

**The Place of Human Rights in Environmental and Natural
Resources Conflicts Management in Kenya**

Kariuki Muigua

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Abstract

Article 19 of the Constitution of Kenya 2010 provides that Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. It further states that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The Constitution also outlines the principles of national security as including the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. In addition to these, the Constitution provides for and envisages the enjoyment of the right to clean and healthy environment and other environmental rights therein, realisation of sustainable development and outlines national values and principles of governance which are geared towards protection of the human rights of all persons, environmental protection and the creation of a peaceful society. This paper argues that it is possible, in the application of some of the environmental conflict management mechanisms, to achieve undesired results that violate or fail to protect the rights of the target groups in a given conflict. The author offers insight on how the conflicts may be addressed in a way that upholds the various rights of groups in a conflict. The paper argues for adoption of a rights-based approach to environmental protection and conflict management.

1. Introduction

International concerns with human rights have expanded considerably in the past several decades.¹ Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law, with the international human rights law laying down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.²

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¹ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice*; 2002 <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

² 'OHCHR | What Are Human Rights' <<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed 10 August 2020.

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In the same breadth, over the years, the environment has secured a special place in the international law discourse. This has been evidenced by various legal instruments that are meant to provide directions and guidelines to the key players and the states in coming up with domestic environmental protection and conservation laws.³ The debate is however informed by two major approaches namely, anthropocentric and ecocentric approaches. While the ecocentric approach is mainly concerned with the moral concern for nature in its own right as deserving protection and conservation, the anthropocentric approach, places humans as the central concern in environmental conservation and protection while the environment is considered secondary.⁴ Thus, ecocentrism is nature-centered, while anthropocentrism is human-centered. International legal instruments on environmental conservation and protection are divided between the two approaches, with some adopting the ecocentrism while others are based on anthropocentrism.⁵ A dual rights-based approach, where the intrinsic value of humans and nature co-exist in an interconnected manner can pool the benefits of both approaches. Both approaches are important and all that is needed is to strike a balance.⁶ Notably, while the sustainable development agenda debates accommodate both approaches, they lean more towards the anthropocentrism. The *2030 Agenda on Sustainable Development Goals*⁷ (SDGs) define sustainable development broadly to cover issues such as poverty, inequality, gender equality, health, education, governance, climate change and environmental protection.⁸ The SDGs rest on three core elements of sustainability

³ Ibid.

⁴ Helen Kopnina and others, 'Anthropocentrism: More than Just a Misunderstood Problem' (2018) 31 *Journal of Agricultural and Environmental Ethics* 109.

⁵ Vito De Lucia, 'The Ecosystem Approach between Anthropocentrism and Ecocentrism' (2015); Louis Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 *Global Journal of Comparative Law* 5; Vito De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 *Journal of Environmental Law* 91; Marie-Catherine Petersmann, 'Narcissus' Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame' (2018) 30 *Journal of Environmental Law* 235; Mohamed El-Kamel Bakari, 'Mapping the "Anthropocentric-Ecocentric" Dualism in the History of American Presidency: The Good, the Bad, and the Ambivalent' [2017] *Consilience* 1; Abadir Ibrahim, 'A Human Rights Approach to Environmental Protection: The Case of Ethiopia' (2009) 1 *Contemporary Legal Institutions*; Louis J Kotzé, 'Human Rights and the Environment in the Anthropocene': [2014] *The Anthropocene Review* <<https://journals.sagepub.com/doi/10.1177/2053019614547741>> accessed 11 August 2020.

⁶ See generally, K. Muigua, *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁷ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice; 2002* <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

⁸ See United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

which include:⁹ Economic: An economically sustainable system that must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectoral imbalances which damage agricultural or industrial production; Environmental: An environmentally sustainable system which must maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is made in adequate substitutes. This includes maintenance of biodiversity, atmospheric stability, and other ecosystem functions not ordinarily classed as economic resources; and Social: A socially sustainable system which must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation.¹⁰

Environmental resources access, use and control are central to meeting human needs.¹¹ That is why environmental conflicts emerge, both nationally and internationally, when one group of persons feel that their rights in this respect are threatened. This is because historically, as the United Nations has observed, environmental resources have often been an indicator of the wealth of those being in a position to utilize them.¹²

Various mechanisms are therefore employed in managing these conflicts and while some sufficiently address the human rights issues that emerge, others may not necessarily achieve as much. This paper critically evaluates the various approaches to environmental conflicts management with a view to recommend the most suitable ones in ensuring that human rights, which mainly inform the anthropocentric approach, are secured. The paper vouches for a rights-based approach to environmental issues and the related conflicts as a way of securing human rights while managing environmental conflicts.

⁹ Jonathan M Harris, 'Basic Principles of Sustainable Development' [2000] Dimensions of Sustainable Development 21, Global Development and Environment Institute, Tufts University, Working Paper 00-04, June 2000 < http://www.buyteknet.info/fileshare/data/ambides_lect/Harris_PrinSD.pdf > Accessed 10 August 2020, pp.5-6.

¹⁰ Ibid, p.6.

¹¹ 'Our Planet, Our Health' <<http://ciesin.org/docs/001-232/chpt1.html>> accessed 11 August 2020; Jean-Louis Martin, Virginie Maris and Daniel S Simberloff, 'The Need to Respect Nature and Its Limits Challenges Society and Conservation Science' (2016) 113 Proceedings of the National Academy of Sciences 6105; Steven C Rockefeller, 'Principles of Environmental Conservation and Sustainable Development: Summary and Survey' [1996] unpublished paper prepared for the Earth Charter Project; 'Global Conservation: Balancing Nature and Human Needs' <<https://www.macfound.org/press/publications/global-conservation-balancing-nature-and-human-needs/>> accessed 11 August 2020.

¹² Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) < <https://na.unep.net/siouxfalls/publications/Conflicts.pdf> > Accessed 10 August 2020.

