of inhabitants of host communities.¹⁰⁷ As such, faced with environmental challenges which include: deforestation: biodiversity loss, drought and desertification, erosion, flooding, air, water and land pollution, industrial pollution, noise pollution, mounting solid wastes and generally unsanitary conditions, the need to effectively enforce environmental laws cannot be overemphasized.¹⁰⁸

Internationally and regionally, there are a number of instruments that strive to facilitate enforcement and compliance with environmental law, and ultimately realisation of the right to clean and healthy environment for all. Article 2 (1) of

¹⁰⁶ International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' p.2, available at <http://www.uncsd2012.org/content/documents/332INECE%20Submission%20Rio%20Compilation%20Document.pdf> [Accessed on 04/09/2015].

¹⁰⁷ Z.O., Edo, 'The Challenges of Effective Environmental Enforcement and Compliance in the Niger Delta Region of Nigeria,' *Journal of Sustainable Development in Africa*, Vol. 14, No.6, 2012, p. 262.

¹⁰⁸ Ibid.

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the *Vienna Convention*¹⁰⁹ outlines some of the States' general obligations towards the ozone layer. The Parties to the Convention are required to take appropriate measures in accordance with the provisions of the Convention and of those protocols in force to which they are party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer. The Convention requires Parties to, in accordance with the means at their disposal and their capabilities: Co-operate by means of systematic observations, research and information exchange in order to better understand and assess the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone layer; adopt appropriate legislative or administrative measures and co-operate in harmonizing appropriate policies to control, limit, reduce or prevent human activities under their jurisdiction or control should it be found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer; co-operate in the formulation of agreed measures, procedures and standards for the implementation of this Convention, with a view to the adoption of protocols and annexes; and co-operate with competent international bodies to implement effectively this Convention and protocols to which they are party. This Convention mainly advocates for preventive and control measures by States implemented through cooperation.

These measures, as observed in the Convention, rotate around protecting human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer. These measures, if implemented can contribute positively in the realisation of the human right to clean and healthy environment. However, since they are only recommendations, they require political goodwill from the States for their implementation.

According to Kenya's Ministry of Environment and Natural Resources, Kenya has made considerable progress in phasing out substances that deplete the

¹⁰⁹ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Kenya is a signatory to the Convention.

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Ozone layer that shields the earth from harmful ultra-violet radiation from the sun.¹¹⁰ The country has already phased out chlorofluorocarbons, halons and methyl bromides which are Ozone depleting substances (ODS) found in applications such as fire-fighting equipment and fumigation for soils and cereals.¹¹¹ The harmful effects of sun radiation include increased cases of skin cancer and eye cataracts among humans, reduced plant and animal activity, poor air quality, damage to plastics and negatively impact on the climate.¹¹²

The *Montreal Protocol*,¹¹³ also an international Treaty, aims to regulate the production and use of chemicals that contribute to the depletion of Earth's ozone layer. The protocol set limits on the production of chlorofluorocarbons (CFCs), halons, and related substances that release chlorine or bromine to the ozone layer of the atmosphere.¹¹⁴

*Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*¹¹⁵ affirms that States are responsible for the fulfillment of their international obligations concerning the protection of human health and protection and preservation of the environment, and are liable in accordance with international law.¹¹⁶ The Convention is also based on the fact that States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of disposal. Under the Convention, "environmentally sound management of hazardous wastes or other wastes" means taking all practicable steps to ensure that hazardous wastes or other

¹¹⁰ Per Principal Secretary for Environment and Natural Resources Dr. Richard Lesiyampe, available at <http://www.environment.go.ke/?p=600> [Accessed on 27/08/2015]

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Montreal Protocol and (London Amendment) on Substances that Deplete the Ozone layer, 1522 UNTS 3; 26 ILM 1550 (1987). Kenya is a signatory to the Protocol.

¹¹⁴ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Arts. 2A-I.

¹¹⁵ Basel, 22 March 1989, 1673 UNTS 126; 28 ILM 657 (1989). Kenya is a signatory to the Convention.

¹¹⁶ Preamble.

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wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.¹¹⁷

The Convention outlines general obligations of State Parties which include, *inter alia*: Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal should inform the other Parties of their decision pursuant to Article 13; Parties are to prohibit or should not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, when notified pursuant to subparagraph (a) above; and Parties should prohibit or should not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes.¹¹⁸ Further to the foregoing, each Party should take the appropriate measures to, *inter alia*: ensure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects; and ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that should be located, to the extent possible, within it, whatever the place of their disposal.¹¹⁹

The Convention requires Parties to co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.¹²⁰

The International Court of Justice, in the 1997 case concerning the *Gabcikovo-Nagymaros Project* (Hungary and Slovakia)¹²¹, observed that “the protection of the environment is...a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the

¹¹⁷ Art. 2.8.

¹¹⁸ Art. 4(1).

¹¹⁹ Art. 4(2).

¹²⁰ Art. 12.

¹²¹ *GabCikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 1. C. J. Reports 1997, p. 7.

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right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.” The Court held that the corpus of international law which relates to the environment now consists of the general obligation of states to ensure that activities within their jurisdiction and control respects the environment of other states or areas beyond national control. The concept of sustainable development is in consonance with the need to reconcile economic development with the protection of the environment. Hence, the terms of agreements to implement must be negotiated by the parties.¹²²

Locally, the Constitution of Kenya 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.¹²³ The Constitution goes further to provide that on such an application, the court 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.¹²⁴

The existing environmental laws such as EMCA 1999 provide for the use of Environmental Impact Assessment (EIA) in environmental management and conservation efforts. EIA is defined as an environmental management tool aiming at identifying environmental problems and providing solutions to prevent or mitigate these problems to the acceptable levels and contribute to achieving sustainable development.¹²⁵ EIA can be a powerful tool for keeping

¹²² Ibid.

¹²³ Art. 70 (1).

¹²⁴ Art. 70(2).

¹²⁵ N.M. Al Ouran, 'Analysis of Environmental Health linkages in the EIA process in Jordan,' *International Journal of Current Microbiology and Applied Sciences*, (2015) Vol. 4, No. 7, 2015, pp. 862-871, p. 862.

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the corporate including Multinational Corporations (MNCs) operating in the country in check. However, the general public should be empowered through more meaningful participation in the same to ensure that the EIAs achieve their objectives. This is the only way that the affected sections of population appreciate the use of EIAs and also ensure that such exercises are not mere formalities on paper but are utilised fully for the protection of the right to clean and healthy environment. This is especially for projects taking place within the community dwellings, with potentially great effects on the people. An example of the same is the recent case of lead poisoning at the Coastal region of Kenya, due to unregulated mining activities.¹²⁶

It has been observed that investing in compliance and enforcement of environmental laws benefits the public by securing a healthier and safer environment for themselves and their children. It also benefits individuals, firms and others in the regulated community by ensuring a level playing field governed by clear rules applied in a fair and consistent manner.¹²⁷

Strengthening environmental compliance and enforcement requires renewed efforts by individuals and institutions everywhere. Government officials, particularly inspectors, investigators, and prosecutors, must exercise public authority in trust for all of their citizens according to the standards of good governance and with a view to protecting and improving public well-being and conserving the environment.¹²⁸ The judiciary has a fundamental contribution to make in upholding the rule of law and ensuring that national and international laws are interpreted and applied fairly, efficiently, and

¹²⁶ B. Jenje, 'MP to compensate families injured by lead poison 'if guilty', *Daily Nation*, Wednesday, April 29, 2015, available at <http://www.nation.co.ke/news/politics/MP-to-compensate-families-injured-by-lead-poison-if-guilty/-/1064/2701594/-/15u9iv1/-/index.html> [Accessed on 05/09/2015]; See also M. W. Chege, *et al*, 'Lead contamination of traditional hand-dug wells in parts of Kwale County, Kenya,' *International Journal of Physical Sciences*, Vol. 8, No.17, 9 May, 2013, pp. 835-839.

¹²⁷ International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' *op cit*, p.2.

¹²⁸ *Ibid*.

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effectively.¹²⁹ Concerted efforts from all the stakeholders, including the general public can ensure that the compliance and enforcement framework in place is used to promote and safeguard the right to clean and healthy environment as envisaged in the Constitution and environmental laws.

4.0 Towards a Clean and Healthy Environment in Kenya

The realisation of the right to clean and healthy environment for the Kenyan people calls for the reconceptualization of the right. The existing framework on environment, including EMCA falls short of defining what entails a clean and healthy environment. From the foregoing argument, it is the author's assertion that the right to a clean and healthy environment can only be fully realised through addressing all issues that adversely affect the environment. The anthropocentric approach mostly adopted by most of the existing legal instruments creates the false impression that the environment should only be protected for the convenience of human beings. However, a better approach should incorporate both anthropocentric and ecocentric ideals for better incentives.

Sustainable development efforts may not bear much if the country does not move beyond laws. There is need for educating the public on the subject, with emphasis on preventive and conservation measures. The same should include change of attitude by the general public. Through encouraging use of traditional knowledge in conservation and production to active and meaningful participation in decision-making, the citizenry can hopefully appreciate the fact that the creation of a clean and healthy environment is not a State's responsibility only but there is a requirement of cooperation between the State actors and the individuals. It is to be recalled that Article 69(2) of the Constitution provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. There is need to empower communities so as to actualise these constitutional provisions.

One of the national values and principles of governance as provided under Article 10 of the Constitution is sustainable development. The principles of

¹²⁹ Ibid.

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sustainable development as captured in EMCA¹³⁰ include: the principle of public participation in the development of policies, plans and processes for the management of the environment; the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle. There is need to actively engage the communities in environmental management and conservation in order to help in the implementation of these principles. With the communities empowered, then it is possible to hold to account those who flout environmental laws, be they entities or individuals. It is easier to engage a community that feels a sense of belonging than one that feels sidelined by the state actors.

There is also a need to diversify production methods and waste disposal through use of innovation and technology. The State departments tasked with encouraging innovation and science ought to work closely with communities as way of identifying the most appropriate technology, either arising from the communities themselves or elsewhere, to boost production and address poverty. This also calls for more scientific research to come up with crops that can do well in dry areas to tackle the problem of drought and ultimate desertification. This will also help in diversification in economic activities by the concerned communities.

Courts also need to work closely with the public as a way of enhancing identification of activities that violate environmental laws as well as increasing the rate of enforcement and compliance with court decisions, by bodies and individuals.

There is also need to sensitise the public on the dangers of environmental degradation through pollution, overstocking, over-exploitation of resources. Other professionals should be brought on board. These may be drawn from such fields as medical, agricultural, mining, amongst others.

¹³⁰ S. 3(5).

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When people appreciate that the state of environmental health directly affects their livelihoods, it is possible to engage them in creation of a better environment that is clean and healthy as the first step towards improving their lives.

5.0 Conclusion

From the foregoing, it is clear that it is possible for the right to clean and healthy environment to be enjoyed in Kenya. The same is protected by the Constitution and has been judicially interpreted. There is however a need to reconceptualise the right to a clean and healthy environment by clearly defining it and according it the correct place in the human rights discourse.

The right to a clean and healthy environment can be equated to the right to life. This is the bold declaration that must be made and captured in our legal framework so as to make it a reality.

Reconceptualizing Corporate Governance for Sustainable Development

Abstract

The paper critically explores the role of Corporate Governance in the Sustainable Development agenda. It asserts that the activities of corporations have a great effect in either promoting or hindering the attainment of Sustainable Development. The paper highlights some of the corporate governance practices that have fostered Sustainable Development including the concepts of Corporate Social Responsibility (CSR) and Environmental, Social and Governance (ESG). It further analyzes some of the corporate governance practices that have impeded the attainment of Sustainable Development. The paper argues a case for reconceptualizing corporate governance in order to realize Sustainable Development.

1.0 Introduction

Corporations play a fundamental role in the society since the vast majority of economic activities around the world are organized through them¹. In modern times, the global role of corporations rivals that of national and local governments². It has been observed that some of the largest corporations have a higher corporate revenue than the Gross Domestic Product (GDP) of most nations across the globe³. Further, some corporations have undergone dynamic growth and gained powers traditionally vested only upon states thus asserting influence on the global stage and affecting the lives of millions of people around the world⁴. Consequently, most functions that were previously vested in the state are now exercised by private actors such as multinational

¹ Rauterberg. G, 'The Corporation's Place in Society' available at http://michiganlawreview.org/wpcontent/uploads/2016/04/114MichLRev.913_Rauterberg.pdf (Accessed on 14/07/2023)

² Milne Library., 'Corporations and their Social Responsibility.' Available at <https://milnepublishing.geneseo.edu/good-corporation-bad-corporation/chapter/1-corporations-and-their-social-responsibility/> (Accessed on 14/07/2023)

³ Ibid

⁴ Monshipouri. M, 'Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities' *Human Rights Quarterly*, No. 25 of 2003, p. 965-989

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corporations⁵. These services include energy, telecommunications, transport, water and sanitation among others⁶. Corporations thus continue to shape the political, economic, social, technological, environmental and legal discourse in the world.

The vast powers yielded by corporations in modern times has also been susceptible to abuse. Indeed, decisions of large multinational corporations are capable of doing more harm to natural persons in terms of human rights violations when compared to states⁷. It has been argued that the activities of corporations have often resulted in societal concerns such as environmental pollution and human rights abuses as a result of too much focus on economic growth⁸. Indeed, the activities of corporations especially Multinational Corporations in the investment sphere in Africa have resulted in gross human rights violations and environmental damage⁹. These concerns have led to the emergence of the concept of corporate governance.

Corporate governance is the system of rules, practices and processes by which an organization is directed and controlled¹⁰. It encompasses every sphere of

⁵ The East African Centre for Human Rights., 'A compendium on economic and social rights cases under the Constitution of Kenya, 2010' available at https://eachrights.or.ke/wpcontent/uploads/2020/07/A_Compndium_On_Economic_And_Social_Rights_Cases_Under_The_Constitution_Of_Kenya_2010.pdf (Accessed on 14/07/2023)

⁶ Ibid

⁷ Mwenda. M., 'The Context of Transformative Constitutionalism in Kenya' available at https://www.academia.edu/13738064/The_Context_of_Transformative_Constitutionalism_in_Kenya (Accessed on 14/07/2023)

⁸ Sozinova. A et al, 'Economic Environmental Activities of Russian Corporations' International Journal of Economics and Financial Issues, Volume 6, Issue 1, 2016, p. 52-56.

⁹ Muigua. K., 'Multinational Corporations, Investment and Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/11/Multinational-Corporations-Investment-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-November-2018.pdf> (Accessed on 14/07/2023)

¹⁰ Investopedia., 'Corporate Governance Definition: How it Works, Principles, and Examples.' Available at

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management from action plans and internal controls to performance measurement and corporate disclosure¹¹. Corporate governance has also been referred to the interaction between the board of directors, the senior management team, and the stockholders within an organization¹². It generally entails striking a balance between the needs of all of a company and its shareholders, including investors, senior management, clients, suppliers, financiers, the government, and the community¹³. Corporate governance covers the areas of environmental awareness, ethical behavior, corporate strategy, compensation, and risk management¹⁴. Corporate governance is thus a system of direction and control within an organization aimed at enhancing good governance practices in the organization.

The corporate governance framework within an organization is guided by several principles including the rights and equitable treatment of shareholders, promoting the role of stakeholders, transparency and disclosure and accountability of the Board of Directors¹⁵. The purpose of corporate governance is to help build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies¹⁶. Sound corporate governance can also enhance Sustainable Development¹⁷.

<https://www.investopedia.com/terms/c/corporategovernance.asp> (Accessed on 14/07/2023)

¹¹ Ibid

¹² Almashhadani. H & Almashhadani. M., 'Corporate Governance Science, Culture and Financial Performance.' *International Journal of Business and Management Invention*, Volume 12, Issue 4, 2023

¹³ Ibid

¹⁴ Peterdy. K., 'Corporate Governance.' Available at <https://corporatefinanceinstitute.com/resources/esg/corporate-governance/> (Accessed on 14/07/2023)

¹⁵ Organisation for Economic Co-operation and Development., 'OECD Principles of Corporate Governance.' Available at <https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf> (Accessed on 14/07/2023)

¹⁶ Ibid

¹⁷ Buckley, P 'Can Corporations Contribute Directly to Society or Only through Regulated Behaviour' *Journal of the British Academy*, 6 (sl), p. 323-374.

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The paper critically explores the role of Corporate Governance in the Sustainable Development agenda. It asserts that the activities of corporations have a great effect in either promoting or hindering the attainment of Sustainable Development. The paper highlights some of the corporate governance practices that have fostered Sustainable Development while also analyzing those that have impeded its attainment. The paper argues a case for reconceptualizing corporate governance in order to realize Sustainable Development.

2.0 Corporate Governance and Sustainable Development

The concept of Sustainable Development received global attention following the release of the Report of the World Commission on Environment and Development which defined it as development that meets the needs of the present without compromising the ability of future generations to meet their own needs¹⁸. Sustainable Development aims to maintain economic advancement and progress while protecting the long-term value of the environment¹⁹. It provides a framework for the integration of environment policies and development strategies²⁰. The overall goal of sustainable development is the long-term stability of the economy and environment which can only be achieved through the integration and acknowledgement of economic, environmental, and social concerns throughout the decision making process²¹. Sustainable Development thus combines elements such as environmental protection, economic development and social concerns²². This concept has been adopted as the leading global framework for international cooperation as envisaged by the United Nations 2030 Agenda for Sustainable

¹⁸ World Commission on Environment and Development., *'Our Common Future.'* Oxford, (Oxford University Press, 1987)

¹⁹ Emas. R., 'The Concept of Sustainable Development: Definition and Defining Principles.' Available at https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_S_D_concept_definiton_rev.pdf (Accessed on 14/07/2023)

²⁰ Ibid

²¹ Ibid

²² Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.'

International Sustainable Development Law., Vol 1

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Development and its Sustainable Development Goals (SDGs)²³. Sustainable Development has also been enshrined as among the national values and principles of governance in Kenya²⁴. Sustainable Development is thus a vital concept and its realization is a shared global endeavour.

Corporate governance plays an integral role in the Sustainable Development agenda. Traditionally, corporate governance was viewed as a model designed to protect shareholder investments from misuse by opportunistic managers within the organization²⁵. In relation to sustainability, there was widespread belief that attention to environmental impacts was part of the company's social responsibility, with purely legal or even ethical and moral implications, while such an impact was disconnected from the corporation's business model and market expectations²⁶. However, in the recent past, corporate governance has been increasingly applied to a more extensive form of monitoring of corporate activities, including their impacts on society and the environment²⁷. Several factors have induced corporations to rethink their traditional approach and increase investments in sustainability practices. These factors include sensitivity towards the sustainable goals of the companies themselves, the need to adapt to the regulatory evolution, the need to increase the quality of products and simultaneously reduce production costs, the desire to improve the image and reputation of corporations in the eyes of consumers who are increasingly sensitive to environmental concerns and new market opportunities²⁸. As a result, corporations have become aware of the growing

²³ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 14/07/2023)

²⁴ Constitution of Kenya, 2010., Article 10 (2) (d), Government Printer, Nairobi

²⁵ Roberts, D. J., & Van den Steen, E., 'Shareholder Interests, Human Capital Investment and Corporate Governance.' *Stanford GSB Working*. Available at <https://doi.org/10.2139/ssrn.230019> (Accessed on 14/07/2023)

²⁶ Naciti. V et al., 'Corporate Governance and Sustainability: A Review of the Existing Literature.' *Journal of Management and Governance*, 2021

²⁷ Roberts, D. J., & Van den Steen, E., 'Shareholder Interests, Human Capital Investment and Corporate Governance.' *Op Cit*

²⁸ Poddar, A., Narula, S. A., & Zutshi, A., 'A study of Corporate Social Responsibility Practices of the Top Bombay Stock Exchange 500 companies in India and their

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link between green practices and success so that sustainability has broadened its boundaries from being merely related to environmental issues to now encompass the company's overall business model²⁹. Consequently, sustainability has become an integral component of the strategies pursued by corporations and of the relationships they establish with various players in the corporate value chain³⁰.

The definition and characteristics of Sustainable Development envisage building of a society where there is a balance between economic, environmental and social goals³¹. The integration of these three dimensions needs to be embraced as a condition for achieving a long-term corporate sustainability³². Indeed, corporate sustainability is seen as the ability of a corporation by its management practices and market presence to positively affect the ecosystem, the community and the economic development³³. Corporate governance can foster Sustainable Development through corporate sustainability. Sustainable Development in the corporate context has been defined as the creation of sustainable organizations through integrated economic, social and ecological systems³⁴. It entails examining a corporation's development over time, taking into account its commitment to a healthy environment, economic and social systems so that the company can be more stable and resistant both to internal and external shocks³⁵.

The Sustainable Development Goals envisage attainment of the Sustainable Development agenda by meeting targets such as ending extreme poverty, promoting food security, promoting access to health and education, achieving

Alignment with the Sustainable Development Goals.' *Corporate Social Responsibility and Environmental Management*, No. 26(6) of 2019, 1184-1205

²⁹ Ibid

³⁰ Naciti. V et al., 'Corporate Governance and Sustainability: A Review of the Existing Literature.' Op Cit

³¹ Boeva. B et al., 'Corporate Governance and the Sustainable Development.' *European Journal of Economics and Business Studies*, Volume 7, No. 1 of 2017

³² Ibid

³³ Ibid

³⁴ Bansal, T., 'Business Sustainability.' Available at <https://journals.sagepub.com/doi/full/10.1177/1476127013520265> (Accessed on 14/07/2023)

³⁵ Ibid

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gender equality, promoting access to clean water and sanitation, ensuring access to affordable and clean energy, enhancing industry, innovation and infrastructure and combating climate change³⁶. Corporations can foster Sustainable Development at the economic, environmental and social levels. Corporations can foster economic development through investments in areas such as energy, infrastructure, industry and the distribution of income through payment of fair wages³⁷. They can further promote Sustainable development in the field of environment through waste reduction, pollution reduction, energy efficiency, reduction of air emissions, reduction of the consumption of hazardous and toxic materials and mitigating the frequency of environmental accidents among other measures aimed at promoting the right to a clean and healthy environment and enhancing climate change mitigation and adaption³⁸. Social sustainability can be attained by corporations by creating employment opportunities, provide equal opportunities for all persons, fostering diversity, encouraging social contacts within and outside the corporation and promoting quality life for their employees³⁹.

Corporations have embraced various corporate governance initiatives to promote sustainability and foster Sustainable Development including the concepts of Corporate Social Responsibility (CSR) and Environmental, Social and Governance (ESG)⁴⁰. CSR is the idea that a company should play a positive role in the community and consider the environmental and social impact of business decisions⁴¹. It is a form of self-regulation that reflects a business's accountability and commitment to contributing to the well-being of communities and society through various environmental and social

³⁶ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Op Cit

³⁷ Achim. M., 'The Impact of the Quality of Corporate Governance On Sustainable Development: An Analysis Based On Development Level.' Available at <https://www.tandfonline.com/doi/epdf/10.1080/1331677X.2022.2080745?needAccess=true&role=buttn> (Accessed on 14/07/2023)

³⁸ Boeva. B et al., ' Corporate Governance and the Sustainable Development.' Op Cit

³⁹ Ibid

⁴⁰ Ibid

⁴¹ BDC., 'What is Corporate Social Responsibility (CSR)?' Available at <https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/corporate-social-responsibility> (Accessed on 14/07/2023)

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measures⁴². CSR plays a vital role in a company's brand perception; attractiveness to customers, employees, and investors; talent retention; and overall business success⁴³. Corporations often implement CSR efforts through measures such as environmental initiatives, charity work, ethical labor practices and volunteer projects⁴⁴. Through CSR which is a tool of corporate governance, a corporation can foster Sustainable Development by promoting environmental and social sustainability which are crucial components of the Sustainable Development agenda⁴⁵.

Environmental, Social and Governance (ESG) on the other hand is a concept that seeks to achieve sustainable, responsible and ethical investment by incorporating Environmental, Social and Governance concerns in corporate decision making⁴⁶. It entails a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing a company's carbon footprint and ensuring there are systems in place to ensure accountability⁴⁷. ESG involves monitoring and reporting environmental concerns such as carbon emissions, water consumption and waste generation; social concerns such as employee, product and customer related data and governance concerns such as political lobbying, anticorruption initiatives and board diversity⁴⁸. The concept of ESG is pertinent since Environmental, Social and Governance concerns have become a societal focal point in light of the Sustainable Development agenda⁴⁹. ESG

⁴² Reckmann. N., 'What Is Corporate Social Responsibility?' Available at <https://www.businessnewsdaily.com/4679-corporate-social-responsibility.html> (Accessed on 15/07/2023)

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Moon. J., 'The Contribution of Corporate Social Responsibility to Sustainable Development.' Available at <https://pdfs.semanticscholar.org/8d7c/f655828a4004d2caaeedeb64d9fb1335446b.pdf> (Accessed on 15/07/2023)

⁴⁶ Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' *Journal of Corporate Finance* 66 (2021): 101889.

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Sriyani. C. & Heenetigala. K., 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study.' *Business Strategy and the Environment*, No. 26 of 2017

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can aid in achieving Sustainable Development by integrating Environmental, Social and Governance factors in corporate activities in order to enhance the sustainability and social impact of business activities⁵⁰.

Corporations have thus embraced various corporate governance tools towards achieving corporate sustainability and fostering Sustainable Development including CSR and ESG. However, despite this progress, certain bad corporate governance decisions have affected the attainment of Sustainable Development. Some corporations have been accused of accounting scandals including the use of fraudulent accounting practices to inflate corporate revenues and hide debts⁵¹. Such practices have often resulted in the collapse of certain corporations when the financial scandals were exposed⁵². This affects the attainment of Sustainable Development at the economic and social levels due to concerns such as loss of revenue and employment opportunities⁵³.

Further, some corporations have been blamed of failing to adhere to the principles of sustainability reporting and the disclosure of ethical, social, and environmental risk in their business activities⁵⁴. Such corporations fail to adhere to the principle of transparency in corporate governance by avoiding to comply with CSR reporting and ESG disclosures⁵⁵. Where corporations fail to comply with transparency and disclosure requirements which are fundamental principles of corporate governance, they may ultimately

⁵⁰ Li. T.T et al., 'ESG: Research Progress and Future Prospects.' Sustainability, No. 13 of 2021.

⁵¹ Petra. S & Spieler. A., 'Accounting Scandals: Enron, Worldcom, and Global Crossing.' Available at <https://www.emerald.com/insight/content/doi/10.1108/978-1-78973-417-120201022/full/html> (Accessed on 15/07/2023)

⁵² Ibid

⁵³ Achim. M., 'The Impact of the Quality of Corporate Governance On Sustainable Development: An Analysis Based On Development Level.' Op Cit

⁵⁴ Adams, C., 'Understanding integrated reporting: The concise guide to integrated thinking and the future of corporate reporting.' Available at <https://doi.org/10.4324/9781351275002> (Accessed on 15/07/2023)

⁵⁵ Ibid

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perpetrate concerns such as environmental pollution and human rights violation thus hindering the achievement of Sustainable Development⁵⁶.

Indeed, some multinational corporations have been accused of perpetrating human rights concerns such as killings, rape, and other forms of sexual and gender-based violence, bad labour practices, land injustices against neighbouring communities and displacement of people while undertaking investment activities⁵⁷. Further, the activities of multinational corporations especially those involved in the exploration of natural resources have resulted in environmental concerns such as environmental degradation, extinction of biodiversity, contamination and destruction of soil and air pollution affecting the socio-economic lives of indigenous populations⁵⁸. Such activities hinder the attainment of Sustainable Development and are often as a result of corporate failure to abide by good corporate governance practices such as ESG and CSR requirements⁵⁹.

Finally, it has been pointed out that corporations have in certain instances failed to consider sustainable governance and corporate integrity in particular⁶⁰. Sustainable Governance represents part of the ESG equation and should be understood as a prerequisite for achieving the entire spectrum of ESG goals⁶¹. Behind each breach of a company's environmental or social

⁵⁶ Achim. M., 'The Impact of the Quality of Corporate Governance On Sustainable Development: An Analysis Based On Development Level.' Op Cit

⁵⁷ Kenya Human Rights Commission., 'Heavy price for Kakuzi's egregious human rights violations' available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rightsviolations.html> (Accessed on 15/07/2023)

⁵⁸ Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' African Research Review Vol. 3 (1), 2009. Pp. 111-124

⁵⁹ Sriyani. C. & Heenetigala. K., 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study.' Op Cit

⁶⁰ Onweazu. O., 'Multinational Oil Corporations Corporate Integrity Ethics and Sustainable Development in Niger Delta, Nigeria.' *Journal of Sustainable Development*; Vol. 5, No. 10; 2012

⁶¹ World Economic Forum., 'Why Sustainable Governance and Corporate Integrity are Crucial for ESG' Available <https://www.weforum.org/agenda/2022/07/the-g-in-esg-3-ways-to-not-miss->

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commitments lies ineffective corporate governance, be it inadequate anti-corruption practices, perverse incentive structures, contradictory lobbying activity, ineffective board oversight or ill-equipped leadership⁶². It is thus vital for companies to foster corporate integrity by embedding governance concerns and corruption risks into ESG investing frameworks in order to promote Sustainable Development⁶³.

The foregoing discussion has demonstrated that good corporate governance practices such corporate sustainability, CSR and ESG can foster the realization of Sustainable Development⁶⁴. However, bad corporate governance practices such as poor accounting practices, failure to adhere to sustainability reporting, failure to enhance ESG and CSR requirements and negligence of sustainable governance and corporate integrity can hinder the attainment of Sustainable Development⁶⁵. There is need to reconceptualize corporate governance in order to advance Sustainable Development.

3.0 Way Forward

There is need to embrace sound corporate governance practices in order to achieve Sustainable Development. One way through which this can be achieved is through corporate disclosure requirements such as sustainability reporting⁶⁶. Through sustainability reporting, a corporation is able to use corporate governance as tool to monitor and disclose corporate progress on aspects such as the achievement of the Sustainable Development Goals⁶⁷. Various models have been adopted towards promoting sustainability reporting as a tool of corporate governance. The United Nations Global Compact (UNGC) has developed sustainability principles focusing on human

[it/?DAG=3&gclid=CjwKCAjw5MOIBhBTEiwAAJ8e1q7lLuk_egfH4cyQe8v1kIMLHVQXfyG6_juEF202fNzXAhU7B25YlxoC7Z0QAvD_BwE](https://www.google.com/search?q=it/?DAG=3&gclid=CjwKCAjw5MOIBhBTEiwAAJ8e1q7lLuk_egfH4cyQe8v1kIMLHVQXfyG6_juEF202fNzXAhU7B25YlxoC7Z0QAvD_BwE) (Accessed on 15/07/2023)

⁶² Ibid

⁶³ Ibid

⁶⁴ Boeva. B et al., 'Corporate Governance and the Sustainable Development.' Op Cit

⁶⁵ World Economic Forum., 'Why Sustainable Governance and Corporate Integrity are Crucial for ESG' Op Cit

⁶⁶ Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' *European Journal of Sustainable Development* (2022), 11, 3, 326-339

⁶⁷ Ibid

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rights, labour, the environment and anti-corruption and encourages participants to self-assess, prepare, and submit a progress report to the UNGC on their performance around these four topical areas⁶⁸. According to the UNGC, the Communication on Progress report should be fully integrated into a company's main stakeholder communications, most often the annual or sustainability report⁶⁹. Corporations can thus develop an annual ESG report discussing organisational performance around these topics in order to fulfil the requirements of the annual Communication on Progress report submissions to the UNGC and ascertain their role in fostering Sustainable Development⁷⁰. In addition, corporations can comply with the Carbon Disclosure Project (CDP) which allows signatory companies to provide performance data on climate change, water security and deforestation on a self-disclosure basis⁷¹. This self-reported data is then used by investors and other stakeholders to make informed data driven decisions with regards a company's environmental impacts⁷². Investors are thus able to select entities that demonstrate climate resilience by evidenced implementation of strategies that future proof their organisations against climate related policies and regulations⁷³. ESG reporting can be used to collect and report data to the CDP⁷⁴. Corporations can thus embrace sustainability and ESG reporting as a tool of corporate governance in order to foster Sustainable Development. However, there is need to ensure transparency and full disclosure in such

⁶⁸ United Nations Global Compact: available at <https://www.unglobalcompact.org/engagelocally/africa/kenya> (Accessed on 15/07/2023)

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Carbon Disclosure Project, available at <https://www.cdp.net/en> (Accessed on 15/07/2023)

⁷² Matisoff.D et al., 'Convergence in environmental reporting: assessing the Carbon Disclosure Project.' *Business Strategy and the Environment* 22.5 (2013): 285-305.'

⁷³ Ibid

⁷⁴ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2022/07/Embracing-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf> (Accessed on 15/07/2023)

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reporting in order to capture the true image in relation to a corporation's role in fostering Sustainable Development⁷⁵.

In addition, there is need for corporations to embrace good corporate governance practices when it comes to the Board of Directors in order to foster Sustainable Development⁷⁶. It has been asserted that the size of the Board of Directors is one element of corporate governance that has influenced companies in implementing and reporting all aspects of sustainable initiatives by companies⁷⁷. Thus, having a larger board might increase the monitoring capability, as members can offer more expertise and, thus, contribute to good board discussion⁷⁸. The size of the board has a connection with corporate involvement in Sustainable Development Goals since more judicial decisions can be made due to the knowledge provided by a larger number of board members⁷⁹. Further, Board Independence is an essential tool of corporate governance that can enhance effective monitoring of a corporation's activities towards fostering Sustainable Development⁸⁰. Thus, more independent board members can guarantee effective monitoring process that can reduce potential opportunistic behaviour by the management of a corporation⁸¹. In addition, gender diversity in the Board of Directors is a crucial influencer of corporate policy that can enhance sustainability particularly in social and environmental issues⁸². It has been asserted that men and women have different cultural and social preferences and a corporation may be induced to assume greater social

⁷⁵ Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' Op Cit

⁷⁶ Ibid

⁷⁷ Cuadrado-Ballesteros, B et al., 'Board Structure to Enhance Social Responsibility Development: A Qualitative Comparative Analysis of US Companies.' *Corporate Social Responsibility and Environmental Management*, Volume 24 No. 6 of 2017, 524-542.

⁷⁸ Ibid

⁷⁹ Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' Op Cit

⁸⁰ Said, R et al., 'The Relationship Between Corporate Social Responsibility Disclosure and Corporate Governance Characteristics in Malaysian Public Listed companies.' *Social Responsibility Journal*, Volume 5 No.2 of 2009, 212-226C

⁸¹ Ibid

⁸² Martinez., M. et al 'Women on Corporate Boards and Sustainable Development'. In D. C. Poff & A. C. Michalos (Eds.), *Encyclopedia of Business and Professional Ethics*. Springer 2020

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responsibility and promote environmental strategies such as using environmentally friendly manufacturing process that reduces the release of toxic waste and recycle activities if it had a reasonable proportion of women in the Board of Directors⁸³. Corporations should thus embrace good corporate governance practices in respect of the Board of Directors including ensuring an appropriate size of the board, promoting board independence and promoting gender diversity in the board in order to enhance Sustainable Development.

Finally, there is need for corporations to adhere to the tenets of Sustainable Development in their business activities. Some corporations especially in the investment sphere have been accused of failing to adhere to the principles of Sustainable Development as evidenced by cases of environmental degradation and human rights violation⁸⁴. Therefore, it is imperative for corporations to comply with the requirements of Sustainable Development and in particular the need for environmental protection and respect for human rights⁸⁵. This will enhance corporate sustainability and profitability while also fast tracking the attainment of the Sustainable Development goals⁸⁶.

4.0 Conclusion

Corporate governance plays an integral role in the realization of the Sustainable Development agenda. Sound corporate governance practices such as corporate sustainability, CSR and ESG can foster the realization of Sustainable Development⁸⁷. However, bad corporate governance practices such as poor accounting practices, failure to adhere to sustainability reporting, failure to enhance ESG and CSR requirements and negligence of sustainable governance and corporate integrity can hinder the attainment of Sustainable Development⁸⁸. There is need to rethink corporate governance in order to

⁸³ Ibid

⁸⁴ Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' Op Cit

⁸⁵ Muigua. K., 'Multinational Corporations, Investment and Natural Resource Management in Kenya.' Op Cit

⁸⁶ Boeva. B et al., ' Corporate Governance and the Sustainable Development.' Op Cit

⁸⁷ Ibid

⁸⁸ World Economic Forum., 'Why Sustainable Governance and Corporate Integrity are Crucial for ESG' Op Cit

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realize Sustainable Development. This can be achieved through embracing sustainability and ESG reporting, adopting good corporate governance practices in respect of the Board of Directors and adhering to the tenets of Sustainable Development⁸⁹. Reconceptualizing corporate governance for Sustainable Development is a cardinal idea that needs to be embraced across the globe.

⁸⁹ Buniamin. S et al., 'The Role of Corporate Governance in Achieving SDGs Among Malaysian Companies.' Op Cit

Reinforcing Climate Diplomacy for Development

Abstract

Tackling climate change has become a top policy agenda, at local, national, regional and global levels due to the ongoing threat of climate change throughout the world. Climate diplomacy has emerged as one of the key tools in the global response towards climate change with the ability to strengthen climate governance throughout the world. This paper critically examines the role of climate diplomacy in the global fight against climate change. It defines climate diplomacy and analyses its salient components. The paper further discusses progress made towards embracing climate diplomacy and responding to climate change. It also points out some of the key concerns in the area of climate diplomacy. The paper further suggests proposals towards reinforcing climate diplomacy for development.

1.0 Introduction

Climate change continues to be a major threat to the international community¹. It is a global emergency that goes beyond national borders. It has been identified as one of the greatest challenges of our time whose adverse impacts undermine the ability of all countries to achieve Sustainable Development². Climate change has been described as the main global challenge that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda³. Its impacts such as intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world⁴. Climate change therefore presents a major threat

¹ United Nations., 'Climate Action.' Available at <https://www.un.org/en/climatechange> (Accessed on 12/02/2024)

² United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 12/02/2024)

³ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

⁴ United Nations., 'What is Climate Change?' Available at <https://www.un.org/en/climatechange/whatis-climate-change> (Accessed on 12/02/2024)

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to long-term growth and prosperity, and it has a direct impact on the economic and social wellbeing of all countries⁵.

Due to its ongoing threat, tackling climate change has become a top policy agenda, at local, national, regional and global levels⁶. There have been global calls on governments and all other stakeholders to put in place measures towards responding to the threat of climate change and ensuring that economies are climate resilient⁷. Tackling climate change is one of the fundamental goals under the United Nation's 2030 Agenda for Sustainable Development with Sustainable Development Goal 13 calling upon countries to take urgent actions towards combating climate change and its impacts⁸. Climate diplomacy has emerged as one of the key tools in the global response towards climate change with the ability to strengthen climate governance throughout the world⁹.

This paper critically examines the role of climate diplomacy in the global fight against climate change. It defines climate diplomacy and analyses its salient components. The paper further discusses progress made towards embracing climate diplomacy towards responding to climate change. It also points out some of the key concerns in the area of climate diplomacy. The paper further suggests proposals towards reinforcing climate diplomacy for development.

2.0 Defining Climate Diplomacy

Diplomacy refers to the art, the science, and the means by which nations, groups, or individuals conduct their affairs, in ways to safeguard their

⁵ Ibid

⁶ United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at <https://www.un.org/en/desa/forum-climatechangeandscience-and-technology-innovation> (Accessed on 12/02/2024)

⁷ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Op Cit

⁸ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015,' Op Cit

⁹ United Nations., 'Africa: Making the Most out of the Climate Negotiations' Available at <https://www.un.org/africarenewal/magazine/december-2023/africa-making-most-out-climate-negotiations> (Accessed on 12/02/2024)

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interests and promote their political, economic, cultural or scientific relations, while maintaining peaceful relationships¹⁰. It has also been defined as a method that governments use to influence the actions of foreign governments through peaceful tactics such as negotiation and dialogue¹¹. It has been pointed out that diplomacy has often been used as a soft skill to shape mindsets and influence international and national agendas as well as the workings of governments¹². It has been argued that with the application of political support and concerted diplomacy, international cooperation can be forged to handle both longstanding and emerging global challenges¹³.

Climate diplomacy refers to global climate negotiations aimed at formulating a common response to the problem of climate change¹⁴. Climate diplomacy has also been defined as the use of diplomatic channels and strategies to address global climate change and its impact on international relations¹⁵. It involves negotiating and implementing climate-related policies, treaties, and agreements at the international level, as well as cooperation between countries and other stakeholders to reduce greenhouse gas emissions, adapt to the impacts of climate change, and promote Sustainable Development¹⁶. Climate diplomacy can also be understood as the practice and process of creating the international climate change regime and ensuring its effective operation¹⁷. Further, climate diplomacy can also be described as the process of advocating

¹⁰ What is Diplomacy? Available at <https://www.cyber-diplomacy-toolbox.com/Diplomacy.html#:~:text=Diplomacy%20is%20the%20art%2C%20the,relations%2C%20while%20maintaining%20peaceful%20relationships>. (Accessed on 13/02/2024)

¹¹ Ibid

¹² Mabey. N., Gallagher. L., & Born. C., 'The Evolution of Climate Diplomacy and the International Climate Regime.' Available at <https://www.jstor.org/stable/resrep17706.6?seq=1> (Accessed on 13/02/2024)

¹³ Ibid

¹⁴ Dimitrov. R., 'Climate Diplomacy' Available at https://www.researchgate.net/profile/Radoslav-Dimitrov-4/publication/322404819_Climate_diplomacy/links/5c89597b299bf14e7e7acf9c/Climate-diplomacy.pdf (Accessed on 13/02/2024)

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Mabey. N., Gallagher. L., & Born. C., 'The Evolution of Climate Diplomacy and the International Climate Regime.' Op Cit

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for actions to respond to climate change in diplomatic dialogues, public diplomacy, and policy instruments, and of contributing to public awareness about climate actions needed to effect change¹⁸.

It has been pointed out that the idea of climate diplomacy entails certain fundamental elements which include: committing to multilateralism in climate policy, particularly to the implementation of the Paris Agreement¹⁹; addressing implications of climate change on global peace and security²⁰; accelerating domestic action and raising global ambition on climate change²¹; and enhancing international climate cooperation through advocacy and outreach²². In addition, it has been posited that there are three critical stages to delivering effective climate diplomacy²³. The first stage involves negotiating a global climate agreement, a process that seeks to deliver effective representation into the United Nations Framework Convention on Climate Change (UNFCCC) process²⁴. The second stage involves building international political conditions for climate negotiations through avenues such as specialist divisions inside Ministries of Environment or Ministries of Foreign Affairs with broader diplomatic efforts to influence country positions in climate negotiations²⁵. The third stage entails implementation and integration of climate change goals in national, regional and international development agendas²⁶.

¹⁸ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Available at <https://blogs.afdb.org/a-race-against-time/post/is-climate-diplomacy-holding-its-promises-with-the-paris-agreement-especially-for-africa-17699> (Accessed on 13/02/2024)

¹⁹ Katja. B., 'The European External Action Service and EU Climate Diplomacy: Coordinator and Supporter in Brussels and Beyond' Available at <https://lirias.kuleuven.be/3394994?limo=0> (Accessed on 13/02/2024)

²⁰ Ibid

²¹ Ibid

²² Ibid

²³ Mabey. N., Gallagher. L., & Born. C., 'The Evolution of Climate Diplomacy and the International Climate Regime.' Op Cit

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

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Climate diplomacy is an essential tool for Development²⁷. It has been argued that countries' implementation of climate actions on the ground cannot be achieved without multilateral climate diplomacy²⁸. In addition, it has been pointed out that climate diplomacy has the potential to advance multilateral action on climate change, outside of the UNFCCC process²⁹. Climate diplomacy can also ensure that national priorities are reflected in the often abstract world of international climate negotiations, and that these negotiations promote additional domestic climate actions³⁰. It is therefore necessary to reinforce climate diplomacy in order to foster development.

3.0 Embracing Climate Diplomacy: Progress and Challenges

It has been observed that climate diplomacy has been at the forefront of shaping the world's response to climate change³¹. The idea of climate diplomacy emerged from environmental diplomacy which is a concept that appeared in the late twentieth century associated with events (conventions) promoted between states and transnational organisations to discuss aspects related to regulating the use of natural resources and curbing environmental challenges such as pollution and climate change³². It has been pointed out that Environmental diplomacy truly came of age at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro (also known

²⁷ Ibid

²⁸ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

²⁹ Climate & Development Knowledge Network., 'Climate Diplomacy: Seeing the Bigger Picture' Available at https://cdkn.org/sites/default/files/files/CDKN_Climate_diplomacy_PolicyBrief_final_web.pdf (Accessed on 13/02/2024)

³⁰ Ibid

³¹ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

³² Sebastiao. S. P., & Soares. I., 'Environmental Diplomacy: from Transnational Policies to the Role of Ambassadors - The contribution of David Attenborough (2018-2020).' Available at <https://www.emerald.com/insight/content/doi/10.1108/JCOM-04-2022-0030/full/html#:~:text=The%20concept%20of%20environmental%20diplomacy,natural%20resources%20and%20regulating%20pollution> (Accessed on 13/02/2024)

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as the “Earth Summit”). The Summit led to the adoption of Agenda 21³³ a daring program of action calling for new strategies to invest in the future to achieve overall sustainable development in the 21st century and the *Rio Declaration on Environment and Development*³⁴ which seeks to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving Sustainable Development³⁵.

The growth of environmental diplomacy permeated the field of climate governance as was evidenced by negotiations which led to adoption of the United Nations Framework Convention on Climate Change (UNFCCC)³⁶. The UNFCCC is the primary international, intergovernmental forum for negotiating the global response to climate change³⁷. The UNFCCC entered into force on 21st March 1994 as the first international legal instrument that focuses on climate change and sets out measures towards addressing the problem³⁸. The objective of the UNFCCC is to stabilize greenhouse gas concentrations at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system³⁹. Since its adoption, the UNFCCC has been the primary multilateral vehicle for international cooperation among

³³ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992., ‘Agenda 21.’ Available at https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf?_gl=1*_9uipp7*_ga*MjA2NDk2MDMxMS4xNjcxMjU5NTEw*_ga_TK9BQL5X7Z*MTY5NDU5NjE3MS41NS4xLjE2OTQ1OTgzODUuM_C4wLjA. (Accessed on 13/02/2024)

³⁴ United Nations General Assembly., ‘Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.’ A/CONF. 151/26 (Vol.1)

³⁵ Ibid, Principle 2

³⁶ African Development Bank Group., ‘Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?’ Op Cit

³⁷ United Nations Framework Convention on Climate Change., United Nations, 1992., Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 13/02/2024)

³⁸ Ibid

³⁹ Ibid

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governments to address the threat of climate change⁴⁰. It has promoted climate diplomacy and laid a global foundation of climate decisions to effect needed change at all levels⁴¹. One of the climate diplomacy instruments that emerged as a result of the UNFCCC is the Conference of Parties (COP), the supreme decision-making body of the Convention that gathers all States that are Parties to the Convention⁴². The COP meets annually unless the Parties decide otherwise (e.g. the 2020 meeting was postponed due to the global COVID-19 pandemic)⁴³. One of the main tasks of the COP is to review the information sent by the Parties to assess the effects of the measures adopted in pursuing the objectives of the Convention⁴⁴.

The COP has strengthened climate diplomacy and is the pinnacle of global climate change negotiations that discusses climate ambition and measures aimed at reducing greenhouse gas emissions and adapting to the impacts of climate change⁴⁵. It has shaped global climate response and led to the adoption of global instruments and commitments on climate change⁴⁶. For example, climate diplomacy initiatives led to the adoption of the Paris Agreement and COP 21. The *Paris Agreement*⁴⁷ is a legally binding international treaty on climate change. It was adopted by 196 Parties at the United Nations Climate Change Conference (COP21) in Paris, France, on 12th December 2015 and

⁴⁰ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

⁴¹ Ibid

⁴² United Nations Climate Change., 'Conference of the Parties (COP)' Available at <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop> (Accessed on 13/02/2024)

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ United Nations., 'Africa: Making the Most out of the Climate Negotiations.' Available at <https://www.un.org/africarenewal/magazine/december-2023/africa-making-most-out-climate-negotiations#:~:text=The%20COP%20is%20the%20pinnacle,the%20impacts%20of%20climate%20change>. (Accessed on 13/02/2024)

⁴⁶ Ibid

⁴⁷ United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 13/02/2024)

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entered into force on 4th November 2016⁴⁸. Its overarching goal is to strengthen the global response to the threat of climate change, in the context of Sustainable Development and efforts to eradicate poverty through holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels; increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development⁴⁹. It has been argued that the Paris Agreement is a major success story of climate diplomacy and managed to change the paradigm of climate diplomacy⁵⁰. It established the Nationally Determined Contributions (NDCs), balanced by reporting and review⁵¹. NDCs are at the heart of the Paris Agreement and the achievement of its long-term goals⁵². NDCs embody efforts by each country to reduce national emissions and adapt to the impacts of climate change⁵³. The Paris Agreement requires each Party to prepare, communicate and maintain successive NDCs that it intends to achieve⁵⁴. Parties are required to pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions⁵⁵.

In addition to the adoption of global climate change instruments such as the UNFCCC and the Paris Agreement, climate diplomacy has played a critical

⁴⁸ United Nations Climate Change., 'The Paris Agreement' Available at <https://unfccc.int/process-and-meetings/the-paris-agreement> (Accessed on 13/02/2024)

⁴⁹ Paris Agreement., Article 2 (1)

⁵⁰ Tskipurishvili. A., 'New Climate Diplomacy under the Paris Climate Agreement' Available at https://ceje.ch/files/8616/4450/0110/University_of_Geneva_-_GGPB_N1-2022_-_A._Tskipurishvili.pdf (Accessed on 13/02/2024)

⁵¹ Ibid

⁵² United Nations Climate Change., 'Nationally Determined Contributions (NDCs)' Available at <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs> (Accessed on 13/02/2024)

⁵³ Ibid

⁵⁴ Paris Agreement., Article 4 (2)

⁵⁵ Ibid

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role in establishing the base for climate finance⁵⁶. Climate finance refers to finance directed towards activities aimed at mitigating or adapting to the impacts of climate change⁵⁷. It involves local, national or transnational financing drawn from public, private and alternative sources of financing that seeks to support mitigation and adaptation actions that will address climate change⁵⁸. Climate finance can therefore be understood as the flow of funds to all activities, programmes or projects intended to help address climate change through both mitigation and adaptation across the world⁵⁹. It is very essential in enhancing the global response to climate change since both mitigation and adaptation activities require large scale financial investments⁶⁰. Climate diplomacy has played a key role in unlocking climate finance⁶¹. For example, it has been pointed out that through climate diplomacy, developing countries have been advocating for their priorities which has seen climate finance move to the front burner of the climate change negotiations⁶². It has been pointed out that through climate diplomacy, African countries have advocated the need to address the financial imbalance and inequity in accessing climate finance⁶³.

Climate diplomacy initiatives have to a certain extent borne fruit and contributed to the development of the field of climate finance. For example, at COP 15, states adopted the *Copenhagen Accord*⁶⁴ which saw developed

⁵⁶ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

⁵⁷ The London School of Economics and Political Science., 'What is Climate Finance?' Available at <https://www.lse.ac.uk/granthaminstitute/explainers/what-is-climate-finance-and-where-willitcomefrom/> (Accessed on 14/02/2024)

⁵⁸ United Nations Climate Change., 'Introduction to Climate Finance.' Available at <https://unfccc.int/topics/introduction-to-climate-finance> (Accessed on 14/02/2024)

⁵⁹ Muigua. K., 'Unlocking Climate Finance for Development.' Available at <https://kmco.co.ke/wpcontent/uploads/2023/08/Unlocking-Climate-Finance-for-Development.pdf> (Accessed on 14/02/2024)

⁶⁰ Ibid

⁶¹ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

⁶² United Nations., 'Africa: Making the Most out of the Climate Negotiations.' Op Cit

⁶³ Ibid

⁶⁴ United Nations., 'Copenhagen Accord: FCCC/CP/2009/L.7' Available at <https://unfccc.int/resource/docs/2009/cop15/eng/107.pdf> (Accessed on 14/02/2024)

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countries committing to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries⁶⁵. *Further, climate diplomacy initiatives led to the activation of the Green Climate Fund (GCF) which is mandated to support countries particularly those that are vulnerable to the impacts of climate change, including least developed countries, small island developing states, and African nations⁶⁶. GCF is the world's largest climate fund and plays a fundamental role in helping developing countries raise and realize their Nationally Determined Contributions (NDC) ambitions towards low emissions and climate-resilient pathways as envisaged under the Paris Agreement⁶⁷. It has been pointed out that since 2015, GCF has approved over \$12 billion for projects across more than 125 developing countries to accelerate clean energy transitions, build resilience in the most vulnerable countries, and catalyze private investments⁶⁸.

Most recently, climate diplomacy initiatives resulted in setting up the Loss and Damage Fund at COP 27 towards responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage⁶⁹. The objective of the Loss and Damage Fund is to establish new funding arrangements for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage, including with a focus on addressing loss and damage by providing and assisting in mobilizing new and additional resources, and that these new arrangements complement and include sources, funds, processes and initiatives under and outside the UNFCCC and the Paris Agreement⁷⁰. It has been pointed out that the establishment of the Loss and Damage Fund was as a result of climate diplomacy initiatives and the culmination of decades of

⁶⁵ Ibid

⁶⁶ Green Climate Fund., 'About GCF.' Available at <https://www.greenclimate.fund/about> (Accessed on 14/02/2024)

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ UNFCCC., 'Decision -/CP.27 -/CMA.4: Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage.' Available at https://unfccc.int/sites/default/files/resource/cma4_auv_8f.pdf (Accessed on 14/02/2024)

⁷⁰ Ibid

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pressure from climate vulnerable developing countries⁷¹. At COP 28, parties of the UNFCCC reached a historic agreement on the operationalization of the Loss and Damage fund and its funding arrangements⁷².

Climate diplomacy therefore plays a key role in enhancing the global response to climate change. It has led to the adoption of key instruments on climate change such as the UNFCCC, the Kyoto Protocol and the Paris Agreement⁷³. In addition, it has contributed to unlocking climate finance as evidenced by the adoption of the Copenhagen Accord, the Green Climate Fund, and the Loss and Damage Fund among other climate finance initiatives⁷⁴. However, despite its efficacy, climate diplomacy has been associated with certain challenges.

There is some concern that climate diplomacy generates more talk than action and that its impact is still not visible, while the negative impact of climate change continues to accelerate⁷⁵. For example, the decisions arrived at in the field of climate finance as a result of climate diplomacy initiatives are hardly met⁷⁶. It has been pointed out that developed countries have failed to deliver on an agreed climate finance target of \$100 billion annually as per the Copenhagen Accord⁷⁷. This results in inadequacy, imbalance and unpredictability of climate finance flows to developing countries⁷⁸. This has

⁷¹ United Nations Environment Programme., 'What you Need to Know about the COP 27 Loss and Damage Fund.' Available at <https://www.unep.org/news-and-stories/story/what-you-need-knowabout-cop27-loss-and-damage-fund> (Accessed on 14/02/2024)

⁷² United Nations Climate Change., 'Operationalization of the New Funding Arrangements, including a Fund, for Responding to Loss and Damage referred to in Paragraphs 2-3 of Decisions 2/CP.27 and 2/CMA.4.' Available at <https://unfccc.int/documents/636558> (Accessed on 14/02/2024)

⁷³ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Kone. T., 'For Africa to meet its Climate Goals, Finance is Essential.' Available at <https://climatepromise.undp.org/news-and-stories/africa-meet-its-climate-goals-finance-essential> (Accessed on 14/02/2024)

⁷⁸ United Nations., 'Accessing Climate Finance: Challenges and opportunities for Small Island Developing States.' Available at

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affected implementation of mitigation and adaptation measures in developing countries⁷⁹.

In addition, it has been pointed out that the split between developed and developing countries has always been an obstacle in climate diplomacy, given the diversity and divergence of views of countries involved⁸⁰. As a result, climate diplomacy still remains polarized as a result of diverging ideological views held by parties, even within country groups which sometimes do not share common views in the climate negotiations⁸¹. For example, it has been pointed out that developing and developed countries have divergent assessments in climate finance as evidenced in the negotiations leading to the establishment of the Loss and Damage Fund⁸².

In addition, it has been observed that developing countries face certain challenges to effective climate diplomacy⁸³. These include limited resources and capacity to effectively gather technical and strategic information or to develop the diplomatic skills necessary to engage effectively in international climate relations, lack of influence given their position in the existing geopolitical landscape, and lack of access to influential non-UNFCCC forums such as the Organisation for Economic Cooperation and Development (OECD)⁸⁴. As a result, it has been argued that developing countries have often

https://www.un.org/ohrrls/sites/www.un.org.ohrrls/files/accessing_climate_finance_challenges_sids_report.pdf (Accessed on 14/02/2024)

⁷⁹ Ibid

⁸⁰ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

⁸¹ Ibid

⁸² Ciacci. A., 'Understanding the Stakes of Climate Talks for Countries in Conflict' Available at <https://www.crisisgroup.org/global/understanding-stakes-climate-talks-countries-conflict> (Accessed on 14/02/2024)

⁸³ Climate & Development Knowledge Network., 'Climate Diplomacy: Seeing the Bigger Picture' Op Cit

⁸⁴ Ibid

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lacked sufficient capacity to engage actively in climate diplomacy and that further, they have had limited influence in shaping negotiations⁸⁵.

