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**ALTERNATIVE DISPUTE**  
*Resolution*



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### *Editor-in-Chief's Foreword*

Trust the Process — a mantra that has not only guided but also illuminated our path from the spark of an idea to the full bloom of realization. Engraved within these pages, whether held in hand or displayed on screen, lies the culmination of fervent aspirations from students determined to carve their indelible mark upon the academic landscape through research, discovery, and the art of the written word.

Anchored by a steadfast commitment to professionalism and scholarly diligence, the articles meticulously arranged in this volume navigate the complex terrains of climate and environmental justice, sports law, and alternative dispute resolution, all under the umbrella of contemporary global discourse. The launch of this edition coincides with a period of heightened engagement with issues at the intersection of law, science, and technology — a testament to its prescience and relevance.

Our ambition has been unwavering: to foster a community of law students who embody the essence of problem-solving, critical analysis, and an unquenchable thirst for knowledge. Thus, we

proudly unveil the University of Embu Law Review. Immerse yourself in the intellectual feast laid out before you, a banquet crafted by the diligent hands of your peers, the scholars of ink and insight.

Profound appreciation is extended to the tireless editors, whose nocturnal labour have brought this law review to fruition. To the Dean and Chairman of the Department, we offer our heartfelt thanks for their unwavering support and guidance. The mentorship of Professor Kariuki Muigua and Advocate James Njuguna has been instrumental; without their generous contributions, this publication might have remained a distant dream.

My deepest gratitude flows to the pioneers who contributed to this inaugural issue, marking a historic moment as the first-ever law journal published by the University of Embu. Their journey along the road less travelled has left an enduring legacy within the University's annals of scholarly works.

With the University of Embu Law Review now vibrant and alive, the meticulous craftsmanship of the Editorial Board stands as a testament to our dedication to excellence. It is with pride that we acknowledge the shared vision of Kimathi Kanana, Silaha Hamisi, and Joseph Amaganga with the board. The overwhelming support from the law students and faculty has been remarkable — a testament to the collective spirit that has brought this endeavour to life.

As we present this labour of love, my heart swells with fulfillment. Yet, none of this would have been conceivable without divine grace. As I herald the launch of this inaugural volume and issue, passing the torch to the successors, I am reminded of the timeless biblical words from 2<sup>nd</sup> Timothy 4:7-8: "I have fought the good fight, I have finished the race, I have kept the faith." \*Veni, Vidi, Vici\* — and to all, a joyous and enlightening read.

Mr. Nyamboga George Nyanaro,

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PROMOTING CLIMATE JUSTICE WITHIN THE HORN OF AFRICA: THIS IS THE WORK  
OF OUR LIFE TIME

*By Nyamboga Nyanaro George<sup>1</sup>*

Abstract

This paper comprehensively examines climate justice in the Horn of Africa region. It begins with introducing the topic and discussing Sustainable Development Goal 15 (SDG 15), which focuses

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on life on land. The importance of environmental justice in the Horn of Africa is then explored, followed by an explanation of the tenets of environmental justice. The paper further delves into the significance of SDG 15 in the region and the legal framework governing environmental justice. The paper identifies several factors exacerbating environmental justice-related problems in the Horn of Africa, including rising temperatures, ecological upset and biodiversity loss, alarming land degradation, conflicts over water resources, transboundary conflicts, and the Grand Ethiopian Renaissance Dam (GERD). The effects of climate change and environmental degradation in the region are then discussed, followed by a review of cases interconnected with environmental justice, such as the Ogiek case, the Endorois case, the case of Ilisu Dam, and the case of Lake Turkana. The paper also highlights the progress made in promoting environmental justice and the role of the Horn of Africa Regional Environmental Center & Network. It concludes with a set of recommendations, emphasizing the need for bolstering regional coordination and cooperation, the role of civil society, and the need for an effective national proactive approach.

## I. Introduction

Aissa Dearing construes the concept of environmental justice through the lens of the proponents Beverly Wright, Robin Saha, Paul Mohai, and Robert Bullard. They found environmental justice to be concerned with distributing the benefits and harms accruing from an environment in a distributable manner, hence rectifying the various systems of oppression based



on race, gender, ethnicity, and other lines of discrimination.<sup>2</sup> The issue of environmental justice manifests across various regions worldwide, and the Horn of Africa is no exception. The Horn of Africa encompasses Uganda, South Sudan, Somalia, Kenya, Ethiopia, Eritrea, and Djibouti.<sup>3</sup> The recent global climate change has made the region receive attention in terms of environmental and climate change justice, given the abundance of natural resources, the richness of the biodiversity, and the region's diverse ecosystem.<sup>4</sup> Despite being described as a cornucopia of biodiversity harbouring ecological species not found in other parts of the world, the region is extremely susceptible to climate change and environmental degradation. This has been evidenced by the region experiencing increased degradation of lands due to vegetation and biodiversity loss, soil erosion, desertification, and deforestation.<sup>5</sup>

Similarly, more than 16 million people in the region cannot access clean water for cleaning because of water shortage. The effect on the population has been that people cannot drink, cook, and clean daily as they used to when water was abundant.<sup>6</sup> Equally, famines have become inescapable because of environmental degradation, followed by unending conflicts over natural resources for the law of natural selection through the survival of the fittest in fighting the now-becoming scarce natural resources. The major cause of this conflict has been unsustainable human activities such as land-use activities, urban-industrial pollution, deforestation, and overgrazing that have exacerbated the change in the global image, as evidenced by more erratic rainfall and rising temperatures.<sup>7</sup> The vulnerability of this region to climate change and environmental degradation has led to the global south facing a myriad of challenges in achieving the fifteenth sustainable development goal, which encompasses promoting environmental justice.

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<sup>2</sup> Aissa Dearing, 'Toward Environmental Justice: Key Concepts' (*JSTOR Daily*, 14 July 2023) <<https://daily.jstor.org/toward-environmental-justice-key-concepts/>> accessed 4 December 2023.

<sup>3</sup> *Regional Integration, Identity and Citizenship in the Greater Horn of Africa* (Boydell & Brewer 2012) <<https://www.jstor.org/stable/10.7722/j.ctt1x73f1>> accessed 5 December 2023.

<sup>4</sup> 'Horn Of Africa - Biodiversity Hotspot' (*prezi.com*) <<https://prezi.com/5dkiwetvI5jo/Horn-of-africa-biodiversity-hotspot/>> accessed 5 December 2023.

<sup>5</sup> 'Environmental Degradation in the Greater Horn of Africa: Some Impacts and Future Implications' <<https://www.twn.my/title2/resurgence/2011/251-252/cover02.htm>> accessed 5 December 2023.

<sup>6</sup> Robert Simpson, 'Horn of Africa: How Climate Change Impacts People's Lives' (*ACTED*, 4 September 2022) <<https://www.acted.org/en/Horn-of-africa-how-climate-change-impacts-peoples-lives/>> accessed 5 December 2023.

<sup>7</sup> 'Overview the Horn of Africa Regional Environment Network | Horn of Africa Regional Environment Centre and Network' <<http://www.aau.edu.et/hoarecn/about/overview-the-Horn-of-africa-regional-environment-network/>> accessed 5 December 2023.

Devoid of vigorous environmental protection through sustainable natural resources management, the Horn of Africa might not achieve the 2030 Sustainable Development Goals (SDGs), encompassing the 15<sup>th</sup> SDG concerning protecting life on land. This can only be achieved through managing the forests sustainably, mitigating the alarming level of desertification, reversing and halting the degradation of the environment, performing surgery to prevent the loss of biodiversity, and ensuring the protection, restoration, and promotion of the terrestrial ecosystems" sustainable use.<sup>8</sup> Gaas" research established that the Great Horn of Africa is off-track and lagging in attaining the 2030 Sustainable Development Goals (SDGs). The reason why most people are living below the poverty line and facing emancipation is because of the unfair sharing of environmental benefits as exacerbated by climate change.<sup>9</sup>

Considering the above, the essay critically addresses the first effect of the ongoing climate and environmental crises in Horn Africa, focusing on the goals outlined under the Sustainable Development Goals, drawing a nexus of these impacts" effect on the environmental justice concept. The following section delves into the Sustainable Development Goal 15.

## II. Sustainable Development Goal 15

Sustainable Development Goal 15 concerns the life on land. It has nine areas of focus whose implementation can be actualised through three modes of implementation; these modes encompass various issues that are not only environmentally sensitive but also interconnected with natural resources on land<sup>10</sup> in the Horn of Africa. Among the desertification targets emerges the need to protect, restore, and promote the terrestrial ecosystems" sustainable use, harnessing the benefits of the forests albeit managing them sustainably, reversing and halting land degradation, addressing the alarming rate of desertification, and whose consequence is the loss

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<sup>8</sup> Kiran Pandey, 'Sustainable Development Goal 15: World off Track on Protecting Life on Land, Finds UN Report' (*Down To Earth*, 15 July 2022) <<https://www.downtoearth.org.in/news/agriculture/sustainable-development-goal-15-world-off-track-on-protecting-life-on-land-finds-un-report-83749>> accessed 5 December 2023.

<sup>9</sup> Abdirahman Gaas, 'Africa's Dilemma in Achieving Sustainable Development Goals' (2022) 14 *Journal of African Studies and Development* 160 <<https://academicjournals.org/journal/JASD/article-full-text-pdf/3151A9C70096>> accessed 15 September 2023.

<sup>10</sup> Dale Andrew, 'ADB Working Paper Series TRADE and SUSTAINABLE DEVELOPMENT GOAL 15: PROMOTING "LIFE on LAND" through MANDATORY and VOLUNTARY APPROACHES Asian Development Bank Institute' (2017) Abstract <<https://www.adb.org/sites/default/files/publication/236001/adbi-wp700.pdf>>.

of diversity. Being one of the United Nations' Sustainable Development Goals of 2015 as part of Agenda 2030, the goal is to ensure that humans thrive on the land they inhabit, given that a flourishing land forms the cornerstone of the life we live on this planet. Moreover, it is no secret that we form part of the ecosystem's composition, which, too sadly, other human beings have damaged through massive deforestation, upsetting natural habitats and hence their loss, and engaging in various practices leading to land degradation. In the crucible of such environmentally degrading activities, the cries of the affected and international community echo through the corridors of environmental justice, resounding a voice that sustainably using our ecosystems while preserving biodiversity is not a mere PR cause but rather a determinant of our survival.<sup>11</sup>

The underscored SDG, apart from the nine targets highlighted hereinabove, leverages twelve targets to vocalise the clarion call to action if the Horn of Africa is to restore and continue protecting the life of land successfully. Target 15.1, for instance, had set a target of restoring and conserving the terrestrial and freshwater ecosystems. In fact, for starters, the goal was for the various UN Nations signatory countries and regions to have been properly restored, conserved, and sustainably used. The particular focus of such ecosystems inter-alia encompassed drylands, mountains, wetlands, and forests under the obligations stipulated in various international agreements. The same year was supposed to see sustainable management and implementation of the various forest types to halt the continued deforestation and restore other forests through initiatives such as reforestation and afforestation. It is upon laying such a foundation that the various initiatives of 2030 will have a set pace. The 2030 goals encompass tackling the issue of deforestation by restoring the soil and land that had been degraded, including but not limited to land affected by desertification caused by massive floods or prolonged drought, while striving towards attaining a land degradation-neutral world.<sup>12</sup>

The above initiatives would also boost through the push to conserve the mountain ecosystems, protecting the natural habitats and biodiversity, ensuring a fair benefit-sharing approach while promoting the genetic sources, eliminating the endangered species poaching as is the case with

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<sup>11</sup> 'Goal 15: Life on Land' (*The Global Goals*) <<https://globalgoals.org/goals/15-life-on-land/>> accessed 5 December 2023.

<sup>12</sup> *ibid.*

ensuring the protected species are not trafficked, ensure that both the water and land ecosystems are prevented from attacks of invasive alien species. Such would be possible through the respective Horn of Africa governments integrating biodiversity and ecosystem integration into their plans. This would inevitably demand increased resource allocation towards conservation, biodiversity, and sustainable use of the ecosystem. Another plan would also be to promote the sustainable management of forests sustainably using financial incentives. By combating trafficking and global poaching, the pursuit of opportunities underpinning sustainable livelihood opportunities is very high.<sup>13</sup>

Environmental justice concerns the fair sharing of burdens and benefits from the environment while determining the distributions in the process.<sup>14</sup> This brings out the significant involvement and fair treatment of all regardless of race, marginalised status, indigenesness, gender, and other discrimination factors in developing environmental policies and decisions regarding natural resources. The end goal should be that while the various communities bear a fair share of environmental harm, they enjoy the benefits equally.<sup>15</sup> Dr Kariuki Muigua further avers that environmental justice has been defined to mean equality in accessing natural resources and to the extent that environmental laws, regulations, and policies do not lead to both stakeholders in the Great Horn of Africa suffering disproportionately. This demands that even the marginalised communities and various indigenous people in the region have rightful access to the needed environmental information and are involved meaningfully in decision-making through effective public participation. This remains the surest way of addressing various vulnerable groups' manifest human rights abuses and the attendant harm caused to their environment.<sup>16</sup>

Like how normal court litigation and alternative justice systems aim to promote access to both restorative and redistributive justice, environmental justice specifically exists to help address the various challenges facing the countries in the Horn of Africa. Such challenges, according to Kebba

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<sup>13</sup> *ibid.*

<sup>14</sup> Dayna Nadine Scott, 'What Is Environmental Justice?' [2014] SSRN Electronic Journal Section on Environmental Justice <<http://www.ssrn.com/abstract=2513834>> accessed 5 December 2023.

<sup>15</sup> *ibid.*

<sup>16</sup> Admin, 'Putting the Concept of Environmental Justice in Context' (*The Lawyer Africa*, 10 October 2023) <<https://thelawyer.africa/2023/10/10/environmental-justice-in-context/>> accessed 5 December 2023.

Jeffang, are mostly related to SDG 15 through the lens of the various challenges which inter-alia encompass loss of biodiversity, the Horn of Africa's climate change vulnerability, the degradation of land quality, and the massive deforestation that has become a concerning issue. He further found the African continent to lose approximately one hundred and ninety-five billion dollars" worth of natural capital yearly to activities such as illegal logging.<sup>17</sup> The need to address such practices through environmental and climate justice makes Climate and Environmental litigation vital in accessing the fountain of justice.

The nexus between climate and environmental justice in the context of SDG is vital yet complicated, often entailing a wide array of perspectives underpinning political, economic, social, and environmental obstacles. This is because climate and environmental justice are not mere transactions to safeguard the environment of the Horn of Africa region. Rather, it addresses the genesis and catalysts of the various causes of environmental degradation, for example, conflicts, inequality, poverty, environmental governance issues, population growth, human ecological conflicts, and, more concerningly, the poverty levels in Africa.<sup>18</sup> Borrowing precedent from the universally declared human rights, environmental justice, akin to climate justice, should be analysed from the lens of protecting the most vulnerable in society following the long history of inequality in benefits accrued from the exploitation of natural resources. The concept of environmental justice has come to the fore of the continental issue, for it is the marginalised groups or those with low bargaining power that face climate change and environmental degradation's disproportionate impacts. Such an impact permeates the economy, vital natural resources, and infrastructure. The interconnectedness of environmental change and related issues continues to have a knock-on effect on other sectors, such as finance, energy, water, and food scarcity, to mention a few.<sup>19</sup>

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<sup>17</sup> Huang Lushan, 'Hope for Environmental Justice in Africa' (*China Dialogue*, 19 December 2022)

<<https://chinadialogue.net/en/pollution/hope-for-environmental-justice-in-africa/>> accessed 5 December 2023.

<sup>18</sup> 'SDG 15: Protect, Restore and Promote Sustainable Use of Terrestrial Ecosystems, Sustainably Manage Forests, Combat Desertification, Halt and Reverse Land Degradation and Halt Biodiversity Loss – SDG Compass'

<<https://sdgcompass.org/sdgs/sdg-15/>> accessed 5 December 2023.

<sup>19</sup> Jhénéelle Williams and others, 'Africa and Climate Justice at COP27 and beyond: Impacts and Solutions through an Interdisciplinary Lens' (2023) 5 UCL Open Environment e062.

### III. Of what importance is environmental justice in the Horn of Africa?

The importance of environmental justice cannot be overemphasised for varied reasons. Among these reasons lies the need to alleviate discrimination in the equitable and fair sharing of their natural and ecological sources. This is through avoiding the enactment of environmental and climate change laws and policies that impose on the marginalised communities and indigenous people disproportionately.<sup>20</sup> Indisputably, human survival is pegged on the utilisation of natural resources. Such resources act as the majority of African communities" (those in the Horn of Africa inclusive) source of livelihood. Of concern is that since the precolonial period till the present post-colonial period, the majority of the said African communities" natural resources access, use, and even control remains undermined, denied, or limited by arbitrary laws, policies, and enforcement apparatuses. This is not supposed to be the status quo. Such resources and the ecological and environmental benefits should be distributed according to environmental management and administrative principles. Such principles encompass equality, fairness, and proportionality.<sup>21</sup> So basic is such a right of access to justice that even environmental justice merits to be grouped under the inalienable human right. The basis for such a presumption emanates from the fact that the people should have a right of self-determination regarding any administrative decision having a ripple effect on their lives and livelihood.

From the above foregoing, there has been a vigorous campaign for various local, national, regional, and international agencies to upscale the ecological protection and safety of the various communities and ethnic or gender minorities greatly or proportionately disadvantaged. Devoid of environmental justice, most stakeholders stand in a vulnerable position of victimhood and injustice meted out by the wielders of power and proponents of disproportionately adverse environmental and natural resources ambitions and plans.<sup>22</sup> In this similar crucible of environmental justice advocacy, the cries of environmentalists and the affected communities echo the need to improve cultural awareness while addressing the pertinent language barrier issue in

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<sup>20</sup> Kariuki Muigua and Francis Kariuki, 'Towards Environmental Justice in Kenya' [January 2015) Kariuki Muigua & Co Advocates Abstract.

<sup>21</sup> *ibid.*

<sup>22</sup> 'Why Is Environmental Justice Important?' (*Ben Crump*) <<https://bencrump.com/environmental-justice-lawyer/why-is-environmental-justice-important/>> accessed 6 December 2023.

taking collective measures to preserve and conserve the environment (emphasis mind). This forms part of the ecological civic education. Such objects would align with the principles of environmental justice being discussed in the following section.

#### IV. Tenets of Environmental Justice

The principles underpinning environmental justice are numerous. However, seventeen of these principles" stand out. Amongst these outstanding principles is the sacredness of mother nature. The principle calls for a harmonious co-existence with the mother, as Calzadilla and Kotze cited while appraising the Bolivian case regarding Mother Earth rights. Before delving into the case's core, it should be known that this principle echoes the need to ensure all species' interdependence for ecological unity, protecting mother nature from ecological destruction.

For this reason, nature rights are receiving the much-needed legal and judicial safeguard in the emerging jurisprudence further supported by various public and legal discourses. The research by the duo equally referred to a 2018 *Transnational Environmental Law* publication that had interrogated the experiment by Uruguay in entrenching the rights of mother nature into their new Constitutional dispensation, a precedent borrowed by comparative Bolivian legal regime in asserting the mother nature rights.<sup>23</sup> This underscores how sacred our environment is and the need to protect its inherent right to help us achieve our socio-economic needs as nations geographically situated in the Horn of Africa.

The need for a public policy that is bias and discrimination-free cannot be overemphasised in the context of environmental justice. The principle is further reiterated by Orcutt's 1991's speech in the First Environmental Leadership regarding the people of colour, resounding the impassioned plea of the affected and concerned stakeholders in the Horn of Africa. Like the People of Colour, their plight is that the various laws and policies aimed at securing environmental integrity should

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<sup>23</sup> Paola Villavicencio Calzadilla and Louis J Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7 *Transnational Environmental Law* 397.

be pegged on mutual respect, guarantee all the people environmental justice, and be free from bias or discrimination.<sup>24</sup>

Interconnected to the principle mentioned above 2 is the environmental justice principle vouching for a right to a balanced, ethical land and natural use. The goal of this principle is hinged on all living things (encompassing humans) best interest and sustainable development. This essentially calls for fair treatment of the ecological surroundings and living things therein,<sup>25</sup> meaningful stakeholder engagement for all those who are affected, protecting the Horn of Africa from any adverse impacts of prospective nuclear testing, protecting the Great Horn of Africa communities from wastes that are hazardous and toxic (including poisons), safeguarding basic natural resources such as food, water, land, and cleanliness of the air the region inhales,<sup>26</sup> and lastly ensuring that all communities have fair access to this resources.<sup>27</sup>

Reviewing the previously agreed international approaches to environmental justice, the various actions that have been predominantly advocated for encompass the protection of the various natural landscapes and forests, securing the endangered ecological wildlife and habitats, reduction of greenhouse gas emissions, incorporation of techniques of managing land that are sustainable while rehabilitating land which has been degraded. This should be combined with sustainably utilising renewable natural resources like geothermal energy, biomass, the sun, water, and wind.<sup>28</sup> Only when these resources are sustainably used can the Horn of Africa grow from what Professor

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<sup>24</sup> Jon Orcutt, 'PRINCIPLES OF ENVIRONMENTAL JUSTICE – Planners Network' (7 November 2023) <<https://www.plannersnetwork.org/1998/05/principles-of-environmental-justice/>> accessed 7 December 2023.

<sup>25</sup> 'Why Is Environmental Justice Important?' (n 21).

<sup>26</sup> Renee Skelton, Vernice Miller, and Courtney Lindwall, 'The Environmental Justice Movement' (NRDC, 22 August 2023) Section delving deeper on What is Environmental Justice <<https://www.nrdc.org/stories/environmental-justice-movement>> accessed 7 December 2023.

<sup>27</sup> Dargan MW Frierson, 'Principles of Environmental Justice' See Principle number 12 of the Enlisted and Justified environmental justice principles. <<https://uw.pressbooks.pub/climatejusticeandenergysolutions/chapter/principles-of-environmental-justice/>> accessed 7 December 2023.

<sup>28</sup> 'Balancing Use of Land for People and Ecosystems | UNFCCC' <<https://unfccc.int/topics/education-youth/youth/global-youth-video-competition/global-youth-video-competition-2019/balancing-use-of-land-for-people-and-ecosystems>> accessed 7 December 2023.



Paul Tiyambe Zeleza refers to as a pawn to a critical player<sup>29</sup> in the global development (and environmental justice) agenda (emphasis mine).

Shifting the focus to the nexus between environmental justice and respect for human rights, Ramirez-Andreotta underscores the need for various guardians of environmental and natural resources determination to respect rights accruing to each other. These rights broadly fall under the cultural, economic, environmental, and political determination of the ruling class and the citizenry as applicable in the Horn of Africa's context.<sup>30</sup> Similarly, the fundamentality of environmental justice applies to the Horn of Africa workers. The principle underscores all the labourers' rights to a work environment that is healthy and whose conditions are safe. We also refer to workers in the formal and informal sectors, for they should not be compelled to choose between unsafe employment or livelihood. Expanding the scope, those who are working from home, the Horn of Africa farmers, fishermen, horticulturalists, those rearing bees, and apiculture farmers should domicile in an environment that is environmental hazards-free given the fundamentality of the right to a clean and healthy environment as universally recognised continentally and globally.<sup>31</sup>

Where an environmental injustice has been meted out to any community or stakeholder in the Horn of Africa, just like other parts of the world, they reserve a right to receive damages, reparations, or adequate compensation. Whereas this has never been the case, as shall be seen in various case studies that would follow, such injustices are tantamount to human rights" transgressions. This is further supported by the fact that human rights and environmental justice are intertwined. Research has established the interconnectedness of the two conceptions, considering the prevalence of human rights" abuses in most cases involving the destruction or

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<sup>29</sup> Paul Tiyambe Zeleza, 'Africa in the 21st Century: From Pawn to a Significant Player' (*The Elephant*, 14 October 2022) <<https://www.theelephant.info/long-reads/2022/10/14/africa-in-the-21st-century-from-pawn-to-a-significant-player/>> accessed 7 December 2023.

<sup>30</sup> Mónica Ramirez-Andreotta, *Environmental and Pollution Science* (Third, Elsevier 2019) Chapter 31 on Environmental Justice <<https://www.sciencedirect.com/topics/earth-and-planetary-sciences/environmental-justice>> accessed 7 December 2023.

<sup>31</sup> 'Principles of Environmental Justice | Reimagine!' <<https://www.reimaginepe.org/21-2/ejprinciples>> accessed 7 December 2023.

degradation of the environment.<sup>32</sup> Evident have been the cases where communal lands are seized arbitrarily, displacing indigenous communities, unbalanced sharing of the resources accruing from the natural resources" exploitation, and improper dumping of hazardous waste is a broad daylight of evidence attesting to human rights abuses in the context of environmental justice.<sup>33</sup> The 21<sup>st</sup> Century has equally seen various assaults and mutilations on national and international environmental rule of law. Similarly, the corridors of justice have in recent decades received various human rights and ecological abuse problems whose wide scope, for example, the indigenous people extermination in Indonesia's region called Irian Jaya, the ecological and human rights abuses in various parts such as the Omo case in the Horn of Africa, the environmental injustices in the region of Philippines, Malaysia, Latin America, and the Balkans.<sup>34</sup> Such plights of justice resound the urgency for various regions (despite the focus being the Horn of Africa) to craft a proper environmental rights enforcement mechanism as a precondition in properly addressing these attendant issues about human rights.

#### V. What is the importance of SDG 15 in the Horn of Africa?

In the crucible of climate change, where the vulnerability of the Horn of Africa region has exposed various powerless individuals to the fangs of climate change, this section of the essay acknowledges the consequences. The effects of inter-alia encompass the challenges faced in the previous years because of environmental degradation, including locust outbreaks, floods, droughts, and conflicts over natural resources threatening millions of citizens in the Horn of Africa's well-being and livelihoods. Unless these disproportionate effects are addressed, the likelihood of millions of people dying because of water scarcity, food insecurity, and death of livestock because of pasture lands" depletion is likely.<sup>35</sup> Remedially, and from the foregoing scholarly reasonings, environmental justice, a form of advocacy for fair sharing of environmental benefits, underscores the need for those in power to engage all the stakeholders meaningfully,

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<sup>32</sup> Francis O Adeola, 'Environmental Injustice and Human Rights Abuse: The States, MNCs, and Repression of Minority Groups in the World System' (2001) 8 Human Ecology Review 39.

<sup>33</sup> *ibid* 40.

<sup>34</sup> Adeola (n 31).

<sup>35</sup> 'The Principles of Environmental Justice' (*Climate Justice Alliance* 18 February 2022)

<<https://climatejusticealliance.org/ej-principles/>> accessed 7 December 2023.

their social class stratification notwithstanding, in conserving and preserving the environment. A similar approach should apply if there are benefits or harm from the environmental use. Where either party has breached the social contract, it would be important to seek an appropriate avenue of dispute resolution and adequate compensation to recompense the aggrieved community.<sup>36</sup>

Aware that the various communities in the Horn of Africa have not been spared of the disproportionate impact caused by environmental degradation, it goes without saying that environmental justice remains the last bastion of hope to clothe the vulnerability of the indigenous communities against future or prospective infringements. The advocates and guardians against such injustices remain the protectors, voicing the plights of the oppressed and ensuring the rights of various stakeholders in the Horn of Africa, such as the children, nomadic pastoralists, refugees, women, and asylum seekers lacking access to the power, and resources remain protected, and their interests secured.<sup>37</sup> Moreover, the ongoing conflict in the Horn of Africa further complicates the pursuit of environmental justice. It is a common truism that no progress (even environmental justice) can be realised if the current conflicts in the Darfur region in Sudan, the civil strife in Southern Sudan, the ongoing war in Somalia, and ethnic wars in Ethiopia. Even in the context of armed conflicts between the militia and the military forces, no civilian or civilian population could be guaranteed environmental justice if the environment they rely on for sustenance is destroyed in the conduct of hostilities.<sup>38</sup> Therefore, this Horn of Africa region is extremely volatile and vulnerable to climate change and environmental degradation in the aftermath.

Statistically, the demography, political landscape, economy, and, most importantly, the pressures on environmental justice seem to intersect in the Horn of Africa. Such a demand has been exacerbated by competition for natural resources, inevitable unrest due to activities such as cattle rustling, and destabilising migration patterns, further brewing conflicts between the states. One might question why the United Nations and other regional organisations are concerned about the issue. However, the answer lies in the effects of such issues spilling over to

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<sup>36</sup> Ibid.

<sup>37</sup> Michelle D Gavin, 'Climate Change and Regional Instability in the Horn of Africa' (*Council on Foreign Relations*, 2022) A Discussion Paper made possible by a grant from the Carnegie Corporation of New York 3.

<sup>38</sup> *ibid* 1.

continental geopolitics, intensifying conflicts and questioning why the external actors are adamant about intervening to salvage the situation. Emphatically, the issue of climate change does not affect only the Horn of Africa but the global north and south as a whole.<sup>39</sup> Only when such shall be the status quo can the international community affirm prospects of an effective global environmental justice (emphasis mine) framework.