2. Linking Human Rights and the Environment

Human rights may be defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination.¹³ The *Universal Declaration of Human Rights of 1948*¹⁴ (UDHR) set the stage for the recognition, protection and promotion of human rights the world over. UDHR places an obligation on all states to employ progressive measures to ensure recognition of human rights provided therein. Notably, the Declaration recognises the need for mobilization of resources by States so as to ensure realization of these rights. Art. 22 thereof provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The UDHR created a basis for the formulation of *International Covenant on Civil and Political Rights*, (ICCPR) 1966¹⁵ and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966.¹⁶ ICCPR provides under Article 47 thereof that nothing in that Covenant should be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. Further, ICESCR, under Article 1.2, provides that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Principle 1 of the *Stockholm Declaration*¹⁷ is however credited as the first international legal instrument which expressly formed a foundation for linking human rights, health, and environmental protection, declaring that: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-

¹³ 'OHCHR | What Are Human Rights' <<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed 10 August 2020.

¹⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹⁶ *International Covenant on Economic, Social and Cultural Rights*; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976).

¹⁷ UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

being.¹⁸ However, while the language of Article 1 of both the *Stockholm Declaration* and the *Rio Declaration*¹⁹ seem to connote a human rights approach to the environmental conservation, during the conferences, various proposals for a direct and thus unambiguous reference to an environmental human right were rejected²⁰. It is arguable that the conferences created an oxymoronic circumstance, in denying what would only be in the nature of ‘the right to adequate conditions of life in an environment of a quality that permits a life of dignity and well-being’.²¹ *Draft Principles on Human Rights and the Environment of 1994*,²² (1994 Draft Principles) is an international instrument that comprehensively addresses the linkage between human rights and the environment. The *1994 Draft Principles* provide for the interdependence between human rights, peace, environment and development. Principle 1 thereof declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.

In the first human rights-based approach to environmental protection, environmental protection is seen as a pre-condition to the enjoyment of internationally-guaranteed human rights, especially the rights to life and health, making it an essential instrument in the effort to secure the effective universal enjoyment of human rights.²³ Indeed, some domestic statutes and constitutions, such as the Constitution of Kenya 2010, have expressly recognised the right to a clean and healthy environment as a justiciable right.²⁴ The place of a clean and healthy environment in realisation of other human rights was well captured in the following words:

Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or

¹⁸ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice*; 2002 <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

¹⁹ Rio Declaration on Environment and Development, A/CONF.151/26, vol. I, 1992.

²⁰ Handl, G., ‘Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992’ (United Nations Audiovisual Library of International Law, 2012).

²¹ 1972 Stockholm Declaration Principle 1. It reads in full: “Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”.

²² Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

²³ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice*; 2002 <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

²⁴ Constitution of Kenya 2010, Art. 42.

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*destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.*²⁵

The second rights-based approach to environmental protection views environmental protection not as an essential element of human rights, but instead it views certain human rights as essential elements to achieving environmental protection, which has as a principal aim the protection of human health, as illustrated by the Rio Declaration on Environment and Development.²⁶

The third approach views the links as indivisible and inseparable and thus posits the right to a safe and healthy environment as an independent substantive human right.²⁷

Recognition of the relationship between abuse of human rights of various vulnerable communities and related damage to their environment is found in the concept of environmental justice. Environmental justice theory recognizes how discrimination and marginalization involves expropriating resources from vulnerable groups and exposing these communities to the ecological harms that result from use of those resources. Environmental justice is based on the human right to a healthy and safe environment, a fair share to natural resources, the right not to suffer disproportionately from environmental policies, regulations or laws, and reasonable access to environmental information, alongside fair opportunities to participate in environmental decision-making.²⁸

Thus, environmental protection should and has in the recent years been treated as a human rights issue because a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans, thereby serving to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life.²⁹

²⁵ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice*; 2002 < https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 4.

²⁶ Ibid, p. 4; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.

²⁷ Ibid, p.4; Bridget Lewis, 'Environmental Rights or a Right to the Environment: Exploring the Nexus between Human Rights and Environmental Protection' (2012) 8 *Macquarie J. Int'l & Comp. Envtl. L.* 36.

²⁸ Scottish Executive Social Research, *Sustainable Development: A Review of International Literature*, (Scottish Executive Social Research, 2006) < <http://www.gov.scot/resource/doc/123822/0029776.pdf> > Accessed 10 August 2020, p.8.

²⁹ Boyle, A., 'Human Rights and the Environment: Where Next?' *The European Journal of International Law*, Vol.23, No. 3, 2012.

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There is, thus, a direct co-relation between the environment and the right to life³⁰, human dignity³¹, right to reasonable standards of sanitation³², the right to food³³, and, the right to clean and safe water in adequate quantities.³⁴

The linkage of human rights and the environment is the entire basis upon which the sustainable development debate rests.³⁵ Sustainable development has been defined as a combination of elements, such as environmental protection, economic development, and most importantly social issues.³⁶ Human rights are inextricable from sustainable development, since human beings are at the centre of concerns for sustainable development.³⁷

The human rights-based approaches to environmental issues provide a powerful framework of analysis and basis for action to understand and guide development, as they draw attention to the common root causes of social and ecological injustice.³⁸ Human rights standards and principles then guide development to more sustainable outcomes by recognizing the links between ecological and social marginalization, stressing that all rights are embedded in complex ecological systems, and emphasizing provision for need over wealth accumulation.³⁹ Internationally, there are two major approaches to human rights and the environment, which are the greening of already existing human rights and the introduction of a third generation of human

³⁰ See Constitution of Kenya 2010, Art. 26.

³¹ Ibid, Art. 28.

³² Ibid, Art. 43(b).

³³ Ibid, Art. 43(c).

³⁴ Ibid, Art. 43(d).