Despite the foregoing challenges, it has been argued that effective climate action cannot be achieved without multilateralism.⁸⁶ Climate diplomacy has been hailed for laying the foundation for common agreement and commitments on climate change and to the possibility of effective climate action⁸⁷. It is therefore necessary to reinforce climate diplomacy for development.

4.0 Way Forward

In order to reinforce climate diplomacy, it is necessary for countries to embrace climate action as a core national development agenda⁸⁸. It has been argued that for climate diplomacy to succeed, climate change must become a core national interest⁸⁹. It is therefore necessary for all countries to mainstream climate agenda in their national development plans⁹⁰. Countries should also strengthen their climate action by developing climate resilient economies and communities⁹¹. Strong action at home enhances the position of countries in climate diplomacy by strengthening their credibility in the climate agenda⁹².

In addition, it is necessary to countries to enhance their capacity in climate diplomacy⁹³. It has been asserted that increasing climate experts' capacity to

⁸⁵ Jallow. B. P., & Craft. B., 'Engaging Effectively in Climate Diplomacy: Policy Pointers from the Gambia' Available at <https://www.jstor.org/stable/resrep01588?seq=1> (Accessed on 14/01/2024)

⁸⁶ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

⁸⁷ Ibid

⁸⁸ Jallow. B. P., & Craft. B., 'Engaging Effectively in Climate Diplomacy: Policy Pointers from the Gambia' Op Cit

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Muigua. K., 'Enhancing Low Carbon Development for Sustainability' Available at <https://kmco.co.ke/wp-content/uploads/2023/09/Enhancing-Low-Carbon-Development-for-Sustainability-.pdf> (Accessed on 14/02/2024)

⁹² Ibid

⁹³ Climate & Development Knowledge Network., 'Climate Diplomacy: Seeing the Bigger Picture' Op Cit

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influence others in their interactions at home and abroad is key to their role in effective climate diplomacy⁹⁴. In addition, it has been suggested that appointment of climate envoys to raise awareness, influence debates and spur action both nationally and internationally is a key measure of raising the capacity of countries in climate diplomacy and a strong signal that climate change is a diplomatic priority⁹⁵. Further, it has been suggested that mobilising capacity and strategic focus for effective engagement in climate diplomacy requires reform of internal strategic decision-making systems, significant reallocation of human and funding resources, training and coordination of generalist diplomats and a strong central capacity to provide support and timely content for influencing⁹⁶. It has also been pointed out that enhancing diplomatic capacity needs to go beyond the current norm of building technical knowledge on climate change and environmental law and policy to also entail skills needed to coordinate and manage political trade-offs while also balancing conflicting economic, energy, climate change and diplomatic goals⁹⁷.

It is also imperative for developing countries to speak in one voice in climate negotiations⁹⁸. It has correctly been observed that developing countries often fail to engage effectively in climate diplomacy due to limited influence in global affairs⁹⁹. This position could jeopardize their climate agenda since it can result in decisions that are in favour of developed countries and contrary to the development needs of developing countries¹⁰⁰. It is thus necessary for developing countries to speak in one voice and develop a common position on climate change in order to strengthen their position in climate diplomacy¹⁰¹. It

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ Jallow. B. P., & Craft. B., 'Engaging Effectively in Climate Diplomacy: Policy Pointers from the Gambia' Op Cit

⁹⁷ Ibid

⁹⁸ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

⁹⁹ Ibid

¹⁰⁰ Climate & Development Knowledge Network., 'Climate Diplomacy: Seeing the Bigger Picture' Op Cit

¹⁰¹ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

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has been argued that with improved coordination, increased resources, and streamlining of the key priority issues such as energy transitions, financing, and adaptation within the climate negotiations, the influence of developing countries on the global stage on the climate agenda will become even more pronounced and effective¹⁰².

Finally, it is vital to accelerate international, continental and regional cooperation towards climate action¹⁰³. It has been argued that the success of climate action across the world will depend on the delivery of adequate means of implementation, including climate finance, technology development and transfer, and capacity building¹⁰⁴. Reinforcing climate diplomacy can raise awareness on the importance of delivery of means of implementation for climate change mitigation and adaptation including climate finance, and technology development and transfer¹⁰⁵. It is therefore necessary to reinforce climate diplomacy in order to mobilise climate finance to enable climate change mitigation and adaptation measures and to facilitate the development and transfer of technology necessary to strengthen climate action¹⁰⁶.

The foregoing measures among others are key in reinforcing climate diplomacy for development.

5.0 Conclusion

Climate diplomacy is an essential tool for development since it enables the implementation of climate actions on the ground¹⁰⁷. It has led to the adoption of key instruments on climate change such as the UNFCCC, the Kyoto Protocol and the Paris Agreement and also contributed to unlocking climate finance¹⁰⁸. However, climate diplomacy is associated with several challenges such as

¹⁰² United Nations., 'Africa: Making the Most out of the Climate Negotiations.' Op Cit

¹⁰³ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

¹⁰⁸ Ibid

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inadequate implementation of climate decisions including climate finance and inequalities between countries with developing countries facing challenges in shaping climate negotiations at the global stage¹⁰⁹. It is necessary to address these challenges in order to reinforce climate diplomacy for development. This calls for countries to embrace climate action as a core national development agenda¹¹⁰; enhance their capacity in climate diplomacy¹¹¹; developing countries to adopt a common agenda and speak in one voice in climate negotiations¹¹²; and accelerating international, continental and regional cooperation towards climate action¹¹³. Reinforcing climate diplomacy for development is a key agenda that needs to be realized.

¹⁰⁹ Climate & Development Knowledge Network., 'Climate Diplomacy: Seeing the Bigger Picture' Op Cit

¹¹⁰ Jallow. B. P., & Craft. B., 'Engaging Effectively in Climate Diplomacy: Policy Pointers from the Gambia' Op Cit

¹¹¹ Climate & Development Knowledge Network., 'Climate Diplomacy: Seeing the Bigger Picture' Op Cit

¹¹² African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

¹¹³ African Development Bank Group., 'Is Climate Diplomacy Holding its Promises with the Paris Agreement, Especially for Africa?' Op Cit

Restoring Landscapes and Ecosystems for Climate Mitigation

Abstract

Climate change is the main global challenge that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda. Responding to climate change has risen to the top of the policy agenda, at local, national, regional and global levels. Countries are responding to climate change through mitigation and adaptation strategies. Restoring landscapes and ecosystems has emerged as one of the nature based solutions towards climate change. This paper critically interrogates the idea of restoring landscapes and ecosystems. It argues that this concept is vital in climate change mitigation. The paper explores the opportunities and progress made towards restoring landscapes and ecosystems for climate action. It also highlights some of the setbacks facing the utilization of this concept in climate mitigation. In addition, the paper proposes measures towards embracing the idea of restoring landscapes and ecosystems for climate action.

1.0 Introduction

Climate change continues to be one of the most defining challenges presently facing the planet¹. It has been described as a global emergency that goes beyond national borders². According to the United Nations, climate change is an issue that requires international cooperation and coordinated solutions at all levels³. The impacts of climate change such as intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world⁴. Climate change is therefore the main global challenge that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda⁵. Due to its adverse impacts, climate change

¹ The World Bank., 'Climate Change.' Available at <https://www.worldbank.org/en/topic/climatechange> (Accessed on 06/02/2024)

² United Nations., 'Climate Action.' Available at <https://www.un.org/en/climatechange> (Accessed on 06/02/2024)

³ Ibid

⁴ United Nations., 'What is Climate Change?' Available at <https://www.un.org/en/climatechange/what-is-climate-change> (Accessed on 06/02/2024)

⁵ Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

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has risen to the top of the policy agenda, at local, national, regional and global levels with efforts being undertaken to respond to its impacts⁶.

The *United Nations Framework Convention on Climate Change*⁷ acknowledges the vulnerability of all countries to the effects of climate change and calls for special efforts to ease the consequences, especially in developing countries which lack the resources to do so on their own. In addition, the *Paris Agreement*⁸ seeks to strengthen the global response to the threat of climate change, in the context of Sustainable Development and efforts to eradicate poverty through holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels⁹; increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production¹⁰; and making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development¹¹. Further, the *United Nations 2030 Agenda for Sustainable Development*¹² acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve Sustainable Development. Sustainable Development Goal

⁶ United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at <https://www.un.org/en/desa/forum-climate-changeandscience-and-technology-innovation> (Accessed on 06/02/2024)

⁷ United Nations Framework Convention on Climate Change., United Nations, 1992., Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 06/02/2024)

⁸ United Nations Climate Change., 'The Paris Agreement.' Available at <https://unfccc.int/process-andmeetings/the-paris-agreement> (Accessed on 06/02/2024)

⁹ Ibid, Article 2

¹⁰ Ibid

¹¹ Ibid

¹² United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 06/02/2024)

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13 calls upon countries to take urgent actions towards combating climate change and its impacts¹³.

Climate change mitigation and adaptation have emerged as key tools in enhancing global, national and local responses to climate change¹⁴. Mitigation involves reducing greenhouse gas emissions and stopping the problem of climate change from growing¹⁵. Adaptation on the other hand involves learning how to live with the existing threat of climate change and protecting humanity from the future effects of climate change¹⁶. Restoring landscapes and ecosystems has emerged as one of the nature based solutions towards climate change¹⁷.

This paper critically interrogates the idea of restoring landscapes and ecosystems. It argues that this concept is vital in climate change mitigation. The paper explores the opportunities and progress made towards restoring landscapes and ecosystems for climate action. It also highlights some of the setbacks facing the utilization of this concept in climate mitigation. In addition, the paper proposes measures towards embracing the idea of restoring landscapes and ecosystems for climate action.

2.0 Conceptualizing Landscapes and Ecosystems Restoration

A landscape is defined as a socio-ecological system that consists of multiple natural and/or human-modified ecosystems, including agricultural lands, native vegetation, and human dwellings¹⁸. An ecosystem on the other had is

¹³ Ibid

¹⁴ World Vision., 'How is the World Responding to Climate Change?' Available at https://www.worldvision.com.au/docs/default-source/school-resources/how-is-the-world-responding-to-climate-change.pdf?sfvrsn=32021b89_0 (Accessed on 06/02/2024)

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Cook-Patton. S et al., 'Protect, Manage and then Restore Lands for Climate Mitigation.' Available at <https://www.nature.com/articles/s41558-021-01198-0> (Accessed on 06/02/2024)

¹⁸ Ifaw., 'What is Landscape Restoration?' Available at <https://www.ifaw.org/initiative/climate-change/what-is-landscape-restoration#:~:text=Landscape%20restoration%20is%20one%20of,landscape%20using%20naturally%20regenerative%20techniques> (Accessed on 06/02/2024)

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defined as a community of organisms and their physical environment interacting as an ecological unit¹⁹. According to the *Convention on Biological Diversity*²⁰, an ecosystem means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit²¹. Restoring landscapes and ecosystems is one of the nature-based solutions to climate change that utilise natural assets and biodiversity to mitigate, adapt to, and build resilience in the face of climate change²².

Nature-based Solutions refers to actions to protect, sustainably manage and restore natural or modified ecosystems, which address societal challenges such as climate change, food and water security and natural disasters effectively and adaptively, while simultaneously providing human well-being and biodiversity benefits²³. They adopt the use of ecosystems and their services towards addressing societal challenges such as climate change, loss of biodiversity, food and water insecurity, and natural disasters among others²⁴. Nature based solutions embrace eco-friendly approaches towards mitigating global social, environmental and economic problems²⁵. They are intended to support the attainment of the development goals of a society while safeguarding human well-being through measures that reflect societal and cultural values and promote resilience of ecosystems²⁶. Landscapes and

¹⁹ United Nations Environment Programme., 'Ecosystem.' Available at <https://leap.unep.org/en/knowledge/glossary/ecosystem> (Accessed on 06/02/2024)

²⁰ United Nations., 'Convention on Biological Diversity.' Available at <https://www.cbd.int/doc/legal/cbd-en.pdf> (Accessed on 06/02/2024)

²¹ Ibid, S 2

²² Ifaw., 'What is Landscape Restoration?' Op Cit

²³ International Union for Conservation of Nature, 'Nature-Based Solutions' available at <https://www.iucn.org/our-work/nature-based-solutions> (Accessed on 06/02/2024)

²⁴ Cohen-Shacham et al., 'Nature-Based Solutions to address Global Societal Challenges' Available at <https://portals.iucn.org/library/node/46191> (Accessed on 06/02/2024)

²⁵ Muigua. K., 'Embracing Nature Based Solutions for Sustainable Development in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2022/09/Embracing-Nature-Based-Solutions-for-Sustainable-Development-in-Kenya.pdf> (Accessed on 06/02/2024)

²⁶ Cohen-Shacham et al., 'Nature-Based Solutions to address Global Societal Challenges' Op Cit

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ecosystems restoration is a nature based approach that aims to restore the ecological characteristics and functions of a landscape or ecosystem using naturally regenerative techniques²⁷.

Restoring landscapes and ecosystems can be described as the process of improvement of degraded land and ecosystems on a large scale that rebuilds ecological integrity and enhances people's lives²⁸. It aims to recover the ecological functionality and enhance human well-being in deforested and degraded landscapes and ecosystems²⁹. Restoring landscapes and ecosystems has been hailed as an important approach that not only returns landscapes and ecosystems to a healthy state, but also increases the amount of carbon sequestered, improves biodiversity and the quality of soil and water in the ecosystem, and provides economic benefits for communities that depend on such landscapes and ecosystems³⁰. It has been posited that activities geared towards restoring landscapes and ecosystems should improve degraded environments by: rebuilding ecological integrity through reducing or reversing the degradation pressure³¹; reintroducing missing or declining biodiversity³²; connecting disconnected landscape elements³³; and stimulating development of a self-sustaining system³⁴. In addition, it has been pointed out that these activities should enhance people's lives by: creating related employment opportunities relevant to the restored landscape in question; building local capacity; improving local quality of life; incorporating local

²⁷ Ifaw., 'What is Landscape Restoration?' Op Cit

²⁸ Food and Agriculture Organization., 'The Key Role of Forest and Landscape Restoration in Climate Action.' Available at <https://www.fao.org/documents/card/en/c/cc2510en> (Accessed on 06/02/2024)

²⁹ Ibid

³⁰ World Economic Forum., 'What are Natural Climate Solutions?' Available at <https://www.weforum.org/agenda/2021/09/what-are-natural-climate-solutions-ncs-alliance/#:~:text=NCS%20are%20actions%20that%20avoid,forest%20conservation%2C%20restoration%20and%20management> (Accessed on 06/02/2024)

³¹ Whitbread-Abrutat. P., 'Exploring World Class Landscape Restoration.' Available at <https://futureterrains.org/wp-content/uploads/2017/11/WCMT-report-full-images.pdf> (Accessed on 06/02/2024)

³² Ibid

³³ Ibid

³⁴ Ibid

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aspirations into a landscape vision; and continuing the human narrative of the landscape by engendering a sense of place and reaffirming cultural identity³⁵.

Approaches adopted towards restoring landscapes and ecosystems include agroforestry which involves mixing trees and shrubs with agricultural crops to improve the productivity and ecological function of agricultural land³⁶; assisted natural regeneration which is a process which helps trees and native vegetation naturally recover by eliminating barriers and threats to their growth, leaning on local knowledge of the land³⁷; mangrove restoration which entails regrowing mangroves in coastal ecosystems to protect communities, safeguard biodiversity, and store carbon³⁸; reforestation which involves planting and maintaining trees across a deforested landscape with little or no remaining forest cover³⁹; riparian restoration that entails reestablishing vegetation along a river, lake, wetland, or other water body to improve its ecological function⁴⁰; and silvopasture which is a process of adding trees to deforested pasture to improve the productivity and health of land managed by pastoralist communities⁴¹. It has been pointed out that restoring landscapes and ecosystems is a process that entails more than just planting trees – it is restoring a whole landscape to meet present and future needs and to offer multiple benefits and land uses over time⁴².

3.0 Restoring Landscapes and Ecosystems for Climate Action: Promises and Pitfalls

Nature plays an important role in climate action. For example, it has been pointed out that terrestrial and marine ecosystems play an important role in regulating climate since they absorb roughly half of man-made carbon

³⁵ Ibid

³⁶ African Forest Landscape Restoration Initiative., 'Restore 100 million Hectares of Land in Africa by 2030.' Available at <https://afr100.org/about> (Accessed on 06/02/2024)

³⁷ Ibid

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

⁴² International Union for Conservation of Nature., 'Forest Landscape Restoration.' Available at [https://www.iucn.org/our-work/topic/forests/forest-landscape-restoration#:~:text=Forest%20landscape%20restoration%20\(FLR\)%20is,deforested%20or%20degraded%20forest%20landscapes](https://www.iucn.org/our-work/topic/forests/forest-landscape-restoration#:~:text=Forest%20landscape%20restoration%20(FLR)%20is,deforested%20or%20degraded%20forest%20landscapes) (Accessed on 06/02/2024)

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emissions⁴³. In addition, biodiversity and ecosystem services help human beings to adapt to and mitigate climate change⁴⁴. Therefore, by conserving nature and restoring ecosystems, it is possible to reduce vulnerability and increase resilience to climate change⁴⁵. Nature conservation and restoration has been identified as a major, cost-efficient approach in the fight against climate change⁴⁶. It has been observed that forest, landscape and ecosystem restoration practices have significant benefits for addressing the impacts of climate change⁴⁷. These include carbon sequestration and reduction of greenhouse gas (GHG) emissions, improving the resilience of landscapes and reducing disaster risks⁴⁸. Restoring landscapes, ecosystems and forests brings barren and degraded areas back to life⁴⁹. It has been pointed out that this restores biodiversity and revitalizes local communities while also contributing to climate change mitigation⁵⁰. For example, it has correctly been asserted that landscape restoration projects that regenerate forests create another ‘carbon sink’ that contributes to climate change mitigation⁵¹. It has been argued that restoration of forests represents the single largest natural climate solution⁵². Restoring forests not only returns forests to a healthy state, but also increases the amount of carbon sequestered therefore contributing to climate mitigation, improves biodiversity and the quality of soil and water in the ecosystem, and provides economic benefits for communities that depend on that forest⁵³.

⁴³ European Commission., ‘Nature’s Role in Climate Change.’ Available at https://climate.ec.europa.eu/system/files/2016-11/nature_and_climate_change_en.pdf (Accessed on 06/02/2024)

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Food and Agriculture Organization., ‘The Key Role of Forest and Landscape Restoration in Climate Action.’ Op Cit

⁴⁸ Ibid

⁴⁹ International Union for Conservation of Nature., ‘Forest Landscape Restoration.’ Op Cit

⁵⁰ Ibid

⁵¹ Ibid

⁵² Cook-Patton. S et al., ‘Protect, Manage and then Restore Lands for Climate Mitigation.’ Op Cit

⁵³ World Economic Forum., ‘What are Natural Climate Solutions?’ Op Cit

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Restoring landscapes and ecosystems is therefore important in climate action. It provides two key management approaches to mitigate the effects of climate change⁵⁴. It helps in sequestering carbon through the establishment of green biomass, and the conservation and restoration of biodiversity and ecosystem services. It has been argued that restoration as a means for climate mitigation has global benefits, whereas restoration as a means of adapting to climate change has benefits at the local and regional scales⁵⁵.

The importance of restoring landscapes and ecosystems for climate action is acknowledged by the 2030 Agenda for Sustainable Development⁵⁶. The Agenda identifies natural resource depletion and environmental degradation as a key threat to sustainability as evidenced by problems such as desertification, drought, land degradation, freshwater scarcity, and loss of biodiversity⁵⁷. The Agenda seeks to protect the planet from degradation including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change so that the planet can support the needs of the present and future generations⁵⁸. Sustainable Development Goal 15 seeks to Protect, restore, and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and biodiversity loss⁵⁹. The targets under SDG 15 include ensuring the conservation, *restoration* and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements; promoting the implementation of sustainable management of all types of forests, halt deforestation, *restore degraded forests* and substantially increase afforestation and reforestation globally; combating desertification, *restoring degraded land and soil*, including

⁵⁴ Von Holle. B., Yelenik. S., & Gornish. E., 'Restoration at the Landscape Scale as a Means of Mitigation and Adaptation to Climate Change.' Available at <https://link.springer.com/article/10.1007/s40823-020-00056-7> (Accessed on 06/02/2024)

⁵⁵ Ibid

⁵⁶ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid, SDG 15

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land affected by desertification, drought and floods, and strive to achieve a land degradation-neutral world; ensuring the conservation of mountain ecosystems, including their biodiversity, in order to enhance their capacity to provide benefits that are essential for sustainable development; and taking urgent and significant action to reduce the degradation of natural habitats, and halting the loss of biodiversity⁶⁰. The 2030 Agenda for Sustainable Development therefore sets the global targets geared towards restoring landscapes and ecosystems for Sustainable Development. It is imperative for all countries to meet these targets in order to restore landscapes and ecosystems for climate mitigation.

Restoring landscapes and ecosystems is also part of the implementation mechanisms of the UNFCCC and the Paris Agreement⁶¹. It has been observed that countries established the 'REDD+' framework to protect forests as part of the Paris Agreement⁶². 'REDD' stands for 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries'⁶³. The '+' stands for additional forest-related activities that protect the climate, namely sustainable management of forests and the conservation and enhancement of forest carbon stocks⁶⁴. Under the framework with these REDD+ activities, developing countries can receive results-based payments for emission reductions when they reduce deforestation⁶⁵. It has been pointed out that REDD+ activities have played a prominent role in restoring forest ecosystems and promoting sustainable forest management practices that reduce the depletion of carbon stock and enhance forest resiliency⁶⁶. According to the

⁶⁰ Ibid

⁶¹ United Nations Framework Convention on Climate Change., United Nations, 1992., Op Cit

⁶² United Nations Climate Change., 'What is REDD+?' Available at <https://unfccc.int/topics/land-use/workstreams/redd/what-is-redd> (Accessed on 07/02/2024)

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Muigua. K., 'Boosting Biodiversity Conservation Through Sustainable Forest Resources Management' Available at <https://kmco.co.ke/wp-content/uploads/2021/11/Boosting-Biodiversity-Conservation-through-improved-Forest-Resources-Management-Kariuki-Muigua-November-2021.pdf> (Accessed on 07/02/2024)

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United Nations Environment Programme (UNEP), REDD+ reduces deforestation through the conservation and sustainable management of forests and supporting developing countries in turning their political commitments, as represented in their Nationally Determined Contributions, into action on the ground⁶⁷. UNEP urges countries to embrace REDD+ activities such as restoration, reforestation and afforestation in order to foster climate action⁶⁸.

In addition, the *Convention on Biological Diversity* emphasizes the need to restore landscapes and ecosystems for climate mitigation⁶⁹. The Convention urges contracting parties to *rehabilitate and restore degraded ecosystems* and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies⁷⁰ (Emphasis added). The Convention of Biological Diversity therefore identifies restoring landscapes and ecosystems as a key in-situ conservation strategy⁷¹. According to the Convention, in-situ conservation means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings⁷². This is contrasted with ex-situ conservation which means the conservation of components of biological diversity outside their natural habitats⁷³. Restoring landscapes and ecosystems is therefore a key theme under the Convention on Biological Diversity. It has been argued that the well-being of the world population in the coming decades will in large part depend on conservation and restoration of ecosystems to maintain and enhance biodiversity and ecosystem services, thereby contributing to sustainable development while reducing environment-related risks such as climate change⁷⁴. It is therefore imperative

⁶⁷ United Nations Environment Programme., 'REDD+' Available at <https://www.unep.org/explore-topics/climate-action/what-we-do/redd> (Accessed on 07/02/2024)

⁶⁸ Ibid

⁶⁹ United Nations., 'Convention on Biological Diversity.' Available at <https://www.cbd.int/doc/legal/cbd-en.pdf>, Op Cit

⁷⁰ Ibid, Article 8 (f)

⁷¹ Ibid

⁷² Ibid, Article 2

⁷³ Ibid

⁷⁴ Convention of Biological Diversity., 'Ecosystem Restoration.' Available at <https://www.cbd.int/restoration/> (Accessed on 07/02/2024)

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to restore landscapes and ecosystems for climate mitigation and Sustainable Development.

Restoring wetlands is also a key agenda under the *Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)*⁷⁵. The Convention acknowledges the fundamental ecological functions of wetlands as regulators of water regimes and as habitats supporting a characteristic flora and fauna, especially waterfowl⁷⁶. It requires contracting parties to formulate and implement plans towards promoting the conservation and wise use of the wetlands in their territory⁷⁷. It has been pointed out that the Ramsar Convention has fostered international cooperation in wetland conservation through actions such as establishing wetland restoration projects⁷⁸. In addition, the Ramsar Strategic Plan 2016–2024 seeks to ensure that wetlands are conserved, wisely used, *restored* and their benefits are recognized and valued by all⁷⁹. It has correctly been observed that wetlands are increasingly valuable under climate change in terms of their ecological functions, ecosystem services, and biodiversity⁸⁰. Some of the key ecosystem services provided by wetlands include carbon sequestration, maintenance and creation of clean water and soil fertility, and regulation of water and climate⁸¹. As a result, restoration and revegetation of wetlands is increasingly vital for creating resilient landscapes better able to respond to a changing climate without dramatic loss of biodiversity or ecosystem function⁸².

⁷⁵ Convention on Wetlands of International Importance especially as Waterfowl Habitat., Available at https://www.ramsar.org/sites/default/files/documents/library/current_convention_text_e.pdf (Accessed on 07/02/2024)

⁷⁶ Ibid

⁷⁷ Ibid, Article 3 (1)

⁷⁸ Ramsar Convention Secretariat., 'An Introduction to the Ramsar Convention on Wetlands, 7th ed. (previously The Ramsar Convention Manual)' Available at https://www.ramsar.org/sites/default/files/documents/library/handbook1_5ed_introductiontoconvention_final_e.pdf (Accessed on 07/02/2024)

⁷⁹ Ibid

⁸⁰ Zivec. P., Sheldon. F., & Capon. S., 'Natural Regeneration of Wetlands under Climate Change.' *Frontiers in Environmental Science.*, Volume 11 (2023)

⁸¹ Ibid

⁸² Ibid

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The need to restore landscapes and ecosystems is also set out under the *United Nations Convention to Combat Desertification*⁸³. The Convention defines desertification as land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities⁸⁴. According to the Convention, combating desertification includes activities which are part of the integrated development of land in arid, semi-arid and dry sub-humid areas for sustainable development which are aimed at prevention and/or reduction of land degradation; rehabilitation of partly degraded land; and reclamation of desertified land⁸⁵. The Convention therefore envisages restoring degraded and desertified land. It requires contracting parties to implement effective strategies aimed at rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at the community level⁸⁶. Similarly, the *Bonn Challenge*⁸⁷ and the *New York Declaration on Forests*⁸⁸ sets targets towards restoring degraded and deforested landscapes. At the Continental level, the *African Forest Landscape Restoration Initiative*⁸⁹ aims to contribute to the Bonn Challenge and African Union's Agenda 2063 through its target of restoring 100 million hectares of land across the continent by 2030.

From the foregoing, it emerges that restoring landscapes and ecosystems for climate mitigation is an agenda that is well embraced at all levels. It has been pointed out that landscape and ecosystem restoration practices have proven to have significant benefits for addressing the impacts of climate change⁹⁰. These include carbon sequestration and reduction of greenhouse gas (GHG)

⁸³ United Nations Convention to Combat Desertification., Available at https://catalogue.unccd.int/936_UNCCD_Convention_ENG.pdf (Accessed on 07/02/2024)

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Ibid, Article 2

⁸⁷ Bonn Challenge., Available at <https://www.bonnchallenge.org/> (Accessed on 07/02/2024)

⁸⁸ New York Declaration on Forests., Available at <https://forestdeclaration.org/wp-content/uploads/2021/10/EN-NYDF-Refresh.pdf> (Accessed on 07/02/2024)

⁸⁹ African Forest Landscape Restoration Initiative., Available at <https://afr100.org/> (Accessed on 07/02/2024)

⁹⁰ Food and Agriculture Organization., 'The Key Role of Forest and Landscape Restoration in Climate Action.' Op Cit

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emissions, improving the resilience of landscapes and reducing disaster risks⁹¹. However, it has been argued that climate mitigation from restoration practices primarily stems from removals, which may be less effective than avoided emissions at lowering atmospheric GHG concentrations⁹². Additionally, it has been pointed out that restoration activities can have high costs and feasibility constraints⁹³. It has also been observed that although landscape and ecosystem restoration approaches are likely key for mitigating negative effects of climate change, they are often not widely used due to logistic and financial feasibility issues⁹⁴. It is imperative to address these concerns in order to effectively embrace the idea of restoring landscapes and ecosystems for climate mitigation.

4.0 Way Forward

Restoring landscapes and ecosystems for climate mitigation calls for adoption of techniques geared towards restoring life to landscapes. Such techniques include ecologically appropriate reforestation which entails planting the suitable trees in the right places and working with local communities to ensure that the new growth will be protected from external threats⁹⁵; farmer-managed natural regeneration which involves systematic growing and management of

⁹¹ Ibid

⁹² Cook-Patton. S et al., 'Protect, Manage and then Restore Lands for Climate Mitigation.' Op Cit

⁹³ Ibid

⁹⁴ Von Holle. B., Yelenik. S., & Gornish. E., 'Restoration at the Landscape Scale as a Means of Mitigation and Adaptation to Climate Change.' Op Cit

⁹⁵ International Union for Conservation of Nature., 'Reviving Land and Restoring Landscapes.' Available at https://d1wqtxts1xzle7.cloudfront.net/79272785/2019-028-En-libre.pdf?1642779955=&response-content-disposition=inline%3B+filename%3DReviving_land_and_restoring_landscapes_p.pdf&Expires=1707309368&Signature=eq9qleQXVbY4wD2L5BO3hQgfcY6gmjwufzJlnm7dpIE~giFi8okLWHuWLNPOSiAVOjaJEdA-lvRZ3aghPbQcjGR90aYGIHGZ9nTOpDIuiwQ0IT-GCP3xZovu-By92bXH32yNpu~6yAAQUqOYF2wcesBjb2JjVaZWUE6U4uz8O7kKJGXDXD23xX7fj9XoFPI-70eTo0FOga9N-6~W4F4cLyPxjMtlgQfQf2MAU8gTh5R2GQEG7rO9sqktAeKshLOaONpM~9hq0wJYhL0eCULgwM6J3aeZeVKQyq4Px2pK9c8hDmP0zrRleuCJxQ0JfeWp85tPM1Y2k5Y2TkeXGdLB~g_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA (Accessed on

07/02/2024)

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trees and shrubs by farmers⁹⁶; rainwater harvesting and aquifer recharge that aims at collecting rain from a roof or roof-like surface into a vessel that redirects its flow into a tank, cistern, deep pit, aquifer, or reservoir to replenish groundwater and restore natural water sources⁹⁷; agroforestry which involves integrating trees and shrubs into agricultural practices⁹⁸; permaculture which is a land management practice that involves mirroring how plants grow in nature in order to give land the same diversity, stability, and resilience that natural ecosystems have⁹⁹; and regenerative agricultural practices such as integrating livestock, maximising crop diversity, crop rotation, composting, and maintaining living root all year round¹⁰⁰.

In addition, it is necessary to improve protection and management of landscapes and ecosystems¹⁰¹. It has been argued that efficient protection and management of landscapes and ecosystems is more effective in climate mitigation since natural ecosystems can store large amounts of carbon, sequester additional carbon and represent more-stable and long-term carbon stores compared with restored lands and ecosystems¹⁰². In addition, efficient protection and management of landscapes and ecosystems offers large near-term climate mitigation objectives since restored landscapes and ecosystems may take decades to centuries to recover carbon that was initially lost when such ecosystems were initially disturbed¹⁰³. Further, effective protection and management of landscapes and ecosystems offers lower-cost mitigation potential than restoration which is usually costly¹⁰⁴.

⁹⁶ Ibid

⁹⁷ Ibid

⁹⁸ Food and Agriculture Organization., 'The Key Role of Forest and Landscape Restoration in Climate Action.' Op Cit

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Cook-Patton. S et al., 'Protect, Manage and then Restore Lands for Climate Mitigation.' Op Cit

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Ibid

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Further, it is imperative to promote restoration of wetlands¹⁰⁵. It has correctly been pointed out that wetlands are hotspots for anthropogenic activity due to their high soil fertility and water supply, and have been subject to significant modification, degradation, and staggering losses due to factors such as climate change¹⁰⁶. The decline in wetlands has been associated with water and food scarcity with the potential to affect social, economic and political stability in most regions of the world¹⁰⁷. Restoration and revegetation of wetlands is therefore increasingly vital for creating resilient landscapes better able to respond to a changing climate without dramatic loss of biodiversity or ecosystem function¹⁰⁸. According to the United Nations, nearly 90 per cent of the world's wetlands have been degraded or lost to date, and the world is losing wetlands three times faster than forests¹⁰⁹. Therefore, there is an urgent need to raise global awareness on wetlands to reverse their rapid loss and to encourage the restoration and conservation of these vital ecosystems¹¹⁰. Wetlands play key ecosystem functions such as carbon sequestration, maintenance and creation of clean water and soil fertility, and regulation of water and climate¹¹¹. Restoring wetlands is therefore necessary for climate mitigation.

It is also vital to combat deforestation and restore forest ecosystems¹¹². It has been pointed out that healthy forests play a crucial role in mitigating climate change by acting as carbon sinks, absorbing billions of metric tonnes of carbon

¹⁰⁵ Zivec. P., Sheldon. F., & Capon. S., 'Natural Regeneration of Wetlands under Climate Change.' Op Cit

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ United Nations., 'Why It is Time for Wetland Restoration Now to Secure a Sustainable Future.' Available at <https://www.un.org/en/un-chronicle/why-it%E2%80%99s-time-wetland-restoration-now-secure-sustainable-future> (Accessed on 07/02/2024)

¹¹⁰ Ibid

¹¹¹ Zivec. P., Sheldon. F., & Capon. S., 'Natural Regeneration of Wetlands under Climate Change.' Op Cit

¹¹² Food and Agriculture Organization., 'The Key Role of Forest and Landscape Restoration in Climate Action.' Op Cit

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dioxide annually¹¹³. According to the International Union for Conservation of Nature, forests help stabilise the climate¹¹⁴. They regulate ecosystems, protect biodiversity, play an integral part in the carbon cycle, support livelihoods, and can help drive sustainable growth¹¹⁵. However, forests are under threat due to deforestation and degradation¹¹⁶. It is estimated that every year the world loses 10 million hectares of forest¹¹⁷. In addition, deforestation and forest degradation accounts for approximately 11 per cent of carbon emissions and is therefore a major cause of climate change¹¹⁸. It is therefore necessary to combat deforestation and restore forest landscapes in order to foster climate mitigation. Some of the strategies that have been advocated towards this end include addressing poverty as a causation factor in deforestation, embracing technology and innovation in combating deforestation, and embracing agroforestry¹¹⁹. It is also necessary to embrace activities such as restoration, reforestation and afforestation in order to restore forest ecosystems¹²⁰.

Finally, there is need to combat climate change. Climate change is a major threat to landscapes and ecosystems through loss of biodiversity, extreme weather events such as drought which can lead to desertification and drying of rivers and wetlands¹²¹. Combating climate change is therefore at the

¹¹³ United Nations Development Programme., 'Forests Can Help us Limit Climate Change – Here is How.' Available at <https://climatepromise.undp.org/news-and-stories/forests-can-help-us-limit-climate-change-here-how#:~:text=Forests%20are%20critical%20ecosystems%2C%20providing,metric%20tonnes%20of%20CO2%20annually>. (Accessed on 07/02/2024)

¹¹⁴ International Union for Conservation of Nature., 'Forests and Climate Change.' Available at <https://iucn.org/resources/issues-brief/forests-and-climate-change> (Accessed on 07/02/2024)

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ United Nations Environment Programme., 'Deforestation' Available at <https://www.unep.org/resources/factsheet/deforestation> (Accessed on 07/02/2024)

¹¹⁸ Ibid

¹¹⁹ Muigua. K., 'Boosting Biodiversity Conservation Through Sustainable Forest Resources Management' Op Cit

¹²⁰ Ibid

¹²¹ United Nations Environment Programme., 'Seven Lessons on Using Ecosystem Restoration for Climate Change Adaptation.' Available at

forefront in maintaining the healthy and natural functioning of landscapes and ecosystems¹²². It is therefore important for all countries to take urgent action to combat climate change and its impacts in order to enhance the resilience and sustainability of landscapes and ecosystems¹²³.

5.0 Conclusion

Restoring landscapes and ecosystems is a process that aims to recover the ecological functionality and enhance human well-being in deforested and degraded landscapes and ecosystems¹²⁴. The process offers numerous benefits such as increasing the amount of carbon sequestered, improving biodiversity and the quality of soil and water in the ecosystem, and providing economic benefits for communities that depend on such landscapes and ecosystems¹²⁵. Restoring landscapes and ecosystems plays an important role in climate mitigation. Despite progress being made towards restoring landscapes and ecosystems such as rivers, lakes, forests, wetlands, restoration activities are yet to be fully embraced due to factors such as high costs and feasibility constraints¹²⁶. In order to effectively restore landscapes and ecosystems for climate mitigation, it is necessary to adopt techniques such as reforestation, agroforestry, and regenerative agricultural practices¹²⁷; improve protection and management of landscapes and ecosystems¹²⁸; promote restoration of wetlands¹²⁹; combat deforestation and restore forest ecosystems¹³⁰; and combat

<https://www.unep.org/resources/policy-and-strategy/seven-lessons-using-ecosystem-restoration-climate-change-adaptation-0> (Accessed on 07/02/2024)

¹²² Ibid

¹²³ Ibid

¹²⁴ Food and Agriculture Organization., 'The Key Role of Forest and Landscape Restoration in Climate Action.' Op Cit

¹²⁵ World Economic Forum., 'What are Natural Climate Solutions?' Op Cit

¹²⁶ Cook-Patton. S et al., 'Protect, Manage and then Restore Lands for Climate Mitigation.' Op Cit

¹²⁷ Food and Agriculture Organization., 'The Key Role of Forest and Landscape Restoration in Climate Action.' Op Cit

¹²⁸ Cook-Patton. S et al., 'Protect, Manage and then Restore Lands for Climate Mitigation.' Op Cit

¹²⁹ Ibid

¹³⁰ Food and Agriculture Organization., 'The Key Role of Forest and Landscape Restoration in Climate Action.' Op Cit

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climate change¹³¹. Restoring landscapes and ecosystems for climate mitigation is a key strategy that needs to be explored at all levels.

¹³¹ Ibid

Safeguarding The Environment During and After Armed Conflict

Abstract

Armed conflicts are undesirable since they result in devastating loss of civilian life, massive displacement of people and violations of human rights and international humanitarian law. However, armed conflicts not only affect people, but also the environment. Therefore, in addition to the protection of civilian population, it is necessary to safeguard the environment during and after armed conflict. This paper critically delves into the need to safeguard the environment during and after armed conflict. The paper asserts that the environment faces major threats during and after armed conflict. It examines some of the impacts of armed conflict on the environment. The paper also probes the progress made towards safeguarding the environment during and after armed conflict. Finally, the paper offers ideas towards safeguarding the environment during armed conflict.

1.0 Introduction

The term conflict generally refers to a situation in which two or more parties perceive that they possess mutually incompatible goals¹. It has been pointed out that conflicts can also occur due to misalignment of goals, actions or motivations which can be real or only perceived to exist². They are a common occurrence in human relationships and interactions³. It has been asserted that conflicts are an inevitable part of living because they are related to situations of scarce resources, division of functions, power relations and role-differentiation⁴. Conflicts can occur in various types and forms and can

¹ Demmers. J., 'Theories of Violent Conflict: An Introduction' (Routledge, New York, 2012)

² Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

³ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <https://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-EastAfrican-CommunityMoving-from-Alternative-to-Appropriate-Dispute-Resolution> (Accessed on 05/03/2024)

⁴ Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Available at <https://ocd.lcwu.edu.pk/cfiles/International%20Relations/EC/IR403/Conflict.ConflictManagementinOrganizations.pdf> (Accessed on 05/03/2024)

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involve individuals, groups, organizations, or states⁵. It has been noted that conflict is not in itself a negative phenomenon⁶. For example, non-violent conflict can be an essential component of social change and development, and is a necessary component of human interaction⁷. However, some types of conflicts are an undesirable and can affect peace, sustainability and development⁸. This category includes armed conflicts.

An armed conflict arises whenever there is fighting between states or protracted armed violence between government authorities and organized armed groups or just between organized armed groups⁹. Such conflicts can be international or non-international¹⁰. An international armed conflict arises when one state or several states use armed force against another state or states¹¹. On the other hand, non-international armed conflicts, which are also referred to as internal armed conflicts, take place within the territory of a state and do not involve the armed forces of any other state¹². The International Committee of the Red Cross (ICRC) points out that an armed conflict exists whenever there is a resort to armed force between states¹³. It further notes that an armed conflict occurs when one or more states have recourse to armed force against another state, regardless of the reasons for or the intensity of the

⁵ United Nations., 'Land and Conflict' Available at https://www.un.org/en/land-natural-resourcesconflict/pdfs/GN_ExeS_Land%20and%20Conflict.pdf (Accessed on 05/03/2024)

⁶ Ibid

⁷ Ibid

⁸ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

⁹ International Committee of the Red Cross., 'Introduction to the Law of Armed Conflict' Available at https://www.icrc.org/en/doc/assets/files/other/law1_final.pdf (Accessed on 05/03/2024)

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³ International Committee of the Red Cross., 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949: Commentary of 2016' Available at <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016#44> (Accessed on 05/03/2024)

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confrontation¹⁴. ICRC also points out that armed conflicts can be non-international (or "internal") in nature which refers to situations of violence involving protracted armed confrontations between government forces and one or more organized armed groups, or between such groups themselves, arising on the territory of a state¹⁵.

Armed conflicts are undesirable¹⁶. It has been correctly observed that armed conflicts mean devastating loss of civilian life, massive displacement of people and violations of human rights and international humanitarian law¹⁷. According to the United Nations, societies ravaged by armed conflicts have paid a massive toll in loss of human life and economic, political and social disintegration¹⁸. It further notes that women and children, in particular, suffer severe atrocities in armed conflicts with sexual violence often being utilized as a weapon of war¹⁹. Armed conflicts result in widespread insecurity and trauma due to the atrocities and suffering of the civilian population which can persist for many decades²⁰. It has been pointed out that armed conflict not only has harmful effects on people, but also on the non-human beings and the

¹⁴ Ibid

¹⁵ International Committee of the Red Cross, 'Internal Conflicts or Other Situations of Violence - What is the Difference for Victims?' Available at [https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm#:~:text=A%20non%2Dinternational%20\(or%20%22,the%20territory%20of%20a%20State](https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm#:~:text=A%20non%2Dinternational%20(or%20%22,the%20territory%20of%20a%20State). (Accessed on 05/03/2024)

¹⁶ Amnesty International, 'Armed Conflict' Available at <https://www.amnesty.org/en/what-we-do/armed-conflict/> (Accessed on 05/03/2024)

¹⁷ Ibid

¹⁸ United Nations, 'Armed Conflict' Available at <https://www.un.org/esa/socdev/rwss/docs/2001/15%20Armed%20Conflict.pdf> (Accessed on 05/03/2024)

¹⁹ Ibid

²⁰ Ibid

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environment²¹. Therefore in addition to the protection of civilian population, it is necessary to safeguard the environment during and after armed conflict²².

This paper critically delves into the need to safeguard the environment during and after armed conflict. The paper asserts that the environment faces major threats during and after armed conflict. It examines some of the impacts of armed conflict on the environment. The paper also probes the progress made towards safeguarding the environment during and after armed conflict. Finally, the paper offers ideas towards safeguarding the environment during armed conflict.

2.0 Impacts of Armed Conflict on the Environment

It has been pointed out that armed conflicts often lead to environmental degradation or destruction, with long-lasting effects that contribute to the increased vulnerability of the affected populations²³. Armed conflicts can cause environmental damage, leading to food and water insecurity, loss of livelihoods, and biodiversity loss²⁴. It has been observed that parties to armed conflicts have polluted water, torched crops, cut down forests, poisoned soils, and killed animals to gain military advantage²⁵. Such acts result in environmental damage which threatens the well-being, health and survival of local populations, and this increases their vulnerability for years and even decades²⁶.

²¹ Diakonia International Humanitarian Law Centre., 'International Humanitarian Law (IHL) and the Protection of the Environment during Armed Conflict' <https://www.diakonia.se/ihl/resources/international-humanitarian-law/protection-environment-natural-resources-ihl/> (Accessed on 05/03/2024)

²² Ibid

²³ Geneva Environment Network., 'Protecting the Environment in Armed Conflict' Available at <https://www.genevaenvironmentnetwork.org/resources/updates/protecting-the-environment-in-armed-conflict/> (Accessed on 06/03/2024)

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

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According to the United Nations Environment Programme (UNEP), the environment continues to be the silent victim of armed conflicts worldwide²⁷. UNEP points out that armed conflict causes significant harm to the environment and the communities that depend on natural resources²⁸. Further, it asserts that direct and indirect environmental damage, coupled with the collapse of institutions, lead to environmental risks that can threaten people's health, livelihoods and security, and ultimately undermine post-conflict peacebuilding²⁹. According to UNEP, environmental factors are rarely, if ever, the sole cause of violent conflict³⁰. However, it has been asserted that 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 prospects for peace³¹. For example, access and flow of water, land degradation, floods and pollution, in addition to competition over extractive resources, can directly worsen tensions and spur conflicts, similarly to resource depletion issues such as deforestation, soil erosion and desertification³².

In addition, it has correctly been observed that building and sustaining military forces during armed conflict can result in severe impact on the environment and natural resources³³. For example, military vehicles, aircraft, vessels, buildings and infrastructure during armed conflict all require energy

²⁷ United Nations Environment Programme., 'Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law' Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/-Protecting%20the%20Environment%20During%20Armed%20Conflict_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&isAllowed= (Accessed on 06/03/2024)

²⁸ Ibid

²⁹ Ibid

³⁰ United Nations Environment Programme., 'Curbing Negative Environmental Impacts of War and Armed Conflict' Available at <https://www.unep.org/news-and-stories/statements/curbing-negative-environmental-impacts-war-and-armed-conflict> (Accessed on 06/03/2024)

³¹ Ibid

³² Ibid

³³ Conflict and Environment Observatory., 'How Does War Damage the Environment?' Available at <https://ceobs.org/how-does-war-damage-the-environment/> (Accessed on 06/03/2024)

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which is often in the form of oil³⁴. This has severe environmental impacts and it is estimated that carbon dioxide emissions of the largest militaries may be far greater than many of the world's countries combined³⁵. Armed conflict could also result in overexploitation of natural resources such as common metals, rare earth elements, water and hydrocarbons in order to sustain armed forces³⁶. In addition, it has been observed that severe pollution incidents can be caused when industrial, oil or energy facilities are deliberately attacked, inadvertently damaged or disrupted during armed conflict³⁷.

Some of the armed conflicts that have had negative impacts on the environment include the Vietnam War³⁸. It has been observed that the war witnessed the use of the toxic herbicide Agent Orange which resulted in massive deforestation and chemical contamination³⁹. Further, it has been observed that the widespread use of chemical defoliants during the war damaged public and ecological health across large areas of Vietnam⁴⁰. It has been noted that the confluence of nature and war with its attendant ecocide and environicide produced extraordinary impacts on Vietnamese society⁴¹.

In addition, it has been observed that the ongoing Russia-Ukraine international armed conflict has had severe environmental impacts including chemical releases and pollution risks from damaged industrial and energy

³⁴ Ibid

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

³⁸ United Nations Environment Programme., 'Rooting for the Environment in times of Conflict and War' Available at <https://www.unep.org/news-and-stories/story/rooting-environment-times-conflict-and-war> (Accessed on 06/03/2024)

³⁹ Ibid

⁴⁰ Conflict and Environment Observatory., 'How Does War Damage the Environment?' Op Cit

⁴¹ Sudilovsky. D. L., 'The Saturated Jungle and the New York Times: Nature, Culture, and the Vietnam War' Available at <https://history.princeton.edu/undergraduate/princeton-historical-review/2021%E2%80%93issue/saturated-jungle-and-new-york-times> (Accessed on 06/03/2024)

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facilities⁴². Further, the war continues to pose ongoing environmental risks associated with the unprecedented militarisation of nuclear sites, threats associated with air quality and solid waste management from the devastation of towns and cities⁴³. In addition, it has been pointed out that the war has resulted in ecological consequences such as damage to arable land, the pollution of water resources, and destruction of vital water infrastructure, pollution and ecosystem disturbance in coastal and marine areas, greenhouse gas emissions and increased vulnerability to the effects of climate change⁴⁴.

It has also been observed that emissions from the Israel-Hamas armed conflict that resulted in Israeli invasion of the Gaza strip in 2023 have immense effect on the climate crisis⁴⁵. Carbon dioxide emissions from aircraft missions, tanks and fuel from other vehicles, as well as emissions generated by making and exploding the bombs, artillery and rockets are resulting in pollution and could worsen the problem of climate change⁴⁶. The impacts of climate change such as sea level rise, drought and extreme heat were already threatening water supplies and food security in Palestine and the ongoing armed conflict could make the situation more severe⁴⁷.

From the foregoing, it is evident that armed conflict has significant impacts on the environment. These impacts can be direct or indirect⁴⁸. It has been observed that direct impacts relate to those whose occurrence may be physically linked to military action and which typically arise within the immediate short-term, whereas indirect impacts are those that can be reliably attributed to the conflict but they usually tangle with many factors and only

⁴² Weir. D., & Denisov. N., 'Assessing Environmental Damage in Ukraine' Available at https://zoinet.org/wp-content/uploads/2018/01/Ukraine-assessing-environmental-damage_EN.pdf (Accessed on 06/03/2024)

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ The Guardian., 'Emissions from Israel's war in Gaza Have 'Immense' effect on Climate Catastrophe' Available at <https://www.theguardian.com/world/2024/jan/09/emissions-gaza-israel-hamas-war-climate-change> (Accessed on 06/03/2024)

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Solomon. N et al., 'Environmental Impacts and Causes of Conflict in the Horn of Africa: A Review' *Earth-Science Reviews.*, Volume 177, 2018 (pp 284-290)

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fully manifest themselves in the medium to longer term⁴⁹. Direct environmental impacts of armed conflict include deliberate destruction of natural resources, environmental contamination and pollution from bombing of industrial sites, and military debris and demolition waste from targeted infrastructure⁵⁰. On the other hand indirect impacts include the environmental footprint of displaced populations, collapse of environmental governance and data vacuum as well as the lack of funding for environmental protection⁵¹. It is therefore necessary to safeguard the environment during and after armed conflict. According to the United Nations, protecting the environment during and after armed conflict is integral to conflict prevention, peacebuilding and Sustainable Development, since there can be no durable peace if the natural resources that sustain livelihoods and ecosystems are destroyed⁵².

3.0 Safeguarding the Environment during and after Armed Conflict: Progress and Challenges

There has been progress towards safeguarding the environment during and after armed conflict. It has been observed that specific treaty and customary International Humanitarian Law (IHL) rules protect the environment during armed conflict⁵³. Following the environmental impacts of the Vietnam war, the *Convention on the Prohibition of Military or any other Hostile use of Environmental Modification Techniques*⁵⁴ also known as the Environmental Modification Convention (ENMOD) was adopted. The Convention defines environmental modification techniques as any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

⁵² United Nations., 'Durable Peace not Possible if Natural Resources are Destroyed, Secretary-General Says on International Day for Preventing Exploitation of Environment in War' Available at <https://press.un.org/en/2021/sgsm21005.doc.htm> (Accessed on 06/03/2024)

⁵³ International Committee of the Red Cross., 'The Protection of the Natural Environment in Armed Conflict' Available at [https://casebook.icrc.org/highlight/protection-natural-environment-armed-conflict#:~:text=International%20humanitarian%20law%20\(IHL\)%2C,a%20party%20to%20the%20conflict](https://casebook.icrc.org/highlight/protection-natural-environment-armed-conflict#:~:text=International%20humanitarian%20law%20(IHL)%2C,a%20party%20to%20the%20conflict) (Accessed on 06/03/2024)

⁵⁴ United Nations., 'Convention on the Prohibition of Military or any other Hostile use of Environmental Modification Techniques' Ch_XXVI_1, Volume 2, United Nations, New York, 10 December, 1976

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structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space⁵⁵. State parties under the Convention undertake not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to other state parties⁵⁶. ENMOD however allows the utilization of environmental modification techniques for peaceful purposes in accordance with generally recognized principles and applicable rules of international law concerning such use⁵⁷.

In addition, *Protocol I*⁵⁸, an amendment to the Geneva Conventions was adopted in 1977 to include provisions prohibiting warfare that may cause widespread, long-term and severe damage to the natural environment. Under additional Protocol I, it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment⁵⁹. Further, additional Protocol I requires care to be taken in warfare to protect the natural environment against widespread, long-term and severe damage⁶⁰. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population⁶¹. Further, additional protocol I prohibits attacks against the natural environment by way of reprisals⁶².

Further, the *Convention Respecting the Laws and Customs of War on Land*⁶³ and its annex: *Regulations concerning the Laws and Customs of War on Land* also known

⁵⁵ Ibid, article II

⁵⁶ Ibid, article I

⁵⁷ Ibid, article III

⁵⁸ Protocols Additional to the Geneva Conventions of 12th August 1949., Available at https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf (Accessed on 06/03/2024)

⁵⁹ Ibid, article 35 (3)

⁶⁰ Ibid, article 55 (1)

⁶¹ Ibid

⁶² Ibid, article 55 (2)

⁶³ Convention Respecting the Laws and Customs of War on Land; and Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.,

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as the *Hague Convention* also envisage safeguarding the environment during armed conflict. Under the Convention and its Regulations, it is forbidden to destroy or seize the enemy's property during armed conflict unless such destruction or seizure be imperatively demanded by the necessities of war⁶⁴. It has been argued that this provision is also aimed at protecting the environment by prohibiting the willful or unjustified destruction of property⁶⁵. Further, under the Hague Regulations, an occupying State is regarded only as administrator and usufructuary of public buildings, real estate, *forests*, and *agricultural estates* belonging to the hostile State, and situated in the occupied country (Emphasis added)⁶⁶. An occupying state is required to safeguard the capital of these properties, and administer them in accordance with the rules of usufruct⁶⁷. It has been pointed out that under the rules of usufruct, the occupying power may administer public property situated in the occupied territory and enjoy the use of real property for the purposes meeting the needs of the army of occupation⁶⁸. However, it cannot use any resources in a manner which decreases its value or depletes the resource⁶⁹. The Hague Convention and its Regulations is therefore vital in safeguarding the environment during armed conflict.

The International Law Commission (ILC) has also formulated *Draft Principles on Protection of the Environment in Relation to Armed Conflicts*⁷⁰. The Principles recognize that environmental consequences of armed conflicts may be severe

available at <https://ihl-databases.icrc.org/assets/treaties/195-IHL-19-EN.pdf> (Accessed on 06/03/2024)

⁶⁴ Ibid, article 23 (g)

⁶⁵ Bouvier. A., 'Protection of the Environment in Time of Armed Conflict' Available at <https://www.icrc.org/en/doc/resources/documents/statement/5cjkj.htm#:~:text=It%20is%20prohibited%20to%20employ,damage%20to%20the%20natural%20environment.&text=Care%20shall%20be%20taken%20in,long%2Dterm%20and%20severe%20damage> (Accessed on 06/03/2024)

⁶⁶ Hague Regulations, article 55

⁶⁷ Ibid

⁶⁸ Diakonia International Humanitarian Law Centre., 'International Humanitarian Law (IHL) and the Protection of the Environment during Armed Conflict' Op Cit

⁶⁹ Ibid

⁷⁰ International Law Commission., 'Draft Principles on Protection of the Environment in Relation to Armed Conflicts' Available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf (Accessed on 06/03/2024)

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and have the potential to exacerbate global environmental challenges, such as climate change and biodiversity loss⁷¹. The Principles reiterate that there is need to enhance the protection of the environment in relation to both international and non-international armed conflicts, including in situations of occupation⁷². Further, under the ILC Principles, effective protection of the environment in relation to armed conflicts requires that measures are taken by states, international organizations and other relevant actors to *prevent, mitigate and remediate* harm to the environment *before, during and after* an armed conflict (Emphasis added)⁷³. Under the Principles, states are required designate, by agreement or otherwise, areas of environmental importance as protected zones in the event of an armed conflict, including where those areas are of cultural importance⁷⁴. In addition, states, international organizations and other relevant actors are also required to take appropriate measures, in the event of an armed conflict, to protect the environment of the lands and territories that indigenous peoples inhabit or traditionally use⁷⁵. Under the Principle of state responsibility, an internationally wrongful act of a state, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that state, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself⁷⁶. Further, in order to safeguard the environment before, during, and after armed conflict, the Principles envisage the application of the law of armed conflict to the environment⁷⁷. The Principles provide that the law of armed conflict, including the principles and rules on distinction, proportionality and precautions shall be applied to the environment, with a view to its protection⁷⁸. The Principles also require occupying powers to ensure sustainable use of natural resources and prevention of transboundary harm⁷⁹. It is necessary to adopt and implement these principles in order to safeguard the environment before, during, and after armed conflict.

⁷¹ Ibid, Preamble

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid, Principle 4

⁷⁵ Ibid, Principle 5 (1)

⁷⁶ Ibid, Principle 9 (1)

⁷⁷ Ibid, Principle 14

⁷⁸ Ibid

⁷⁹ Ibid, Principles 20 & 21.