## VI. The legal framework governing environmental justice in the Horn Africa

So fundamental is the right to environmental justice that is satisfactory in promoting sustainable development that the African Charter on Human and People's Rights guarantees all persons a right to a healthy environment.<sup>40</sup> Nations in the Horn of Africa have entrenched the right, a good example being the Constitution of Kenya 2010.<sup>41</sup> It should be noted that the African Charter's drafting does not confer individual rights to a clean and healthy environment; Rather, it grants such a right to all the indigenous people in the various countries in the Horn of Africa, including the fundamentality of this principle is further voiced by the multilateral Convention on Biological Diversity seeking to conserve the Horn of Africa's biological diversity, ensure the components of the biological diversity are used sustainably, and ensure the genetic resources" benefits are shared equitably and fairly. This multilateral treaty remains a key document if the Horn of Africa is to attain environmental justice that betokens sustainable development. Justifiably, the treaty set the stage for the 1992 Rio De Janeiro summit that brought to fruition Agenda 21, which came into effect in 1993. Fortunately, the treaty applies to the Horn of Africa because only the United States of America has not ratified it. It is further supported by the Nagoya Protocol and Cartagena Protocol supplementary agreements, specifically addressing the following pollutions: excess nutrients, hazardous chemicals and pesticides, and plastic pollution.<sup>42</sup>

Given the intertwined nature of climate change and environmental justice, the United Nations Framework Convention on Climate Change (UNFCCC) voices a concern by calling the various nations, even within the Horn of Africa, to find innovative ways to deal with greenhouse gas

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<sup>39</sup> *ibid* 2.

<sup>40</sup> Article 24 of the Africa Charter on Human and People's Rights (1981).

<sup>41</sup> Constitution of Kenya 2010, Article 42.

<sup>42</sup> Biosafety Unit, 'Target 7. Pollution reduced, halving nutrient loss and pesticide risk' (Convention on Biological Diversity, 2021) <<https://www.cbd.int/gbf/targets/7/>> accessed 8 December 2023.

emissions. This object is pivoted on the principle themed "common but differentiated responsibilities and respective capabilities" by considering the priorities more so on development matters.<sup>43</sup> What such a framework does is acknowledge the states' responsibility to address the issue of climate change as intertwined with environmental justice by obliging the states to contribute to the campaign based on the stretch of their efforts and capabilities.<sup>44</sup> The principle extends to outline its goals that encompass the global temperature rise's limitation, finding ways of mitigating the impacts of climate change, and averting the interference deemed humanely dangerous into the climate system.<sup>45</sup> UNFCCC Architecture borrows heavily from the Paris Agreement 2015 and the Kyoto Protocol. So important is climate change as an aspect of environmental justice that the international community, the Horn of Africa needed the Montreal Protocol and the statehood conferring Vienna Convention on the Law of Treaties (VCLT).<sup>46</sup>

## VII. Factors exacerbating environmental justice-related problems in the Horn of Africa

### a. Temperatures are on the rise

The effects of the rising temperatures in the Horn of Africa have been the plague of prolonged yet frequent drought. Because of disproportionate suffering because of inequitably shared benefits and risks, the Horn of Africa is feeling the consequences, more so from a cocktail of humanitarian crises. The evidence of such prolonged and frequent drought encompasses displacement in the communities' pursuit of better living conditions, conflict with natural resources, and malnutrition because of food insecurity. Such effects are against the damning fact that the Horn of Africa

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<sup>43</sup> 'United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol / Republic of Türkiye Ministry of Foreign Affairs' <[https://www.mfa.gov.tr/united-nations-framework-convention-on-climate-change-\\_unfccc\\_-and-the-kyoto-protocol.en.mfa](https://www.mfa.gov.tr/united-nations-framework-convention-on-climate-change-_unfccc_-and-the-kyoto-protocol.en.mfa)> accessed 8 December 2023.

<sup>44</sup> Per Josephson, 'Common but Differentiated Responsibilities in the Climate Change Regime-Historic Evaluation and Future Outlooks' (Thesis, Stockholm University, 2017) <<https://www.diva-portal.org/smash/get/diva2:1134510/FULLTEXT01.pdf>> Accessed 8 December 2023.

<sup>45</sup> 'History of the Convention | UNFCCC' (*Unfccc.int*2020) <<https://unfccc.int/process/the-convention/history-of-the-convention#:~:text=In%201992%2C%20countries%20joined%20an,wer%2C%20by%20then%2C%20inevitable.>>> accessed 8 December 2023.

<sup>46</sup> For access to the various international treaties and conventions, check out 'LibGuides: Climate Change and Environmental Law Guide: International Agreements' (*Brooklaw.edu* 2015) <<https://guides.brooklaw.edu/c.php?g=1197665&p=8776472>> accessed 8 December 2023.

remains one of the global and continental regions that are food insecure.<sup>47</sup> History reminds us of our origins; hence, the Great Hort of Africa (GHA) must question the droughts.<sup>48</sup> First was the 2011 drought, which rendered an estimated eleven million persons food insecure.<sup>49</sup> Then came the 2016-2017 drought, where a damning statistic of fifteen million people were rendered food insecure. Another calamity would attack in 2022 that affected over 36.4 million people but spread across the Horn of Africa; Ethiopia was most affected with a population of 24.1 million people rendered food insecure, followed by Somalia at 7.8 million, and Kenya coming third with 4.5 million victims. This figure has not even captured other conflict-prone regions such as West Uganda, the Darfur region in Sudan, and South Sudan.<sup>50</sup> Lastly, 2023 has seen over 31.9 million people urgently need basic human needs due to unprecedented droughts at the beginning of the year. Among the nations mentioned above, 17.2 million come from Ethiopia, Somalia follows with 8.25 million people, and Kenya alone stands at 6.4 million.<sup>51</sup>

Food security in the Horn of Africa is one of the manifestations of environmental injustice. It is high time for a diagnosis or prognosis of the various causes and symptoms. Among these signs is the productivity of GHA agriculture, which is declining. Secondly, we have the costly nature of agricultural inputs. This inevitably leads to a decline in food stocks worldwide<sup>52</sup> to the extent that organisations such as the World Food Programme (WFP) lack adequate stock to distribute to the areas most affected in the Horn of Africa. However, some of these issues have been blamed on the respective state's neglect to invest adequately in rural infrastructure and infrastructure

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<sup>47</sup> Emongor R.A, 'Food Security in the Horn of Africa: The Implications of a Drier, Hotter and More Crowded Future' (*UNEP Sioux Falls*) <[https://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article\\_id=72](https://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article_id=72)> accessed 8 December 2023.

<sup>48</sup> Andrea Wallace, 'Greater Horn of Africa (Food Insecurity and Drought)' [2020] Open GLAM <<https://www.netimpact.org/sites/default/files/documents/what-workers-want-2012-summary.pdf>> accessed 8 November 2023.

<sup>49</sup> 'Principles of Environmental Justice | Reimagine!' (n 30).

<sup>50</sup> 'Horn of Africa Drought: Regional Humanitarian Overview & Call to Action (Revised 28 November 2022) - Ethiopia Relief Web' (29 November 2022) <<https://reliefweb.int/report/ethiopia/Horn-africa-drought-regional-humanitarian-overview-call-action-revised-28-november-2022>> accessed 8 December 2023.

<sup>51</sup> 'Horn of Africa Drought Regional Humanitarian Overview & Call to Action (Revised 26 May 2023) - Ethiopia | ReliefWeb' Read <<https://reliefweb.int/report/ethiopia/Horn-africa-drought-regional-humanitarian-overview-call-action-revised-26-may-2023>> accessed 8 December 2023.

<sup>52</sup> R Emongor, 'Food Price Crisis And Food Insecurity In Kenya' Kenya Agricultural and Research Institute (KARI) <<https://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH01b5/cd96f147/6ca2937f179e1.dir/Food%20crisis%20and%20food%20insecurity%20in%20Kenya.pdf>>.

likely to enable land reclamation methods such as irrigation. Furthermore, inadequate climate financing of these regions has exacerbated climate variability and consequent change in the Horn, leaving the communities to bear the brunt of food insecurity, malnutrition, and civil struggles due to conflict with the becoming scarce natural resources.<sup>53</sup> Surprisingly, even agriculture, touted to be the backbone of the economy, has always received little investment in capital and agricultural research and extension.

Despite a wider pool of Agricultural Research and Extension intellectuals from the various universities of the region, rarely are they engaged to offer their human capital, and they end up seeking greener pastures, leading to a brain drain. Lastly, even when the above initiatives have been exploited albeit underwhelmingly, the smallholders' access to poor markets or no markets at all or lack of value addition thereof leads to them exporting unfinished goods, only to buy finished goods from the same purchases at either a higher or an exorbitant price (A good example being the price of Nescafe in the retail stores). Such destabilizes the economies of scale, exchange rates, and the amount of foreign exchange that reaches the farmer's pocket as revenue. Indisputably, despite the UNHCR offering the much-needed life-saving humanitarian aid,<sup>54</sup> the sustainability concern lingers, and the Horn of Africa's environmental justice plea is vocal on the fact that the region cannot leave on survival and dependence on aid from the United Nations and countries from the West.

#### b. Ecological upset and biodiversity loss

The communities' rights to access natural resources freely and sustainably as part of environmental justice have been curtailed by the loss of biodiversity and the disturbance of the ecology. The consequence of such loss has been the unending conflict over the natural resources.<sup>55</sup> This is why issues to do with the aforeanalysed increased immigration around the

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<sup>53</sup> R.A (n 46).

<sup>54</sup> 'Horn Of Africa Drought Emergency' <<https://donate.unhcr.org/africa/en-af/Horn-africa-drought-emergency>> accessed 8 December 2023.

<sup>55</sup> Admin (n 15).

region, livelihoods being displaced,<sup>56</sup> resources being depleted, the scarcity of water and food insecurity are on the rise. Despite being among the regions with arid and semi-arid hotspots, the region is known to be a habitat of over 2700 endemic plant species.<sup>57</sup> They include the myrrh trees and Frankincense. Of concern is how the formerly known plant environment and habitat has greatly altered its original state, that is, from better to worse.<sup>58</sup> Evidently, industrial waste has increased contamination of both the land and aquatic ecology; this is why the Lake Nakuru of the Horn of Africa region has faced a reduced or rather decreased number of flamingos.<sup>59</sup> This is on top of the endemic yet unaddressed issues concerning land grabbing, monoculture agriculture, and deforestation.<sup>60</sup> Indeed, such cannot remain the status quo if Africa is to build its envisioned biodiversity reclamation through the restoration of forests, amongst other environmental justice initiatives.

### c. Alarming land degradation in the Horn of Africa

Indisputably, the Horn of Africa's natural habitat and the environment are facing alarming degradation. This is the basis of the background allusion as supported by the conflicts over natural resources, social dislocations, economic challenges, and famines.<sup>61</sup> From the top of a researcher's head, albeit supported by the wide repository of literature, the contributing factors to such a status quo inter-alia encompasses amplified overgrazing and logging, decreased fertility of the soil due to monocropping, pollution, the loss of vegetation and biodiversity, the erosion of the soil,

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<sup>56</sup> 'Time to Talk: Climate, Environment & Conflict in the Horn of Africa' (*International Crisis Group* 28 February 2023) <<https://www.crisisgroup.org/africa/Horn-of-africa/time-talk-climate-environment-conflict-Horn-of-africa>> accessed 9 December 2023.

<sup>57</sup> 'Nature Picture Library Horn of Africa' <<https://www.naturepl.com/habitats-hotspots/hotspots/Horn-of-africa.html>> accessed 9 December 2023.

<sup>58</sup> 'Horn of Africa - New World Encyclopedia' <[https://www.newworldencyclopedia.org/entry/Horn\\_of\\_Africa](https://www.newworldencyclopedia.org/entry/Horn_of_Africa)> accessed 9 December 2023.

<sup>59</sup> 'Time To Talk: Climate, Environment & Conflict in The Horn of Africa' (N 55); 'Environmental Threats in The Horn Of AFRICA~Fridah Keng'ara | LinkedIn' <<https://www.linkedin.com/pulse/environmental-threats-Horn-of-africafridah-kengara-fridah-keng-ara/>> accessed 9 December 2023.

<sup>60</sup> Nnimmo Bassey, 'Africa's Struggle for Environmental Justice in an Age of Death' (*African Arguments*, 30 June 2023) <<https://africanarguments.org/2023/06/africa-struggle-for-environmental-justice-in-an-age-of-death/>> accessed 9 December 2023.

<sup>61</sup> 'Environmental Degradation in the Greater Horn of Africa: Some Impacts and Future Implications' (n 4).



desertification, drought, and climate change.<sup>62</sup> The region cannot ignore other symptoms of environmental justice issues such as the frequent droughts, the ever-rising temperatures afore analysed, and rainfall better described as erratic.<sup>63</sup> Therefore, there is a need to address the alarming issue of land degradation in the Horn of Africa.

d. Conflicts over water as a resource; the Horn of Africa context

The Horn of Africa region has not been immune to transboundary water conflicts. The conflict over the various water sources has become the root cause of violent conflicts, even social unrest in the African region. Most of these waters that have emerged to be bedrocks of such conflicts inter-alia encompass river basins, lakes, and aquifers that two or more countries happen to share.<sup>64</sup> However, it should be noted that conflicts have often arisen when the supplies from these transboundary sources have been misused to the extent of brewing tensions that act as a desert of conflicts.<sup>65</sup>

e. Transboundary conflicts

The depletion or scarcity of natural resources due to climate change-induced floods and droughts has brought about transboundary conflicts. Such types of conflicts even extend beyond borders; a good illustration is the water source dispute between the basins of the rivers Nile and Shabelle.<sup>66</sup> Such a dispute has become an epicenter of confluence and interaction for several

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<sup>62</sup> 'Horn of Africa Cross-Border Drought Action Plan 2017: Required Response to Safeguard Livestock-Based Livelihoods in Cross-Border Areas of Ethiopia, Kenya, Somalia, South Sudan and Uganda, March – June 2017 - South Sudan | ReliefWeb' (28 March 2017) Boldened section on Droughts in the Horn of Africa have been increasing in severity and frequency <<https://reliefweb.int/report/south-sudan/Horn-africa-cross-border-drought-action-plan-2017-required-response-safeguard>> accessed 9 December 2023.

<sup>63</sup> 'Overview – Horn of Africa Regional Environment Centre and Network' Section on Why does the Horn of Africa need HoA-REN? <<https://hoarec.org/about-us/network/overview/>> accessed 9 December 2023.

<sup>64</sup> 'Transboundary Waters' (UN-Water) <<https://www.unwater.org/water-facts/transboundary-waters>> accessed 9 December 2023.

<sup>65</sup> Florian Krampe and others, 'Water Security and Governance in the Horn of Africa' (Stockholm International Peace Research Institute 2020) 39.

<sup>66</sup> Florian Krampe and others, 'The Nile and Juba—Shabelle Basins' (Stockholm International Peace Research Institute 2020) Sections on the Physical trends <<https://www.jstor.org/stable/resrep24527.9>> accessed 11 December 2023.

environmental and socio-economic justice processes.<sup>67</sup> The evaporating transboundary tensions over the water sources are on the precipice of a brewing violent conflict, and geopolitical tensions are between Ethiopia and Sudan.<sup>68</sup> The major source of such a catastrophic conflict would be the Nile basin, which happens to be shared by many IGAD states since the river is among the longest in Africa and across many East African countries. The convergence of its tributaries, i.e., the white and the Blue Nile, is close to Khartoum, Sudan. Its use by one nation to the environmental justice detriment of the other has made the countries stand in a state of endless socio-political tensions. It is noteworthy, however, that the hotspot for such tensions remains Sudan, Ethiopia, and Egypt's lower riparian states.<sup>69</sup>

What makes the Juba-Shabelle Basin a center of conflict is a two-pronged aspect. First, the region, shared by Somalia, Kenya, and Ethiopia, faces high rainfall variability and several inconsistent floods and droughts. Both climate change occurrences hang the lives of the over fifteen million people who rely on the water basin for domestic use, watering of livestock, hydropower, and irrigation; this connotes the benefits supposedly shared in the context of environmental justice. This implies that the multiple challenges being faced in the region, such as the violent conflicts over the natural resources, political tensions (causing instability in the region of transboundary convergence), the institutional capacity that is often lacking, degradation of the environment leading to the depletion of the natural resources, poor quality of water, and the consequent scarcity.<sup>70</sup> Whereas the avenues and prospects of international entry are high, that is, through constructive dialogue and practical approaches to address the water governance and security issues in the region, the dispute resolution mechanisms that they deploy during the unfolding of such events remain hampered by the inherent lack of political cooperation amongst the states. Impliedly, this means that the region shall continue to have a weak harmonious co-existence, leading to reduced information sharing on environmental integrity and sustainability, hence a lack of promoted resilient water management strategies.<sup>71</sup> Environmental justice under

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<sup>67</sup> Krampe and others (n 64).

<sup>68</sup> Abdullahi Elmi Mohamed, 'Managing Shared Basins in the Horn of Africa – Ethiopian Projects on the Juba and Shabelle Rivers and Downstream Effects in Somalia' (2013) *I Natural Resources and Conservation* 35-39.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid* 37.

<sup>71</sup> Krampe and others (n 65).

this political atmosphere would call for the involved states' meeting of minds to forge an appropriate negotiation, collaboration, dispute prevention, and dispute resolution mechanism (emphasis mine).

f. Grand Ethiopian Renaissance Dam (GERD)

The prospects of the environmental utility of such a project would have tradeoffs notwithstanding, its growth and harmonious implementation remain hampered (greatly) by the tensions among Sudan, Egypt, and Ethiopian regions.<sup>72</sup> The continuance of such tensions threatens the vitality of such a project in providing energy and spurring economic growth if the project is fully implemented. Besides promoting renewable energy sources such as development through electrification, environmental justice remains hampered because the project redraws the Nile region's political and physical boundaries.<sup>73</sup> While Ethiopia's intention while rolling out the project is to promote its economic development through electrification, the concerns voiced by Sudan and Egypt regard the downstream effect whereby the project would reduce their access to water.<sup>74</sup>

Statistically, Egypt relies on water from the Nile River, ninety percent. Their major concern, as connected to the aspect of sharing environmental benefits and harms from that place, is the fact that the project's implementation would shrink equitable sharing of the resources and would further cripple the already volatile diplomatic relations<sup>75</sup> among the states. GERD's impact would undoubtedly (albeit in the short-term) affect the supplies of fresh water to Egypt and Sudan while exacerbating long-term issues concerning water management<sup>76</sup>, for example, droughts caused by

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<sup>72</sup> Julius Maina, 'Ethiopia's Dam Dispute: Five Key Reads about How It Started and How It Could End' (*The Conversation*, 25 July 2022) <<http://theconversation.com/ethiopias-dam-dispute-five-key-reads-about-how-it-started-and-how-it-could-end-187644>> accessed 11 December 2023.

<sup>73</sup> 'Nile Dam Dispute: Ethiopia, Egypt and Sudan Agree to Resume Talks' *BBC News* (21 July 2020) <<https://www.bbc.com/news/world-africa-53494604>> accessed 11 December 2023.

<sup>74</sup> *ibid.*

<sup>75</sup> Yuki, 'The Grand Ethiopian Renaissance Dam and Its Effect on Egypt -' (*The Borgen Project*, 4 September 2021) <<https://borgenproject.org/the-grand-ethiopian-renaissance-dam-and-egypt/>> accessed 11 December 2023.

<sup>76</sup> Walter Bonne, 'Analyzing the Implications of the Grand Ethiopian Renaissance Dam – NYU JILP' (2 June 2021) Section on An Asymmetric Tragedy of the Commons <<https://www.nyujilp.org/analyzing-the-implications-of-the-grand-ethiopian-renaissance-dam/>> accessed 11 December 2023.

erratic rain and even drought (emphasis). Addressing such an issue would demand international community intervention, critically stressing regional dialogue and cooperation to reach a consensus on solving issues regarding sharing the project's benefits and harms. This would equally encompass appropriate dispute resolution methods.<sup>77</sup>

#### VIII. Effects of climate change and environmental degradation in the Horn of Africa

The absence of hampered environmental justice portends signs of various environmental challenges that the countries in the Horn of Africa continue to grapple with. The effects have an impact on the well-being and well-being of individuals. Among the effects has been the exacerbated regional security risks due to migration induced by climate change effects.<sup>78</sup> From the human rights perspective, the crisis induced by environmental injustice as a consequence of unchecked climate change effects by the haves or rather the Marxist-defined ruling class has worsened displacement, disease, and epidemics to the extent that both members of a family, that is, the adults and the children are forced to be on the move in search of water and food, lest they all die of hunger, starvation or the last stroke of malnutrition.<sup>79</sup> The consequence of such unprecedented migration has been the children becoming sick, going days without taking any food, children missing school, deprivation of their inviolable right to education, and children compelled to engage in child labour to fend for the family. In contrast, some of the children in the Horn of Africa are left with no choice but to consent to early marriages.<sup>80</sup> In the crucible of climate change, it is the girls and women who bear the greatest brunt; this further amplifies the overlooked but exploding existential inequalities, posing peculiar setbacks to their safety, health, and livelihoods.<sup>81</sup>

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<sup>77</sup> Maina (n 71).

<sup>78</sup> Michelle Gavin, 'Climate Change and Regional Instability in the Horn of Africa Center for Preventive Action' (Council on Foreign Relations, 58 East 68th Street, New York, NY 10065, 2022) 3-7. <[https://cdn.cfr.org/sites/default/files/report\\_pdf/Climate%20Change%20and%20Regional%20Instability%20in%20the%20Horn%20of%20Africa.pdf?\\_gl=1](https://cdn.cfr.org/sites/default/files/report_pdf/Climate%20Change%20and%20Regional%20Instability%20in%20the%20Horn%20of%20Africa.pdf?_gl=1)> Accessed 11 December 2023.

<sup>79</sup> 'Children Face Devastating Climate Emergency in the Horn of Africa | UNICEF' <<https://www.unicef.org/emergencies/catastrophe-looms-Horn-africa>> accessed 11 December 2023.

<sup>80</sup> *ibid.*

<sup>81</sup> 'Explainer: How Gender Inequality and Climate Change Are Interconnected' (*UN Women – Headquarters*, 28 February 2022) <<https://www.unwomen.org/en/news-stories/explainer/2022/02/explainer-how-gender-inequality-and-climate-change-are-interconnected>> accessed 11 December 2023.

What about the exacerbated political, economic, and social inequalities? Most African countries experience disproportionate climate change risks from being exposed to the disproportionate effects of climate change. The situation is further worsened by an inherently lacking democratic governance system, which restricts the citizenry's participation in affairs concerning climate change, environmental justice and other persistent existential challenges in the Horn of Africa.<sup>82</sup> Failing to anchor an effective democratic pluralism and order across the region forms the bedrock of root causes of poor governance practices and socio-economic inequalities.<sup>83</sup> The foregoing climate justice status quo is further worsened by the undermined development, stability, and peace in the Horn of Africa. This is backed by the extreme climate change vulnerability as characterised by the afore-analysed porous borders of the land, issues to do with unresolved transboundary waters, other cross-border multiple disputes, numerous pastoralists" communities, and the expansive drylands.<sup>84</sup>

The addition of the ongoing conflicts across the various regions in the Horn of Africa adds a cocktail of woes that further worsen the already complicated efforts to harmonise nations and forge a collaborative accord forward.<sup>85</sup> In short, the Horn of Africa is not on the brink of political turmoil-conflicts, and incessant disputes are the current normal and remain the disputants" daily cup of coffee (emphasis). Moreover, three years after its occurrence, the shockwaves of COVID-19 and the other challenges faced in the region<sup>86</sup> , such as locust invasions, further echo the impassioned plea of the Horn of Africa's vulnerable populations for an effective and robust system to tackle climate change.

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<sup>82</sup> Nebiyu Daniel Meshesha, 'Imperative Issues for Durable Peace and Stability in the Horn of Africa | Wilson Center' <<https://www.wilsoncenter.org/blog-post/imperative-issues-durable-peace-and-stability-Horn-africa>> accessed 11 December 2023.

<sup>83</sup> CÉLINE GUIVARCH, NICOLAS TACONET and AURÉLIE MÉJEAN, 'Linking Climate and Inequality' (*IMF*, September 2021) <<https://www.imf.org/en/Publications/fandd/issues/2021/09/climate-change-and-inequality-guivarch-mejean-taconet>> accessed 11 December 2023.

<sup>84</sup> Gavin (n 36).

<sup>85</sup> *ibid.*

<sup>86</sup> 'Addressing Food Insecurity and Climate Change in the Horn of Africa: Regional Solutions' (*World Bank*) <<https://www.worldbank.org/en/news/feature/2022/12/12/addressing-food-insecurity-and-climate-change-in-the-Horn-of-africa-regional-solutions>> accessed 11 December 2023.

## IX. Cases interconnected with environmental justice

### a. The Ogiek case

The cases to do with environmental justice have found their way into the corridors of justice. In this context, the first case in point regards the Ogiek. The Ogiek case saw the 2017 ruling of the African Court on Human and People's Rights, finding the Government of Kenya (hereinafter "the Respondent") to have violated the rights of the Ogiek as an indigenous community dwelling in the forest. Specifically, the Court found the respondent of the African Charter's right to property ownership, culture, life, natural resources, and development.<sup>87</sup> The charter decreed the above rights to the extent that their violation should be justifiable by the law, logic or the rules of natural justice.

To recompense the aggrieved appellants, the Court ordered the respondents to compensate the Ogiek for the moral prejudice caused because of violating their rights and by the virtue that they were tantamount to development, culture, and religion, hence discriminatory.<sup>88</sup> The Court further ordered the Kenyan government to issue non-monetary reparations encompassing restituting land ancestrally inhabited by the Ogiek, followed by unequivocally recognising them as indigenous people.<sup>89</sup>

This 2015 judgment emphasizes why respect for the environmental rights of the indigenous is vital in the wake of the region's vulnerability to climate change.<sup>90</sup> It underscores the need for the states in the Horn of Africa to honour and respect the indigenous people's rights to ancestral,

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<sup>87</sup> 'Kenya: UN Expert Hails Historic Ruling Awarding Reparations to Ogiek Indigenous Peoples' (*OHCHR*) <<https://www.ohchr.org/en/press-releases/2022/07/kenya-un-expert-hails-historic-ruling-awarding-reparations-ogiek-indigenous>> accessed 13 December 2023.

<sup>88</sup> 'Indigenous Ogiek Win "landmark" Reparations Ruling from African Court | Grist' <<https://grist.org/indigenous/indigenous-ogiek-win-landmark-reparations-ruling-from-african-court/>> accessed 13 December 2023.

<sup>89</sup> Sofia Olofsson, 'After Decades of Illegal Evictions – Indigenous Ogiek Win Reparations Ruling Against the Republic of Kenya' (*Harvard International Law Journal*, 19 January 2023) the Introduction and the right to land sections <<https://journals.law.harvard.edu/ilj/2023/01/after-decades-of-illegal-evictions-indigenous-ogiek-win-reparations-ruling-against-the-republic-of-kenya/>> accessed 13 December 2023.

<sup>90</sup> Gavin (n 36).

which is often rich in diversity and vital in mitigating the effects of climate change.<sup>91</sup> This implies that the government in the Horn of Africa should engage in meaningful public participation and stakeholder engagement and, as a result, engage prior, free and informed consent before rolling out any project, be it conserving or investment in an environmental sustainability project long as it touches on their ancestral land.<sup>92</sup>

The aforementioned meaningful stakeholder consultation should be accompanied by adequate compensation or an agreed/consented alternative scheme of resettlement of the affected community, particularly in the case of the indigenous communities domiciling in the Horn of Africa. From a human right, an illegal eviction affects such people" disproportionately, hence tantamount to an environmental injustice. This is why decisions of such a nature emanating from the African Court on Human and People's Rights demonstrate how such institutional frameworks stand as a bastion, protecting the indigenous communities' rights in an era where environmental issues and aspects of climate change have come to the fore. The overreaching emphasis on the attendant human rights ultimately betokens the concept of sustainable development.

#### b. Endorois case

The matter of the Endorois concerned the indigenous community's rights to which the African Commission on Human and People's Rights" ruling found the government of Kenya in violation of the pastoralists" community rights, some of which included the environment. The case's particulars concerned the government (respondents) displacing the Endorois community from their ancestral land in Lake Bogoria to create and conserve wildlife for ecotourism. The government's actions" showing disdain and disregard of the people's human rights as encompassing environmental injustice through violation of the administrative law principles, the African Commission on Human Rights found the respondent to have violated a vast array of human rights encompassing the right to free natural resources" disposition, the right to culture,

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<sup>91</sup> 'HORN OF AFRICA ENVIRONMENTAL SUSTAINABILITY AND RESILIENCE (HoA-ESR) Project (2019-2023)' <<https://hoarec.org/2021/01/10/Horn-of-africa-environmental-sustainability-and-resilience-project/>> accessed 13 December 2023.

<sup>92</sup> 'Kenya: UN Expert Hails Historic Ruling Awarding Reparations to Ogiek Indigenous Peoples' (n 86).

right to property, and the right to the religious practice. The case and that of Ogiek set precedence as the first and second cases to recognise the rights of the indigenous people in the Horn of Africa over traditionally-owned land, hence among the novel human rights case laws that found a violation of the indigenous people's rights to development.

i. The nexus between the Endorois case and human rights

Just like the Ogiek case, the matter of the Endorois indigenous people emphasised that environmental justice is core in the Horn of Africa given its interconnectedness with climate change-whose effects have ravaged all the nations the region hosts.<sup>93</sup> The matter stressed the need to respect the indigenous communities' rights to their traditional land handed down by their ancestors, embracing the principle of intergenerational equity<sup>94</sup>. Interconnected was the right of the appellants to conserve their ancestral land rich in ecological biodiversity,<sup>95</sup> and hence, they are critical players in climate mitigation and for purposes of what Dr. Kariuki Muigua defines as attaining environmental sustainability for future posterity. Intertwined with the issue is the importance of the respondents meaningfully engaging the indigenous people through public participation on various environmental conservation issues and ancestral land investment projects, for any arbitrary administrative decision impacts them.<sup>96</sup> Where the respondents or any other government deems it necessary to annex such category of people's ancestral land, they should be compensated adequately, the procedure set out at law followed, and the indigenous people given adequate time to relocate.<sup>97</sup> They should also benefit equitably from ecotourism without downplaying free, prior and informed consent.<sup>98</sup>

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<sup>93</sup> 'The Endorois Case' (ESCR-Net) <<https://www.escr-net.org/news/2018/endorois-case>> accessed 14 December 2023.