³⁵ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613; Dias, Ayesha. "Human rights, environment and development: With special emphasis on corporate accountability." *Human Development Report* (2000); Geiser, Hans. *Sustainable development from a human rights perspective and the challenges it represents for the Caribbean SIDS (a discussion paper)*. ECLAC, 2010; 'Human Rights Council (HRC) :: Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=225&menu=3170>> accessed 11 August 2020; 'Human Rights and Development' (*Icelandic Human Rights Centre*) <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-development>> accessed 11 August 2020; 'Human Rights and the Environment' (*Icelandic Human Rights Centre*) <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-the-environment>> accessed 11 August 2020.

³⁶ Salustiano del Campo Momoh Tomoko Hamada ,Giancarlo Barbiroli,Saskia Sassen, Eleonora Barbieri-Masini, Paul Nchoji Nkwi, Owen Sichone, Abubakar (eds), *Social And Economic Development – Volume VIII* (EOLSS Publications 2010).

³⁷ 1992 *Rio Declaration*, Principle 1, which reads in full: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

³⁸ Aled Dilwyn Fisher, 'A Human Rights-Based Approach to the Environment and Climate Change' [2014] *Practitioner Guide for The Global Initiative for Economic, Social and Cultural Rights*, March 2014.

³⁹ Ibid.

rights.⁴⁰ While this paper does not delve into this debate and the debate is still ongoing on the proper place of human environmental rights⁴¹, what is not deniable is the fact that there is an important link between human rights and the protection and conservation of the environment.

3. Environmental and Natural Resources Conflicts: Overview of Conflict Management Mechanisms

It is worth pointing out that there exist various mechanisms which may be used in dealing with certain types of conflicts. For instance, Article 33 of the *Charter of the United Nations* provides that the parties to any dispute should, first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* (emphasis added).⁴²

Conflict may be defined as a struggle over values or claims to status and resources, in which the aim of the conflicting parties is not only the desired values but also neutralize, injure or eliminate their rivals.⁴³ There are many factors that determine the emergence, persistence, and even management of conflicts ranging from internal to relational and contextual factors.⁴⁴

Social conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs.⁴⁵ Conflict is also regarded as undesirable in many societies since, in its violent form, it claims the lives of many people, destroy property, and diverts human as well as financial resources away from development.⁴⁶

⁴⁰ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613; Boyle, Alan. "Human rights or environmental rights? A reassessment." *Fordham Environmental Law Review* (2007): 471-511; West, Thomas Ernest Riversdale Barker. "Human and nonhuman rights approaches to environmental protection." PhD diss., University of Nottingham, 2017; Horn, Laura S. "Reframing human rights in sustainable development." *Journal of the Australasian Law Teachers Association* (2013): 1-15.

⁴¹ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.

⁴² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁴³ Mengesha, Abebe Demewoz, Samson Seid Yesuf, and Tessema Gebre, "Indigenous Conflict Resolution Mechanisms among the Kembata Society." *American Journal of Educational Research*, 2015, Vol. 3, No. 2, pp. 225-242 at pp. 225-226.

⁴⁴ L Kriesberg, *Factors Shaping the Course of Intractable Conflict. Beyond Intractability* (Electronic source [200705 04] 2003).

⁴⁵ Adan, Mohamud, and Ruto Pkalya. "Conflict Management in Kenya-Towards Policy and Strategy Formulation." (2006); Muigua, Kariuki. "Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya." (2018).

⁴⁶ Mengesha, Abebe Demewoz, Samson Seid Yesuf, and Tessema Gebre, "Indigenous Conflict Resolution Mechanisms among the Kembata Society." *American Journal of Educational Research*, 2015, Vol. 3, No. 2, pp. 225-242 at p.227.

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Natural resource conflicts may be defined as social conflicts (violent or non-violent) that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and political frameworks.⁴⁷ They are the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.⁴⁸ Natural resource conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.⁴⁹

Conflict management may be defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.⁵⁰ Conflict management is seen as a multidisciplinary field of research and action that addresses how people can make better decisions collaboratively.⁵¹ Thus, the roots of conflict are addressed by building upon shared interests and finding points of agreement.⁵²

The conflicts under review in this paper are those associated with environmental and natural resources. The environment-conflict nexus is a subset of “environmental security” — a field of inquiry that seeks to determine whether or not traditional notions of security (which emphasize countering military threats with military power) should be adapted to include threats posed by population growth and diminishing quantity and quality of environmental goods and services.⁵³

Majority of cases of resource conflicts, often revolve around the following: conflict over resource ownership; conflict over resource access; conflict over decision making associated with

⁴⁷ Mikkel Funder, Signe Marie Cold-Ravnkilde and Ida Peters Ginsborg, *Addressing Climate Change and Conflict in Development Cooperation: Experiences from Natural Resource Management* (DIIS Report 2012) < https://www.researchgate.net/profile/Mikkel_Funder/publication/259324612_Addresssing_Climate_Change_and_Conflict_in_Development_Cooperation_Experiences_from_Natural_Resource_Management/links/0046352b01b1a81862000000/Addresssing-Climate-Change-and-Conflict-in-Development-Cooperation-Experiences-from-Natural-Resource-Management.pdf > Accessed 10 August 2020, p. 17.

⁴⁸ Toepfer, K., “Forward”, in Schwartz, D. & Singh, A., *Environmental conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999). p.4

⁴⁹ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁵⁰ Ibid.

⁵¹ Anderson, J., et al, ‘Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,’ < <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> > Accessed 10 August 2020.

⁵² Ibid.

⁵³ Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) < <https://na.unep.net/siouxfalls/publications/Conflicts.pdf>> Accessed 10 August 2020, p.6.