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Further, the United Nations and its entities such as UNEP and the United Nations Environment Assembly (UNEA) have also attempted to foster the protection of the environment during and after armed conflicts. The United Nations General Assembly adopted a resolution on the *Observance of the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict*⁸⁰. The Resolution acknowledges that damage to the environment in times of armed conflict impairs ecosystems and natural resources long beyond the period of conflict, and often extends beyond the limits of national territories and the present generation⁸¹. The Resolution invites member states, entities of the United Nations system and other international and regional organizations to observe 6 November each year as the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict⁸². Further, on 27 May 2016, UNEA adopted a *Resolution*⁸³ for the protection of the environment in areas affected by armed conflict. The Resolution reiterates the importance of safeguarding the natural environment in times of armed conflict for the sake of future generations and to consolidate efforts for the protection of our common environment⁸⁴. It also recognizes the role of healthy ecosystems and sustainably managed resources in reducing the risk of armed conflict⁸⁵. The Resolution urges state to mitigate and minimize the specific negative effects of environmental degradation in situations of armed conflict and post-conflict on people in vulnerable situations, including children, youth, persons with disabilities, older persons, indigenous peoples, refugees and internally displaced persons, and migrants, as well as to ensure the protection of the environment in such situations⁸⁶. It also urges states to implement relevant laws and cooperate closely on

⁸⁰ United Nations General Assembly., 'Observance of the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict' A/RES/56/4, 13 November, 2001

⁸¹ Ibid

⁸² Ibid

⁸³ United Nations Environment Assembly of the United Nations Environment Programme., 'Protection of the Environment in areas affected by Armed Conflict' UNEP/EA.2/Res.15

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Ibid

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preventing, minimizing and mitigating the negative impacts of armed conflicts on the environment⁸⁷.

In addition, during its sixth session held in Nairobi, Kenya from 26 February-1 March 2024, UNEA adopted a *Resolution*⁸⁸ on environmental assistance and recovery in areas affected by armed conflict. The Resolution acknowledges that armed conflicts can impede the delivery of essential services and undermine effective environmental management, and that environmental degradation in situations of armed conflict and post-conflict, can impact human health, wellbeing and livelihoods, with people in all vulnerable situations including children, youth, persons with disabilities, older persons, Indigenous Peoples, refugees and internally displaced persons particularly exposed to such effects⁸⁹. According to the Resolution, effective, inclusive and sustainable environmental assistance can play an important role in conflict recovery and Sustainable Development in areas affected by armed conflicts⁹⁰. The Resolution encourages states to increase the effectiveness of environmental assistance and recovery in areas affected by armed conflicts⁹¹. It also urges UNEP in collaboration with other United Nations Agencies and relevant stakeholders to provide environmental assistance and recovery in areas affected by armed conflicts⁹². There is need to implement this Resolution in order to effectively safeguard the environment in areas affected by armed conflict during and after such conflicts.

Despite the adoption of Conventions, Rules, Principles, and Resolutions aimed at safeguarding the environment before, during and after armed conflict, it has been observed that armed conflicts continue to be a major cause of environmental damage, leading to food and water insecurity, loss of

⁸⁷ Ibid

⁸⁸ United Nations Environment Assembly of the United Nations Environment Programme., 'Draft Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' UNEP/EA.6/L.15

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

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livelihoods, and biodiversity loss⁹³. UNEP notes that in spite of the protection afforded by several legal instruments, the environment continues to be the silent victim of armed conflicts worldwide⁹⁴. It has correctly been observed that damage caused to the natural environment by armed conflict can have a severe and lasting impact on people's life, and thus must be thoroughly addressed by all parties to an armed conflict⁹⁵. It is therefore necessary to safeguard the environment during and after armed conflict.

4.0 Way Forward

In order to safeguard the environment before, during, and after armed conflict, it is vital to strengthen the implementation of treaties and conventions aimed at safeguarding the environment in such situations⁹⁶. It has been observed that despite the protection afforded by several legal instruments, the environment continues to be the silent victim of armed conflicts worldwide which can be attributed to ineffective implementation of such legal instruments⁹⁷. It has been asserted that International Humanitarian Law (IHL), along with other branches of international law, provide a legal framework for the protection of the natural environment in armed conflict, both during the conduct of hostilities and when under the control of a party to the conflict⁹⁸. With regard to implementation, it has been pointed out that the treaties of IHL provide various mechanisms for implementing their substantive provisions which include the system of Protecting Powers⁹⁹; the International Fact-Finding Commission¹⁰⁰; specific functions assigned to the ICRC to interpret and monitor the implementation of international humanitarian law¹⁰¹; the

⁹³ Geneva Environment Network., 'Protecting the Environment in Armed Conflict' Op Cit

⁹⁴ United Nations Environment Programme., 'Rooting for the Environment in times of Conflict and War' Op Cit

⁹⁵ International Committee of the Red Cross., 'The Protection of the Natural Environment in Armed Conflict' Op Cit

⁹⁶ United Nations Environment Programme., 'Rooting for the Environment in times of Conflict and War' Op Cit

⁹⁷ Ibid

⁹⁸ International Committee of the Red Cross., 'The Protection of the Natural Environment in Armed Conflict' Op Cit

⁹⁹ Bouvier. A., 'Protection of the Environment in Time of Armed Conflict' Op Cit

¹⁰⁰ Ibid

¹⁰¹ Ibid

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obligation to ensure respect for law¹⁰²; the principle of individual penal responsibility¹⁰³; and the obligation of states to ensure that the provisions of the Geneva Conventions and their Additional Protocols are known and respected as widely as possible¹⁰⁴. It is therefore necessary to comply with these mechanisms in order to ensure implementation of IHL treaties and conventions aimed at safeguarding the environment the environment before, during, and after armed conflict. In addition, it has been asserted that parties to armed conflicts have the obligation to respect and ensure respect of the rules protecting the natural environment and adopt all necessary measures to implement such protections¹⁰⁵.

In addition, it has been argued that there is need to consider ecocide as an international crime¹⁰⁶. Ecocide refers to mass damage and destruction of ecosystems and severe harm to nature which is widespread or long-term¹⁰⁷. It has been observed that armed conflict could result in severe destruction or deterioration of nature that could be qualified as ecocide¹⁰⁸. As a result, recognizing ecocide as a core international crime may prevent humanity from consequent atrocities as well as protect the environment from being damaged¹⁰⁹. According to the United Nations there is need to accelerate legal recognition of ecocide as an international crime as an essential protective and preventive deterrent to severe and either widespread or long-term harm to ecosystems¹¹⁰. There have been proposals towards amending the Rome Statute

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ International Committee of the Red Cross., 'The Protection of the Natural Environment in Armed Conflict' Op Cit

¹⁰⁶ Sharma. K., 'Ecocide: Will it be the Fifth International Crime' Available at <https://www.sconline.com/blog/post/2021/11/26/ecocide/> (Accessed on 07/03/2024)

¹⁰⁷ Stop Ecocide International., 'What is Ecocide?' Available at <https://www.stopecocide.earth/what-is-ecocide> (Accessed on 07/03/2024)

¹⁰⁸ Van Uhm. D., '22 Atrocity Crimes and Ecocide: Interrelations between Armed Conflict, Violence, and Harm to the Environment' Available at <https://academic.oup.com/edited-volume/42558/chapter-abstract/357099488?redirectedFrom=fulltext> (Accessed on 07/03/2024)

¹⁰⁹ Ibid

¹¹⁰ United Nations., 'To accelerate, via Diplomatic Convening and Building of Cross-Sector Networks and Collaborations, the Introduction of Enhanced and Enforceable

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of the International Criminal Court (ICC) in order to create an international crime of ecocide¹¹¹. If these proposals are taken up by parties to the ICC, ecocide would become the fifth category of offences to be prosecuted under the court, alongside war crimes, crimes against humanity, genocide, and the crime of aggression¹¹². It has been observed that the inclusion of ecocide as a fifth international crime holds great significance as it carries along with it various related advantages¹¹³. For example, the environment will gain its lost importance which has been sidelined due to overexploitation by human beings for economic advantages¹¹⁴. In addition, countries may get inspired and bring change in their national criminal laws which will boost the strictness of the crime and protection of the environment¹¹⁵. Further, recognition of ecocide as an international crime will help in the prosecution of environment law crimes that fall outside national laws¹¹⁶. It is therefore necessary to create and prosecute the international crime of ecocide in order to effectively safeguard the environment before, during, and after armed conflict.

Legal Protections for Water (“Ecocide Law”) into International, National and Regional Legislative Frameworks’ Available at <https://sdgs.un.org/partnerships/accelerate-diplomatic-convening-and-building-cross-sector-networks-and-collaborations> (Accessed on 07/03/2024)

¹¹¹ United Nations Environment Programme., ‘Observations on the Scope and Application of Universal Jurisdiction to Environmental Protection’ Available at https://www.un.org/en/ga/sixth/75/universal_jurisdiction/unep_e.pdf (Accessed on 07/03/2024)

¹¹² United Nations Environment Programme., ‘How New Laws Could Help Combat the Planetary Crisis’ Available at <https://www.unep.org/news-and-stories/story/how-new-laws-could-help-combat-planetary-crisis> (Accessed on 07/03/2024)

¹¹³ Sharma. K., ‘Ecocide: Will it be the Fifth International Crime’ Op Cit

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Ibid

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In addition, it is important to strengthen environmental assistance and recovery in areas affected by armed conflict¹¹⁷. At UNEA-6, a *Resolution*¹¹⁸ was adopted to provide environmental assistance in areas affected by armed conflict. The Resolution acknowledges that effective, inclusive and sustainable environmental assistance can play an important role in conflict recovery and Sustainable Development in areas affected by armed conflicts¹¹⁹. It calls for enhanced environmental assistance and recovery in areas affected by armed conflict¹²⁰. If implemented, the Resolution will lead to the development of much-needed technical guidance for states and other stakeholders on how to measure environmental damage in times of armed conflict in order to provide effective assistance and recovery¹²¹. It is thus vital to implement the UNEA-6 Resolution in order to effectively safeguard the environment during and after armed conflict.

Finally, there is need strengthen international peace and security in order to prevent and manage armed conflicts¹²². These conflicts are a major threat to international peace, security, and stability¹²³. They result in devastating loss of civilian life, massive displacement and violations of human rights and IHL¹²⁴. They also result in environmental degradation or destruction, with long-lasting effects that contribute to the increased vulnerability of the affected

¹¹⁷ Conflict and Environment Observatory., 'UNEA-6 Passes Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' Available at <https://ceobs.org/unea-6-passes-resolution-on-environmental-assistance-and-recovery-in-areas-affected-by-armed-conflict/> (Accessed on 07/03/2024)

¹¹⁸ United Nations Environment Assembly of the United Nations Environment Programme., 'Draft Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' Op Cit

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ Conflict and Environment Observatory., 'UNEA-6 Passes Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' Op Cit

¹²² United Nations., 'Peace and Security' Available at <https://www.un.org/en/global-issues/peace-and-security> (Accessed on 07/03/2024)

¹²³ Amnesty International., 'Armed Conflict' Op Cit

¹²⁴ Ibid

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populations¹²⁵. Curbing armed conflicts is vital for economic development, social justice, respect for human rights, promoting good governance, strengthening the rule of law and fostering environmental protection¹²⁶. Some of the approaches that can be utilized to curb armed conflicts and foster international peace and security include issuing ceasefire directives, deployment of United Nation peacekeeping operations to reduce tensions in troubled areas, keeping opposing forces apart, creating conditions for sustainable peace after settlements have been reached, use of economic sanctions such as trade embargoes, and collective military action when necessary¹²⁷. Fostering international peace and security also has benefits on the environment since it helps to curb the negative environmental impacts of war and armed conflict¹²⁸.

5.0 Conclusion

Armed conflicts have severe impacts on the environment. They often lead to environmental degradation or destruction, with long-lasting effects that contribute to the increased vulnerability of the affected populations¹²⁹. Environmental damage as a result of armed conflicts also leads to food and water insecurity, loss of livelihoods, and biodiversity loss¹³⁰. It is therefore necessary to safeguard the environment during and after armed conflict. Protecting the environment during and after armed conflict is integral to conflict prevention, peacebuilding and Sustainable Development, since there can be no durable peace if the natural resources that sustain livelihoods and

¹²⁵ Geneva Environment Network., 'Protecting the Environment in Armed Conflict' Op Cit

¹²⁶ United Nations., 'Working Together to Prevent and Manage Armed Conflicts' Available at https://unsceb.org/sites/default/files/imported_files/prevent%20and%20manage%20armed%20conflicts.pdf (Accessed on 07/03/2024)

¹²⁷ United Nations., 'Peace and Security' Op Cit

¹²⁸ United Nations Environment Programme., 'Curbing Negative Environmental Impacts of War and Armed Conflict' Op Cit

¹²⁹ Geneva Environment Network., 'Protecting the Environment in Armed Conflict' Op Cit

¹³⁰ Ibid

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ecosystems are destroyed¹³¹. Despite the protection afforded by several legal instruments, the environment continues to be the silent victim of armed conflicts worldwide¹³². Safeguarding the environment during and after armed conflict therefore calls for strengthening the implementation of treaties and conventions on environmental protection in armed conflicts¹³³; creating and prosecuting the international crime of ecocide¹³⁴; strengthening environmental assistance and recovery in areas affected by armed conflict¹³⁵; and promoting international peace and security¹³⁶. Safeguarding the environment during and after armed conflict is an ideal that we need to achieve for the benefit of present and future generations.

¹³¹ United Nations., 'Durable Peace not Possible if Natural Resources are Destroyed, Secretary-General Says on International Day for Preventing Exploitation of Environment in War' Op Cit

¹³² United Nations Environment Programme., 'Rooting for the Environment in times of Conflict and War' Op Cit

¹³³ United Nations Environment Programme., 'Rooting for the Environment in times of Conflict and War' Op Cit

¹³⁴ United Nations Environment Programme., 'Observations on the Scope and Application of Universal Jurisdiction to Environmental Protection' Op Cit

¹³⁵ Conflict and Environment Observatory., 'UNEA-6 Passes Resolution on Environmental Assistance and Recovery in areas affected by Armed Conflict' Op Cit

¹³⁶ United Nations., 'Peace and Security' Op Cit

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Abstract

Good governance is not only important for the national government but also for the various sectors in discharging service to the people. One such area is the provision of basic needs such as water which is critical for human survival and securing of livelihoods. Water sector governance is an area that involves various state laws, regulations, and formal and informal players. It involves balancing the conflicting interests and needs of various stakeholders through clearly defined responsibilities, transparency and accountability of formal and informal players. Water resources governance has to consider and balance various interests which range from cultural, economic, social, legal and political contexts. This paper approaches water governance in this perspective and affirms the need to accommodate the various users and their diverse needs as far as water is concerned. To assess the current measures and attempts by the state to achieve the constitutionally guaranteed right of access to clean and safe water in adequate amounts, the paper offers an overview and analysis of the provisions of Water Act 2016 in light of the international best practices in water governance and the sustainable development agenda.

1.0 Introduction

Good governance frameworks are said to embrace the relationships between governments and societies, including laws, regulations, institutions, and formal and informal interactions which affect the ways in which governance systems function, stressing the importance of involving more voices, responsibilities, transparency and accountability of formal and informal organizations associated in any process.¹ The concept of good governance as used in this paper is informed by the foregoing definition of the term due to the important elements such as stakeholders' voices, responsibilities, transparency and accountability.

Water governance may be defined as the range of political, social, economic and administrative systems that are in place to regulate the development and management of water resources and provision of water services at different

¹ Tortajada, C., 'Water Governance: Some Critical Issues,' *International Journal of Water Resources Development*, Vol. 26, No.2, 2010, pp.297-307, p. 298.

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levels of society.² It comprises mechanisms, processes, and institutions through which all involved stakeholders, including citizens and interest groups, articulate their priorities, exercise their legal rights, meet their obligations and mediate their differences.³ It is, however, noteworthy that different people and institutions use the concept in different ways, and within varying cultural, economic, social, legal and political contexts.⁴ This paper approaches water governance in this perspective considering that the discussion looks at the various users and their diverse needs as far as water is concerned.

The current law, ⁵ was enacted to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution.⁶ This paper offers an overview and analysis of the provisions of this law in light of the international best practices in water governance and the sustainable development agenda.

2.0 Water Governance in Kenya

Water Resources governance in Kenya has come a long way from the colonial times when, as it has been observed, in many African states, colonial water laws, which have largely been continued by the independent states, emphasised the use of water for commercial agriculture and provision of water services to the settler population and largely ignored the local population's need for water for domestic and productive purposes.⁷ Even in the independent African states, most laws on water governance and management have been adopting a top-down approach to governance, effectively sidelining communities and their water needs.

² K' Akumu, O.A., 'Toward effective governance of water services in Kenya,' *Water Policy*, Vol. 9, 2007, pp.529-543 at p. 530.

³ Tortajada, C., 'Water Governance: Some Critical Issues,' op cit, p. 299.

⁴ Ibid, p. 299.

⁵ No.43 of 2016, Laws of Kenya.

⁶ Ibid, s. 3.

⁷ Hellum, A., et al, 'The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,' in Hellum A., et al (eds), *Water is Life: Women's Human Rights in National and Local Water Governance in Southern and Eastern Africa*, (Weaver Press, Harare, 2015), p. 10.

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Over the years, the State has attempted to come up with laws, rules and regulations aimed at addressing issues related to water governance and curbing mismanagement of water resources. However, these objectives may not have been adequately realized and this has often led to a critical situation in many parts of the country with many communities suffering from acute water shortages. Kenya is often classified as a water-scarce country with renewable fresh water per capita standing at 647m³ against the United Nations recommended minimum of 1,000m³.⁸ They have difficulties accessing safe water for drinking and other domestic needs.

The right to water is recognised internationally and this has been captured in many international documents, as well as regional legal instruments on basic human rights. The right to water is the fundamental human right of access to water of a quality and quantity sufficient to satisfy basic human needs: consumption, hygiene and sanitation (e.g. bathing or laundry), cleaning, cooking, and subsistence agriculture.⁹ The *General Comment No. 15 on the Right to Water* provides that the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.¹⁰

Principle 4 of the Dublin Conference Water Principles states that "... it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price".

With regard to the user water rights, the Water Act 2016 provides that every person has the right to access water resources, whose administration is the

⁸ Concern Worldwide Kenya, 'Five year ASAL Water Hygiene and Sanitation Strategy for Marsabit County 2013 - 2018,' (Dublin Institute of Technology), p.4. Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKEwj5YbYvMXPahVrBsAKHfN7Cz4QFgg3MAQ&url=http%3A%2F%2Fwww.dit.ie%2Fdtc%2Fmedia%2Fditdtc%2FConcern%25205%2520Year%2520WASH%2520Strategy%252010%2520December%25202012_draft1.doc&usg=AFQjCNHUDMkjrzy1fsQnCsUm47prfTDsBQ [Accessed on 5/10/2016].

⁹ Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' op cit. p. 25.

¹⁰ United Nations, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11), para. 2.

function of the national government as stipulated in the Fourth Schedule to the Constitution.¹¹ Section 63 thereof also provides that every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated in Article 43 of the Constitution. Section 37(l) provides that a permit is not required- for the abstraction or use of water, without the employment of works, from any water resource for domestic purposes by any person having lawful access to the water resource; for the abstraction of water in a spring which is situated wholly within the boundaries of the land owned by any one landholder and does not naturally discharge into a watercourse abutting on or extending beyond the boundaries of that land; or for the storage of water in, or the abstraction of water from a reservoir constructed for the purpose of such storage and which does not constitute a water course for the purposes of this Act. This exception to the requirement for an operation permit is essential in ensuring that the right of access to water resources for domestic use is not curtailed. This is especially relevant in light of the Constitutional right to right to clean and safe water in adequate amounts for all.¹²

3.0 Institutional and Regulatory Arrangements

3.1 Institutional Framework on Water Governance

All water resources in Kenya are vested in the state where the Ministry of Water and Irrigation is responsible for creating institutions to manage water resources and provide water services. The Water Act 2016 provides that every water resource is vested in and held by the national government in trust for the people of Kenya.¹³

The Water Resources Authority established in Section 11(l) of the Water Act 2016 is to serve as an agent of the national government and regulate the management and use of water resources.¹⁴ The functions of the Authority include, inter alia, to: formulate and enforce standards, procedures and Regulations for the management and use of water resources and flood

¹¹ S. 9, No.43 of 2016, Laws of Kenya.

¹² Art. 43, Constitution of Kenya 2010.

¹³ Water Act 2016, s.5.

¹⁴ Ibid, S. 6.

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mitigation; regulate the management and use of water resources; enforce Regulations made under this Act; receive water permit applications for water abstraction, water use and recharge and determine, issue, vary water permits; and enforce the conditions of those permits; collect water permit fees and water use charges; determine and set permit and water use fees; provide information and advice to the Cabinet Secretary for formulation of policy on national water resource management, water storage and flood control strategies; coordinate with other regional, national and international bodies for the better regulation of the management and use of water resources; and advise the Cabinet Secretary generally on the management and use of water resources.¹⁵

Water Act 2016 also establishes the National Water Harvesting and Storage Authority whose functions and powers shall be to- undertake on behalf of the national government, the development of national public water works for water resources storage and flood control; maintain and manage national public water works infrastructure for water resources storage; collect and provide information for the formulation by the Cabinet Secretary of the national water resources storage and flood control strategies; develop a water harvesting policy and enforce water harvesting strategies: undertake on behalf of the national government strategic water emergency interventions during drought; and advise the Cabinet Secretary on any matter concerning national public water works for water storage and flood control.¹⁶

Section 29(1) of the Water Act 2016 provides that Water Resource Users Associations may be established as associations of water resource users at the sub-basin level in accordance with Regulations prescribed by the Authority. A Water Resource Users Association should be a community based association for collaborative management of water resources and resolution of conflicts concerning the use of water resources.¹⁷

¹⁵Ibid, s.12.

¹⁶ Ibid, S. 30 & 32.

¹⁷ Ibid, S. 29(2).

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Section 25 tasks the Cabinet Secretary to establish a Basin Water Resources Committee for each respective basin area which shall be responsible for the management of the water resources within a respective basin area.

The Cabinet Secretary may, by notice in the Gazette, establish one or more waterworks development agencies and define the geographical area of jurisdiction of each such agency.¹⁸ The powers and functions of the water works development agency shall be to- undertake the development, maintenance and management of the national public water works within its area of jurisdiction; and operate the waterworks and provide water services as a water service provider, until such a time as responsibility for the operation and management of the waterworks are handed over to a county government, joint committee, authority of county governments or water services provider within whose area of jurisdiction or supply the waterworks is located.¹⁹

Section 69(1) of the Act provides that as soon as possible, following the commissioning of the waterworks, the waterworks development agency should enter into an agreement with the county government, the joint committee or authority of the county governments within whose area of jurisdiction the water works is located, jointly with the water service provider within whose area of supply the water works are located for the use by the joint committee, authority or water services provider, as the case may be, of the water works to provide water services.²⁰

Section 70(1) of the Water Act 2016 establishes the Water Services Regulatory Board whose principal object is to protect the interests and rights of consumers in the provision of water services.

Section 64(1) of the Water Act 2016 provides that the Cabinet Secretary should, within one year of the commencement of this Act and every five years thereafter, following public participation, formulate a Water Services Strategy. The object of the Water Strategy shall be to provide the Government's plans

¹⁸ Ibid, S. 65(1).

¹⁹ Ibid, S. 68.

²⁰ Ibid, S. 69(1).

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and programs for the progressive realization of the right of every person in Kenya to water.²¹

The Water Strategy should contain, among other things, details of-existing water services; the number and location of persons who are not provided with a basic water supply and basic sewerage services; standards for the progressive realisation of the right to water; and a resource mobilization strategy for the implementation of the plans.²²

The Cabinet Secretary should in consultation with county governments, provide a national water sector investment and financing plan aggregated from the county government plans which should include, among other details, the time frames for the plans and an investment programme based on the investment plans.²³

The basin area water resources management strategy should facilitate the establishment and operation of Water Resources Users Associations.²⁴ The Basin Water Resources Committees may contract water resource users associations as agents to perform certain duties in water resource management.²⁵

Upon the designation of a basin area, the Basin Area Water Authority is required to prescribe requirements and a time frame for resources the formulation of a basin area water resources management strategy.²⁶ The basin area water resources management strategy should be formulated by a basin water resources committee in consultation with the Authority and the county governments whose areas of jurisdiction lie within the basin area.²⁷

²¹ Ibid, S. 64(2).

²² Water Act 2016, S. 64(3).

²³ Ibid, S.64(5).

²⁴ Ibid, S. 29(3).

²⁵ Ibid, S.29(4).

²⁶ Ibid, S. 28(1)

²⁷ Ibid, S. 28(2).

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A basin area water resources management strategy should be consistent with the national water resources policy; put in place measures to fulfill the water resource quality objectives for each class of water resource in the basin area; describe the measures to be put in place for the sustainable management of water resources of the basin area; contain a water allocation plan for the water resources of the basin area; provide systems and guidelines to enable the users of water resources within the basin area to participate in managing the water resources of the basin area; and provide a strategy for financing the management of the water resources of the basin area.²⁸

A basin water resources committee should consist of- not less than four and not more than seven members appointed by the Authority in consultation with the Cabinet Secretary; and a representative of each county government whose area falls within the basin appointed by the appointing authority after approval by the county assembly.²⁹

The persons appointed to the Basin Water Resources Committee must be residents of the respective basin area and should include- a representative of a ministry responsible for matters relating to water resources; a representative of farmers or pastoralists within the basin area concerned; a representative of a public benefits organisation engaged in water resources management programmes within the basin area concerned; and a representative of the business community operating within the basin area concerned.³⁰

The powers and functions of the Basin Water Resources Committee shall be: to advise the Authority and county governments, at the respective regional office, concerning- conservation, use and apportionment of water resources; the grant, adjustment, cancellation or variation of any permit; protection of water resources and increasing the availability of water; annual reporting to the users of its services and the public on water issues and their performance within the basin area; collection of data, analyzing and managing the information system on water resources; review of the basin area water resources management strategy; facilitation of the establishment and

²⁸ Ibid, S. 28(3).

²⁹ Water Act 2016, S. 26(1).

³⁰ Ibid, S.26(3).

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operations of water resource user associations; flood mitigation activities; information sharing between the basin area and the Authority; the equitable water sharing within the basin area through water allocation plans; and any other matter related to the proper management of water resources.³¹

The Water Act 2016 also provides that it shall be the duty of a licensee receiving trade effluent into its sewerage system to ensure that it has in place measures for the receipt and handling of the effluent without causing-pollution of the environment; harm to human health; damage to the sewerage system: or a contravention of applicable laws or standards set by the Regulatory Board.³² A person should not discharge any trade effluent from any trade premises into the sewers of a licensee without the consent of the licensee.³³

In order to deal with disputes, the Act also establishes a Water Tribunal³⁴ and the same is empowered to exercise the powers and functions set out in this Act and in particular to hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.³⁵ In addition to the powers set out in subsection (1), the Tribunal has the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.³⁶

A person aggrieved by a decision of the Tribunal may, within twenty-one days from the date of that decision, appeal to the Land and Environmental Court, established under article 162(2) of the Constitution on an issue of law.³⁷ A decision of a water basin organization, the Authority, the Regulatory Board or the Tribunal against which no appeal has been preferred within thirty days

³¹ Ibid, S. 27.

³² Ibid, S. 108(1).

³³ Ibid, S. 108(2).

³⁴ Ibid, S. 119(1).

³⁵ Water Act 2016, S. 121(1).

³⁶ Ibid, S. 121(2).

³⁷ Ibid, S.124.

from the date on which the decision was made, becomes binding on all parties.³⁸

3.2 Establishment of Protected Areas and Ground Water Conservation Area

Section 22(l) of the Water Act 2016 provides that where the Authority is satisfied that in order to conserve a vulnerable water resource, special measures are necessary for the protection of a catchment area or a part thereof, it may by Order published in the Gazette declare such catchment area to be a protected area.

Section 23(l) of the Water Act provides that the Authority may declare the area to be a ground water conservation area, where it is satisfied that, in any area, special measures for the conservation of ground water are necessary in the public interest for- the protection of public water or water supplies used for industry, agriculture or other private purposes; the conservation of the water resources of the aquifer of the ground water resources; or ecological reasons. Section 24(l) requires the Water Resources Authority, in consultation with the Cabinet Secretary, may designate a defined area from which rain water flows into a watercourse to be a basin area for the purposes of this Act.³⁹

3.3 Operational Permits

One of the characteristics of privatisation and commercialisation of water resources is the need for operational permits for various uses of water. Section 36 of the Water Act 2016 provides that a permit is required for any of the following purposes- any use of water from a water resource, except as provided by section 37; the drainage of any swamp or other land; the discharge of a pollutant into any water resource; and any other purpose, to be carried out in or in relation to a water resource, which is prescribed by Regulations made under this Act to be a purpose for which a permit is required.

Further, Section 42(1) provides that the conditions on a permit may require that on the issue of the permit and at prescribed intervals thereafter, the permit holder shall pay charges to the Authority for the use of water in accordance

³⁸ Ibid, S. 125.

³⁹ Ibid, S.24(1).

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with the terms of the permit and the Regulations prescribed by the Authority. The charges are to be determined by reference to a schedule of charges published in the Gazette by the Authority following public consultation.⁴⁰

Where there is an agreement between the Authority and a water resources users' association, the Authority may make available a portion of the water use charges to be used for financing such regulatory activities as the water resources users association has agreed to undertake on behalf of the Authority.⁴¹

Section 43(1) provides that in issuing a permit, and in fixing any conditions to be imposed on a permit, the Authority shall take into account such factors as it considers relevant, including- existing lawful uses of the water; efficient and beneficial use of water in the public interest; any basin area water resources management strategy applicable to the relevant water resource; the likely effect of the proposed water use on the water resource and on other water users; the classification and the resource quality objectives of the water resource; the investments already made and to be made by the water user in respect of the water use in question; the strategic importance of the proposed water use; the quality of water in the water resource which may be required for the reserve; and the probable duration of the activity or undertaking for which a water use is to be authorised.

The water Act 2016 provides that where, in the opinion of the Authority, it is desirable that water use in respect of one or more water resources, including ground water, within a specific geographic area be rationalized or reviewed so as to- achieve a sustainable allocation of water from a water resource which is under stress; achieve equity in allocations; promote beneficial use of water in the public interest; facilitate efficient management of water resources, or protect water resource quality, the Authority may issue a notice in the Gazette requiring all water users, including permit holders, to apply or reapply for permits for one or more types of water use.⁴²

⁴⁰ Water Act 2016, S. 42(2).

⁴¹ Ibid, S. 42(3).

⁴² Water Act 2016, S. 47(1).

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The Act requires that the proposed allocation schedule must be subjected to public consultation, after which the basin water resources committee should prepare a preliminary allocation schedule and ought to, by notice published in the Gazette advertise the times and places at which a copy of the schedule may be inspected.⁴³ A person dissatisfied with the preliminary allocation schedule may appeal to the Water Tribunal within thirty days of the publication under subsection (3).⁴⁴

The Authority may also in the case of an inter basin water transfer cancel or vary a permit if such cancellation or variation is necessary for the accommodation of additional water users of a water source.⁴⁵

3.4 Privatisation and Commercialisation of Water Resources

The United Nations estimates that over one billion people across the world do not have access to safe, clean drinking water, although this is a basic human need.⁴⁶ This may be attributed to different problems and challenges which may range from water availability, supply and access, amongst others. Water, being mainly a public good commodity, is mostly vested in the state and hence public institutions are tasked with its management and distribution. However, over the years this has changed internationally, with more private players entering the scene in order to enhance efficiency. It has been observed that when public companies entrusted with the supply of water in the vast majority of developing countries failed to make the infrastructural investments required to provide water services to all, reforms involving commercialization of water services—the application of principles of cost recovery and profit maximization—and private sector participation were proposed as a way to increase investment in water delivery networks, improve access for all sectors of the population and reduce the burden of public services on government finances.⁴⁷

⁴³ Ibid, S. 47(3).

⁴⁴ Ibid, S. 47(4).

⁴⁵ Ibid, S. 48(1).

⁴⁶ United Nations Research Institute for Social Development, 'Commercialization, Privatization and Universal Access to Water,' available at [http://www.unrisd.org/80256B3C005BB128/\(httpProjects\)/E8A27BFBD688C0A0C1256E6D0049D1BA](http://www.unrisd.org/80256B3C005BB128/(httpProjects)/E8A27BFBD688C0A0C1256E6D0049D1BA) [Accessed on 5/1/2017].

⁴⁷ Ibid.

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It has been argued that water should be treated “as an economic good”, a proclamation that originated in the International Conference on Water and the Environment (Dublin Conference 1992).⁴⁸ Managing water as an economic good is said to be an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.⁴⁹

It has however been argued that water’s characteristics that make it difficult to marketize include its status as a public good, a natural monopoly, a merit good and/or basic (human) right and a scarce resource.⁵⁰ The UN Committee on Economic, Social and Cultural Rights, in their publication, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*⁵¹, asserts that water is a limited natural resource and a public good fundamental for life and health. Furthermore, the human right to water is indispensable for leading a life in human dignity, and it is a prerequisite for the realization of other human rights.⁵² According to the Committee, the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.⁵³

⁴⁸ Perry, C.J., et al, *Water as an Economic Good: A Solution, or a Problem?* Research Report 14, (International Irrigation Management Institute, Colombo, 1997), p. 1.

⁴⁹ Ibid.

⁵⁰ Akech, J.M.M., ‘Governing Water and Sanitation In Kenya: Public Law, Private Sector Participation And The Elusive Quest For A Suitable Institutional Framework,’ *Paper prepared for the workshop entitled ‘Legal Aspects of Water Sector Reforms’ to be organised in Geneva from 20 to 21 April 2007 by the International Environmental Law Research Centre (IELRC) in the context of the Research partnership 2006-2009 on water law sponsored by the Swiss National Science Foundation (SNF)*, p. 6. Available at http://www.ielrc.org/activities/workshop_0704/content/d0702.pdf [Accessed on 5/01/2017].

⁵¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11. Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11).

⁵² Ibid, para.1.

⁵³ Ibid, para. 2.

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The right to water falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.⁵⁴ It is also inextricably related to the right to the highest attainable standard of health and the rights to adequate housing and adequate food.⁵⁵ Priority in the allocation of water must be given to the right to water for personal and domestic uses, and also to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.⁵⁶

The foregoing assertions by the UN Committee on Economic, Social and Cultural Rights have been captured in the Constitution of Kenya which 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; 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.⁵⁷

Section 43(2) of the Water Act provides that the use of water for domestic purposes shall take precedence over the use of water for any other purpose, and the Authority may, in granting any permit, reserve such part of the quantity of water in a water resource as in its opinion is required for domestic purposes. These are important provisions considering that providing access to water not only for domestic uses, but also for growing, preparing and selling food and other products that are vital for family welfare and food security is a key element in the realisation of the right to water as a part of the right to food, the right to health, and the right to an adequate living standard.⁵⁸ The Act also provides that nature and degree of water use authorized by a permit should

⁵⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), *op cit.* Para. 3.

⁵⁵ *Ibid*, para. 3.

⁵⁶ *Ibid*, para. 6.

⁵⁷ Article 43(1), Constitution of Kenya 2010.

⁵⁸ Hellum, A., et al, 'The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,' *op cit.*, p. 23.

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be reasonable and beneficial in relation to other persons who use the same sources of supply or bodies of water.⁵⁹

The International Conference on Water and the Environment which resulted in the Dublin Statement on Water and Sustainable Development⁶⁰ came up with four guiding principles which should inform water governance at both international and national levels. The fourth Dublin principle on water is that water has an economic value in all its competing uses and should be recognized as an economic good. The argument has been that this principle should be interpreted to mean that water should be provided by private companies and that consumers should pay the full cost of water provision (full-cost recovery), signaling a radical shift from the subsidized public provision of water that had previously been the norm in many parts of the world.⁶¹

In the water sector, one of the most common ways of bringing in the private sector is through concession agreements, via which the state, while retaining ownership, transfers the right of operating the water utility to a private company.⁶² Section 93(1) of the Water Act 2016 provides that a water services provider may enter into a public private partnership or public partnerships for the exercise and performance by another person of some or all of its functions as a licensee with respect to a part or the whole of its area of water service provision.

The advocates for private sector participation on the water and sanitation policy agenda for the South saw it as a means of achieving greater efficiency

⁵⁹ Section 43(2), Water Act 2016.

⁶⁰ United Nations, The Dublin Statement on Water and Sustainable Development, Adopted January 31, 1992 in Dublin, Ireland, International Conference on Water and the Environment. Dublin, Ireland, International Conference on Water and the Environment, available at <http://un-documents.net/h2o-dub.htm> [Accessed on 05/10/2016]

⁶¹ Miroso, O. & Harris, L.M., 'Human Right to Water: Contemporary Challenges and Contours of a Global Debate,' *Antipode*, Vol. 44, No. 3, 2012, pp. 932-949 at p. 935.

⁶² United Nations Research Institute for Social Development, 'Commercialization, Privatization and Universal Access to Water,' available at [http://www.unrisd.org/80256B3C005BB128/\(httpProjects\)/E8A27BFBD688C0A0C1256E6D0049D1BA](http://www.unrisd.org/80256B3C005BB128/(httpProjects)/E8A27BFBD688C0A0C1256E6D0049D1BA)

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and expansion in the water and sanitation sector.⁶³ This is because there is general agreement that public utilities have been too slow in extending access to services and that they can be inefficient and corrupt, and increasing private sector involvement was meant to address these problems.⁶⁴

It has been argued that under the right circumstances, it may well be possible for private sector participation to improve efficiency and increase the financial resources available for improving water and sanitation services.⁶⁵ However, it can also direct finance to urban centres and neighbourhoods that are already comparatively well served, further polarize the politics of water and sanitation (especially when prices increase) and create new regulatory problems. Much depends on the way privatization is developed and the local context.⁶⁶ This seems to be the approach that was adopted by the water Act 2016, with much emphasis being on the provision of water to the urban areas and extension to the rural areas only being a matter left to the licensing authorities.

For instance, the Water Act 2016 empowers county governments to establish water services providers, which may be a public limited liability company established under the Companies Act, 2015 or other body providing water services as may be approved by the Regulatory Board. In establishing a water services provider, a county government must comply with the standards of commercial viability set out by the Regulatory Board.⁶⁷ A water services provider shall be responsible for- the provision of water services within the area specified in the licence; and the development of county assets for water service provision.⁶⁸ The Act also provides that a county water services provider may with the approval of the relevant licensing authority extend water services to rural or developing areas.⁶⁹ The Act further provides that nothing in its provisions should deprive any person or community of water

⁶³ Budds, J. & McGranahan, G., 'Are the debates on water privatization missing the point? Experiences from Africa, Asia and Latin America,' *Environment & Urbanization*, Vol. 15, No. 2, October 2003, pp. 87-114 at p. 87.

⁶⁴ *Ibid*, p. 87.

⁶⁵ *Ibid*, p. 88.

⁶⁶ *Ibid*, p.88.

⁶⁷ Water Act 2016, S. 77.

⁶⁸ *Ibid*, S. 78(1).

⁶⁹ *Ibid*, S. 81.

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services on the grounds only that provision of such services is not commercially viable.⁷⁰

The Act also requires every county government to put in place measures for the provision of water services to rural areas which are considered not to be commercially viable for the provision of water services.⁷¹ The measures referred to in subsection (2) shall include the development of point sources, small scale piped systems and standpipes which meet the standards set by the Regulatory Board and which may be managed by the Water community associations, public benefits organizations or a private person under a contract with the county government.⁷² Further, in order to implement its obligations under this section, a county government should formulate and submit annually to the Regulatory Board and to the Cabinet Secretary, a five year development plan incorporating an investment and financing plan for the provision of water services in the rural areas referred to subsection (1) within its area of jurisdiction.⁷³ The Cabinet Secretary is also to provide technical, financial and other assistance to a county government to enable the county government to discharge its responsibility under this section.⁷⁴

Under the Water Act 2016, there is also established a water sector financing institution to be known as the Water Sector Trust Fund.⁷⁵ The object of the Fund is to provide conditional and unconditional grants to counties, in addition to the Equalisation Fund and to assist in financing the development and management of water services in marginalized areas or any area which is considered by the Board of Trustees to be underserved including- community level initiatives for the sustainable management of water resources; development of water services in rural areas considered not to be commercially viable for provision of water services by licensees; development of water services in the under-served poor urban areas; and research activities

⁷⁰ Ibid, S. 94(1).

⁷¹ Ibid, S. 33(2).

⁷² Ibid, S. 33(3).

⁷³ Ibid, S. 33(4).

⁷⁴ Ibid, S. 33(5).

⁷⁵ Water Act 2016, S. 113(1).

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in the area of water resources management and water services, sewerage and sanitation.⁷⁶

It has been argued that, in practice rather than in theory, many stakeholders, including water users associations, non-governmental organizations (NGOs) and local communities, may build on local knowledge and networks, but may often lack support, funds, institutional and technical capacities or even membership to significantly contribute to the management of water resources.⁷⁷ It is therefore a laudable move to have in place a fund that seeks to community level initiatives and ensuring that all persons have access to clean and safe water in adequate amounts, as a matter of right. This is especially important in areas that may have been sidelined on the basis of not being commercially viable for provision of water services by licensees. The fund however needs to be scrupulously guarded against misappropriation and diversion by self-seeking stakeholders, if the above objectives are to be realized.

It is noteworthy that most of the institutions established under this law comprise of professionals and even where the Act provides for consultations, the same is provided for in simplistic terms. The main players in the water governance matters are the government organs and private sector players, with little or no role for communities who may usually be the most affected by policies and state actions on water. It has been suggested that by directly involving users of water in the governance of the resource, the knowledge on which this participation is based may be more meaningful than otherwise may have been possible since local stakeholders may often be more familiar with the peculiarities of local economic, social, cultural and environmental situations.⁷⁸ Further, it might also mean that users involved may accept the regulations as appropriate and consistent with their values and interests and may also be more willing to comply with them.⁷⁹

⁷⁶ Ibid, S. 114.

⁷⁷ Tortajada, C., 'Water Governance: Some Critical Issues,' *op cit*, p. 300.

⁷⁸ Ibid, p. 300.

⁷⁹ Ibid, p. 300.

4.0 Bridging the Gap

It has been posited that the basic principles for effective water governance include open and transparent, inclusive and communicative, coherent and integrative, equitable and ethical approaches while in terms of performance, the basic attributes include accountable, efficient, responsive and sustainable operations.⁸⁰ The degree of integration of the principles and attributes in any system serve as good indicators of whether the system will be able to achieve effective governance or not.⁸¹

4.1 A Human Rights Approach to Water

It has been acknowledged that one of the problems believed to contribute to inequitable access to water is a perception among community members that there are cartels comprising of powerful politicians, employees of water service providers, water vendors, and government employees, among others who are out to ensure that the status quo of the existing water problems is maintained.⁸² It is estimated that over 50% of Kenya's households do not have access to safe drinking water and the proportion is higher for the poor.⁸³

It is noteworthy that the user water rights are different from the human right to water in that while water rights are the legal authorization to use a specified quantity of water "for a specific purpose under specific conditions," the human right to water focuses on the amount and quality of water required by human beings to meet their basic needs, which should serve as a minimum requirement for water rights to be granted to each individual.⁸⁴

From the Act, it seems that the law places greater emphasis on the water rights while sidelining the human right to water. This is seen from the emphasis on licenses for the various uses of water. There are inadequate provisions placing elaborate responsibility on the various institutions and governance bodies in

⁸⁰ K'Akumu, O.A., 'Toward effective governance of water services in Kenya,' op cit at p. 531.

⁸¹ Ibid, p. 531.

⁸² Moraa, H., *Water governance in Kenya: Ensuring Accessibility, Service delivery and Citizen Participation*, (iHub Research, July 2012), p.9. Available at http://ihub.co.ke/ihubresearch/uploads/2012/july/1343052795__537.pdf.

⁸³ Ibid, p.5.

⁸⁴ Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' op cit. p. 26.

implementation of the human right to water. The UN General Assembly Resolution on the human right to water and sanitation⁸⁵ formally recognises the right to water and sanitation and acknowledges that clean drinking water and sanitation are essential to the realisation of all human rights. The Resolution calls upon States and international organisations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all. The implementation of the Act should adopt a human rights approach which would help in addressing the inequitable distribution and access to water resources.

4.2 Opportunities for Public Participation in Water Governance

Public participation means different things to different people and may take several forms, ranging from information supply – to consultation, discussions with the public, co-decision making – to a situation in which the “public” is in charge of parts of natural resources management, for example, through water users’ associations.⁸⁶ Public participation would improve the quality of decision making by opening up the decision-making process and making better use of the information and creativity that is available in society. Moreover, it would improve public understanding of the management issues at stake, make decision making more transparent, and might stimulate the different government bodies involved to coordinate their actions more in order to provide serious follow-up to the inputs received. Management itself would become less controversial, less litigation would take place, and implementation of decisions would be much smoother. Finally, public participation could improve democracy. Public participation would be imperative whenever government does not have enough resources (information, finance, power, etc.) to manage an issue effectively, as is usually the case in water management.⁸⁷

⁸⁵ The United Nations General Assembly Resolution, The human right to water and sanitation, A/RES/64/292, July 2010.

⁸⁶ Huitema, D., et al, ‘Adaptive Water Governance: Assessing the Institutional Prescriptions of Adaptive (Co-)Management from a Governance Perspective and Defining a Research Agenda,’ *Ecology and Society*, Vol. 14, No.1, pp.1-26 at p. 5.

⁸⁷ *Ibid*, p.5.

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Scholars have argued that inclusiveness requires wide participation throughout the policy chain right from conception to implementation.⁸⁸ Furthermore, participation is necessary to make decisions more politically acceptable and to foster accountability and stakeholders should collectively design and implement policies and management strategies that meet their goals effectively and acceptably.⁸⁹

It has been argued that the community-based water governance systems anchored in unwritten customary norms and values shape perceptions of water rights and water governance at local levels.⁹⁰ The Community-based norms and practices often referred to as 'living customary law,' have endured in spite of efforts by both colonial and independent African governments to redefine citizen's relationship to water through state laws and policies.⁹¹

4.3 Effective Water Governance for the Realisation of Sustainable Development Agenda

Water is a finite and irreplaceable resource that is fundamental to human well-being. It is only renewable if well managed. Today, more than 1.7 billion people live in river basins where depletion through use exceeds natural recharge, a trend that will see two-thirds of the world's population living in water-stressed countries by 2025. While water scarcity can pose a serious challenge to sustainable development, if managed efficiently and equitably, it can play a key enabling role in strengthening the resilience of social, economic and environmental systems in the light of rapid and unpredictable changes. Water is one of the natural resources at the core of sustainable development debate and it is critical for socio-economic development, healthy ecosystems and for human survival itself.⁹² Goal 6 of the United Nation's *Transforming our*

⁸⁸ K'Akumu, O.A., 'Toward effective governance of water services in Kenya,' op cit at p. 538.

⁸⁹ Ibid, p. 538.

⁹⁰ Hellum, A., et al, 'The Human Right to Water and Sanitation in a Legal Pluralist Landscape: Perspectives of Southern and Eastern African Women,' op cit., pp. 6-7; 20.

⁹¹ Ibid, p. 7.

⁹² United Nations, 'International Decade for Action 'water for Life 2005-2015': Water and sustainable development,' available at http://www.un.org/waterforlifedecade/water_and_sustainable_development.shtml [Accessed on 05/10/2016].

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world: the 2030 Agenda for Sustainable Development acknowledges states' obligation to ensure availability and sustainable management of water and sanitation for all. It requires that by 2030, states should achieve universal and equitable access to safe and affordable drinking water for all.⁹³ States are also required to achieve access to adequate and equitable sanitation and hygiene for all.⁹⁴ By 2030, they are also required to substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water scarcity and substantially reduce the number of people suffering from water scarcity.⁹⁵

In order to protect the water sources and guarantee supply, states are also required to protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes.⁹⁶ This is besides the obligation to 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.⁹⁷ They are also required to ensure the conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements.⁹⁸ It is worth pointing out that focus should not only be on the water resources and their access and use, but there should also be the responsibility to ensure that the resources are not depleted. Hence, there should be an integrated approach to water resources governance.

Access to safe water and sanitation are crucial for human survival and are believed to be essential considerations when addressing socioeconomic development, poverty, and health problems.⁹⁹ The United Nation's 2030

⁹³ Paragraph 6.1, *Transforming our world: the 2030 Agenda for Sustainable Development*.

⁹⁴ *Ibid*, Para. 6.2.

⁹⁵ *Ibid*, Para. 6.4.

⁹⁶ *Transforming our world: the 2030 Agenda for Sustainable Development*, para.6.6.

⁹⁷ *Ibid*, Para. 12.4.

⁹⁸ *Ibid*, Para. 15.1.

⁹⁹ Nkonya, L.K., 'Realizing the Human Right to Water in Tanzania,' *op cit.*, p. 25.

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Agenda on Sustainable Development affirms that social and economic development depends on the sustainable management of our planet's natural resources. As such, it captures the determination to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife, and also to promote sustainable tourism, to tackle water scarcity and water pollution, to strengthen cooperation on desertification, dust storms, land degradation and drought and to promote resilience and disaster risk reduction.¹⁰⁰ To achieve this, the 2030 Agenda requires the states to implement integrated water resources management at all levels, including through transboundary cooperation as appropriate.¹⁰¹

Scarcity and misuse of fresh water is believed to pose a serious and growing threat to sustainable development and protection of the environment.¹⁰² This is because, human health and welfare, food security, industrial development and the ecosystems on which they depend, are all at risk, unless water and land resources are managed more effectively in the present decade and beyond than they have been in the past.¹⁰³

The United Nations affirms that water is also at the heart of adaptation to climate change, serving as the crucial link between the climate system, human society and the environment.¹⁰⁴ It is vital for reducing the global burden of

¹⁰⁰ Target 33, United Nation 2030 Agenda on Sustainable Development.

¹⁰¹ Ibid, Para.6.5.

¹⁰² United Nations, The Dublin Statement on Water and Sustainable Development, 1992, op cit.

¹⁰³ Gorre-Dale, E., 'The Dublin Statement on Water and Sustainable Development', *Environmental Conservation*, Vol. 19, No.2, 1992, p. 181. Available at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/843EB9B98E0F63A3DA36041F7BF3BF16/S0376892900030733a.pdf/div-class-title-the-dublin-statement-on-water-and-sustainable-development-div.pdf> [Accessed on 05/10/2016].

¹⁰⁴ United Nations, 'International Decade for Action 'water for Life 2005-2015': Water and sustainable development,' op cit.; See generally, UN Water, 'Climate Change Adaptation: The Pivotal Role of Water,' available at http://www.unwater.org/downloads/unw_ccpol_web.pdf [Accessed on 05/2/2016].

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disease and improving the health, welfare and productivity of populations.¹⁰⁵ This is affirmed in the 2030 Agenda on Sustainable Development which obligates states to improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally.¹⁰⁶

It is notable that Kenya's Water Act 2016 has provisions covering these areas, by mainly obligating licensed water providers and users to take particular measures. However, this Act does not have clear provisions on the role of local communities in water provision, use and conservation measures. While it is notable that a number of provisions provide for consultations and public participation, there is the risk of communities being sidelined in governance issues and having them reduced to mere spectators and recipients of institutional policies and decisions. This would be against the constitutional principles and values of governance including 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.¹⁰⁷ It is imperative to ensure that these principles and values are implemented in water resources governance for realisation of the human right to water and sustainable development agenda.

The 2030 Agenda on Sustainable Development tasks states to support and strengthen the participation of local communities in improving water and sanitation management.¹⁰⁸ Arguably, sustainable use of resources such as water requires the meaningful participation of all. This is alongside the obligation to expand international cooperation and capacity-building support to developing countries in water- and sanitation-related activities and programmes, including water harvesting, desalination, water efficiency, wastewater treatment, recycling and reuse technologies.¹⁰⁹ Kenya should

¹⁰⁵ Ibid.

¹⁰⁶ United Nation 2030 Agenda on Sustainable Development, Para. 6.3.

¹⁰⁷ Art. 10(2), Constitution of Kenya 2010 (Government Printer, 2010, Nairobi)

¹⁰⁸ United Nation 2030 Agenda on Sustainable Development, Para. 6.b .

¹⁰⁹ *Transforming our world: the 2030 Agenda for Sustainable Development*, Para. 6.a.

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ensure that local communities are actively involved in water resources governance in the country for realisation of sustainable development agenda. This will ensure that policy measures adopted by the state agencies incorporate the unique but useful knowledge of these communities in conservation measures.

5.0 Conclusion

From the highlighted provisions in this paper, the Water Act 2016 mainly seeks to address depletion, inefficient consumption and pollution of water resources in the country, through a number of measures, as discussed. While this law can be hailed as a positive step towards addressing the ever worsening problem of access, use and governance of water resources, there is need for periodic review of the performance especially as far as the implementation of provisions on the access, use and public participation are concerned.

Under the current constitutional dispensation, the right of access to clean and safe drinking water is recognised as significant in the quest for realisation of the human right to economic and social rights such as the highest attainable standard of health, reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality. This reflects the international human rights law position on the issue. Arguably, these rights cannot be reasonably achieved without first securing the right to clean and safe water in adequate amounts. Streamlining water governance in Kenya for sustainable development is thus urgent and necessary.

Strengthening Environmental Rule of Law for Sustainability

Abstract

This paper critically discusses the concept of environmental rule of law. It defines environmental rule of law and examines its salient principles. The paper further examines progress made towards promoting environmental rule of law at the global, regional and national levels. It also explores some of the challenges facing the realization of environmental rule of law and suggests measures towards strengthening environmental rule of law for sustainability

1.0 Introduction

The rule of law has been defined as a phenomenon that comprises a number of principles of a formal and procedural character, addressing the way in which a society is governed¹. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society². The procedural principles on the other hand concern the processes by which these norms are administered, and the institutions like courts and an independent judiciary that their administration requires³. On some accounts, the rule of law also comprises certain substantive ideals like a presumption of liberty and respect for private property rights⁴. The hallmarks of respect for the rule of law in a society include separation of powers of the executive, legislature, and judiciary; regular, free, and fair elections; an independent and impartial judiciary; free and independent media institutions; and equality of the people before the law⁵.

¹ Waldron. J., 'The Rule of Law.' Available at <https://plato.stanford.edu/Entries/rule-of-law/> (Accessed on 12/09/2023)

² Ibid

³ Ibid

⁴ Muigua. K., 'Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses.' Available at <http://kmco.co.ke/wp-content/uploads/2023/09/Rule-of-Law-Approach-for-Inclusive-Participation-in-Environmental-Social-and-Governance-ESG-Accountability-Mechanisms-for-Climite-Resilient-Responses-1.pdf> (Accessed on 12/09/2023)

⁵ International Commission of Jurists., 'Democratic Governance & Rule of Law.' Available at <https://icj-kenya.org/what-we-do/democratic-governance-rule-of-law/> (Accessed on 12/09/2023)

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The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards⁶. According to the United Nations, the rule of law requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency⁷. The rule of law therefore essentially means that the law and regulation matters and that legal rights will have the backing of the state⁸. In addition, the rule of law infers that the state itself is constrained by law and cannot act unfairly or arbitrarily in relation to its own citizens and businesses⁹.

The rule of law is foundational to resilient democratic societies¹⁰. It has further been asserted that the rule of law is an enabler of justice and development¹¹. According to the International Development Law Organization (IDLO), the rule of law is inseparable from equality, from access to justice and education, from access to health and the protection of the most vulnerable¹². The IDLO further points out that the rule of law is crucial for the viability of communities and nations, and for the environment, that sustains them¹³. The importance of the rule of law is also recognized under the 2030 Agenda for Sustainable

⁶ United Nations., 'What is the Rule of Law.' Available at <https://www.un.org/ruleoflaw/what-is-therule-of-law/> (Accessed on 12/09/2023)

⁷ Ibid

⁸ Lee. P., 'The Rule of Law and Investor Approaches to ESG: Discussion Paper.' Available at https://binghamcentre.biicl.org/documents/155_rule_of_law_and_investor_approaches_to_esg.pdf (Accessed on 12/09/2023)

⁹ Ibid

¹⁰ United States Agency for International Development., 'Democracy, Human Rights and Governance.' Available at <https://www.usaid.gov/democracy/rule-law> (Accessed on 12/09/2023)

¹¹ International Development Law Organization (IDLO)., 'Rule of Law.' Available at <https://www.idlo.int/what-we-do/rule-law> (Accessed on 12/09/2023)

¹² Ibid

¹³ Ibid

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Development at its Sustainable Development Goals (SDGs)¹⁴. SDGs 16 and 16.3 seeks to promote the rule of law at the national and international levels and ensure equal access to justice for all¹⁵.

According to the United Nations Environment Programme (UNEP), the rule of law is essential in all sectors of governance including the environment¹⁶. Consequently, the idea of environmental rule of law has emerged¹⁷. This paper critically discusses the concept of environmental rule of law. It defines environmental rule of law and examines its salient principles. The paper further examines progress made towards promoting environmental rule of law at the global, regional and national levels. It also explores some of the challenges facing the realization of environmental rule of law and suggests measures towards strengthening environmental rule of law for sustainability.