<sup>94</sup> '276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya'.

<sup>95</sup> Lucy Claridge, 'Landmark Ruling Provides Major Victory to Kenya's Indigenous Endorois' (Minority Rights Group International, July 2010) Analysis of the Commission's decision and recommendations.

<sup>96</sup> Gabrielle Lynch, 'Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 African Affairs 24.

<sup>97</sup> 'The Endorois Case' (n 92).

<sup>98</sup> Nqobizitha Ndlovu and Enyinna S Nwauche, 'Free, Prior and Informed Consent in Kenyan Law and Policy After Endorois and Ogiek' (2022) 66 Journal of African Law 201-5.



Of importance from the above case is how the law stands as a citadel in securing the indigenous peoples' rights in promoting environmental justice and balancing the use and conservation of environmental purposes.<sup>99</sup> Ultimately, the matter serves as a clarion call for the international community and the government to address the region's various environmental obstacles, preserve the human rights accruing to all and consequently promote environmental and sustainable development.

c. The case of Ilisu Dam

Despite being a matter decided by the European Court on human rights, it holds important environmental justice lessons and reasonings for the Horn of Africa, in the matter brought by Turkish Kurdish villagers opposing the Ilisu Dam, which was to be constructed on the Tigris River.<sup>100</sup> The application asserted that such a construction would violate the villagers' rights to the environment, culture, and property. In contrast, the project had evoked massive resistance from Neighbours in Turkey's downstream, the environmental and social non-governmental organisations, and the professionals targeting international contractors and donors.<sup>101</sup> The Kurdish identity repression was played by a coalition of organisations opposing the dam project on both the cultural, environmental, and human rights freedom. The case further drew an aspect of environmental security and integrity, given the effect such a project would have on the ecosystem and the destruction in the construction process.

The case emphasized the need for all the villagers affected by a project to be consulted and given adequate reparations, compensation, and access to justice when their environmental rights are infringed.<sup>102</sup> The same would be equated to proper treatment of the indigenous by the administrative agencies in an area where issues to do with environmental protection and climate

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<sup>99</sup> Michelle D Gavin, 'Climate Change and Regional Instability in the Horn of Africa' (*Council on Foreign Relations*) <<https://www.cfr.org/report/climate-change-and-regional-instability-Horn-africa>> accessed 14 December 2023.

<sup>100</sup> Jeroen Warner, 'The Struggle over Turkey's Ilisu Dam: Domestic and International Security Linkages' (2012) 12 *International Environmental Agreements: Politics, Law and Economics* 231.

<sup>101</sup> Berenika Drazewska, 'Hasankeyf, the Ilisu Dam, and the Existence of "Common European Standards" on Cultural Heritage Protection' (2019) 2018 *Santander Art and Culture Law Review* 89.

<sup>102</sup> Warner (n 99).

change are at the fore. The matter further stresses the importance of an effective and robust legal and institutional framework in promoting climate and environmental justice in the wake of challenges such as environmental degradation and climate change due to ecological extermination and global warming.<sup>103</sup> The unity of the region and the globe is crucial in addressing the abovementioned challenges and promoting environmental justice.

d. The case of Lake Turkana

The matter concerned a complaint by the Turkana and Oromo communities regarding the alleged Gibe III construction on River Omo, one of the tributaries feeding Lake Turkana water. The Two communities in Kenya and Ethiopia argued that such a construction would devastatingly affect their way of life, livelihoods, and ecosystems. The Environmental and Land Court ruling in Kenya found the land upon which the windmills had been elected to contravene conveyancing laws, hence illegal. The project proposes that the LTWP procured a lease over 150,000 acres of land for 33 years, purposely for developing a wind power farm that would harbour windpower turbines, which would be 33 in number.<sup>104</sup> The issue was interconnected with environmental justice because the project was being erected in an environment surrounded by the locals. The project would have had environmental and climate change impacts, impacts of which the local communities were not meaningfully consulted.

Moreover, the strain on the natural resources emphasised the need for adequate compensation for the effect done and the lack of assurance that such a project's disproportionate effect on River Omo would be averted. Arguably, the Omo project further stressed fidelity to the rule of law, the quest for environmental justice, and the place of the international community in promoting environmental justice within the Horn of Africa.<sup>105</sup> In so doing, environmental rights would be protected and sustainable development promoted.

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<sup>103</sup> Drazewska (n 100).

<sup>104</sup> 'Wind Farms in Indigenous Areas: The Fosen (Norway) and the Lake Turkana Wind Project (Kenya) Cases' (*Opinio Juris*, 15 December 2021) <<https://opiniojuris.org/2021/12/15/wind-farms-in-indigenous-areas-the-fosen-norway-and-the-lake-turkana-wind-project-kenya-cases/>> accessed 14 December 2023.

<sup>105</sup> 'East Africa / Horn of Africa - Environment | Heinrich Böll Stiftung' <<https://www.boell.de/en/2008/09/18/east-africa-horn-africa-environment>> accessed 14 December 2023.

## X. Progress made in promoting environmental justice

Despite the quest for environmental justice remaining unquenched, progress made is commendable cross-border, signifying that the various stakeholders are fervently fighting for respect of the rights, benefits, and equitable sharing of harms meted out to the environment by all stakeholders. Take Somalia, for example. The Somali Ecological Society is at the forefront of promoting environmental justice for various marginalised people in that region within the Horn of Africa. Being a non-profit organisation founded in 1983 and the first of its kind in Somalia, it has actively promoted awareness across various stakeholders concerning their rights and obligations regarding environmental justice. It has done so through promoting environmental advocacy, education, and awareness campaigns against the various communities in Somalia.<sup>106</sup> Among the roles being played by the NGO include supporting sustainable livelihoods, preliminarily focusing on protecting remaining forests in Somalia, promoting the ecosystem's recovery, establishing research centers regarding forest ecology and wildlife study, and providing budding environmentalists with the much-clamoured opportunities for training. The organisation further deploys various guards for purposes of reserve" protection. Undoubtedly, the efforts towards ecological conservation and sustainable livelihoods" support cannot be ignored; a step in the right direction.<sup>107</sup> Next, let us scrutinize PENHA, which in full means Pastoralist Environmental Network in the Horn of Africa.

The organisation mentioned above significantly promotes environmental justice within and beyond the Horn of Africa. The African spirit and Ubuntu philosophy inspire the Non-Governmental Organisation to promote environmental research and extension.<sup>108</sup> Founded in 1989 by various practitioners and enthusiasts of development, the goal was to create a sustainable future of pastoralism within the Horn of Africa, underscoring the viability of intergenerational equity (emphasis).

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<sup>106</sup> 'Somalia Wildlife Conservation Organisations' (*Fortune of Africa Somalia*, 2 September 2013) <<https://fortuneofafrica.com/somalia/somalia-wildlife-conservation-organisations/>> accessed 14 December 2023.

<sup>107</sup> *ibid.*

<sup>108</sup> 'About Us – PENHA' <<https://www.penhanetwork.org/about-us/>> accessed 14 December 2023.

For over three years, the organisation's action-driven and practical research concerning the development of sustainable agropastoralism cannot be overlooked. It has further spearheaded building climate resilience, innovation across the various enterprises, gender equality, innovation, regional cooperation, and global cooperation across the various African regions.<sup>109</sup> The organisation further strives to spearhead cooperation across environmental lobby groups and seekers of justice-this is by finding ways of handling the issues to do with global warming and prevention of conflicts as guided by research. Empowering is the role PENHA plays by actively engaging the pastoralist communities in the role they play in their development. The impact of such an initiative is dealt with when the NGO intervenes to mitigate the effects of climate change by cultivating ideal practices concerning sustainable livelihoods, food security, inter-organisational collaboration, and other laudable collaboration across different areas. The mentioned collaboration stretches to various research areas and running workshops to find problems in various conflicts involving natural resources.

Moreover, PENHA partners with various women's organisations for affirmative action and empowerment of the female gender. This serves the role of attitude changing across the divide regarding the role women play in the public and economic lives, hence equitable participation of both genders on environmental justice, which undoubtedly betokens sustainable development.<sup>110</sup> Research and extension of such a caliber transcend beyond gender equity and equality to encompass delivering workshops centering around agricultural aspects of animal husbandry and the building of livelihoods that are sustainable while oozing the principles of natural justice and environmental sustainability.<sup>111</sup> The above roles are crowned by advocacy, whereby PENHA ensures the community can access crucial natural resources to propel their socio-economic growth.

## XI. The Horn of Africa Regional Environmental Center & Network

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<sup>109</sup> 'PENHA – Pastoral and Environmental Network in the Horn of Africa' <<https://www.penhnetwork.org/>> accessed 14 December 2023.

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

Abbreviated as the HoA-REC&N, it is an international research institute not affiliated with the government. Established in 2006, its goal has been harmonising academic research and environmental and climate change practitioners for conserving natural resources, the environment and promoting climate resilience in the Horn of Africa.<sup>112</sup> Such harmonisation has always been blended with advocacy for environmental governance and sustainable development across Africa's Horn. The organisation's role in advancing environmental justice cannot be ignored, from its major concern for the environment to exploring feasible sustainable development within Africa's Horn.<sup>113</sup> Furthermore, the NGO brings on board environmentalists to chart sustainable natural resource management and environmental conservation initiatives. By spearheading projects regarding climate change mitigation and adaptation projects, great products such as sustainable energy sources are advanced. Such conservation initiatives transcend beyond mitigation and adaptation to encompass remediation and restoration of degraded ecosystems.<sup>114</sup> It achieves its objectives through collaboration with various organisations across the borders of the regional states. Where citizenry's lives hang in the balance, the organisation partners with government agencies, private enterprises and other international bodies operating in the region to achieve the much-needed ground impact.<sup>115</sup> Therefore, it is arguable that the crucial role played by HoA-REC&N in promoting environmental justice in the Horn of Africa attests to the vitality of knowledge across various organisations and key players; for purposes of addressing various natural resource and environmental-related issues, hence tackling environmental matters in a way that is respectful to human rights while ensuring fidelity to justice.

## XII. Conclusion

The essay looked into the nexus of SDG 15 with the issue of natural justice in Kenya. Part I of the essay introduced the concept of environmental justice worldwide, narrowing the issue to the Horn of Africa and arguing that various groups bear the brunt of environmental injustices. Part II

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<sup>112</sup> 'Overview – Horn of Africa Regional Environment Centre and Network' (n 62).

<sup>113</sup> *ibid.*

<sup>114</sup> 'Overview the Horn of Africa Regional Environment Network | Horn of Africa Regional Environment Centre and Network' (n 6).

<sup>115</sup> 'Horn of Africa Regional Environment Centre and Network | Seek Wisdom, Elevate Your Intellect and Serve Humanity' <<http://www.aau.edu.et/hoarecn/>> accessed 14 December 2023.

debunked SDG 15, arguing that it concerns life on land, encompassing the need to protect ecological diversity and strive to conserve the environment and natural resources through their sustainable use. Part III critiqued the importance of environmental justice, finding its vitality to center on equitable benefit-sharing of the life on land and natural resources therein, hence not only sharing the harm caused to the environment. The part also argued that environmental justice ensures that the rights of the marginalised community to the environment and the land natural resources used are respected and safeguarded.

The idea resonated with the argument in Part IV that questioned the importance of SDG 15 in the Horn of Africa, finding it to protect the life on land on which various stakeholders, the indigenous communities in Africa, rely for survival and sustenance. Part V explored factors threatening life on land to encompass global warming, causing climate change effects that have seen an increase in sea level affecting the coastal lands, prolonged droughts, and erratic rains, to mention a few. Part VI established the effects of environmental degradation to cause, if not exacerbated by transboundary conflicts, conflicts over natural resources, and land degradation, all discussed in-depthly in Part VII as fleshing the previous paragraph.

Part VIII found the effects of climate change and environmental degradation to be why the Horn of Africa is experiencing land degradation, erratic rain, and endless conflicts over rapidly depleting natural resources. The legal framework supporting environmental justice was deponed to encompass the UN Charter, AU Charter, and UNFCCC. Part IX demonstrated how the African Court on People and Human Rights and the European Court on Human Rights established jurisprudence on environmental justice. This was seen in the *Ogiek*, *Endorois*, the *Ilisu dam* and the case of *Lake Turkana*, which highlighted the need to protect various human rights, encompassing the right to environmental protection, free, prior, and informed consent, and the right to culture, ancestral land, and development. Despite the progress made by SESS, PENHA, and HoA-REC&N, as discussed in part X, more work needs to be done, hence why the following section recommends the feasible approaches to advancing environmental justice in the Horn of Africa.

### XIII. Recommendations

#### a. Bolstering Regional Coordination and Cooperation

The nations mentioned above forming the Horn of Africa should strengthen their ties on matters of collaboration and cooperation by working together to tackle the various environmental issues they share and those that demand expedited justice. This could take the nature of knowledge sharing of the various research institutes, sharing the available human resources technical know-how, and borrowing ideal practices within and beyond the region. Moreover, there should be regional cooperation between international and regional bodies such as the United Nations, the African Union, the East African Community and the International Authority on Development (IGAD) to deploy the needed financial resources, skilled experts, and the necessary logistical support encompassing alternative dispute resolution methods and environmental restoration techniques to promote the life on land as so decreed under SDG 15. They should be equally at the forefront to promote environmental justice by ensuring that the rights of any stakeholder relating to SDG 15 are not deprived. This should take the form of environmental law litigation, as seen in the aforeanalysed jurisprudence from the African Commission on Human and People's Rights. In so doing, the environmental law principles such as polluter pays, intergenerational equity and respect for the environmental rule of law are upheld.

The international community, both the governmental, intergovernmental, and non-governmental agencies, could provide the needed funding in the form of research and extension grants, technical aid, and other resources, such as experts to educate all the stakeholders on the idea of environmental protection, conservation, awareness of SDG 15, and other initiatives such as land reclamation methods, afforestation, agroforestry, and afforestation to mention but a few in the Horn of Africa. Is the aid path equally open to donors who can philanthropically fund environmental justice in the Horn of Africa? How do you provide scholarships to passionate advocates of environmental law to go abroad or even learn the nuances of advanced national and international environmental law so as to come back and advocate for the environmental rights of various people? Similarly, other environmentalists, such as those pursuing environmental science,

can equally receive grants to undertake further research on best practices to deal with land degradation, aspects to do with global warming and prolonged drought and how to attain a sustainable environmental and ecological diversity vis-à-vis sustainability for future posterity.

b. The role of the civil society

The Horn of Africa has various organisations whose role in promoting environmental justice through empowering civil society cannot be ignored. A good example is Natural Justice, which stresses the need to have lawyers for the community; ICRC, which strives to ensure the conduct of hostilities does not degrade the environment or exacerbate climate change; and the role played by the aforeanalysed non-governmental organisations incorporated in Somalia and within the Horn of Africa. Apart from promoting environmental advocacy and creating awareness even at the community or local area level, such organisations can fund even undergraduate law students through grants, and the governments should mainstream all these stakeholders into the process of legislative and policy-making for inclusivity.

Now, all the stakeholders, even the ILEC stakeholders and the Kenyan Model United Nations at large, environmental and climate resilience in the wake of crises must be done to address the crises in the first instance. This is attainable through various practices; for example, stress on land management and use of sustainable practices, investment in green and renewable energy sources, such as natural gas, and implementing smart agricultural and climate-change practices and techniques. The local communities, the language barrier and information asymmetry notwithstanding, should be informed on climate change adaptation measures. This should take the form of training them in a language they can understand, that is, their local dialect and finding the various ways of ensuring they access seeds or seedlings that are client-resilient for environmental conservation/restoration/remediation. Attaining environmental justice demands a proactive multifaceted approach that should bring every stakeholder on board.

c. Need for an effective national and national proactive approach



One may ask? What about the regulatory framework path? Is it feasible? Taking the United Nations Convention to Combat Desertification (UNCCD)<sup>116</sup>, various nations in the region should see the effect of UNCCG, given its legal bidding nature and prospects of tackling the effects of prolonged droughts and desertification. The same trend should be followed by effective national enforcement mechanisms and initiatives incorporating long-term plans backed up by partnership arrangements vis-à-vis international collaboration. The same should be followed by a robust Convention on Biological Diversity (CBD) enforcement. Whereas the countries across the region, for example, Kenya, have ratified the convention, they are yet to create a mechanism to realise its three main goals encompassing conserving the biological diversity, the diversity components sustainable use, fair and equitable genetic resources benefit sharing as a way of achieving the goal of environmental justice.<sup>117</sup> Regarding the Paris Agreement<sup>118</sup> and the idea of carbon markets, regions within the Horn of Africa should strive to attain the Nationally Determined Contributions of below 2 degrees Celcius without infringing the rights of any stakeholders, more so the indigenous community.<sup>119</sup> Such NDCs should be further enhanced periodically (every five years) to reflect a higher, smarter, more time-bound, and more achievable ambition.

The Horn of Africa should also give Africa the attention it deserves, whose agenda is to promote climate resilience, environmental integrity, and justice as among the Key areas identified by the union. The agenda should be integrated into the national development plans and strategies and proactively promote a peaceful and prosperous Africa, propelled by the citizenry and symbolising a dynamic force to reckon with in the global arena.<sup>120</sup> Little is said about the importance of the African Forest Landscape Restoration Initiative (AFR100) to environmental

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<sup>116</sup> 'Convention' (UNCCD) <<https://www.unccd.int/convention/overview>> accessed 15 December 2023.

<sup>117</sup> United Nations, 'CONVENTION on BIOLOGICAL DIVERSITY UNITED NATIONS 1992' (1992) <<https://www.cbd.int/doc/legal/cbd-en.pdf>> Accessed 15 December 2023.

<sup>118</sup> 'The Paris Agreement | UNFCCC' <<https://unfccc.int/process-and-meetings/the-paris-agreement>> accessed 15 December 2023.

<sup>119</sup> 'Key Aspects of the Paris Agreement | UNFCCC' <<https://unfccc.int/most-requested/key-aspects-of-the-paris-agreement>> accessed 15 December 2023.

<sup>120</sup> 'Goals & Priority Areas of Agenda 2063 | African Union' <<https://au.int/en/agenda2063/goals>> accessed 15 December 2023.

justice. Through its goal of reforestation 100 million hectares of degraded lands<sup>121</sup> because of deforestation across Africa, the 2030 ecological restoration program will be realised.<sup>122</sup> The region and the nations therein should architect and enforce strategies that would gradually realise the restoration of the forest landscape and align with the guidelines of AFR100.<sup>123</sup> Therefore, in implementing such programs (in the form of commitments and frameworks), environmental justice would be realised through biodiversity conservation, sustainable development, addressing desertification, and promoting climate resilience. No man is an island; this is why the framework is better implemented in a manner coordinated and spiced by political goodwill and ensures all involved stakeholders, including the indigenous communities, meaningfully participate in the agenda.

The biodiversity and terrestrial ecosystems' sustainable management cannot be overemphasised. This will be done through ideal conservation and restoration initiatives. Among the ideal initiatives would be leveraging the best repository of available scientific education. Such initiatives would serve as the guiding mechanism for effectively implementing conservation initiatives. This would undoubtedly entail understanding the dynamics of the ecosystem, the effects of humans, and the precedented/unprecedented climate change effects. The utilisation of Traditional Ecological Knowledge would buttress this; this would involve using predictive sources that are complex but ingeniously implementable to tackle similar phenomena.<sup>124</sup> Such a phenomenon would promote individual species conservation or ecologically sensitive areas over time. The preceding approach should be followed by capitalising on the available innovative technologies. Such leveraging would catalyse Traditional Ecological Knowledge and birth novel

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<sup>121</sup> 'African Forest Landscape Restoration Initiative (AFR100) | Wood Energy Catalogue | Food and Agriculture Organization of the United Nations' <<https://www.fao.org/forestry/energy/catalogue/search/detail/en/c/1370746/>> accessed 15 December 2023.

<sup>122</sup> 'African Forest Landscape Restoration Initiative (AFR100)' (*World Resources Institute*, 29 March 2023) <<https://www.wri.org/initiatives/african-forest-landscape-restoration-initiative-afr100>> accessed 15 December 2023.

<sup>123</sup> AFR100, 'People Restoring Africa's Landscape' <<https://afr100.org/>> accessed 15 December 2023.

<sup>124</sup> Ulysses Paulino Albuquerque and others, 'Integrating Traditional Ecological Knowledge into Academic Research at Local and Global Scales' (2021) 21 *Regional Environmental Change* 45.

knowledge.<sup>125</sup> The technologies would further reinforce the collaboration and the interaction among the various human stakeholders, enhancing the tacit knowledge dissemination and transfer.

The salient role of adopting a participatory approach cannot be overlooked. Derived from the African Commission/Court on Human Rights demystified public participation principle, such an approach encompasses the local communities' involvement in the conservation agenda.<sup>126</sup> Such facilitates churning out of culturally appropriate and sensitive approaches, gaining the support of the locals, and hence the high prospects of success. Such efforts would prove futile if deprived of adequate resource mobilisation.<sup>127</sup> The pool of resources includes human, technical, and financial resources. Such resources would be the drivers in effectively implementing these strategies of conservation.<sup>128</sup> Illustratively, these resources are core in powering the needed funds for research undertaking, the source of the needed technical resources to set the development projects in motion, and the human resources for conservation efforts maintenance and management.<sup>129</sup> Taking heed of all that has been deponed herein will effectively promote environmental justice in the Horn of Africa.

## THE END

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<sup>125</sup> Nikhil Khant and Kumari Anjari, 'Traditional Ecological Knowledge (TEK): A Strategic Resource for Tribal Communities | SpringerLink' (January 2021) <[https://link.springer.com/referenceworkentry/10.1007/978-3-319-95960-3\\_130](https://link.springer.com/referenceworkentry/10.1007/978-3-319-95960-3_130)> accessed 15 December 2023.

<sup>126</sup> Kyle Powys Whyte, 'On the Role of Traditional Ecological Knowledge as a Collaborative Concept: A Philosophical Study' (2013) 2 *Ecological Processes* 7.

<sup>127</sup> 'Innovative Financing Needed to Tackle Climate Change in Africa' (*Africa Renewal*, 4 October 2021) <<https://www.un.org/africarenewal/magazine/october-2021/innovative-financing-needed-tackle-climate-change-africa>> accessed 15 December 2023.

<sup>128</sup> fangweizhao, 'A New Global Framework for Managing Nature Through 2030: 1st Detailed Draft Agreement Debuts' (*United Nations Sustainable Development*, 12 July 2021) <<https://www.un.org/sustainabledevelopment/blog/2021/07/a-new-global-framework-for-managing-nature-through-2030-1st-detailed-draft-agreement-debuts/>> accessed 15 December 2023.

<sup>129</sup> 'Financing for Development: Mobilizing Sustainable Development Finance beyond COVID-19' Trade and Development Board Intergovernmental Group of Experts on Financing for Development Fifth session Geneva, 21–23 March 2022 Item 3 of the provisional agenda.

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# ENVIRONMENTAL JUSTICE THROUGH THE LENS OF CONFLICT RESOLUTION: ITS INFLUENCE ON SUSTAINABILITY

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## Abstract

*The very existence of humanity has been contingent on a mechanism for resolving disputes expeditiously and amicably. This is because, in ancient societies, conflicts regarding sustenance and companions were amicably resolved in some fashion. The prevailing mechanisms employed were negotiation, conciliation, and mediation. In contrast, the emergence of Alternative Dispute Resolution (ADR) in the twenty-first century can be attributed to an increasing aversion towards litigation, most notably the rise of litigation in common law systems.*

*Since its inception more than three decades ago, ADR has evolved into a worldwide phenomenon and has been progressively integrated into the administration of justice on a global scale. Additionally, environmental concerns are progressively infiltrating the justice system.*

*This paper discusses the concept of environmental justice, how it intersects with conflict resolution, and how it fosters sustainability. It expansively canvasses the concept of environmental justice and its relationship with conflict. It examines a case study on environmental justice that had adverse effects on both the environment and marginalized communities and how ADR has paved the way for the resolution of environmental justice concerns. Lastly, it expounds on the relationship between environmental justice and sustainability and how sustainable development goals promote sustainability in matters of environmental justice.*

## Introduction

Environmental law, which typically addresses the consequences of human activity on the environment, is an extensive and ever-evolving subject. It is a field of law that serves as the foundation for addressing all the issues arising from pollution, climate change, the extraction of natural resources, and more. Environmental disputes are generally intricate and challenging to

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reconcile due to their far-reaching impact on the welfare of communities, individuals, and other stakeholders.

In contrast, ADR addresses the matter in a systematic and uncomplicated fashion. Environmental disputes typically encompass a wide array of stakeholders, including private individuals, the general public, and various communities. Moreover, these disputes can transpire in a variety of jurisdictions, including both domestic and international ones. An environmental dispute from one individual may spark an industrial dispute in another, and it may even threaten the sovereignty of a nation.

#### Understanding environmental justice

Environmental justice has become a unifying cause of subjugated communities all over the world who take on an unequal share of the weight of the destruction of the environment. Although environmental justice has always been a part of social justice movements, the concept first became popular in the US in the 1980s when poor and racial/ethnic minorities came together to oppose the location of unsafe waste disposal and polluting facilities in their neighborhoods.<sup>131</sup> In recent years, vulnerable populations in rich and poor nations alike, as well as weak entities like small island states, have come to appreciate the rhetoric of environmental justice.<sup>132</sup>

In Africa, the fight for environmental justice is wide-ranging and intricate. It is the ongoing struggle for the continent's emancipation and for the change of society and ecology. It is a truth that the environment sustains us: the air, rivers, and soil are not dead or lifeless things. Our surroundings are where we feel grounded and established. Because we are deeply ingrained in our surroundings, our food comes from there. We do not consider the Earth and her many offerings to be objects that need to be used, changed, eaten, or thrown away. Knowing that the Earth is a living, breathing being rather than a dead one alerts us to the fact that desperate exploitation that undermines the environment's capacity to regenerate itself is an act of ecocide.

Marginalized communities now have a voice thanks to the ethically appealing language of environmental justice. Unfortunately, a large portion of the environmental justice research has

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<sup>131</sup> C. G. Gonzalez, "Environmental Racism, American Exceptionalism, and Cold War Human Rights" (2017) 26 *Transnational Law and Contemporary Problems* 281 at 282–283.

<sup>132</sup> L. Temper, D. del Bene, and J. Martinez-Alier, "Mapping the Frontiers and Front Lines of Global Environmental Justice: The EJAtlas" (2015) 22 *Journal of Political Ecology* 255–278.



fallen short of providing an in-depth examination of the numerous ways that identity characteristics such as poverty, race, gender, indigeneity, age, and disability, many of which are protected by international human rights law, and intersect to create environmental injustice in particular contexts. Put another way, there needs to be a more theoretical understanding of the social aspect of sustainable development and how it relates to environmental justice.

In an effort to remedy this deficiency, proponents and researchers of environmental justice have defined environmental justice in four parts: distributive justice, procedural justice, corrective justice, and social justice.<sup>133</sup> Distributive justice calls for equitable distribution of the advantages and disadvantages of economic activity across and within countries.<sup>134</sup> Procedural justice requires that environmental decision-making procedures be inclusive, open, and well-informed to uphold procedural fairness.<sup>135</sup> States must uphold environmental regulations, compensate persons whose rights are infringed, and end harmful behavior to exercise corrective justice.<sup>136</sup> Social justice stresses how closely linked the fights for social and economic justice are to the environmental movement.<sup>137</sup>

Put another way, it is impossible to isolate environmental injustice from economic exploitation, the subjugation of racial and gender groups, the marginalization of minorities, the elderly, immigrants, and persons with disabilities, the continued eviction of Indigenous populations, and the imperial and post-colonial dominance of the Global South.

Although environmental justice is an accepted concept in the literature, experts must agree on its definition. This idea is becoming increasingly pertinent to research on informal communities, among other things. The physical layout and environmental factors of informal communities point to a number of injustices associated with the area, such as inadequate or non-existent sanitation, restricted availability of water, difficulties obtaining transportation, cost,

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<sup>133</sup> Routledge Handbook of International Environmental Law (Abingdon, UK: Routledge, 2013), p. 77

<sup>134</sup> D. French, "Sustainable Development and the Instinctive Imperative of Justice in the Global Order," in D. French (ed.), *Global Justice and Sustainable Development* (Leiden: Martinus Nijhoff, 2010), p. 8.

<sup>135</sup> R. R. Kuehn, "A Taxonomy of Environmental Justice" (2000) 30 *Environmental Law Reporter* p. 10688.

<sup>136</sup> *Ibid.*, pp. 10693–10698.

<sup>137</sup> C. G. Gonzalez, "An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms" (2011) 32.

accessibility, and a shortage of social services. These and several additional socio-economic requirements constitute a component of the value chain of global environmental justice disputes.