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resource management; and conflict over distribution of resource revenues as well as other benefits and burdens.⁵⁴

The structure of relations between parties to the conflict and the way parties interpret the same may affect the course of the conflict and its management.⁵⁵ The relation factors include differences in sizes (group conflicts), economic endowment (resources), coerciveness between the parties, and cultural patterns of conduct.⁵⁶ They also include the nature and degree of integration between adversaries in economic, social, and cultural domains.⁵⁷ Thus, if any of the mechanisms used to address these conflicts is to be considered successful, it must deal with one or more of these factors.⁵⁸

Conflicts ought to be managed effectively and a number of mechanisms are used in achieving this, each with its own distinct merits and demerits. This section offers an overview of the various mechanisms used in management of environmental conflicts. Notably, conflict management mechanisms mostly used take either the form of conflict settlement or conflict resolution.⁵⁹ Conflict settlement deals with all the strategies that are oriented towards producing an outcome in the form of an agreement among the conflict parties that might enable them to end an armed conflict, without necessarily addressing the underlying conflict causes.⁶⁰ Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.⁶¹ Parties have

⁵⁴ The United Nations Department of Political Affairs and United Nations Environment Programme, *Natural Resources and Conflict: A Guide for Mediation Practitioners*, (2015, UN DPA and UNEP), p. 11.

⁵⁵ 'The Structure of International Conflict Management: An Analysis of the Effects of Interactability and Mediation - Jacob Bercovitch, Patrick M. Regan; *The International Journal for Peace Studies*' <https://www.gmu.edu/programs/icar/ijps/vol4_1/bercovitch.htm> accessed 11 August 2020; Swanström, Niklas LP, and Mikael S. Weissmann. "Conflict, conflict prevention, conflict management and beyond: A conceptual exploration. Concept paper." *Central Asia-Caucasus Institute and Silk Road Studies Program, Johns Hopkins University-SAIS and Uppsala University* (2005).

⁵⁶ Muigua, Kariuki. "Managing natural resource conflicts in Kenya through negotiation and mediation." (2016); Alao, Abiodun. *Natural resources and conflict in Africa: the tragedy of endowment*. Vol. 29. University Rochester Press, 2007; Bavinck, Maarten, Lorenzo Pellegrini, and Erik Mostert, eds. *Conflicts over natural resources in the Global South: conceptual approaches*. CRC Press, 2014.

⁵⁷ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁵⁸ Bercovitch, Jacob. "Conflict and conflict management in organizations: A framework for analysis." *Hong Kong Journal of Public Administration* 5, no. 2 (1983): 104-123; Jin Lim and AsscProfDr Rashad Yazdanifard, 'The Difference of Conflict Management Styles and Conflict Resolution in Workplace' (2012) 1 *Business & Entrepreneurship Journal* 141.

⁵⁹ Bloomfield, David. "Towards complementarity in conflict management: Resolution and settlement in Northern Ireland." *Journal of Peace Research* 32, no. 2 (1995): 151-164.

⁶⁰ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁶¹ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol. 32, No. 2(May, 1995), p.152; Mwagiru Makumi, 'Conflict in Africa: Theory Processes and Institutions of Management' [2006] Nairobi: Centre for Conflict Research 115.

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to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.⁶² As such, settlement mechanisms may not necessarily address the human rights issues relevant to the emergence and management of the conflict.

On the other hand, conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.⁶³ Conflict resolution mechanisms include negotiation, mediation and problem solving facilitation.⁶⁴ This is in recognition of the fact that the view of what is just and what is unjust are not universally shared, and as such, divergent views of justice often cause social conflicts.⁶⁵ This is attributed to the fact that frequently, the parties involved in conflicts are convinced that their own view is the solely valid one.⁶⁶ It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgement of an authority accepted by all parties or by a negotiated agreement between the parties: agreements are just when the parties are equally free in their decision and equally informed about all relevant facts and possible outcomes.⁶⁷ A resolution approach to management of environmental conflicts is therefore more desirable since it gives the groups involved a chance to participate in environmental decision-making as well as expressing their ideas, thus creating an opportunity to address their needs and rights.⁶⁸

The institutional framework in Kenya on environmental management and conflict management includes: the Environment and Land Court⁶⁹, the National Environmental Management

⁶² Baylis, C., and Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p.135.

⁶³ 'Negotiation and Mediation Techniques for Natural Resource Management'

<<http://www.fao.org/3/a0032e/a0032e03.htm>> accessed 11 August 2020.

⁶⁴ Udezo, Benson OS. "Concepts and methods of conflict resolution and Peace-Building: Imperatives for religious leaders in Nigeria." *Journal of Religion and Human Relations* 1, no. 2 (2009); Fisher, Ron. "Sources of conflict and methods of conflict resolution." *International Peace and Conflict Resolution, School of International Service, The American University* (2000).

⁶⁵ corissajoy, 'Principles of Justice and Fairness' (*Beyond Intractability*, 29 June 2016)

<https://www.beyondintractability.org/essay/principles_of_justice> accessed 11 August 2020; Scott D Campbell, 'Sustainable Development and Social Justice: Conflicting Urgencies and the Search for Common Ground in Urban and Regional Planning' (2013) 1 Michigan Journal of Sustainability

<<http://hdl.handle.net/2027/spo.12333712.0001.007>>.

⁶⁶ 'Learning to See Things from Another's Perspective, Opinion News & Top Stories - The Straits Times' <<https://www.straitstimes.com/opinion/learning-to-see-things-from-anothers-perspective>> accessed 11 August 2020.

⁶⁷ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Greenwood Publishers, Nairobi, 2016.

⁶⁸ 'Environmental Conflicts' (*ACCORD*) <<https://www.accord.org.za/ajcr-issues/environmental-conflicts/>> accessed 11 August 2020; 'Negotiation and Mediation Techniques for Natural Resource Management'

<<http://www.fao.org/3/a0032e/a0032e04.htm>> accessed 11 August 2020.

⁶⁹ Established under the Constitution of Kenya 2010 and *Environment and Land Court Act*, 2011.