2.0 Defining Environmental Rule of Law

Environmental law is a collective term encompassing all aspects of the law that provide protection to the environment¹⁸. *It entails a set of regulatory regimes and environmental legal principles which focus on the management of specific natural resources, such as land, wildlife and biodiversity, forests, minerals, water, fisheries and coastal and marine resources*¹⁹. It has been observed that if human society is to stay within the bounds of critical ecological thresholds, it is imperative that environmental laws are widely understood, respected, and enforced and the

¹⁴ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 12/09/2023)

¹⁵ Ibid

¹⁶ United Nations Environment Programme., 'Promoting Environmental Rule of Law.' Available at <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law> (Accessed on 12/09/2023)

¹⁷ Ibid

¹⁸ Conserve Energy Future., 'What is Environmental Law: Importance and Components.' Available at <https://www.conserve-energy-future.com/environmental-law-and-its-components.php#:~:text=The%20two%20basic%20factors%20that,preserve%20and%20protect%20the%20environment> (Accessed on 12/09/2023)

¹⁹ Ibid

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benefits of environmental protection are enjoyed by people and the planet²⁰. Environmental rule of law offers a framework for addressing the gap between environmental laws as set out in text and in practice and is key to achieving the Sustainable Development Goals²¹.

Environmental rule of law is understood as the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically Sustainable Development in the rule of law²². This concept integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance²³. It highlights environmental sustainability by connecting it with fundamental rights and obligations²⁴. It reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations²⁵. Environmental rule of law therefore refers to an ideal where environmental laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet²⁶. According to the International Union for Conservation of Nature (IUCN), the concept of environmental rule of law is founded upon key elements of governance including development, enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies that are

²⁰ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Available at https://www.unep.org/news-and-stories/press-release/dramatic-growth-laws-protect-environment-widespread-failure-enforce?_ga=2.16775999.845015847.1694504989-17506007.1686563450 (Accessed on 12/09/2023)

²¹ Ibid

²² International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Available at <http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091064.pdf> (Accessed on 12/09/2023)

²³ United Nations Environment Programme., 'Environmental Rule of Law.' Available at <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law> 0#:~:text=Environmental%20rule%20of%20law%20is,with%20fundamental%20rights%20and%20obligations (Accessed on 12/09/2023)

²⁴ Ibid

²⁵ Ibid

²⁶ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

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efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality; respect for human rights, including the right to a safe, clean, healthy, and sustainable environment; measures to ensure effective compliance with laws, regulations, and policies, including adequate criminal, civil, and administrative enforcement, liability for environmental damage, and mechanisms for timely, impartial, and independent dispute resolution; effective rules on equal access to information, public participation in decision-making, and access to justice; environmental auditing and reporting, together with other effective accountability, transparency, ethics, integrity and anti-corruption mechanisms; and use of best-available scientific knowledge²⁷. It has been observed that despite most countries having established, to varying degrees, environmental laws and institutions to foster environmental governance, there is a growing recognition that a considerable implementation gap exists in both developed and developing nations between the requirements of environmental laws and their implementation and enforcement²⁸. UNEP in its global assessment of environmental rule of law finds weak enforcement to be a global trend that is exacerbating environmental threats, despite prolific growth in environmental laws and agencies worldwide over the past few decades²⁹. The goal of environmental rule of law is to bridge this gap and foster the implementation and enforcement of environmental laws³⁰.

IUCN posits that without the environmental rule of law and the enforcement of legal rights and obligations, environmental governance, conservation, and protection may be arbitrary, subjective, and unpredictable³¹. Therefore,

²⁷ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

²⁸ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

²⁹ United Nations Environment Programme., 'Dramatic Growth in Laws to Protect Environment, But Widespread Failure to Enforce, Finds Report.' Available at https://www.unep.org/news-and-stories/press-release/dramatic-growth-laws-protect-environment-widespread-failure-enforce?_ga=2.16775999.845015847.1694504989-17506007.1686563450 (Accessed on 12/09/2023)

³⁰ Ibid

³¹ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

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environmental rule of law and robust institutions are essential to respond to increasing environmental pressures that threaten the ecological integrity of the Earth, in a way that respects fundamental rights and principles of justice and fairness³². Environmental rule of law is therefore an essential tool of environmental governance³³.

Environmental rule of law is central to Sustainable Development³⁴. The concept of Sustainable Development seeks to foster development that meets the needs of the present without compromising the ability of future generations to meet their own needs³⁵. It combines elements such as environmental protection, economic development and social concerns³⁶. Environmental rule of law provides an essential platform underpinning the four pillars of Sustainable Development – economic, social, environmental, and peace³⁷. It seeks to integrate the fundamental principles of environmental law in environmental governance in order to realize Sustainable Development³⁸. These principles include the principles of intergenerational and intragenerational equity, the polluter-pays principle, the precautionary principle, the principle of public participation and the principle of international cooperation in the management of shared environmental resources³⁹. Environmental rule of law is thus vital in the attainment of the Sustainable Development agenda and the SDGs. UNEP asserts that the rule of law in environmental matters is essential for equity in terms of the advancement of the SDGs, the provision of fair access by assuring a rights-

³² Ibid

³³ Muigua. K., 'Revisiting the Role of Law in Environmental Governance in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2019/06/Revisiting-the-Role-of-Law-in-Environmental-Governance-in-Kenya-Kariuki-Muigua-June-2019.pdf> (Accessed on 12/09/2023)

³⁴ United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit

³⁵ World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

³⁶ Fitzmaurice. M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1

³⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

³⁸ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

³⁹ Ibid

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based approach, and the promotion and protection of environmental and other socio-economic rights⁴⁰.

It has been pointed out that without environmental rule of law, development cannot be sustainable⁴¹. However, the presence of environmental rule of law ensures that well-designed laws are implemented by capable government institutions that are held accountable by an informed and engaged public lead to a culture of compliance that embraces environmental and social values⁴². Strengthening environmental rule of law is thus vital in protecting the environmental, social, and cultural values and to achieving ecologically Sustainable Development⁴³. It is therefore imperative that environmental rule of law should serve as the legal foundation for promoting environmental ethics and achieving environmental justice, global ecological integrity, and a sustainable future for all, including for future generations, at local, national, regional, and global levels⁴⁴.

The United Nations observes that environmental law is a foundation for environmental sustainability and the full realisation of its objectives is ever more urgent in light of growing environmental pressures⁴⁵. The world is facing increasing environmental problems including climate change, biodiversity loss, water scarcity, air and water pollution, soil degradation, among others, which contribute to poverty and to growing social inequalities⁴⁶. Conflicts over natural resources and environmental crimes are further intensifying these problems thus hindering sustainability⁴⁷. Environmental rule of law is vital in

⁴⁰ United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit

⁴¹ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

⁴² Ibid

⁴³ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

⁴⁴ Ibid

⁴⁵ United Nations., 'Environmental Law.' Available at <https://www.un.org/ruleoflaw/thematic-areas/land-property-environment/environmental-law/> (Accessed on 12/09/2023)

⁴⁶ Earth. Org., '15 Biggest Environmental Problems of 2023.' Available at <https://earth.org/the-biggest-environmental-problems-of-our-lifetime/#> (Accessed on 12/09/2023)

⁴⁷ Ibid

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addressing these challenges by fostering sound environmental governance and realization of its principles including Environmental Justice and Environmental Democracy⁴⁸. Environmental Justice means the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making⁴⁹. It also refers to the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies⁵⁰. Environmental Justice is attained when every person enjoys the same degree of protection from environmental and health hazards and has access to the decision-making process to have a healthy environment⁵¹. The concept of Environmental Democracy focuses on how decisions are made, with a particular emphasis on the need for citizens, interest groups, and communities generally, to participate and have their voices heard⁵². It enshrines principles such as inclusivity, representativity, accountability, efficiency, and effectiveness, as well as social equity, justice and good governance⁵³. Environmental rule of law seeks to foster these principles by enhancing access to information, public participation, and access to justice and effective remedies in environmental matters⁵⁴. Environmental rule of law is therefore pertinent in fostering sound environmental governance by ensuring that the environment and natural resources are managed sustainably, transparently, and on the basis of the rule of law towards Sustainable

⁴⁸ Muigua. K, Wamukoya. D, & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

⁴⁹ Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at <https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml> (Accessed on 12/09/2023)

⁵⁰ United States Environmental Protection Agency; 'Environmental Justice.' Available at <https://www.epa.gov/environmentaljustice> (Accessed on 12/09/2023)

⁵¹ Ibid

⁵² Muigua. K., 'Realising Environmental Democracy in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf> (Accessed on 12/09/2023)

⁵³ Ibid

⁵⁴ Ibid

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Development, peace and justice⁵⁵. It is therefore vital to strengthen environmental rule of law for sustainability.

3.0 Global Trends in Environmental Rule of Law: Prospects and Challenges

The importance of environmental rule of law received global recognition during the first world conference on the environment being the 1972 United Nations Conference on the Human Environment held in Stockholm, Sweden⁵⁶. Participants at the conference adopted a series of principles for sound management of the environment including the *Stockholm Declaration and Action Plan for the Human Environment* and several resolutions⁵⁷. The Stockholm Declaration provides that the protection and improvement of the human environment is a major issue which affects the well-being of people and economic development throughout the world and it is the urgent desire of the people of the whole world and the duty of all Governments⁵⁸. The Declaration stipulates several principles that are vital in advancing environmental rule of law including the need to protect and improve the environment for present and future generations, careful planning and management of natural resources, halting and preventing environmental pollution, adoption of environmental laws and policies and adopt an integrated and the need to adopt a co-ordinated approach in development planning so as to ensure that development is compatible with the need to protect and improve environment⁵⁹. The Stockholm Declaration was an important milestone for the development of environmental rule of law across the globe since it was the first global document outlining the general principles for the management of natural resources and the environment⁶⁰.

⁵⁵ United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit

⁵⁶ United Nations., 'United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm.' Available at <https://www.un.org/en/conferences/environment/stockholm1972> (Accessed on 13/09/2023)

⁵⁷ Ibid

⁵⁸ United Nations Environment Programme., 'Stockholm Declaration.' Available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf> (Accessed on 13/09/2023)

⁵⁹ Ibid

⁶⁰ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

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Environmental rule of law was further enhanced following the United Nations Conference on Environment and Development also known as the 'Earth Summit', held in Rio de Janeiro, Brazil, from 3-14 June 1992⁶¹. The Earth Summit concluded that the concept of Sustainable Development was an attainable goal for all the people of the world, regardless of whether they were at the local, national, regional or international level⁶². It also recognized that integrating and balancing economic, social and environmental concerns in meeting our needs is vital for sustaining human life on the planet and that such an integrated approach is possible⁶³. One of the major results of the Earth Summit was the adoption of *Agenda 21*⁶⁴ a daring program of action calling for new strategies to invest in the future to achieve overall sustainable development in the 21st century.

Agenda 21 affirms that integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future⁶⁵. It calls for international cooperation to accelerate Sustainable Development in developing countries and related domestic policies⁶⁶. Agenda 21 further acknowledges the importance of the rule of law in sustainability and provides that laws and regulations suited to country -specific conditions are among the most important instruments for transforming environment and development policies into action, not only through "command and control" methods, but also as a normative framework for economic planning and market instruments⁶⁷. It further stipulates that it is

⁶¹ United Nations., 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.' Available at <https://www.un.org/en/conferences/environment/rio1992> (Accessed on 13/09/2023)

⁶² Ibid

⁶³ Ibid

⁶⁴ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992., 'Agenda 21.' Available at https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf?_gl=1*_9uipp7*_ga*MjA2NDk2MDMxMS4xNjcxMjU5NTEw*_ga_TK9BQL5X7Z*_MTY5NDU5NjE3MS41NS4xLjE2OTQ1OTgzODUuMC4wLjA. (Accessed on 13/09/2023)

⁶⁵ Ibid, Preamble

⁶⁶ Ibid, Chapter 2

⁶⁷ Ibid, Chapter 8.13

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essential to develop and implement integrated, enforceable and effective laws and regulations that are based upon sound social, ecological, economic and scientific principles in order to enhance sustainability⁶⁸. It also recognizes the importance of judicial and administrative procedures in advancing environmental rule of law and calls upon Governments and legislators, with the support, where appropriate, of competent international organizations, to establish judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and should provide access to individuals, groups and organizations with a recognized legal interest⁶⁹. Agenda 21 is therefore vital in fostering environmental rule of law by calling upon countries to develop integrated strategies to maximize compliance with their laws and regulations relating to Sustainable Development. These strategies include enactment of enforceable, effective laws, regulations and standards that are based on sound economic, social and environmental principles and appropriate risk assessment, incorporating sanctions designed to punish violations, obtain redress and deter future violations; establishing mechanisms for promoting compliance; strengthening institutional capacity for collecting compliance data, regularly reviewing compliance, detecting violations, establishing enforcement priorities, undertaking effective enforcement, and conducting periodic evaluations of the effectiveness of compliance and enforcement programmes; fostering mechanisms for appropriate involvement of individuals and groups in the development and enforcement of laws and regulations on environment and development and national monitoring of legal follow-up to international instruments⁷⁰.

Another important legal instrument that was adopted during the Earth Summit which is vital in advancing environmental rule of law is the *Rio Declaration on Environment and Development*⁷¹. The Declaration sought to balance the interests of states in exploiting their natural resources for

⁶⁸ Ibid, Chapter 8.14

⁶⁹ Ibid, Chapter 8.18

⁷⁰ Ibid, Chapter 8.21

⁷¹ United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

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development and environmental conservation with the aim of achieving Sustainable Development⁷². The Declaration stipulates that human beings are at the centre of concerns for Sustainable Development and are entitled to a healthy and productive life in harmony with nature⁷³. It further states that in order to achieve Sustainable Development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it⁷⁴. The Rio Declaration upholds key environmental principles that are vital in strengthening environmental rule of law including the principle of inter and intra generational equity, the principle of public participation, the precautionary principle and the principle of international cooperation⁷⁵. It also recognizes the role of women, youth and indigenous people and local communities in environmental management and development⁷⁶.

The Earth Summit was thus an important milestone in advancing environmental rule of law. It has been pointed out that following the 1992 Rio Earth Summit, countries made a concerted effort to enact environmental laws, build environment ministries and agencies, and enshrine environment-related rights and protections in their national constitutions⁷⁷. At the global level, the right to a clean, healthy and sustainable environment has been recognized by the United Nations General Assembly as a fundamental human right⁷⁸. The resolution by the United Nations General Assembly further affirms the importance of the right to a clean, healthy and sustainable environment for the enjoyment of all human rights⁷⁹. The declaration by the United Nations General Assembly demonstrates global acceptance of the right to a clean, healthy and sustainable environment as a human right and could stimulate

⁷² Ibid, Principle 2

⁷³ Ibid, Principle 1

⁷⁴ Ibid, Principle 4

⁷⁵ Ibid

⁷⁶ Ibid, Principles 20, 21 and 22

⁷⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

⁷⁸ United Nations General Assembly (UNGA)., 'The Human Right to a Clean, Healthy and Sustainable Environment.' UNGA Resolution 'A/76/L.75.'

⁷⁹ Ibid

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global efforts towards attaining this right and strengthening environmental rule of law⁸⁰.

In addition, there has been progress towards fostering environmental rule of law at the global level through the adoption of treaties, conventions and other legal and regulatory instruments geared towards promoting environmental sustainability and Sustainable Development, in general⁸¹. Some of the key instruments include the *Ramsar Convention*⁸² whose purpose is to foster the conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving Sustainable Development throughout the world⁸³; the *Convention on Biological Diversity*⁸⁴ whose objective is to promote 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 resources⁸⁵; the *United Nations Convention on the Law of the Sea*⁸⁶ that seeks to promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment; the *United Nations Framework Convention on Climate Change*⁸⁷ and the *Paris Agreement*⁸⁸ which are geared towards combating climate change. Ensuring compliance with these among

⁸⁰ Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment.' Available at <http://kmco.co.ke/wp-content/uploads/2023/06/Realizing-the-Right-to-a-Clean-Healthy-and-Sustainable-Environment.pdf> (Accessed on 13/09/2023)

⁸¹ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁸² Convention on Wetlands of International Importance especially as Waterfowl Habitat, 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972)

⁸³ Ibid

⁸⁴ 1992 Convention on Biological Diversity, (1993) ATS 32/ 1760 UNTS 79/ 31 ILM 818 (1992)

⁸⁵ Ibid, Article 1

⁸⁶ United Nations Convention on the Law of the Sea., Available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (Accessed on 13/09/2023)

⁸⁷ United Nations Framework Convention on Climate Change., United Nations, 1992., Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 13/09/2023)

⁸⁸ United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 13/09/2023)

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other international instruments is vital in promoting international environmental law as a tool for addressing specific environmental threats and for integrating long-term environmental protection into the global economy⁸⁹. The *2030 Agenda for Sustainable Development*⁹⁰ and its 17 SDGs is also vital in fostering environmental rule of law. It is a plan of action for people, planet and prosperity⁹¹. It envisages the realization of Sustainable Development through tackling global environmental problems including water scarcity, lack of access to affordable, reliable, sustainable and modern energy and climate change through a combination of measures including enhancing national laws, policies and planning⁹². Achieving the 2030 Agenda for Sustainable Development is therefore vital in enhancing sustainability through environmental rule of law among other measures.

Further, the International Court of Justice (ICJ) has also played a vital role in enhancing environmental rule of law at the global level by providing an avenue for realizing the right of access to justice and legal remedies in environmental matters⁹³. In the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*⁹⁴, ICJ emphasized the need for the two countries to continue their cooperation and devise the necessary means to promote the equitable utilization of the river, while protecting its environment. The Court also recently rendered its first decision on environmental damage and compensation in the case *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*⁹⁵. Such decisions are pertinent in strengthening environmental rule of law at the global level.

⁸⁹ Hunter. D., 'International Treaties and Principles Protect the Environment and Guard against Climate Change.' *Insights on Law and Society.*, Volume 19, Issue 1 (2021)

⁹⁰ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' A/RES/70/1., Op Cit

⁹¹ Ibid

⁹² Ibid

⁹³ The ICJ and Environmental Case Law., Available at <https://www.uio.no/studier/emner/jus/jus/JUS5520/h15/undervisningsmateriale/icj-and-international-environmental-law.pdf> (Accessed on 13/06/2023)

⁹⁴ International Court of Justice., 'Pulp Mills on the River Uruguay (Argentina v. Uruguay).' Available at <https://www.icj-cij.org/case/135> (Accessed on 13/09/2023)

⁹⁵ International Court of Justice., 'Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua).' Available at <https://www.icj-cij.org/case/150> (Accessed on 13/09/2023)

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Environmental rule of law has also been fostered in Africa through regional environmental agreements. It has been argued that a regional approach to environmental governance through regional environmental agreements has an advantage over global agreements since there is greater similarity of interests, norms, perceptions and values at the regional level which enhances international cooperation⁹⁶. In Africa, these instruments include the *African Convention on the Conservation of Nature and Natural Resources*⁹⁷ which 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 policies and programmes⁹⁸. Further instruments include the *Bamako Convention*⁹⁹ that is aimed at preventing environmental pollution by hazardous wastes by prohibiting the import into Africa of any hazardous (including radioactive) waste and the *Treaty for the Establishment of the East African Community*¹⁰⁰ which provides for co-operation in environment and natural resources and calls upon partner states to take joint efforts to cooperate in the efficient management of natural resources with key priorities to sectors such as climate change adaptation and mitigation, natural resource management and biodiversity conservation, disaster reduction and management, and pollution control and waste management¹⁰¹.

The African Court of Justice and Human Rights and the African Commission on Human and Peoples' Rights which are judicial bodies established pursuant to the African Charter on Human and People's Rights have also played a pivotal role in fostering environmental rule of law in Africa through some of

⁹⁶ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁹⁷ Africa Union, *African Convention on the Conservation of Nature and Natural Resources*, OAU, 1001, UNTS 3.

⁹⁸ Ibid, Article 1

⁹⁹ Africa Union., 'Bamako Convention On The Ban Of The Import Into Africa And The Control Of TransBoundary Movement And Management Of Hazardous Wastes Within Africa, 1991.' Available at <https://www.informea.org/en/treaties/bamako-convention/text> (Accessed on 13/09/2023)

¹⁰⁰ East African Community, *The Treaty for the Establishment of the East African Community*, Available at https://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf (Accessed on 13/09/2023)

¹⁰¹ Ibid

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their decisions¹⁰². In the Endorois Case, the African Commission on Human and People's Rights upheld the right of indigenous communities to utilize natural resources including ancestral land¹⁰³. This decision is integral in enhancing environmental rule of law by recognizing the rights of indigenous people to property, to culture, to the free disposition of natural resources, and to development¹⁰⁴.

At the national level, the Constitution of Kenya recognizes the right to a clean and healthy environment as a fundamental human right¹⁰⁵. The Constitution further stipulates several obligations by the state in respect of the environment including the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits, the need to encourage public participation in the management, protection and conservation of the environment, the obligation to protect genetic resources and biological diversity and the obligation to eliminate processes and activities that are likely to endanger the environment¹⁰⁶. Constitutional recognition of environmental related rights is one the key ways of fostering environmental rule of law.¹⁰⁷ In addition, the *Environmental Management and Co-ordination Act*¹⁰⁸ establishes the legal and institutional framework for the management of the environment in Kenya. The Act upholds the right of every Kenyan to a clean and healthy environment and sets out various measures towards upholding this right including environmental planning, protection and conservation of the environment, Environmental Impact Assessment, Environmental Audit and

¹⁰² Muigua. K., 'African Court of Justice and Human Rights: Emerging Jurisprudence.' Available at <http://kmco.co.ke/wp-content/uploads/2020/06/African-Court-on-Human-and-Peoples-Rights-Emerging-Jurisprudence-Kariuki-Muigua-June-2020.pdf> (Accessed on 14/09/2023)

¹⁰³ Claridge. L., 'Landmark Ruling Provides Major Victory to Kenya's Indigenous Endorois.' Available at <https://www.refworld.org/pdfid/4ca571e42.pdf> (Accessed on 14/09/2023)

¹⁰⁴ Ibid

¹⁰⁵ Constitution of Kenya, 2010., Article 42., Government Printer, Nairobi

¹⁰⁶ Ibid, Article 69

¹⁰⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹⁰⁸ Environmental Management and Co-ordination Act., No. 8 of 1999, Government Printer, Nairobi

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Monitoring, environmental restoration and conservation orders and enforcement of environmental rights through courts and tribunals¹⁰⁹. The Act further establishes the National Environment Management Authority which has the mandate to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment¹¹⁰.

Courts and tribunals are also integral enhancing environmental rule of law and fostering environmental justice in Kenya¹¹¹. The Constitution of Kenya also recognizes the role of litigation in enforcement of environmental rights¹¹². It allows a person alleging the denial, infringement or violation or of the right to a clean and healthy environment to apply to a court for redress in addition to any other legal remedies that are available¹¹³. The Environmental Management and Co-ordination Act further sets out the role of the Environment and Land Court and the National Environment Tribunal in fostering the right to a clean and healthy environment in Kenya¹¹⁴. Litigation has fostered environmental rule of law in Kenya through decisions that have emanated from the Environment and Land Court, the National Environment Tribunal and other courts and judicial bodies¹¹⁵. Through such decisions, judicial bodies have pronounced themselves on several environmental matters

¹⁰⁹ Ibid

¹¹⁰ Ibid, S 7 & 9.

¹¹¹ Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Available at <http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-inSafeguardingEnvironmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-> (Accessed on 14/09/2023)

¹¹² Constitution of Kenya, 2010., Article 70

¹¹³ Ibid

¹¹⁴ Ibid, S 3 & S 125

¹¹⁵ See for example the cases of Peter K. Waweru -vs- Republic, Miscellaneous Civil Application, 118 of 2004, (2006) eKLR; Friends of Lake Turkana Trust vs Attorney General & 2 others., ELC Suit No. 825 of 2012, (2014) eKLR; KM & 9 others v Attorney General & 7 others, Petition No. 1 of 2016 (2020) eKLR; National Environment Management Authority -vs- Kelvin Musyoka & Others⁵⁹, Mombasa Civil Appeal No. E004 of 2020; Mohamed Ali Baadi and others -vs- Attorney General & 11 Others, Petition No. 22 of 2012 (2018) eKLR

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including Sustainable Development, public participation, access to information, climate change, pollution and compensation¹¹⁶.

From the foregoing, it emerges that there have been attempts towards promoting environmental rule of law at the global, regional and national level. However, it has been observed that while environmental laws have become commonplace across the globe, too often they exist mostly on paper because government implementation and enforcement is irregular, incomplete, and ineffective¹¹⁷. In addition, the laws that have been enacted are lacking in ways that impede effective implementation (for example, by lacking clear standards or the necessary mandates)¹¹⁸. As a result, it has been argued that there is no culture of environmental compliance in most societies¹¹⁹. This often hinders sound environmental governance and sustainability¹²⁰. There is need to address these challenges and foster a culture of compliance and enforcement of environmental laws in order to strengthen environmental rule of law for sustainability.

4.0 Way Forward: Strengthening Environmental Rule of Law for Sustainability

It is imperative to strengthen the rule of law in general in order to enhance environment sustainability and social justice¹²¹. It has been argued that the rule of law is an element not only for economic growth, but also for environment sustainability and social justice¹²². One of the key ways of strengthening environmental rule of law is by enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered through fair and inclusive processes to achieve the highest

¹¹⁶ Ibid

¹¹⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

¹²¹ Leogrande. A., 'The Rule of Law in the ESG Framework in the World Economy.' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4355016 (Accessed on 14/09/2023)

¹²² Ibid

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standards of environmental quality; respect for human rights, including the right to a safe, clean, healthy, and sustainable environment¹²³.

In addition, it is vital to embrace civic engagement in order to strengthen environmental rule of law. It has been rightly pointed out that environmental rule of law requires an approach that involves everyone including the civil society¹²⁴. The effective engagement of civil society results in more informed decision making by government, more responsible environmental actions by companies, more assistance in environmental management by the public, and more effective environmental law¹²⁵. Civic engagement can be fostered through public participation and access to information¹²⁶. Public participation is believed to be important in bridging the gap between the government, civil society, private sector and the general public, building a common understanding about the local situation, priorities and programmes as it encourages openness, accountability and transparency, and is thus at the heart of inclusive decision-making¹²⁷.

Further, public participation can improve the quality of decision-making by providing decision-makers with additional, unique information on local conditions¹²⁸. In addition, public participation can also improve policy implementation by increasing the legitimacy of the decision-making process and, in so doing, reducing instances of conflict¹²⁹. Citizen involvement in

¹²³ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

¹²⁴ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDSMEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCEMANAGEMENT-IN-KENYA.pdf> (Accessed on 14/09/2023)

¹²⁸ Cerezo. L, & Garcia. G., 'Lay Knowledge and Public Participation in Technological and Environmental Policy.' Available at <https://scholar.lib.vt.edu/ejournals/SPT/v2n1/pdf/CEREZO.PDF> (Accessed on 14/09/2023)

¹²⁹ Ibid

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environmental decision making has been associated with several benefits which include: information and ideas on public issues; public support for planning decisions; avoidance of protracted conflicts and costly delays; reservoir of good will which can carry over to future decisions; and spirit of cooperation and trust between decision makers and the public¹³⁰. The Importance of public participation in environmental decision making is upheld under Principle 10 of the *Rio Declaration on Environment and Development* which stipulates that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall 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 shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided (emphasis added)¹³¹.

It is thus pertinent to foster effective public participation and access to information in order to strengthen environmental rule of law. It is also vital to uphold the rights and foster the participation of indigenous people and communities who play an important role in managing the environment and natural resources through traditional ecological knowledge¹³². Local communities possess unique and valuable contextual knowledge of natural resources and have a vested interest in ensuring the sustainable use of land and resources¹³³. It is therefore desirable to uphold indigenous peoples' full

¹³⁰ Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Op Cit

¹³¹ Rio Declaration on Environment and Development, Principle 10

¹³² United Nations., 'Indigenous People and the Environment.' Available at <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/environment.html#:~:text=The%20rights%20to%20lands%2C%20territories,o f%20their%20traditional%20knowledge%20systems> (Accessed on 14/09/2023)

¹³³ International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Available at https://www.idlo.int/sites/default/files/pdfs/publications/climate_justice_policy_pa_per_-_climate_action_-_final.pdf (Accessed on 14/09/2023)

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participation in environmental governance in order to strengthen environmental rule of law.

In addition, environmental rule of law can be strengthened by embracing a rights-based approach to environmental governance¹³⁴. A rights-based approach to environmental protection is one that is normatively based on rights and directed toward protecting those rights¹³⁵. This approach differs from regulatory approaches where environmental statutes set forth certain requirements and prohibitions relating to the environment¹³⁶. It has been argued that taking a rights-based approach to improving environmental rule of law provides a strong impetus and means for implementing and enforcing environmental protections¹³⁷. There has been progress towards realizing this goal through the recognition of the right to a clean, healthy and sustainable environment as a human right¹³⁸. This approach provides an impetus for realizing the right to a clean, healthy and sustainable environment and other human rights towards attainment of the Sustainable Development agenda¹³⁹. There is also need to enhance access to justice in order to strengthen environmental rule of law. Courts and tribunals play a pivotal role in enhancing environmental rule of law and fostering environmental justice¹⁴⁰. It has been observed that countries have reinforced and publicized the linkages between human rights and the environment, which has elevated the normative importance of environmental law and empowered courts and enforcement agencies to enforce environmental requirements¹⁴¹. It is thus vital to enhance access to justice by addressing barriers such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow which hinder

¹³⁴ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment.' Op Cit

¹³⁹ Ibid

¹⁴⁰ Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit

¹⁴¹ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

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effective access to justice¹⁴². It is also crucial to enhance practices such as public interest litigation in order to enhance access to justice in environmental matters¹⁴³.

Capacity building is also vital in strengthening environmental rule of law. It is therefore critical to create strong environmental agencies and continuously strengthen their capacity in order to enhance their effectiveness in environmental governance¹⁴⁴. It is also vital to adequately build capacity for judges, staff and ADR practitioners in environmental law in order to ensure that justice institutions, both formal and informal have the capacity to foster sound environmental governance¹⁴⁵. Further, it is essential to foster public awareness and education on environmental laws and regulations in order to promote compliance and enforcement of such laws¹⁴⁶.

Finally, there is need to move beyond the law in order to enhance sound environmental governance. One of the ways through which these can be achieved is by embracing the concept of community-based natural resource management through organized community legal action or through Alternative Dispute Resolution and traditional justice systems¹⁴⁷. Further, the concept of Environmental, Social and Governance (ESG) plays a fundamental role in environmental governance by incorporating Environmental, Social and Governance matters in corporate decision making in order to foster

¹⁴² 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: 29

¹⁴³ United Nations Economic Commission for Europe., ‘Access to Justice in Environmental Matters: Standing, Costs and Available Remedies.’ Available at https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE_Access2Justice_Study_Final_logos.pdf (Accessed on 14/09/2023)

¹⁴⁴ United Nations Environment Programme., ‘Environmental Rule of Law: First Global Report.’ Op Cit

¹⁴⁵ International Development Law Organization., ‘Climate Justice: A Rule of Law Approach for Transformative Climate Action.’ Op Cit

¹⁴⁶ United Nations Environment Programme., ‘Environmental Rule of Law: First Global Report.’ Op Cit

¹⁴⁷ Muigua. K, Wamukoya. D, & Kariuki. F., ‘Natural Resources and Environmental Justice in Kenya.’ Op Cit

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sustainability¹⁴⁸. It is thus vital for organizations to embrace ESG in order to achieve sustainable, responsible and ethical investments towards sustainability¹⁴⁹. Environmental ethics and morals should also be embraced in environmental governance¹⁵⁰. These ideas recognize the intrinsic value of nature and the responsibility of humans to act in accordance with ethical and moral principles towards environmental protection¹⁵¹. They envisage the moral and ethical obligations of human beings to protect and preserve the environment¹⁵². It is also ideal to embrace science and technology which play an important role in environmental governance in areas such sustainable waste management, climate change mitigation, sustainable agricultural practices and adoption of green and clean technologies¹⁵³. Through the measures discussed above among others, environmental rule of law will be strengthened towards sustainability.

5.0 Conclusion

Environmental rule of law plays an important role in environmental governance. It offers a framework for addressing the gap between environmental laws as set out in text and in practice and is key to achieving the Sustainable Development Goals¹⁵⁴. There has been global progress towards promoting environmental rule of law through the enactment of environmental laws, establishment of environment ministries and agencies, and enshrining environment-related rights and protections in national constitutions¹⁵⁵.

¹⁴⁸ Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR Research in Corporate Finance.' *Journal of Corporate Finance* 66 (2021): 101889.

¹⁴⁹ Ibid

¹⁵⁰ Minter. B., 'Environmental Ethics.' Available at <https://www.nature.com/scitable/knowledge/environmental-ethics-96467512/#:~:text=Environmental%20ethics%20is%20a%20branch,sustain%20biodiversity%20and%20ecological%20systems>. (Accessed on 14/09/2023)

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Muigua. K., 'Utilising Science and Technology for Environmental Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf> (Accessed on 14/09/2023)

¹⁵⁴ United Nations Environment Programme., 'Environmental Rule of Law.'

¹⁵⁵ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

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However, progress towards realizing environmental rule of law has often been thwarted by challenges of implementation and enforcement of environmental laws¹⁵⁶. This often hinders sound environmental governance and sustainability¹⁵⁷. It is thus imperative to strengthen environmental rule of law in order to foster sustainability. This can be achieved through the enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies, embracing civic engagement through public participation and access to information in environmental governance, upholding a rights-based approach to environmental governance, enhancing access to justice in environmental matters, capacity building and moving beyond the law for sound environmental governance¹⁵⁸. Strengthening environmental rule of law for sustainability is a noble endeavour which must be realized.

¹⁵⁶ Ibid

¹⁵⁷ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

¹⁵⁸ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit; See also Muigua. K., 'Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses.' Op Cit

The Place of Environmental, Social and Governance (ESG) in Arbitration

Abstract

The paper critically discusses the relationship between Environmental, Social and Governance (ESG) and arbitration. The paper argues that arbitration represents a viable mechanism for managing ESG related disputes while simultaneously promoting ESG tenets. It addresses some of the current concerns in ESG and the ability of arbitration to deal with these concerns. The paper further proposes recommendations towards embracing arbitration in management of ESG disputes for Sustainable Development.

1.0 Introduction

Environment, Social and Governance (ESG) is a concept that seeks to promote sustainable, responsible and ethical corporate behavior by incorporating Environmental, Social and Governance concerns in corporate decision making¹. The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making². Further, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever³. In addition, there has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies⁴.

¹ Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' *Journal of Corporate Finance* 66 (2021): 101889.

² De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008)

³ Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' *Utrecht Law Review* 14.2 (2018): 1-5.'

⁴ Martin.C et al., 'Corporate governance and the 2008–09 Financial Crisis.' *Corporate Governance: An International Review* 19.5 (2011): 399-404; See also Erkens. D.H, et al Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide." *Journal of corporate finance* 18.2 (2012): 389-411.

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Consequently, how corporations handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. Most investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from investors⁵. Matters touching on climate change and sustainability dominate current ESG focus⁶. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention⁷. Many projects, investors and sponsors are also demanding more detailed identification and mitigation of environmental and social impacts of investment projects before making commitment or funding⁸. The importance of ESG tenets is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders⁹.

The public scrutiny of corporations and the need to operate within socially acceptable standards have resulted in many corporations incorporating ESG commitments in commercial contracts¹⁰. These commitments can take various forms including respect for the environment, human rights and labour laws.¹¹ ESG related disputes can arise where corporations violate such commitments. Such disputes can be managed through various mechanisms including arbitration.

⁵ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2022/07/Embracing-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf> (accessed on 28/09/2022)

⁶ Ibid

⁷ Ibid

⁸ Muigua. K., 'Realising Environmental, Social and Governance Tenets for Sustainable Development' available at <http://kmco.co.ke/wp-content/uploads/2022/07/Realising-Environmental-Social-and-Governance-Tenets-of-Sustainable-Development-Kariuki-Muigua-July-2022.pdf> (accessed on 28/09/2022)

⁹ Ibid

¹⁰ Von Wobeser., 'The Role of Arbitration in ESG Disputes' available at https://www.vonwobeser.com/index.php/publication?p_id=1650 (accessed on 28/09/2022)

¹¹ Ibid

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The paper seeks to discuss the place of Environmental, Social and Governance (ESG) in arbitration. It brings out the nexus between ESG and arbitration. The paper further highlights and discusses the viability of arbitration in management of ESG related disputes. It also proposes interventions towards embracing arbitration in management of ESG disputes for Sustainable Development.

2.0 The Nexus between Environmental Social and Governance (ESG) and Arbitration

Arbitration is form of Alternative Dispute Resolution (ADR) mechanisms. ADR refers to a set of mechanisms that are applied in management of disputes without resort to adversarial litigation¹². It has been described as a private and consensual process where parties to a dispute agree to present their grievances to a third party for resolution¹³. In Kenya, arbitration alongside other ADR mechanisms has been recognized under the Constitution¹⁴.

It is argued that ESG principles have become a model for sustainable business development through which a corporations' goal for solving environmental, social and governance problems is achieved¹⁵. Consequently, ESG considerations have an increasing impact in international business as evidenced by the incorporation of sustainability clauses in investment contracts¹⁶. In such contracts, investors are required to adhere to the concept of sustainable development as envisaged under the contracts and failure to do so may result in ESG related disputes.

In the wake of the climate change debate, there have been calls for responsible business practice towards climate change mitigation through measures such

¹² Muigua. K., 'Settling Disputes Through Arbitration in Kenya' Glenwood Publishers Limited, 4th Edition, 2022

¹³ Ibid

¹⁴ Constitution of Kenya, 2010, Article 159 (2) (c)

¹⁵ Mazhorina. M.V., 'ESG Principles in International Business and Sustainable Contracts' available at https://aprp.msar.ru/jour/article/view/3223?locale=en_US (accessed on 28/09/2022)

¹⁶ Ibid

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as reduction of carbon emissions¹⁷. The Paris Agreement on Climate Change has raised the awareness of the need for global efforts to combat climate change and the role of responsible and ethical corporate behavior towards achieving this goal¹⁸. Further, corporations are increasingly required to safeguard human rights as envisaged by 'S' pillar of ESG¹⁹.

However, some corporations have been accused of violating these ESG concerns as a result of their business practices. Some corporations have been accused of failing to promote climate change mitigation through reduction of carbon emissions and transitioning to cleaner energy production²⁰. Further, some corporations have been accused of violating fundamental human rights such as the right to a clean and healthy environment especially in the investment sphere in Africa²¹. These instances have resulted in an increasing number of ESG-related disputes.

The growth of ESG concerns has seen corporations being increasingly required to embrace ESG principles in their business practices. Consequently, ESG clauses are being adopted in commercial and investment contracts²². In case of violation of such clauses, ESG related disputes are bound to occur. It has been asserted that adoption of ESG-related practices into pre-existing social and governance models adopted by corporations would be disruptive²³. The

¹⁷ International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' available at <https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2022/the-rising-significance-of-esg-and-the-role-of-international-arbitration/> (accessed on 28/09/2022)

¹⁸ Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

¹⁹ Ibid

²⁰ Ibid

²¹ Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' available at <http://kmco.co.ke/wp-content/uploads/2018/11/International-Investment-Law-and-Policy-in-Africa-AILA-Conference-Paper-5-11-2018.pdf> (accessed on 28/09/2022)

²² International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' Op Cit

²³ The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at <https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf> (accessed on 28/09/2022)

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inclusion of ESG clauses in commercial contracts not only points to the importance of ESG concerns to companies but it also serves as potential source of disputes where such considerations are not complied with²⁴. ESG issues are not only reshaping corporate behavior across the globe but can also be a potential battleground in international disputes²⁵. This creates the need for an effective mechanism of management of such disputes in order to enhance ESG principles in the quest for Sustainable Development.

Arbitration has for a long time been the most viable mechanism for management of international commercial and investment disputes²⁶. It offers a neutral forum for the management of disputes and addresses some of the concerns that parties may have in relation to the other parties' legal system²⁷. In international commercial and investment arbitration, parties are reluctant to submit to the jurisdiction of the other party due to the likelihood of favoritism by the host judicial system²⁸. Further, arbitration has the potential of facilitating expeditious management of disputes²⁹. In international commercial and investment arbitration, there is need to manage disputes expeditiously in order to preserve the commercial interests of parties.³⁰ The viability of arbitration in management of international commercial disputes is further enhanced by the availability of a legal framework for the recognition and enforcement of foreign arbitral awards. The *New York*³¹ Convention provides the legal framework for the recognition and enforcement of foreign arbitral awards across different jurisdictions.

²⁴ Ibid

²⁵ Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' available at <https://www.whitecase.com/news/media/arbitration-esg-era> (accessed on 28/09/2022)

²⁶

²⁷ Moses. L.M, '*The Principles and Practice of International Commercial Arbitration*' 2nd Edition, 2017, Cambridge University Press

²⁸ Ibid

²⁹Muigua. K., 'Promoting International Commercial Arbitration in Africa' available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA.pdf>

³⁰ Ibid

³¹ United Nations Conference on International Commercial Arbitration, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' United Nations, 1958

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Consequently, the adoption of ESG elements in international commercial and investment agreements has resulted in the use of arbitration to manage disputes arising from such agreements³². ESG concerns have become prominent in investor-state arbitration with arbitral tribunals having to determine issues relating to climate change, corruption and human rights³³. It has been asserted that the growth of ESG will redefine the practice of arbitration as it seeks to adapt to the new concerns created by ESG³⁴. However, the flexibility of arbitration and its ability to adapt to emerging concerns means that it is well positioned to manage ESG disputes³⁵. However, there is need for reform in order to enhance the role of arbitration in managing ESG disputes.

3.0 Enhancing the Role of Arbitration in Management of Environmental Social and Governance (ESG) Disputes

Arbitration represents a viable mechanism for management of ESG disputes. The following can be done towards enhancing the use of arbitration in ESG disputes:

3.1 Knowledge in ESG Concerns

Statistics show that many ESG related disputes are being managed through arbitration³⁶. According to the International Chamber of Commerce, engineering, construction and energy disputes represent the highest number of cases handled representing 38% of all cases registered in 2021³⁷. Such disputes entail ESG components such as renewable energy projects, environmental protection and human rights concerns³⁸. This demonstrates that ESG and arbitration are inextricably linked. Arbitration practitioners thus

³² Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

³³ Ross. A., 'We need talk about ESG' available at <https://globalarbitrationreview.com/we-need-talk-about-esg> (accessed on 28/09/2022)

³⁴ Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' Op Cit

³⁵ Ibid

³⁶ Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

³⁷ International Chamber of Commerce., 'ICC Dispute Resolution Statistics: 2020' available at <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/> (accessed on 28/09/2022)

³⁸ Ibid

need to equip themselves with knowledge in ESG related matters in order to be better placed to manage ESG related disputes.

3.2 Promoting Sustainable Development

Sustainable Development has been defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs³⁹. This concept entails a combination of elements including environmental protection, economic development and social issues⁴⁰. The importance of Sustainable Development has seen the adoption of the Sustainable Development Goals as the global blueprint of development⁴¹. Most of the Sustainable Development Goals entail aspects of ESG such as clean water and sanitation, affordable and clean energy, industry, innovation and infrastructure and climate action⁴². Arbitration practitioners should therefore promote the principles of sustainable development when managing ESG related disputes. This could entail requiring investors to comply with the host country environmental laws and ESG standards in mining, energy and construction disputes which have an ESG bearing⁴³.

3.3 Upholding Human Rights

The 'S' pillar in ESG seeks to promote responsible and ethical corporate behavior through aspects such as respect for human rights⁴⁴. However, corporate behavior especially in the investment sphere in Africa has resulted in gross violation of human rights⁴⁵. Some corporations which have invested

³⁹ World Commission on Environment and Development, *Our Common future*. Oxford, (Oxford University Press, 1987).

⁴⁰ Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' *International Sustainable Development Law*, Vol. 1

⁴¹ United Nations., 'Sustainable Development Goals' available at <https://sdgs.un.org/goals> (accessed on 28/09/2022)

⁴² Ibid, Goals 6, 7, 9 and 13.

⁴³ The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at <https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf>

⁴⁴ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

⁴⁵ Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' Op Cit

in oil exploration have been accused of human right abuses, environmental degradation and unsustainable peace due to their business culture⁴⁶. In Kenya, a multinational corporation that has invested in the agricultural sector has been accused of human right abuses such as killings, rape, and other forms of sexual and gender-based violence allegedly committed by its guards, bad labour practices and land injustices against the neighbouring communities⁴⁷. Some of these disputes have ended up in arbitration where tribunals are called upon to adjudicate on human rights issues⁴⁸. Arbitrators should thus seek to uphold human rights in such disputes by rendering awards that are in line with human rights standards⁴⁹. By promoting human rights, arbitrators will be embracing the ‘S’ pillar that is fundamental in the ESG debate.

3.4 Promoting Good Governance

The Governance pillar in ESG seeks to achieve good financial and accounting standards as well as legal and regulatory compliance, such as transparency, corporate structures and ethics in corporate conduct⁵⁰. It also seeks to align Governance with the Sustainable Development Goals where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)⁵¹. Good governance can be promoted through arbitration by rendering awards that adhere to good governance practices such as transparency, accountability, reporting and disclosure.

⁴⁶ Maiangwa.B & Agbibo.D., ‘Oil Multinational Corporations, Environmental Irresponsibility and Turbulent Peace in the Niger Delta’ *Africa Spectrum* 2/2013: 71-83

⁴⁷ Kenya Human Rights Commission., ‘Heavy price for... egregious human rights violations’ available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html> (accessed on 29/09/2022)

⁴⁸ Amao. O., ‘Corporate Social Responsibility, Human Rights and the Law: Multinational corporations in Developing Countries.’ Routledge, 2011.

⁴⁹ Krajewski, M. ‘Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice.’ Available at SSRN 3133529 (2018).

⁵⁰ RL360, “Governance-The G in ESG,” Available at: <https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm> (accessed on 29/09/2022)

⁵¹ Sustainable Development’ available at <https://sdgs.un.org/goals> (accessed on 29/09/2022)

3.5 Seeking Expert Assistance in Complex ESG Matters

Arbitration has a significant role in promoting ESG tenets in areas such as climate change. Arbitrators play a significant role in shaping and adapting international law to respond to the climate crisis⁵². However, in some instances, arbitration has been slow to act in response to the climate crisis⁵³. Some climate change concerns such as determining adherence to climate change commitments through low carbon transition requires arbitrators to be fully informed and engaged in such concepts⁵⁴. This may require expert analysis and guidance from persons with requisite knowledge in environmental matters⁵⁵. Arbitrators should therefore seek expert assistance in such issues in order to be fully informed and render awards that promote ESG principles.

4.0 Conclusion

The relationship between Environmental, Social and Governance (ESG) and arbitration continues to grow. Adoption of ESG by corporations as a means of promoting responsible and ethical business practices and the wide use of arbitration in management of international commercial and investment disputes points to increased use of arbitration in management of ESG related disputes⁵⁶. In managing such disputes, arbitrators should promote ESG considerations whilst balancing the needs and interests of parties involved in issues such as climate change⁵⁷. Arbitration represents a viable mechanism for managing ESG disputes while simultaneously promoting Sustainable

⁵² Greenwood. L., 'The Canary is Dead: Arbitration and Climate Change' *Journal of International Arbitration*, Volume 38, Issue 3 (2021)

⁵³ Ibid

⁵⁴ Miles. W., 'BVI: A Frontline Focus for Resolving Future Climate Change Related Disputes' available at https://www.bviiac.org/Portals/0/Files/Publications/Wendy%20Miles%20QC_BVI_A%20Frontline%20Focus%20for%20Resolving%20Future%20Climate%20Change%20Related%20Disputes.pdf (accessed on 29/09/2022)

⁵⁵ Cummins. T et al., 'ESG Litigation – How Companies Can Get Ready, Respond and Resolve Claims' available at <https://www.emerald.com/insight/content/doi/10.1108/JOIC-07-2021-0032/full/html> (accessed on 29/09/2022)

⁵⁶ Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

⁵⁷ Ibid

The Place of Environmental, Social and Governance (ESG) in Arbitration

Development. There is need to enhance the viability of arbitration in management of ESG related disputes.

Transitioning from Fossil Fuels to Clean Energy

Abstract

This paper critically discusses the need to transition from fossil fuels to clean energy. It argues that energy transition has become an imperative in light of global challenges including climate change and scarce energy supplies. It examines the role of fossil fuels in the global threat of climate change. The paper further discusses the efficacy of initiatives adopted at national, regional, continental and global levels towards transitioning from fossil fuels to clean energy. It also highlights the challenges facing the global transition from fossil fuels to clean energy. The paper further proposes reforms aimed at accelerating the transition from fossil fuels to clean energy.

1.0 Introduction

Energy transition involves the long-term structural change to energy systems¹. It refers to the change in the composition (structure) of primary energy supply, the gradual shift from a specific pattern of energy provision to a new state of an energy system². Energy transition has also been described as the global energy sector's shift from fossil-based systems of energy production and consumption including oil, natural gas and coal to renewable energy sources like wind and solar, as well as lithium-ion batteries³. Energy transition can also refer to the shift from fossil fuels to renewable energy sources in an effort to reduce CO₂ emissions⁴.

Several factors may stimulate the transition from reliance on one major energy resource to another. These factors include the depletion or shortage of local or

¹ Nalule. V., & Leal-Arcas. R., 'Chapter 8 - Energy Decentralization and Energy Transition in Poland.' *Electricity Decentralization in the European Union* (Second Edition)., 2023 pp209-240

² Mazzone. A., 'Energy Transition in Isolated Communities of the Brazilian Amazon.' *The Regulation and Policy Latin American Energy Transitions.*, 2020., pp 319-330

³ S & P Global., 'What is Energy Transition?' Available at <https://www.spglobal.com/en/research-insights/articles/what-is-energy-transition> (Accessed on 25/12/2023)

⁴ Deloitte., 'The Energy Transition Explained.' Available at <https://www2.deloitte.com/nl/nl/pages/energy-resources-industrials/articles/future-of-energy-faq.html> (Accessed on 25/12/2023)

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regional energy supplies and resources⁵; increase in costs of one energy source followed by a corresponding decrease in the cost of another energy sources⁶; adverse environmental and health impacts of one energy source such as air and water pollution creating the desirability of alternative sources of energy⁷; and technological change and innovation resulting in more efficient sources of energy⁸. Energy transition is therefore usually determined by factors such as the availability of energy resources, the costs of obtaining energy resources as well as their usefulness, and in recent years, by efforts to protect the climate⁹. According to the United Nations Environment Programme (UNEP), the energy transition is a continuing process requiring long-term energy strategies and planning, with a country-tailored focus on applying appropriated energy technologies to reach net-zero emissions¹⁰.

It has rightly been pointed out that facing global climate change and increasing scarcity and expense of petroleum, the world community is compelled to transition to sustainable energy systems as well as to better manage energy demand and supply¹¹. Energy transition has therefore become an imperative in light of global challenges including climate change and scarce energy supplies¹².

This paper critically discusses the need to transition from fossil fuels to clean energy. It examines the role of fossil fuels in the global threat of climate change. The paper further discusses the efficacy of initiatives adopted at national, regional, continental and global levels towards transitioning from fossil fuels to clean energy. It also highlights the challenges facing the global transition

⁵ Solomon. B., & Krishna. K., 'The Coming Sustainable Energy Transition: History, Strategies, and Outlook.' *Energy Policy* 39 (2011) 7422-7431

⁶ Ibid

⁷ Ibid

⁸ Ibid

⁹ Nalule. V., & Leal-Arcas. R., 'Chapter 8 - Energy Decentralization and Energy Transition in Poland.' Op Cit

¹⁰ United Nations Development Programme., 'Energy Transition.' Available at <https://www.undp.org/energy/our-work-areas/energy-transition> (Accessed on 25/12/2023)

¹¹ Solomon. B., & Krishna. K., 'The Coming Sustainable Energy Transition: History, Strategies, and Outlook.' Op Cit

¹² Ibid

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from fossil fuels to clean energy. The paper further proposes reforms aimed at accelerating the transition from fossil fuels to clean energy.

2.0 Fossil Fuels and Climate Change

Fossil fuels is a generic term that refers to non-renewable energy sources such as coal, coal products, natural gas, derived gas, crude oil, petroleum products and non-renewable wastes¹³. These fuels originate from plants and animals that existed in the geological past¹⁴. Fossil fuels are made from decomposing plants and animals¹⁵. These fuels are found in Earth's crust and contain carbon and hydrogen, which can be burned for energy. Coal, oil, and natural gas are examples of fossil fuels¹⁶.

Fossil fuels have been a major source of global energy supply for many decades. According to the International Energy Agency (IEA), fossil fuels including coal, oil and natural gas have accounted for almost 80 per cent of global energy supply for many decades¹⁷. It has been asserted that fossil fuels including coal, oil, and natural gas have been powering economies for over 150 years, and currently supply about 80 percent of the world's energy¹⁸. It has correctly been pointed out that fossil fuels have always had the major share in the global primary energy consumption and will continue to hold the position in the foreseeable future as more unconventional fossil fuels are explored¹⁹. Fossil fuels therefore hold an important position in the global energy mix.

¹³ European Commission., 'Glossary:Fossil Fuel.' Available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Fossil_fuel (Accessed on 26/12/2023)

¹⁴ Ibid

¹⁵ National Geographic., 'Fossil Fuels.' Available at <https://education.nationalgeographic.org/resource/fossil-fuels/> (Accessed on 26/12/2023)

¹⁶ Ibid

¹⁷ International Energy Agency., 'World Energy Outlook: 2023.' Available at <https://iea.blob.core.windows.net/assets/42b23c45-78bc-4482-b0f9-eb826ae2da3d/WorldEnergyOutlook2023.pdf> (Accessed on 26/12/2023)

¹⁸ Environmental and Energy Study Institute., 'Fossil Fuels.' Available at <https://www.eesi.org/topics/fossil-fuels/description> (Accessed on 26/12/2023)

¹⁹ Yildiz. I., 'Fossil Fuels.' *Comprehensive Energy Systems.*, (2018), Volume 1., pp 521-567

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Despite their importance in global energy supply, the extraction and burning of fossil fuels has serious environmental consequences including climate change²⁰. It has been pointed out that when fossil fuels are burned, the stored carbon and other greenhouse gases are released into the atmosphere²¹. An excess buildup of greenhouse gases in the atmosphere as a result of burning of fossil fuels has resulted in dramatic changes to Earth's climate – a trend that will worsen as more fossil fuels are burned²². It has been pointed out that the production and use of fossil fuel for electricity and transportation among other uses is not only contributing to climate change, but is also causing health problems, destroying natural ecosystems, and releasing toxins such as mercury and arsenic into communities²³.

It has been asserted that emissions from fossil fuels are the dominant cause of global warming and climate change²⁴. The United Nations correctly opines that fossil fuels including coal, oil and natural gas are by far the largest contributor to global climate change, accounting for over 75 per cent of global greenhouse gas emissions and nearly 90 per cent of all carbon dioxide emissions²⁵. It is therefore important to transition from fossil fuels to clean energy in order to confront climate change. It has been pointed out that increased production and use of fossil fuels is not compatible with a safe and liveable future²⁶. As a result, it has been argued that in order to protect the

²⁰ Ibid

²¹ Environmental and Energy Study Institute., 'Fossil Fuels.' Op Cit

²² Ibid

²³ The National Wildlife Federation., 'Reducing Fossil Fuel Reliance.' Available at <https://www.nwf.org/Home/Our-Work/Climate/Climate-Change/Fossil-Fuels> (Accessed on 26/12/2023)

²⁴ Fossil fuels and Climate Change: The Facts., Available at <https://www.clientearth.org/latest/news/fossil-fuels-and-climate-change-the-facts/#:~:text=What%20is%20the%20link%20between,temperature%20has%20increased%20by%201C> (Accessed on 26/12/2023)

²⁵ United Nations., 'Causes and Effects of Climate Change.' Available at <https://www.un.org/en/climatechange/science/causes-effects-climate-change> (Accessed on 26/12/2023)

²⁶ Amnesty International., 'Global: Fossil Fuel Production will be Double the Level Needed to Limit Global Warming to 1.5°C.' Available at <https://www.amnesty.org/en/latest/news/2023/11/global-fossil-fuel-production-will-be-double-the-level-needed-to-limit-global-warming-to-1-5c/> (Accessed on 26/12/2023)

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health and lives of present and future generations, the world needs a rapid, equitable phase-out of fossil fuels²⁷.

3.0 Transitioning from Fossil Fuels to Clean Energy: Progress and Setbacks

The need to transition from fossil fuels to clean energy is acknowledged in several legal and policy instruments.

The *United Nations Framework Convention on Climate Change (UNFCCC)*²⁸ acknowledges the need to transition from fossil fuels to clean energy. The UNFCCC states that countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of *fossil fuels* and associated energy-intensive products are highly vulnerable to climate change²⁹. The UNFCCC requires all countries and especially developing countries which are still highly dependent on fossil fuels to explore the possibilities for achieving greater energy efficiency and for controlling greenhouse gas emissions in general, including through the application of new technologies in the energy sector such as renewable energy on terms which make such an application economically and socially beneficial³⁰. The UNFCCC therefore sets the stage for global transition from fossil fuels to clean energy.