In Kenya, this view is elucidated by the Owino Uhuru case.<sup>138</sup> The people living in Owino Uhuru, an informal community in Kenya, have been involved in a legal battle since 2016 to seek compensation for damages they sustained due to pollution caused by a lead-acid smelting facility. The now-defunct Metal Refineries Limited managed the lead-acid smelting factory from 2007 until its shutdown in 2014. A class action lawsuit was launched in 2016 on behalf of the society's residents. The High Court ruled in favour of the Owino Uhuru inhabitants in an August 2020 ruling that the state has since challenged. The court stated that the pollution infringed rights to life, health, water, and a clean and healthy environment. The Environment and Land Court ordered the state and the proprietors of a battery recycling firm to reimburse the residents of Owino Uhuru village for decades of toxic exposure to lead brought about by the neighbouring smelting facility.

Literature offers various explanations for understanding environmental justice. The definition of environmental justice varies based on the specific circumstances and setting. For this instance, the concept of environmental justice will be explained in two distinct sections. Justice as a right encompasses the concept of environmental justice, which entails the entitlement to a secure, wholesome, fruitful, and enduring environment for everyone. Here, "environment" encompasses all aspects, including the ecological, physical, social, political, aesthetic, and economic surroundings.<sup>139</sup> Furthermore, environmental justice encompasses a range of circumstances that facilitate the realization of that entitlement, whereby the preservation, satisfaction, and reverence of individual and collective identities, necessities, and dignities are ensured in a manner that enables self-fulfillment and empowerment at both personal and communal levels.<sup>140</sup>

This expansive definition surpasses the conventional environmental justice perspective, which solely focuses on allocating advantages and disadvantages. Equitable distribution is crucial for attaining environmental justice, but it must be comprehended in the context of broader social and historical factors. Multiple studies have extensively recorded occurrences of environmental

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<sup>138</sup> 'Petition I of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/198619/>> accessed January 5, 2024.

<sup>139</sup> NRE 392 Coursepack (Welsch). University of Michigan. Winter 1997. Dollar Bill Copying. Accessed March 27, 2011: (<http://gladstone.uoregon.edu/~caer/ej-definitions.html>).

<sup>140</sup> Ibid.

injustices and shown a correlation between race and class and unequal exposure to environmental hazards. Working towards environmental justice involves not only comprehending specific environmental problems, such as the improper disposal of dangerous garbage in a low-income minority neighbourhood, but also questioning the institutions and processes that perpetuate environmental injustices.

Muigua defines environmental justice as encompassing the right to access natural resources without experiencing an unfair burden from environmental policies, rules, and regulations, as well as the right to get environmental information and actively participate in decision-making processes. The 2010 constitution mandates the state to ensure sustainable exploitation, utilization, management, and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits.<sup>141</sup> The constitution thus bestows duties and responsibilities upon both the state and the citizens to ensure effective environmental governance.<sup>142</sup>

#### Environmental justice and conflict: How the environment, people, and conflict interact

The relationship between environmental justice and conflict is intricate. Environmental disputes have different origins and manifestations in other parts of the world. Causes can include disputes over natural resources at the local, family, and community levels, as well as control over essential environmental resources like fossil fuels. Conflicts may take many different forms, ranging from local disputes to full-scale conflicts and even genocide. Everyone believes that conflict stems from incompatibility, even though it depends on the actors' actions—which may not always be violent. According to Wallensteen, conflict arises in action, actors, and incompatibility.<sup>143</sup> Therefore, a complete meaning of conflict is a scenario whereby a minimum of two actors (parties) aim to obtain an accessible set of limited resources simultaneously.

Conflict, in any form, has the potential to have a number of effects, though at varying geographic dimensions. These effects include physical harm to the supply of natural resources and the human population and effects on production and overall economic growth. The emphasis

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<sup>141</sup> Constitution of Kenya 2010, Article 69(1)(a).

<sup>142</sup> Admin, 'Constitution of Kenya 2010 and Natural Resource and Environmental Management' (March 5, 2022) <<https://thelawyer.africa/2022/03/05/constitution-and-natural-resource-and-environmental-management/>> accessed January 5, 2024.

<sup>143</sup> Wallensteen, P. 2007. Understanding conflict resolution. London, Sage.

on the environment and conflict encompasses the various ways that humans impact the natural resources and processes of the planet, as well as how natural occurrences, processes, and even environmental preservation may impact human existence.

Academic and political circles alike are coming to the conclusion that people are controlling the environment more and more, with a variety of unintended effects. Additionally, it is common for nature to be privatized in a variety of ways, most notably through land ownership. Humans have fought for dominance over the natural world and still do, using it as an outlet for the aftereffects of expanding global trade. However, it is becoming evident that the ecosystem has specific defensive mechanisms. This is evidenced by the rise in natural disasters such as droughts, floods, etc., worries about global warming, and the harsh weather it brings.

Conventional wisdom has it that people have played a significant role in environmental conflicts. Over the past decades, people have immensely gained more control over the environment, which has seen them as the custodians and consumers of the natural environment. Steffen argues that the Earth's ecosystem has significantly changed, mainly because of increased global population and human activity. This highlights that the wealth of nature and its capacity to both adapt and consume human activities are seriously threatened.

The ability to use natural resources and assets is essential in achieving livelihood security, particularly in underprivileged communities and households whose everyday survival and incomes are frequently directly dependent on these resources. However, by overusing and degrading natural resources, livelihood activities frequently lead to desertification, deforestation, soil erosion, diminishing water levels, and other environmental problems that negatively impact livelihoods. Lack of alternatives frequently causes environmental damage in vulnerable environments with limited resources, which raises hazard and poverty rates and contributes to what is sometimes referred to as the "poverty trap." Conflicts between families and communities can frequently arise as a result of people fighting for dwindling resources.

Given the relationships between people, the environment, and conflicts, it is essential to understand how ecosystems work and adapt to changes in either the natural or man-made world. Okech discusses control as an aspect of such a remedy. He argues that environmental

conservation, which protects biodiversity by prohibiting humans from using specific environmental products and services in a given area, is essential.<sup>144</sup>

#### Case study: The Turkana Oil Discovery

Kenya, particularly in Turkana has experienced recent discoveries of oil and gas. The British exploration company Tullow Oil, which was in charge of the project, found economically viable oil reserves in the southern Lokichar Basin. Turkana is an arid area inhabited mainly by marginalized communities, especially pastoralists. Due to inadequate governmental involvement and governance structures for the emerging oil sector, the pastoralists are confronted with land relocation, environmental hazards, and alienation from making choices and sharing benefits schemes.<sup>145</sup> The people's interests in Turkana were further undermined by elite control and robust national development strategies backed by foreign forces. The locals have voiced their complaints against the government and financiers of the project, thus interfering with the company's activities.

The finding of oil has had significant ramifications for the local inhabitants. Importantly, research has revealed that women were not adequately represented in choices made by the oil firm and the community. Moreover, they were mainly exposed to challenges caused by displacement due to oil exploitation. Furthermore, the extractive sector has caused the migration of laborers, shifted the local economy from cattle to cash, and restricted access to natural grazing pastures.

Le Billon expounds on the impact of oil extraction in Turkana by making a contradictory connection between inadequate development and natural resources like oil, which he refers to as the "resource curse."<sup>146</sup> This covers elements including poverty, war, and environmental deterioration. These variables affect communities residing in resource-rich locations, as well as those on a national level. Rich resource endowments might make nations more prone to violence by eroding their capacity to rule and succeed economically. Second, disputes over managing,

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<sup>144</sup> Okech, R. (2010). Wildlife-community conflicts in conservation areas in Kenya. *African Journal on Conflict Resolution*, 10 (2), pp. 65–80.

<sup>145</sup> Kennedy Mkutu and others, 'New Oil Developments in a Remote Area: Environmental Justice and Participation in Turkana, Kenya' (2019) 28 *The Journal of Environment & Development* 223.

<sup>146</sup> Philippe Le Billon, 'Oil and Armed Conflicts in Africa' (2010) 29 *African Geographical Review* 63.

exploiting, and distributing resources' earnings may arise. Thirdly, confrontations can last longer when aggressive sides have access to resource earnings.

According to Johannes, Zulu, and Kalipeni, foreigners and non-Turkana people have been drawn to the oil discoveries.<sup>147</sup> Fearing greater social and economic marginalization, traditionally marginalized local people have expressed concern about the finding of oil. There is growing evidence that decision-making about oil has disadvantaged local populations. Among the issues the locals are dealing with are land grabs by "outsiders," widespread corruption, emerging inter-ethnic dangers, hazards, and twisted possibilities. These issues might fuel violent clashes and inter-ethnic disputes between the locals, the company, and the government.

It is worth noting that the possibility of persistent societal unrest in Turkana is likely to contribute to inequality and unequal development that result from oil exploration.<sup>148</sup> Communities are more tense with the government's efforts to provide a solid legal foundation for the country to profit from oil due to perceived and actual lack of gain, violation of land rights, adverse environmental effects, and inadequate information on the project. Similar conflicts after resource discoveries have been observed at the regional level, and worries over cross-border repercussions have been voiced. Effective resource management is essential to reducing the persistence of economic, political, and social marginalization when oil revenues begin to flow in.

According to research by the conservation organization World Wide Fund for Nature, the Turkana Oil project will cause tremendous environmental damage.<sup>149</sup> This consists of soil, ground, and surface water pollution due to the increasing generation of dangerous substances such as chemical fluids, wastewater, and solid trash. According to the paper, the trends could worsen because the Turkana resources were initially explored and appraised before the Community Land Act of 2016, which would govern compensation agreements with the community.<sup>150</sup> According to the survey, pastoralist groups see diminishing pastoral land as intentional relocation and

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<sup>147</sup> Eliza Johannes, Leo Zulu and Ezekiel Kalipeni, 'Oil Discovery in Turkana County, Kenya: A Source of Conflict or Development?' (2014) 34 *African Geographical Review*.

<sup>148</sup> Kennedy Mkutu Agade, "'Ungoverned Space' and the Oil Find in Turkana, Kenya' (2014) 103 *The Round Table* 497.

<sup>149</sup> Siro Abdallah and others, *Preliminary Threat Analysis: Foundation Stage Development of the South Lokichar Oil Field Basin* (2020).

<sup>150</sup> <https://www.the-star.co.ke/authors/gilbertkoech>, 'Turkana Oil Could Become Curse to Residents, Report Warns' (*The Star*) <<https://www.the-star.co.ke/counties/rift-valley/2020-08-27-turkana-oil-could-become-curse-to-residents-report-warns/>> accessed January 9, 2024.

destruction of livelihood means that can only be sustained by such a vulnerable ecology upon which they have relied for decades.

The case study has comprehensively expounded on the impacts of the Turkana Oil project on the marginalized communities, mainly how they are not involved in decision-making processes, which might affect them and their source of livelihood, particularly their pastoral lands. Thus, the case study emphasizes how crucial environmental justice is to enterprises involving the extraction of natural resources. It draws attention to the significance of meaningful participation, acknowledging marginalized populations, and distributing profits and disadvantages fairly.

#### Alternative Dispute Resolution as a tool for environmental justice

The promulgation of the 2010 constitution in Kenya saw notable advancements in promoting and defending human rights, gender equality, and access to justice in several spheres, including environmental justice. The constitution and legislation provide frameworks to resolve or manage environmental conflicts. This includes the establishment of the Environment and Lands Court, a specialized court meant to hear and determine environmental and land matters under Article 162(2)(b). The court obtains its jurisdiction from section 13 of the ELC Act.<sup>151</sup> The Act also enables ELC to enforce constitutional provisions that touch on the environment, notably Articles 42, 69, and 70, which provide for the enforcement of the right to a clean and healthy environment.<sup>152</sup>

To complement ELC, the ELC Act requires the Environment and Lands Court,<sup>153</sup> on its motion and in agreement with the parties to request them to adopt and implement ADR and Traditional Dispute Resolution mechanisms as provided in Article 159(2) of the Constitution. Thus, ADR mechanisms like arbitration, mediation, conciliation, negotiation, and expert determination have been appreciated as playing an instrumental role in resolving environmental disputes and promoting environmental justice.<sup>154</sup>

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<sup>151</sup> Environment and Land Court Act (ELC Act) No. 19 of 2011.

<sup>152</sup> ELC Act 2011, s 13(3).

<sup>153</sup> Id at Article 20.

<sup>154</sup> Kariuki Muigua, "Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework." In: Arbitration Institutions in Africa Conference 2015. Arbitration Institutions in Africa Conference 2015.

2010 saw the Constitution of Kenya recognize the crucial role Alternative Dispute Resolution plays in resolving conflicts by enshrining ADR and giving it constitutional significance. Article 189(4) of the CoK mandates that national legislation provide "procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation, and arbitration. " In addition, Article 159(2)(c) of the constitution calls for courts and tribunals to be governed by the principle of ADR and TDR mechanisms. ADR has gained legal legitimacy in the constitution due to its acceptance, and it is currently a component of the conflict settlement process of Kenya's governance system.<sup>155</sup> Muigua contends that the inclusion of alternative dispute resolution (ADR) procedures in the Constitution of Kenya would improve access to justice by raising knowledge of ADR's potential to resolve conflicts outside of courtrooms and giving Kenyans more authority.<sup>156</sup>

The use of ADR in environmental conflicts has been promoted since the application involves the voluntary consent of the parties, their direct involvement, the ability for them to withdraw, the employment of a facilitative approach by an impartial third party devoid of decision-making capacity, and the parties' decision-making and solution-making.<sup>157</sup> Because of these features, environmental alternative dispute resolution promotes positive approaches to conflict resolution, gives participants a sense of control over their choices, and can be enforced by the court, making the decisions legally binding.<sup>158</sup> As a result, the relationships between the parties to the ADR are improved, and providing advantages to the larger community is simpler.

It is important to note that applying ADR in resolving environmental disputes is not futile, even when the parties cannot reach an agreement. According to O'Leary and Husar, in the event that ADR fails to resolve environmental disputes, it improves information exchange, clarifies issues, improves pre-trial planning, and explores alternatives that might have yet to be considered.<sup>159</sup>

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<sup>155</sup> Duncan Ojwang', 'Dismantling Kenya Jurist Stereotypes toward the Traditional Justice Systems: Can something good come from Article 159 (2) (C) of the Constitution?' (2015) 3(2) Institute of Chartered Arbitrators Journal of Alternative Dispute Resolution 192.

<sup>156</sup> Kariuki Muigua, 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanism' 2015) 3(2) Institute of Chartered Arbitrators Journal of Alternative Dispute Resolution 64.

<sup>157</sup> Joseph A Siegel, 'Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use' (2007) 24(1) Pace Environmental Law Review 187.

<sup>158</sup> John S Andrew, 'Examining the Claims of Environmental ADR: Evidence from Waste Management Conflicts in Ontario and Massachusetts' (2001) 21(1) Sage Journals.

<sup>159</sup> Rosemary O'Leary and Maja Husar, 'What Environmental and Natural Resource Attorneys Really Think About ADR: A National Survey' (2002) 16 National Resources and Environment Journal 262.



When appropriately used, alternative dispute resolution (ADR) has a tendency to result in high settlement rates and creative problem-solving, which may improve results for all parties involved, the environment, and the number of cases that do not require litigation. ADR can also save costs for the parties and the courts while increasing public engagement and access to justice by involving interested parties in mediation or joint decision-making before a court judgment is made.<sup>160</sup>

#### Relationship between environmental justice and sustainability

The need for sustainability in environmental conservation was first introduced and crafted in the 1972 Stockholm Conference, where nations idealized the concept of sustainable development.<sup>161</sup> The concept gained momentum following the 1987 Brundtland Report, which defined sustainable development as the development that meets the needs of present generations without compromising the ability of future generations to meet their own needs.<sup>162</sup> The relationship between environmental justice and sustainability underscores the concept of sustainable development, the main concept of which is that environmental negligence poses a hazard to both humans and the world's ecosystems.

Before the concept of sustainable development emerged, the Global South championed the right to development as an expression of their right to self-determination. Till the SDGs were adopted in 2015, the right to development and sustainable development coexisted side by side.<sup>163</sup> As an alternate option for the dominant model of economic growth, sustainable development is now recognized as the primary structure for environmental governance.<sup>164</sup> Since the Brundtland Commission study became widely known, it has developed significantly.

As has been well observed, issues with sustainability could arise as resource scarcity or absence, resource deterioration, intentional or unintentional damage to resources for immediate

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<sup>160</sup> George Pring and Cathreen Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (Access Initiative 2009) 16.

<sup>161</sup> United Nations, 'United Nations Conference on the Human Environment, Stockholm 1972' (*United Nations*) <<https://www.un.org/en/conferences/environment/stockholm1972>> accessed January 9, 2024.

<sup>162</sup> Brian R Keeble, 'The Brundtland Report: "Our Common Future"' (1988) 4 *Medicine and War* 17.

<sup>163</sup> UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, October 21, 2015, UN Doc. A/RES/ 70/1.

<sup>164</sup> UN World Commission on Environment and Development, *Our Common Future, Report of the World Commission on Environment and Development* (Oxford: Oxford University Press, 1987).

benefit, or ignorance of the complex connections that exist between resources.<sup>165</sup> The statement that sustainable development is essentially a social justice project that focuses on equitable growth that meets human necessities while still acknowledging that safeguarding the environment is essential to meet these requirements captures the need for sustainable development.<sup>166</sup> Thus, Muigua argues that the optimal strategies for sustainable development ought to integrate environmentally focused and anthropocentric viewpoints on environmental issues.<sup>167</sup>

Sustainability is an essential aspect of environmental justice since sustainable development values a triple-bottom strategy for human wellbeing. According to some, the "triple bottom line approach to human wellbeing" is embraced by sustainable development.<sup>168</sup> It seeks to combine inclusiveness, sustainability of the environment, and economic growth. The principles of social inclusion include participation, equality of gender, and non-discrimination. Nations are allowed to use their resources sovereignly to the extent permitted by their respective environmental and development policies,<sup>169</sup> However, this power is not unrestricted and cannot be legitimately used without consideration for the adverse effects on people's rights or the environment.<sup>170</sup>

This study thus appreciates that the relationship between environmental justice and sustainability is founded on the recognition that every individual is entitled to a clean environment. Therefore, environmental justice concerns frequently emerge when this right is infringed, especially in marginalized populations that are disproportionately affected by environmental impacts. Achieving sustainability requires resolving these problems because it guarantees that the benefits and costs associated with the environment are distributed fairly.<sup>171</sup> On that note, sustainability can be achieved through advocating for equal access to resources, which will, in

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<sup>165</sup> Thatcher, A., 'Theoretical definitions and models of sustainable development that apply to human factors and ergonomics,' in Broberg, N. O., et al., (eds), *Human Factors In Organizational Design And Management – Xi*, Nordic Ergonomics Society Annual Conference – 46, 2014, pp. 747-752 at p. 747.

<sup>166</sup> *Ibid.*

<sup>167</sup> Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

<sup>168</sup> J. Sachs, "From Millennium Development Goals to Sustainable Development Goals" (2012) 379 *Viewpoint* 2206–2211 at 2206.

<sup>169</sup> UN General Assembly, *Rio Declaration on Environment and Development*, August 12, 1992, UN Doc. A/CONF.151/26 (Vol. I), Principle 2.

<sup>170</sup> e P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment* 3rd ed. (Oxford: Oxford University Press, (2009).), p. 115.

<sup>171</sup> Mary Menton and others, 'Environmental Justice and the SDGs: From Synergies to Gaps and Contradictions' (2020) 15 *Sustainability Science* 1621.

turn, ensure that every individual, irrespective of their background, is able to access the resources they require to flourish.

Importantly, conserving the environment, assisting financial sustainability, and promoting social equity spearheading the steps towards sustainability. Issues related to financial sustainability often result in adverse effects of pollution, mainly on public health or source of income for marginalized communities. Thus, addressing these issues will help advance social fairness and build an environmentally friendly society by ensuring everyone has a say in decisions about the environment.<sup>172</sup> Consequently, we can encourage environmentally friendly business practices and lower expenses, which will help sustain the economy.

It is often believed that attaining environmental and climate justice requires states to uphold, respect, and perform their duties under the environmental human rights agreement. According to Principles 1 and 2 of the 2018 Framework Principles on Human Rights and the Environment, for instance, "States should ensure a safe, clean, healthy, and sustainable environment in order to respect, protect, and fulfill human rights" and "States should respect, protect, and fulfill human rights in order to ensure a safe, clean, healthy, and sustainable environment" are two of the concepts that the former Special Rapporteur on Human Rights and the Environment established.<sup>173</sup> While it is uncommon for international legal documents to expressly declare this, an ecologically sound earth framework is necessary for a sustainable ecosystem.

To conclude, addressing environmental justice concerns involves more than just correcting specific injustices; it also entails helping to advance sustainability as a larger objective. It is about ensuring that our actions do not undermine the ability of future generations to meet their own needs. It is about establishing a society where every individual, irrespective of background, can thrive in a healthy atmosphere and participate in choices that impact their life.

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<sup>172</sup> 'Environmental Justice: How Sustainability Is About More Than Just the Planet | Environmental Solutions Initiative' (*Environmental Solutions Initiative | Focusing MIT's talents on the interdisciplinary environmental challenges of today*, September 12, 2019) <<https://environmentalsolutions.mit.edu/news/environmental-justice-how-sustainability-is-about-more-than-just-the-planet/>> accessed January 9, 2024.

<sup>173</sup> UN General Assembly, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, January 24, 2018, UN Doc. A/HRC/37/59.

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## The Global Biodiversity Framework (GBF); a feasible reality or a mirage?

By Gloria Koskei Cherotich,<sup>174</sup> Joshua Kimani,<sup>175</sup> and Nyamboga George Nyanaro<sup>176</sup>  
Abstract

*The Global Biodiversity Framework (GBF) is a plan adopted by the Conference of the Parties (COP 15) of the Convention on Biological Diversity (CBD) in 2022. It sets out a path to achieve a world that lives in harmony with nature by 2050, with four goals and 23 targets to be completed by 2030. However, effective implementation has been an ongoing challenge for international frameworks like the GBF. Despite this, the GBF has received support from a comprehensive package of decisions, including a monitoring framework, an enhanced mechanism for planning, monitoring, reporting, and reviewing implementation, financial resources, capacity development, technical and scientific cooperation, and an agreement on digital sequence information on genetic resources. This article examines the strengths and weaknesses of the GBF in terms of its alignment with the Sustainable Development Goals (SDGs), financial resources and capacity-building, inclusiveness and equity, and effectiveness and accountability. It also provides recommendations for improving the implementation of the GBF and enhancing its contribution to biodiversity conservation and sustainable use.*

### A. Introduction

In the face of a rapidly deteriorating global ecosystem, the Global Biodiversity Framework (GBF) emerges as a beacon of hope, a meticulously crafted blueprint for the conservation and restoration of the planet's biodiversity.<sup>177</sup> This framework is not merely a set of guidelines; it is a clarion call to action, a collective commitment to safeguard the intricate web of life that sustains us all (emphasis). An indisputable fact is that biodiversity, the rich tapestry of life on Earth, is the cornerstone of our existence. It provides us with food, clean water, medicines, and shelter. It

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<sup>177</sup> Convention on Biological Biodiversity , 'Kunming-Montreal Global Biodiversity Framework' (UNEP - UN Environment Programme 2022) <<https://www.unep.org/resources/kunming-montreal-global-biodiversity-framework>> accessed 1 March 2024.

regulates our climate and diseases, and it supports the pollination of crops and the purification of air and water.<sup>178</sup> Yet, this irreplaceable natural heritage is under siege, assailed by the relentless forces of habitat destruction, overexploitation, pollution,<sup>179</sup> and the overarching spectre of climate change.

The GBF is a response to this existential crisis, a policy instrument that encapsulates the urgency and the scale of the intervention required. It is a testament to the global consensus that the well-being of humanity is inextricably linked to the health of the natural world.<sup>180</sup> By setting ambitious targets for 2030, the GBF aims to halt and reverse the tide of biodiversity loss, ensuring that ecosystems are resilient and that the benefits they provide are equitably shared.<sup>181</sup>

This introductory section will critically examine the genesis of the GBF, its strategic objectives, and the challenges it faces in its implementation. It will scrutinize the framework's potential to align with the Sustainable Development Goals and address the underlying causes of biodiversity decline. Furthermore, it will explore the GBF's capacity to foster transformative change, not just in policy and practice, but in the hearts and minds of people across the globe. For it is only through a profound shift in our relationship with nature that we can hope to secure a sustainable future for all life on Earth.

## B. Demystifying Global Biodiversity Framework (GBF)

The Global Biodiversity Framework (GBF), a seminal document for the future of biodiversity, was adopted at the 15<sup>th</sup> meeting of the Conference of the Parties (COP 15) to the Convention on Biological Diversity (CBD) in October 2021.<sup>182</sup> This pivotal moment marked the culmination of years of rigorous negotiations and consultations among a diverse array of stakeholders,

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<sup>178</sup> GGI Insights, 'Biodiversity: The Living Tapestry We're Unraveling' (*Graygroupintl.com* 30 August 2023) <<https://www.graygroupintl.com/blog/biodiversity>> accessed 2 March 2024.

<sup>179</sup> 'Five Drivers of the Nature Crisis' (*United Nations Environmental Program (UNEP)2022*) <<https://www.unep.org/news-and-stories/story/five-drivers-nature-crisis>> accessed 2 March 2024.

<sup>180</sup> Mirjam Schleiffer and others, 'Report on Biodiversity and Related Concepts Perceptions Deliverable Number: DI.1' (2023) Section dealing with GBF <[https://orgprints.org/id/eprint/50787/1/PLANET4B\\_DI.1\\_Report-on-biodiversity-and-related-concepts-perceptions\(1\).pdf](https://orgprints.org/id/eprint/50787/1/PLANET4B_DI.1_Report-on-biodiversity-and-related-concepts-perceptions(1).pdf)> accessed 8 March 2024.

<sup>181</sup> WWF, 'Environmental Groups Urge UN Biodiversity Talks to Embrace a "Nature-Positive by 2030" Goal' (*Panda.org*2022) <[https://wwf.panda.org/wwf\\_news/?5282941/Environmental-groups-urge-UN-biodiversity-talks-to-embrace-a-Nature-Positive-by-2030-goal](https://wwf.panda.org/wwf_news/?5282941/Environmental-groups-urge-UN-biodiversity-talks-to-embrace-a-Nature-Positive-by-2030-goal)> accessed 2 March 2024.

<sup>182</sup> 'COP15: Final Text of Kunming-Montreal Global Biodiversity Framework' (*Convention on Biological Diversity* 2022) <<https://www.cbd.int/article/cop15-final-text-kunming-montreal-gbf-221222>> accessed 1 March 2024.

including governments, civil society organizations, indigenous peoples, and representatives from the private sector.<sup>183</sup>

Furthermore, GBF is anchored by a compelling vision: “Living in harmony with nature by 2050,” a future where biodiversity is valued, conserved, restored, and wisely used, maintaining ecosystem services, sustaining a healthy planet, and delivering benefits essential for all people.<sup>184</sup> Its mission is to take urgent action across society to halt and reverse biodiversity loss and ensure that ecosystems are resilient and continue to provide essential services for human well-being and the planet’s health.<sup>185</sup>

Shifting gears to GBF’s longer term goals, the framework sets forth five long-term goals aimed at addressing the underlying causes of biodiversity loss, reducing pressures on biodiversity, ensuring its sustainable use, and addressing equity, benefit-sharing, and participation: a) Address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society.<sup>186</sup> Secondly, GBF reduce the direct pressures on biodiversity and promote sustainable use. Thirdly, it improves the status of biodiversity by safeguarding ecosystems, species, and genetic diversity.<sup>187</sup> This is in line with enhancing the benefits to all from biodiversity and ecosystem services.<sup>188</sup> It would also promote implementation through participatory planning, knowledge management, and capacity building (emphasis).

Being an action-oriented framework, operationalisation, GBF delineates 21 action-oriented targets that are pragmatic and measurable. These targets span a wide range of actions, including

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<sup>183</sup> Ibid.

<sup>184</sup> ‘CCICED Special Policy Study Post-2020 Global Biodiversity Conservation 2021 Report’ (2021) Page 16-42. <<https://cciced.eco/wp-content/uploads/2021/09/1-2-Post-2020-Global-Biodiversity-Conservation-EN-1.pdf>> accessed 1 March 2024.

<sup>185</sup> Astrid Nygaard and Helle Sjøvaag, ‘Monitoring the Pulse of the Planet Assessing the Transformative Potential of Applying the UN Biodiversity Lab as a Governance Instrument’ (2023) <<https://uis.brage.unit.no/uis-xmlui/bitstream/handle/11250/3090550/no.uis%3Ainspera%3A153029635%3A68274076.pdf?sequence=1&isAllowed=y>> accessed 1 March 2024.

<sup>186</sup> ‘Strategic Goal A. Address the Underlying Causes of Biodiversity Loss by Mainstreaming Biodiversity across Government and Society | InforMEA’ (InforMEA.org 2020) <<https://www.informea.org/en/goal/strategic-goal-address-underlying-causes-biodiversity-loss-mainstreaming-biodiversity-across>> accessed 1 March 2024.

<sup>187</sup> ‘Strategic Goal B. Reduce the Direct Pressures on Biodiversity and Promote Sustainable Use | InforMEA’ (InforMEA.org 2015) <<https://www.informea.org/en/goal/strategic-goal-b-reduce-direct-pressures-biodiversity-and-promote-sustainable-use>> accessed 1 March 2024.