Authority,⁷⁰ National Environmental Complaints Committee⁷¹, National Environment Tribunal and other various informal community based resource governance bodies.⁷² The existing legal mechanism for managing natural resource conflicts as enshrined in the environmental law statutes include the courts of law both under civil and criminal law,⁷³ statutory tribunals set up under various laws (such as the Land Adjudication Boards)⁷⁴ and customary law systems of conflict management.⁷⁵

4. Human Rights Protection in Environmental and Natural Resources Conflicts: Prospects and Challenges

Some authors rightly pointed out over 25 years ago that ‘political and strategic impact of surging populations, spreading disease, deforestation and soil erosion, water depletion, air pollution, and possibly, rising sea levels — developments that will prompt mass migration and, in turn, incite group conflicts — will be the core foreign-policy challenge in the twenty-first century’.⁷⁶ Predictably, all these issues and more have continued to inform the international debates on development and environmental conservation and protection. Nothing captures this better than the *United Nations 2030 Agenda on Sustainable Development*⁷⁷ which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.⁷⁸ The *2030 Agenda for Sustainable Development*⁷⁹ is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger

⁷⁰ Established under S.7 of the EMCA (Cap 8 of 1999).

⁷¹ Environment Management and Co-ordination Act, Act. No. 8 of 1999; Environmental Management and Co-ordination (Amendment) Act, 2015 (No. 5 of 2015).

⁷² Some communities like the Meru, Maasai, Giriama, etc, have councils of elders who sit and resolve small scale disputes that erupt within their respective communities.

⁷³ Environment Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Ss. 137-146

⁷⁴ Established under Land Adjudication Act, Cap. 284, Laws of Kenya.

⁷⁵ Mbote, P.K., ‘Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention,’ IELRC Working 2005-1. <<http://www.ielrc.org/content/w0501.pdf>> Accessed 10 August 2020.

⁷⁶ Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) <<https://na.unep.net/siouxfalls/publications/Conflicts.pdf>> Accessed 10 August 2020.

⁷⁷ *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

⁷⁸ United Nations Development Programme, ‘Sustainable Development Goals (SDGs),’ <http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development_agenda.html> Accessed 10 August 2020.

⁷⁹ *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

freedom and was formulated in recognition that eradicating poverty in all its forms and dimensions, including extreme poverty, which is seen as the greatest global challenge and an indispensable requirement for sustainable development.⁸⁰

The participants resolved, between 2015 and 2030, to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources. They resolved also to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities.⁸¹ Notably, in order to build peaceful, just and inclusive societies, management of environmental and natural resource-based conflicts is paramount. However, for the world states to also ensure that they protect human rights and promote gender equality and the empowerment of women and girls, the conflict management mechanisms employed must be used in a way that does not result in a conflict between the two goals.

This section highlights some of the challenges that are likely to arise in select environmental and natural resource-based conflict management mechanisms used internationally and nationally as far as securing human rights is concerned.

a. Human Rights and Environmental Litigation

National legal systems governing natural resource management are mostly based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.⁸² Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.⁸³ The judicial systems mostly employ the conflict settlement approach, with all its associated advantages and

⁸⁰ Ibid, Preamble.

⁸¹ Ibid, Agenda No. 3.

⁸² Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁸³ Ibid.

disadvantages.⁸⁴ Litigation does not afford the affected parties a reasonable and fair opportunity to participate in finding a lasting solution because, apart from the coercive nature of the process, litigation is also subject to other procedural technicalities which may affect its effectiveness.⁸⁵

While it is true that the Constitution of Kenya vests the courts with the authority to uphold and enforce the Bill of Rights,⁸⁶ some environmental conflicts require active participation in decision-making with full disclosure of the relevant information. However, the nature of the representative leadership in the country may not always allow this to happen. Political leaders may purport to speak and make decisions on behalf of a certain group, with minimal or no participation and access to information by the group in question and the same may unfortunately be treated as a reflection of the group's position on the issues in question.⁸⁷ As such, some of their rights and/or needs may not be adequately protected or realised. It is also possible that power relations and lack of access to courts may come in the way of accessing justice for a marginalised or a disadvantaged group of persons.⁸⁸ It is thus arguable that the court may not always deliver what the particular group needs or deserves. Thus while such approaches as litigation or arbitration may be the most appropriate in some reliefs such as: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and/or an order of judicial review,⁸⁹ they may fail to address the deep rooted causes of a conflict.⁹⁰ Procedural rights are limited by

⁸⁴ See Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi – 2017; Abdulla Mohamed Hamza, Mimir Todorovic and Knez Mihaljeva Street, 'Peaceful Settlement Of Disputes' 7 G.J.C.M.P., Vol.6(1):11-17.

⁸⁵ Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29, p. 29.

⁸⁶ Constitution of Kenya, Article 23; See also Article 70.

⁸⁷ Jacobsen, Dag Ingvar. "Are the relations between politicians and administrators at the local level determined by the degree of central government regulations?." In *ECPR, Joint Sessions Workshops*, no. 21. 2001; Kanyinga, Karuti. "Kenya: Democracy and political participation." (2014).

⁸⁸ Magdalena Sepulveda Carmona and Kate Donald, 'Access to Justice for Persons Living in Poverty: A Human Rights Approach' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2437808 <<https://papers.ssrn.com/abstract=2437808>> accessed 11 August 2020; 'Law and Justice Foundation - Access to Justice and Legal Needs. Stage 1: Public Consultations' <<http://www.lawfoundation.net.au/report/consultations>> accessed 11 August 2020.

⁸⁹ See Constitution of Kenya 2010, Article 23 (3).