The *Paris Agreement*³¹ aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels,

²⁷ The Global Climate & Health Alliance., 'Health and Fossil Fuels: A Rapid and Just Transition.' Available at <https://climateandhealthalliance.org/initiatives/fossil-fuel-phaseout/> (Accessed on 26/12/2023)

²⁸ United Nations Framework Convention on Climate Change., United Nations 1992, Available at https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf (Accessed on 26/12/2023)

²⁹ Ibid, Article 4

³⁰ Ibid

³¹ Paris Agreement., United Nations, 2015., Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 26/12/2023)

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recognizing that this would significantly reduce the risks and impacts of climate change³². It has been pointed out that though the phrase ‘fossil fuels’ does not appear in the Paris Agreement neither to the terms ‘coal’, ‘oil’ and ‘natural gas’ despite these resources being responsible for most greenhouse gas emissions, the omission reflects the decision by national governments, reinforced by industry lobbyists, to focus emissions reduction efforts on reducing the demand for fossil fuels, rather than limiting fossil fuel supply by discouraging or even prohibiting their extraction in the first place³³. The Paris Agreement therefore envisages the transition from fossil fuels to clean energy in order to reduce global greenhouse gas emissions. Implementation of the Paris Agreement is necessary in shifting towards a net-zero emissions world³⁴. The transition from fossil fuels is also envisioned under the *United Nations 2030 agenda for Sustainable Development*³⁵. Sustainable Development Goal (SDG) 7 seeks to ensure access to affordable, reliable, sustainable and modern energy for all³⁶. Among the targets under SDG 7 include ensuring universal access to affordable, reliable and modern energy services; substantially increasing the share of renewable energy in the global energy mix; doubling the global rate of improvement in energy efficiency; and enhancing international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology³⁷. Achieving the targets under SDG 7 is necessary in transitioning from fossil fuels to clean energy including renewable sources of energy. In addition SDG 12 seeks to foster sustainable consumption and production patterns³⁸. Among the targets under SDG 12 is to rationalize

³² Ibid, Article 2 (1) (a)

³³ Council on Foreign Relations., ‘To Tackle Climate Change, Keep Fossil Fuels in the Ground.’ Available at <https://www.cfr.org/article/tackle-climate-change-keep-fossil-fuels-ground> (Accessed on 26/12/2023)

³⁴ United Nations., ‘The Paris Agreement.’ Available at <https://www.un.org/en/climatechange/paris-agreement> (Accessed on 26/12/2023)

³⁵ United Nations General Assembly., ‘Transforming Our World: the 2030 Agenda for Sustainable Development.’ 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 26/12/2023)

³⁶ Ibid, SDG 7

³⁷ Ibid

³⁸ Ibid, SDG 12

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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 communities³⁹. Regulation of fossil fuel subsidies has been identified as key measure geared towards shifting from fossil fuels to clean energy⁴⁰. Transitioning from fossil fuels to clean energy is therefore an essential part of the Sustainable Development agenda.

Transitioning from fossil fuels to clean energy is also an important agenda in Africa. Africa Union's *Agenda 2063*⁴¹ posits that the Continent faces enormous energy challenges that include low generation capacity and efficiency, high costs, unstable and unreliable energy supplies, low access to modern energy, insufficient energy infrastructure, and lack of institutional and technical capacity to harness huge resources partly due to dependence on fossil fuels for generation of electricity⁴². Among the aspirations under Agenda 2063 is to create environmentally sustainable and climate resilient economies and communities in Africa through measures such as the adoption of renewable sources of energy⁴³. Agenda 2063 portrays the vision of a Continent where renewable energy (wind, solar, hydro, bioenergy, ocean tidal waves, geothermal and other renewables) will claim more than half of the energy consumption for households, businesses and organizations⁴⁴. Implementing Agenda 2063 is thus necessary in order to transition from fossil fuels to clean energy in Africa.

³⁹ Ibid, SDG 12.c

⁴⁰ World Resources Institute., '4 Ways to Shift from Fossil Fuels to Clean Energy.' Available at <https://www.wri.org/insights/4-ways-shift-fossil-fuels-clean-energy> (Accessed on 26/12/2023)

⁴¹ Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 26/12/2023)

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

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At the regional level, the *East African Community Climate Change Policy*⁴⁵ stipulates the importance of transitioning from fossil fuels to clean energy within the East African Community (EAC). According to the Policy, energy is the driver of social and economic development in the EAC region, and most of the EAC partner states depend on imported fossil based fuel (oil)⁴⁶. The Policy acknowledges that the use of fossil oil is unsustainable due to its high emission factor that is a major contributor to global warming and climate change⁴⁷. It further states that the search for alternative source of energy exacerbated by climate change usually leads to use of fossil based fuel to generate electricity for industrial needs that are also economically costly to the region⁴⁸. The Policy seeks to increase the availability and accessibility of sustainable, reliable and affordable renewable energy resources in the EAC and urges member states to embrace measures such as scaling up investment in renewable energy technologies to provide access to affordable cleaner energy, improve efficiency in use of biomass energy especially for rural communities; developing appropriate alternative energy sources, policies and measures to increase energy efficiency; devising a precautionary approach to the development of bio-fuels for mitigation and energy in view of food security issues; and improving energy efficiency and promoting clean energy technologies including; hydropower, solar and wind⁴⁹. It is necessary for member states of the EAC to actualize the provisions of this Policy in order to transition from fossil fuels to clean energy.

At the national level, the *Energy Act*⁵⁰ of Kenya embraces the transition from fossil fuels to clean energy sources including renewable energy. The Act defines renewable energy as non-fossil energy generated from natural non-depleting resources including but not limited to solar energy, wind energy, biomass energy, biological waste energy, hydro energy, geothermal energy

⁴⁵ East African Community., 'EAC Climate Change Policy Framework.' Available at <https://www.eac.int/environment/climate-change/eac-climate-change-policy-framework> (Accessed on 26/12/2023)

⁴⁶ Ibid, Part 3.2.4 (i)

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Energy Act., No. 1 of 2019., Laws of Kenya., Government Printer, Nairobi

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and ocean and tidal energy⁵¹. It urges the state to develop, promote and manage the use of renewable sources of energy in Kenya and establishes the Rural Electrification and Renewable Energy Corporation which is tasked to fulfill that mandate⁵². In addition, the *Climate Change Act*⁵³ requires the state to embrace climate change response measures and actions such as enhancing energy conservation, efficiency and use of renewable energy in industrial, commercial, transport, domestic and other uses⁵⁴. Further, the *National Energy Policy*⁵⁵ identifies key challenges in the energy sector in Kenya including reliance on fossil fuels which results in high electricity costs⁵⁶. It further acknowledges that there is increasing concern about spiralling degradation of the environment as exemplified by increased local air pollution and acid precipitation from ever growing fossil fuel combustion⁵⁷. It also identifies the depletion of energy resources including fossil fuels as a major concern in the energy sector in Kenya⁵⁸. The Policy urges the country to move towards renewable sources of energy. It correctly points out that renewable energy, derived from the naturally occurring resources including geothermal, hydro, solar, wind, ocean energy, biomass, biofuels, biogas and municipal waste can supply the country's energy needs and those of future generations in a sustainable way if effectively harnessed through careful planning and advanced technology⁵⁹. In addition, the Policy asserts that renewable energy has potential to enhance energy security, mitigate climate change, generate income, create employment and generate foreign exchange savings⁶⁰. It is thus imperative to transition from fossil fuels to clean energy including renewable energy in Kenya.

⁵¹ Ibid, S 2

⁵² Ibid, S 43 & 44

⁵³ Climate Change Act., No. 11 of 2016., Laws of Kenya., Government Printer, Nairobi

⁵⁴ Ibid, S 13 (3) (j)

⁵⁵ Ministry of Energy., 'National Energy Policy.' Available at https://kplc.co.ke/img/full/BL4PdOqKtxFT_National%20Energy%20Policy%20October%20%202018.pdf (Accessed on 26/12/2023)

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid

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From the foregoing, it is evident that the need to transition from fossil fuels to clean energy is recognized at the global, continental, regional and national levels. There has been some progress towards transitioning from fossil fuels to clean energy. The IEA points out that although demand for fossil fuels has been strong in recent years, there are signs of a change in direction⁶¹. According to the IEA, alongside the deployment of low-emissions alternatives, the rate at which new assets that use fossil fuels are being added to the energy system has slowed⁶². The IEA however warns that even as demand for fossil fuels falls, energy security challenges will remain since the process of adjustment to changing demand patterns will not necessarily be easy or smooth⁶³. It is therefore important to ensure that the transition from fossil fuels to clean energy is done in manner that fosters energy security.

The transition from fossil fuels to clean energy recently received a major boost at the 2023 United Nations Climate Change Conference/ Conference of the Parties of the UNFCCC (COP 28) when states adopted the global stocktake decision⁶⁴. The COP 28 decision underlines the urgent need to address, in a comprehensive and synergetic manner, the interlinked global crises of climate change and biodiversity loss in the broader context of achieving the Sustainable Development Goals, as well as the vital importance of protecting, conserving, restoring and sustainably using nature and ecosystems for effective and sustainable climate action⁶⁵. The decision affirms the commitment of member states to accelerate climate action in this critical decade on the basis of the best available science, reflecting equity and the principle of *common but differentiated responsibilities and respective capabilities* in the light of different national circumstances and in the context of Sustainable Development and efforts to eradicate poverty (Emphasis added)⁶⁶. It further emphasizes that finance, capacity-building and technology transfer are critical

⁶¹ International Energy Agency., 'World Energy Outlook: 2023.' Op Cit

⁶² Ibid

⁶³ Ibid

⁶⁴ United Nations Climate Change., 'Decision -/CMA.5: Outcome of the First Global stocktake' Available at <https://unfccc.int/documents/636584> (Accessed on 26/12/2023)

⁶⁵ Ibid

⁶⁶ Ibid

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enablers of climate action⁶⁷. It requires states to embrace collective progress towards achieving the purpose and long-term goals of the Paris Agreement through measures such as transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science⁶⁸. It also requires countries to phase out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible towards strengthening climate action⁶⁹.

The cop 28 decision has been lauded as signaling the ‘beginning of the end’ of the fossil fuel era⁷⁰. It has been asserted that the decision lays the ground for a swift, just and equitable transition, underpinned by deep emissions cuts and scaled-up finance⁷¹. The COP 28 decision urges all countries to take actions towards achieving, at a global scale, a tripling of renewable energy capacity and doubling energy efficiency improvements by 2030⁷². It further urges countries to accelerate efforts towards the phase-down of unabated coal power, phasing out inefficient fossil fuel subsidies, and other measures that drive the transition away from fossil fuels in energy systems, in a just, orderly and equitable manner, with developed countries continuing to take the lead⁷³. The COP 28 outcome is a major milestone in transitioning away from fossil fuels and towards renewables and energy efficiency⁷⁴. It is therefore necessary for all countries to implement the outcome of COP 28 in order to ensure that

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ United Nations Climate Change., ‘COP28 Agreement Signals “Beginning of the End” of the Fossil Fuel Era.’ Available at <https://unfccc.int/news/cop28-agreement-signals-beginning-of-the-end-of-the-fossil-fuel-era> (Accessed on 26/12/2023)

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ European Parliament., ‘COP28 Climate Talks Agree on Transitioning Away from Fossil Fuels.’ Available at <https://www.europarl.europa.eu/news/en/press-room/20231205IPR15686/cop28-climate-talks-agree-on-transitioning-away-from-fossil-fuels> (Accessed on 26/12/2023)

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the transition from fossil fuels to clean energy is done in manner that fosters justice and equity⁷⁵.

Transitioning from fossil fuels to clean energy is therefore an important global agenda. However, this transition faces certain hurdles. It has been observed that fossil fuel subsidies provided to companies in the fossil fuel sector continue to encourage the production and use of these sources of energy⁷⁶. In addition, developing countries continue to face challenges accessing technology and finance to invest in clean energy sources including renewable energy hence continued reliance on fossil fuels⁷⁷. It is imperative to address these among other challenges in order to accelerate the global transition from fossil fuels to clean energy.

4.0 Way Forward

In order to transition from fossil fuels to clean energy, there is need to eliminate fossil fuel subsidies⁷⁸. According to the United Nations Environment Programme (UNEP), the production and use of fossil fuels in many countries is encouraged through large subsidies⁷⁹. These subsidies are undesirable since they contribute to air pollution and congestion, are a drain on national budgets, often do not reach the poorest households, crowd-out investment in clean energy, and encourage excessive energy consumption⁸⁰. The IEA observes that the transition to clean energy alternatives remains a challenge in countries where fossil fuel subsidies have still not been phased out⁸¹. Fossil fuel subsidies are also undesirable since they distort markets and are often ultimately paid by consumers through higher taxes or consumer prices,

⁷⁵ United Nations., 'Climate and Environment.' Available at <https://news.un.org/en/story/2023/12/1144742> (Accessed on 26/12/2023)

⁷⁶ The National Wildlife Federation., 'Reducing Fossil Fuel Reliance.' Op Cit

⁷⁷ Muigua. K., 'Accelerating Energy Transition in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2023/09/Accelerating-Energy-Transition-in-Kenya.pdf> (Accessed on 26/12/2023)

⁷⁸ World Resources Institute., '4 Ways to Shift from Fossil Fuels to Clean Energy.' Op Cit

⁷⁹ United Nations Environment Programme., 'Fossil Fuel Subsidy Reform.' Available at <https://www.unep.org/explore-topics/green-economy/what-we-do/economic-and-fiscal-policy/fiscalpolicy/policy-analysis-3> (Accessed on 26/12/2023)

⁸⁰ Ibid

⁸¹ International Energy Agency., 'World Energy Outlook: 2023.' Op Cit

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especially in importing regions⁸². Fossil fuel subsidies are therefore a major hindrance in the global transition towards clean energy. The COP 28 decision urges all countries to phase out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible towards strengthening climate action⁸³. It is therefore important for all countries to face out fossil fuel subsidies in order to embrace the transition towards clean energy.

In addition, it is necessary for all countries to scale up investments in clean energy including renewable sources of energy. It has correctly been opined that generating renewable energy creates far lower emissions than burning fossil fuels⁸⁴. Transitioning from fossil fuels, which currently account for the lion's share of global greenhouse gas emissions, to renewable energy is key to addressing the climate crisis across the globe⁸⁵. Countries should therefore transition towards renewable sources of energy such as wind, solar, hydropower, geothermal and tidal energy which are prevalent throughout the globe⁸⁶. The economic, societal and environmental benefits of renewable sources of energy are numerous. Renewable sources of energy are available in abundance, cheaper and are a healthier option for people and the planet⁸⁷. Countries should therefore enhance investments in renewable sources of energy due to their numerous advantages.

It is also important for developed countries to support the transition to clean energy sources in developing countries through finance, technology

⁸² Ibid

⁸³ United Nations Climate Change., 'Decision -/CMA.5: Outcome of the First Global stocktake' Op Cit

⁸⁴ United Nations., 'What is Renewable Energy?.' Available at <https://www.un.org/en/climatechange/what-is-renewable-energy> (Accessed on 26/12/2023)

⁸⁵ Ibid

⁸⁶ Muigua. K., 'Adopting Green Energy for a Bright Tomorrow.' Available at <https://kmco.co.ke/wp-content/uploads/2023/06/Adopting-Green-Energy-for-a-Bright-Tomorrow.pdf> (Accessed on 26/12/2023)

⁸⁷ United Nations., 'Climate Action.' Available at <https://www.un.org/en/climatechange/howcommunities-are-embracing-renewable-energy> (Accessed on 26/12/2023)

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development and transfer and capacity-building⁸⁸. The COP 28 outcome emphasizes that finance, capacity-building and technology transfer are critical enablers of climate action across all sectors including energy transition⁸⁹. The principle of ‘*common but differentiated responsibility and respective capabilities*’ enshrined in global climate change instruments including the UNFCCC calls upon developed countries to take the lead in fostering climate action through initiatives such as climate finance and technology transfer to developing countries⁹⁰. Developed countries should therefore enhance climate funding, technology transfer and capacity building in developing countries geared towards transitioning from fossil fuels to clean energy.

Further, it is necessary to improve access to electricity and clean cooking⁹¹. It has been pointed out that household energy needs entail two components: access to clean cooking facilities and access to electricity⁹². However, access to electricity remains a challenge in many regions of the world especially Africa. The IEA estimates that nearly 600 million people or an equivalent of 43 per cent of the Continent’s population lack access to electricity⁹³. It further points out that less than a fifth of African countries have targets to reach universal electricity access by 2030⁹⁴. It has further been pointed out that the Sub-Saharan region of Africa has the lowest rate of access to electricity with just nearly half of the population having access to electricity compared to the

⁸⁸ United Nations Climate Change., ‘COP28 Agreement Signals “Beginning of the End” of the Fossil Fuel Era.’ Op Cit

⁸⁹ United Nations Climate Change., ‘Decision -/CMA.5: Outcome of the First Global stocktake’ Op Cit

⁹⁰ United Nations Framework Convention on Climate Change., United Nations 1992., Op Cit

⁹¹ World Resources Institute., ‘4 Ways to Shift from Fossil Fuels to Clean Energy.’ Op Cit

⁹² Muigua. K., ‘Towards Energy Justice in Kenya.’ Available at <https://kmco.co.ke/wp-content/uploads/2020/02/Towards-Energy-Justice-in-Kenya-00000005.pdf> (Accessed on 26/12/2023)

⁹³ International Energy Agency., ‘Access to Electricity.’ Available at <https://www.iea.org/reports/sdg7-data-and-projections/access-to-electricity> (Accessed on 26/12/2023)

⁹⁴ Ibid

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global access rate of nearly 90 per cent⁹⁵. In addition, it has been noted that many people across the world lack access to clean energy sources such as electricity and use polluting, inefficient fuels such as firewood for household chores such as cooking⁹⁶. Progress remains slow in promoting clean cooking facilities especially in Africa with bio-energy sources such as charcoal, wood fuel and dung being the most common source of energy in Kenya especially among the rural population⁹⁷. Lack of access to electricity and clean cooking facilities encourages the use of fossil fuels a situation which contributes to environmental problems including climate change⁹⁸. It is imperative for all countries to enhance access to electricity and clean cooking facilities through measures such as lowering electricity tariffs, promoting rural electrification and enhancing access to clean energy sources for purposes of cooking such as Liquefied Petroleum Gas (LPG)⁹⁹. Fostering access to electricity and clean cooking facilities will enhance the transition from fossil fuels to clean energy. Finally, it is important for all countries to achieve energy efficiency and security¹⁰⁰. According to the IEA, energy efficiency is an essential component of energy transitions which provides some of the quickest and most cost-effective CO₂ mitigation options while lowering energy bills and strengthening energy security¹⁰¹. The IEA further posits that energy efficiency is the single largest measure to avoid energy demand in the Net Zero Emissions by 2050 Scenario¹⁰². In addition, most efficiency measures result in cost savings to consumers, lowering energy bills and helping cushion the

⁹⁵ United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Available at <https://unctad.org/publication/commoditiesglance-special-issue-access-energy-sub-saharanafrica#:~:text=Access%20to%20energy%20is%20defined,be%20scaled%20up%20over%20time> (Accessed on 26/11/2023)

⁹⁶ Muigua. K., 'Towards Energy Justice in Kenya.' Op Cit

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Muigua. K., 'Adopting Green Energy for a Bright Tomorrow.' Op Cit

¹⁰⁰ World Resources Institute., '4 Ways to Shift from Fossil Fuels to Clean Energy.' Op Cit

¹⁰¹ International Energy Agency., 'Energy Efficiency.' Available at <https://www.iea.org/energy-system/energy-efficiency-and-demand/energy-efficiency> (Accessed on 26/12/2023)

¹⁰² Ibid

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effects of unexpected price spikes, a situation that was witnessed after Russia's invasion of Ukraine¹⁰³. Energy security on the other hand refers to the uninterrupted availability of energy sources at an affordable price¹⁰⁴. Long-term energy security mainly deals with timely investments to supply energy in line with economic developments and environmental needs while short-term energy security focuses on the ability of the energy system to react promptly to sudden changes in the supply-demand balance¹⁰⁵. Energy efficiency and energy security are vital components of global energy transition towards clean energy by ensuring the availability, affordability and security of energy sources¹⁰⁶. In the absence of energy efficiency and security, the transition towards clean energy cannot be effectively realized a situation that could result in the continued use of fossil fuels¹⁰⁷. It is therefore desirable for all countries to achieve energy efficiency and security in order to transition from fossil fuels to clean energy.

The foregoing among other measures are pertinent in transitioning from fossil fuels to clean energy.

5.0 Conclusion

The extraction and burning of fossil fuels has serious environmental consequences including climate change¹⁰⁸. It has been observed that fossil fuels including coal, oil and natural gas are by far the largest contributors to global climate change, accounting for over 75 per cent of global greenhouse gas emissions and nearly 90 per cent of all carbon dioxide emissions¹⁰⁹. It is therefore important to transition from fossil fuels to clean energy in order to confront climate change. There has been progress towards transitioning from fossil fuels to clean energy at the global, continental, regional and national levels through measures such as embracing renewable sources of energy.* These efforts received a major boost at COP 28 when countries committed to transition away from fossil fuels in energy systems, in a just, orderly and

¹⁰³ Ibid

¹⁰⁴ International Energy Agency., 'Energy Security.' Available at <https://www.iea.org/topics/energy-security> (Accessed on 26/11/2023)

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Yildiz. I., 'Fossil Fuels.' Op Cit

¹⁰⁹ United Nations., 'Causes and Effects of Climate Change.' Op Cit

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equitable manner and phase out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible towards strengthening climate action¹¹⁰. However, the transition from fossil fuels to clean energy is hindered by factors such as fossil fuel subsidies and inadequate resources and technology in developing countries¹¹¹. In order to effectively transition from fossil fuels to clean energy there is need for all countries to eliminate fossil fuel subsidies¹¹²; scale up investments in clean energy including renewable sources of energy¹¹³; accelerate finance, technology development and transfer and capacity-building to developing countries¹¹⁴; improve access to electricity and clean cooking¹¹⁵; and foster energy efficiency and security¹¹⁶. Transitioning from fossil fuels to clean energy is an important agenda that needs to be fast-tracked for climate action and Sustainable Development.

¹¹⁰ United Nations Climate Change., 'Decision -/CMA.5: Outcome of the First Global stocktake' Op Cit

¹¹¹ Muigua, K., 'Accelerating Energy Transition in Kenya.' Op Cit

¹¹² United Nations Environment Programme., 'Fossil Fuel Subsidy Reform.' Op Cit

¹¹³ United Nations., 'What is Renewable Energy?.' Op Cit

¹¹⁴ United Nations Climate Change., 'Decision -/CMA.5: Outcome of the First Global stocktake' Op Cit

¹¹⁵ World Resources Institute., '4 Ways to Shift from Fossil Fuels to Clean Energy.' Op Cit

¹¹⁶ ¹¹⁶ International Energy Agency., 'Energy Efficiency.' Op Cit

Managing Environmental Conflicts through Alternative Dispute Resolution

Abstract

This paper critically discusses the role of Alternative Dispute Resolution (ADR) mechanisms in managing environmental conflicts. It defines environmental conflicts and examines their nature and causes. It also explores the viability of ADR mechanisms in managing environmental conflicts noting to highlight the advantages and drawbacks thereof. The paper argues that ADR mechanisms can be a viable tool in managing environmental conflicts and fostering sustainability. It proposes initiatives towards strengthening the role of ADR mechanisms in managing environmental conflicts.

1.0 Introduction

It has been correctly observed that conflicts are a common occurrence in human relationships and interactions¹. They are an inevitable part of living because they are related to situations of scarce resources, division of functions, power relations and role-differentiation². The term conflict generally refers to a situation in which two or more parties perceive that they possess mutually incompatible goals³. It has also been defined as a process of social interaction involving a struggle over claims to resources, power and status, beliefs, and other preferences and desires⁴. It has been pointed out that conflict centers on incompatibilities, an expressed struggle, and interdependence among two or more parties⁵. Incompatibility refers to mutually exclusive or diametrically

¹ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf> (Accessed on 18/01/2024)

² Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Available at <https://ocd.lcwu.edu.pk/cfiles/International%20Relations/EC/IR-403/Conflict.ConflictManagementinOrganizations.pdf> (Accessed on 18/01/2024)

³ Demmers. J., 'Theories of Violent Conflict: An Introduction' (Routledge, New York, 2012)

⁴ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

⁵ Putnam. L., 'Definitions and Approaches to Conflict and Communication.' Available at

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opposed goals, values, or beliefs⁶. Conflict can therefore be understood as the interaction of interdependent people who perceive incompatibility and the possibility of interference from others as a result of this incompatibility⁷.

Conflicts are undesirable phenomena in any given society. It has been posited that conflicts can affect peace, sustainability and development⁸. Conflicts can result in deaths and injuries, population displacement, the destruction of assets, and the disruption of social and economic systems⁹. As a result, it has been argued that development is not feasible in a conflict situation¹⁰. According to the United Nations, conflicts are major threat to the achievement of Sustainable Development¹¹. It posits that the Sustainable Development Goals (SDGs) have an intrinsic relationship to peace and stability¹². As a result, there is need for effective and expeditious management of conflicts in order to spur Sustainable Development¹³.

Conflict management refers to the processes and techniques adopted towards stopping or preventing overt conflicts and aiding the parties involved to reach

https://www.researchgate.net/profile/L_Putnam/publication/292654875_Definitions_and_approaches_to_conflict_and_communication/links/6483440ab3dfd73b776fe6ef/Definitions-and-approaches-to-conflict-and-communication.pdf (Accessed on 18/01/2024)

⁶ Ibid

⁷ Ibid

⁸ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

⁹ Mahler. D. G., & Vishwanath. T., 'When the Consequences of Conflicts Last Generations: Intergenerational Mobility in Iraq and Vietnam.' Available at <https://blogs.worldbank.org/dev4peace/when-consequences-conflicts-last-generations-intergenerational-mobility-iraq-and-vietnam#:~:text=They%20include%20deaths%20and%20injuries,of%20social%20and%20economic%20systems>. (Accessed on 18/01/2024)

¹⁰ Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-KenyaRevised-version-of-20.10.14.pdf> (Accessed on 18/01/2024)

¹¹ United Nations., 'No Peace, No Sustainable Development: A Vicious Cycle that We Can Break.' Available at <https://www.un.org/en/chronicle/article/no-peace-no-sustainable-development-vicious-cycle-we-can-break> (Accessed on 18/01/2024)

¹² Ibid

¹³ Ibid

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a durable and peaceful solution to their differences¹⁴. Conflict management therefore involves handling all stages of a conflict as well as the mechanisms used in addressing conflicts¹⁵. It has been pointed out that the purpose of conflict management, whether undertaken by the parties in conflict or whether involving the intervention of an outside party, is to affect the entire structure of a conflict situation so as to contain the destructive components in the conflict process (such as hostility and use of violence) and help the parties possessing incompatible goals to find some solution to their conflict¹⁶. In addition, it has been argued that effective conflict management succeeds in minimizing disruption stemming from the existence of a conflict, and providing a solution that is satisfactory and acceptable¹⁷. Various approaches and techniques can be adopted towards managing conflicts ranging from the most informal negotiations between the parties themselves through increasing formality and more directive interventions from external sources to a full court hearing with strict rules of procedure¹⁸.

It has been argued that conflict management could result in settlement through the use of mechanisms such as litigation and arbitration which are highly coercive, power based and involve a lot of compromise in addressing the conflict¹⁹. Settlement mechanisms can be effective in providing an immediate solution to a conflict but fail to address underlying issues leaving the likelihood of conflicts reemerging in future²⁰. Conflict management could also result in resolution through the use of Alternative Dispute Resolution (ADR) processes such as mediation, negotiation and facilitation which are non-coercive, non-power based and focus on the needs and interest of

¹⁴ Leeds. C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners.' *International Journal of Peace Studies*, Volume 2, No. 2, 1997

¹⁵ Ibid

¹⁶ Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Op Cit

¹⁷ Ibid

¹⁸ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹⁹ Ibid

²⁰ Ibid

parties²¹. Resolution mechanisms result in mutually satisfying outcomes that address the root causes of conflicts therefore creating long lasting outcomes²². This paper critically discusses the role of ADR mechanisms in managing environmental conflicts. It defines environmental conflicts and examines their nature and causes. It also explores the viability of ADR mechanisms in managing environmental conflicts noting to highlight the advantages and drawbacks thereof. The paper argues that ADR mechanisms can be a viable tool in managing environmental conflicts and fostering sustainability. It proposes initiatives towards strengthening the role of ADR mechanisms in managing environmental conflicts.

2.0 Environmental Conflicts: Definition and Causes

The environment is a major cause of conflicts. It has been observed that nearly every community finds itself embroiled in occasional disputes over public land use, private land development, water quality or quantity, air quality, protection of habitats and species, waste disposal, use and management of natural resources, environmental hazards among other issues²³. Environmental conflicts are therefore a common occurrence. It has been posited that what is often at stake in such conflicts are fundamental issues including individual and community health, racial and ethnic justice, the integrity or destruction of whole ecosystems, and the economic or cultural viability of human communities²⁴. According to the United Nations Environment Programme (UNEP), factors such as environmental degradation, inequitable access to natural resources and the transboundary movement of hazardous materials can lead to environmental conflicts and pose a risk to national security and human health²⁵.

²¹ Ibid

²² Ibid

²³ Dukes. F., 'What we Know About Environmental Conflict Resolution: An Analysis Based on Research.' *Conflict Resolution Quarterly*., Volume 22, Issue 1-2

²⁴ Ibid

²⁵ United Nations Environment Programme., 'Disasters and Conflicts.' Available at <https://www.unep.org/regions/europe/regional-initiatives/disasters-and-conflicts> (Accessed on 18/01/2024)

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Environmental conflicts have been broadly defined as social conflicts related to the environment²⁶. Further, environmental conflicts have also been defined as conflicts caused by the environmental scarcity of a resource, that means: caused by a human-made disturbance of its normal regeneration rate²⁷. In addition, environmental conflicts can also refer to 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 forests²⁸. It has been argued that conflicts caused by physical, geopolitical or socio-economic resource scarcity are not environmental conflicts but traditional conflicts of resource distribution²⁹. Further, it has been asserted that environmental conflicts differ, but frequently overlap, with other types of conflicts on gender, class, territory, and identity among others³⁰. In addition, it has been observed that environmental conflicts such as conflicts over natural resources have always been part of human history³¹. Environmental conflicts have been classified as a subset of the larger category of public conflicts involving issues such as health and health care, race and ethnicity, economic development, and governance³². Environmental conflicts often involve a combination of these issues³³. In addition, it has been observed that environmental conflicts may involve multiple jurisdictions and multiple levels of jurisdiction (including international, regional, national and local), and the conflict may be less about the resources stake than about issues of jurisdiction or precedent³⁴.

²⁶ Scheidel. A et al., 'Environmental Conflicts and Defenders: A Global Overview.' *Global Environmental Change*, 63 (2020)

²⁷ Libiszewski. S., 'What is an Environmental Conflict?' Available at https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/What_is_Environment_Conflict_1992.pdf (Accessed on 18/01/2024)

²⁸ Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Available at <https://kmco.co.ke/wp-content/uploads/2022/09/Environmental-Conflict-Management-Institutions-and-Approaches.pdf> (Accessed on 18/01/2024)

²⁹ Libiszewski. S., 'What is an Environmental Conflict?' Op Cit

³⁰ Scheidel. A et al., 'Environmental Conflicts and Defenders: A Global Overview.' Op Cit

³¹ Ibid

³² Dukes. F., 'What we Know About Environmental Conflict Resolution: An Analysis Based on Research.' *Conflict Resolution Quarterly*., Volume 22, Issue 1-2

³³ Ibid

³⁴ Ibid

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The causes of environmental conflicts vary across the globe and their manifestations differ considerably³⁵. It has been observed that causes of environmental conflicts can range from control over vital environmental resources to contestations over natural resources at the community and/or household levels³⁶. In addition, it has been argued that environmental conflicts are largely due to poverty or resource scarcities, which can be demand-induced, supply-induced, or structural³⁷. This view implies that the occurrence and intensity of environmental conflicts would increase as resources become scarcer, or if resources have been overused, depleted, or degraded to a certain threshold, environmental conflicts would worsen³⁸. For example, it has been argued that environmental scarcities have had great adverse effects on populations, including violent conflicts in many parts of the developing world³⁹. In addition, it has been argued that these conflicts are especially expected to be more devastating in poor societies since they are less able to buffer themselves from environmental scarcities and the social crises they cause⁴⁰.

Environmental conflicts are a major threat to the achievement of Sustainable Development⁴¹. According to UNEP, while natural resources are key to achieving Sustainable Development, they are also increasingly acting as drivers of fragility, conflict and violence⁴². It further asserts that as the global population continues to rise, the global demand for natural resources continues to grow, and the impacts of climate change begin to materialize, and

³⁵ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

³⁶ Ibid

³⁷ Scheidel. A et al., 'Environmental Conflicts and Defenders: A Global Overview.' Op Cit

³⁸ Ibid

³⁹ Homer-Dixon, T.F., "Environmental scarcities and violent conflict: evidence from cases," *International Security* 19, No. 1 (1994): 5-40 at p. 6

⁴⁰ Ibid

⁴¹ United Nations Environment Programme., 'Environmental Cooperation and Peacebuilding.' Available at <https://www.unep.org/topics/fresh-water/disasters-and-climate-change/environment-security/environmental-cooperation-and#:~:text=International%20law%2C%20environment%20and%20conflict,and%20r%20eliance%20on%20conflict%20resources>. (Accessed on 18/01/2024)

⁴² Ibid

therefore competition over natural resources is set to intensify, a situation that could spiral into more environmental conflicts⁴³. In addition, it has been contended that natural resource- based conflicts also are, directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development⁴⁴. It is therefore necessary to foster effective management of environmental conflicts in order to realize Sustainable Development.

3.0 Managing Environmental Conflicts through ADR: Opportunities and Challenges

ADR is an umbrella term that encompasses a set of processes that are applied to manage disputes without resort to adversarial litigation⁴⁵. It can also refer to a set of mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes⁴⁶. These processes include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others⁴⁷. ADR mechanisms have been recognized at the global level under the *Charter of the United Nations*⁴⁸. The Charter provides that parties to a dispute shall 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 choice⁴⁹ (Emphasis added). At a national level, the *Constitution of Kenya*⁵⁰ embraces ADR mechanisms. It mandates courts and

⁴³ Ibid

⁴⁴ Muigua. K., 'Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/Managing-Environmental-Conflicts-through-Participatory-Mechanisms-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-August-2018.pdf> (Accessed on 18/01/2024)

⁴⁵ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁴⁶ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁴⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁴⁸ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

⁴⁹ Ibid, Article 33 (1)

⁵⁰ Constitution of Kenya, 2010., Government Printer, Nairobi

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tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and TDRMs⁵¹.

ADR mechanisms are viewed as ideal in enhancing access to justice⁵². Access to justice has been recognized as a fundamental human right⁵³. It has been described as a basic principle of the rule of law⁵⁴. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable⁵⁵. It has been correctly observed that international standards recognize access to justice as both a basic human right and a means to protect other universally recognized human rights⁵⁶. Access to justice is at the heart of the United Nation's 2030 Agenda for Sustainable Development which acknowledges that sustainable peace and development cannot be achieved without justice⁵⁷. Sustainable Development Goal (SDG) 16 seeks to foster Peace, Justice and Strong Institutions with states committing to provide access to justice for all, recognizing it as a key indicator of peaceful and inclusive societies⁵⁸. At a national level, the Constitution of Kenya recognizes access to justice as a fundamental human right⁵⁹. It requires the state to ensure access to justice for all persons and that if any fee is required, it shall be reasonable and shall not impede access to justice⁶⁰.

⁵¹ Ibid, Article 159 (2) (c)

⁵² Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁵³ United Nations., 'Access to Justice.' Available at <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (Accessed on 19/01/2024)

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ American Bar Association., 'Human Rights and Access to Justice.' Available at https://www.americanbar.org/advocacy/rule_of_law/what-we-do/human-rights-access-to-justice/ (Accessed on 19/01/2024)

⁵⁷ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 19/01/2024)

⁵⁸ Ibid, SDG 16

⁵⁹ Constitution of Kenya, 2010., Government Printer, Nairobi

⁶⁰ Ibid

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Despite the recognition of access to justice as a basic human right at the global and national levels, it has been pointed out that the right of access to justice especially in developing countries has hitherto been hampered by many unfavourable factors such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow⁶¹. In light of the foregoing challenges, ADR mechanisms have been advocated as a viable option in enhancing access to justice⁶². ADR processes contain certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost- effective management of disputes which makes them ideal in enhancing access to justice⁶³.

It has been argued that ADR mechanisms can enhance Environmental Justice by promoting effective and efficient management of environmental conflicts⁶⁴. Environmental Justice is a concept that seeks to foster the right of every person to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making⁶⁵. Environmental Justice is attained when every person enjoys the same degree of protection from environmental and health hazards and has access to the decision-making process to have a healthy environment⁶⁶. It has been argued that enhancing access to justice in environmental matters is one of the key ways of promoting Environmental Justice⁶⁷.

⁶¹ 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: 29

⁶² Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
⁶³ Ibid

⁶⁴ Grad. F.P., 'Alternative Dispute Resolution in Environmental Law.' *Columbia Journal of Environmental Law* Volume: 14, Issue 1

⁶⁵ Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at <https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml> (Accessed on 19/01/2024)

⁶⁶ United States Environmental Protection Agency; 'Environmental Justice.' Available at <https://www.epa.gov/environmentaljustice> (Accessed on 19/01/2024)

⁶⁷ Pickup. F., 'Five Steps to Environmental Justice.' Available at <https://www.undp.org/blog/five-stepsenvironmental-justice> (Accessed on 19/01/2024)

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ADR processes can foster Environmental Justice by enhancing access to justice in environmental matters due to their potential to promote effective and efficient management of environmental conflicts⁶⁸. For example, it has been opined that mediation has been effectively used to manage environmental disputes in areas such as land use, natural resource management, water resources, energy, air quality among others⁶⁹. In addition, it has been posited that ADR has been used with varying degrees of success in policy-making, standard setting, the determination of development choices, and in the enforcement of environmental standards⁷⁰.

The role of ADR mechanisms in managing environmental conflicts is recognized at both global and national levels. At the global level, the *Rio Declaration on Environment and Development*⁷¹ envisages the use of ADR mechanisms in managing environmental conflicts. Principle 10 of the Declaration stipulates as follows:

*'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall 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 shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided (Emphasis added)*⁷².

It has been argued that principle 10 of the Rio Declaration encourages the use of ADR processes in managing environmental conflicts through its emphasis on three pillars of environmental governance: *information related to dangers to the environment should be available to the public, the public should participate in the*

⁶⁸ Grad. F.P., 'Alternative Dispute Resolution in Environmental Law.' Op Cit

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

⁷² Ibid, Principle 10

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decision-making process, methods and channels of accessing to justice should be available to all individuals⁷³. ADR mechanisms such as mediation can realize these pillars by promoting participation, consensus building and access to justice in environmental matters⁷⁴.

In addition, the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*⁷⁵ also encourages the use of ADR techniques in managing environmental conflicts. The Convention urges states to pursue the management of disputes through negotiation or by any other means of dispute settlement acceptable to the parties to the dispute⁷⁶. It also permits parties to pursue binding methods like arbitration and adjudication if the amicable methods have failed⁷⁷.

Further, the *Paris Agreement*⁷⁸ also represents global efforts towards managing an environmental conflict through ADR mechanisms. It aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change⁷⁹. Adoption of the Paris Agreement saw the application of ADR mechanisms especially negotiation to respond to

⁷³ Alkhayer, J., 'Role of ADR Methods in Environmental Conflicts in the light of Sustainable Development.' Available at <https://iopscience.iop.org/article/10.1088/1755-1315/1084/1/012057/pdf> (Accessed on 19/01/2024)

⁷⁴ Ibid

⁷⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters., Available at <https://unece.org/DAM/env/pp/documents/cep43e.pdf> (Accessed on 19/01/2024)

⁷⁶ Ibid, Article 16

⁷⁷ Ibid

⁷⁸ Paris Agreement., United Nations, 2015., Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 19/01/2024)

⁷⁹ Ibid, Article 2 (1) (a)

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climate change which is a major environmental problem⁸⁰. The 2015 United Nations Climate Change Conference (COP 21) in Paris saw 195 nations participate in *negotiating* a framework to curb emissions and take common action on climate change (Emphasis added)⁸¹.

Further, at a national level, the *Environment and Land Court Act*⁸² of Kenya encourages the Environment and Land Court (ELC) to embrace the use of ADR mechanisms to manage environmental conflicts⁸³. The Act provides that the ELC may adopt and implement, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of Alternative Dispute Resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution⁸⁴. In addition, the *Community Land Act of Kenya*⁸⁵ also encourages settlement of disputes relating to community land through ADR methods including traditional dispute and conflict resolution mechanisms where it is appropriate to do so⁸⁶. In particular, the Act recognizes the use of mediation and arbitration in managing disputes relating to community land⁸⁷.

The role of ADR mechanisms in managing environmental conflicts is therefore well entrenched in law. It has been argued that certain benefits of ADR processes make them suited for use in resolving environmental problems⁸⁸. For instance, the processes that permit the greatest degree of party autonomy, such negotiation, conciliation, and mediation, are informal, cost-effective, and give parties the freedom to come up with their own creative and long-term solutions to environmental problems⁸⁹. For example, it has been argued that

⁸⁰ Dani. R., 'Role of Alternative Dispute Resolution in Environmental Disputes.' Available at <https://viamediationcentre.org/readnews/NTE3/Role-of-Alternative-Dispute-Resolution-in-Environmental-Disputes> (Accessed on 19/01/2024)

⁸¹ Ibid

⁸² Environment and Land Court Act., No. 19 of 2011, Government Printer, Nairobi

⁸³ Ibid, Article 20

⁸⁴ Ibid, Article 20 (1)

⁸⁵ Community Land Act., No. 27 of 2016., Government Printer, Nairobi

⁸⁶ Ibid, S 39 (1)

⁸⁷ Ibid, S 40 & 41

⁸⁸ Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

⁸⁹ Ibid

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ADR mechanisms can aid parties to environmental conflicts, such as those involving the implementation of environmental projects, to come up with creative remedies over and above traditional remedies available in litigation⁹⁰. Therefore, instead of cancelling projects, parties through ADR processes such as negotiation and mediation can agree and come up with mutually acceptable solutions such as effective mitigation measures taking into account their respective needs and concerns⁹¹.

ADR mechanisms can also promote effective management of environmental conflicts by encouraging consensus building and participatory approaches towards conflict management⁹². It has been pointed out that ADR mechanisms especially mediation can foster community involvement in the conflict management process through the use of peace committees, Non-Governmental Organisations, religious bodies, among other bodies within communities⁹³. This process can facilitate effective management of conflicts by addressing the root causes of such conflicts⁹⁴. Therefore, in case of environmental conflicts, mediation affords parties an opportunity to sustain or improve their relationships which is important especially in cases of environmental projects such as those related to energy, water and infrastructure whose completion may be for the larger good of every person involved⁹⁵. By encouraging participation and consensus building, ADR mechanisms encourage amicable management of environmental conflicts and

⁹⁰ Higgs. S., 'The Potential for Mediation to Resolve Environmental and Natural Resources Disputes.' Available at https://www.acctm.org/docs/The%20Potential%20For%20Mediation%20to%20Resolve%20Environmental%20CONNOR-Higgs_.pdf (Accessed on 19/01/2024)

⁹¹ Ibid

⁹² Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Attaining-Environmental-Justice-through-Alternative-Dispute-Resolution.pdf> (Accessed on 19/01/2024)

⁹³ Muigua. K., 'Natural Resource Conflicts: Addressing Inter-Ethnic Strife through Environmental Justice in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2019/09/Natural-Resource-ConflictsAddressing-Inter-Ethnic-Strife-Through-Environmental-Justice-in-kenya-Kariuki-Muigua-7th-September2019.pdf> (Accessed on 19/01/2024)

⁹⁴ Ibid

⁹⁵ Higgs. S., 'The Potential for Mediation to Resolve Environmental and Natural Resources Disputes.' Op Cit

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provide the basis for sustained relationships which is especially important where environmental projects are involved⁹⁶.

From the foregoing, it is evident that ADR mechanisms are viable in managing environmental conflicts. Further, in light of climate change concerns and the need to transition towards green economies, it has been argued that ADR mechanisms will be increasingly useful in managing environmental and sustainability disputes such as those concerning renewable energy, carbon reduction, waste management, electrification, sustainable transport and infrastructure among others⁹⁷.

ADR mechanisms play crucial role in managing specific types of environmental conflicts and problems. For example, it has been argued that negotiation plays a critical role in environmental resource management which is vital step in minimizing environmental conflicts⁹⁸. Negotiation as an ADR mechanism often involves a discussion between two or more parties with conflicting interests aiming to reach an agreement⁹⁹. Negotiation has been at the heart of environmental conflict management and has resulted in the adoption of numerous global, continental and regional instruments aimed at addressing specific environmental problems and issues including climate change, conservation of biodiversity, pollution, and the management of specific natural resources including land, forests, water and wetlands, wildlife, the blue economy among others¹⁰⁰.

⁹⁶ Ibid

⁹⁷ World Intellectual Property Organization., 'WIPO Alternative Dispute Resolution for Green Technology and Sustainability.' Available at <https://www.wipo.int/amc/en/center/specific-sectors/greentechnology-sustainability/> (Accessed on 19/01/2024)

⁹⁸ Eshragh. F., Pooyandeh. M., & Marceau. D., 'Automated Negotiation in Environmental Resource Management: Review and Assessment.' *Journal of Environmental Management.*, Volume 162, No. 1 (2015)

⁹⁹ Ibid

¹⁰⁰ International Institute for Sustainable Development., 'Negotiations.' Available at <https://enb.iisd.org/negotiations> (Accessed on 19/01/2024)

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In addition, mediation has been advanced as a vital tool in preventing and resolving environmental and natural resources conflicts¹⁰¹. It has been observed that natural resources such as land, timber, water as well as extractive resources have played an important role in igniting and prolonging conflict particularly in fragile states where management and oversight of such resources is often weak¹⁰². Mediation is seen as a viable tool in managing such conflicts by focusing on a broad range of benefits tied to natural resources, including employment opportunities, revenue, services, access and infrastructure¹⁰³. Attributes of mediation including voluntary participation and agreement, confidentiality of exchanges among parties, the search of mutually satisfactory solutions have been identified as well suited for the multi-party complex context of environmental conflicts¹⁰⁴.

Finally, arbitration can provide an avenue for the effective and efficient management of complex environmental conflicts such as those related to climate change and energy¹⁰⁵. Arbitration allows parties to select a third party with requisite knowledge and experience in such matters in order to promote effective management of their conflict¹⁰⁶. Further, due to its transnational applicability, arbitration can be effectively utilized in managing environmental conflicts involving parties from different jurisdictions¹⁰⁷. It has been observed that environmental conflicts may involve parties from different nationalities since the effects of issues such as pollution and climate change

¹⁰¹ United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Available at <https://www.unep.org/news-and-stories/press-release/mediation-can-prevent-resolve-natural-resources-disputes-new-un> (Accessed on 19/01/2024)

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Kaufman. S., 'Mediation in Environmental Disputes.' Available at <https://www.eolss.net/sample-chapters/c14/E1-40-03-03.pdf> (Accessed on 19/01/2024)

¹⁰⁵ Muigua. K., 'The Viability of Arbitration in management of Climate Change Related Disputes in Kenya' Available at <http://kmco.co.ke/wp-content/uploads/2022/04/The-Viability-of-Arbitration-inmanagement-of-Climat-Change-Related-Disputes-in-Kenya-11th-April-2022.pdf> (Accessed on 19/01/2024)

¹⁰⁶ Ibid

¹⁰⁷ Ibid

may spread across different states¹⁰⁸. Such disputes cannot be managed by national courts due to jurisdictional concerns¹⁰⁹. ADR mechanisms such as arbitration and mediation are able to promote management of such disputes since they apply across multiple jurisdictions and further guarantee enforcement of decisions¹¹⁰.

It therefore emerges that ADR techniques are viable in managing environmental conflicts. However, it has been contended that ADR processes have not been given an adequate chance within the framework of environmental conflict management¹¹¹. UNEP posits that despite their viability, ADR mechanism such as negotiation and mediation are often underutilized in the context of conflicts involving natural resources¹¹². It is also necessary to address some of the challenges inherent in ADR mechanisms such as power imbalances, enforceability challenges and lack of urgent protection measures such as injunctions in order to encourage the use of these processes in managing environmental conflicts¹¹³.

4.0 Way Forward

ADR mechanisms can promote effective and efficient management of environmental conflicts. They allow parties to enjoy autonomy over the process and outcome and have the ability to foster expeditious, cost-effective, flexible and non-complex management of disputes¹¹⁴. They also allow parties to come up with creative remedies over and above traditional remedies

¹⁰⁸ Elborough. L., 'International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change.' Available at <http://www.nzlii.org/nz/journals/NZJLEnvLaw/2017/5.pdf> (Accessed on 19/01/2024)

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

¹¹² United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit

¹¹³ Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Op Cit

¹¹⁴ Muigua. K. & Kariuki. F., 'Towards Environmental Justice in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Towards-Environmental-Justice-in-Kenya-January2015.pdf> (Accessed on 19/01/2024)

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available in litigation¹¹⁵. It is therefore necessary to embrace ADR processes in order to foster effective management of environmental conflicts.

It is also important to continuously modify the legal and institutional framework on ADR at all levels including national levels in order to enhance the uptake of these mechanisms in environmental conflicts¹¹⁶. ADR mechanisms such as mediation and arbitration have been well embraced in some kind of disputes especially those that are commercial in nature¹¹⁷. However their role in environmental conflict management is yet to be fully entrenched¹¹⁸. By continuously refining the legal and institutional framework on ADR, these mechanisms can become more utilized in managing environmental among other types of conflicts¹¹⁹.

It is also necessary for States to encourage the use of ADR mechanisms in environmental governance and conflict management¹²⁰. States play a fundamental role in environmental governance and are often responsible for formulating laws, policies and best approaches towards managing the environment¹²¹. Through this role, states and their institutions can encourage the use of ADR mechanisms in environmental governance and management¹²². For example, the Constitution of Kenya urges the state to encourage public participation in the management, protection and conservation of the environment¹²³. It has correctly been pointed out that fostering public participation which is a fundamental principle in the Environmental Justice debate involves the use of ADR processes such as

¹¹⁵ Higgs. S., 'The Potential for Mediation to Resolve Environmental and Natural Resources Disputes.' Op Cit

¹¹⁶ Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

¹¹⁷ Ibid

¹¹⁸United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit

¹¹⁹ Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

¹²⁰ Ibid

¹²¹ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

¹²² Ibid

¹²³ Constitution of Kenya., 2010., Article 69 (1) (d) Government Printer, Nairobi

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negotiation and mediation¹²⁴. Therefore by encouraging the use of ADR mechanisms in environmental governance and conflict management, the state can fulfil its obligations in respect of the environment including the need to promote public participation in the management, protection and conservation of the environment¹²⁵.

In addition, state institutions such as the Judiciary also have a role to play in promoting the use of ADR mechanisms in managing environmental conflicts. For example, in Kenya the Environment and Land Court Act¹²⁶ encourages the Environment and Land Court (ELC) to embrace the use of ADR mechanisms to manage environmental conflicts¹²⁷. The Act provides that the ELC may adopt and implement, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of Alternative Dispute Resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution¹²⁸. In addition, the Act provides that where an ADR mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled¹²⁹. The ELC can therefore foster the use of ADR mechanisms in managing environmental conflicts by referring cases to ADR. It has been argued that the ELC can adopt and implement environmental ADR by promoting supervised ADR (also referred to as court annexed ADR) or judicial referral of a dispute to an appropriate ADR process¹³⁰. Courts therefore have an important role to play in promoting the use of ADR in managing environmental conflicts.

Finally, it has been contended that the suitability of ADR mechanisms in managing environmental conflicts can be enhanced by addressing the

¹²⁴ Grad. F., 'Alternative Dispute Resolution in Environmental Law.' *Columbia Journal of Environmental Law*, Volume: 14 Issue: 1

¹²⁵ Ibid

¹²⁶ Environment and Land Court Act., No. 19 of 2011, Government Printer, Nairobi

¹²⁷ Ibid, S 20

¹²⁸ Ibid, S 20 (1)

¹²⁹ Ibid, S 20 (2)

¹³⁰ Ingonga. R. M., 'Alternative Dispute Resolution in Environmental Disputes: A Case of the Specialized Environment and Land Court in Kenya' *Journal of Conflict Management and Sustainable Development*, Volume 2 (1) (2018)

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inadequacies inherent in some ADR mechanisms such as lack of formal recognition and enforcement of outcomes¹³¹. As a result, there is a need for all countries to enact sound legal and policy frameworks for effective utilization of ADR to ensure full access to justice in all areas¹³². This will promote legitimization of ADR mechanisms thus enabling their advantages to be realized across different sectors including environmental governance¹³³. For example, in Kenya, adoption of the *Alternative Justice Systems Framework Policy*¹³⁴ is a vital step in mainstreaming ADR mechanisms and enhancing their uptake in managing a wide range of conflicts including environmental conflicts¹³⁵.

The foregoing measures among others are necessary in order to promote efficient management of environmental conflicts through ADR.

5.0 Conclusion

Environmental conflicts are a major threat to the achievement of Sustainable Development¹³⁶. These conflicts are directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development¹³⁷. It is therefore necessary to foster effective management of environmental conflicts in order to realize Sustainable Development. ADR mechanisms are ideal in managing environmental

¹³¹ Ansari. A et al., 'Alternative Dispute Resolution in Environmental and Natural Resource Disputes.' *Journal of the Indian Law Institute*, Volume 59, No.1, 2017

¹³² Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISINGALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (Accessed on 19/01/2024)

¹³³ Ibid

¹³⁴ The Judiciary of Kenya., 'Alternative Justice Systems Framework Policy.' Available at https://www.unodc.org/documents/easternafrika/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf (Accessed on 19/01/2024)

¹³⁵ Muigua. K., 'Mainstreaming Alternative Justice Systems in Africa.' Available at <https://kmco.co.ke/wp-content/uploads/2023/11/Mainstreaming-Alternative-Justice-Systems-in-Africa.pdf> (Accessed on 19/01/2024)

¹³⁶ United Nations Environment Programme., 'Environmental Cooperation and Peacebuilding.' Op Cit

¹³⁷ Muigua. K., 'Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya.' Op Cit

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conflicts. These techniques encourage participation and consensus building and can enable parties to craft creative and long-term solutions to environmental problems¹³⁸. However, despite their advantages, ADR processes have not been given an adequate chance within the framework of environmental conflict management¹³⁹. In addition, certain challenges such as power imbalances, enforceability challenges and lack of urgent protection measures such as injunctions could potentially limit the suitability of ADR mechanisms in managing environmental conflicts¹⁴⁰. It is imperative address such concerns in order to enhance management of environmental conflicts through ADR. This can be achieved through enhancing the uptake of ADR processes in environmental conflicts, strengthening the legal and institutional framework on ADR at all levels, encouraging the use of ADR mechanisms in environmental governance and management by the state and its institutions, and addressing the underlying concerns in ADR such as enforceability challenges and power imbalances¹⁴¹. Managing environmental conflicts through ADR is a noble and achievable endeavour towards Sustainable Development.

¹³⁸ Ibid

¹³⁹ Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

¹⁴⁰ Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Op Cit

¹⁴¹ Ansari. A et al., 'Alternative Dispute Resolution in Environmental and Natural Resource Disputes.' Op Cit; Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Op Cit; Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

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Abstract

Environmental, Social and Governance (ESG) has been described as a key concept in fostering sustainable, responsible and ethical investments. This paper critically examines the role of ESG in fostering sustainable investments in Africa. It argues that embracing ESG tenets can enhance sustainable, responsible and ethical investments in Africa. The paper highlights some of the factors hindering the realization of sustainable investments in Africa. It further proposes reforms aimed at adopting ESG tenets for sustainable investments in Africa.

1.0 Introduction

ESG has also been defined as a concept that seeks to achieve sustainable, responsible and ethical investment by incorporating Environmental, Social and Governance factors in corporate decision making¹. ESG integration involves incorporating environmental, social and governance indicators into investment and business decision-making processes². It has been correctly observed that the integration of the ESG criteria has become an instrument responsible for defining, planning, operationalizing and executing the actions of corporations directed at environmental prevention and preservation, in addition to social responsibility and the quality performance of their activities³.

The concept of ESG is pertinent in the sustainability agenda⁴. The rise of ESG has been necessitated by global sustainability problems including climate change, corporate corruption and financial inequality⁵. It has been pointed out

¹ Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' *Journal of Corporate Finance* 66 (2021): 101889.

² Barbosa. A., et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' *Humanities & Social Sciences Communications.*, 2023

³ Ibid

⁴ Ibid

⁵ CMS., 'Putting the 'S' in 'ESG'- a Corporate Guide.' Available at <https://cms.law/en/int/publication/social-aspect-of-esg-lexicon-of-most-important-terms-and-phrases> (Accessed on 08/01/2023)

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that ESG includes key elements around environmental and social impact, as well as how governance structures can be amended to maximize stakeholder well-being towards sustainability⁶. It incorporates Environmental factors such as climate change considerations, energy efficiency, carbon emissions, waste management and resource consumption⁷; Social factors including human rights, labour relations, employee welfare, community engagement, diversity and inclusion⁸; and Governance issues such as board diversity, transparency and internal control systems towards achieving sustainability⁹. Realizing ESG tenets is therefore necessary in order to achieve sustainability.