<sup>188</sup> Ibid.

reducing threats to biodiversity, promoting sustainable use and benefit-sharing,<sup>189</sup> and enhancing the institutional and societal ability to implement the GBF.

The GBF also identifies four enabling conditions critical for the successful implementation of its targets which are; a. adequate financial resources, b. capacity-building and development, c. an inclusive governance model, ensuring the full and effective participation of indigenous peoples and local communities, d. access to and sharing of technology. Observing the implementation pulse of GBF is influenced by indicators, baselines, and monitoring.<sup>190</sup> A robust set of indicators and baselines underpins the GBF, providing a framework for monitoring progress and ensuring accountability. These mechanisms are designed to track changes in biodiversity status, measure the effectiveness of interventions, and facilitate adaptive management.<sup>191</sup>

The adoption of the GBF was a watershed event in the history of biodiversity conservation. It reflects a global acknowledgment of the intrinsic value of biodiversity and the urgent need to act collectively to preserve the natural world.<sup>192</sup> The framework's comprehensive approach, integrating a vision and mission with strategic goals, targets, and enabling conditions, offers a coherent and actionable roadmap for the international community to follow.<sup>193</sup> However, the true test of the GBF will lie in its implementation—turning the framework's aspirations into tangible outcomes for biodiversity and the people who depend on it (authors' emphasis).

### C. GBF's promising future

It is a trite fact that the Global Biodiversity Framework (GBF) is a comprehensive and ambitious plan to conserve and restore biodiversity by 2030. It aligns with the Paris Agreement on climate whose aim is to hold global average temperature rise to below 1.5 degrees compared

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<sup>189</sup> Knowledge Hub, 'First Draft of Global Biodiversity Framework Identifies Four Goals for 2050 | News | SDG Knowledge Hub | IISD' (*iisd.org*2021) <<https://sdg.iisd.org/news/first-draft-of-global-biodiversity-framework-identifies-four-goals-for-2050/>> accessed 8 March 2024.

<sup>190</sup> 'Consolidated Target Guidance Notes' (*Cbd.int*2024) <<https://www.cbd.int/gbf/targets/notes.shtml>> accessed 2 March 2024.

<sup>191</sup> 'Strengthening the Foundational Elements of the Post-2020 Global Biodiversity Framework a Guide for Negotiators' (2021) Introduction section <<https://www.iied.org/sites/default/files/pdfs/2021-06/20236iied.pdf>> accessed 1 March 2024.

<sup>192</sup> Catherine Mungai, 'Linking Science and Policy to Propel Biodiversity Action in Kenya' (*IUCN* 22 May 2023) <<https://www.iucn.org/blog/202305/linking-science-and-policy-propel-biodiversity-action-kenya>> accessed 1 March 2024.

<sup>193</sup> *Ibid.*

to pre-industrial times.<sup>194</sup> Interconnectedly, biodiversity and climate that are two sides of the same coin— hence the two go hand in hand.

Illustratively, land and marine ecosystems, which are home to the vast majority of the world's species, absorb more than 50 per cent of man-made carbon emissions.<sup>195</sup> This makes them vital to meeting the Paris Agreement's central goal of mitigating climate change. At the same time, biodiversity plays a huge role in building resilience to the unavoidable impacts of climate change, with nature-based solutions such as the protection of coral reefs and mangrove forests protecting coastal communities from storms, flooding, and erosion.<sup>196</sup> Therefore, the GBF is a key step in protecting the world's lands and oceans and bolsters efforts to safeguard the world's climate.

Emphatically If properly and timely actualised, the GBF could offer significant opportunities for sustainable development, human well-being, and planetary health. According to a report by the World Economic Forum, business opportunities worth \$10 trillion that could create 395 million jobs by 2030 and pave the way towards a people- and nature-positive economy could be generated by implementing the GBF's targets.<sup>197</sup> Moreover, the GBF could enhance cooperation and coordination among different stakeholders, including governments, civil society, indigenous peoples, and the private sector, by providing a common vision and framework for action.<sup>198</sup> The GBF could also foster innovation and scientific knowledge by strengthening capacity-building and development, access to and transfer of technology, and promotion of development of and access to innovation and technical and scientific cooperation (author's emphasis).

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<sup>194</sup> 'COP15 Ends with Landmark Biodiversity Agreement' (*United Nations Environment Programme* 2022) <<https://www.unep.org/news-and-stories/story/cop15-ends-landmark-biodiversity-agreement>> accessed 1 March 2024.

<sup>195</sup> 'Why Nature Holds the Key to Meeting Climate Goals' (*UN Environment Programme* 2022) <<https://www.unep.org/news-and-stories/story/why-nature-holds-key-meeting-climate-goals>> accessed 2 March 2024.

<sup>196</sup> YJ Shin and others, 'Actions to Halt Biodiversity Loss Generally Benefit the Climate' (2022) 28 *Global Change Biology* 2846 <[https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9303674/#:~:text=Biodiversity%20offsets%20are%20meant%20to%20compensate%20for,loss%20\(NNL\)%20principles%20implemented%20across%2037%20countries%2C](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9303674/#:~:text=Biodiversity%20offsets%20are%20meant%20to%20compensate%20for,loss%20(NNL)%20principles%20implemented%20across%2037%20countries%2C)> accessed 1 March 2024.

<sup>197</sup> Chris Hamill-Stewart, Gayle Markovitz and World Economic Forum, 'How Climate Change Makes Global Health Issues Harder to Solve' (*World Economic Forum* 20 September 2023) <<https://www.weforum.org/agenda/2023/09/how-climate-change-is-making-it-harder-to-solve-global-health-issues/>> accessed 1 March 2024.

<sup>198</sup> *Ibid.*

GBF, with its ambitious goals and targets are not without significant challenges that could impede its successful implementation. Let's delve into these challenges in depth:

#### D. The needed recipe of political goodwill and commitment

The GBF's success hinges on the political will and commitment of all parties involved. However, this is often compromised by competing national priorities such as economic development, trade, and security.<sup>199</sup> The challenge lies in reconciling these interests with environmental objectives and fostering a political environment where biodiversity conservation becomes a non-negotiable pillar of national and international policy (emphasis).

#### E. Financial Resources and Technical Support

Adequate, predictable financial resources and technical support are the bedrock of the GBF's implementation, particularly for developing countries, small island states, least developed countries, and indigenous communities. These groups often lack the capacity to implement complex biodiversity projects without substantial external support.<sup>200</sup> The disparity in resource allocation threatens to widen the gap between developed and developing nations in terms of biodiversity conservation and sustainable use.<sup>201</sup>

#### F. Participation and Collaboration

Effective and inclusive participation of all stakeholders is crucial for the GBF. This includes not just governments, but also civil society, indigenous peoples, and the private sector. Moreover, cross-sectoral collaboration is essential, as sectors like agriculture, forestry, fisheries, energy, and tourism have significant impacts on biodiversity.<sup>202</sup> The challenge is to create synergies and partnerships that can integrate biodiversity considerations into all areas of policy and practice.

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<sup>199</sup> Qingyang Li, Yingxue Ge and Jeffrey A Sayer, 'Challenges to Implementing the Kunming-Montreal Global Biodiversity Framework' (2023) 12 Land 2166 <<https://www.mdpi.com/2073-445X/12/12/2166>> accessed 27 February 2024.

<sup>200</sup> IPBES, 'Download the Complete Document of the Kunming-Montreal Global Biodiversity Framework Montreal, 19 December 2022 – Nearing the Conclusion of a Sometimes Fractious Two-Week Meeting, Nations of the World Today Agreed on a Historic Package of Measures Deemed Critical to Addressing the Dangerous Loss Of' (LinkedIn.com 19 December 2022) <<https://www.linkedin.com/pulse/nations-adopt-four-goals-23-targets-2030-landmark-un-biodiversity->>> accessed 1 March 2024.

<sup>201</sup> Ibid.

<sup>202</sup> 'IUCN COMMISSION on ENVIRONMENTAL, ECONOMIC and SOCIAL POLICY' (2023) 11-24 <[https://portals.iucn.org/library/sites/library/files/documents/Policy-Matters-Issue-23\\_0.pdf](https://portals.iucn.org/library/sites/library/files/documents/Policy-Matters-Issue-23_0.pdf)> accessed 1 March 2024.

## G. Awareness and Communication

A profound challenge for the GBF is the lack of awareness and communication about the intrinsic value of biodiversity. The public, policymakers, and decision-makers must be made aware of the benefits of biodiversity conservation and the grave risks and costs associated with its loss and inaction.<sup>203</sup> Without widespread understanding and support, the GBF risks remaining a document of good intentions rather than a catalyst for real change.

Therefore, whereas GBF provides a comprehensive framework for action, its potential can only be realized through concerted efforts to overcome these challenges. It requires a paradigm shift in how we value and interact with nature, backed by strong political resolve, adequate funding, inclusive participation, and pervasive awareness campaigns.<sup>204</sup> Only then can the GBF transform from a visionary document into a driver of tangible, positive change for our planet's biodiversity (author's emphasis).

The Global Biodiversity Framework (GBF) is a pivotal instrument for steering the world towards a sustainable future. However, for such a future to be unlocked, various things are core. A good example would be fortifying the political resolve, why? it is imperative to elucidate the interconnections between biodiversity and other global agendas. The Sustainable Development Goals (SDGs), the Paris Agreement, and the agenda 2063 are all intertwined with biodiversity conservation.<sup>205</sup> By emphasizing these synergies, parties to the Convention on Biological Diversity (CBD) can be motivated to prioritize biodiversity and recognize its role in fulfilling broader global commitments.

Resource mobilisation and technical support cannot be overemphasized, why? Diversifying funding sources is crucial, encompassing public, private, domestic, and international contributions.<sup>206</sup> Innovative financing models like green bonds, carbon credits, and payment for

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<sup>203</sup> Mohamad and others, 'Public Awareness on Biodiversity Conservation and Well-Being: Case of Gunung Mulu National Park, Sarawak' (2022) 88 *GeoJournal* 3471 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9795449/>> accessed 8 February 2024.

<sup>204</sup> David O Obura and others, 'Achieving a Nature- and People-Positive Future' (2023) 6 *One Earth* 105 <<https://www.sciencedirect.com/science/article/pii/S259033222005899>> accessed 1 March 2024.

<sup>205</sup> 'Introductory Sections of the GBF' (*Convention on Biological Diversity* 2024) <<https://www.cbd.int/gbf/introduction>> accessed 2 March 2024.

<sup>206</sup> Gopinathan Achamkulangare, 'AN ANALYSIS of the RESOURCE MOBILIZATION FUNCTION within the UNITED NATIONS SYSTEM' <[https://www.un.org/en/ecosoc/qcpr/pdf/jiu\\_report-analysis\\_of\\_resource\\_mobilization.pdf](https://www.un.org/en/ecosoc/qcpr/pdf/jiu_report-analysis_of_resource_mobilization.pdf)>.



ecosystem services can provide the necessary capital and incentives for biodiversity conservation, thereby ensuring the GBF's targets are met.<sup>207</sup>

All the proposals mentioned above would undoubtedly require a multi-stakeholder and multi-sectoral approach is essential for the GBF's implementation. This approach should respect and recognize the rights, roles, and responsibilities of each stakeholder, integrating their knowledge, perspectives, and interests.<sup>208</sup> By adopting both bottom-up and top-down strategies, the GBF can foster inclusive participation and collaboration across various sectors and communities. This would go together with raising awareness about the significance of biodiversity and the GBF is critical. This can be achieved through diverse platforms and channels, including media, education, campaigns, and events.<sup>209</sup> Therefore, Ansari finds that utilizing stories, images, videos, and data in various formats and languages can effectively communicate the benefits of biodiversity conservation and the risks associated with its loss, thereby informing, and engaging the public, policymakers, and decision-makers.<sup>210</sup>

By implementing these recommendations, the GBF can overcome the challenges it faces and harness the opportunities it presents, ultimately leading to a more biodiverse and sustainable world.<sup>211</sup> The foregoing approach should be cognisant of that indigenous peoples play a crucial role in the implementation of the Global Biodiversity Framework (GBF). Their rights, knowledge, including traditional knowledge associated with biodiversity, innovations, worldviews, values, and practices are recognized as integral to solving the world's biodiversity crisis. The GBF emphasizes

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<sup>207</sup> 'Stepping up on Biodiversity: What the Kunming-Montreal Global Biodiversity Framework Means for Responsible Investors Stepping up on Biodiversity What the Kunming-Montreal Global Biodiversity Framework Means for Responsible Investors' (2023) <<https://www.financeforbiodiversity.org/wp-content/uploads/Stepping-up-on-Biodiversity.pdf>> accessed 2 March 2024.

<sup>208</sup> 'Use of the Multi-Sectoral Approach to Ending Gender-Based Violence and Female Genital Mutilation in Africa - Burkina Faso' (*ReliefWeb* 22 March 2022) <<https://reliefweb.int/report/burkina-faso/use-multi-sectoral-approach-ending-gender-based-violence-and-female-genital>> accessed 1 March 2024.

<sup>209</sup> Emiel de Lange and others, 'Communicating the Biodiversity Crisis: From "Warnings" to Positive Engagement' (2022) 15 *Tropical Conservation Science* Background and Recommendations sections .

<sup>210</sup> Dawud Ansari and others, 'Communicating Climate Change and Biodiversity Loss with Local Populations: Exploring Communicative Utopias in Eight Transdisciplinary Case Studies' (2023) 5 *UCL Open environment* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10571513/>> accessed 1 March 2024.

<sup>211</sup> Sui C Phang, Pierre Failler and Peter Bridgewater, 'Addressing the Implementation Challenge of the Global Biodiversity Framework' (2020) 29 *Biodiversity and Conservation* 3061 <<https://pubmed.ncbi.nlm.nih.gov/32836919/>> accessed 1 March 2024.

the need for their full and effective participation in decision-making, with respect for their free, prior, and informed consent.

Globally, indigenous lands overlap with at least 30 to 40% of Earth's intact ecosystems and protected areas, and in some regions, they may protect up to 80% of the biodiversity. Their stewardship often achieves greater conservation results and sustains more biodiversity than government-protected areas.<sup>212</sup> Therefore, it's essential that Indigenous Peoples have access to finance commensurate with their role in biodiversity management and conservation (author's emphasis).

Arguably, GBF calls for the recognition of Indigenous Peoples as legal entities, enabling their organizations to receive and manage funding directly. It also recommends that National Biodiversity Finance Plans include specific components for support of Indigenous Peoples- and Local Communities-led biodiversity projects.<sup>213</sup> Noteworthy, indigenous Peoples are not just beneficiaries of the GBF but are active leaders and partners in its implementation, bringing invaluable knowledge and practices to the forefront of global conservation strategies.

#### H. The Youth's role in promoting GBF

The role of youth in biodiversity conservation is pivotal and multifaceted. Young people bring fresh perspectives, energy, and innovative ideas that are crucial for driving change and ensuring the sustainability of conservation efforts. In terms of awareness and advocacy, for example, the youth can act as powerful advocates for biodiversity, raising awareness about its importance and the threats it faces.<sup>214</sup> They can engage their peers and the wider community through social media, events, and campaigns.<sup>215</sup>

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<sup>212</sup> The Nature Conservancy, 'Indigenous Peoples & Local Communities and Resource Mobilization in the Global Biodiversity Framework (GBF)' (2021)

<[https://www.nature.org/content/dam/tnc/nature/en/documents/TNC\\_IPs\\_LCs\\_ResourceMobilization.pdf](https://www.nature.org/content/dam/tnc/nature/en/documents/TNC_IPs_LCs_ResourceMobilization.pdf)>.

<sup>213</sup> 'Launch of the Global Biodiversity Framework Fund' (*Convention on Biological Diversity* 2023)

<<https://www.cbd.int/article/launch-global-biodiversity-framework-fund>> accessed 1 March 2024.

<sup>214</sup> Kaddu Kiwe Sebunya, 'Africa Stands at a Crucial Juncture. With Internal and External Pressures Escalating for Our Rich Resources, We Are Faced with Pivotal Choices.' (*LinkedIn.com* 3 October 2023)

<[https://www.linkedin.com/pulse/africas-youth-leaders-biodiversity-conservation-kaddu-kiwe-sebunya?trk=public\\_post\\_main-feed-card\\_feed-article-content](https://www.linkedin.com/pulse/africas-youth-leaders-biodiversity-conservation-kaddu-kiwe-sebunya?trk=public_post_main-feed-card_feed-article-content)> accessed 1 March 2024.

<sup>215</sup> Ibid.

The youth's role in capacity building and education cannot be overemphasized. Justifiably, pursuing education in environmental science and related fields, youth can build the necessary skills and knowledge to contribute effectively to biodiversity conservation.<sup>216</sup> They can also educate others, fostering a culture of environmental stewardship. Likewise, volunteering for conservation projects allows youth to gain hands-on experience and contribute directly to the protection of ecosystems and species.<sup>217</sup> They can take the initiative further by leading the way in technological innovation and research, developing new solutions to conservation challenges, and contributing to scientific knowledge.

The youth can engage with policy processes, ensuring that the voices of future generations are heard in the creation of laws and policies that affect biodiversity. In adopting sustainable lifestyles, youth can reduce their ecological footprint and set an example for others to follow.<sup>218</sup> They can also build networks and collaborate with various stakeholders, including NGOs, government agencies, and the private sector, to amplify their impact on biodiversity conservation (author's emphasis). The foregoing means that the youth are not just the leaders of tomorrow but also the change-makers of today, capable of making significant contributions to the preservation of our planet's biodiversity (emphasis).

Ensuring equitable benefit-sharing in biodiversity conservation is a multifaceted challenge that requires a combination of legal frameworks, policy development, and community engagement.<sup>219</sup> Among the key strategies to achieve this encompasses implementing the Nagoya Protocol on Access and Benefit-sharing which is a supplementary agreement to the Convention on Biological

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<sup>216</sup> Job Mwangi, 'Regional Resource Hub - Why African Youth Must Be at the Forefront in Conservation' (Rcmrd.org 21 April 2023) <<https://esahub.rcmrd.org/en/news/231-why-african-youth-must-be-at-the-forefront-in-conservation>> accessed 1 March 2024.

<sup>217</sup> Alejandrina Ocanas, 'An Exploration: How Voluntourism Conservation Projects an Exploration: How Voluntourism Conservation Projects Coordinate with and Contribute to Conservation Efforts in Madre Coordinate with and Contribute to Conservation Efforts in Madre de Dios, Peru de Dios, Peru' (2019) Abstract and introductory sections <<https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=12527&context=etd>> accessed 13 February 2024.

<sup>218</sup> '7 Ways Youth Can Reduce Their Ecological Footprints' (*Citizens for Public Justice* 24 April 2019) <<https://cpj.ca/7-ways-youth-can-reduce-their-ecological-footprint/#:~:text=Continue%20to%20practice%20the%20basics,equal%20to%20670%20water%20bottles.>> accessed 1 March 2024.

<sup>219</sup> 'BioTrade and Access and Benefit Sharing: From Concept to Practice a Handbook for Policymakers and Regulators HANDBOOK for BIOTRADE and ACCESS and BENEFIT SHARING POLICYMAKERS and REGULATORS Note' (2016) 54-77 <[https://unctad.org/system/files/official-document/ditcted2017d6\\_en.pdf](https://unctad.org/system/files/official-document/ditcted2017d6_en.pdf)> accessed 22 February 2024.

Diversity (CBD).<sup>220</sup> It provides a legal framework to ensure that the benefits arising from the utilization of genetic resources are shared fairly and equitably. The same case could be said about developing National ABS Legislation whereby countries in Africa are needed to develop national access and benefit-sharing (ABS) legislation that aligns with the Nagoya Protocol.<sup>221</sup> This legislation should ensure that genetic resources within their jurisdictions are accessed properly and that benefits are shared equitably.

Moreover, the equitable sharing formula also encompasses meaningfully engaging Indigenous Peoples and Local Communities. Why? Indigenous peoples and local communities harbour a repository of traditional knowledge related to biodiversity. Their involvement in decision-making and benefit-sharing agreements is crucial for equitable outcomes.<sup>222</sup> Conversely, innovative financial mechanisms such as green bonds, carbon credits, and payment for ecosystem services can provide incentives for biodiversity conservation and ensure that benefits are shared among all stakeholders.<sup>223</sup>

Additionally, building the capacity of governments and stakeholders to negotiate fair benefit-sharing agreements is essential. This includes understanding the legal aspects of ABS and the value of genetic resource.<sup>224</sup> Delving into monitoring and transparency, establishing clear indicators and baselines for monitoring the implementation of benefit-sharing agreements can enhance transparency and accountability.<sup>225</sup> Proactively, the various stakeholders should encourage all forms of partnerships between governments, private sector, and civil society can lead to more sustainable and equitable benefit-sharing models. Hence, by integrating these strategies into the

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<sup>220</sup> Michael Heinrich and others, 'Access and Benefit Sharing under the Nagoya Protocol—Quo Vadis? Six Latin American Case Studies Assessing Opportunities and Risk' (2020) 11 *Frontiers in Pharmacology* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7294742/>> accessed 8 March 2024.

<sup>221</sup> Ibid.

<sup>222</sup> IISD, 'Indigenous Peoples: Defending an Environment for All' (*International Institute for Sustainable Development* 2022) <[<sup>223</sup> van Niekerk, 'Economic Inclusion: Green Finance and the SDGs' \(2024\) 16 \*Sustainability\* 1128 <<https://www.mdpi.com/2071-1050/16/3/1128>> accessed 8 March 2024.](https://www.iisd.org/articles/deep-dive/indigenous-peoples-defending-environment-all#:~:text=In%20CBD%20Article%208(j)> accessed 1 February 2024.</a></p></div><div data-bbox=)

<sup>224</sup> Martin Brink, 'IMPLEMENTATION of ACCESS and BENEFIT SHARING POLICIES in SUB-SAHARA AFRICA: INVENTORY, ANALYSIS and PROPOSALS (Final Version)' (2013) summary of findings <<https://edepot.wur.nl/280508>>.

<sup>225</sup> Sandra Lim MG, 'Evidence Nexus Unleashed: Unlocking Sustainable Impact Series" in Our Pursuit of Sustainable Impact, It Is Crucial to Measure the Impact of Our Interventions and Track Progress towards Our Goals. By Doing So, We Can Assess the Effectiveness of Our Initiatives, Identify Areas for Improvement' (*Linkedin.com* 9 October 2023) <<https://www.linkedin.com/pulse/part-s-i-i-sustainable-impact-monitoring-evaluation-sandra-lim-mg>> accessed 1 February 2024.

implementation of biodiversity conservation projects, we can work towards a more equitable distribution of the benefits derived from our natural resources.

- I. Progress made; tracking wide global case studies
  - a. *Trees and Bees (Nepal)*

This project in the Sarlahi district of Nepal focuses on improving resilience to climate change and natural disasters through nature-based solutions like expanding tree cover and cultivating beehives to support forest biodiversity and generate income, especially for women.<sup>226</sup>

- b. *Watershed Forest Restoration (Paraguay, Brazil)*

The Itaipú hydroelectric power plant-initiated watershed restoration programs, including forest protection and reforestation, to secure a reliable flow of water for hydropower production and deliver social and environmental co-benefits to the communities and biodiversity along the Paraná River.<sup>227</sup>

- c. *Coastal Zone Adaptation (Tanzania)*

This project involves building and upgrading sea walls, relocating aquifers, and restoring mangrove forests to protect coastal communities from floods and the impacts of sea-level rise.<sup>228</sup>

- d. *Tongass Forest Conservation (USA)*

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<sup>226</sup> 'About Trees and Bees' (RECOFTC 2 November 2016) <<https://www.recoftc.org/nepal/projects/trees-and-bees/about/about-trees-and-bees>> accessed 1 March 2024.

<sup>227</sup> 'CASE STUDY: ITAIPU and SDG 15 Activities by ITAIPU Binacional Supporting Implementation of the Sustainable Development Goal 15 (SDG 15) of the United Nations 2030 Agenda for Sustainable Development PROTECT, RESTORE and PROMOTE SUSTAINABLE USE of TERRESTRIAL ECOSYSTEMS, SUSTAINABLY MANAGE FORESTS, COMBAT DESERTIFICATION, HALT and REVERSE LAND DEGRADATION and HALT BIODIVERSITY LOSS' (2020) 12-50 <[https://itaipu.energy/wp-content/uploads/2022/06/itaipu\\_case\\_study\\_15.pdf](https://itaipu.energy/wp-content/uploads/2022/06/itaipu_case_study_15.pdf)> accessed 1 February 2024.

<sup>228</sup> David Cabana and others, 'Enabling Climate Change Adaptation in Coastal Systems: A Systematic Literature Review' (2023) 11 *Earth's Future* <<https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2023EF003713#:~:text=In%20response%20to%20these%20challenges,well%2Dbeing%20of%20coastal%20communities.>> accessed 1 February 2024.

In Southeast Alaska, the Tongass is known as the “Lungs of North America” due to its massive carbon storage capacity. Local leaders have ended old-growth logging and are now focusing on sustainable opportunities like carbon markets to support Indigenous stewardship.<sup>229</sup>

e. The Great Green Wall (Africa)

An initiative to combat desertification in the Sahel region by planting a wall of trees across Africa from Senegal to Djibouti. It aims to restore 100 million hectares of currently degraded land.<sup>230</sup> These projects showcase the diverse approaches to tackling climate change and enhancing ecosystem health, demonstrating the power of community involvement and innovative conservation strategies.

J. Conclusion

This paper has discussed implementation of the Global Biodiversity Framework (GBF) whereby it began by discussing the GBF’s development and implementation, highlighting its critical role in conserving biodiversity by 2030 and its alignment with other global agendas like the Paris Agreement. Following sections investigated the challenges facing the GBF, such as lack of political will, financial resources, stakeholder collaboration, and public awareness. It then delved into opportunities that could arise from its successful implementation, including sustainable development and job creation. It then investigated various blueprints that could bolster GBF, as encompassing enhancing political commitment, mobilizing financial resources, fostering inclusive participation, and increasing awareness and communication.

Moreover, the paper emphasized of the vital roles various stakeholders, particularly indigenous peoples play in GBF implementation and the active participation of youth in biodiversity conservation. Thereafter, the article delved into equitable Benefit-Sharing, addressing the importance of equitable benefit-sharing in biodiversity conservation and strategies to ensure it, such as implementing the Nagoya Protocol and developing national ABS legislation. Tracking the

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<sup>229</sup> Adam Bloom, ‘5 Conservation Projects That Are Focused on Long-Term Success’ (*The Nature Conservancy* 15 February 2022) <<https://www.nature.org/en-us/what-we-do/our-priorities/protect-water-and-land/land-and-water-stories/conservation-projects-long-term-success/>> accessed 1 February 2024.

<sup>230</sup> ‘A Green Wall to Promote Peace and Restore Nature in Africa’s Sahel Region’ (*UNEP* 2023) <<https://www.unep.org/news-and-stories/story/green-wall-promote-peace-and-restore-nature-africas-sahel-region#:~:text=Launched%20by%20the%20African%20Union,productive%20landscapes%20across%2011%20countries.>> accessed 12 February 2024.

progress till the present saw the article delve into case laws of successful biodiversity projects, testifying in favour of diverse approaches to conservation and community involvement. During the whole intellectual inquiry, the emphasized on the criticality and importance of biodiversity and the collective efforts needed to preserve it for future generations.

#### K. Sequel

The journey towards a sustainable future is being paved by innovative and impactful biodiversity projects across the globe. From aforesaid Trees and Bees initiative in Nepal that intertwines ecological resilience with livelihood enhancement, to the Watershed Forest Restoration efforts in South America that harmonize hydropower needs with ecological integrity, these projects exemplify the power of integrating human well-being with nature conservation.

Likewise, the analysed Coastal Zone Adaptation in Tanzania showcases the critical role of ecosystem restoration in climate change adaptation, while the Tongass Forest Conservation in the USA underscores the importance of sustainable management of forest resources for carbon sequestration. The ambitious Great Green Wall project across Africa stands as a beacon of hope against desertification, aiming to restore degraded lands and improve local communities' lives.

These examples not only reflect the successful application of conservation principles but also highlight the essential collaboration between local communities, governments, and international bodies. They serve as inspiring models for future endeavors, reminding us that through collective action and shared vision, we can achieve a harmonious balance between human development and the natural world. As we continue to face environmental challenges, these projects offer a testament to the ingenuity and resilience of the human spirit in its quest to protect our planet's precious biodiversity.

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## The Bitcoin Bite: How ADR could help address the environmental impact of Bitcoin mining in Kenya

By Hamisi. A. Silaha<sup>231</sup>

### Abstract

In the age of technological advancement, a mere click unlocks access to the entire world. From communication to healthcare and education, every sector has witnessed a revolutionary transformation. Yet, this wave of change has also reached the doorsteps of the traditional financial markets. The concept of money traces its roots back to ancient times, emerging as a solution to the complexities of barter trade. Dating as far back as the 7th century B.C. in Lydia (modern-day Turkey) and China, money swiftly replaced the cumbersome exchange system. Fast forward fourteen centuries, and the landscape of currency underwent another seismic shift with the introduction of digital currencies. Cryptocurrencies, powered by blockchain technology, represent a new frontier in the evolution of money, transcending physical boundaries and redefining the way we perceive and transact value.