⁹⁰ Mwagiru Makumi, 'Conflict in Africa: Theory Processes and Institutions of Management' [2006] Nairobi: Centre for Conflict Research 115.

technicalities thus denying the group of persons in question an opportunity to actively and meaningfully participate in decision-making processes.⁹¹

b. Alternative Dispute Resolution Mechanisms and Human Rights in Environmental Matters

The phrase Alternative Dispute Resolution (ADR) refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.⁹² However, while arbitration is considered as part of ADR mechanisms, due to its coercive nature and great similarity to litigation, for purposes of this discussion, arbitration is grouped together with litigation. As such, the use of the term ADR in this paper should be construed to refer to mediation, conciliation, negotiation and traditional/community based dispute management mechanisms.

ADR methods have been associated with the advantages of being cost effective, expeditious, informal and participatory.⁹³ As a result, parties retain a degree of control and relationships can be preserved. Conflict management mechanisms such as mediation encourages “win-win” situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.⁹⁴ ADR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management.⁹⁵

Traditional Dispute Resolution Mechanisms (TDRMs) include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others.⁹⁶ It has been

⁹¹ Benjamin Richardson and Jona Razzaque, ‘Public Participation in Environmental Decision Making’; OITA US EPA, ‘Public Participation Guide: Introduction to Public Participation’ (*US EPA*, 24 February 2014) <<https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation>> accessed 11 August 2020; Canberra corporateName=Commonwealth Parliament; address=Parliament House, ‘Citizens’ Engagement in Policymaking and the Design of Public Services’ <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1112/12rp01> accessed 11 August 2020; NU CEPAL, ‘International Human Rights Standards Applicable to Access to Information, Public Participation and Access to Justice. Executive Summary (Preliminary Version)’.

⁹² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁹³ Ibid; Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi, 2015; Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2013.

⁹⁴ Fenn, P., “Introduction to Civil and Commercial Mediation”, in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CI Arb, London, 2002), p.10.

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

⁹⁶ Muigua, Kariuki. "Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems." *Alternative Dispute Resolution* (2017): 1-80; Dahal, Dev Raj, and Chandra Dev Bhatta. "The relevance of

observed that where traditional community leadership is strong and legitimate it has positive impacts in promoting local people's priorities in natural resource management.⁹⁷ The traditional and customary systems for managing conflict are associated with: encouraging participation by community members, and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.⁹⁸

ADR and TDRM processes are therefore more likely to afford communities or disgruntled groups procedural rights, and in effect, help in achievement of environmental justice and environmental democracy.⁹⁹ They would provide a viable platform for access to justice which is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.¹⁰⁰

While ADR and TDR mechanisms may suffer from the unenforceability of their outcomes and potential gender bias,¹⁰¹ they may provide a good platform for the realisation of procedural rights

local conflict resolution mechanisms for systemic conflict transformation in Nepal." *Berghof Foundation for Peace Support* (2008).

⁹⁷ Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' *Overseas Development Institute Natural Resource Perspectives*, No. 76, March 2002, p.4.

⁹⁸ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁹⁹ Ilaria Beretta, 'Some Highlights on the Concept of Environmental Justice and Its Use' [2012] e-cadernos CES <<http://journals.openedition.org/eces/1135>> accessed 11 August 2020; Alma L Lowry, 'Achieving Justice through Public Participation: Measuring the Effectiveness of New York's Enhanced Public Participation Plan for Environmental Justice Communities'; 'Environmental Democracy? Does Anyone Really Care?' (*E-International Relations*, 26 October 2012) <<https://www.e-ir.info/2012/10/26/environmental-democracy-does-anyone-really-care/>> accessed 11 August 2020.

¹⁰⁰ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

¹⁰¹ Muigua, Kariuki. "Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems." *Alternative Dispute Resolution* (2017): 1-80; Deborah R Hensler, 'Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don't Know' <<https://core.ac.uk/reader/147643940>> accessed 11 August 2020; Todd B Carver and Albert A Vondra, 'Alternative Dispute Resolution: Why It Doesn't Work and Why It Does' [1994] *Harvard Business Review* <<https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>> accessed 11 August 2020; Lorna McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26 *European Journal of International Law* 607.

and the ability to recognise and address deep rooted causes of conflicts while coercive mechanisms such as litigation may come in handy in realisation of substantive rights.¹⁰²

5. Securing Human Rights in Environmental and Natural Resources Conflict Management

While there are other regulatory approaches to achieving environmental protection and addressing or avoiding environmental conflicts that are not rights-based such as economic incentives and disincentives, criminal law, and private liability regimes¹⁰³, a human rights based approach is arguably the most effective one that ensures that conflicts and all or most of their root causes are effectively addressed thus limiting any chances of reemergence of these conflicts.¹⁰⁴ While the emphasis on responsibilities rather than rights may still have its place in environmental protection and management of environmental conflicts, recognising the rights of conflicting groups and upholding them could be more effective.¹⁰⁵ The two approaches should therefore be used but with a rights-based one getting significant recognition. For instance, the Constitution of Kenya 2010 provides for environmental rights which include the right to clean and healthy environment for every person¹⁰⁶ but also spells out the duty of every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.¹⁰⁷

Where conflict cannot be contained in a functional way, it can erupt in violence, war, and destruction, loss of life, displacements, long-term injuries, psychological effects as a result of trauma suffered especially in case of violent conflicts, and deep fear, distrust, depression, and

¹⁰² Tom Tyler and Rebecca Hollander-Blumoff, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] Faculty Scholarship Series <https://digitalcommons.law.yale.edu/fss_papers/4992>.

¹⁰³ D Shelton, *Human Rights, Health & Environmental Protection: Linkages in Law & Practice; 2002* <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 4.

¹⁰⁴ 'What Is HRBAP? | Human Rights-Based Approach to Programming' (UNICEF) <https://www.unicef.org/policyanalysis/rights/index_62012.html> accessed 11 August 2020; 'A Human Rights Approach to Conflict Resolution' (*Ethics & International Affairs*, 9 September 2019) <<https://www.ethicsandinternationalaffairs.org/2019/a-human-rights-approach-to-conflict-resolution/>> accessed 11 August 2020.