ESG is vital in fostering sustainable, responsible or ethical investments¹⁰. It has been argued that ESG is usually a standard and strategy used by investors to evaluate corporate behavior and future financial performance of organizations¹¹. ESG therefore stems from sustainable and responsible investments¹².

This paper critically examines the role of ESG in fostering sustainable investments in Africa. It argues that embracing ESG tenets can enhance sustainable, responsible and ethical investments in Africa. The paper highlights some of the factors hindering the realization of sustainable investments in Africa. It further proposes reforms aimed at adopting ESG for sustainable investments in Africa.

⁶ Peterdy. K., & Miller. N., 'ESG (Environmental, Social, & Governance).' Available at <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/> (Accessed on 08/01/2023)

⁷ Henisz. W, Koller. T, & Nuttall. R., 'Five Ways that ESG Creates Value.' *McKinsey Quarterly*, 2019

⁸ Ibid

⁹ Ibid

¹⁰ Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' Op Cit

¹¹ Li. T., et al., 'ESG: Research Progress and Future Prospects.' Available at <https://pdfs.semanticscholar.org/0dd4/941ebea33330210daff5f37a1c8cdd0547d7.pdf> (Accessed on 08/01/2024)

¹² Ibid

2.0 The Link between ESG and Sustainable Investment

Sustainable investing is an idea which balances traditional investing with Environmental, Social, and Governance-related (ESG) insights in order to improve long-term outcomes¹³. Sustainable investing can also refer to a range of practices in which investors aim to achieve financial returns while promoting long-term environmental or social value¹⁴. It ensures that organizations are not judged solely on short-term financial gains but on a broader picture of what and how they contribute to society¹⁵. It has been argued that investments are sustainable if their total economic, social and environmental benefits can be predicted to outweigh their total cost¹⁶. Economic sustainability of investments refers to the long-term viability of a market-based activity for all actors involved¹⁷. Social sustainability consists of effects of investments on human development, individual well-being and collective outcomes such as peace and social cohesion¹⁸. Further, environmental sustainability is achieved investment activities do not surpass the boundaries of ecological systems that support life on Earth (considering issues such as climate change, chemical pollution and freshwater use)¹⁹.

ESG is central to realizing sustainable investing²⁰. It has been argued that ESG fosters socially responsible and sustainable investments by enabling investors to incorporate their values and concerns (such as environmental and social

¹³ CFA Institute., 'What is Sustainable Investing?' Available at <https://www.cfainstitute.org/en/rpc-overview/esg-investing/sustainable-investing> (Accessed on 08/01/2024)

¹⁴ Harvard Business School., 'What is Sustainable Investing?' Available at <https://online.hbs.edu/blog/post/sustainable-investing> (Accessed on 08/01/2024)

¹⁵ Ibid

¹⁶ Organisation for Economic Co-Operation and Development., 'Africa's Sustainable Investments in Times of Global Crises.' Available at <https://www.oecd-ilibrary.org/sites/32dddc3a-en/index.html?itemId=/content/component/32dddc3a-en> (Accessed on 08/01/2024)

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid

²⁰ Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' Op Cit

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concerns) into their selection of investments instead of simply considering the potential profitability and/or risk presented by an investment opportunity²¹. ESG presents a set of non-financial performance indicators that are vital in ensuring sustainable, ethical and responsible investments²². It has been observed that demand for non-financial information has risen considerably over the past few decades in order to enhance socially responsible investment therefore challenging the traditional capital market's view which assumes that an organization's responsibility is solely to its shareholders²³. ESG enables organizations to foster sustainable investments by also seeking to address values beyond financial returns²⁴. ESG therefore promotes sustainable investing by focusing on nonfinancial dimensions of a firm's performance²⁵. It specifically relates to the impact of the company on the environment, social progress, and good governance²⁶.

It has been pointed out that the concept of ESG is usually a standard and strategy used by investors to evaluate corporate behavior and future financial performance²⁷. As an investment concept for evaluating the sustainability of organizations, the three tenets of ESG are the key factors to be considered in the process of investment analysis and decision making²⁸. In addition, the ESG tenets can help to measure the sustainability and social impact of business activities²⁹. Due to its importance in fostering sustainable investment, it has

²¹ CFI, ESG (Environmental, Social and Governance), Available at: <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-socialgovernance/> (Accessed on 08/01/2024)

²² Ibid

²³ Eccles. R., Lee. L-E., & Strohle. J., 'The Social Origins of ESG? An Analysis of Innovest and KLD.' Available at https://www.researchgate.net/profile/Judith-Strohle/publication/330732655_The_Social_Origins_of_ESG_An_Analysis_of_Innovest_and_KLD/links/5c7fc8e9458515831f895ba7/The-Social-Origins-of-ESG-An-Analysis-of-Innovest-and-KLD.pdf (Accessed on 08/01/2024)

²⁴ Ibid

²⁵ Van Duuren. E., Plantinga. A., & Scholtens. B., '. ESG Integration and the Investment Management Process: Fundamental Investing Reinvented.' *Journal of Business Ethics*, 138(3), 525-533.

²⁶ Ibid

²⁷ Li. T., et al., 'ESG: Research Progress and Future Prospects.' Op Cit

²⁸ Ibid

²⁹ Ibid

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been correctly observed that ESG factors are becoming increasingly important to investors and customers³⁰. As a result, investors are looking for companies that are socially responsible and have a positive impact on the environment and society while customers are also looking for companies that share their values and have a positive impact on the community³¹. Consequently, how companies handle ESG issues has become a major concern especially for investors, customers and other key stakeholders³².

It has been pointed out the importance of ESG is evidenced by the change in the legal and regulatory landscapes around the world to reflect the expectations of investors, customers, employees and other stakeholders³³. ESG factors now apply in many areas increasingly driving investment decisions and commercial contracts to company strategy and culture³⁴. According to the Organisation for Economic Co-operation and Development (OECD), the growth of ESG approaches by investors has been driven by private and public sector initiatives to reach the objectives of the Paris Agreement and the Sustainable Development Goals (SDGs)³⁵. This has seen the incorporation of climate transition factors among other ESG considerations into investment

³⁰ Muigua. K., 'Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses.' Available at <https://kmco.co.ke/wp-content/uploads/2024/01/Rule-of-Law-Approach-for-Inclusive-Participation-in-Environmental-Social-and-Governance-ESG-Accountability-Mechanisms-for-Climate-Resilient-Responses.pdf> (Accessed on 08/01/2024)

³¹ ESG., 'The Link Between ESG and Community Engagement: Building Stronger Relationships.' Available at <https://vakilsearch.com/blog/the-link-between-esg-and-community-engagement/> (Accessed on 08/01/2024)

³² Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2022/07/EmbracingESG-Principles-for-Sustainable-Development-in-Kenya.pdf> (Accessed on 08/01/2024)

³³ Ibid

³⁴ Sriyani. C. & Heenetigala. K., 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study.' *Business Strategy and the Environment*, No. 26 of 2017

³⁵ Organisation for Economic Co-Operation and Development., 'Environmental Social and Governance (ESG) Investing' Available at <https://www.oecd.org/finance/esg-investing.htm> (Accessed on 08/01/2024)

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decisions and the growth of what has come to be known as ESG investing as a leading form of sustainable finance for long-term value and alignment with societal values³⁶. ESG is therefore a key component of sustainable investment.

3.0 ESG and Sustainable Investment in Africa: Promises and Pitfalls

ESG tenets are vital in enhancing sustainable investment in Africa. The African Union points out that the concept of ESG is increasingly become an important factor in determining the competitiveness of businesses as they serve the society in which they operate with a critical focus on the sustainability of their activities³⁷. It further points out that Africa is not an exception to this evolving trend³⁸. The African Union further states that ESG requirements are vital in accessing finance and markets in Africa³⁹. It has been argued that a strong approach towards ESG in Africa is necessary in order to create value by laying the foundation for sustainable investing, continued government and community support, and access to investment capital and world-class partners, which will better position the continent for long-term profitability and impact⁴⁰.

It has also been argued that African organisations simply cannot afford to downplay the importance of ESG tenets⁴¹. Africa continues to face environmental, economic and social development problems including climate change, poverty, food insecurity, water scarcity, health challenges, energy crisis, environmental degradation, high debt distress risks among others

³⁶ Ibid

³⁷ African Union., 'The Environmental, Social, and Governance: An African Private Sector Study.' Available at <https://au.int/en/announcements/20230329/environmental-social-and-governance-african-private-sector-study> (Accessed on 08/01/2023)

³⁸ Ibid

³⁹ Ibid

⁴⁰ Africa 50., 'ESG & Climate.' Available at <https://www.africa50.com/our-company/esg-climate/> (Accessed on 08/01/2023)

⁴¹ PwC Kenya., 'Taking Action on your ESG Strategy - Africa.' Available at <https://www.pwc.com/ke/en/publications/taking-action-on-your-esg-strategy.html> (Accessed on 08/01/2023)

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which are major threat to the Sustainable Development agenda⁴². African organizations and Multinational Corporations (MNCs) play a major role in addressing these challenges and fostering Sustainable Development in Africa through investments in key sectors such as agriculture, health, energy, education, infrastructure among others⁴³. As a result, it has been observed that African business leaders have the opportunity to drive effective ESG strategies towards sustainability⁴⁴. African organisations can help to build trust in their societies and deliver sustained business outcomes by implementing effective ESG strategies⁴⁵. It has correctly been asserted that businesses in Africa cannot succeed if their societies fail⁴⁶.

Sustainable investments are of vital importance in Africa in light of global challenges including the climate crisis and the aftermath of the COVID-19 pandemic⁴⁷. It has been pointed out that recent global shocks have amplified investment barriers in Africa by lowering investor confidence and worsening information shortages while increasing the cost of capital in Africa more than in other regions of the world⁴⁸. For example, it has been pointed out that as result of unfavourable country credit ratings and heightened risk aversion among international investors, the costs of public and private capital are far above global averages in many African countries, especially in the renewable energy sector⁴⁹. Sustainable investments are essential to steer Africa's productive transformation towards inclusion and resilience⁵⁰. It has been

⁴² The World Bank., 'The World Bank in Africa.' Available at <https://www.worldbank.org/en/region/afr/overview> (Accessed on 08/01/2024)

⁴³ Muigua. K., 'Multinational Corporations, Investment and Natural Resource Management in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2018/11/Multinational-Corporations-Investment-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-November-2018.pdf> (Accessed on 08/01/2024)

⁴⁴ PwC Kenya., 'Taking Action on your ESG Strategy - Africa.' Op Cit

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Organisation for Economic Co-Operation and Development., 'Africa's Sustainable Investments in Times of Global Crises.' Op Cit

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

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noted that there is a growing awareness that sustainable investing can tackle the environmental, social and economic challenges in Africa and that the resulting economic growth will be sustainable, benefitting investors and African citizens in the long run⁵¹. To this end, it has been argued that integrating ESG factors into investment is particularly important for developing countries, which have limited resources to adapt to urbanization and supply side shocks in the market⁵². Adopting ESG tenets can therefore unlock sustainable investment in Africa.

ESG can help Africa realize sustainable investments. It has been pointed out that ESG considerations are taking centre-stage in all discussions of sustainability and becoming an important benchmark for funding assessments across the world⁵³. Firms in Africa can embrace ESG and incorporate its demands into their operations in order to attract critical sustainable investments⁵⁴. It has been argued that ESG considerations will have an increasingly important impact on the investment landscape in Africa⁵⁵. As a result, it has been contended that firms in Africa big and small will experience increased demands and expectations regarding how they conduct business hence the need to adopt ESG for sustainable investments in Africa⁵⁶.

⁵¹ Premji. Z., 'Sustainable Investing: Unlocking Africa's Potential.' Available at <https://www.bscapitalmarkets.com/sustainable-investing-unlocking-africansquos-potential.html> (Accessed on 08/01/2024)

⁵² Ibid

⁵³ Nunekpeku. R., 'ESG Inroads and Sustainable Investments in Africa: Promoting Compliance by Private Companies.' Available at <https://thebftonline.com/2023/04/11/esg-inroads-and-sustainable-investments-in-africa-promoting-compliance-by-private-companies/?amp=> (Accessed on 09/01/2024)

⁵⁴ Ibid

⁵⁵ International Labour Organization., 'Environmental Social Governance (ESG) and Its Implications for Enterprises in Africa.' Available at https://www.ilo.org/actemp/regions/africa/WCMS_848401/lang--en/index.htm (Accessed on 09/01/2024)

⁵⁶ Ibid

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It has been argued that Africa has immense potential to adopt ESG for sustainable investments⁵⁷. Africa Union's Agenda 2063 enshrines the ideal of a prosperous Africa, based on inclusive growth and Sustainable Development⁵⁸. Agenda 2063 seeks to achieve Sustainable Development in Africa through various strategies including fostering intra-African investments⁵⁹. Agenda 2063 presents a case for sustainable investments in Africa by advocating for corporate social and environmental investments⁶⁰.

It has further been argued that Africa can leverage on the African Continental Free Trade Area (AfCFTA) to promote sustainable investing and green transition in the continent⁶¹. AfCFTA seeks to achieve certain objectives including creating a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent⁶². It has been argued that the AfCFTA will be a game changer, creating the world's largest free trade area and a single market for goods and services worth \$3.4 trillion for more than 1.3 billion Africans⁶³. The United Nations opines that AfCFTA is appropriately designed to deepen integration, foster trade and investment, enhance the mobility of capital and labour,

⁵⁷ Organisation for Economic Co-Operation and Development., 'Africa's Sustainable Investments in Times of Global Crises.' Op Cit

⁵⁸ Africa Union., 'Agenda 2063: The Africa We Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 09/01/2024)

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ United Nations Economic Commission for Africa., 'Africa Should Leverage the AfCFTA to Promote Green Transition.' Available at <https://www.uneca.org/stories/africa-should-leverage-the-afcfta-to-promote-green-transition> (Accessed on 09/01/2024)

⁶² African Union., 'Agreement Establishing the African Continental Free Trade Area.' Available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (Accessed on 09/01/2024)

⁶³ African Economic Outlook 2023., 'Mobilizing Private Sector Financing for Climate and Green Growth in Africa.' Available at https://www.afdb.org/sites/default/files/documents/publications/afdb23-01_aeo_main_english_0602.pdf (Accessed on 09/01/2024)

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support industrialization, and the development of a dynamic services sector⁶⁴. At its full realization, the AfCFTA with the mandate of eliminating trade barriers, will be the largest free trade area in the world bringing together the 55 countries⁶⁵. It has been argued that the AfCFTA Protocol on Investment presents a unique opportunity for African countries to attract and promote investments in green sectors that support green transition⁶⁶. The Protocol provides several mechanisms for African countries to achieve green transition and sustainable investment⁶⁷. These mechanisms include promoting investment in green sectors, facilitating technology transfer, developing green investment standards and encouraging regional cooperation⁶⁸. The AfCFTA can therefore be a catalyst of sustainable investments in Africa which embrace ESG tenets.

In addition, Africa is also endowed with an abundance of natural resources which presents numerous opportunities for sustainable investment. It has been observed that with its massive deposit of oil, gas and mineral resources, Africa is the world's fastest-growing region for Foreign Direct Investment⁶⁹. The United Nations further opines that Africa is rich in natural resources ranging from crude oil, natural gas, minerals, forests and wildlife which holds the key for social and economic development in the continent⁷⁰. It asserts that measures such as sustainable investments can serve to reverse the losses from

⁶⁴ United Nations., 'Africa's Free Trade on Track, More Efforts Needed.' Available at [https://www.un.org/africarenewal/magazine/january-2023/africa%E2%80%99s-free-trade-track-moreefforts-needed#:~:text=lies%20ahead%2C%20though.-,Presently%2C%20intra%20Africa%20trade%20stands%20low%20at%20just%2014.4%25%20of,day\)%2C%20according%20to%20UNCTAD](https://www.un.org/africarenewal/magazine/january-2023/africa%E2%80%99s-free-trade-track-moreefforts-needed#:~:text=lies%20ahead%2C%20though.-,Presently%2C%20intra%20Africa%20trade%20stands%20low%20at%20just%2014.4%25%20of,day)%2C%20according%20to%20UNCTAD) (Accessed on 09/01/2024)

⁶⁵ United Nations Economic Commission for Africa., 'Africa Should Leverage the AfCFTA to Promote Green Transition.' Op Cit

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Abe. O., 'Leveraging Natural Resources for Sustainable Development in Africa.' Available at <https://www.afronomicslaw.org/2019/07/30/leveraging-natural-resources-for-sustainable-development-in-africa> (Accessed on 09/01/2024)

⁷⁰ United Nations Environment Programme., 'Is Africa's Natural Capital the Gateway to Finance Its Development?' Available at <https://www.unep.org/news-and-stories/story/africas-natural-capital-gateway-finance-its-development> (Accessed on 09/01/2024)

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natural capital to help the continent free resources that can finance implementation of development agendas⁷¹. African countries can adopt ESG for sustainable investment in their natural resources⁷². For example, it has been pointed out that Africa is seeing increased investment in renewable energy and infrastructure projects, which align with ESG goals⁷³. Solar and wind energy projects, for instance, not only address environmental concerns but also contribute to expanding access to clean energy in the region⁷⁴. Africa therefore has the potential to adopt ESG for sustainable investing.

However, adopting ESG for sustainable investing in Africa faces certain hurdles. It has been contended that the African investment reality is marked by the dominance of extractive industries, high exposure to climate change and pressing developmental needs⁷⁵. The dominance of extractive industries poses a clear obstacle to the rise of 'green' investment strategies on the continent⁷⁶. For example, investment strategies by some Multinational corporations in the extractives sector in Africa have been accused of flouting ESG requirements by resulting in environmental concerns including the extinction of biodiversity, contamination and destruction of soil and air pollution as a result of oil spillages and social challenges including gross human rights violations and land injustices⁷⁷. Such practices have had an impact on economic activities, social-cultural life and human health of the

⁷¹ Ibid

⁷² Wadhvani, H., 'Charting the ESG Landscape in Africa: Sustainable Opportunities and Challenges.' Available at <https://www.linkedin.com/pulse/charting-esg-landscape-africa-sustainable-challenges-wadhvani/> (Accessed on 09/01/2023)

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ International Labour Organization., 'Environmental Social Governance (ESG) and Its Implications for Enterprises in Africa.' Op Cit

⁷⁶ Ibid

⁷⁷ Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' Share the World Resources, 3rd October 2006, available at <http://www.stwr.org/multinationalcorporations/multinational-corporations-mnacs-beyond-theprofitmotive.html#legalrights> (Accessed on 09/01/2024)

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affected people thus hindering the attainment of Sustainable Development within the ESG framework in Africa⁷⁸.

In addition, it has been argued that there are significant barriers in the form of: poor infrastructure, weak regional infrastructure links, limited access to market information, failure of regulation, and small domestic markets hindering the adoption of ESG for sustainable investments in Africa⁷⁹. As a result, it has been argued that Africa's sustainable financing and investment gap remains small in global comparison⁸⁰. Addressing these challenges calls for the adoption of ESG principles for sustainable investment in Africa.

4.0 Way Forward

In order to adopt ESG for sustainable investment in Africa, there is need to accelerate ESG integration in investment practices⁸¹. It has been pointed out that the heightened focus on investments in Sub-Saharan Africa is certain to increase the flow of finance to the region, increasing infrastructure and benefitting its businesses and clients⁸². However, a clear, systematic approach is important for ESG integration for sustainable investment in Africa⁸³. It has been asserted that in order to remain competitive, businesses in Africa must strike the right balance between short-term focus on profitability and the long-term benefits of ESG integration to secure investment⁸⁴. It is therefore necessary for African governments to prioritise responsible and sustainable

⁷⁸ Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review* Vol. 3 (1), 2009. Pp. 111-124

⁷⁹ Premji, Z., 'Sustainable Investing: Unlocking Africa's Potential.' Op Cit

⁸⁰ International Labour Organization., 'Environmental Social Governance (ESG) and Its Implications for Enterprises in Africa.' Op Cit

⁸¹ Premji, Z., 'Sustainable Investing: Unlocking Africa's Potential.' Op Cit

⁸² Ibid

⁸³ Ibid

⁸⁴ Modise, P., 'Expert Opinion: How ESG can unlock sustainable investment for Africa.' Available at <https://environment-analyst.com/global/109676/expert-opinion-how-esg-can-unlock-sustainable-investment-for-africa#:~:text=ESG%20integration%20for%20long%2Dterm%20benefits&text=It%20is%20essential%20for%20African,practices%2C%20and%20transparent%20reporting%20mechanisms>. (Accessed on 09/01/2024)

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investments in all sectors and collaborate with private sector entities to establish stringent regulations, industry best practices, and transparent reporting mechanisms⁸⁵.

There is also need to foster access to ESG data in order enhance sustainable investment in Africa. It has observed that as investors increasingly look for ways to align their portfolios with sustainability, the need for reliable ESG data has become increasingly significant⁸⁶. In Africa, ESG considerations often go hand-in-hand with requirements such as improving communities, fostering good governance, and creating sustainable infrastructure⁸⁷. It has been contended that accurate ESG data allows investors to assess risk and make better-informed decisions about where and how to invest⁸⁸. According to OECD, limited availability of ESG data is a major issue which hinders risk assessments and mitigation strategies and increasing the cost of searching for investment opportunities⁸⁹. Lack of data also makes it difficult to measure the allocation of funds towards sustainable development and impacts⁹⁰. Enhancing access to ESG data through measures such as ESG disclosure and reporting can help foster sustainable investment towards the realization of Sustainable Development in Africa⁹¹.

ESG disclosure and reporting requirements have been identified as vital tools in adopting ESG for sustainable investment in Africa⁹². ESG reporting and

⁸⁵ Ibid

⁸⁶ How and Where to Find ESG Data to Invest in Africa., Available at <https://toum.ai/blog/how-and-where-to-find-esg-data-to-invest-in-africa> (Accessed on 09/01/2024)

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Organisation for Economic Co-Operation and Development., 'Africa's Sustainable Investments in Times of Global Crises.' Op Cit

⁹⁰ Ibid

⁹¹ African Development Bank Group., 'Africa Economic Brief - The role of ESG rating in Sustainable Development in Africa - Volume 12 | Issue 10.' Available at <https://www.afdb.org/en/documents/africa-economic-brief-role-esg-rating-sustainable-development-africa-volume-12-issue-10> (Accessed on 09/01/2023)

⁹² Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

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disclosure frameworks can help embed ESG factors in investment decisions⁹³. ESG disclosure and reporting can also enhance access to ESG information which is a key driver of investment and development policy decision making⁹⁴. African countries can therefore adopt mandatory ESG disclosure and reporting requirements which comply with relevant international treaties, ESG standards and local regulations in order to foster sustainable investments⁹⁵. In Kenya for example, the Nairobi Securities Exchange has developed an ESG Disclosure Manual to guide listed companies in Kenya on ESG disclosure and reporting⁹⁶. The ESG Manual proposes mandatory ESG disclosures for NSE listed companies to help achieve sustainable business practices⁹⁷. Embracing reporting and disclosure requirements can lead to the adoption of ESG for sustainable investment in Africa.

Further, it has been argued that there is need to need to integrate ESG clauses in Bilateral Investment Treaties (BITs) in order to realize sustainable investment in Africa⁹⁸. It has been pointed out that many BITs are incorporating ESG matters including specific provisions on the protection of the environment, climate action and Sustainable Development⁹⁹. African countries should therefore negotiate appropriately and integrate ESG clauses in BITs in order to make investments more aligned with ESG concerns such climate action, environmental governance, respect for human rights as well as

⁹³ Ibid

⁹⁴ African Development Bank Group., 'Africa Economic Brief - The role of ESG rating in Sustainable Development in Africa - Volume 12 | Issue 10.' Op Cit

⁹⁵ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

⁹⁶ Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual', available at <https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf> (Accessed on 09/01/2024)

⁹⁷ Ibid

⁹⁸ Muigua. K., 'Bilateral Investment Treaties and Environmental, Social and Governance in Africa.' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Bilateral-Investment-Treaties-and-Environmental-Social-and-Governance-in-Africa-1.pdf> (Accessed on 09/01/2024)

⁹⁹ United Nations Conference on Trade and Development., 'The International Investment Treaty Regime and Climate Action.' Available at https://unctad.org/system/files/officialdocument/diaepcbinf2022d6_en.pdf (Accessed on 09/01/2024)

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other public policy imperatives¹⁰⁰. Integrating ESG clauses in BITs can help promote sustainable, ethical and socially responsible investments in Africa¹⁰¹. Finally, it is imperative for the private sector in Africa to embrace Sustainable Development practices including green investments in order to foster the ESG agenda in the continent¹⁰². It has been argued that Africa's private sector can bolster the continent's green agenda and drive increased Gross Domestic Product (GDP), higher income per capita, and create numerous jobs for people on the continent¹⁰³. According to UNEP, there are numerous opportunities for green investments in Africa in areas such as sustainable agriculture, agribusiness, the blue economy, ecotourism, climate smart opportunities for a net zero transition including renewable energy solutions and the African voluntary carbon market¹⁰⁴. Fostering investments in these among other areas can lead to green growth in line with ESG requirements and contribute towards the attainment of the Sustainable Development goals in Africa¹⁰⁵.

Through the foregoing among other measures, adopting ESG tenets for sustainable investment in Africa will become a reality.

5.0 Conclusion

ESG is vital in fostering sustainable, responsible or ethical investments¹⁰⁶. It is usually a standard and strategy used by investors to evaluate corporate behavior and future financial performance of organizations¹⁰⁷. There is immense potential to adopt ESG tenets for sustainable investment in Africa as set out in Agenda 2063, opportunities presented by AfCFTA and the

¹⁰⁰ Ibid

¹⁰¹ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

¹⁰² United Nations Environment Programme., 'Africa's Green Business Opportunities are Abundant, UNEP Study Shows.' Available at <https://www.unep.org/news-and-stories/press-release/africas-green-business-opportunities-are-abundant-unep-study-shows> (Accessed on 09/01/2023)

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' Op Cit

¹⁰⁷ Li. T., et al., 'ESG: Research Progress and Future Prospects.' Op Cit

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abundance of natural resources in Africa¹⁰⁸. However, the adoption of ESG for sustainable investment in Africa faces several barriers in the form of: poor infrastructure, weak regional infrastructure links, limited access to market information, failure of regulation, and small domestic markets¹⁰⁹. Adopting ESG principles for sustainable investment in Africa calls for accelerating ESG integration in investment practices¹¹⁰; enhancing access to ESG data¹¹¹; embracing ESG disclosure and reporting¹¹²; integrating ESG clauses in BITs¹¹³; and embracing Sustainable Development practices in the private sector¹¹⁴. Adopting ESG tenets for sustainable investment in Africa is the way to go in order to achieve sustainability.

¹⁰⁸ International Labour Organization., 'Environmental Social Governance (ESG) and Its Implications for Enterprises in Africa.' Op Cit

¹⁰⁹ Premji. Z., 'Sustainable Investing: Unlocking Africa's Potential.' Op Cit

¹¹⁰ Ibid

¹¹¹ How and Where to Find ESG Data to Invest in Africa., Op Cit

¹¹² Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

¹¹³ Muigua. K., 'Bilateral Investment Treaties and Environmental, Social and Governance in Africa.' Op Cit

¹¹⁴ United Nations Environment Programme., 'Africa's Green Business Opportunities are Abundant, UNEP Study Shows.' Op Cit

Abating Air Pollution for a Healthy Environment

Abstract

Environmental pollution is one of the major global challenges facing humanity and a key cause of morbidity and mortality. It is one of the triple planetary crisis alongside climate change and biodiversity loss. Environmental pollution occurs in various forms including water pollution; land pollution; noise pollution; and air pollution. It has been identified as a key threat to not only the Sustainable Development agenda but also to the very existence of the humankind. Addressing this problem is therefore necessary for Sustainable Development and the good health and well-being of humanity. This paper critically discusses the problem of air pollution. It defines air pollution and examines its causes and effects. The paper argues that air pollution is a key threat to Sustainable Development and good health and well-being of humanity. It further posits that abating air pollution is necessary for the sustainability of both nature and humankind. The paper critically examines some of the measures adopted towards addressing air pollution noting to highlight their strength and weaknesses. It also suggests approaches towards abating air pollution for a healthy environment.

1.0 Introduction

Pollution has been defined as the indirect or direct alteration of the biological, thermal, physical, or radioactive properties of any medium in such a way as to create a hazard or potential hazard to human health or to the health, safety or welfare of any living species¹. In addition, the *Environmental Management and Co-ordination Act (EMCA)*² of Kenya defines pollution as any direct or indirect alteration of the physical, thermal, chemical, biological, or radio-active properties of any part of the environment by discharging, emitting, or depositing wastes so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants³. Further,

¹ United Nations Environment Programme., 'Pollution' Available at <https://leap.unep.org/en/knowledge/glossary/pollution#:~:text=The%20indirect%20or%20direct%20alteration,welfare%20of%20any%20living%20species.%20> (Accessed on 11/03/2024)

² Environmental Management and Co-Ordination Act, No. 8 of 1999, Government Printer, Nairobi

³ Ibid, S 2

environmental pollution has been defined as 'the contamination of the physical and biological components of the earth/atmosphere system to such an extent that normal environmental processes are adversely affected⁴. It can also refer to any discharge of material or energy into water, land, or air that causes or may cause acute (short-term) or chronic (long-term) detriment to the Earth's ecological balance or that lowers the quality of life⁵. It has been noted that a substance that causes pollution is known as a pollutant⁶. These substances can exist in solid, liquid, or gaseous form⁷. Pollution occurs in various forms including water pollution; land pollution; noise pollution; and air pollution⁸.

Environmental pollution has been identified as one of the major global challenges facing humanity and a key cause of morbidity and mortality⁹. Alongside climate change and biodiversity loss, pollution is among the triple planetary crisis which is a term that refers to the three main interlinked issues that humanity currently faces¹⁰. According to the World Bank, pollution is the largest environmental cause of disease and premature death¹¹. It points out that pollution causes more than nine million premature deaths, the majority of them as a result of air

⁴ Ullah, S., "A sociological study of environmental pollution and its effects on the public health Faisalabad city," *International Journal of Education and Research*, Vol. 1 No. 6 June 2013, p.2.

⁵ Coker, A.O., "Environmental Pollution: Types, Causes, Impacts and Management for the Health and SocioEconomic Well-Being of Nigeria," p.1. Available at <https://pdfs.semanticscholar.org/8e7b/a9595bab30d7ea87715533353c53f7452811.pdf> (Accessed on 11/03/2024)

⁶ Khasanova. S., & Alieva. E., 'Environmental Pollution: Types, Causes and Consequences' Available at <http://dx.doi.org/10.1051/bioconf/20236307014> (Accessed on 11/03/2024)

⁷ Ibid

⁸ Coker, A.O., "Environmental Pollution: Types, Causes, Impacts and Management for the Health and SocioEconomic Well-Being of Nigeria," Op Cit

⁹ Khasanova. S., & Alieva. E., 'Environmental Pollution: Types, Causes and Consequences' Op Cit

¹⁰ United Nations Climate Change., 'What is the Triple Planetary Crisis?' Available at <https://unfccc.int/news/what-is-the-triple-planetary-crisis#:~:text=The%20triple%20planetary%20crisis%20refers,change%2C%20pollution%20and%20biodiversity%20loss.> (Accessed on 11/03/2024)

¹¹ World Bank Group., 'Pollution' Available at <https://www.worldbank.org/en/topic/pollution> (Accessed on 11/03/2024)

pollution¹². The World Bank further notes that pollution of all types hinder development outcomes¹³. For example, air pollution, exposure to lead and other chemicals, and hazardous waste including exposure to improper e-waste disposal, causes debilitating and fatal illnesses, create harmful living conditions, and destroys ecosystems¹⁴. In addition, pollution stunts economic growth, exacerbates poverty and inequality in both urban and rural areas, and significantly contributes to climate change¹⁵. It has also been pointed out that poor people, who cannot afford to protect themselves from the negative impacts of pollution, end up suffering the most¹⁶.

According to the United Nations Environment Programme (UNEP), environmental contamination significantly contributes to non-infectious diseases like cancer and respiratory illnesses, causing approximately nine million deaths annually¹⁷. UNEP further notes that air pollution alone is responsible for nearly seven million deaths¹⁸. In addition, pollution, through air, freshwater and ocean contamination, accumulates toxic chemicals in the food chain, harming humans and animals¹⁹. Environmental pollution is therefore a threat to not only the Sustainable Development agenda but also to the very existence of the humankind²⁰. Addressing this problem is therefore necessary for Sustainable Development and the good health and well-being of humanity.

¹² Ibid

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ United Nations Environment Programme., 'Pollution and Health' Available at <https://www.unep.org/topics/chemicals-and-pollution-action/pollution-and-health> (Accessed on 11/03/2024)

¹⁸ Ibid

¹⁹ Ibid

²⁰ Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Available at <https://kmco.co.ke/wp-content/uploads/2019/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf> (Accessed on 11/03/2024)

This paper critically discusses the problem of air pollution. It defines air pollution and examines its causes and effects. The paper argues that air pollution is a key threat to Sustainable Development and good health and well-being of humanity. It further posits that abating air pollution is necessary for the sustainability of both nature and human kind. The paper critically examines some of the measures adopted towards addressing air pollution noting to highlight their strength and weaknesses. It also suggests approaches towards abating air pollution for a healthy environment.

2.0 Air Pollution: Causes and Effects

Air pollution refers to the introduction of chemicals, particulate matter, or biological materials that cause harm or discomfort to humans or other living organisms, or cause damage to the natural environment or built environment, into the atmosphere²¹. The World Health Organization (WHO) defines air pollution as the contamination of the indoor or outdoor environment by any chemical, physical or biological agent that modifies the natural characteristics of the atmosphere²². It has been noted that household combustion devices, motor vehicles, industrial facilities and forest fires are some of the common sources of air pollution²³. Further, according to UNEP, air pollution comes from many sources – from cookstoves and kerosene lamps to coal-fired power plants, vehicle emissions, industrial furnaces, wildfires, and sand and dust storms among others²⁴.

It has been asserted that air pollution is the greatest environmental threat to public health globally and accounts for an estimated seven

²¹ Sharma, S. B., Jain, S., Khirwadkar, P., & Kulkarni, S., 'The Effects of Air Pollution on the Environment and Human Health,' *Indian Journal of Research in Pharmacy and Biotechnology*, Volume 1, No. 3 (2013)

²² World Health Organization., 'Air Pollution' Available at https://www.who.int/health-topics/air-pollution#tab=tab_1 (Accessed on 12/03/2024)

²³ Ibid

²⁴ United Nations Environment Programme., 'About Air' Available at <https://www.unep.org/explore-topics/air/about-air> (Accessed on 12/03/2024)

million premature deaths every year²⁵. UNEP notes that air pollution is the most-pressing environmental health crisis of our time, responsible for an estimated seven million premature deaths every year²⁶. It further notes that approximately nine in ten people around the world breathe unclean air, which increases the risk of asthma, heart disease and lung cancer²⁷.

WHO notes that outdoor and indoor air pollution cause respiratory and other diseases and are important sources of morbidity and mortality²⁸. It further points out that the burden of disease attributable to air pollution is now estimated to be on a par with other major global health risks such as unhealthy diets and tobacco smoking²⁹. Air pollution has also been identified as a risk factor for some noncommunicable diseases such as ischemic heart disease, stroke, chronic obstructive pulmonary disease, asthma and cancer³⁰. It is estimated that almost all of the global population (approximately ninety nine per cent) breathe air that exceeds WHO guideline limits and contains high levels of pollutants, with low- and middle-income countries suffering from the highest exposures³¹. Further, according to UNEP, most recorded air pollution-linked deaths occur in developing countries, where laws are weak or not applied, vehicle emission standards are less stringent and coal power stations more prevalent³². Air pollution is therefore a major global concern especially in developing countries.

²⁵ United Nations Environment Programme., 'Pollution Action Note - Data you Need to Know' Available at <https://www.unep.org/interactives/air-pollution-note/> (Accessed on 12/03/2024)

²⁶ United Nations Environment Programme., 'Five Cities Tackling Air Pollution' Available at <https://www.unep.org/news-and-stories/story/five-cities-tackling-air-pollution> (Accessed on 12/03/2024)

²⁷ Ibid

²⁸ World Health Organization., 'Air Pollution' Op Cit

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

³² United Nations Environment Programme., 'Air Pollution Hurts the Poorest Most' Available at <https://www.unep.org/news-and-stories/story/air-pollution-hurts-poorest-most> (Accessed on 12/03/2024)

Abating Air Pollution for a Healthy Environment.

Air pollution is also linked to climate change³³. UNEP notes that air pollution is also fundamentally altering the climate, with profound impacts on the health of the planet³⁴. It has been correctly asserted that many of the drivers of air pollution (such as combustion of fossil fuels) are also sources of greenhouse gas emissions³⁵. As a result, policies to reduce air pollution, therefore, offer a win-win strategy for both climate and health, lowering the burden of disease attributable to air pollution, as well as contributing to the near- and long-term mitigation of climate change³⁶. Abating air pollution is thus a vital tool in climate change mitigation³⁷.

Air pollution is thus an undesirable phenomenon that does not only damage human health, but also hampers the planet and the economy in many ways³⁸. Abating air pollution is therefore of utmost importance for the health of humanity and nature. WHO correctly takes the position that clean air is fundamental to health³⁹. Further, it has been argued that clean air is a human right, and a necessary pre-condition for addressing climate change as well as achieving many Sustainable Development Goals (SDGs)⁴⁰. Improving our air quality will bring health, development, and environmental benefits⁴¹. The global nature of the challenge of air pollution calls for an enhanced global response in order to effectively abate the problem⁴².

³³ United Nations Environment Programme., 'About Air' Op Cit

³⁴ Ibid

³⁵ World Health Organization., 'Air Pollution' Op Cit

³⁶ Ibid

³⁷ Ibid

³⁸ United Nations Environment Programme., 'Air Pollution Hurts the Poorest Most' Op Cit

³⁹ World Health Organization., 'Air Pollution' Op Cit

⁴⁰ United Nations Environment Programme., 'Air Pollution Hurts the Poorest Most' Op Cit

⁴¹ United Nations Environment Programme., 'Pollution Action Note – Data you Need to Know' Op Cit

⁴² World Health Organization., 'Air Pollution' Op Cit

3.0 Abating Air Pollution: Progress and Challenges

The need to abate pollution is recognized under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁴³ which enshrines the right of every person to the enjoyment of the highest attainable standard of physical and mental health⁴⁴. In order to realize this right, the Covenant urges states to take relevant measures including those necessary for the improvement of all aspects of environmental and industrial hygiene⁴⁵. It has been argued that these provisions of the ICESCR recognise the right of every person to be free from all forms of pollution including air pollution⁴⁶.

In addition, the *United Nations Framework Convention on Climate Change (UNFCCC)*⁴⁷ is an international legal instrument that seeks to confront climate change by stabilizing greenhouse gas concentrations at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system⁴⁸. Achieving the objectives of the UNFCCC is also vital in abating air pollution⁴⁹. It has been correctly argued that air quality and climate change are interconnected because the chemical substances that lead to a degradation in air quality are normally co-emitted with greenhouse gases⁵⁰. Therefore, changes in one inevitably cause changes in the other⁵¹. As a result, efforts to combat climate change by avoiding or limiting greenhouse gas emissions are

⁴³ 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

⁴⁴ Ibid, article 12 (1)

⁴⁵ Ibid, article 12 (2) (b)

⁴⁶ Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit

⁴⁷ United Nations General Assembly, 'United Nations Framework Convention on Climate Change' Resolution / Adopted by the General Assembly, 20 January 1994, A/RES/48/189.

⁴⁸ Ibid, article 2

⁴⁹ United Nations Climate Change., 'Air Quality Sinks as Climate Change Accelerates' Available at <https://unfccc.int/news/air-quality-sinks-as-climate-change-accelerates#:~:text=%E2%80%9CAs%20the%20globe%20warms%2C%20wildfires,say%20WMO%20Secretary%2DGeneral%20Prof.> (Accessed on 12/03/2024)

⁵⁰ Ibid

⁵¹ Ibid

also important in tackling air pollution⁵². It is therefore necessary to achieve the objectives of the UNFCCC by combating climate change in order to simultaneously abate air pollution.

*WHO Global Air Quality Guidelines*⁵³ seek to enhance the global response to air pollution. According to the Guidelines, clean air is fundamental to health⁵⁴. The Guidelines offer quantitative health-based recommendations for air quality management, expressed as long- or short-term concentrations for a number of key air pollutants⁵⁵. According to WHO, exceedance of the air quality guideline levels is associated with major risks to public health⁵⁶. Though the Guidelines are not legally binding standards; they do provide WHO Member States with an evidence-informed tool that can shape legislation and policy on air pollution⁵⁷. Ultimately, the goal of the WHO Guidelines is to provide guidance to help reduce levels of air pollutants in order to decrease the enormous health burden resulting from exposure to air pollution worldwide⁵⁸. WHO sets out several measures that are necessary for implementation of the Guidelines including the existence and operation of air pollution monitoring systems; public access to air quality data; legally binding, globally harmonized air quality standards; and air quality management systems⁵⁹. Implementing the WHO Guidelines is therefore necessary to abate air pollution. According to the Guidelines, abatement refers to the reduction or elimination of pollution, which involves either legislative measures or technological procedures, or both⁶⁰.

⁵² Ibid

⁵³ World Health Organization., 'Global Air Quality Guidelines' Available at <https://iris.who.int/bitstream/handle/10665/345329/9789240034228-eng.pdf?sequence=1> (Accessed on 12/03/2024)

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid

Further, the United Nations General Assembly (UNGA) has recognized the human right to a clean, healthy and sustainable environment⁶¹. According to the United Nations, this right includes the right to clean air⁶². According to the United Nations, the impact of climate change, the unsustainable management and use of natural resources, the *pollution of air*, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights(Emphasis added)⁶³. It has been argued that the UNGA Resolution is a watershed moment in the fight against the triple planetary crises of climate change, biodiversity loss and pollution⁶⁴. It has also been pointed out that upholding the right to a clean, healthy, and sustainable environment is vital in protecting the planet and its people from air pollution among other environmental problems⁶⁵. It is thus imperative to safeguard the human right to a clean, healthy, and sustainable environment as part of the measures towards abating air pollution.

At a national level, the *Constitution of Kenya*⁶⁶ enshrines the right of all Kenyans to a clean and healthy environment⁶⁷. It has been noted that this right includes the right to clean air⁶⁸. Realizing the right to a clean

⁶¹ United Nations General Assembly (UNGA), 'The Human Right to a Clean, Healthy and Sustainable Environment.' UNGA Resolution 'A/76/L.75.'

⁶² Ibid

⁶³ Ibid

⁶⁴ United Nations Environment Programme., 'Advancing the Right to a Healthy Environment' Available at <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-right-healthyenvironment#:~:text=Over%20150%20countries%20have%20binding,change%2C%20biodiversity%20loss%20and%20pollution> (Accessed on 12/03/2024)

⁶⁵ Climate & Clean Air Coalition., 'UN Declares Healthy Environment - Including Clean Air - A Human Right' Available at <https://www.ccacoalition.org/news/un-declares-healthy-environment-including-clean-air-human-right> (Accessed on 12/03/2024)

⁶⁶ Constitution of Kenya, 2010., Government Printer, Nairobi

⁶⁷ Ibid, article 42

⁶⁸ United Nations General Assembly (UNGA), 'The Human Right to a Clean, Healthy and Sustainable Environment.' Op Cit

and healthy environment in Kenya as envisioned under the Constitution is therefore necessary in abating air pollution. In addition, the Constitution of Kenya gives powers to county governments to control of air pollution and noise pollution among other public nuisances⁶⁹. County governments therefore have a key role to play in abating air pollution in Kenya.

In addition, EMCA requires the Cabinet Secretary in charge of matters relating to environment and natural resources on the recommendation of the National Environment Management Authority (NEMA) to establish Air Quality Standards⁷⁰. According to EMCA, the Air Quality Standards should provide for the criteria and guidelines for air pollution control for both mobile and stationary sources⁷¹. Further, EMCA requires the Cabinet Secretary to issue Guidelines to minimize emissions of greenhouse gases and identify suitable technologies to minimize air pollution; and do all such things as appear necessary for the monitoring and controlling of air pollution⁷². Pursuant to these provisions, the *Air Quality Regulations, 2014*⁷³ were enacted. The objective of these Regulations is to provide for the prevention, control and abatement of air pollution to ensure clean and healthy ambient air⁷⁴. The Regulations further seek to ensure that there is establishment of emission standards for various sources such as mobile sources like motor vehicles and stationary sources such as industries as outlined under EMCA⁷⁵. The Regulations prohibit any person from acting in a way that directly or indirectly causes, or is likely to cause immediate or subsequent air pollution⁷⁶. They also set out several mechanisms for ensuring air quality including inspection and monitoring⁷⁷. Further, in order to ensure clean and healthy ambient air, the Regulations makes it

⁶⁹ Constitution of Kenya, 2010., Fourth Schedule, Part 2

⁷⁰ Environmental Management and Co-ordination Act, No. 8 of 1999, S 78, Government Printer, Nairobi

⁷¹ Ibid, S 78 (1) (b) (iii)

⁷² Ibid, S 78 (1) (d) & (e)

⁷³ Environmental Management and Co-ordination Act., The Environmental Management and Co-ordination (Air Quality) Regulations, 2014, Legal Notice No. 34

⁷⁴ Ibid, Regulation 4

⁷⁵ Ibid

⁷⁶ Ibid, Regulation 5 (1) (a)

⁷⁷ Ibid, Part XI

an offence to commit acts of air pollution in Kenya⁷⁸. Under the Regulations, a person who contravenes their provisions commits an offence and is liable on conviction to a fine of five hundred thousand shillings or imprisonment for a term not exceeding six months⁷⁹.

Despite the existence of laws, policies and regulations aimed at preventing air pollution, the problem continues to persist at all levels with developing countries being the most affected⁸⁰. It has been posited that developing nations have limited air quality management systems due to inadequate legislation and lack of political will, among other challenges⁸¹. In addition it has been contended that maintaining a balance between economic development and environmental management is usually a challenge in developing countries with there being no adequate investments in pollution prevention technologies⁸². Air pollution is a major threat to human health, environmental sustainability, and economic development⁸³. Improving our air quality will bring health, development, and environmental benefits⁸⁴. It is therefore necessary to abate air pollution in order to realize a healthy environment.

4.0 Way Forward

In order to abate air pollution, it is necessary to realize the right to a Clean, Healthy, and Sustainable environment⁸⁵. This right encompasses various elements including clean and balanced ecosystems, *clean air*,

⁷⁸ Ibid, Regulation 76

⁷⁹ Ibid

⁸⁰ Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit

⁸¹ Ibid

⁸² Ibid

⁸³ United Nations Environment Programme., 'Air Pollution Hurts the Poorest Most' Op Cit

⁸⁴ United Nations Environment Programme., 'Pollution Action Note - Data you Need to Know' Op Cit

⁸⁵ Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment' Available at <https://kmco.co.ke/wp-content/uploads/2023/06/Realizing-the-Right-to-a-Clean-Healthy-and-Sustainable-Environment.pdf> (Accessed on 13/03/2024)

rich biodiversity and a stable climate (Emphasis added)⁸⁶. A safe, clean, healthy and sustainable environment is considered to be integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation⁸⁷. The right to a Clean, Healthy and Sustainable Environment is an essential human right that has been equated to the right to life⁸⁸. The importance of this right has been upheld by UNGA which recognized the human right to a clean, healthy and sustainable environment⁸⁹. It has been argued that realization of the right to a Clean, Healthy, and Sustainable environment can aid in tackling environmental challenges such as pollution, climate change, and unsustainable management of natural resources⁹⁰. It is therefore necessary to realize the right to a Clean, Healthy, and Sustainable Environment in order to abate air pollution alongside other environmental problems.

In addition, there is need to strengthen air quality laws and regulations including through monitoring⁹¹. Air quality across the globe continues to deteriorate due to air pollution threatening human health and contributing to climate change and biodiversity loss⁹². In addition, it has been argued that air quality monitoring and transparent access to data is critical for humanity since it helps us understand how air pollution

⁸⁶ Zimmer K, 'The Human Right That Benefits Nature' Available at <https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature> (Accessed on 13/03/2024)

⁸⁷ Muigua. K., 'Recognising a Human Right to Safe, Healthy and Sustainable Environment.' Available at <http://kmco.co.ke/wp-content/uploads/2021/04/Recognising-a-Human-Right-to-Safe-Healthy-andSustainable-Environment-Kariuki-Muigua-1st-April-2021.pdf> (Accessed on 13/03/2024)

⁸⁸ Peter K. Waweru v Republic, Misc. Civil Application No. 118 of 2004, (2006) eKLR

⁸⁹ United Nations General Assembly (UNGA)., 'The Human Right to a Clean, Healthy and Sustainable Environment.' UNGA Resolution 'A/76/L.75.' Op Cit

⁹⁰ Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment' Op Cit

⁹¹ Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit

⁹² United Nations Environment Programme., 'How is Air Quality Measured?' Available at <https://www.unep.org/news-and-stories/story/how-air-quality-measured#:~:text=Some%20use%20lasers%20to%20scan,nitrogen%20dioxide%20and%20sulfur%20dioxide.> (Accessed on 13/03/2024)

impacts people, places and planet⁹³. Through monitoring, it is possible to identify air pollution hotspots and take targeted action to protect and improve human and environmental well-being⁹⁴. However, it has been noted that air quality monitoring is yet to be fully embraced in developing countries meaning that people may be disproportionately impacted by air pollution in such countries⁹⁵. It is therefore necessary to enhance air quality monitoring by implementing air quality laws and investing in technology and infrastructure to improve data reliability⁹⁶. Investing in technology will enable government agencies to achieve real time air pollution monitoring which can go a long way in ensuring that pollutants are kept within acceptable levels as defined by the WHO standards⁹⁷.

Further, it is imperative to fully operationalize and enhance the enforcement of laws and regulations on air pollution⁹⁸. For example, in Kenya, it has been argued that it is vital to fully operationalize the Air Quality Regulations in order to ensure clean and healthy ambient air⁹⁹. In addition, there is need for strict enforcement of compliance with the emission standards for various sources such as mobile sources including motor vehicles and stationary sources such industries as stipulated in the Air Quality Regulations and EMCA¹⁰⁰. One of the key ways that can be used to achieve this goal is effective enforcement of the polluter pays principle¹⁰¹. According to this principle, the costs of pollution should be borne by the polluter¹⁰². The aim of this principle is

⁹³ Ibid

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Muigua. K., 'Enforcing the Right to Clean and Healthy Environment in Kenya through the Polluter Pays principle' Available at <https://kmco.co.ke/wp-content/uploads/2023/02/Enforcing-the-Right-to-Clean-and-Healthy-Environment-in-Kenya-Through-the-Polluter-Pays-principle-Kariuki-Muigua-February-2023.pdf> (Accessed on 13/03/2024)

¹⁰² Ibid

to distribute the costs of pollution from governments to organisations and people that engage in acts of pollution¹⁰³. Under the *Rio Declaration on Environment and Development*¹⁰⁴, national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the *polluter should, in principle, bear the cost of pollution*, with due regard to the public interest and without distorting international trade and investment (Emphasis added)¹⁰⁵. Further, under EMCA, the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law¹⁰⁶. It is therefore necessary to implement this principle in order to ensure that organizations and persons found liable of air pollution alongside other forms of pollution bear the costs of such pollution¹⁰⁷. It has been argued that making violators bear the cost of environmental restoration will go a long way in not only guaranteeing the right to clean environment but also in achieving Sustainable Development¹⁰⁸.

Courts also have a role to play in abating air pollution at all levels¹⁰⁹. It has been pointed out that courts provide a platform for realizing access to justice which is key in enforcing human rights including the right to a Clean, Healthy, and Sustainable environment¹¹⁰. For example, in

¹⁰³ Ibid

¹⁰⁴ United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

¹⁰⁵ Ibid, Principle 16

¹⁰⁶ Environmental Management and Co-ordination Act., No. 8 of 1999, S 2, Government Printer, Nairobi

¹⁰⁷ Muigua. K., 'Enforcing the Right to Clean and Healthy Environment in Kenya through the Polluter Pays principle'

¹⁰⁸ Ibid

¹⁰⁹ Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Available at <http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-in-Safeguarding-Environmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-1.pdf> (Accessed on 13/03/2024)

¹¹⁰ Ibid

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Kenya, the Constitution grants jurisdiction to courts to enforce environmental rights through measures such as orders to prevent, stop or discontinue any act or omission that is harmful to the environment; orders to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; orders to provide compensation for any victim of a violation of the right to a clean and healthy environment among others¹¹¹. It has been argued that there is need for courts to promote the realization of the right to a clean, healthy and sustainable environment by enhancing the principles of Sustainable Development and developing sound jurisprudence in environmental matters including cases concerning air pollution¹¹². Further, it is necessary to enhance access to justice including access to courts in order to allow victims of air pollution among other environmental malpractices to realize environmental justice¹¹³.

Finally, it is of utmost importance to combat climate change¹¹⁴. It has been noted that air quality and climate change are interconnected since the chemical substances that lead to a degradation in air quality are normally co-emitted with greenhouse gases¹¹⁵. Therefore, changes in one inevitably cause changes in the other¹¹⁶. As a result, efforts to combat climate change by avoiding or limiting greenhouse gas emissions are also important in tackling air pollution¹¹⁷. According to the World Bank, air pollution and climate change are two sides of the same coin, but they are typically addressed separately¹¹⁸. It asserts that they should be tackled jointly, with a focus on protecting peoples' health particularly in low and middle-income countries in order to strengthen

¹¹¹ Constitution of Kenya, 2010, Article 70., Government Printer, Nairobi

¹¹² Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit

¹¹³ Ibid

¹¹⁴ United Nations Climate Change., 'Air Quality Sinks as Climate Change Accelerates' Op Cit

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸ World Bank Group., 'What You Need to Know About Climate Change and Air Pollution' Available at

<https://www.worldbank.org/en/news/feature/2022/09/01/what-you-need-to-know-about-climate-change-and-air-pollution> (Accessed on 13/03/2024)

human capital and reduce poverty¹¹⁹. Therefore, efforts to reduce greenhouse gas emissions provide dual benefits: of better air quality and improved health in localities and the global benefit of mitigating climate change¹²⁰. It is therefore crucial to confront climate change in order to simultaneously abate air pollution.

5.0 Conclusion

Air pollution is the most-pressing environmental health crisis of our time, responsible for an estimated seven million premature deaths every year¹²¹. Air pollution also contributes to climate change¹²². Improving our air quality will bring health, development, and environmental benefits¹²³. It is therefore necessary to abate air pollution for a healthy environment for the benefit of both humanity and nature. This can be achieved through realizing the right to a Clean, Healthy, and Sustainable Environment¹²⁴; strengthening air quality laws and regulations including through monitoring¹²⁵; full operationalization and enhancing the enforcement of laws and regulations on air pollution¹²⁶; enhancing access to environmental justice¹²⁷; and combating climate change¹²⁸. Abating air pollution for a healthy environment is the way to go towards ensuring the sustainability of our planet.

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ United Nations Environment Programme., 'Five Cities Tackling Air Pollution' Op Cit

¹²² United Nations Environment Programme., 'About Air' Op Cit

¹²³ United Nations Environment Programme., 'Pollution Action Note - Data you Need to Know' Op Cit

¹²⁴ Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment' Op Cit

¹²⁵ Muigua. K., 'Safeguarding the Environment through Effective Pollution Control in Kenya' Op Cit

¹²⁶ Ibid

¹²⁷ Muigua. K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit

¹²⁸ United Nations Climate Change., 'Air Quality Sinks as Climate Change Accelerates' Op Cit

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Abstract

This paper critically explores the need to embrace sound environmental governance in Africa. It argues that embracing sound environmental governance is an important agenda towards sustainability in Africa. The paper examines the progress made towards realizing good environmental governance in Africa. It also discusses some of the challenges facing the attainment of sound environmental governance in Africa. In addition, the paper also suggests reforms towards embracing sound environmental governance in Africa for sustainability.

1.0 Introduction

Governance refers to the fundamental question of how organisation, decisions, order and rule are achieved in heterogeneous and highly differentiated societies¹. It has been asserted that at its core, governance addresses the problem of economic and political co-ordination in social life². It has been argued that governance is one of the most important factors for ensuring effective environmental management and conservation actions³.

Environmental governance has been defined as the set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes⁴. It comprises of rules, practices, policies and institutions that shape how humans interact with the environment⁵. Environmental governance is a process that links and harmonizes policies, institutions, procedures, tools and information to allow participants (public and private sector, Non-Governmental Organizations (NGOs), local communities) to manage conflicts, seek points of consensus, make

¹ Bridge. G., & Perreault. T., 'Environmental Governance.' *A Companion to Environmental Geography.*, Blackwell Publishing Ltd, 2009

² Ibid

³ Bennett. N., & Satterfield. T., 'Environmental Governance: A Practical Framework to Guide Design, Evaluation, and Analysis.' Available at <https://onlinelibrary.wiley.com/> (Accessed on 10/01/2024)

⁴ Lemos. M.C., & Agrawal. A., 'Environmental Governance' *Annual Review of Environmental Resources.*, Volume 31, 2006, pp 297-325

⁵ Haque. M., 'Environmental Governance.' Available at https://www.researchgate.net/publication/318166768_Environmental_Governance (Accessed on 10/01/2024)

fundamental decisions, and be accountable for their actions⁶. Environmental governance can also refer to the processes of decision-making involved in controlling and managing the environment and natural resources⁷. According to the United Nations Environment Programme (UNEP), environmental governance includes policy, rules and norms that govern human behavior and it also addresses who makes decisions, how decisions are made and carried out, the scientific information needed for decision-making and how the public and major stakeholders can participate in the decision-making⁸.