In a parallel to traditional mints that produce physical currency, cryptocurrencies are brought into existence through mining operations, with Bitcoin mining serving as a prime example for our study. Each unit of Bitcoin possesses its distinct identity and only a specific number could ever exist. However, unlike conventional mining, the process of Bitcoin mining involves solving computational puzzles rather than physical extraction. Miners undertake these challenges in exchange for Bitcoin rewards. While this industry undoubtedly generates employment opportunities, it also carries unintended consequences, notably its significant environmental impact.

The energy-intensive nature of cryptocurrency mining operations has raised concerns about their ecological footprint. As miners consume substantial amounts of electricity to power their

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computational processes, they inadvertently contribute to carbon emissions, noise pollution and E-waste. Kenya finds itself at a disadvantage due to the absence of comprehensive legislation concerning cryptocurrencies and their mining processes. This paper aims to delve into the benefits and risks associated with cryptocurrencies, scrutinize their environmental impact, and propose strategies to mitigate these challenges. Central to these proposed solutions is the application of Alternative Dispute Resolution (ADR) mechanisms.

## I. Introduction

Kenya, much like numerous other nations, finds itself immersed in the recent surge of interest surrounding cryptocurrency. This phenomenon is marked by widespread adoption and substantial investments in various virtual currencies such as Bitcoin, Dogecoin, and Ethereum. But delving into the mechanics of cryptocurrency raises the question: How does it work? In nature, cryptocurrencies are manifested digitally.<sup>232</sup> This implies there is no actual money or notes; instead, transactions are conducted electronically. This digital format allows for speedy and smooth cross-border transactions without the need for intermediaries such as banks, which are sometimes slow and costly. Most cryptocurrencies rely on blockchain technology to function. It is essentially a distributed and decentralized ledger that records all transactions via a network of computers. Each transaction is packed into a block, which is then connected to the preceding blocks to build a chain.<sup>233</sup> This sequence of blocks, often known as a "blockchain," assures transactional openness, permanence, and security.

Decentralization is at the heart of cryptocurrency, separating it from traditional fiat currencies. In a decentralized system, no single entity has control or authority over the currency.<sup>234</sup> Instead, cryptocurrencies function on a peer-to-peer network, which allows users to perform transactions directly without the need for intermediaries.<sup>235</sup> This system promotes transparency,

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<sup>232</sup>Thomas DeMichele's, 'How Does Cryptocurrency Work? (for Beginners)' (*CryptoCurrency Facts* 9 October 2022) <<https://cryptocurrencyfacts.com/how-does-cryptocurrency-work-for-beginners/>> accessed 25 February 2024.

<sup>233</sup> Bela Shrimali and Hiren B Patel, 'Blockchain State-of-The-Art: Architecture, Use Cases, Consensus, Challenges and Opportunities' (2022) 34 *Journal of King Saud University - Computer and Information Sciences* 6793 <<https://www.sciencedirect.com/science/article/pii/S131915782100207X>> accessed 28 February 2024.

<sup>234</sup> Jaya Vaidhyathan and Aashika Jain, 'What Is Cryptocurrency and How Does It Work?' *Forbes* (10 January 2024) <<https://www.forbes.com/advisor/in/investing/cryptocurrency/what-is-cryptocurrency-and-how-does-it-work/>> accessed 24 February 2024.

<sup>235</sup> Igor Makarov and Antoinette Schoar, 'Cryptocurrencies and Decentralized Finance (DeFi)' [2022] SSRN Electronic Journal.



resilience, and censorship resistance, allowing individuals to have more control over their finances. Cryptocurrency wallets are digital repositories for storing, transmitting, and receiving coins.<sup>236</sup> These wallets come in a variety of formats, including software wallets, hardware wallets, and paper wallets, with varying levels of security and convenience. Cryptocurrency exchanges serve as online marketplaces where users may buy, sell, and trade various cryptocurrencies for fiat cash or other digital assets.

The tales of Cryptocurrency are unique and interesting. From a period where not many people were interested in it to its current dominance. There are tales of individuals almost two decades ago purchasing entire pizzas for 10,000 Bitcoins (BTC) which in current valuation is over seven million Kenya shillings.<sup>237</sup> In this paper, we will focus on Bitcoin and its mining.

## ii. Impact of digital currencies

The rise of cryptocurrencies has upended traditional money markets by offering speedier and more secure alternatives to established banking processes. This disruption creates new opportunities for investment and financial activity, which might lead to an increase in demand for crypto-related assets as acceptance rises.<sup>238</sup> However, this change causes higher volatility in traditional markets, driven by speculation and uncertainty regarding cryptocurrencies.

Cryptocurrencies have various advantages that will transform the way we transact and access financial services.<sup>239</sup> One major advantage is its decentralization. Cryptographic techniques used by cryptocurrencies also provide strong security for online transactions, increasing confidence and protecting against fraudulent activity. Another key advantage of cryptocurrencies is their worldwide accessibility, which allows anybody with an internet connection to engage in transactions regardless of geographical limits or traditional financial infrastructures. It is also

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<sup>236</sup> Yimika Erinle and others, 'SoK: Design, Vulnerabilities, and Security Measures of Cryptocurrency Wallets' (2023) <<https://arxiv.org/pdf/2307.12874.pdf>> accessed 22 February 2024.

<sup>237</sup> Rob Price, '10,000 Bitcoins Could Buy 2 Pizzas in 2010 but Now Worth \$100 Million' (*Business Insider* 29 November 2017) <<https://www.businessinsider.com/bitcoin-pizza-10000-100-million-2017-11?r=US&IR=T>> accessed 28 February 2024.

<sup>238</sup> Mohd Javaid and others, 'A Review of Blockchain Technology Applications for Financial Services' (2022) 2 BenchCouncil Transactions on Benchmarks, Standards and Evaluations 100073 <<https://www.sciencedirect.com/science/article/pii/S2772485922000606>> accessed 28 February 2024.

<sup>239</sup> Han; David, 'The Diversification Benefits of Cryptocurrency Asset Categories and Estimation Risk: Pre and Post Covid-19' (2023) 29 The European Journal of Finance 800 <<https://ideas.repec.org/a/taf/eurjfi/v29y2023i7p800-825.html>> accessed 28 February 2024..

worth noting that many cryptocurrencies with restricted supply act as a hedge against inflation, providing protection against the erosion of purchasing value over time.

Cryptocurrencies include a number of hazards, which investors and users should be aware of.<sup>240</sup> One of the most noticeable hazards is severe price volatility, in which cryptocurrency prices can fluctuate drastically, potentially resulting in significant financial losses for investors. Furthermore, the absence of clear laws in many countries, such as Kenya, creates uncertainty, making investors exposed to unexpected legislative changes that might damage the market.<sup>241</sup> Cybersecurity concerns are another important danger, since the cryptocurrency market is riddled with hacking attempts, frauds, and theft. These dangers weaken faith in the security of digital assets and can cause financial loss to consumers.<sup>242</sup> Furthermore, the energy-intensive process of cryptocurrency mining, as will be portrayed, raises environmental concerns, since it contributes to higher energy usage and carbon emissions.

The anonymous aspect of cryptocurrencies also makes them appealing for illegal activity such as money laundering, fraud, and unlawful transactions, degrading their reputation and introducing legal concerns to users.<sup>243</sup> Furthermore, unlike traditional government-backed currencies, cryptocurrencies lack sovereign assurances, leaving investors vulnerable in the case of a market crash or loss. There is therefore an urgent need for the area to no longer be overlooked by the relevant Kenyan authorities.

### iii. Mining

Bitcoin mining is an important part of the BTC network since it validates transactions and adds new bitcoins to circulation. Bitcoin mining entails verifying and confirming transactions that take

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<sup>240</sup>Debra A McGilsky, Yan Sun and Steven A Harrast, 'Determining the Inherent Risks of Cryptocurrency: A Survey Analysis' (2021) 16 Current Issues in Auditing <<https://publications.aaahq.org/cia/article/16/2/A10/223/Determining-the-Inherent-Risks-of-Cryptocurrency-A>> accessed 28 February 2024.

<sup>241</sup> Tonuchi E Joseph and others, 'The Implication of Cryptocurrency Volatility on Five Largest African Financial System Stability' (2024) 10 Financial Innovation <<https://jfin-swufe.springeropen.com/articles/10.1186/s40854-023-00580-5>> accessed 22 February 2024.

<sup>242</sup> Sauradeep Bag, 'Digital Assets, Real Threats: Security Challenges of Cryptocurrency' (*orfonline.org* 2024) <<https://www.orfonline.org/expert-speak/digital-assets-real-threats-security-challenges-of-cryptocurrency>> accessed 22 February 2024.

<sup>243</sup> David Sanz-Bas and others, 'Cryptocurrencies and Fraudulent Transactions: Risks, Practices, and Legislation for Their Prevention in Europe and Spain' (2021) 10 Laws 57 <<https://www.mdpi.com/2075-471X/10/3/57>> accessed 28 February 2024.

place on the Bitcoin network.<sup>244</sup> When a user begins a BTC transaction, it is broadcast to the network and collected into a block with other pending transactions. Miners verify the legitimacy of these transactions by solving sophisticated cryptographic challenges connected with each block. It is worth noting that there can only ever be 21 million Bitcoins, both mined and produced.

One of the key motivations for miners to engage in the mining process is the possibility of receiving newly created bitcoins as a reward. This method is similar to conventional mining, which extracts rich materials from the ground. However, in the case of BTC, miners employ computer power to solve mathematical problems, and when they successfully validate a block of transactions, they are paid with a fixed quantity of Bitcoin.<sup>245</sup> Due to the computational complexity of the operation, BTC mining requires specialized technology. Initially, miners utilized central processing units (CPUs) to mine bitcoins, but as the network became more competitive, miners switched to more powerful graphics processing units (GPUs), and then to application-specific integrated circuits (ASICs).<sup>246</sup>

Bitcoin mining uses a consensus process known as proof-of-work (PoW). In PoW, miners compete to discover a nonce (a random number) that, when paired with block data, produces a hash value that fulfills the network's difficulty objective.<sup>247</sup> This method is computationally intensive and acts as a measure to protect the network against fraudulent behaviors such as double-spending or tampering with transaction history.<sup>248</sup> The notion of PoW assures that the bulk of the network's processing power is committed to honest mining activities, preserving the blockchain's integrity.

#### iv. The environmental impact

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<sup>244</sup>Joshua A Kroll, Ian C Davey and Edward W Felten, 'The Economics of Bitcoin Mining, or Bitcoin in the Presence of Adversaries' (*Scinapse* 2019) <<https://www.scinapse.io/papers/2188530018>> accessed 22 February 2024.

<sup>245</sup> Brian Baker, 'What Is Bitcoin Mining and How Does It Work?' (*Bankrate Press* 17 November 2023) <<https://www.bankrate.com/investing/what-is-bitcoin-mining/>> accessed 21 February 2024.

<sup>246</sup> Alex de Vries and Christian Stoll, 'Bitcoin's Growing E-Waste Problem' (2021) 175 *Resources, Conservation and Recycling* 105901 <<https://www.sciencedirect.com/science/article/abs/pii/S0921344921005103>> accessed 28 February 2024.

<sup>247</sup> Nicolas Houy, 'The Bitcoin Mining Game' [2014] Social Science Research Network <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2407834](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407834)> accessed 23 February 2024.

<sup>248</sup> K Venkatesan and Syarifah Bahiyah Rahayu, 'Blockchain Security Enhancement: An Approach towards Hybrid Consensus Algorithms and Machine Learning Techniques' (2024) 14 *Scientific Reports* <<https://www.nature.com/articles/s41598-024-51578-7>> accessed 28 February 2024.

Bitcoin mining has received major criticism for its infamous insatiable appetite for energy, which has increased due to the massive amount of electricity necessary to run the network. Thousands of specialized mining rigs operate continuously, requiring massive quantities of power.<sup>249</sup> As the Bitcoin network expands and becomes more competitive, energy usage rises, raising worries about its long-term viability and environmental impact.<sup>250</sup> Majority of Bitcoin miners take up the task at a large-scale level setting up huge firms for the operations. In turn, the industry has evolved into one of the highest energy consumption industries of our time.<sup>251</sup>

The global BTC mining network utilized a staggering 173.42 terawatt-hours (TWh) of electricity between 2020 and 2021.<sup>252</sup> This energy consumption surpasses that of many countries. During the same 2020–2021 period, the BTC mining process released over 85.89 million metric tons of carbon dioxide equivalent (CO<sub>2</sub>eq), a figure comparable to the emissions generated by burning 84 billion pounds of coal or operating 190 natural gas-fired power plants.<sup>253</sup> Beyond greenhouse gas emissions, the environmental impact of BTC mining extends to its water footprint. The global water footprint of BTC mining in that timeframe reached approximately 1.65 cubic kilometers, surpassing the domestic water consumption of 300 million people in rural Sub-Saharan Africa.<sup>254</sup> These figures are not only illustrative of the impact that Bitcoin mining has on the environment but also its dependence on renewable energy.

In 2017, Eugene Mutai in an interview with CNN painted a picture of how dependent he was to the national electricity grid and how regular power outages affected his mining activities.<sup>255</sup> He

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<sup>249</sup> Karl O'dwyer and David Malone, 'Bitcoin Mining and Its Energy Footprint' (2014)

<[http://karlodwyer.com/publications/pdf/bitcoin\\_KJOD\\_2014.pdf](http://karlodwyer.com/publications/pdf/bitcoin_KJOD_2014.pdf)> Accessed 23 February 2023.

<sup>250</sup> Murray A Rudd and others, 'Bitcoin and Its Energy, Environmental, and Social Impacts: An Assessment of Key Research Needs in the Mining Sector' (2023) 14 *Challenges* 47 <<https://www.mdpi.com/2078-1547/14/4/47>> accessed 24 February 2024.

<sup>251</sup> Ibid.

<sup>252</sup> Sanaz Chamanara, S. Arman Ghaffarizadeh and Kaveh Madani, 'The Environmental Footprint of Bitcoin Mining across the Globe: Call for Urgent Action' (2023) 11 *Earth's Future* <<https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2023EF003871>> accessed 22 February 2024.

<sup>253</sup> UNU, 'UN Study Reveals the Hidden Environmental Impacts of Bitcoin: Carbon Is Not the Only Harmful By-Product' (*United Nations University* 6 March 2024) <<https://unu.edu/press-release/un-study-reveals-hidden-environmental-impacts-bitcoin-carbon-not-only-harmful-product>> accessed 28 February 2024.

<sup>254</sup> United Nations University, 'UN Study Reveals the Hidden Environmental Impacts of Bitcoin: Carbon Is Not the Only Harmful Byproduct' (*EurekaAlert* 24 October 2023) <<https://www.eurekaalert.org/news-releases/1005545>> accessed 25 February 2024.

<sup>255</sup> Chris Giles, 'Inside the World of a Kenyan Cryptocurrency Miner' (*CNN* 18 December 2017) <<https://edition.cnn.com/2017/12/18/africa/inside-life-cryptocurrency-miner-kenya-africa/index.html>> accessed 22 February 2024.

gave a rough estimate of how out of roughly the \$800 he made a month \$160 would go to his electricity bill, translating to 20% of his income.<sup>256</sup> Miners in Kenya are largely dependent on the national grid for supply which on hindsight does not generate as much waste.<sup>257</sup> It is however possible to transition into use of solar or wind power to run the rigs which will ease the burden on the already struggling national grid.

Furthermore, the cryptocurrency mining industry's fast technical improvement causes mining technology to frequently become obsolete.<sup>258</sup> As newer, more efficient models are created, older technology becomes outdated and is frequently discarded, adding to the accumulation of electronic trash (e-waste).<sup>259</sup> The persistent humming of cooling fans and the operation of mining equipment frequently produce noisy settings.<sup>260</sup> Buildings are typically not soundproofed adequately and due to the enormous energy requirements of mining, these rigs are frequently set up in cities and residential areas.<sup>261</sup>

#### v. The legal regime around Bitcoin mining in Kenya

The regulation of Bitcoin and other cryptocurrencies is essentially controlled by three fundamental legislations, each overseen by a separate regulatory body.<sup>262</sup> The National Payments Systems Act (NPSA), governed by the Central Bank of Kenya (CBK), oversees payment systems and service providers in the nation. This legislation gives the CBK the authority to regulate payment service providers, including mobile phone service providers, to maintain the security and integrity of payment platforms.<sup>263</sup> Under the NPSA, the CBK is authorized to regulate cryptocurrency operations and give warnings about potential hazards. The Capital Markets Act,

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<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

<sup>258</sup> Ryan Smith, 'What Is the Environmental Impact of Bitcoin Mining?' (*CoinCentral* 12 June 2018) <<https://coincentral.com/what-is-the-environmental-impact-of-bitcoin-mining/>> accessed 25 February 2024.

<sup>259</sup> Ibid.

<sup>260</sup> Du, Marx W M and C Nell, 'Efficient Use of Energy in the Ventilation and Cooling of Mines' (2014) 114 *Journal of the Southern African Institute of Mining and Metallurgy* 1033 <[http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S2225-62532014001200013](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-62532014001200013)> accessed 28 February 2024.

<sup>261</sup> Ibid.

<sup>262</sup> 'Kenya and Cryptocurrency' (*Freeman Law* 15 December 2023) <<https://freemanlaw.com/cryptocurrency/kenya/>> accessed 28 February 2024.

<sup>263</sup> David Geral, Irene Muthoni and Brian Kalule, 'UNSCRAMBLING BLOCKCHAIN : REGULATORY FRAMEWORKS in CRYPTOCURRENCY' <[https://bowmanslaw.com/wp-content/uploads/2018/09/Unscrambling-Blockchain\\_Session-I\\_Regulatory-Frameworks.pdf](https://bowmanslaw.com/wp-content/uploads/2018/09/Unscrambling-Blockchain_Session-I_Regulatory-Frameworks.pdf)> Accessed 27 February 2023.

managed by the Capital Markets Authority, governs Kenya's capital markets and securities.<sup>264</sup> While primarily concerned with traditional financial instruments, the CMA may have authority over certain parts of cryptocurrency trading and investing activities, particularly those that resemble securities or investment products.<sup>265</sup>

Ultimately, the Communications Authority administers the Kenya Information and Communication Act (KICA), which oversees Kenya's telecommunications and information technology industries. While not expressly addressing cryptocurrencies, this legislation may include laws governing digital assets and internet platforms that facilitate bitcoin transactions.<sup>266</sup> Kenya currently lacks any issue-specific regulations regarding cryptocurrency. There has been talk on the need to adopt rules that directly address issues related to cryptocurrency mining and trade, but this is yet to see fruition. The most significant problem in this regard is jurisdictional, as bitcoin is transboundary.

The Central Bank of Kenya has issued public cautions about the hazards of cryptocurrencies, highlighting their volatility and lack of particular regulation. Despite these cautions, bitcoin trading is still legal in Kenya, and anyone can freely purchase and sell cryptocurrencies.<sup>267</sup> However, cryptocurrency firms operating in Kenya must seek a license from Kenyan authorities, specifically under the Money Remittance legislation.<sup>268</sup> Failure to get necessary authorization may result in a suspension of banking services for certain organizations.

Although BTC mining is not explicitly regulated, mining businesses in Kenya must follow appropriate financial and commercial laws.<sup>269</sup> This includes meeting license requirements and

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<sup>264</sup> Jeff Kangethe, 'Digital Currencies: A Conceptual Framework for Its Regulation & Feasibility as Legal Tender' [2024] Social Science Research Network <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4704906](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4704906)> accessed 28 February 2024.

<sup>265</sup> Ibid.

<sup>266</sup> Robert Greenfield IV, 'The State of Crypto Regulation: Kenya - Umoja Protocol - Medium' (*Medium* 7 July 2023) <<https://medium.com/umoja-protocol/the-state-of-crypto-regulation-kenya-8a1189bda6b>> accessed 28 February 2024.

<sup>267</sup> Anne M Munyua, 'The Model of Regulation for Virtual Currencies in Kenya' [2021] Uonbi.ac.ke <<http://erepository.uonbi.ac.ke/handle/11295/157256>> accessed 28 February 2024.

<sup>268</sup> Baker Mckenzie, 'Blockchain and Cryptocurrency in Africa a Comparative Summary of the Reception and Regulation of Blockchain and Cryptocurrency in Africa' (2018) <[https://www.bakermckenzie.com/-/media/files/insight/publications/2019/02/report\\_blockchainandcryptocurrencyreg\\_feb2019.pdf](https://www.bakermckenzie.com/-/media/files/insight/publications/2019/02/report_blockchainandcryptocurrencyreg_feb2019.pdf)> Accessed 24 February 2023.

<sup>269</sup> Davis Mokaya Maoga, 'Mapping out the Regulatory Framework Position on Crypto-Assets' (*ResearchGate* 3 March 2023)

adhering to normal operations.<sup>270</sup> The regulatory landscape around digital currencies in Kenya are evolving, with authorities responding to the difficulties and possibilities posed by electronic assets.

vi. The Role of government in addressing the environmental impact

The government could consider a variety of initiatives to address the environmental damage. The government might impose laws to limit the energy use of Bitcoin mining companies.<sup>271</sup> This might include requiring the use of renewable energy sources or imposing energy efficiency criteria on mining operations.<sup>272</sup> KenGen has stepped up, aiming to provide miners with geothermal, hydro, and wind power exclusively for mining activities.<sup>273</sup>

The government may reduce the environmental effect of Bitcoin mining and encourage sustainable practices within the business through similar programs. The government could promote digital currencies by contributing funds to research and development initiatives focused at improving the energy efficiency of blockchain technology used in BTC mining.<sup>274</sup> By investing in innovation, governments may encourage the development of more sustainable mining methods and technologies that minimize energy use and environmental impact.<sup>275</sup> Aside from mining and trading, this outlet would also provide employment opportunities for Kenya's ever-expanding labor force. killing two birds with one stone.

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<[https://www.researchgate.net/publication/368961106\\_Mapping\\_out\\_the\\_Regulatory\\_Framework\\_Position\\_on\\_Crypto-Assets](https://www.researchgate.net/publication/368961106_Mapping_out_the_Regulatory_Framework_Position_on_Crypto-Assets)> accessed 20 February 2024.

<sup>270</sup> PATRICK ALUSHULA, 'Kenya Moves to Regulate Bitcoin Trade on Grey Listing Risk' (*Business Daily* 19 February 2024) <<https://www.businessdailyafrica.com/bd/economy/kenya-moves-to-regulate-bitcoin-trade-on-grey-listing-risk--4529684>> accessed 23 February 2024.

<sup>271</sup> Elisha Nyikuli and Odeyo, 'Exploring Financial Inclusion in Kenya through Cryptocurrencies: A Case for a Regulatory Framework' (Masters of Laws (LLM, Strathmore University, 2021) Section on findings <<https://su-plus.strathmore.edu/server/api/core/bitstreams/8428ce7f-d47f-40a0-9a85-484fbc3c0589/content>> accessed 28 February 2024.

<sup>272</sup> Mary K Pratt, 'The Environmental Impact of Bitcoin Mining Explained' (*Sustainability and ESG* 2023) <<https://www.techtarget.com/sustainability/feature/The-environmental-impact-of-bitcoin-mining-explained>> accessed 28 February 2024.

<sup>273</sup> Faustine Ngila, 'Kenya's Energy Company Is Offering Geothermal Power to Bitcoin Miners' (*Quartz* 2 June 2022) <<https://qz.com/africa/2172437/kengen-is-offering-geothermal-power-to-bitcoin-miners>> accessed 22 February 2024.

<sup>274</sup> Yehia Ibrahim Alzoubi and Alok Mishra, 'Green Blockchain – a Move towards Sustainability' (2023) 430 *Journal of Cleaner Production* 139541 <<https://www.sciencedirect.com/science/article/pii/S0959652623036995>> accessed 27 February 2024.

<sup>275</sup> Ibid.

Policymakers may develop rules and incentives to promote sustainable Bitcoin mining techniques.<sup>276</sup> This might include providing tax breaks or subsidies to mining firms that utilize renewable energy or implement environmentally friendly technology. Governments may further encourage the adoption of environmentally friendly practices across industries by fostering a favorable environment.<sup>277</sup> Players may also be encouraged to launch educational activities to enhance public knowledge about the environmental effects of Bitcoin mining. Policymakers can use educational campaigns to educate stakeholders about the energy-intensive nature of mining activities and the significance of reducing environmental damage.<sup>278</sup> By raising awareness, governments may encourage individuals and companies to make educated decisions that promote sustainability (author's emphasis).

Given the multinational nature of Bitcoin and cryptocurrency mining, international collaboration is critical for resolving environmental concerns. Governments can work with other nations to develop international norms and rules for sustainable mining operations. Nations can work together to harmonize legislation, exchange best practices, and jointly reduce the environmental effect of Bitcoin mining on a global scale.<sup>279</sup> International treaties and agreements governing digital assets would help to overcome the jurisdictional complications of domestic law.<sup>280</sup> It is vital that the Kenyan government does not fall behind (author's emphasis).

#### vii. Use of ADR in crypto mining

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<sup>276</sup>Rose Njomo, 'AN IMPENDING TRANSITION from FIAT CURRENCY to CRYPTOCURRENCY: REGULATION PREDICAMENT in KENYA KABARAK...' (*ResearchGate* 14 January 2023) <[https://www.researchgate.net/publication/367150651\\_AN\\_IMPENDING\\_TRANSITION\\_FROM\\_FIAT\\_CURRENCY\\_TO\\_CRYPTOCURRENCY\\_REGULATION\\_PREDICAMENT\\_IN\\_KENYA\\_KABARAK\\_UNIVERSITY](https://www.researchgate.net/publication/367150651_AN_IMPENDING_TRANSITION_FROM_FIAT_CURRENCY_TO_CRYPTOCURRENCY_REGULATION_PREDICAMENT_IN_KENYA_KABARAK_UNIVERSITY)> accessed 20 February 2024.

<sup>277</sup> Jon Truby, 'Decarbonizing Bitcoin: Law and Policy Choices for Reducing the Energy Consumption of Blockchain Technologies and Digital Currencies' (2018) 44 *Energy Research & Social Science* 399 <<https://www.sciencedirect.com/science/article/abs/pii/S2214629618301750>> accessed 28 February 2024.

<sup>278</sup> Jessica Beyer, 'The Political Geography and Environmental Impacts of Cryptocurrency Mining - the Henry M. Jackson School of International Studies' (*The Henry M. Jackson School of International Studies* 10 July 2019) <<https://jsis.washington.edu/news/the-political-geography-and-environmental-impacts-of-cryptocurrency-mining/>> accessed 19 February 2024.

<sup>279</sup> Antulio Rosales, Heather Millar and Andrew Richardson, 'Leveraging Intra-Provincial Regulatory Differences in a Post-Paris Context: Cryptocurrency Mining "Reverse Battery" Strategy in Atlantic Canada' (2024) 17 *The Extractive Industries and Society* 101396 <<https://www.sciencedirect.com/science/article/pii/S2214790X23001843>> accessed 28 February 2024.

<sup>280</sup> Rodrigo Polanco, 'The Impact of Digitalization on International Investment Law: Are Investment Treaties Analogue or Digital?' (2023) 24 *German Law Journal* 574 <<https://www.cambridge.org/core/journals/german-law-journal/article/impact-of-digitalization-on-international-investment-law-are-investment-treaties-analogue-or-digital/EC552536BFEF0E8AEF3DF250B180E158>> accessed 28 February 2024.



Alternative Dispute Resolution Mechanisms might play a critical role in addressing the environmental challenges raised by bitcoin and crypto mining in Kenya. ADR techniques can let stakeholders affected by Bitcoin mining join in community discussions and make more informed decisions.<sup>281</sup> By engaging local people in talks about mining operations and their environmental effects, ADR may assist identify community objectives, concerns, and preferences for sustainable mining methods.<sup>282</sup> Communities can create locally customized rules or norms for ethical mining activities via discourse and consensus-building, instilling a feeling of ownership and care of environmental resources (author's emphasis).

ADR could additionally offer a venue for championing for the rights and interests of communities impacted by Bitcoin mining, amplifying their voices in policy conversations and decision-making processes as needed.<sup>283</sup> By advocating for environmental justice, ADR practitioners can raise awareness about the social and environmental consequences of mining activities, advocate for policy reforms to strengthen environmental regulations, and promote greater corporate accountability and responsibility in the mining industry (author's emphasis).

In the case of conflicts or disputes originating from Bitcoin mining activities, ADR can provide a culturally appropriate and accessible forum for settling differences.<sup>284</sup> Traditional conflict resolution processes inherent in ADR, such as mediation, arbitration, or customary law practices, can provide additional options for resolving grievances and finding mutually acceptable outcomes.<sup>285</sup> ADR promotes conversation and reconciliation, which helps to establish harmony and social cohesion within impacted communities, eventually aiding sustainable development and environmental conservation initiatives.<sup>286</sup> It is critical to recognize that, while ADR can supplement formal regulatory frameworks and governance structures, its efficacy in addressing the detrimental effects of Bitcoin mining may be dependent on wider institutional support, cooperation, and integration into existing legal and regulatory mechanisms. ADR activities must

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<sup>281</sup> Francis Gerard Bautista, 'ADR in the Blockchain Ecosystem: A Primer - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog* 14 December 2023) <<https://arbitrationblog.kluwerarbitration.com/2023/12/14/adr-in-the-blockchain-ecosystem-a-primer/>> accessed 24 February 2024.

<sup>282</sup> Ibid.

<sup>283</sup> Tamar Meshel and Moin A Yahya, 'Crypto Dispute Resolution: An Empirical Study' (*Ssrn.com* 5 October 2021) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3975500](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975500)> accessed 28 February 2024.