¹⁰⁵ 'A Human Rights Approach to Conflict Resolution' (*Ethics & International Affairs*, 9 September 2019) <<https://www.ethicsandinternationalaffairs.org/2019/a-human-rights-approach-to-conflict-resolution/>> accessed 11 August 2020.

¹⁰⁶ Constitution of Kenya 2010, Article 42.

¹⁰⁷ Constitution of Kenya 2010, Article 69 (2).

sense of hopelessness.¹⁰⁸ All these raise significant but diverse human rights issues. However, while failure to address conflicts is likely to give rise to the listed adverse effects on human life, use of the inappropriate mechanism(s) to deal with the conflicts may address the problem for one group of persons while plunging the other one into deeper problems.¹⁰⁹ Scholars have argued that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control which many find non-negotiable.¹¹⁰

It has also been argued that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control which many find non-negotiable.¹¹¹ The clash of interests can take many forms. It could be over resources such as land, food, territory, water, energy sources, and natural resources.¹¹² Conflict could also be associated with power and control of the resources.¹¹³ Conflicts could also be over identity,¹¹⁴ namely cultural, social and political identities to which people feel tied. Conflicts over status may arise, relating to whether people feel treated with respect and dignity and whether their traditions and social position are respected.¹¹⁵ Conflicts could be caused by differences of values, particularly those embodied in systems of government, religion, or ideology.¹¹⁶ Further, conflicts have been associated with the changing norms, values, and world views about property rights within formerly subsistence-based (or pastoralist) communities.¹¹⁷ These types of conflicts may be deep seated and the formal approaches to conflict management such as courts may not necessarily address all the issues

¹⁰⁸ See K Annan, G Machel and B Mkapa, 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya' [2014] Nairobi: African Union Commission.

¹⁰⁹ Blondel, Alice. "Climate change fuelling resource-based conflicts in the Asia-Pacific." *Asia-Pacific Human Development Report Background Papers Series 12* (2012).

¹¹⁰ Burton, J., *Conflict: Human Needs Theory* (New York: St. Martin's Press), 1990; Kelman, H., *International Behavior: A Social Psychological Analysis* (New York: Holt, Rinehart and Winston), 1965.

¹¹¹ Ibid.

¹¹² Buckles, D. & Rusnak, D., 'Conflict and collaboration in natural resource management,' (International Development Research Centre, 2005), p. 2.

¹¹³ Ibid, p. 2.

¹¹⁴ See Rothman, J., *Resolving Identity-Based Conflict: In Nations, Organizations, and Communities*. (San Francisco: Jossey-Bass Publishers, 1997).

¹¹⁵ EAIM, 'Peace and Stability Are Prelude to Economic Development and Prosperity,' <http://www.togoruba.org/togoruba1964/mainTogorubamap/mainMap/headingMap/English/2006/Art.sFeb-2006/1802EAIM06-06EA.html> Accessed 10 August 2020.

¹¹⁶ Adamu, A & Ben, A., 'Migration and Violent Conflict in Divided Societies: Non-Boko Haram violence against Christians in the Middle Belt region of Nigeria,' *Nigeria Conflict Security Analysis Network (NCSAN) Working Paper No. 1*, (World Watch Research, Abuja, Nigeria, March 2015).

¹¹⁷ Armitage, D., 'Adaptive Capacity and Community-Based Natural Resource Management,' *Environmental Management*, Vol. 35, No. 6, pp. 703–715, p. 710.

arising.¹¹⁸ They require participatory approaches that take into account the concerns and rights of the target groups. Empowering these communities through such means as ensuring that they have access to all the information required in decision making and negotiating with them on what trade-offs may be necessary can potentially achieve environmental protection while at the same time ensuring that the human rights of these groups are protected.¹¹⁹ This is because, conflicts do not occur in vacuum and to a large extent, they are dependent on the context.¹²⁰ As such, the needs of target groups differ and must be treated as such.

The *1992 Conference of Rio de Janeiro on Environment and Development* formulates a link between human rights and environmental protection largely in procedural terms, declaring in Principle 10 that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because environmental issues are best handled with the participation of all concerned citizens, at the relevant level.¹²¹

The Sustainable Development Goals (SDGs) acknowledge that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.¹²² The SDGs recognize the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights, on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.¹²³

¹¹⁸ Philip Onguny and Taylor Gillies, 'Land Conflict in Kenya: A Comprehensive Overview of Literature' [2019] *Les Cahiers d'Afrique de l'Est / The East African Review* <<http://journals.openedition.org/eastafrica/879>> accessed 11 August 2020; Muigua, Kariuki. "Conflict Management Mechanisms for Effective Environmental Governance in Kenya." (2018); Young, Laura A., and Korir Sing'Oei. *Land, livelihoods and identities: Inter-community conflicts in East Africa*. Minority Rights Group International, 2011; N Rass, 'Policies and Strategies to Address the Vulnerability of Pastoralists in Sub-Saharan Africa'; PY Le Meur and others, 'Conflict over Access to Land & Water Resources within Sub-Saharan Dry Lands: Underlying Factors, Conflict Dynamics and Settlement Processes' [2006] Final report, GRET, Paris.

¹¹⁹ Machingura, Fortunate, and Seven Lally. "The Sustainable Development Goals and their trade-offs." *London: ODI* (2017); Balbo, Marcello, and Giulia Guadagnoli. "United Nations Trust Fund for Human Security Projects implemented by UN-Habitat in Afghanistan, Cambodia and Sri Lanka."

¹²⁰ T Belay, 'Conflicts, Conflict Resolution Practices and Impacts of the War in South Sudan' (2015) 2 *International Journal of School and Cognitive Psychology* S 013.

¹²¹ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice; 2002* <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 4.

¹²² United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

¹²³ *Ibid.*

A human rights-based approach to environmental protection is therefore capable of not only addressing the conflict but also ensures that all other relevant rights in such scenarios are observed and upheld.¹²⁴ The choice of mechanism to be used is thus equally important.