It has been argued that environmental governance should be understood broadly so as to include all institutional solutions for resolving conflicts over environmental resources⁹. It has been pointed that this approach would eliminate the distinction between 'governance' and 'government' in environmental matters and help to understand why solutions not involving the state are used to respond to some environmental conflicts, and why solutions based on the central role of the state prevail in others¹⁰. To this extent, it has been asserted that 'governance' is an umbrella term for diverse forms of state and non-state political control exercised today at various policy levels against the backdrop of growing complexity in actor structures and the operating environment¹¹. The term 'governance' therefore takes in a broader range of actors and policy instruments than 'government' which is restricted to state action¹². It has correctly been pointed out that an important aspect of

⁶ Ibid

⁷ What is Environmental Governance., Available at <https://acrobat.adobe.com/id/urn:aaid:sc:EU:a6a47b07-e9e0-4590-8a49-9e55a3bb2a75> (Accessed on 10/01/2024)

⁸ United Nations Environment Programme., 'Environmental Governance.' Available at <https://www.unep.org/regions/west-asia/regional-initiatives/environmental-governance> (Accessed on 10/01/2024)

⁹ Paavola. J., 'Institutions and Environmental Governance: A Reconceptualization.' *Ecological Economics.*, Volume 63, No. 1 (2007): 93-103, p 94

¹⁰ Ibid

¹¹ Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Glenwood Publishers Limited, 2020

¹² Bell. C., 'Governance and Law: The Distinctive Context of Transitions from Conflict and its Consequences for Development Interventions.' Available at https://www.politicalsettlements.org/wp-content/uploads/2017/09/2015_BP_4_Bell_Governance-and-Law.pdf (Accessed on 10/01/2024)

governance as opposed to government, and of multi-level governance in particular, is the participation of non-state actors in decision-processes on the different levels of governance¹³. It has been suggested that good governance entails elements such as participation, rule of law, transparency, responsiveness, consensus building, equity and inclusiveness, effectiveness and efficiency, and accountability¹⁴. Sound environmental governance takes into account the role of all actors that impact the environment, including governments, NGOs, the private sector and civil society, who must all cooperate to achieve effective governance that can help humanity move to a more sustainable future¹⁵.

This paper critically explores the need to embrace sound environmental governance in Africa. It argues that embracing sound environmental governance is an important agenda towards sustainability in Africa. The paper examines the progress made towards realizing good environmental governance in Africa. It also discusses some of the challenges facing the attainment of sound environmental governance in Africa. In addition, the paper also suggests reforms towards embracing sound environmental governance in Africa for sustainability.

2.0 The Need for Sound Environmental Governance

Sound environmental governance is vital in fostering Sustainable Development¹⁶. It has correctly been pointed out that sound management of the environment and natural resources in a sustainable and transparent manner can be the engine for Sustainable Development as well as a platform for peace and justice¹⁷. It has been contended that sound environmental governance has four generalizable and distinct objectives: to be effective, to be equitable, to be responsive, and to be robust¹⁸. Effective environmental

¹³ Newig, J., & Fritsch, O., 'Environmental Governance: Participatory, Multi-Level – And Effective?' *Environmental Policy & Governance.*, Volume 19, Issue 3 (2009)

¹⁴ United Nations Environment Programme., 'Environmental Governance.' Op Cit

¹⁵ Ibid

¹⁶ Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Op Cit

¹⁷ Ibid

¹⁸ Bennett. N., & Satterfield. T., 'Environmental Governance: A Practical Framework to Guide Design, Evaluation, and Analysis.' Op Cit

governance focuses on aspects such as direction, coordination, capacity, accountability, and efficiency; equitable environmental governance engages decision-making processes and produces socioeconomic outcomes that might be characterized as: inclusive, participatory, fair, and just¹⁹; responsiveness ensures that environmental governance is adaptable both to changing environmental and social conditions and to diverse contexts²⁰; and robust environmental governance ensures functioning institutions which persist over time, maintain performance, and cope with environmental disturbances and crises²¹.

Sound environmental governance fosters environmental justice²². Environmental Justice refers to the right of every person to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making²³. It has been argued that Environmental Justice seeks to achieve the ideal of access, participation and procedural justice in environmental decision making²⁴. Environmental Justice highlights the plight of vulnerable people and communities who bear the most burden when it comes to environmental damage and seeks to give them a voice through access to environmental information and participation in environmental decision making in order to ensure sustainable and equitable development²⁵. It has been argued that sound environmental governance reflects both distributive and procedural justice concerns²⁶. Procedural justice

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

²² Paavola. J., 'Institutions and Environmental Governance: A Reconceptualization.' Op Cit

²³ Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at <https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml> (Accessed on 10/01/2024)

²⁴ Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' *WIREs Clim Change* 2014

²⁵ Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

²⁶ Paavola. J., 'Institutions and Environmental Governance: A Reconceptualization.' Op Cit

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assures those whose interests are not endorsed by a particular environmental decision that their interests can count in other decisions²⁷. It also enables affected parties to express their consent or dissent, and to maintain their dignity²⁸. Distributive justice on the other hand seeks to ensure that environmental benefits and burdens are shared fairly and in a way that does not contribute toward further marginalization of vulnerable groups, from both intra and intergenerational perspectives, within and among nations²⁹.

According to UNEP, sound environmental governance can safeguard the environment and human rights and contribute towards the achievement of all 17 United Nations Sustainable Development Goals³⁰. It further points out that there is need for appropriate legal frameworks on the global, regional, national and local level to pursue good environmental governance that will lead to a healthy and prosperous planet for all living creatures, now and in the future³¹. The need for sound environmental governance is succinctly captured in the United Nation's 2030 Agenda for Sustainable Development³². The 2030 Agenda seeks to balance the three dimensions of Sustainable Development: the economic, social and environmental³³. It urges all countries to embrace sound environmental governance in order to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change so that the planet can support the needs of the present and

²⁷ Schlosberg, D & Collins, L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' Op Cit

²⁸ Ibid

²⁹ Ibid

³⁰ United Nations Environment Programme., 'About Environmental Rights and Governance.' Available at <https://www.unep.org/explore-topics/environmental-governance/about-environmental-rights-and-governance#:~:text=In%20our%20globalized%20world%2C%20environmental,humans%20interact%20with%20the%20environment.> (Accessed on 10/01/2024)

³¹ United Nations Environment Programme., 'Environmental Governance.' Op Cit

³² United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 10/01/2024)

³³ Ibid

future generations³⁴. The 2030 Agenda embeds environmental protection in virtually all the Sustainable Development Goals (SDGs)³⁵. Realizing the 2030 Agenda for Sustainable Development is critical in fostering sound environmental governance at all levels³⁶.

The importance of sound environmental governance was also considered during the Earth Summit in 1992³⁷. The Earth Summit concluded that the concept of Sustainable Development was an attainable goal for all the people of the world, regardless of whether they were at the local, national, regional or international level³⁸. It also recognized that integrating and balancing economic, social and environmental concerns in meeting our needs is vital for sustaining human life on the planet and that such an integrated approach is possible³⁹. One of the major results of the Earth Summit was the adoption of *Agenda 21*⁴⁰ a daring program of action calling for new strategies to invest in the future to achieve overall sustainable development in the 21st century. Agenda 21 affirms that integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future⁴¹. One of the key objectives of Agenda 21 is to improve the legal and institutional capacities of countries to cope with national problems of governance and effective law-making and law-applying in the field of environment and Sustainable Development⁴².

³⁴ Ibid

³⁵ Ibid

³⁶ Ibid

³⁷ United Nations., 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.' Available at <https://www.un.org/en/conferences/environment/rio1992>

³⁸ Ibid

³⁹ Ibid

⁴⁰ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992., 'Agenda 21.' Available at https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf?_gl=1*_9uipp7*_ga*MjA2NDk2MDMxMS4xNjcxMjU5NTEw*_ga_TK9BQL5X7Z*_MTY5NDU5NjE3MS41NS4xLjE2OTQ1OTgzODUuM_C4wLjA. (Accessed on 10/01/2024)

⁴¹ Ibid, Preamble

⁴² Ibid

Another important legal instrument that was adopted during the Earth Summit which is vital in promoting sound environmental governance is the *Rio Declaration on Environment and Development*⁴³. The Declaration seeks to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving Sustainable Development⁴⁴. The Declaration stipulates that human beings are at the centre of concerns for Sustainable Development and are entitled to a healthy and productive life in harmony with nature⁴⁵. It further states that in order to achieve Sustainable Development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it⁴⁶. The Rio Declaration upholds key environmental principles that are vital in promoting sound environmental governance which include Sustainable Development, inter and intra generational equity, environmental protection, public participation, the precautionary principle and the principle of state cooperation⁴⁷. Further, in order to achieve sound environmental governance, the Rio Declaration requires states to enact effective environmental legislation⁴⁸. It also recognizes the role of women, youth and indigenous people and local communities in environmental governance⁴⁹. In particular, the Declaration provides 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 practices⁵⁰. It requires states to recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of Sustainable Development⁵¹. Implementing the principles enshrined in the Rio Declaration on Environment and Development can enhance sound environmental governance.

⁴³ United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

⁴⁴ Ibid, Principle 2

⁴⁵ Ibid, Principle 1

⁴⁶ Ibid, Principle 4

⁴⁷ Rio Declaration on Environment and Development, Op Cit

⁴⁸ Ibid, Principe 11

⁴⁹ Rio Declaration on Environment and Development, Op Cit

⁵⁰ Ibid, Principle 22

⁵¹ Ibid

From the foregoing, it emerges that sound environmental governance is a prerequisite for the attainment of Sustainable Development. It has been argued that there is need to embrace sound environmental governance in Africa in order to achieve sustainability⁵².

3.0 Embracing Sound Environmental Governance in Africa: Progress and Setbacks

Africa is endowed with a rich environment that includes natural resources ranging from arable land, water, oil, natural gas, minerals, forests and wildlife⁵³. It has been correctly pointed out that the continent holds a huge proportion of the world's natural resources, both renewables and non-renewables⁵⁴. UNEP asserts that over 70 per cent of people living in sub-Saharan Africa depend on forests and woodlands for their livelihoods⁵⁵. Further, it has been observed that land is an economic development asset as well as a socio-cultural resource in Africa⁵⁶. Although not evenly distributed, each country in Africa has a fair share of its own natural resources therefore resulting in diversity on the availability of these resources in the continent⁵⁷. These include organic natural resources ranging from forests and the forest products in general and other land based resources such as oil, gold, iron, cobalt, uranium, copper, bauxite, silver and petroleum⁵⁸. Africa is home to the world's largest arable landmass; second largest and longest rivers (the Nile and the Congo); and its second largest tropical forest⁵⁹. Further, it is estimated that the continent's proven oil reserves constitute 8 per cent of the world's

⁵² Asongu. S., & Odhiambo. N., 'Enhancing Governance for Environmental Sustainability in Sub-Saharan Africa.' *Energy Exploration & Exploitation.*, Volume 39, Issue 1 (2020)

⁵³ United Nations Environment Programme., 'Our Work in Africa.' Available at <https://www.unep.org/regions/africa/our-work-africa> (Accessed on 11/01/2024)

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit

⁵⁸ Ibid

⁵⁹ African Development Bank Group., 'Catalyzing Growth and Development through Effective Natural Resources Management.' Available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/AfDB_ANRC_BROCHURE_en.pdf (Accessed on 11/01/2023)

stock and those of natural gas amount to 7 per cent⁶⁰. In addition, minerals account for an average of 70 per cent of total African exports and about 28 per cent of Gross Domestic Product (GDP)⁶¹. Against this backdrop, sound environmental governance is vital if Africa is to reap the full benefits from its rich environment and natural resources.

It has been posited that Africa's natural resources provide a unique opportunity to foster human and economic development in the continent⁶². According to UNEP, Africa has a lot to gain in pulling together and harnessing its vast environment and natural resources to finance the development agenda towards greater prosperity; and it must also ensure that future growth and exploitation of natural resources is results-oriented, climate resilient and sustainable⁶³. On this basis, it has been argued that there is need to enhance responsible environmental stewardship in order to ensure sustainability in Africa⁶⁴. The continent has enormous potential for sustainable growth and environmental conservation⁶⁵.

According to the African Union, sustainable environmental management is fundamental to the pursuit of food security, peace, security, and stability in Africa⁶⁶. The African Union correctly opines that many African economies are heavily dependent on natural resources to fuel economic growth and development⁶⁷. For example, agriculture, forestry and fishing, mining and quarrying, and oil and natural gas are crucial contributors to the GDP of many African economies⁶⁸. In addition, it has been correctly observed that a large portion of the African population, especially the rural population, is directly

⁶⁰ Ibid

⁶¹ Ibid

⁶² African Development Bank Group., 'Catalyzing Growth and Development through Effective Natural Resources Management.' Op Cit

⁶³ United Nations Environment Programme., 'Our Work in Africa.' Op Cit

⁶⁴ African Development Bank Group., 'Catalyzing Growth and Development through Effective Natural Resources Management.' Op Cit

⁶⁵ United Nations Environment Programme., 'Our Work in Africa.' Op Cit

⁶⁶ Africa Union., 'Africa Environment and Wangari Maathai Day.' Available at <https://au.int/en/wangari-maathai-day> (Accessed on 11/01/2024)

⁶⁷ Ibid

⁶⁸ Ibid

dependent on the natural environment for their sustenance and livelihoods⁶⁹. According to Africa Union's *Agenda 2063*⁷⁰, Africa's natural resources play a critical role for vast segments of Africa's population who depend on the continent's biodiversity, forests and land for their livelihoods directly or indirectly⁷¹. Africa's natural resources also make a direct contribution to economic development through tourism, agriculture, logging among other activities⁷². Therefore, sound governance and management of the continent's natural resources is of paramount importance if the continent is to achieve the Sustainable Development agenda⁷³.

The need for sound environmental governance in Africa is captured in African Union's development blueprint *Agenda 2063*⁷⁴. Agenda 2063 enshrines the ideal of a prosperous Africa, based on inclusive growth and Sustainable Development⁷⁵. Sound environmental governance is an important item under Agenda 2063 which seeks to put in place measures to sustainably manage the continent's rich biodiversity, forests, land and waters and using mainly adaptive measures to address climate change risks⁷⁶. Among the key goals of Agenda 2063 is to foster environmentally sustainable and climate resilient economies and communities in Africa⁷⁷. Agenda 2063 seeks to achieve this goal through sound environmental governance practices including sustainable natural resource management; conservation of biodiversity, genetic resources and ecosystems; promoting sustainable consumption and production patterns in Africa; fostering water security; enhancing climate resilience and natural disasters preparedness and prevention; and embracing renewable energy in Africa⁷⁸. Realizing these targets is essential in promoting sound environmental governance in Africa.

⁶⁹ Ibid

⁷⁰ African Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 11/01/2024)

⁷¹ Ibid

⁷² Ibid

⁷³ Africa Union., 'Africa Environment and Wangari Maathai Day.' Op Cit

⁷⁴ African Union., 'Agenda 2063: The Africa we Want.' Op Cit

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

In addition, there has been adoption of legal instruments in Africa at the continental, regional and national levels aimed to guide countries in their efforts to foster sound environmental governance towards Sustainable Development. The *African Convention on the Conservation of Nature and Natural Resources*⁷⁹ aims to enhance environmental protection in Africa; 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 in Africa⁸⁰. The Convention requires states to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner⁸¹.

Further, the *Bamako Convention on the Ban of the Import to Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*⁸² seeks to foster environmental conservation in Africa by prohibiting the import of all hazardous wastes for any reason into Africa. It has been argued that the Convention is meant to ensure that even as African countries engage in development projects and international trade with countries outside the region, they do not engage in activities that adversely affect the environment⁸³. At the regional level, the *Treaty for the Establishment of the East African Community*⁸⁴ seeks to foster sound environmental governance within the East African Community (EAC). The treaty recognises that development activities may have negative impacts on the environment leading to the degradation of

⁷⁹ African Union., 'African Convention on the Conservation of Nature and Natural Resources.' Available at https://au.int/sites/default/files/treaties/41550-treaty-Charter_ConservationNature_NaturalResources.pdf (Accessed on 11/01/2024)

⁸⁰ Ibid, Article II

⁸¹ Ibid, Article III (3)

⁸² African Union., 'Bamako Convention on the Ban of the Import to Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.' Available at https://au.int/sites/default/files/treaties/7774-treaty-0015_-_bamako_convention_on_hazardous_wastes_e.pdf (Accessed on 11/01/2024)

⁸³ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

⁸⁴ East African Community., 'Treaty for the Establishment of the East African Community.' Available at https://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf (Accessed on 11/01/2024)

the environment and depletion of natural resources and that a clean and healthy environment is a prerequisite for Sustainable Development⁸⁵. It requires actions by the EAC relating to the environment to pursue certain objectives including: to preserve, protect and enhance the quality of the environment; to contribute towards the sustainability of the environment; to ensure sustainable utilisation of natural resources like lakes, wetlands, forests and other aquatic and terrestrial ecosystems; and to jointly develop and adopt water resources conservation and management policies that ensure sustenance and preservation of ecosystems⁸⁶. The Treaty also requires member states of the EAC to cooperate in the management of the environment and natural resources⁸⁷. The Treaty is therefore vital in fostering sound environmental governance within the EAC.

At the national level, the *Constitution of Kenya of Kenya*⁸⁸ for example, seeks to promote sound environmental governance. It enshrines Sustainable Development as one of the national values and principles of governance⁸⁹. It also recognizes the right to a clean and healthy environment as a fundamental human right⁹⁰. The Constitution further stipulates several obligations by the state in respect of the environment including the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits, the need to encourage public participation in the management, protection and conservation of the environment, the obligation to protect genetic resources and biological diversity and the obligation to eliminate processes and activities that are likely to endanger the environment⁹¹. The Constitution also recognizes the role of courts in promoting environmental governance and stipulates 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

⁸⁵ Ibid, Article 111

⁸⁶ Ibid

⁸⁷ Ibid, Articles 112 & 114

⁸⁸ Constitution of Kenya, 2010, Government Printer, Nairobi

⁸⁹ Ibid, Article 10 (2) (d)

⁹⁰ Ibid, Article 42

⁹¹ Ibid, Article 69

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 matter⁹². Realizing these provisions is vital in fostering sound environmental governance in Kenya.

Further, the *Environmental Management and Co-ordination Act*⁹³ establishes the legal and institutional framework for the management of the environment in Kenya. The Act upholds the right of every Kenyan to a clean and healthy environment and sets out various measures towards upholding this right including environmental planning, protection and conservation of the environment, Environmental Impact Assessment, Environmental Audit and Monitoring, environmental restoration and conservation orders and enforcement of environmental rights through courts and tribunals⁹⁴. The Act further establishes the National Environment Management Authority which has the mandate to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment⁹⁵.

As a result of the foregoing efforts, it has been observed that there has been progress towards embracing sound environmental governance in Africa⁹⁶. UNEP notes that efforts have been made towards promoting sound environmental governance in Africa through measures such as strengthening environmental legislation, use of technology in environmental enforcement, decentralization of authority to govern renewable resources such as forests, irrigation systems, and inland fisheries, criminalization of environmental offences and enhanced environmental litigation⁹⁷. In addition the *African*

⁹² Ibid, Article 70 (1)

⁹³ Environmental Management and Co-ordination Act., No. 8 of 1999, Government Printer, Nairobi

⁹⁴ Ibid

⁹⁵ Ibid, S 7 & 9

⁹⁶ United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/43943/Environmental_rule_of_law_progress.pdf?sequence=3 (Accessed on 11/01/2024)

⁹⁷ Ibid

Commission on Human and Peoples' Rights has continued to elaborate on the understanding of environment-related rights enshrined in the African Charter on Human and Peoples' Rights, including the right to a general satisfactory environment favourable to development, the right to life, and the right to cultural development and equal enjoyment of the common heritage of mankind⁹⁸.

However, despite these efforts there are several challenges hindering the realization of sound environmental governance in Africa. It has been pointed out that unsustainable exploitation of Africa's natural resources by its growing population, and the laxity by authorities to effect and implement sound regulations to tame abuse and over exploitation of these resources is creating environmental challenges⁹⁹. In addition, it has been pointed out that Africa is facing the prospect of environmental calamity in the form of the triple planetary crisis comprising of climate change, nature and biodiversity loss, and pollution and waste¹⁰⁰. Africa is currently facing pressing environmental issues which include deforestation, air pollution, water pollution, biodiversity loss and oil spills which have been attributed to poor environmental governance among other reasons¹⁰¹. According to the African Union, the unfolding phenomena of climate change, biodiversity depletion, desertification, land degradation and unsustainable use of finite natural resources remain a serious risk for Africa since they pose real impediments to achieving the SDGs and Africa's Agenda 2063¹⁰². It also notes that crises being witnessed across the continent such as droughts, armed conflicts, or other natural disasters, are exacerbated by environmental deterioration¹⁰³. It is imperative to embrace sound environmental governance in order to address the foregoing among other environmental challenges in Africa.

⁹⁸ Ibid

⁹⁹ United Nations Environment Programme., 'Our Work in Africa.' Op Cit

¹⁰⁰ United Nations Environment Programme., 'Fostering Collaboration to Address Environmental Challenges in Africa.' Available at <https://www.unep.org/news-and-stories/speech/fostering-collaboration-address-environmental-challenges-africa> (Accessed on 11/01/2024)

¹⁰¹ Nguyen. L., '5 Biggest Environmental Issues In Africa In 2023.' Available at <https://earth.org/environmental-issues-in-africa/> (Accessed on 11/01/2024)

¹⁰² Africa Union., 'Africa Environment and Wangari Maathai Day.' Op Cit

¹⁰³ Ibid

4.0 Way Forward

In order to embrace sound environmental governance in Africa, there is need to strengthen environmental rule of law¹⁰⁴. Environmental law is a collective term encompassing all aspects of the law that provide protection to the environment¹⁰⁵. It entails a set of regulatory regimes and environmental legal principles which focus on the management of specific natural resources, such as land, wildlife and biodiversity, forests, minerals, water, fisheries and coastal and marine resources¹⁰⁶. According to UNEP, environmental rule of law is central to Sustainable Development¹⁰⁷. It integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance¹⁰⁸. It has been contended that without environmental rule of law and the enforcement of legal rights and obligations, environmental governance, conservation, and protection may be arbitrary, subjective, and unpredictable¹⁰⁹. Therefore, environmental rule of law and robust institutions are vital in fostering responses to increasing environmental pressures that threaten the ecological integrity of the Earth, in a way that respects fundamental rights and principles of justice and fairness¹¹⁰. Environmental rule of law is therefore an essential tool of environmental

¹⁰⁴ United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

¹⁰⁵ Conserve Energy Future., 'What is Environmental Law: Importance and Components.' Available at <https://www.conserve-energy-future.com/environmental-law-and-itscomponents.php#:~:text=The%20two%20basic%20factors%20that,preserve%20and%20protect%20the%20environmen> (Accessed on 11/01/2024)

¹⁰⁶ Ibid

¹⁰⁷ United Nations Environment Programme., 'Promoting Environmental Rule of Law.' Available at <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law> (Accessed on 11/01/2023)

¹⁰⁸ Ibid

¹⁰⁹ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Available at <http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091064.pdf> (Accessed on 11/01/2023)

¹¹⁰ Ibid

governance¹¹¹. Strengthening environmental rule of law can promote sound environmental governance in Africa through measures such as implementation and enforcement of environmental laws, building strong environmental institutions and enhancing access to justice in environmental matters¹¹².

In addition, there is need to embrace civic engagement in environmental management¹¹³. It has been pointed out that civic engagement encompasses sharing of information between the government and the public, participation by civil society organizations and other stakeholders – including academics, businesses and media – in decision-making processes, and political action by citizens to influence the adoption and implementation of policies and laws¹¹⁴. Civic engagement in environmental matters is a dynamic process that supports inclusive, consultative and accountable decision-making and implementation¹¹⁵. The Role of civic engagement in environmental governance is succinctly captured by the *Rio Declaration on Environment and Development* which stipulates as follows:

‘Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall 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 shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and

¹¹¹ Muigua. K., ‘Strengthening Environmental Rule of Law for Sustainability.’ Available at <https://kmco.co.ke/wp-content/uploads/2023/09/Strengthening-Environmental-Rule-of-Law-for-Sustainability-pdf> (Accessed on 11/01/2024)

¹¹² Ibid

¹¹³ United Nations Environment Programme., ‘Environmental Rule of Law: Tracking Progress and Charting Future Directions.’ Op Cit

¹¹⁴ Ibid

¹¹⁵ Ibid

administrative proceedings, including redress and remedy, shall be provided.
(Emphasis added)¹¹⁶.

Principle 10 of the Rio Declaration establishes three fundamental pillars of civic engagement in environmental decision-making which are broad access to information concerning the environment that is held by public authorities; realistic and meaningful opportunities to participate in decision-making processes related to the environment; and effective access to judicial and administrative proceedings¹¹⁷. It has been correctly opined that the pillars of civic engagement including access to information and public participation can promote Sustainable Development and improve the quality of decision-making by providing decision-makers with additional, unique information on local conditions in the context of social, environmental and economic decision making¹¹⁸. In addition, public participation can also improve policy implementation and foster peace and sustainability by increasing the legitimacy of the decision-making process and, in so doing, reducing instances of conflict¹¹⁹. It has been asserted that citizen involvement in environmental decision making has been associated with several benefits which include: information and ideas on public issues; public support for planning decisions; avoidance of protracted conflicts and costly delays; reservoir of good will which can carry over to future decisions; and spirit of cooperation and trust between decision makers and the public¹²⁰. In addition, effective access to judicial and administrative proceedings is essential in fostering environmental

¹¹⁶ United Nations General Assembly., ‘Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.’ A/CONF. 151/26 (Vol.1), Principle 10

¹¹⁷ Ibid

¹¹⁸ Cerezo. L, & Garcia. G., ‘Lay Knowledge and Public Participation in Technological and Environmental Policy.’ Available at <https://scholar.lib.vt.edu/ejournals/SPT/v2n1/pdf/CEREZO.PDF> (Accessed on 11/01/2024)

¹¹⁹ Ibid

¹²⁰ Muigua. K., ‘Towards Meaningful Public Participation in Natural Resource Management in Kenya.’ Available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDSMEANINGFULPUBLICPARTICIPATION-IN-NATURAL-RESOURCEMANAGEMENT-IN-KENYA.pdf> (Accessed on 11/01/2024)

justice¹²¹. Therefore, in order to embrace sound environmental governance in Africa, there is need to enhance civic engagement through access to information, public participation, and effective access to judicial and administrative proceedings.

It is also imperative foster the role of indigenous people and indigenous knowledge in environmental conservation and management¹²². Indigenous people are often at the heart of environmental conservation efforts because conserving unique biodiversity relies on the knowledge, innovations and practices of those who live in direct contact with nature¹²³. For example, it has been pointed out that forests managed by indigenous peoples and local communities are at least as effective at maintaining forest cover as those under stricter protection regimes¹²⁴. The Rio Declaration provides 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 practices¹²⁵. It requires states to recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of Sustainable Development¹²⁶.

It has been posited that in Africa, indigenous knowledge systems such as using animal dung as manure, sighting of the new moon before planting, rain-making rituals, and planting of trees to serve as shades have helped to conserve the wetlands and the forests of most societies and are effective in promoting environmental sustainability¹²⁷. African societies have for many

¹²¹ Muigua. K., 'Realizing Environmental Justice through Litigation.' Available at <https://kmco.co.ke/wpcontent/uploads/2023/07/Realizing-Environmental-Justice-through-Litigation.pdf> (Accessed on 11/01/2024)

¹²² United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ Rio Declaration on Environment and Development, Principle 22

¹²⁶ Ibid

¹²⁷ Egeruoh-Adindu. I., 'Leveraging Indigenous Knowledge for Effective Environmental Governance in West Africa.' Available at <https://www.scirp.org/journal/paperinformation?paperid=121949#:~:text=Indigenous%20knowledge%20systems%20such%20as,effective%20in%20promoting%20environmental%20sustainability.> (Accessed on 11/01/2024)

centuries used indigenous knowledge to manage environmental issues such as water scarcity or pollution, land pollution, erosion, protection of forests, curbing overfishing, deforestation, and management of other natural resources¹²⁸. African countries can therefore leverage indigenous knowledge to foster sound environmental governance. This can be achieved through approaches such as decentralized or community-based environmental management systems¹²⁹. It has been argued that such approaches can promote sound environmental governance because of factors such as competition among subnational units, bringing decision-making closer to those affected by governance, thereby promoting higher participation and accountability and helping decision makers take advantage of more precise time- and place-specific knowledge about natural resources¹³⁰.

Finally there is need to combat climate change among other pressing environmental problems in Africa¹³¹. Africa is classified as a continent that is highly vulnerable to climate change due to several reasons including endemic poverty and high dependence on rain-fed agriculture, complex governance and institutional dimensions, limited access to capital including markets and technology, weak infrastructure, ecosystem degradation and poor management of natural resources, disasters both natural and man-made and conflicts¹³². This vulnerability is worsened by strong dependence of African economies on climate sensitive natural resources¹³³. It has been observed that climate change is having a devastating impact on the African continent creating food insecurity, stressing water resources, depleting human health,

¹²⁸ Ibid

¹²⁹ United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

¹³⁰ Ibid

¹³¹ Muigua. K., 'Reflections on Confronting Climate Change in Africa.' Available at <https://kmco.co.ke/wp-content/uploads/2023/08/Reflections-on-Confronting-Climate-Change-in-Africa.pdf> (Accessed on 11/01/2024)

¹³² Kimaro. Didas et al., 'Climate Change Mitigation and Adaptation in ECA/SADC/COMESA Region: Opportunities and Challenges.' Available at https://www.researchgate.net/publication/346628199_Climate_Change_Mitigation_and_Adaptation_in_ECASADCCOMESA_region_Opportunities_and_Challenges (Accessed on 11/01/2024)

¹³³ Ibid

displacing populations and impeding socio-economic development¹³⁴. Climate change therefore represents a major threat to Africa achieving the Sustainable Development Goals¹³⁵. Climate change is significantly impacting the environment and natural resources in Africa through intense droughts, water scarcity and increasing risk of extinction of biodiversity including plant and animal species¹³⁶. Confronting climate change alongside other environmental problems including pollution, desertification and loss of biodiversity in Africa is thus an urgent need if the continent is to realize the Sustainable Development agenda¹³⁷. African countries should therefore take urgent action to combat climate action and its impacts on the continent through measures such as embracing sound environmental governance¹³⁸. The foregoing measures among others are essential in embracing sound environmental governance in Africa.

5.0 Conclusion

Sound management of the environment and natural resources in a sustainable and transparent manner can be the engine for Sustainable Development as well as a platform for peace and justice¹³⁹. The United Nation's 2030 Agenda enshrines the need for sound environmental governance by seeking to balance the three dimensions of Sustainable Development: the economic, social and environmental¹⁴⁰. Further, the importance of sound environmental governance in Africa is set out in the African Union's development blueprint *Agenda 2063*¹⁴¹. There have been efforts towards promoting sound environmental

¹³⁴ Rao. V., & Yadav. P., 'Confronting Climate Change in Africa.' Available at <https://knowledge.insead.edu/responsibility/confronting-climate-change-africa> (Accessed on 11/01/2024)

¹³⁵ African Development Bank Group., 'Climate Change in Africa.' Available at <https://www.afdb.org/en/cop25/climate-change-africa> (Accessed on 11/01/2024)

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Muigua. K., 'Taking Urgent Action to Combat Climate Change.' Available at <https://kmco.co.ke/wp-content/uploads/2023/09/Taking-Urgent-Action-to-Combat-Climate-Change.pdf> (Accessed on 11/01/2024)

¹³⁹ Muigua. K., 'Securing Our Destiny through Effective Management of the Environment.' Op Cit

¹⁴⁰ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

¹⁴¹ African Union., 'Agenda 2063: The Africa we Want.' Op Cit

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governance in Africa through measures such as strengthening environmental legislation, use of technology in environmental enforcement, decentralization of authority to govern renewable resources such as forests, irrigation systems, and inland fisheries, criminalization of environmental offences and enhanced environmental litigation¹⁴². However, sound environmental governance in Africa continues to be threatened by environmental problems including climate change, biodiversity depletion, desertification, land degradation and unsustainable use of finite natural resources¹⁴³. It is imperative to embrace sound environmental governance in Africa in order to achieve sustainability. This can be realized through strengthening environmental rule of law¹⁴⁴; embracing civic engagement in environmental management¹⁴⁵; fostering the role of indigenous people and indigenous knowledge in environmental conservation and management¹⁴⁶; and combating climate change among other pressing environmental problems in Africa¹⁴⁷.

Embracing Sound Environmental Governance in Africa is key if the goal of Sustainability is to be attained.

¹⁴² United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

¹⁴³ Africa Union., 'Africa Environment and Wangari Maathai Day.' Op Cit

¹⁴⁴ United Nations Environment Programme., 'Environmental Rule of Law: Tracking Progress and Charting Future Directions.' Op Cit

¹⁴⁵ Ibid

¹⁴⁶ Egeruoh-Adindu. I., 'Leveraging Indigenous Knowledge for Effective Environmental Governance in West Africa.' Op Cit

¹⁴⁷ Muigua. K., 'Reflections on Confronting Climate Change in Africa.' Ibid

Mediating Natural Resource Based- Conflicts for Peace and Prosperity

Abstract

This paper critically explores the role of mediation in managing natural resource-based conflicts. It argues that mediation is an effective mechanism for managing natural resource-based conflicts. The paper discusses some of the salient attributes of mediation that makes it ideal in managing natural resource based conflicts. It also examines the progress made towards mediating natural resource-based conflicts and challenges thereof. The paper further puts forward suggestions towards enhancing the role of mediation in managing natural resource-based conflicts for peace and prosperity.

1.0 Introduction

Mediation has been described as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussions and the flow of information, and thus aiding in the process of reaching an agreement¹. Mediation has also been defined as a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences². The United Nations describes mediation as a voluntary process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements³.

Mediation is normally a continuation of the negotiation process since it arises where parties to a conflict have attempted negotiations, but have reached a deadlock⁴. Parties therefore involve a third party known as a mediator to assist

¹ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017

² JAMS Mediation Services., 'Mediation Defined: What is Mediation?' Available at <https://www.jamsadr.com/mediation-defined/> (Accessed on 20/01/2024)

³ United Nations., 'Basics of Mediation: Concepts and Definitions.' Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/Basics%20of%20Mediation.pdf> (Accessed on 20/01/2024)

⁴ Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

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them continue with the negotiations and ultimately break the deadlock⁵. A mediator does not have the power to impose a resolution, but rather facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem solving to enable the parties to reach their own agreement⁶.

Mediation is one of the processes that are commonly referred to as Alternative Dispute Resolution (ADR)⁷. These are mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes⁸. They include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others⁹. Mediation alongside other ADR mechanisms are recognized at both global and national levels. At the global level, the *Charter of the United Nations*¹⁰ encourages parties to disputes to seek solutions by negotiation, enquiry, *mediation*, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice (Emphasis added)¹¹. At a national level, the Constitution of Kenya requires courts and tribunals to promote ADR mechanisms including reconciliation, *mediation*, arbitration and TDRMs (Emphasis added)¹².

ADR mechanisms including mediation are viewed as ideal in enhancing access to justice due to their key attributes¹³. It has been argued that mediation has certain advantages which makes the process viable in managing disputes¹⁴. Its key features towards this end include informality, flexibility, efficiency, confidentiality, party autonomy and the ability to promote expeditious and

⁵ Ibid

⁶ Ibid

⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

⁸ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

⁹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹⁰ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

¹¹ Ibid, Article 33 (1)

¹² Constitution of Kenya, 2010., Article 159 (2) (c) Government Printer, Nairobi

¹³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹⁴ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

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cost effective management of disputes¹⁵. It has also the ability to preserve relationships due to its potential to address the root causes of the conflict thus negating the need for future conflict or conflict management¹⁶. In light of these advantages, it has been argued that mediation is a viable tool for managing natural resource- based conflicts for peace and prosperity¹⁷.

This paper critically explores the role of mediation in managing natural resource- based conflicts. It argues that mediation is an effective mechanism for managing natural resource based conflicts. The paper discusses some of the salient attributes of mediation that makes it ideal in managing natural resource based conflicts. It also examines the progress made towards mediating natural resource- based conflicts and challenges thereof. The paper further puts forward suggestions towards enhancing the role of mediation in managing natural resource- based conflicts for peace and prosperity.

2.0 Role of Mediation in Managing Natural Resource Based Conflicts

It has been argued that natural resource- based conflicts are prevalent all over the world as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests¹⁸. Natural resources such as land, water, forests, minerals, and oil are important sources of livelihoods, income and influence for countries and communities around the world¹⁹. However, when these resources are poorly managed or inequitably shared, or when business operations are implemented without

¹⁵ Ibid

¹⁶ Ibid

¹⁷ United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/9294/-Natural_resources_and_conflic.pdf?sequence=2&%3BisAllowed (Accessed on 20/01/2024)

¹⁸ Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Available at <https://kmco.co.ke/wp-content/uploads/2022/09/EnvironmentalConflict-Management-Institutions-and-Approaches.pdf> (Accessed on 21/01/2024)

¹⁹ ReliefWeb., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Available at <https://reliefweb.int/report/world/natural-resources-and-conflict-guide-mediation-practitioners-0#:~:text=One%20of%20the%20prerequisites%20to,by%20an%20independent%20third%20party> (Accessed on 21/01/2024)

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due consideration for context and communities, they can contribute to tensions that can escalate into violent conflict, or worsen pre-existing conflict dynamics²⁰. According to the United Nations Environment Programme (UNEP), while natural resources are key to achieving Sustainable Development, they are also increasingly acting as drivers of fragility, conflict and violence²¹. It further asserts that as the global population continues to rise, the global demand for natural resources continues to grow, and the impacts of climate change begin to materialize, and therefore competition over natural resources is set to intensify, a situation that could spiral into more natural resource based conflicts²². It has been asserted that population growth and environmental degradation are intensifying competition over already scarce resources, such as land and water, and climate change threatens to increase such competition even further²³. As a result, it has been contended that natural resources will increasingly become key drivers in a growing number of disputes, with potentially significant consequences for international, regional, and national peace and security²⁴. In addition, it has been contended that natural resource- based conflicts also are, directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development²⁵. It has been argued that natural resources have been at the heart of many international conflicts over the past decades and this situation is likely to continue in the coming years²⁶. As a result, it is imperative

²⁰ Ibid

²¹ United Nations Environment Programme., 'Environmental Cooperation and Peacebuilding.' Available at <https://www.unep.org/topics/fresh-water/disasters-and-climatechange/environment-security/environmental-cooperationand#:~:text=International%20law%2C%20environment%20and%20conflict,and%20reliance%20on%20conflict%20resources>. (Accessed on 21/01/2024)

²² Ibid

²³ ReliefWeb., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

²⁴ Ibid

²⁵ Muigua. K., 'Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/ManagingEnvironmental-Conflicts-through-Participatory-Mechanisms-for-Sustainable-Development-in-KenyaKariuki-Muigua-August-2018.pdf> (Accessed on 21/01/2024)

²⁶ International Organization for Peace Building., 'Natural Resources and Conflict: A Path to Mediation.' Available at <https://www.interpeace.org/2015/11/natural-resources-and-conflict-a-path-to-mediation/> (Accessed on 22/01/2024)

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to embrace effective management of natural resource based- conflicts in order to promote Sustainable Development.

Mediation has been advanced as an ideal mechanism in managing natural resource- based conflicts²⁷. It has been argued that mediation processes which are voluntary and consensus-based tend to lead to resolution and outcomes that are longer lasting and more sustainable than adversarial processes or otherwise imposed outcomes²⁸. In natural resource- based conflicts, sustainable outcomes are more desirable because the shared benefits of these resources often cross tribal, societal, communal, and national boundaries²⁹. Collaboration over the ownership, management, and use of such resources is therefore critical to peace and stability³⁰.

It has been argued that mediation can promote effective management of natural resource based- conflicts by fostering collaborative approaches towards management of natural resources and conflicts related to such resources³¹. Collaborative natural resources management has been defined as a partnership by which various stakeholders agree on sharing among themselves the management functions, rights and responsibilities for a territory or a set of resources³². It involves a number of processes that help establish and maintain mutually agreeable principles and practices for managing natural resources including conflict management³³. The main objective of collaborative management approaches is to manage natural resources such as lands, forests, marine areas and their products through negotiating mutually agreeable principles and practices among stakeholder and establishing ways of sharing among stakeholders the power to make

²⁷ Ibid

²⁸ ReliefWeb., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.'
Op Cit

²⁹ Ibid

³⁰ Ibid

³¹ Food and Agriculture Organization., 'An introduction to Natural Resource Conflicts, Collaborative Management and Sustainable Livelihoods.' Available at <https://www.fao.org/3/a0032e/a0032e04.htm> (Accessed on 21/01/2024)

³² Ibid

³³ Ibid

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decisions and exercise control over resource use³⁴. It has been argued that mediation can foster effective management of natural resource-based conflicts by building consensus and collaboration³⁵. Mediation can help stakeholders of natural resources to identify ways to maximize shared benefits and address common problems and challenges together³⁶. Through mediation alongside other collaborative approaches including negotiation, natural resources can be treated as a platform for cooperation that transcends religious, ideological, political, or tribal differences, which can be leveraged to tackle more challenging problems down the line³⁷. Mediation is therefore an effective mechanism for managing natural resource based conflicts due to its potential to build peace and bring people together, binding them towards the common goal of sharing resources³⁸.

The features of mediation including flexibility and party autonomy also make the process ideal in managing natural resource based conflicts³⁹. Mediation has been identified an extremely flexible approach to dispute resolution that puts a wide range of tools, techniques, and processes in the hands of the mediator and the parties⁴⁰. This flexibility provides plenty of room to bring in technical information and experts that can be seen as impartial and fair to all sides, or to use collaborative approaches to data collection, analysis, or monitoring⁴¹. It also gives parties the freedom to come up with their own creative and long-

³⁴ Ibid

³⁵ Antonia. E., & Benedikt. K., 'Negotiation and Mediation Techniques for Natural Resource Management.' Available at <https://iwrmaactionhub.org/node/1988/printable/pdf> (Accessed on 21/01/2024)

³⁶ United Nations Department of Political Affairs., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Available at <https://gsdrc.org/document-library/natural-resources-and-conflict-a-guide-for-mediation-practitioners/> (Accessed on 21/01/2024)

³⁷ Ibid

³⁸ International Organization for Peace Building., 'Natural Resources and Conflict: A Path to Mediation.' Op Cit

³⁹ Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

⁴⁰ Bennett. L., 'Mediation in Natural Resources and Land Conflicts.' Available at <https://climate-diplomacy.org/magazine/cooperation/mediation-natural-resources-and-land-conflicts> (Accessed on 21/01/2024)

⁴¹ Ibid

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term solutions to natural resource based problems⁴². In addition, attributes of mediation including voluntary participation and agreement, confidentiality of exchanges among parties, the search of mutually satisfactory solutions have been identified as well suited for the multi-party complex context of natural resource based conflicts⁴³. These features make mediation a viable tool in managing such conflicts by focusing on a broad range of benefits tied to natural resources, including employment opportunities, revenue, services, access and infrastructure⁴⁴.

Mediation can also foster effective management of natural resource- based conflicts by promoting participatory approaches towards conflict management⁴⁵. It has been pointed out that mediation can foster community involvement in the conflict management process through the use of peace committees, Non-Governmental Organisations, religious bodies, among other bodies within communities⁴⁶. This process can facilitate effective management of conflicts by addressing the root causes of such conflicts⁴⁷. Therefore, in case of environmental conflicts, mediation affords parties an opportunity to sustain or improve their relationships⁴⁸. By encouraging participation and consensus building, mediation encourages amicable management of environmental

⁴² Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

⁴³ Kaufman. S., 'Mediation in Environmental Disputes.' Available at <https://www.eolss.net/samplechapters/c14/E1-40-03-03.pdf> (Accessed on 22/01/2024)

⁴⁴ United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Available at <https://www.unep.org/news-and-stories/pressrelease/mediation-can-prevent-resolve-natural-resources-disputes-new-un> (Accessed on 22/01/2024)

⁴⁵ Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Attaining-Environmental-Justice-throughAlternative-Dispute-Resolution.pdf> (Accessed on 22/01/2024)

⁴⁶ Muigua. K., 'Natural Resource Conflicts: Addressing Inter-Ethnic Strife through Environmental Justice in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2019/09/Natural-ResourceConflictsAddressing-Inter-Ethnic-Strife-Through-Environmental-Justice-in-kenya-Kariuki-Muigua7th-September2019.pdf> (Accessed on 22/01/2024)

⁴⁷ Ibid

⁴⁸ Ibid

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conflicts and provide the basis for sustained relationships which is especially important where environmental projects are involved⁴⁹. Mediation is therefore vital in managing natural resource-based conflicts due to its ability to support the capacities of societies to manage their own conflicts⁵⁰. It fosters the participation of all parties at all levels, including the elites and grassroots towards effective management of natural resource-based conflicts⁵¹. It has been argued that mediation is a people centred and participatory process⁵². It therefore shifts focus from resources to people and encourages their participation in conflict management in a manner which respects their views⁵³. Mediation therefore fosters participatory approaches towards conflict management by encouraging community-based and collaborative approaches to resource management which enable different stakeholders to participate in decision-making in order to develop and manage their resources⁵⁴.

From the foregoing, it is evident that mediation can be effective strategy for managing natural resource-based conflicts. According to the African Union, national and trans-boundary resource dispute management and mediation mechanisms are important ways to help different parties move from a position of conflict to one of cooperation⁵⁵. It further asserts that cooperating over shared resources or common challenges can help build confidence between divided groups and maintain a degree of communication⁵⁶. Over time, this cooperation over the environment and natural resources can have important spillover effects, further binding the parties into sharing mutual benefits and

⁴⁹ Ibid

⁵⁰ International Organization for Peace Building., 'Natural Resources and Conflict: A Path to Mediation.' Op Cit

⁵¹ Ibid

⁵² Food and Agriculture Organization., 'An introduction to Natural Resource Conflicts, Collaborative Management and Sustainable Livelihoods.' Op Cit

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ African Union., 'Report of the African Union Panel of the Wise on Improving the Mediation and Resolution of Natural Resource-Related Conflicts Across Africa.' Available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/31043/AUP.pdf?sequence=1> (Accessed on 22/01/2024)

⁵⁶ Ibid

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diminishing the possibility of a return to conflict⁵⁷. Further, according to UNEP, natural resource based conflicts are often more amenable to mediation than other dispute management processes⁵⁸. UNEP points out that finding consensus and building alliances over natural resources is often easier because natural resources shape economic incentives that transcend other areas⁵⁹. In addition, it has been argued that mediation over natural resources can effectively help parties identify ways to maximize and share benefits, and ultimately unlock entrenched or zero-sum positions, allowing parties to develop cooperative and constructive relationships that can be carried over to other areas⁶⁰.

Despite its potential to foster effective management of natural resource based conflicts, it has been pointed out that mediation has not been given an adequate chance within the framework of natural resource based conflict management⁶¹. According to UNEP, despite mediation being a vital tool in preventing and resolving conflicts, it is often underutilized in the context of conflicts involving natural resources⁶². This has been attributed to several reasons including the technical nature of natural resource-based conflicts, laxity by countries to identify or act on opportunities for proactive use of mediation as a tool for conflict prevention and peacebuilding, and the political dimension of natural resource-based conflicts⁶³. It is necessary to address these concerns in order to enhance the use of mediation in managing natural resource based conflicts. It is also imperative to deal with some of the challenges inherent in mediation such as power imbalances, enforceability

⁵⁷ Ibid

⁵⁸ United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/9294/-Natural_resources_and_conflic.pdf?sequence=2&isAllowed (Accessed on 22/01/2024)

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

⁶² United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit

⁶³ United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

challenges and lack of urgent protection measures such as injunctions in order to strengthen its role in managing natural resource- based conflicts⁶⁴.

3.0 Way Forward

There is need to embrace mediation in order to foster effective management of natural resource based conflicts. It has been contended that with climate change, rapid population growth and environmental degradation placing new pressures on environmental and social systems, effectively preventing and resolving resource natural resource- based conflicts has never been more urgent⁶⁵. Mediation can be particularly effective in helping parties identify ways to maximise and share resource benefits therefore preventing and fostering effective management of natural resource- based conflicts⁶⁶.

In order to improve the practice of mediating natural resource- based conflicts, it is imperative to consider the context of the natural resource in question⁶⁷. It has been argued that each natural resource sector generates multiple forms of conflict, which require different approaches to mediation⁶⁸. As a result, it is important for the mediation process to take into account the characteristics and

⁶⁴ Muigua. K., 'Attaining Environmental Justice through Alternative Dispute Resolution.' Op Cit

⁶⁵ United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit

⁶⁶ Ibid

⁶⁷ Humphreys. M., 'Natural Resources, Conflict, and Conflict Resolution : Uncovering the Mechanisms.' Available at https://d1wqtxts1xzle7.cloudfront.net/30923495/ch_8_-_humphreys-libre.pdf?1392206230=&response-content-disposition=inline%3B+filename%3DNatural_resources_conflict_and_conflict.pdf&Expires=1705927305&Signature=Es-678uwVqTDUhnCfVqepokgpEsPjTMj55OkqsXCU8zVv6guYZwWP-ZA0SYWEgRPhkzHFnpfQSS3B4V9-wkytt3CIEh0gUG15C9xgmorrPGeQ1LQEA1e7P~rqya0h6T-CdQwIxxSSj8ePNyY8Q8tDWzcDB9PuOr5-eIHNoYc1XGewuiAg3FURjsscrctTgehuWILKkuKfu9K4yxQzi~XWvB3yFYzvsbCajtvQh9BcPEVixhn9vedLSD9SByB01Sy04CZ5X2Rf8BtfoDF73SwmsCUKehWQ-cdVhhVLDivUOhe1VfieG4-Q0mAuYsVGvW60pU3WQjL~eQnctbMwqKFO_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA (Accessed on 22/01/2024)

⁶⁸ United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

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functionality of the resource in question, together with mechanisms for dealing with uncertainties⁶⁹. It has been argued that for mediation to be effective in managing natural resource based conflicts, there is need to understand the root cause of the conflict, the interaction of natural resources with other conflict drivers, the broader political economy, and the entry-points for a mediated solution⁷⁰.

It is also necessary to enhance access and dissemination of information in order to strengthen the role of mediation in managing natural resource based conflicts⁷¹. Access to information can foster the participation of all stakeholders including the public in the mediation process⁷². It has been argued that one of the requirements for an effective mediation processes over natural resources is for all parties to have equal access to impartial scientific and technical information about the resource in dispute⁷³. Access to information has confidence building benefits and ensures effective participation of all stakeholders in the mediation process towards mutually acceptable and long lasting solutions⁷⁴.

In addition, there is need to ensure that mediation embraces collaborative approaches towards managing natural resource based conflicts⁷⁵. Collaborative approaches can help stakeholders of natural resources to identify ways to maximize shared benefits and address common problems and challenges together⁷⁶. In addition, natural resources can be treated as a platform for cooperation that transcends religious, ideological, political, or tribal differences, which can be leveraged to tackle more challenging problems

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Muigua. K., 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/Managing-Natural-Resource-Conflicts-in-Kenya-through-Negotiation-and-Mediation.pdf> (Accessed on 22/01/2024)

⁷² Ibid

⁷³ United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

⁷⁴ Ibid

⁷⁵ Antonia. E., & Benedikt. K., 'Negotiation and Mediation Techniques for Natural Resource Management.' Op Cit

⁷⁶ Ibid

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down the line⁷⁷. It has been contended that in order to effectively mediate natural resource- based conflicts, mediation should aim for collaboration over shared benefits, which can generate the trust needed to tackle other issues⁷⁸. In addition, it has been suggested that while when managing natural resource-based conflicts, mediators should try to help parties move past zero-sum, win-lose positions by identifying ways that stakeholders can maximize shared benefits and address common problems and challenges together⁷⁹. Embracing collaborative approaches can enhance the effectiveness of mediating natural resource based conflicts.

It is also vital to ensure the participation of all stakeholders in the mediation process⁸⁰. Mediation has the ability to promote effective management of natural resource based conflicts by encouraging consensus building and participatory approaches towards conflict management⁸¹. It can foster community involvement in the conflict management process through the use of peace committees, Non-Governmental Organisations, religious bodies, among other bodies within communities⁸². It is therefore necessary to embrace the participation of all stakeholders when mediating natural resource- based conflicts in order to address the root causes of conflicts and afford parties an opportunity to sustain or improve their relationships⁸³. Despite the importance of inclusivity and participation in mediating natural resource based conflicts, it has correctly been pointed out that inviting the participation of all stakeholders may prove too difficult or fragmented to produce consensus⁸⁴. Therefore, understanding which actors to include in mediation, and the potential political impacts of including some and excluding others, is

⁷⁷ Ibid

⁷⁸ United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

⁷⁹ Ibid

⁸⁰ Muigua. K., 'Managing Environmental Conflicts through Alternative Dispute Resolution.' Available at <https://kmco.co.ke/wp-content/uploads/2024/01/Managing-Environmental-Conflicts-through-Alternative-Dispute-Resolution-1.pdf> (Accessed on 22/01/2024)

⁸¹ Ibid

⁸² Ibid

⁸³ Ibid

⁸⁴ United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

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essential⁸⁵. However, ensuring consultation with a sufficiently wide set of stakeholders is crucial to establish and maintain the legitimacy of the process and foster effective mediating of natural resource based conflicts⁸⁶.

Finally, it is imperative to strengthen the legal, policy, institutional and human capacity in order to effectively mediate natural resource- based conflicts⁸⁷. It has been suggested that there is need to enhance capacity building within communities in order to develop a level-playing field that will enable less powerful stakeholders to participate equitably in a process of consensual negotiation and mediation⁸⁸. It is also important for mediators to enhance their capacity to mediate natural resource- based conflicts through education and training and seeking expert evidence in technical aspects related to natural resources⁸⁹. It is also pertinent to strengthen the legal, policy and institutional framework on mediation at all levels including national levels in order to enhance its suitability in managing natural resource based conflicts⁹⁰.

The foregoing among other measures are important towards improving the practice of mediating natural resource based conflicts for peace and prosperity.

4.0 Conclusion

Mediation is an ideal mechanism in managing natural resource- based conflicts⁹¹. It can promote effective management of natural resource based conflicts by fostering collaborative approaches towards management of natural resources and conflicts related to such resources⁹². It also gives parties

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ Muigua. K., 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation.' Op Cit

⁸⁸ Ibid

⁸⁹ United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners.' Op Cit

⁹⁰ Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

⁹¹ International Organization for Peace Building., 'Natural Resources and Conflict: A Path to Mediation.' Op Cit

⁹² Food and Agriculture Organization., 'An introduction to Natural Resource Conflicts, Collaborative Management and Sustainable Livelihoods.' Op Cit

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the freedom to come up with their own creative and long-term solutions to natural resource based problems⁹³. Despite mediation being a vital tool in preventing and resolving conflicts, it is often underutilized in the context of conflicts involving natural resources⁹⁴. It is imperative to embrace mediation in order to effectively manage natural resource based conflicts in light of growing global challenges including climate change, rapid population growth and environmental degradation⁹⁵. In order to improve the practice of mediating natural resource based conflicts, it is imperative to consider the context of the natural resource in question, enhance access and dissemination of information, embrace collaborative approaches towards managing natural resource based conflicts, ensure the participation of all stakeholders in the mediation process, and strengthen the legal, policy, institutional and human capacity on mediation at all levels⁹⁶. Mediating natural resource- based conflicts for peace and prosperity is a goal that can be achieved by all countries.

⁹³ Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit

⁹⁴ United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit

⁹⁵ United Nations Environment Programme., 'Mediation Can Prevent, Resolve Natural Resources Disputes New UN Guide Launched.' Op Cit

⁹⁶ Ibid; Muigua. K., 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation.' Op Cit; Muigua. K., 'Environmental Conflict Management Institutions and Approaches.' Op Cit; and ⁹⁶ Muigua. K., 'Managing Environmental Conflicts through Alternative Dispute Resolution.'

Placing Health at the Centre of Climate Action

Abstract

The impacts of climate change are being felt across different sectors including health. Climate change has been described as the single biggest health threat facing humanity. The paper critically discusses the link between climate change and health. It argues that climate change is a major threat to human health and well-being. It examines the impacts of climate change on human health and well-being as well as global health systems. The paper proposes measures towards placing health at the centre of climate action in order to ensure good health and well-being for all.

1.0 Introduction

Climate change has been highlighted as the most defining challenge facing humanity¹. It is a major global concern that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda². The United Nations 2030 Agenda for Sustainable Development acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve Sustainable Development³. Adverse impacts of climate change such including intense droughts, water scarcity, severe wild fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world threatening the achievement of Sustainable Development⁴. It has been pointed out that if left unchecked, climate change will undo a lot of the development progress made over the past

¹ United Nations., 'What is Climate Change?' Available at <https://www.un.org/en/climatechange/what-is-climate-change> (Accessed on 08/12/2023)

² Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

³ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 08/12/2023)

⁴ United Nations., 'What is Climate Change?' Op Cit

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years and will also provoke mass migrations that will lead to instability and wars⁵.