<sup>284</sup> Cemre Kadioglu Kumtepe, 'A Brief Introduction to Blockchain Dispute Resolution' [2020] Social Science Research Network <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4083107](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4083107)> accessed 28 February 2024.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

also be context-specific, culturally sensitive, and inclusive, taking into consideration local norms, traditions, and governance structures (author's emphasis).

#### viii. Conclusion

Unemployment and the widespread availability of the internet in Kenya have led to a significant number of young people turning to various online avenues in pursuit of earning a livelihood. One such avenue that has gained popularity over the years is cryptocurrency trading, with many individuals setting up mining rigs to generate income. However, like Eugene Mutai's experience, many of these rigs rely solely on the national power supply. Given this trend, it is essential to reconsider both the regulation and structure of the cryptocurrency industry in Kenya. Effective regulation would play a crucial role in ensuring that these mining rigs do not become public nuisances or environmental hazards, while also preventing cryptocurrencies from being used for fraudulent activities. Moreover, regulated cryptocurrency operations could provide an additional source of revenue for the government

The global community has made strides towards regulating cryptocurrencies, recognizing the challenges posed by their unique characteristics. However, due to the decentralized and borderless nature of cryptocurrencies, effective regulation remains challenging at the national level. It is imperative for the international community to collaborate and establish unified rules and guidelines to protect users and the public at large. Embracing this new wave of change is crucial to avoid being left behind in the rapidly evolving digital landscape. Kenya, in particular, has the opportunity to become a pioneer in cryptocurrency regulation rather than waiting to play catch-up. By taking proactive steps to develop robust regulatory frameworks, Kenya can position itself as a leader in fostering a safe and conducive environment for cryptocurrency innovation and investment. ADR could be the missing link in addressing that bitcoin environmental bite.

#### ix. Recommendations

Several approaches may be taken to address the environmental effect. Miners might implement Proof of Stake (PoS).<sup>287</sup> PoS is an alternative consensus mechanism that, when compared to Bitcoin's existing Proof of Work (PoW) method, provides a more energy-efficient system for

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<sup>287</sup> Lepore, Cristian, Michela Ceria, Andrea Visconti, Udai Pratap Rao, Kaushal Arvindbhai Shah, and Luca Zanolini. "A survey on blockchain consensus with a performance comparison of PoW, PoS and pure PoS." *Mathematics* 8, no. 10 (2020): 1782.

transaction validation and blockchain security. In PoS, validators are chosen to produce new blocks and verify transactions depending on how much bitcoin they own and are prepared to stake as collateral.

Because PoS does not rely on computational puzzles like PoW, it uses far less energy, giving it a possible alternative for lowering the environmental effect of cryptocurrency mining. Miners may also recycle and reuse electronic waste. As mining technology becomes obsolete or nears the end of its useful life, recycling and reusing electronic waste can help to reduce environmental pollution and resource depletion. Metals, polymers, and rare earth elements can be removed and reused to make new electrical devices or for other industrial purposes. Refurbishing and reselling outdated mining equipment may also extend its life and minimize the need for new gear, which contributes to sustainability initiatives.

Moving Bitcoin mining operations to areas with ample renewable energy sources or a surplus of energy can reduce dependency on fossil fuels and lower carbon emissions. Miners may take a more sustainable and ecologically friendly approach to bitcoin mining by utilizing renewable energy sources such as solar, wind, and hydroelectric power. Using waste methane gas from oil fields or other industrial processes to generate electricity can provide a sustainable energy source for mining operations while also lowering methane emissions and environmental degradation. Relocation might also help to address the issue of noise pollution by allowing the rigs to be placed up distant from residential areas or even densely populated cities.

Carbon offsetting entails making up for the carbon emissions caused by Bitcoin mining by investing in programs that lower greenhouse gas emissions elsewhere.<sup>288</sup> These projects might involve forestry efforts, renewable energy development, or energy efficiency measures. By offsetting emissions through these actions, Bitcoin miners may reduce their environmental effect and contribute to global climate change mitigation efforts.

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<sup>288</sup> Watt, Robert. "The fantasy of carbon offsetting." *Environmental Politics* 30, no. 7 (2021): 1069-1088.

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## FROM ADVERSARIES TO ALLIES: ALTERNATIVE JUSTICE SYSTEMS AS A STRATEGY FOR EMPOWERING ENVIRONMENTAL JUSTICE IN AFRICA

*By Solomon Gatherer Njuguna<sup>289</sup>*

### Abstract

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*Environmental justice is an idea whose urgency in the wake of environmental change and a warming climate change cannot be over-emphasized. Problematically, conflicts over environmental resources, benefits, and harms thereof have become intractable, dynamic, and complex. This is partly attributed to the diverse actors, norms, values, and interests that portend various challenges to conventional legal and dispute resolution methods. As a sick patient seeks medical attention, so does this paper do research excavation, analysing and consequently proposing effective entrenchment of a dispute resolution framework which would, instead of turning humanity to be adversaries, architects a consensus, dialogic, and collaborating atmosphere for the conflicting parties to amicably settle/resolve their disputes. Mediating green, a predominant idea from the foregoing serves to amalgamate regional sustainability practices, and environmental law into the fabric of mediation. Hypothetically, the paper argues that mediating green is the much-needed approach in promoting effective environmental governance, hence contributing to the attainment of the global sustainable development goals.*

## I. Introduction

Environmental justice, as an ideal, stands at the confluence of ethics, rights, and ecological sensibility. It is a concept that demands a critical examination of the socio-political structures that govern our interaction with the environment.<sup>290</sup> At its core, environmental justice insists on the fair treatment and meaningful involvement of all individuals in environmental decision-making processes. This principle challenges the status quo, questioning why certain communities bear the brunt of environmental hazards while others remain insulated from such risks.<sup>291</sup> This brings to the fore the idea that environmental justice movements are not just about mitigating exposure to environmental hazards; they are a clarion call for systemic change, seeking to dismantle historical patterns of inequality that have led to a disproportionate number of landfills, toxic waste sites, and polluting industries being in areas inhabited by marginalized groups.<sup>292</sup> Emphatically,

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<sup>290</sup> L Amede Obiora, 'Symbolic Episodes in the Quest for Environmental Justice' (1999) 21 Human Rights Quarterly 464 <[https://www.jstor.org/stable/pdf/762712.pdf?refreqid=fastly-default%3A93aa876031e1f6a1f7d983317363035e&ab\\_segments=&origin=&initiator=&acceptTC=1](https://www.jstor.org/stable/pdf/762712.pdf?refreqid=fastly-default%3A93aa876031e1f6a1f7d983317363035e&ab_segments=&origin=&initiator=&acceptTC=1)> accessed 7 January 2024.

<sup>291</sup> Ilaria Beretta, 'Some Highlights on the Concept of Environmental Justice and Its Use' [2012] e-cadernos ces Section on the knowledge on Environmental Justice from Specialised Literature <<https://journals.openedition.org/eces/1135>> accessed 7 January 2024.

<sup>292</sup> Ali, 'A Service of Zbw Leibniz-Informationszentrum Wirtschaft Leibniz Information Centre for Economics a Conceptual Framework for Environmental Justice Based on Shared but Differentiated Responsibilities' (2001) <<https://www.econstor.eu/bitstream/10419/80259/1/358262577.pdf>> accessed 11 February 2024.

therefore, the quest for environmental justice is a quest for a reformed society where the color of one's skin, the depth of one's pockets, or the origin of one's birth does not predetermine the quality of air one breathes or the purity of water one drinks (author's emphasis).

Moreover, environmental justice transcends the mere allocation of environmental goods and ills; it is about ensuring equitable access to a healthy environment—a fundamental human right. It is about creating a world where every individual, regardless of their socioeconomic status, could live in a healthy and sustainable environment.<sup>293</sup> It is about empowering every voice, especially those that have been historically silenced, to participate in shaping the policies and projects that affect their lives and the environment they cherish.<sup>294</sup>

Essentially, environmental justice is radically envisioned to reimagine of our relationship with the natural world. It is a vision of a future where environmental burdens are not shouldered by the few but shared by all, and where the well-being of the planet is inextricably linked to the well-being of its inhabitants.<sup>295</sup> It is a call to action for all of us to build a more equitable, just, and sustainable world.

In Kenya, the quest for environmental justice is a complex endeavor, deeply rooted in the constitutional mandate that obliges every citizen to engage with state organs in the protection and conservation of the environment. Article 69 of Kenya's constitution is a progressive provision that enshrines the right to a clean and healthy environment<sup>296</sup> and the duty to promote sustainable development and utilization of natural resources.

Despite this robust legal framework, the reality on the ground presents a stark contrast, where the pursuit of environmental justice is marred by a myriad of challenges. Marginalized communities often find themselves on the frontline of environmental degradation.<sup>297</sup> The unequal

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<sup>293</sup> Melanie Pimentel, 'The Right to a Healthy Environment, a Social Environmental Justice Approach' (2023) <<https://su.diva-portal.org/smash/get/diva2:1791871/FULLTEXT01.pdf>> accessed 28 January 2024.

<sup>294</sup> Ibid.

<sup>295</sup> Brack Hale and others, 'Environmental Justice, "Collapse" and the Question of Evidence Environmental Justice, "Collapse" and the Question of Evidence' (2015) 3 <<https://www.fus.edu/intervalla-files/vol3/vol3.pdf>>.

<sup>296</sup> Article 42 of the Constitution of Kenya 2010.

<sup>297</sup> Revamp Rave Network, 'In the Ever-Evolving Nature of the Climate Crisis, One Glaring Truth Emerges—Its Impacts Are far from Indiscriminate. Instead, They Disproportionately Afflict Marginalised Communities, Deepening Existing Inequalities and Vulnerabilities.' (*Linkedin.com* 25 September 2023)

distribution of environmental burdens is glaringly evident in instances of lead poisoning, where residents in proximity to lead battery recycling plants endure the dire consequences of lead contamination.<sup>298</sup> Their health and well-being are compromised, a clear violation of the environmental rights guaranteed by the constitution (emphasis).

Furthermore, the issue of dumping sites exemplifies the systemic flaws in waste management practices. Poorly managed disposal sites become a source of pollution and disease, disproportionately affecting the health and livelihoods of nearby communities.<sup>299</sup> These communities are trapped in a cycle of environmental injustice, where their environment becomes a dumping ground for waste, and their rights to a clean and healthy environment are overlooked (emphasis). Visibly, such a situation calls for a critically ingenious approach to environmental justice in Kenya, one that not only addresses the symptoms but also tackles the root causes of environmental inequality. It demands a concerted effort from all stakeholders to ensure that the constitutional promise of a healthy environment is not a mere aspiration but a lived reality for every Kenyan,<sup>300</sup> for the path forward must be paved with policies and actions that prioritize the health of the environment and the people who depend on it, ensuring that no community is left to bear an undue share of environmental harms and benefits.

## II. Manifestations of Environmental Harm

Environmental harm manifests in various forms, and its repercussions are felt most acutely by those least equipped to cope. In Kenya, land displacement serves as a stark illustration of this phenomenon. Development projects and resource extraction, often touted as harbingers of progress, can have the unintended consequence of severing communities from their ancestral

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<<https://www.linkedin.com/pulse/championing-environmental-justice-empowering-marginalised>> accessed 1 March 2024.

<sup>298</sup> Felix Horne, 'Landmark Decision in Kenya Lead Pollution Case' (*Human Rights Watch* 22 July 2020) <<https://www.hrw.org/news/2020/07/22/landmark-decision-kenya-lead-pollution-case>> accessed 1 March 2024.

<sup>299</sup> Navarro Ferronato and Vincenzo Torretta, 'Waste Mismanagement in Developing Countries: A Review of Global Issues' (2019) 16 *International Journal of Environmental Research and Public Health* 1060 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6466021/>> accessed 7 March 2024.

<sup>300</sup> Kariuki Muigua, 'Entrenching Ecocentric Approach to Environmental Management in Kenya | University of Nairobi' (*Uonbi.ac.ke*2020) <<https://www.uonbi.ac.ke/news/entrenching-ecocentric-approach-environmental-management-kenya>> accessed 1 March 2024.

lands, disrupting their cultural practices, and undermining their livelihoods.<sup>301</sup> This displacement is not merely a change of location; it is an erosion of identity and a threat to the social fabric of communities (emphasis).

Challenge mentioned hereinabove compound-considering the limited access to environmental Information and decision-making. Marginalized communities frequently find themselves excluded from the conversations that shape the landscape of their lives. The lack of access to critical information about environmental projects and policies that affect them is a barrier to their ability to safeguard their interests and the environment they depend on.<sup>302</sup> Moreover, a weak enforcement of environmental laws further exacerbates the situation. When regulations designed to protect the environment are not effectively enforced, it emboldens companies and individuals to pollute and degrade the environment without fear of repercussions.<sup>303</sup> This regulatory laxity not only damages the ecosystem but also imperils the health and well-being of surrounding communities, who are left to bear the brunt of such environmental transgressions.<sup>304</sup>

However, amidst these challenges, there are concerted efforts to steer the course towards environmental justice.<sup>305</sup> Legal advocacy, exemplified by organizations like Natural Justice, leverages the power of the law to enable communities to assert their rights to land, resources, and a healthy environment.<sup>306</sup> Community mobilization and education are also pivotal, as they

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<sup>301</sup> 'Kenya: IRIN Focus on Dangers of Deforestation - Kenya' (*ReliefWeb* 2 November 2000) <<https://reliefweb.int/report/kenya/kenya-irin-focus-dangers-deforestation>> accessed 29 February 2024.

<sup>302</sup> Muriel Adams, Sonja Klinsky and Nalini Chhetri, 'Barriers to Sustainability in Poor Marginalized Communities in the United States: The Criminal Justice, the Prison-Industrial Complex and Foster Care Systems' (2019) 12 *Sustainability* 220 <<https://www.mdpi.com/2071-1050/12/1/220>> accessed 1 March 2024.

<sup>303</sup> Knowledge Hub, 'Environmental Laws Impeded by Lack of Enforcement, First-Ever Global Assessment Finds | News | SDG Knowledge Hub | IISD' (*iisd.org* 2019) <<https://sdg.iisd.org/news/environmental-laws-impeded-by-lack-of-enforcement-first-ever-global-assessment-finds/>> accessed 1 March 2024.

<sup>304</sup> Taylor Kilduff, 'The Difficulties of Enforcing Global Environmental Law' (*Georgetown.edu* 2019) <<https://www.law.georgetown.edu/environmental-law-review/blog/214/>> accessed 2 March 2024.

<sup>305</sup> Kariuki Muigua, 'Securing Our Destiny through Effective Management of the Environment' (2020) Chapter 1 <<https://kmco.co.ke/wp-content/uploads/2020/04/Securing-Our-Destiny-through-Effective-Management-of-the-Environment-Kariuki-Muigua-April-2020.pdf>> accessed 2 March 2024.

<sup>306</sup> Natural Justice, 'Protecting Community Lands & Resources in Africa' (2013) Executive Summary <<https://naturaljustice.org/wp-content/uploads/2016/03/Protecting-Community-Lands.pdf>> accessed 1 March 2024.

raise awareness about environmental issues and empower communities to stand up for their rights.<sup>307</sup>

Further, government initiatives, underpinned by the 2010 Kenyan Constitution's recognition of the right to a healthy environment, aim to redress environmental injustices.<sup>308</sup> However, the path to realizing these initiatives is fraught with obstacles, and the effectiveness of their implementation remains a critical concern.

Therefore, whereas the pursuit of environmental justice in Kenya is bolstered by a strong constitutional framework and dedicated advocacy, the journey is far from complete. The nation stands at a crossroads, where the promise of environmental justice must be matched by the political will, resources, and collective resolve to create an equitable and sustainable future for all its citizens.<sup>309</sup> Environmental justice, therefore, is not just an aspiration but a call to action—a call to build a society where the environment is protected as a common good and where every individual has the agency to shape the decisions that affect their lives and the natural world they inhabit.<sup>310</sup>

### III. The African Environmental Law dialogue

The struggle for environmental justice in Africa is a multifaceted and intricate battle, reflective of the continent's vast diversity yet united by common challenges. The disproportionate distribution of environmental burdens upon marginalized communities is a glaring injustice, with pollution from industrial activities, mining, and inadequate waste management leading to significant

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<sup>307</sup> Ibid.

<sup>308</sup> Daniel Nzeki, 'Demystifying the Right to a Clean and Healthy Environment in Kenya and How It Can Be Enforced' (2021) <<http://journalofcmsd.net/wp-content/uploads/2021/07/Demystifying-The-Right-to-A-Clean-and-Healthy-Environment-in-Kenya-and-how-it-can-be-Enforced.pdf>> accessed 13 February 2024.

<sup>309</sup> Kariuki Muigua and Francis Kariuki, 'Towards Environmental Justice in Kenya' (2017) Abstract section <<https://kmco.co.ke/wp-content/uploads/2018/08/Towards-Environmental-Justice-in-Kenya-1st-September-2017.pdf>> accessed 19 February 2024.

<sup>310</sup> Jedediah Purdy, 'The Long Environmental Justice Movement' Abstract section <[https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6338&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6338&context=faculty_scholarship)> accessed 18 February 2024.

air and water pollution. These practices disrupt lives, compromise health, and threaten the livelihoods of those in surrounding areas.

Land degradation, fueled by climate change, deforestation, and unsustainable agricultural practices, further exacerbates food insecurity, and threatens the livelihoods of vulnerable populations.<sup>311</sup> Resource extraction activities, often conducted without transparency or community consultation, result in displacement, environmental degradation, and disputes over the fair sharing of benefits.<sup>312</sup>

The barriers to participation and access to information are significant. Many communities are left in the dark about environmental projects and policies that directly impact their lives, hindering their ability to advocate for their rights and interests.<sup>313</sup> Weak environmental governance and the ineffective enforcement of regulations leave these communities exposed to exploitation and environmental harm, with corruption serving as an additional obstacle to achieving justice.<sup>314</sup>

Yet, amidst these challenges, there are beacons of hope. Grassroots movements and activism are on the rise, with local communities organizing to defend their environmental rights, raising awareness, and advocating for systemic change.<sup>315</sup> Legal advocacy has emerged as a powerful tool,<sup>316</sup> with organizations and individuals leveraging legal channels to challenge harmful practices and hold polluters accountable.

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<sup>311</sup> FAO, 'Climate Change and Food Security: Risks and Responses' (2015)

<<https://www.fao.org/3/i5188e/i5188e.pdf>> Accessed 2 March 2024.

<sup>312</sup> Ruth Greenspan Bell, 'Protecting the Environment during and after Resource Extraction' [2018] Oxford University Press eBooks 318 <<https://academic.oup.com/book/27405/chapter/197226481>> accessed 1 March 2024.

<sup>313</sup> 'Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean towards Achievement of the 2030 Agenda for Sustainable Development'

<<https://repositorio.cepal.org/server/api/core/bitstreams/df4bbf15-d052-4247-a17a-b56accc77a3d/content>> accessed 11 February 2024.

<sup>314</sup> Anita Akella and James Cannon, 'Strengthening the Weakest Links Strategies for Improving the Enforcement of Environmental Laws Globally REPORT CCG' <<https://www.oecd.org/env/outreach/33947741.pdf>> Accessed 1 March 2024.

<sup>315</sup> United Nations, 'Who Are Environmental Defenders?' (UNEP - UN Environment Programme 2018)

<<https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/who>> accessed 1 March 2024.

<sup>316</sup> Vis Legis Law Practice, Advocates, 'Introduction: Environmental Justice Refers to the Fair and Equitable Treatment of All People with Respect to Environmental Laws, Regulations, and Policies, regardless of Race,



Policy and legislative initiatives are also underway, with some African nations taking proactive steps to enhance environmental governance, strengthen regulations, and encourage community participation in decision-making processes.<sup>317</sup> These efforts represent a growing recognition of the need for inclusive and effective environmental stewardship, signaling a potential turning point in the continent's journey towards true environmental justice. The path ahead is challenging, but the resolve of Africa's people and the emerging initiatives provide a foundation for optimism and sustained action.

At the global stage; what's happening? Globally, the pursuit of environmental justice reflects a broader struggle against entrenched inequalities and systemic failures. The disproportionate distribution of environmental burdens upon marginalized communities is a stark global reality.<sup>318</sup> These communities, often the least responsible for ecological degradation, face the most significant exposure to pollution, waste dumps, and environmental harm.<sup>319</sup> This inequity is compounded by limited access to essential resources like clean water and sanitation, as well as a lack of critical information about environmental threats and rights.

Weak enforcement of environmental regulations further perpetuates this injustice, allowing polluters to harm local communities and ecosystems with little to no consequence. Land dispossession and resource extraction activities frequently displace communities from their

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Colour, National Origin, or Income. It Seeks to Ensure That All People Enjoy the Same Degree of Protection from Environmenta' (*Linkedin.com* 29 November 2023) <<https://www.linkedin.com/pulse/legal-challenges-environmental-equity-strategies-change-vllp2017-7ncff>> accessed 1 March 2024.

<sup>317</sup> Kariuki Muigua and li, 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya' (2017) Abstract and Conclusion sections <<https://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-Managing-Natural-resources-and-Equitable-Benefit-Sharing-in-Kenya-17th-November-2017-Kariuki-Muigua.pdf>> accessed 2 March 2024.

<sup>318</sup> Jayajit Chakraborty, Timothy W Collins and Sara E Grineski, 'Environmental Justice Research: Contemporary Issues and Emerging Topics' (2016) 13 *International Journal of Environmental Research and Public Health* 1072 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5129282/>> accessed 27 February 2024.

<sup>319</sup> 'Poverty and Environmental Degradation: A Literature Review and Analysis Anantha Duraiappah CREED Working Paper Series No 8' (1996) pp. 8-25 <<https://www.iied.org/sites/default/files/pdfs/migrate/8127IIED.pdf>> accessed 2 February 2024.

ancestral lands and traditional livelihoods, often proceeding without fair compensation, consent, or consultation,<sup>320</sup> leaving a trail of cultural and ecological disruption.

Despite these challenges, there are notable global efforts pushing back against these injustices. Grassroots movements are gaining momentum, as communities worldwide mobilize to assert their environmental rights, raise awareness, and hold polluters accountable.<sup>321</sup> Legal action has become a pivotal avenue for justice, with international environmental law and national legal frameworks being leveraged to protect communities and the environment.<sup>322</sup> International collaboration is also key, with treaties, conventions, and organizations like the UN Environment Programme (UNEP) playing instrumental roles in promoting environmental justice and sustainable development.<sup>323</sup>

These efforts signify a growing recognition of the interconnectedness of human rights and environmental health. They represent a collective determination to forge a future where environmental justice is not an ideal but a lived reality for all, irrespective of geography, socio-economic status, or cultural background.<sup>324</sup> The path to environmental justice is a global one, demanding unwavering commitment and collaborative action to ensure that the rights to a healthy environment are universally upheld and respected (author's emphasis).

The global quest for environmental justice is a clarion call to action, demanding robust environmental governance that enforces laws effectively, combats corruption, and fosters

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<sup>320</sup> Lara Domínguez and Colin Luoma, 'Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment' (2020) 9 Land 65 <<https://www.mdpi.com/2073-445X/9/3/65>> accessed 17 February 2024.

<sup>321</sup> 'How Grassroots Environmental Activism Has Changed the Course of History' (*Goldman Environmental Prize* September 2021) <<https://www.goldmanprize.org/blog/grassroots-environmental-activism/>> accessed 1 March 2024.

<sup>322</sup> 'International Environmental Law as a Means for Enhancing the Protection of the Environment in Warfare: A Critical Assessment of Scholarly Theoretical Frameworks' (*International Review of the Red Cross* December 2023) <<https://international-review.icrc.org/articles/international-environmental-law-protection-of-the-environment-924>> accessed 1 March 2024.

<sup>323</sup> UN Environment, 'Why Does UN Environment Programme Matter?' (*UNEP - UN Environment Programme* 2017) <<https://www.unep.org/about-un-environment/why-does-un-environment-matter>> accessed 2 March 2024.

<sup>324</sup> Diego Hernández Guzmán and Judith Hernández, 'Global Citizenship: Towards a Concept for Participatory Environmental Protection' [2023] *Global Society* 1 <<https://www.tandfonline.com/doi/epdf/10.1080/13600826.2023.2284150?needAccess=true>> accessed 19 February 2024.

transparency. It is a movement that seeks to empower marginalized communities by providing them with the necessary resources, legal support,<sup>325</sup> and platforms to participate in decision-making processes that affect their lives and environment.

Transitioning to sustainable practices is another cornerstone of this endeavor, urging a shift towards development practices that not only protect the environment but also ensure the equitable sharing of benefits.<sup>326</sup> This transition is pivotal in rectifying the current imbalance where the most marginalized, who contribute the least to environmental degradation, bear the heaviest burdens (author's emphasis).

Building global solidarity is essential in this journey. It involves fostering collaboration between governments, civil society organizations, and communities worldwide to address the multifaceted environmental challenges we face.<sup>327</sup> By acknowledging the global dimensions of environmental injustice and supporting ongoing efforts, we can collectively work towards a future where a healthy and sustainable environment is a universal right, not a privilege.<sup>328</sup>

From the local landscapes of Kenya to the global stage, the narrative remains consistent: marginalized communities are disproportionately affected by environmental harm. Limited access to information and participation exacerbates their plight.<sup>329</sup> Thus, activism, legal action, and stronger regulations are vital to empower these communities and achieve true environmental justice. It is a call for collaborative action, fair development, and the assurance that everyone,

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<sup>325</sup> 'Achieving Justice and Human Rights in an Era of Climate Disruption International Bar Association Climate Change Justice and Human Rights Task Force Report' (2014) <<https://www.ibanet.org/document?id=Achieving-Justice-and-Human-Rights-in-an-Era-of-Climate-Disruption-report>> accessed 24 February 2024.

<sup>326</sup> Santosh G, 'In Today's Interconnected World, Humanity Faces an Array of Global Crises That Threaten Our Collective Future. Environmental Degradation, manifesting in the Form of Climate Change, Biodiversity Loss, and Pollution, Poses an Unprecedented Risk to the Natural Systems upon Which All Life Depends.' (*Linkedin.com* 24 February 2024) <<https://www.linkedin.com/pulse/from-crisis-transformation-accelerating-transition-sustainable-g-dgfgc>> accessed 16 February 2024.

<sup>327</sup> 'Support Civil Society's International Solidarity Efforts for Peace: UN Experts' (*OHCHR* 2023) <<https://www.ohchr.org/en/statements/2023/12/support-civil-societys-international-solidarity-efforts-peace-un-experts>> accessed 1 March 2024.

<sup>328</sup> Mary Menton and others, 'Environmental Justice and the SDGs: From Synergies to Gaps and Contradictions' (2020) 15 *Sustainability Science* 1621 <<https://link.springer.com/article/10.1007/s11625-020-00789-8>> accessed 18 February 2024.

<sup>329</sup> IPCC SIXTH LANGUAGE, 'Chapter 8: Poverty, Livelihoods and Sustainable Development' (*Ipcc.ch* 2022) <<https://www.ipcc.ch/report/ar6/wg2/chapter/chapter-8/>> accessed 1 March 2024.

everywhere, has a voice in shaping their environmental future. In this collective endeavor,<sup>330</sup> humans strive to build a world where environmental rights are recognized as fundamental rights for all.

#### IV. Appropriate dispute resolution; a new frontier

In the intricate dance of dispute resolution, the art of negotiation reigns supreme as the most frequently employed and often preferred method. It is the initial step in the journey toward reconciliation, where direct communication serves as the bridge between discord and harmony.<sup>331</sup> Negotiation is the embodiment of dispute resolution without tears, a process that champions the virtues of efficiency, fairness, and mutual respect.

The art of negotiation cannot be overlooked. At its core, negotiation is an exercise in diplomacy. It is a strategic dialogue where parties, armed with their perspectives and interests, come together to weave a tapestry of compromise.<sup>332</sup> The process is akin to a duet, where each participant steps forward with proposed solutions, engaging in a delicate balance of give-and-take. The dialogue is not a battleground but a fertile ground for exploration, where possibilities are unearthed, and common ground is cultivated).

Among the benefits of negotiation encompass cost-effectiveness, considering it is a lean process, eschewing the need for extensive external resources that other methods might demand. This frugality is not born of necessity but of design, as negotiation seeks to resolve conflicts without imposing undue financial burdens on the parties involved.<sup>333</sup> Collaboratively and far from being a zero-sum game, negotiation is a collaborative endeavor. It is a process that fosters

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<sup>330</sup> 'SPECIAL ISSUE on ENVIRONMENTAL DEFENDERS CONSERVATION and the NEED for GREATER DEFENDERS PROTECTION' (IUCN 2021) 1-25  
<<https://portals.iucn.org/library/sites/library/files/documents/Policy-Matters-Issue-22-vol3.pdf>> accessed 17 February 2024.

<sup>331</sup> E Wertheim, 'Negotiations and Resolving Conflicts: An Overview' (2020) 1 BMJ 455  
<<https://www.europarc.org/communication-skills/pdf/Negotiation%20Skills.pdf>> accessed 12 February 2024.

<sup>332</sup> Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 *The American Journal of International Law* 373 <<https://www.jstor.org/stable/pdf/3651152.pdf>> accessed 17 February 2024.