Considering that conflicts between biodiversity conservation and other human activities are intensifying as a result of growing pressure on natural resources and associated demands by some for greater conservation,¹²⁵ approaches to reducing conflicts are increasingly focusing on engaging stakeholders in processes that are perceived as fair, that is, independent and where stakeholders have influence, and which in turn can generate trust between stakeholders.¹²⁶ Increased trust through fair participatory processes makes conflict resolution more likely.¹²⁷ Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process.¹²⁸

There is a need for taking local communities into confidence and having confidence in them; engaging with their ideas, experiences, values, and capabilities and working with them, not on their behalf, to achieve resource-conservation objectives and community benefits.¹²⁹ In such approaches, environmental protection is achieved while at the same time, the communities' rights are protected.¹³⁰

It is recommended that conflict resolution mechanisms such as negotiation and mediation should be utilised more in management of environmental and natural resource-based conflicts as they can afford the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.¹³¹ This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.¹³² It is arguable that resolution

¹²⁴ Campese, Jessica. *Rights-based approaches: Exploring issues and opportunities for conservation*. CIFOR, 2009 <http://www.cifor.org/publications/pdf_files/Books/BSunderland0901.pdf> Accessed 11 August 2020.

¹²⁵ Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, pp. 10–17.

¹²⁹ Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

¹³⁰ Ibid.

¹³¹ Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Working Paper No. 135*, (Overseas Development Institute, April, 2000), p. 16.

¹³² Mwangi Makumi, 'Conflict in Africa: Theory Processes and Institutions of Management' [2006] Nairobi: Centre for Conflict Research 115.

mechanisms have better chances of achieving parties' satisfaction and protecting their rights when compared to settlement mechanisms.¹³³ Settlement mechanisms may first be used to quell any violence after which resolution mechanisms should be employed to address the deep rooted issues which mostly touch on human rights on such issues as dignity, culture and participation among others, since conflict management processes are not mutually exclusive and one can lead to the other.¹³⁴

Notably, the 2010 Constitution of Kenya created an opportunity for exploring the use of ADR mechanisms and TDRMs in managing natural resource conflicts.¹³⁵ ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, should be utilised in addressing the complex issues in environmental conflicts that may not be resolved through the formal methods such as courts.¹³⁶ This is because some mechanisms such as mediation and negotiation can potentially bring about inclusiveness and public participation of all members of the community in decision-making. They are relevant in enjoyment of procedural rights in environmental matters.

6. Conclusion

Human rights fall under substantive and procedural rights. Environmental law is one of the branches of law where procedural rights play a vital role in addressing environmental concerns. This paper has argued that while the formal approaches to environmental protection are important in securing substantive environmental rights, they may not be as effective in achieving procedural rights. It is for this reason that stakeholders should consider and promote active utilisation of other informal approaches such as ADR and TDR in ensuring that all the rights of communities are protected. There is a need to strike a balance between conservation measures and access to resources by communities, through employing approaches that help in understanding the needs of the particular people and responding appropriately and consequently

¹³³ Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2013.

¹³⁴ Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

¹³⁵ Constitution of Kenya 2010, Art. 60; 67; 159(2) (c).

¹³⁶ Muigua, Kariuki, and Kariuki Francis. "alternative Dispute resolution, access to Justice and Development in Kenya." *Strathmore LJ* 1 (2015): 1; Sandford, R. A. "Environmental dispute resolution: mediation, an effective alternative to litigation?." PhD diss., University of Tasmania, 1990.

building trust within communities, and between communities and the national government.¹³⁷ In addition, for conflict management to be successful there is a need to employ participatory approaches so that the major issues can be identified, analysed and properly addressed.¹³⁸

A bottom-top approach to natural resource management, including conflict management, creates an opportunity to involve the local people who may have insiders' grasp of the issues at hand.¹³⁹

While conflicts cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential loss of lives and property. Management of natural resource conflicts also ensures security in terms of a guarantee of continued access to and use of the environmental resources necessary for to survival from generation to generation. Human rights are an integral part of any democracy and should therefore not be sacrificed; the place of human rights in Environmental and Natural resources Conflict management in Kenya is thus central and should remain so.

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'OHCHR | What Are Human Rights' <<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed 10 August 2020.

Adamu, A & Ben, A., 'Migration and Violent Conflict in Divided Societies: Non-Boko Haram violence against Christians in the Middle Belt region of Nigeria,' *Nigeria Conflict Security Analysis Network (NCSAN) Working Paper No. 1*, (World Watch Research, Abuja, Nigeria, March 2015).

Anderson, J., Gauthier, M., Thomas, G. and Wondolleck, J., 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' <<http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage>> Accessed 10 August 2020.

Armitage, D., 'Adaptive Capacity and Community-Based Natural Resource Management,' *Environmental Management*, Vol. 35, No. 6, pp. 703–715.

¹³⁷ Office for ECOSOC Support and Coordination United Nations. *Achieving sustainable development and promoting development cooperation: dialogues at the Economic and Social Council*. UN, 2008; Muigua, Kariuki. "Managing natural resource conflicts in Kenya through negotiation and mediation." (2016).

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¹³⁹ Muigua, Kariuki. "Conflict Management Mechanisms for Effective Environmental Governance in Kenya." (2018); 'Negotiation and Mediation Techniques for Natural Resource Management' <<http://www.fao.org/3/a0032e/a0032e04.htm>> accessed 11 August 2020; Hartter, Joel, and Sadie J. Ryan. "Top-down or bottom-up?: Decentralization, natural resource management, and usufruct rights in the forests and wetlands of western Uganda." *Land Use Policy* 27, no. 3 (2010): 815-826; Mark Reed and Julian sidoli del ceno, 'Mediation and Conservation Conflicts: From Top-down to Bottom-Up' (2015).

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