Due to its adverse impacts, tackling climate change has become a top policy agenda at local, national, regional and global levels⁶. The *United Nations Framework Convention on Climate Change* (UNFCCC) acknowledges the vulnerability of all countries to the effects of climate change and calls for special efforts to ease the consequences, especially in developing countries which lack the resources to do so on their own⁷. Further, Sustainable Development Goal 13 urges all countries to take urgent action to combat climate change and its impacts⁸. Climate action is being accelerated across the world with countries embracing adaptation and mitigation techniques towards confronting climate change⁹. Adaptation entails adjustments in ecological, social or economic systems in response to actual or expected climatic stimuli and their effects¹⁰. It refers to changes in processes, practices and structures to moderate potential damages or to benefit from opportunities associated with climate change¹¹. Adaptation techniques can range from building flood defences, setting up early warning systems for cyclones,

⁵ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at <https://www.un.org/sustainabledevelopment/climate-change/> (Accessed on 08/12/2023)

⁶ United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at <https://www.un.org/en/desa/forum-climatechangeandscience-and-technology-innovation> (Accessed on 08/12/2023)

⁷ United Nations Framework Convention on Climate Change., United Nations, 1992., Available at https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf (Accessed on 08/12/2023)

⁸ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' SDG 13, Op Cit

⁹ Muigua. K., 'Taking Urgent Action to Combat Climate Change.' Available at <https://kmco.co.ke/wp-content/uploads/2023/09/Taking-Urgent-Action-to-Combat-Climate-Change.pdf> (Accessed on 08/12/2023)

¹⁰ United Nations Climate Change., 'Adaptation and Resilience.' Available at <https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/introduction#:~:text=Loss%20and%20damage%20arising%20from,forest%20degradation%2C%20loss%20of%20biodiversity> (Accessed on 08/12/2023)

¹¹ Ibid

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switching to drought-resistant crops, to redesigning communication systems, business operations and government policies¹². Climate change mitigation involves reducing greenhouse gas emissions and stopping the problem of climate change from growing¹³. It involves approaches such as embracing renewable sources of energy including solar, wind and hydro power; adopting climate smart agricultural practices; fostering green transport and infrastructure and promoting sustainable waste management¹⁴. Mitigation envisages transforming key sectors of the economy including energy, industry, transport, food, agriculture and forestry systems in order to reduce greenhouse gas emissions and limit global temperature rise¹⁵.

The impacts of climate change are being felt across different sectors including health. According to the United Nations, climate change is the single biggest health threat facing humanity¹⁶. As a result, it has been argued that there is need place health at the centre of climate action¹⁷.

The paper critically discusses the link between climate change and health. It argues that climate change is a major threat to human health and well-being. It examines the impacts of climate change on human health and well-being as well as global health systems. The paper proposes measures towards placing health at the centre of climate action in order to ensure good health and well-being for all.

2.0 Climate Change and Health

According to the United Nations, the impacts of climate change are already harming health, through air pollution, diseases, extreme weather events,

¹² Ibid

¹³ United Nations Climate Change., 'Introduction to Mitigation.' Available at <https://unfccc.int/topics/introduction-to-mitigation> (Accessed on 08/12/2023)

¹⁴ Ibid

¹⁵ United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Op Cit

¹⁶ United Nations., 'Causes and Effects of Climate Change.' Available at <https://www.un.org/en/climatechange/science/causes-effects-climate-change#:~:text=Climate%20change%20is%20the%20single,grow%20or%20find%20sufficient%20food.> (Accessed on 08/12/2023)

¹⁷ Ibid

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forced displacement, pressures on mental health, and increased hunger and poor nutrition in places where people cannot grow or find sufficient food¹⁸. The World Health Organization (WHO) also identifies climate change as a fundamental threat to human health¹⁹. According to WHO, climate change affects the physical environment as well as all aspects of both natural and human systems – including social and economic conditions and the functioning of health systems²⁰. WHO further asserts that climate change is a threat multiplier, undermining and potentially reversing decades of health progress across the world²¹. It has rightly been pointed out that as climatic conditions change, more frequent and intensifying weather and climate events are observed, including severe storms, extreme heat, floods, droughts and wildfires²². WHO points out that these weather and climate hazards affect health both directly and indirectly, increasing the risk of deaths, noncommunicable diseases, the emergence and spread of infectious diseases, and health emergencies²³. Climate change is therefore a threat health to human health and well-being since it affects the food we eat, the water we drink, the air we breathe, and the weather we experience²⁴.

It has been argued that as the global climate crisis worsens, its devastating impacts on human health and well-being will also accelerate²⁵. Climate change is increasing heat-related illnesses and deaths; changing the patterns of infectious disease transmission, making deadly disease outbreaks and

¹⁸ Ibid

¹⁹ World Health Organization., 'Climate Change and Health.' Available at <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> (Accessed on 08/12/2023)

²⁰ Ibid

²¹ Ibid

²² Ibid

²³ Ibid

²⁴ United States Environmental Protection Agency., 'Climate Impacts on Human Health.' Available at <https://climatechange.chicago.gov/climate-impacts/climate-impacts-human-health#:~:text=Climate%20change%20increases%20the%20risk,or%20liver%20and%20kidney%20damage> (Accessed on 08/12/2023)

²⁵ The World Bank., 'Health and Climate Change.' Available at [https://www.worldbank.org/en/topic/health/brief/health-and-climate-change#:~:text=This%20is%20critical%20as%20the,gas%20\(GHG\)%20emissions%20globally](https://www.worldbank.org/en/topic/health/brief/health-and-climate-change#:~:text=This%20is%20critical%20as%20the,gas%20(GHG)%20emissions%20globally) (Accessed on 08/12/2023)

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pandemics more likely; worsening maternal and child health outcomes; and intensifying health impacts from extreme weather events such as floods, droughts, wildfires, and windstorms²⁶. Further, it has been pointed out that climate shocks and growing stresses such as changing temperature and precipitation patterns, drought, floods and rising sea levels contribute to environmental degradation and affect social determinants of physical and mental health²⁷. It has been argued that all aspects and determinants of health are affected by climate change, from clean air, water and soil to food systems and livelihoods²⁸. Climate change is rapidly affecting access to basic human needs including food, safe drinking water and sanitation, and clean air therefore affecting both physical and mental health²⁹. Climate change is therefore affecting health through direct impacts such as heat waves, droughts, heavy storms, and sea-level rise, and indirect impacts including vector-borne and airways diseases, food and water insecurity, undernutrition, and forced displacements³⁰.

Climate change is also affecting global health systems. It has been pointed out that the climate crisis exerts significant strains on health systems, simultaneously increasing demand for health services whilst also impairing the system's ability to respond³¹. Further, according to WHO, climate change is impacting the health workforce and infrastructure, reducing capacity to provide universal health coverage (UHC)³².

From the foregoing, it is evident that climate change is major threat to health. The WHO projects that between the years 2030 and 2050, climate change is expected to cause approximately 250, 000 additional deaths per year, from health problems such as undernutrition, malaria, diarrhoea and heat stress

²⁶ Ibid

²⁷ World Health Organization., 'Climate Change and Health.' Op Cit

²⁸ Ibid

²⁹ The World Bank., 'Health and Climate Change.' Op Cit

³⁰ Pan American Health Organization., 'Climate Change and Health.' Available at <https://www.paho.org/en/topics/climate-change-and-health> (Accessed on 08/12/2023)

³¹ The World Bank., 'Health and Climate Change.' Op Cit

³² World Health Organization., 'Climate Change and Health.' Op Cit

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alone³³. It further estimates that the direct damage costs to health as result of climate change (excluding costs in health-determining sectors such as agriculture and water and sanitation) to be between US\$ 2–4 billion per year by 2030³⁴. It has rightly been pointed out that the severity of health risks as a result of climate change will depend on the ability of public health and safety systems to address or prepare for these changing threats, as well as factors such as an individual's behavior, age, gender, and economic status³⁵. It has been argued that people in developing countries may be the most vulnerable to health risks as a result of climate change³⁶. The WHO also asserts that areas with weak health infrastructure mostly in developing countries will be the least able to cope with health risks associated with climate change without assistance to prepare and respond³⁷.

Placing health at the centre of climate action is therefore an urgent concern. If left unaddressed, the climate crisis threatens to undo years of progress in development, global health and poverty reduction, and to further widen existing health inequalities between and within populations³⁸. It also severely jeopardizes the realization of UHC in various ways, including by compounding the existing burden of disease and by exacerbating existing barriers to accessing health services, often at the times when they are most needed³⁹. In addition, it has been asserted that the negative health effects of climate change could drive nearly 40 million people globally into extreme poverty by the year 2030⁴⁰. It is therefore necessary for all countries to place health at the centre of climate action.

³³ Ibid

³⁴ Ibid

³⁵ United States Environmental Protection Agency., 'Climate Impacts on Human Health.' Op Cit

³⁶ Ibid

³⁷ World Health Organization., 'Climate Change and Health.' Op Cit

³⁸ Ibid

³⁹ Ibid

⁴⁰ The World Bank., 'Impact of Climate Change on Health: The Cost of Inaction.' Available at <https://www.worldbank.org/en/news/video/2023/11/30/health-impacts-of-climate-change> (Accessed on 08/12/2023)

3.0 Placing Health at the Centre of Climate Action: Progress and Setbacks

The right to health is at the heart of the United Nation's 2030 Agenda for Sustainable Development⁴¹. SDG 3 aims to ensure health lives and promote well-being for all at all ages⁴². SDG 3 makes a bold commitment to end the epidemics of AIDS, tuberculosis, malaria and other communicable diseases by 2030⁴³. It also aims to achieve universal health coverage, and provide access to safe and affordable medicines and vaccines for all among other targets⁴⁴. SDG 3 acknowledges threats to the climate and the environment as key determinants in achieving good health and well-being for all under the Sustainable Development agenda⁴⁵. It has been pointed out that the 2030 Agenda for Sustainable Development provides an opportunity to address health, human rights, humanitarian responses, climate change and other development challenges in a more integrated manner than ever before⁴⁶. The United Nations Development Programme (UNDP) urges countries to embrace integrated development solutions to addressing the links between health, environmental degradation and climate change⁴⁷.

It has been pointed out that countries are placing health at the centre of climate action by incorporating the themes and targets of SDG 3 in their Nationally Determined Contributions (NDCs) envisaged under the Paris Agreement⁴⁸. Many countries through their NDCs are increasingly prioritising SDG 3 targets such as ending epidemics and communicable diseases, fostering access to Universal Health Care and medicines by linking them to climate-induced

⁴¹ United Nations., 'Transforming our World: the 2030 Agenda for Sustainable Development.' Op Cit

⁴² Ibid, Sustainable Development Goal 3

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ United Nations Development Programme., 'UNDP Support to the Implementation of Sustainable Development Goal 3.' Available at <https://www.undp.org/sites/g/files/zskgke326/files/publications/SDG-3%20Health.pdf> (Accessed on 08/12/2023)

⁴⁷ Ibid

⁴⁸ United Nations., 'Discussion on SDG and NDC Implementation: Country Trends and Examples from the NDC Partnership.' Available at https://www.un.org/sites/un2.un.org/files/technical_brief_ndc_synergies_confere_nce.pdf (Accessed on 08/12/2023)

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health risks prevention, contingency health strategy development, and communicable diseases prevention as key strategies for climate action⁴⁹. Climate change adaptation actions now include those prioritizing health and SDG 3 such as enhancing vaccination and prevention against water and vector borne diseases, and increasing access to clean drinking water; increasing health facilities; and building of infrastructure that protects against heat such as ventilation or shaded areas⁵⁰.

At the regional level, climate change has been identified as a key threat to health in Africa. It has been argued that African countries will suffer health consequences related to the effects of climate change since their people are among the most vulnerable to climatic change in the world⁵¹. This vulnerability is due in part to existing problems of poverty, weak institutions and armed conflict in the Continent which limit the capacity of African countries to deal with the additional health problems posed by climate change⁵². The impacts of climate change on health in Africa are manifested through health problems including malnutrition, Neglected Tropical Diseases (NTDs), diarrhoea, malaria, and meningitis⁵³. These diseases have been identified as climate sensitive and their impacts are likely to worsen in light of the growing climate crisis in Africa⁵⁴.

⁴⁹ Ibid

⁵⁰ Gonzales-Zuniga., 'SCAN (SDG & Climate Action Nexus) tool: Linking Climate Action and the Sustainable Development Goals.' Available at https://ambitiontoaction.net/wp-content/uploads/2018/10/Methods_note_final.pdf (Accessed on 08/12/2023)

⁵¹ Climate for Development-Africa. Programme., 'Climate Change and Health in Africa: Issues and Options.' Available at https://archive.uneca.org/sites/default/files/PublicationFiles/policy_brief_12_climate_change_and_health_in_africa_issues_and_options.pdf (Accessed on 08/12/2023)

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

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In light of the foregoing concerns, Africa Union's *Agenda 2063* identifies climate change as key threat to Sustainable Development in Africa⁵⁵. It seeks to foster environmentally sustainable and climate resilient economies and communities in Africa across all sectors including health⁵⁶. *Agenda 2063* also seeks to expand access to quality health care services in Africa⁵⁷. It further posits that by the year 2063, every citizen in Africa will have full access to affordable and quality health care services, universal access to sexual and reproductive health and rights information, and these services will be available to all women, including young women, adolescents, women with disability, those living with AIDS and all vulnerable groups⁵⁸. It also seeks to combat diseases and illnesses prevalent in the continent including HIV/AIDS, Malaria and Tuberculosis⁵⁹. Achieving the health targets envisaged under *Agenda 2063* requires placing health at the centre of climate action.

In addition, the *Africa Health Strategy* seeks to realize an integrated, inclusive and prosperous Africa free from its heavy burden of disease, disability and premature deaths⁶⁰. The strategy seeks to achieve this vision by strengthening health systems performance, increasing investments in health, improving equity and addressing social determinants of health to reduce priority disease burdens⁶¹. It also identifies strategic approaches required to achieve its vision which include sustainable improvement in health system performance, leadership and good governance, health financing, expanding social protection to address equity, prioritizing human resources for health, enhancing access to essential medicines, promoting commodity security, strengthening supply systems, and fostering health research and innovation⁶². It has been argued that African governments, coordinating bodies, and other

⁵⁵ Africa Union., 'Agenda 2063: The Africa we Want.' Available at https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 08/12/2023)

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Africa Union., 'Africa Health Strategy 2016 - 2030.' Available at https://au.int/sites/default/files/documents/24098-au_ahs_strategy_clean.pdf (Accessed on 08/12/2023)

⁶¹ Ibid

⁶² Ibid

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organisations need to address the impact of climate change on health in Africa in order to achieve the health targets of the Continent including those set out under the Africa Health Strategy⁶³.

The *African Union Climate Change and Resilient Development Strategy and Action Plan* also asserts that the realization of Africa's Agenda 2063 cannot be possible without proactive collective Continental efforts aimed at addressing the impacts and encumbrances of climate change, which hampers Africa's integration and development⁶⁴. It acknowledges the effects of climate change on health in Africa⁶⁵. For example, the Strategy posits that a substantial increase in the magnitude of heat waves is projected for most of Africa, with potential effects for health and agriculture⁶⁶. It further asserts that there are increasing climate change threats for ecosystems, biodiversity, human health, food and water security and socio-economic development in Africa due to climate hazards such as increasing temperatures, rising sea levels, extended dry seasons, changing precipitation patterns and more extreme weather events⁶⁷. According to the Strategy, human health in Africa will be negatively affected by climate change and its impacts, which can modify the transmission of diseases such as cholera, malaria meningitis, and zoonotic diseases such as Ebola and coronaviruses⁶⁸. It further asserts that the death rate from climate change is 60 to 80% higher in Africa than it is in the next most vulnerable region (Southeast Asia) due to pre-existing vulnerabilities and the weakened ability of the Continent to adapt to the impacts of climate change⁶⁹.

⁶³ Climate for Development-Africa. Programme., 'Climate Change and Health in Africa: Issues and Options.' Available at https://archive.uneca.org/sites/default/files/PublicationFiles/policy_brief_12_climate_change_and_health_in_africa_issues_and_options.pdf (Accessed on 08/12/2023)

⁶⁴ Africa Union., 'African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032).' Available at https://au.int/sites/default/files/documents/42276-doc-CC_Strategy_and_Action_Plan_2022-2032_23_06_22_ENGLISH-compressed.pdf (Accessed on 09/12/2023)

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

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Consequently, the Strategy projects that there will be up to 70,000 additional deaths in Africa by 2030 because of climate change, with malaria and diarrhoea responsible for the largest proportions of these deaths⁷⁰. In addition, the Strategy points out that climate change-induced floods and cyclones can lead to contamination of water supplies, increasing the prevalence of vectorborne diseases in Africa⁷¹. Placing health at the centre of climate action is a priority agenda under the Strategy⁷². It seeks to integrate climate action and health through measures such as transitioning to renewable energy sources due to their direct health benefits in terms of air quality, fostering food security to address the challenges of malnutrition in Africa, protecting and restoring Africa's ecosystems in order to prevent the occurrence and risk of zoonotic and vector-borne diseases, an mainstreaming climate change considerations (including gender, youth and indigenous knowledge considerations) and updated NDC policy actions across sectoral policies including health⁷³. The African Union Climate Change and Resilient Development Strategy and Action Plan is pivotal in placing health at the centre of climate action in Africa. There is need to actualize the Strategy in order to foster an integrated approach towards health and climate action in Africa.

At the national level, the *Health Act*⁷⁴ of Kenya requires the national health system to ensure that measures for managing environmental risk factors to curtail occurrence and distribution of diseases are put in place and implemented⁷⁵. Such measures include the reduction of morbidity and mortality of waterborne, food-borne and vector transmitted diseases, and mitigating the health effects of climate change⁷⁶. In addition, the *Kenya Health Policy*⁷⁷ acknowledges that climate change is a national, regional and global health challenge with adverse impacts on the health sector. The policy seeks

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ Health Act., No. 21 of 2017., Laws of Kenya.

⁷⁵ Ibid, S 68 (2)

⁷⁶ Ibid, 68 (2) (b)

⁷⁷ Kenya Health Policy 2014-2030., Available at https://publications.universalhealth2030.org/uploads/kenya_health_policy_2014_to_2030.pdf (Accessed on 11/12/2023)

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to attain the highest possible standard of health for all Kenyans in a responsive manner and sets out the need to address the challenges in the health sector in Kenya including the impacts of climate change⁷⁸. *Kenya's Updated Nationally Determined Contribution*⁷⁹ also places health at the centre of climate action. The NDC mentions specific adaptation measures focused on health such as conducting a vulnerability and risk assessment of different climate risks on human health; developing a public awareness and social mobilisation strategy on climate change and health impacts and developing health programmes, protocols and guidance to manage new climate change related impacts on the health sector⁸⁰.

It is therefore evident that there has been some progress towards placing health at the centre of climate action. These efforts have received a major boost following the adoption of the United Nations Climate Change Conference (COP28) Declaration on Climate and Health⁸¹. The Declaration expresses concern about the negative impacts of climate change on health and stresses the importance of addressing the interactions between climate change and human health and wellbeing in the context of the UNFCCC and the Paris Agreement, as the primary international, intergovernmental fora for the global response to climate change⁸². There is need for all countries to implement the Declaration in order to place health at the centre of climate action.

Despite the foregoing efforts, climate change continues to a major threat to health in all countries. If left unaddressed, the climate crisis threatens to undo years of progress in development, global health and poverty reduction, and to further widen existing health inequalities between and within populations⁸³.

⁷⁸ Ibid

⁷⁹ United Nations Framework on Climate Change Secretariat, 'Kenya's Updated Nationally Determined Contribution (NDC).' Available at <https://unfccc.int/sites/default/files/NDC/2022-06/Kenya%27s%20First%20NDC%20%28updated%20version%29.pdf> (Accessed on 11/12/2023)

⁸⁰ Ibid

⁸¹ World Health Organization., 'COP28 UAE Declaration on Climate and Health.' Available at <https://www.who.int/publications/m/item/cop28-uae-declaration-on-climate-and-health> (Accessed on 11/12/2023)

⁸² Ibid

⁸³ World Health Organization., 'Climate Change and Health.' Op Cit

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Placing health at the centre of climate action is therefore an urgent global concern.

4.0 Way Forward

In order to place health at the centre of climate action, it is imperative for countries to ensure that health is central to climate change mitigation and adaptation policies⁸⁴. The COP 28 Declaration on Climate and Health urges countries to strengthen the development and implementation of policies that maximize the health gains from mitigation and adaptation actions and prevent worsening health impacts from climate change, including through close partnerships with Indigenous Peoples, local communities, women and girls, children and youth, healthcare workers and practitioners, persons with disabilities and the populations most vulnerable to the health impacts of climate change⁸⁵. It is also vital for all countries through their NDCs to prioritise SDG 3 targets such as ending epidemics and communicable diseases, fostering access to Universal Health Care and medicines by linking them to climate-induced health risks prevention, contingency health strategy development, and communicable diseases prevention as key strategies for climate action⁸⁶.

In addition, it is important for countries to pursue climate change adaptation actions prioritizing health and SDG 3 such as enhancing vaccination and prevention against water and vector borne diseases, and increasing access to clean drinking water; increasing health facilities; and building of infrastructure that protects against heat such as ventilation or shaded areas⁸⁷. There is also need for countries to pursue adaptation interventions such as urgent nutrition support, surveillance systems, and emergency response centers in order to cushion the health sector against the adverse impacts of climate change⁸⁸. It has also been pointed out that key intervention strategies

⁸⁴ Ibid

⁸⁵ World Health Organization., 'COP28 UAE Declaration on Climate and Health.' Op Cit

⁸⁶ United Nations., 'Discussion on SDG and NDC Implementation: Country Trends and Examples from the NDC Partnership.' Op Cit

⁸⁷ Gonzales-Zuniga., 'SCAN (SDG & Climate Action Nexus) Tool: Linking Climate Action and the Sustainable Development Goals.' Op Cit

⁸⁸ The World Bank., 'Health and Climate Change.' Op Cit

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required to place health at the centre of climate action include strengthening health systems to predict, detect, prepare, and respond to climate risks and disasters, by, for example, building climate-informed surveillance and early-warning systems, increasing health workforce capacity in climate-health, and climate proofing healthcare infrastructure⁸⁹.

Another key measure towards placing health at the centre of climate action is reducing greenhouse gas emissions from the health sector. It has rightly been observed that the health sector is not only affected by climate change but also contributes to the magnitude of the crisis, being responsible for around 5 percent of global greenhouse gas emissions⁹⁰. It is therefore essential for all countries to ensure that their health sectors and health systems transition to low-carbon, high-quality service delivery, such as through clean, renewable energy for infrastructure and fleets, and low-carbon medicines and equipment⁹¹. The COP 28 Declaration on Climate and Health also urges all countries to embrace measures to curb emissions and reduce waste in the health sector, such as by assessing the greenhouse gas emissions of health systems, and developing action plans, nationally determined decarbonization targets, and procurement standards for national health systems, including supply chains⁹². Curbing greenhouse emissions in the health sector is therefore an important approach in placing health at the centre of climate action.

It is also pertinent to ensure that the health sector and health systems are climate resilient. A climate resilient health system is one that is capable to anticipate, respond to, cope with, recover from and adapt to climate-related shocks and stress, so as to bring sustained improvements in population health, despite an unstable climate⁹³. Climate resilient health systems provide an opportunity for sustainable human development due to their ability to reduce

⁸⁹ Ibid

⁹⁰ Rodriguez-Jimenez., 'The Carbon Footprint of Healthcare Settings: A Systematic Review.' Available at <https://doi.org/10.1111/jan.15671> (Accessed on 11/12/2023)

⁹¹ The World Bank., 'Health and Climate Change.' Op Cit

⁹² World Health Organization., 'COP28 UAE Declaration on Climate and Health.' Op Cit

⁹³ Mosadeghrad. A. M., et al., 'Strategies to Strengthen a Climate-Resilient Health System: A Scoping Review.' *Globalization & Health.*, Volume 19, No. 62 (2023)

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the effects of climate change on health while promoting better health⁹⁴. WHO urges countries to build better, more climate-resilient and environmentally sustainable health systems by ensuring that core services, environmental sustainability and climate resilience are central components of UHC and primary health care; supporting health systems to leapfrog to cheaper, more reliable and cleaner solutions, while decarbonizing high-emitting health systems; and mainstreaming climate resilience and environmental sustainability into health service investments, including the capacity of the health workforce⁹⁵.

Further, there is need to accelerate the realization of the SDGs. It has rightly been argued that climate change is rapidly affecting most of the SDGs especially those relating to access to basic human needs including food, safe drinking water and sanitation, energy, and clean air therefore affecting both physical and mental health⁹⁶. Actualizing the SDGs and the Sustainable Development agenda can help countries confront climate change while fostering good health and well-being for all. Countries should therefore pursue policies that work towards accelerating achievement of the SDGs, including SDG3; by reducing poverty and hunger; improving health and livelihoods; strengthening social protection systems, promoting food security and improved nutrition, fostering access to clean sources of energy, safe drinking water, and sanitation and hygiene for all; and work towards achieving UHC⁹⁷.

Finally, there is need to combat inequalities within and among countries in the health sector through measures such as accelerating health financing⁹⁸. It has been pointed out that people in developing countries may be the most vulnerable to health risks as a result of climate change⁹⁹. Further, WHO also asserts that areas with weak health infrastructure mostly in developing

⁹⁴ Ibid

⁹⁵ World Health Organization., 'Climate Change and Health.' Op Cit

⁹⁶ The World Bank., 'Health and Climate Change.' Op Cit

⁹⁷ World Health Organization., 'COP28 UAE Declaration on Climate and Health.' Op Cit

⁹⁸ Ibid

⁹⁹ United States Environmental Protection Agency., 'Climate Impacts on Human Health.' Op Cit

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countries will be the least able to cope with health risks associated with climate change without assistance to prepare and respond¹⁰⁰. Finance for health and climate change has been identified as vital in helping developing countries and vulnerable populations to implement health-relevant adaptation and mitigation actions¹⁰¹. However, health systems and actors face challenges in accessing finance for health and climate change activities, particularly in low- and middle-income countries¹⁰². This challenge underscores the need to better leverage synergies at the intersection of climate change and health in order to improve the efficiency and effectiveness of finance flows¹⁰³. The COP 28 Declaration on Climate and Health proposes measures towards unlocking climate finance for health including encouraging the scaling up of investments in climate and health from domestic budgets, multilateral development banks, multilateral climate funds, health financing institutions, philanthropies, bilateral development agencies, and private sector actors; encouraging international finance providers, including development banks, to strengthen the synergies between their climate and health portfolios, and enhance their support for country-led projects and programs in the health-climate nexus; sharing learnings and best practices on financing and implementing climate-health interventions, and develop a common understanding of existing needs for climate-health finance, grounded in country priorities and needs; and improving monitoring, transparency and evaluation efforts of climate finance, as relevant, including for climate-health initiatives, in order to strengthen common understanding of its efficiency and effectiveness, and to maximize the delivery of positive health outcomes¹⁰⁴. There is need to unlock climate finance for health in order to place health at the centre of climate action.

¹⁰⁰ World Health Organization., 'Climate Change and Health.' Op Cit

¹⁰¹ World Health Organization., 'Climate Change and Health.' Available at <https://www.who.int/teams/environment-climate-change-and-health/climate-change-and-health/country-support/finance-for-health-and-climate-change> (Accessed on 11/12/2023)

¹⁰² Ibid

¹⁰³ World Health Organization., 'COP28 UAE Declaration on Climate and Health.' Op Cit

¹⁰⁴ Ibid

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Through the foregoing initiatives, countries will be able to place health at the centre of climate action.

5.0 Conclusion

Climate change is major threat to health. All aspects and determinants of health are affected by climate change, from clean air, water and soil to food systems and livelihoods¹⁰⁵. The impacts of climate change are already harming health, through air pollution, diseases, extreme weather events, forced displacement, pressures on mental health, and increased hunger and poor nutrition in places where people cannot grow or find sufficient food¹⁰⁶. The climate crisis is also exerting significant strains on health systems, simultaneously increasing demand for health services whilst also impairing the system's ability to respond¹⁰⁷. It is therefore imperative to place health at the centre of climate action. Efforts to place health at the centre of climate action have received a major boost following the adoption of the COP 28 Declaration on Climate and Health which promises to accelerate mitigation and adaptation actions in the health sector¹⁰⁸. There is need for countries to implement the Declaration and adopt measures towards placing health at the centre of climate action. This can be achieved by ensuring that health is central to climate change mitigation and adaptation policies; pursuing climate change adaptation actions prioritizing health and SDG 3; reducing greenhouse gas emissions from the health sector; ensuring that the health sector and health systems are climate resilient; accelerating the realization of the SDGs; and unlocking climate finance for health¹⁰⁹. Placing health at the centre of climate action is an urgent and achievable national, regional and global agenda.

¹⁰⁵ World Health Organization., 'Climate Change and Health.' Op Cit

¹⁰⁶ United Nations., 'Causes and Effects of Climate Change.' Op Cit

¹⁰⁷ The World Bank., 'Health and Climate Change.' Op Cit

¹⁰⁸ World Health Organization., 'COP 28 UAE Declaration on Climate and Health.' Op Cit

¹⁰⁹ Ibid; World Health Organization., 'Climate Change and Health.' Op Cit; The World Bank., 'Health and Climate Change.' Op Cit

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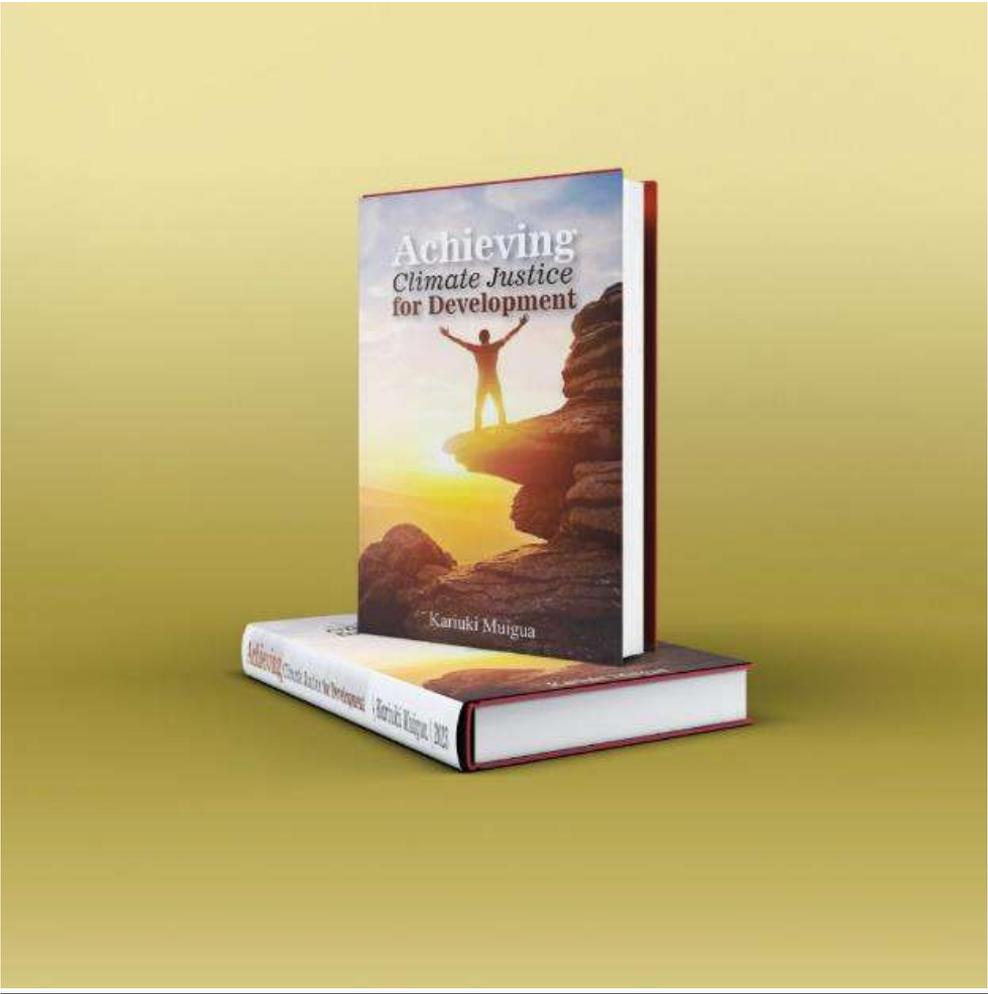
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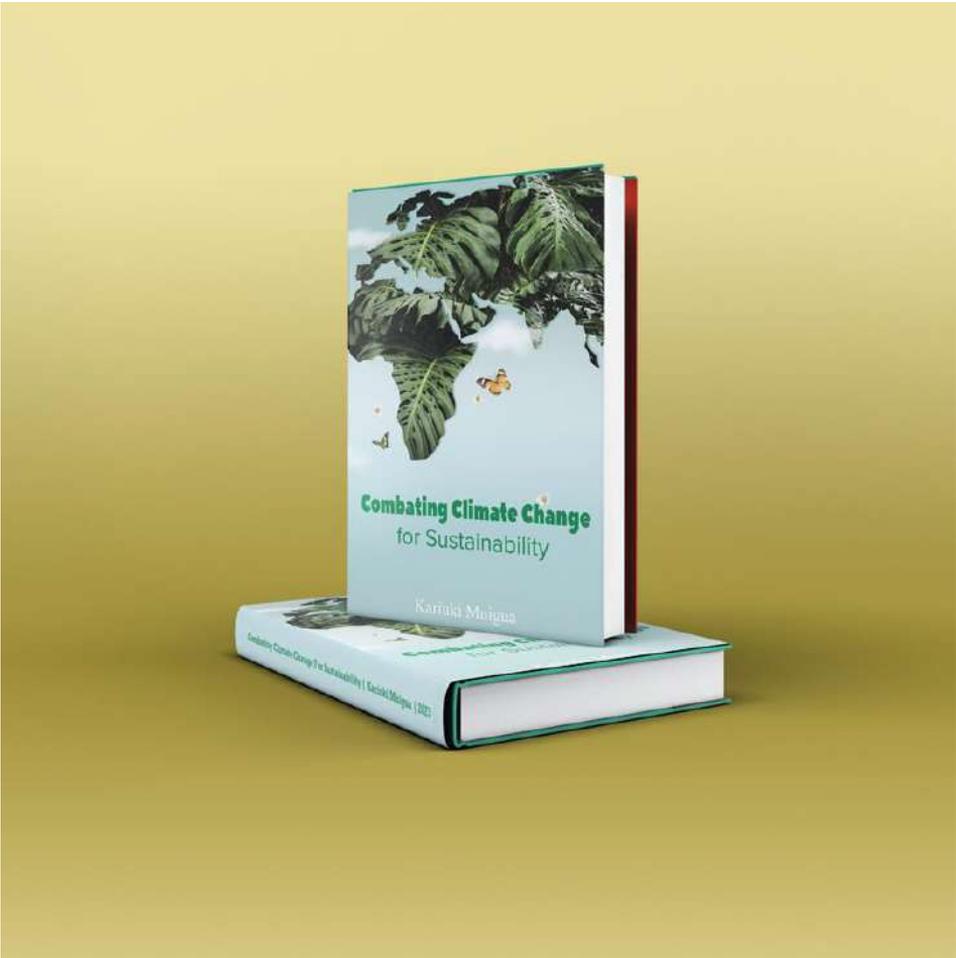
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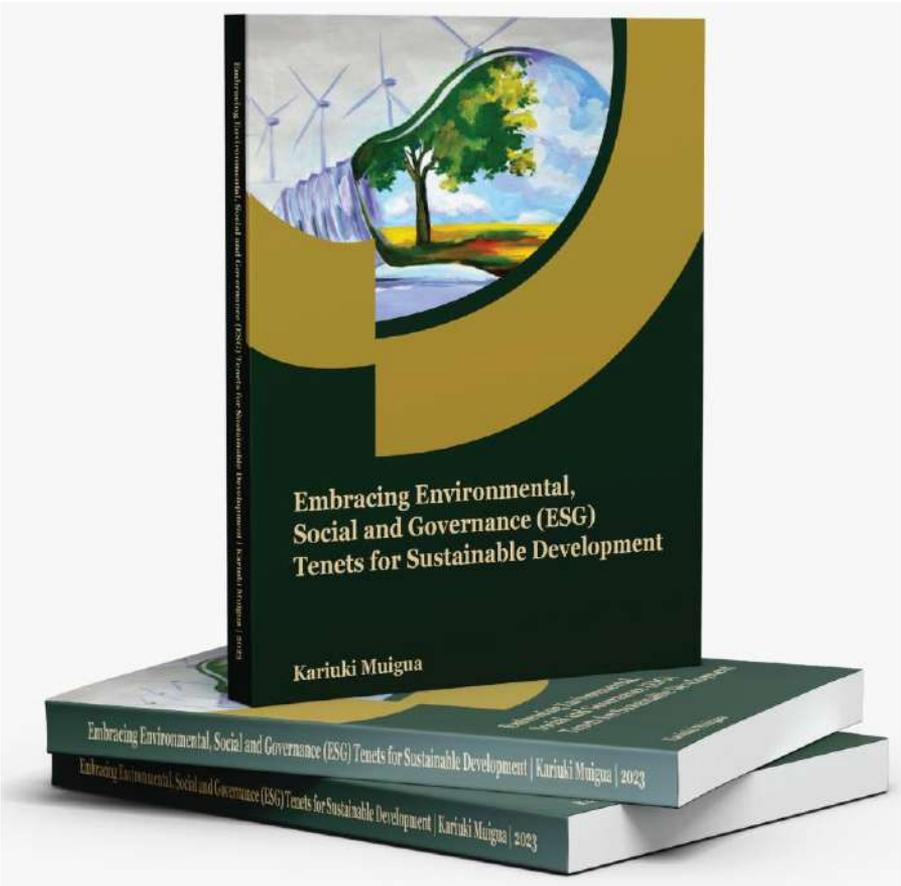
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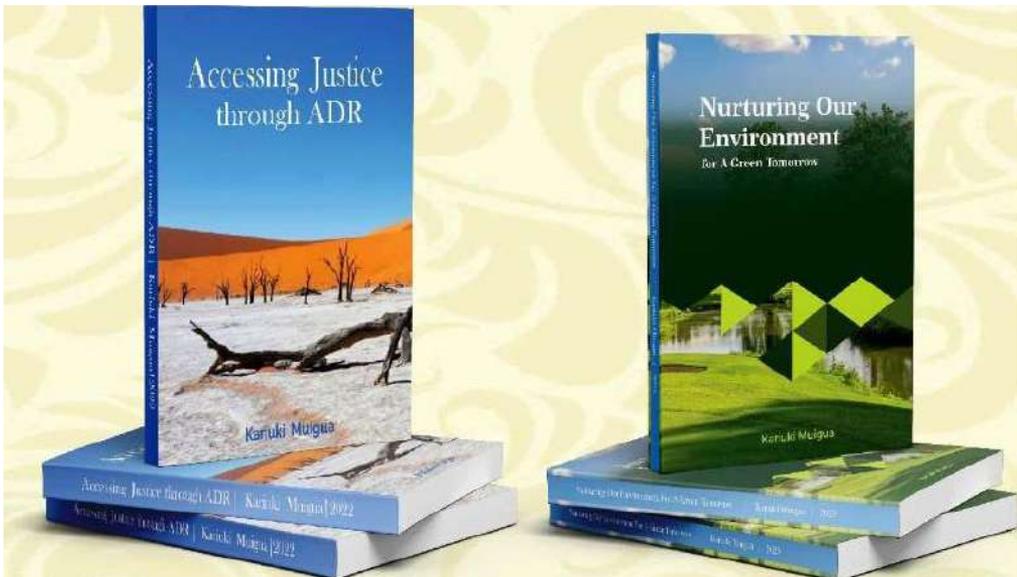
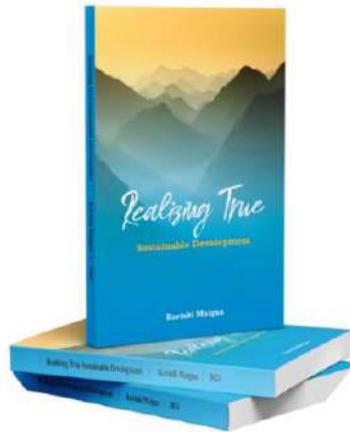
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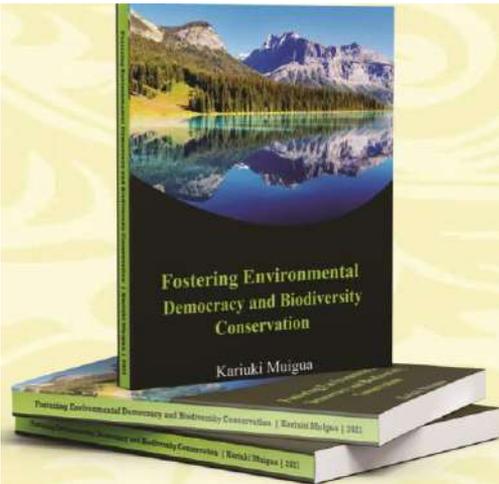
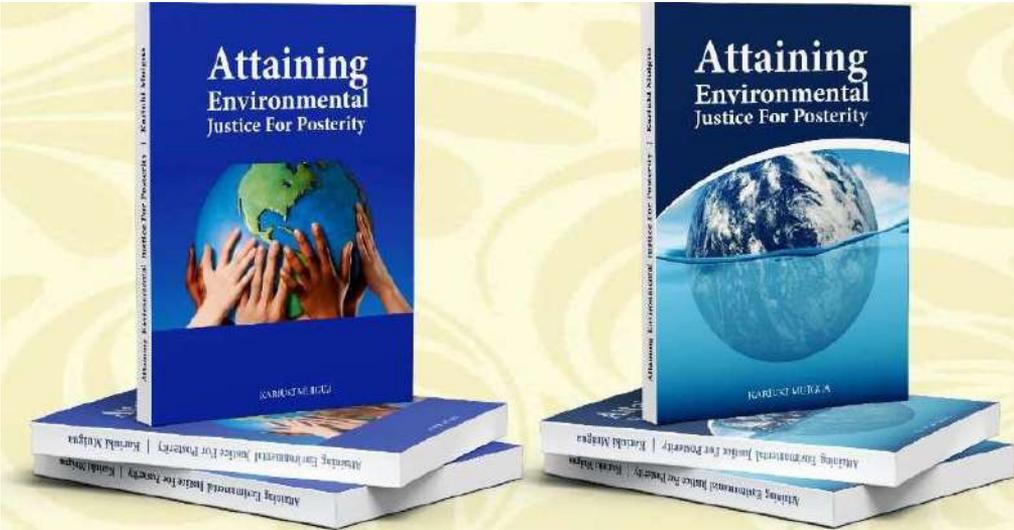


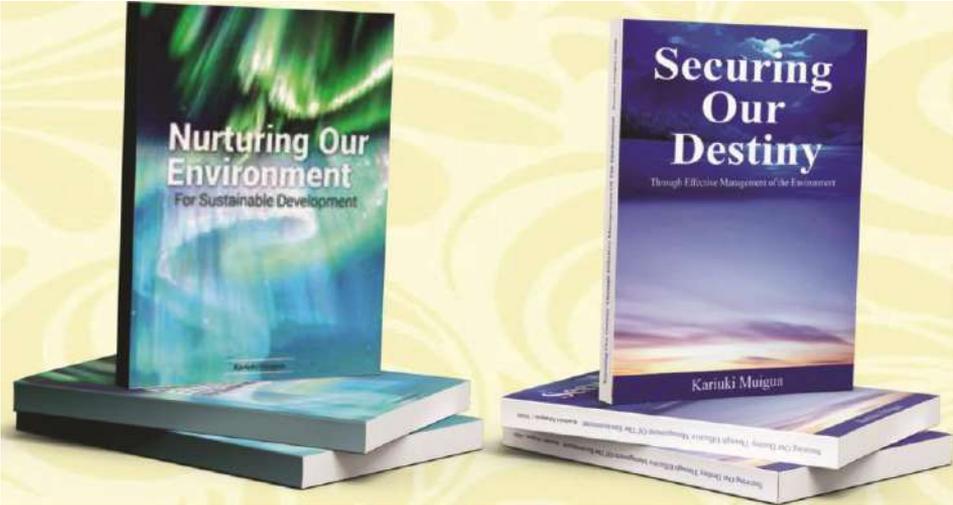
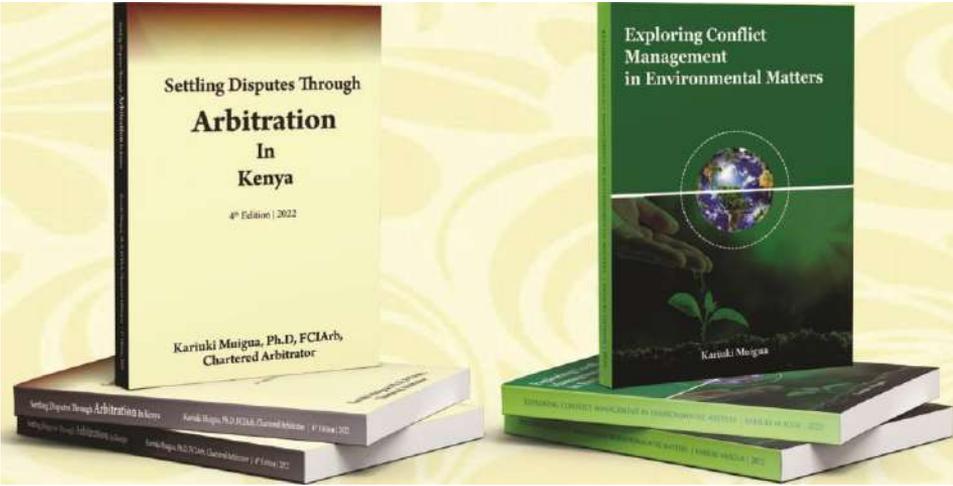


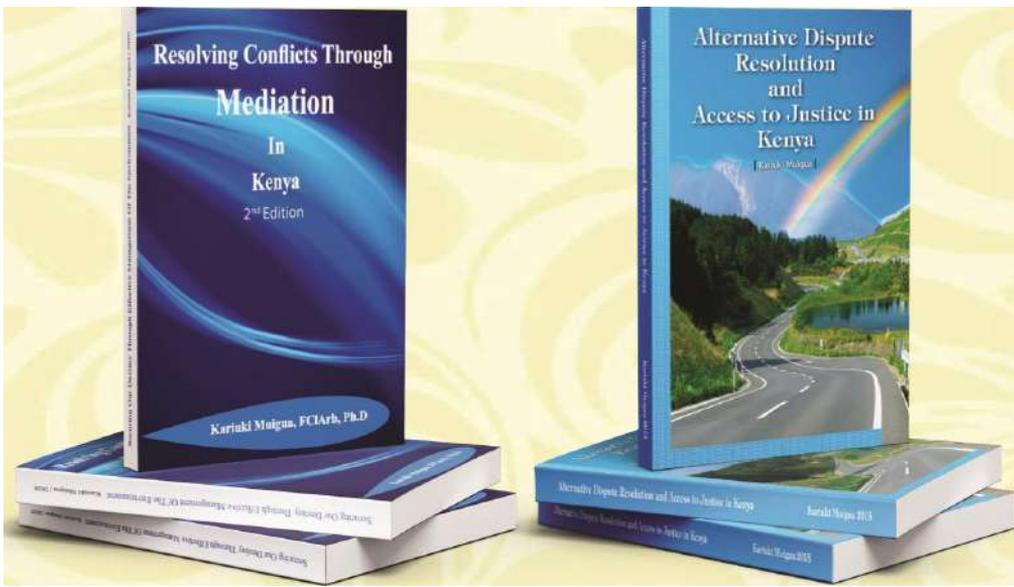
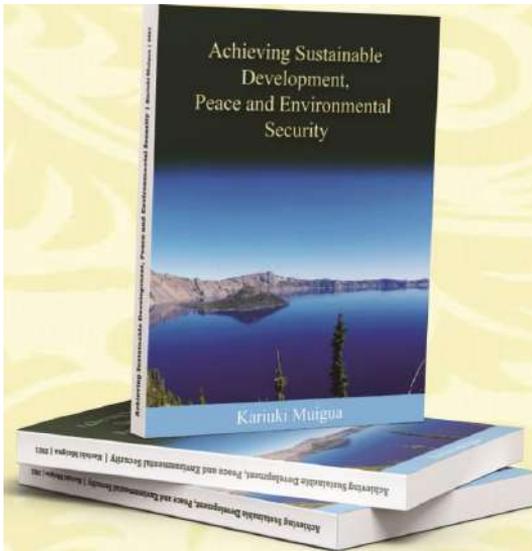


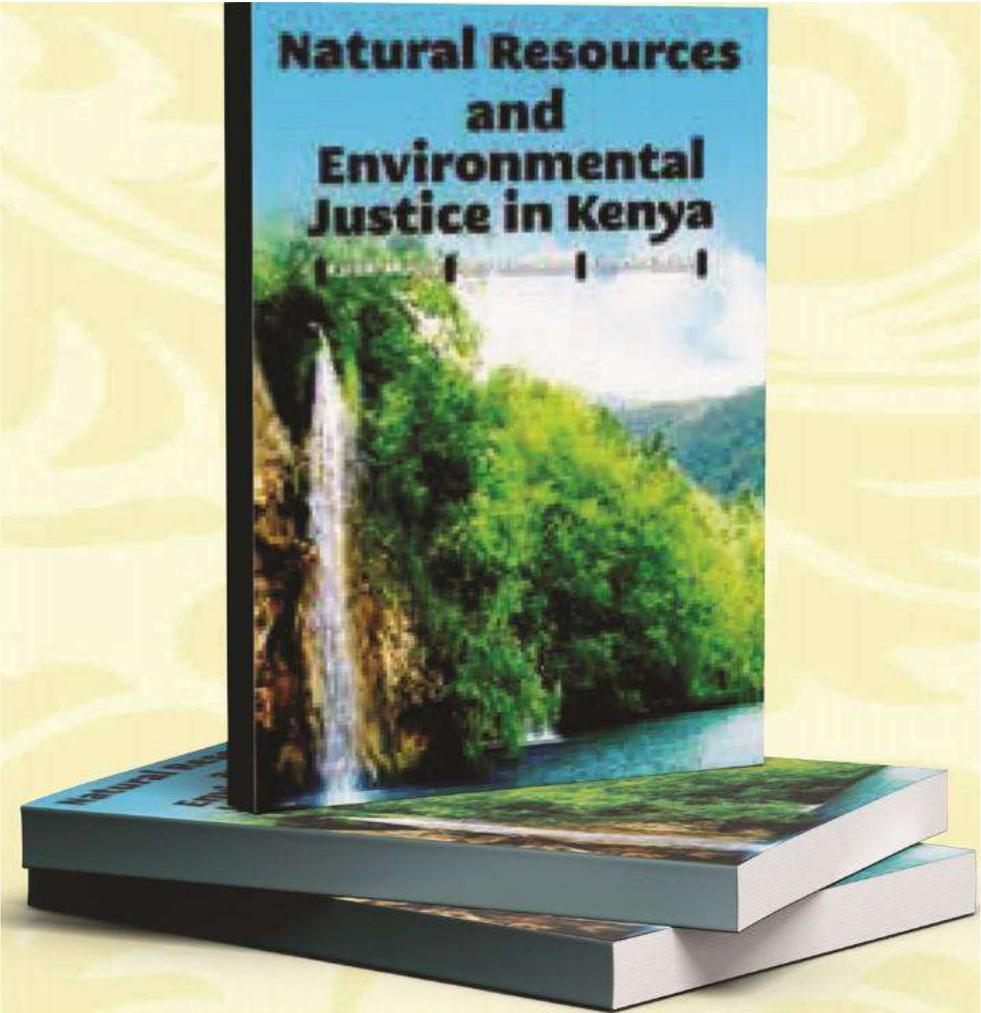












Actualizing the Right to a Clean and Healthy Environment is a book that brings together a collection of papers touching on the theme: Actualizing the Right to a Clean and Healthy Environment.

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Actualizing the Right to a Clean and Healthy Environment is an ideal whose time is now.

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He is a Member of the Permanent Court of Arbitration (PCA) nominated by the Republic of Kenya and has served as a Member of the National Environment Tribunal. He is a distinguished law scholar, Environmental Consultant, an accredited mediator and a Chartered arbitrator. He has widespread training and experience in both international and national commercial arbitration and mediation. He has received numerous awards and honours for his exemplary work in academia and Alternative Dispute Resolution.

Chambers and Partners Global Guide 2024 ranked him in Band 1 of Dispute Resolution (Arbitrators), the ranking which recognizes the Top 6 Arbitrators in Kenya noting that he is "highly recommended as a leading lawyer". He was awarded the 'Academic Champion of ADR' at the inaugural Women in ADR Awards 2024. He was also awarded the Outstanding Mentor Award by his inceptees in recognition of his guidance, care and support. He was recognized and awarded for his role as the Chartered Institute of Arbitrators (CI Arb) Africa Trustee from 2019 to 2022 by CI Arb Kenya Branch at the CI Arb Kenya Branch ADR Excellence Awards 2022. His book, *Settling Disputes through Arbitration in Kenya 4th Edition*, Glenwood publishers 2022, was awarded the Publication of the Year Award 2022 by CI Arb Kenya Branch at the CI Arb Kenya Branch ADR Excellence Awards 2022. He is the winner of ADR Practitioner of the Year Award at the AIAA Awards 2022. He is also the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. In 2022, Chambers and Partners ranked him in Band 1 of Dispute Resolution (Arbitrators) noting that "He has been involved in several ground-breaking arbitrations," "has an astute understanding of arbitration" and "is respected for litigation." He was awarded the Inaugural CI Arb (Kenya Branch) ADR Lifetime Achievement Award 2021 as well as the ADR Publication of the Year Award 2021 by the Chartered Institute of Arbitrators (Kenya Branch). He also received the ADR Practitioner of the Year Award 2021 by the Law Society of Kenya, Nairobi Branch at the Nairobi Legal Awards. He is a recipient of the 8th C. B. Madan Prize of 2020 for commitment and outstanding scholarly contribution to constitutionalism and the rule of law in Kenya.

Hon. Prof. Muigua has on various occasions been appointed by leading arbitral institutions including the Chartered Institute of Arbitrators (CI Arb-Kenya), the Nairobi Centre for International Arbitration (NCIA), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) among other institutions, as both a sole arbitrator and a member of an arbitral tribunal in arbitrations involving commercial disputes.

He is a Fellow of Chartered Institute of Arbitrators (CI Arb)-Kenya chapter. He is a member of the International Bar Association (IBA), the International Commission of Jurists, Human Rights Institute of the International Bar Association, the London Court of International Arbitration (LCIA), Chartered Institute of Arbitrators (UK) and Kenya Branch, Member of Commonwealth Lawyers Association and fellow of the Institute of Certified Public Secretaries of Kenya. He served as the Branch Chairman of CI Arb-Kenya from 2012 to 2015. He was elected (unopposed) to the Chartered Institute of Arbitrators (CI Arb) Board of Trustees as the Regional Trustee for Africa, for the term beginning 1st January 2019 for a term of four years until 31st December 2022.

Hon. Prof. Muigua also serves as the Editor in Chief of three leading peer reviewed journals in East Africa, the *Alternative Dispute Resolution Journal*, the *Journal of Conflict Management and Sustainable Development* and *Journal of ADR & Sustainability*. The three journals have been hailed as leading publications in the fields of ADR, Conflict Management and Sustainable Development. The *Alternative Dispute Resolution Journal* was awarded the Arbitration Publication of the Year Award 2020 at the Africa Arbitration Awards.

He is an Advocate of the High Court of Kenya of over 35 years standing and practicing at Karuki Muigua & Co. Advocates, a firm that specialises in environmental and commercial law litigation and Alternative Dispute Resolution. The firm is also listed as a leading Kenyan commercial law firm in the distinguished Martindale Hallbell Directory.

He has authored the following books: *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015); *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, Nairobi, 2013); *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015); *Nurturing Our Environment for Sustainable Development*, (Glenwood Publishers, Nairobi, 2016); *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers, Nairobi) 1st Edition (2012); 2nd Edition (2012); 3rd Edition (2017); and 4th Edition (2022).

His other works include *Securing Our Destiny through Effective Management of the Environment*, (Glenwood Publishers, Nairobi-2020); *Achieving Sustainable Development, Peace and Environmental Security* (Glenwood Publishers, Nairobi, 2021); *Fostering Environmental Democracy and Biodiversity Conservation*, (Glenwood Publishers 2021); *Exploring Conflict Management in Environmental Matters* (Glenwood Publishers 2022); *Attaining Environmental Justice for Posterity, Volume 1 and 2*, (Glenwood Publishers 2022); *Accessing Justice Through ADR*, (Glenwood Publishers 2022); *Nurturing our Environment for a Green Tomorrow*, (Glenwood Publishers 2023); *Realizing True Sustainable Development*, (Glenwood Publishers 2023); *Embracing Environmental Social and Governance (ESG) trends for Sustainable Development*, (Glenwood Publishers 2023); *Combating Climate Change for Sustainability*, (Glenwood Publishers 2023); *Achieving Climate Justice for Development*, (Glenwood Publishers 2023); and *Promoting The Rule of Law for Sustainable Development* (Glenwood Publishers 2024).

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