<sup>333</sup> 'Negotiation Advantage: Make the First Move' (*Wharton Executive Education* 17 February 2020)  
<<https://executiveeducation.wharton.upenn.edu/thought-leadership/wharton-at-work/2012/09/negotiation-advantage/>> accessed 1 March 2024.

understanding and lays the foundation for a future working relationship.<sup>334</sup> It recognizes that today's adversaries can be tomorrow's allies and that the resolution of a conflict can be the beginning of a partnership (author's emphasis). Moreover, negotiation is not bound by rigid protocols or one-size-fits-all solutions. It is a fluid process, adaptable to the unique needs and concerns of the parties.<sup>335</sup> It allows for bespoke resolutions, tailor-made to address the specific contours of the dispute at hand.

In the realm of dispute resolution, the path to justice is often fraught with both promise and peril. While negotiation stands as a beacon of autonomy and mutual agreement, it is not without its pitfalls. The specter of impasse looms large when communication falters or when the chasm between parties' positions seems insurmountable.<sup>336</sup> Power imbalances may skew the scales of negotiation or negotiation, leading to outcomes that favor the strong over the fair. Moreover, the art of negotiation is not innate; it requires honed skills in communication and compromise,<sup>337</sup> a dance that both parties must perform with grace and tact.

Mediation, the gentle guide in the tumult of dispute, offers a structured process where a mediator orchestrates the dialogue, ensuring that all voices are heard and no single party casts too long a shadow. The cloak of confidentiality wraps these discussions, allowing for candor without the fear of repercussions beyond the mediation room.<sup>338</sup> This method holds the power to heal and preserve relationships, a salve for ongoing partnerships strained by conflict. Yet,

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<sup>334</sup> Jeswald Salacuse, 'The Importance of a Relationship in Negotiation' (*PON - Program on Negotiation at Harvard Law School* 12 December 2023) <<https://www.pon.harvard.edu/daily/negotiation-training-daily/negotiate-relationships/>> accessed 1 March 2024.

<sup>335</sup> Paul Meerts, 'Diplomatic Negotiation Essence and Evolution' (2015) The Introductory section <[https://www.clingendael.org/sites/default/files/pdfs/Diplomatic\\_Negotiation\\_Web\\_2015.pdf](https://www.clingendael.org/sites/default/files/pdfs/Diplomatic_Negotiation_Web_2015.pdf)> accessed 11 February 2024.

<sup>336</sup> Suzanne C De Janasz and others, 'Negotiation and Dispute Resolution' (*IMD business school for management and leadership courses* 19 August 2022) <<https://www.imd.org/research-knowledge/negotiation/articles/negotiation-and-dispute-resolution/>> accessed 1 March 2024.

<sup>337</sup> Matthew Toren, 'The Art of Negotiation: Essential Skills for Young Entrepreneurs - Kidpreneurs' (*Kidpreneurs* 23 October 2023) <<https://kidpreneurs.org/the-art-of-negotiation-essential-skills-for-young-entrepreneurs/>> accessed 3 March 2024.

<sup>338</sup> Roy Bregman, 'Introduction in the Realm of Conflict Resolution, Mediation Has Emerged as a Compelling Alternative to the Traditional and Often Protracted Litigation Process. This Article Explores the Concept of Mediation, Its Myriad Benefits in Reducing Court Cases, and the Pivotal Role Played by Mediation Lawyer' (*Linkedin.com* 22 September 2023) <[https://www.linkedin.com/pulse/mediation-effective-route-conflict-resolution-roy-bregman?trk=article-ssr-frontend-pulse\\_more-articles\\_related-content-card](https://www.linkedin.com/pulse/mediation-effective-route-conflict-resolution-roy-bregman?trk=article-ssr-frontend-pulse_more-articles_related-content-card)> accessed 17 February 2024.

mediation's success is not a foregone conclusion. It is a delicate ecosystem that thrives on the willingness of all involved to engage constructively.<sup>339</sup> The absence of such commitment can render the process fruitless. And while mediation encourages resolution, it offers no guarantee; the specter of unresolved issues may still linger.<sup>340</sup> Furthermore, the cost of mediation, though often less than litigation, is not negligible, as mediator fees must be considered.

## V. Arbitration: The Gavel of Finality

Arbitration, the more formal cousin of negotiation and mediation, brings a sense of finality and formality to the table. An arbitrator, often an expert in the field, delves into the evidence and arguments, emerging with a decision that binds both parties.<sup>341</sup> This process offers a definitive end to disputes, with the arbitrator's verdict carrying the weight of law, enforceable in the courts.

The merits of arbitration are clear: it provides a conclusive resolution, and the decision-maker is typically an expert, ensuring that the outcome is informed by deep knowledge and understanding. However, the narrative of arbitration is incomplete without acknowledging its own set of challenges, which include the potential for significant costs,<sup>342</sup> the formalities and complexities of legal procedures, and the finality of the decision, which leaves little room for appeal or further negotiation (author's emphasis).

## VI. Conciliation

Conciliation is akin to a harmonious mediator as it offers a symphony of negotiation and mediation. It orchestrates a structured dialogue, with the conciliator's baton guiding the discourse

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<sup>339</sup> Alexander Oddy, 'What Is the Definition of Success in Mediation? - Kluwer Mediation Blog' (*Kluwer Mediation Blog* December 2011) <<https://mediationblog.kluwerarbitration.com/2011/12/01/what-is-the-definition-of-success-in-mediation-2/>> accessed 1 March 2024.

<sup>340</sup> Mark Woodward Smith, 'Mediation – Advantages and Disadvantages' (*Systech-int.com* 2024) <<https://www.systech-int.com/insights/thoughts/mediation-advantages-and-disadvantages>> accessed 1 March 2024.

<sup>341</sup> Alternative Dispute Resolution - FasterCapital, 'Alternative Dispute Resolution - FasterCapital' (*FasterCapital* 2018) <<https://fastercapital.com/startup-topic/Alternative-Dispute-Resolution.html>> accessed 5 March 2024.

<sup>342</sup> Cynthia F, 'The Advantages and Disadvantages of Arbitration | San Jose Corporate Lawyers' (*Sacattorneys.com* 2018) <<https://www.sacattorneys.com/the-advantages-and-disadvantages-of-arbitration.html>> accessed 2 March 2024.

and occasionally interjecting with harmonious suggestions for resolution.<sup>343</sup> This method can illuminate unexplored avenues, unlocking innovative solutions that might have otherwise remained hidden in the shadows of conflict.

However, the melody of conciliation can falter if the parties are not attuned to the conciliator's suggestions. Its effectiveness is contingent upon the openness of both parties to consider and potentially embrace these proposals. Moreover, conciliation may not be the panacea for all disputes, especially those entangled in complex legalities or skewed power dynamics.<sup>344</sup> The financial considerations, mirroring those of mediation, add another note of caution to this method's repertoire.

## VII. How about litigation?

Defined by legal artist as the court's solemn judgment, litigation remains as the court's most formal bastion of dispute resolution; for it is the judicial coliseum where disagreements are laid bare before the bench. The judge or jury, in their role as impartial arbiters, deliver a verdict with the gravity of finality—a legally binding judgment that etches the resolution into the annals of law.<sup>345</sup> This process, while steeped in formality, offers transparency and accountability, with the public record serving as a testament to the proceedings.

Yet, the path to litigation is arduous, often marred by the sands of time as months, or years, trickle by before a resolution is reached. The financial toll is formidable, with legal fees and court costs potentially erecting barriers to access for individuals or smaller entities.<sup>346</sup> The adversarial

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<sup>343</sup> 'What Is Conciliation? - Dispute Resolution Hamburg' (*Dispute-resolution-hamburg.com* 2024) <<https://www.dispute-resolution-hamburg.com/information/conciliation>> accessed 1 March 2024.

<sup>344</sup> Admin, 'The Use of Conciliation in Resolving Labour Disputes in Kenya' (*TheLawyer.africa* 15 January 2022) <<https://thelawyer.africa/2022/01/15/conciliation-of-labour-disputes-in-kenya/>> accessed 12 February 2024.

<sup>345</sup> Hon. Justice (Prof.) J.B Ojwang', 'The Judge's Ultimate Task: Formulating the Judgment | Kenya Law' (*Kenyalaw.org* 2014) <<http://kenyalaw.org/kenyalawblog/the-judges-ultimate-task-formulating-the-judgment/>> accessed 1 March 2024.

<sup>346</sup> Barney Jordaan, 'Recent Surveys Show That Corporates around the World Are Experiencing an Increase in Litigation, with Contract, Regulatory and Intellectual Property-Related Disputes at the Top of the List. Some Also Reported Not Only an Increase in Litigation Spend and Cost of Settlements, but Also an Increase in T' (*Linkedin.com* 5 December 2014) <<https://www.linkedin.com/pulse/2014/12/05/160259-48129923-litigation-costs-money-destroys-value-and-increases-corporate-risk>> accessed 16 February 2024.

nature of litigation can fray the threads of relationships, and the unpredictable outcome, subject to the whims of legal interpretation, adds a layer of uncertainty to this already daunting process.<sup>347</sup>

Therefore, from the collaborative overtures of negotiation to the authoritative pronouncements of litigation, the spectrum of dispute resolution offers a range of methods, each with its distinct rhythm and cadence.<sup>348</sup> The choice of measure is a strategic decision, harmonizing the specifics of the dispute with the desired outcomes and the parties' capacities. In the grand orchestra of justice, these methods provide the instruments for a resolution that resonates with fairness and equity,<sup>349</sup> ensuring that the symphony of dispute resolution plays on without missing a beat.

## VIII. Conclusion

This paper has argued that in the green scheme of things, disputes are inevitable in the environmental law. This is in a bid to promote environmental justice amongst the stakeholders, considering its concern over equitable distribution of environmental harms and benefits. Such disputes have been established by the paper to either emanate from or being exacerbated by conflict over the natural (and by extension) environmental resources. In fact, environmental injustices meted on the minority groups have been a major concern, particularly over the minority groups. This is despite the various international laws and regulations argued herein having provided an elaborate framework for ensuring environmental justice. Subsequently the paper discussed pros of alternative dispute resolution mechanisms and litigation, citing their cons. It concluded by proposing the need to augment the dispute resolution mechanism in a strategic manner to promote climate justice, through multistakeholder engagement within and even

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<sup>347</sup> Gary Bryner, *Environmental Justice* (Oxford University Press 2017) Chapter 2.

<<https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-167?d=%2F10.1093%2Facrefore%2F9780190846626.001.0001%2Facrefore-9780190846626-e-167&p=emailAoP9HYDfW3vc2>> accessed 2 February 2024.

<sup>348</sup> 'Dispute Resolution – TripleOKlaw' (*Tripleoklaw.com* 2023) <<https://www.tripleoklaw.com/capabilities/dispute-resolution/>> accessed 2 March 2024.

<sup>349</sup> Mwai Maina and Macharia Muriuki, "Going back to the Roots"; Resolving Disputes through Alternative Means with a Bias in Traditional Justice Systems' (2021)

<<http://kenyalaw.org/kl/fileadmin/pdfdownloads/KLReviewJournal/Resolving-disputes-through-alternative-means.pdf>> accessed 13 February 2024.



beyond the horn of Africa. Emphatically, resolving climate change disputes is a conversation that the globe needs to have right now as a critical pathway of promoting sustainable development within and beyond Africa.

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## ENVIRONMENTAL JUSTICE AND INFORMAL SETTLEMENTS: A KENYA PERSPECTIVE.

By Gachumi Mwangi Vincent.<sup>350</sup>

### Abstract

*This paper aims to investigate the relationship between informal settlements and environmental justice, with a particular focus on evaluating the major obstacles that have impeded Kenya's progress towards a double-digit decline in informal settlements. To ensure that the polycentric framework around this topic is evaluated, the legal and institutional frameworks will also be assessed. The traditional slum approach and marginalized and indigenous populations will be the two main areas of focus. An examination of the Community Land Act particularly, focusing on the issue of land tenure uncertainty. The paper will focus on Ogiek people, Kibera slum and Korogocho Slum in relation to statistical data and comparative analysis.*

#### i. Background

*'In the dance of justice, a mantle we inherit, A fight to reclaim spaces green, in spirit and merit.*

*Through study and praxis, our fate we transform, In unwavering solidarity, against the norm.'*<sup>351</sup> Informal settlements can be defined as residential areas that which have no tenure security, and this leads to the ranging types of the dwellings occupied by the settlers which include Squatting and informal rental settlements and they directly intertwined with lack of proper

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<sup>350</sup> Fourth Year Law Student University of Embu, University of Embu Legal Aid Clinic President, Researcher.

<sup>351</sup> Ibid.

housing and infrastructure which means that they are not included in government spatial plans. Which excludes them from life's basic like, steady supply of clean water and sewerage and garbage disposal. Informal settlements range from squatter settlements, shacks to slums<sup>352</sup> like the many that have erected in almost all major towns and cities in Kenya.

They are characterized by lack of basic infrastructure basic services and poor housing structures they often are breeding grounds for hazardous illnesses with regards to hygiene. The common characteristic that which cuts across all informal settlements as commonly referred to as in the academia world and illegal settlements as referred to by the government is that their inhabitants are, criminalized, displaced, and persecuted.

The statistics surrounding people residing in Informal settlements globally has grown to almost 1.1 billion people and thus this is as an increase by 165 million people as recorded in a period of the last twenty years.<sup>353</sup> Statistics have shown that 46% of Africans reside in informal settlements and this means that this is not only a global crisis but also a regional one that which requires concerted efforts and a holistic approach to overcome.<sup>354</sup>

Kenya has a record 54.7% of its total population residing in informal settlements and world bank projections show hint that almost 60% of all kenyan families residing in informal settlements reside in informal settlements or slums. The U.N Habitat profile shows that only 5% of the total residential land in Nairobi city is covered by informal settlements yet these same informal settlements house more than 50% of all Nairobi residents or half the city's populace.<sup>355</sup> If this is not the perfect depiction of a crisis then I really do not know what is!

When environmental laws, regulations, and policies are developed, implemented, and enforced, they should treat everyone equally and without any discrimination based on their gender, color, or sexual orientation, this is known as environmental justice. Fundamentally,

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<sup>352</sup> 'They Are Not "Informal Settlements"—They Are Habitats Made by People' (*The Nature of Cities*, 26 April 2016) <<https://www.thenatureofcities.com/2016/04/26/they-are-not-informal-settlements-they-are-habitats-made-by-people/>> accessed 27 February 2024.

<sup>353</sup> 'Informal Settlements Are Growing Everywhere — Here's What We Do' (*World Economic Forum*, 22 August 2023) <<https://www.weforum.org/agenda/2023/08/informal-settlements-are-growing-heres-how-we-provide-everyone-a/>> accessed 27 February 2024.

<sup>354</sup> 'What Is Environmental Justice? | Department of Energy' <<https://www.energy.gov/lm/what-environmental-justice>> accessed 27 February 2024.

<sup>355</sup> 'Kenya: Nairobi Urban Profile | UN-Habitat' <<https://unhabitat.org/kenya-nairobi-urban-profile>> accessed 27 February 2024.

environmental justice ensures that there are coordinated efforts to ensure that the laws are obeyed and that the public is included in all processes that entail access to and benefits from natural resources.

The Constitutional provisions, Statutory provisions, and Institutional Frameworks can be used to review the Kenyan legal landscape. This highlights several notable areas, including the effectiveness of public participation in environmental impact audits as well as environmental impact assessments.

The major task is that the concept of Environmental law and Sustainable development goals intermarry each other and the only stumbling block is to make sure that that these two concepts completely move in the same spirit since the key predicament can be making sure that the four key principles that Environmental Justice is founded on distribution, procedure, recognition and capabilities align with what SDG's advocate for and that is making sure that the environment and its resources is utilized by the current generation in a way that which will be beneficial to the current generation and future generations.<sup>356</sup> Environmental justice impacts have been recorded in key areas such as regulation of the impacts that industrial plants have on local residents, even access to environmental benefits and services in socially and economically disadvantaged areas, the restoration of contaminated industrial land, and the inclusion of local residents in planning and development issues through public participation.<sup>357</sup> Principle 10 of the Rio Declaration provides that "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.

At the national level, everyone 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 process..." In the ELC Petition No. 8 of 2021 the court reasoned that all these Environmental laws have been enacted for a reason and thus they are sacrosanct and that they should be followed since their authority emanates from the Constitution. The Court was making a decision on whether the Environmental impact assessment carried took into account meaningful public participation and

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<sup>356</sup> Mary Menton and others, 'Environmental Justice and the SDGs: From Synergies to Gaps and Contradictions' (2020) 15 Sustainability Science 1621.

<sup>357</sup> 'Social and Environmental Justice' (*Forest Research*) <<https://www.forestresearch.gov.uk/tools-and-resources/fthr/urban-regeneration-and-greenspace-partnership/greenspace-in-practice/practical-considerations-and-challenges-to-greenspace/social-and-environmental-justice/>> accessed 28 February 2024.

this is with regards to any projects that will have any impact on the environment. Public Participation is coined with right to information<sup>358</sup> pertaining the project to elicit reasoned views during public participation.

## ii. Legal Framework in Kenya Governing Informal Settlements

The most serious problem confronting informal settlements in Kenya, like in any other region of the world, is the question of tenure uncertainty. The Kenyan legal environment, on the other hand, has seen significant jurisprudential advancements that have directly driven key developments and changes in land ownership, as well as the elaboration of our current laws, but this has not been without severe gaps, as with many other areas of law.

The Constitution guarantees that all land belongs to the people of Kenya collectively as either individuals or communities<sup>359</sup> which leads to a classification of land into either Public, private or community.<sup>360</sup>

## iii. Community land tenure dilemma

The constitution provides for Community land by denoting that the land shall be held by the identified communities on the basis of ethnicity, culture or similar community of interest<sup>361</sup> the provision goes ahead and states that Community land shall consist of land that which land lawfully registered under the name of a group under specific laws, land transferred to a community through an action of the law and any other land that which has been declared Community land by an act of parliament.<sup>362</sup>

Kenyan laws allow for the applicability of Statutes and as such the Community Land Act comes in handy which came into force in 2012. The Primary focus of this statute was to give life into articles 61 and 63 of the constitution which is through the provision of land rights, management and administration of community land. A community is defined as the means a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes, common ancestry, similar culture or unique mode of livelihood, socio-

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<sup>358</sup> Article 35 Constitution of Kenya, 2010.

<sup>359</sup> Article 61(1) Constitution of Kenya, 2010.

<sup>360</sup> Article 61(2) Constitution of Kenya, 2010.

<sup>361</sup> Article 63(1) Constitution of Kenya, 2010.

<sup>362</sup> Article 63(2)(a)(b)(c) Constitution of Kenya, 2010.

economic or other similar common interest, geographical space, ecological space or ethnicity.<sup>363</sup> The law is very clear that the legal standing of a community land is just as good as Private land or public land respectively and that the individuals forming a community shall be apportioned land for their exclusive use and occupation.

The Lacunae is the ambiguity in the definition of a community since the definition stops at similar common interests and this completely rules out slums and other informal settlements in that the only common factor amongst slum dwellers is the fact that they live in slums and this would be a misrepresentation of facts in that slum dwellers are driven by different motivations and aspirations and it is impossible to reconcile the very ingrained differences.

The perfect solution for this predicament as stated by Kameri Mbote and Ondote would be the recognition of Slum dwellers as communities directly addressing tenure uncertainties which would in a large scale solve some of these issues.<sup>364</sup>

- iv. Environmental injustice in various informal settlements
  - a) Traditional focus: slums

Kenya is termed as a developing economy and this means it is a protracted yet weary course to achieving first world status and this is with regards to infrastructure, medical sector, education and even commerce which means it is in all areas, to add poor housing on top of really overstretched spatial planning laws is a calamitous affair.

The most notable slums in Kenya include Kibera which is Africa's largest informal settlement Mukuru Kwa Njenga, Mukuru kwa Reuben and Korogocho. The key problems facing informal settlements in Kenya are a representation web that which spans from water to sanitation and environmental issues.

- b) A Kibera and Korogocho focus

This part focus on; Slum Organization, Rural-urban Migration, Planning standards, House structure, water, solid waste disposal, sanitary facilities. Slums lack the proper infrastructure and this means that basic requirements like water are not available and the available water is sold at

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<sup>363</sup> Community Land Act, 2012.

<sup>364</sup> 7 Kameri-Mbote P and Odote C, "Innovating Tenure Rights for Communities in Informal Settlements.

very high prices which means it will not be enough and the water is prone contamination since it is in a slum set-up. The lack of access to water is a boomerang effect for the water borne diseases that which have been experienced.<sup>365</sup>The sewer system in these Slums is non-functional that means that there are broken sewer pipes right next to pipes carrying clean water which puts the residents at a risk. Garbage collection is also an issue in that it is very common to find piles of garbage having not having been collected most times this garbage is left in ditches and since slums do not have drainage systems during the rainy seasons then this waste will act as blockade and will lead to flooding within the slums it will also mean that these water which ends up in rivers like Nairobi and this means that the waste materials will be transferred into that river.<sup>366</sup> This is an indirect consequence from improper management of slums and a negative impact for the Environment.

Kenya as a country has really tried to contain the issue of informal settlements and specifically with slums and this has been through major initiatives that which were kick started a few years ago.

c) Kenya informal settlements improvement project

This project is under the stewardship of the Ministry of Lands, Housing and Urban Development Their key objectives are institutional strengthening and program management which shall include financing the actualization of certain activities and this includes surveys, evaluation, and project monitoring. Support of policy development, frameworks that will assist in the realization of housing for low-income households. Investment in infrastructure is pivotal in that it allows for the allocation of funds for projects like; paved foot paths, street lighting, storm water drainage infrastructure, solid waste management and electrification. The thorn on the side is the issue on enhancing tenure security and starting the whole process towards issuance of titles.<sup>367</sup>

d) Other informal settlements

i. Indigenous and marginalized groups

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<sup>365</sup> 'Kenya: Nairobi Urban Profile | UN-Habitat' (n 5).

<sup>366</sup> Mary Amuyunzu-Nyamongo and Alex Chika Ezeh, 'A Qualitative Assessment of Support Mechanisms in Informal Settlements of Nairobi, Kenya' (2005) 9 *Journal of Poverty* 89.

<sup>367</sup> The Kenya Informal Settlement Improvement Programme, pg 40 – 43.

UNHCR recognizes indigenous to mean ethnic,<sup>368</sup> religious linguistic or cultural group that is fewer in number than the rest of the population and the members share both common identity and rights. There has not been one single definition of Indigenous persons that which has been accepted widely however the wording of the UNHCR borrows from the definition adopted by International Labour Organization Convention on Indigenous and Tribal Peoples (1989) which states that indigenous persons are descendants of populations that which have been conquered, colonized or present boundaries were established by the dominant cultures now.<sup>369</sup> Indigenous communities however have indigenous rights that which they have continued to enjoy key rights which include specific and collective rights including the right to practice customary law and protect their traditional knowledge, intellectual property and cultural heritage.

Protection of the rights of Indigenous people's rights has been made possible by the African Court on Human and People's Rights in Africa the court was established by Member states of the African Union in January 25<sup>th</sup> 2004.

e) *African Commission on Human and People's Rights v Republic of Kenya.*

i. *Brief Facts*

The application relates to the Ogiek Community of the Mau Forest and the Ogiek did allege that they were an indigenous minority ethnic group in Kenya comprising of close to 20,000 members and about 15,000 of whom were inhabitants of the greater Mau Forest a land mass expanding close to 400,000 hectares. The issuance of an 30day eviction notice can be noted as the inception point of this dispute. The Eviction notice was served on 2009 by the Kenya Forestry service demanding that the Ogiek leave the forest. He grounds the eviction order was founded on were that the forest contained a natural water catchment zone and thus constituted government land as per the provisions of section 4 of the Government Land Act. The Ogiek held the opinion that they were not directly involved in the decision making that which led to the pronouncement of the eviction order.

ii. *Court's Reasoning?*

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<sup>368</sup> 'Minorities and Indigenous Peoples' (UNHCR, 30 January 2024)  
<<https://emergency.unhcr.org/protection/persons-risk/minorities-and-indigenous-peoples>> accessed 28 February 2024.

<sup>369</sup> *ibid.*



The Court found that the Ogiek had provided compelling evidence to show that Mau Forest was their ancestral home. The Court also noted that the Ogiek be allowed to continue with their religious practices in Mau as the lack of permission by the government was a key hindrance to the carrying out of their religious practices. The court reasoned that Kenya had acted in a very discriminatory manner towards the Ogiek people in that the government had already recognized the indigenous status of other communities like the Maasai people and this would mean that the Ogiek were not under the protection of the laws that which were protecting other people in Kenya with the indigenous people's status and this discrimination extended to their free exercise of culture and religion.<sup>370</sup>

The Court ordered the Kenyan government to pay compensation to the Ogiek for the material and moral prejudice suffered and make sure that plans were made to make sure that measures had been put in place to make sure that the Ogiek are granted both identity and Title to their ancestral land. The Court also ordered that the Ogiek be actively involved in all activities that which do involve development, conservation or investment in that land.<sup>371</sup>

This paper seeks to advance the idea that Environmental Justice is actually applicable and very much practical for that case, and this leads to the progressive jurisprudence from the African Court on People's and Human Rights that it is a formidable precedent not only in Kenya but globally in the advancement of the rights of rights of indigenous and marginalized people. The enforcement and recognition of the rights of these vulnerable groups goes a step further in trying to deal with the predicament on Tenure rights and tenure uncertainty and specifically with regards to such groups which can in turn be defined not only as indigenous but also as communities which in turn aligns with the spirit of the drafters of Sessional paper 3 of 2009 and the Community Land Act and the 2010 Kenyan Constitution for the Constitution and all laws are living documents but they need life to be continually breathed into them and this is through practical interpretation, actualization and realization of the intent of its provisions.

#### f) Conclusion

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<sup>370</sup> 'Ogiek Case: Protection of an Indigenous Community in Kenya' (*Amnesty International*, 25 June 2023) <<https://www.amnesty.org/en/latest/campaigns/2023/06/ogiek-case-protection-of-an-indigenous-community-in-kenya/>> accessed 28 February 2024.

<sup>371</sup> *Ibid.*

Informal settlements and how they intersect with environmental justice are a highly fair cause, which leads to an inquiry on how these ideas align with sustainable development goals and the overall environmental law framework. This is a crisis, and as with any other crisis, immediate intervention is required to prevent a catastrophic end. Informal settlements are marked by illegality as well as a housing problem, which affects not only half the city's population but also a majority of its citizens. The government has attempted to create polycentric frameworks while keeping in mind the fact that the 2010 Kenyan Constitution formed the foundation for these structures and regulations.

The key areas of focus that clearly depict the real situation are Kibera and Korogocho and the Ogiek Community as a representative of both squatters and marginalized communities. This paper has explored both the global and local trends and this has very much influenced the reasoning employed even with coming up with the key approaches that which the government should relook while they approach this specific issue.

#### g) Recommendations

- i. Increase in the funding channeled towards upscaling the informal settlements that we have in Kenya which can be done through the creation of an informal settlement Fund which would contain monies that would be channeled into steering forward infrastructure and development in informal settlements which would be under the Ministry Lands, Urban planning.
- ii. Push for more government private sector partnership in that there are very many Non-governmental organizations that which are working tirelessly in the informal settlements either to deal issues of water hygiene and sanitation and a collaborative effort between the two would be of very great outcome to the success acquiring large scale reduction of informal settlements.
- iii. Reevaluating the polycentric framework that governs informal settlements will lead to further developments within the area.
- iv. The government's adherence to the rule of law and thus not acting in contempt of Court orders like with the issue of evictions of squatters.

- v. Parliament fast-tracking the Bills that which address a crisis such as informal settlements and making sure that they are passed into law so that all involved government organs can operate under one framework which will be a concerted effort and which will yield more sound outcome.

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'They Are Not "Informal Settlements"—They Are Habitats Made by People' (*The Nature of Cities*, 26 April 2016) <<https://www.thenatureofcities.com/2016/04/26/they-are-not-informal-settlements-they-are-habitats-made-by-people/>> accessed 27 February 2024

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## AMPLIFYING THE IMPACT: CLIMATE CHANGE AND ENVIRONMENTAL DEGRADATION IN THE CONTEXT OF ARMED CONFLICT

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### Abstract

*“No one has seen an end to war, not unless s/he is dead,” recounted Plato in the Republic. Horrors of war on the natural environment cannot be overlooked; from the Gaza strip to Bakhut Ukraine, from North Kivu in Congo to the Darfur region in Sudan. Horror after horror, destruction of the ecological biodiversity after alteration of climate to cause adverse change. Such cannot remain to status quo forever if the ideas of environmental justice, so what is the next way forward? This paper sheds light on the humanitarian impact of environmental degradation and climate change in armed conflict-affected areas, highlighting their profound effect on the lives and livelihoods of civilians. It then proposes effective action-based responses that humanitarian law stakeholders can apply to ensure global environmental protection, sustainability, and climate resilience in areas experiencing armed conflict.<sup>378</sup> The recommendations encompass a range of mitigation and adaptive measures aimed at addressing ongoing environmental degradation, combating climate change, and implementing sustainable practices throughout the entire duration of an armed conflict. The goal is to safeguard a serene and sustainable environment and to*

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<sup>378</sup> United Nations (UN), 'With Climate Crisis Generating Growing Threats to Global Peace, Security Council Must Ramp up Efforts, Lessen Risk of Conflicts, Speakers Stress in Open Debate' UN Press (13 June 2023) <<https://press.un.org/en/2023/sc15318.doc.htm>> accessed 17 May 2023.

*prevent future generations from being denied the benefits of a tranquil and resilient climate due to indiscriminate armed attacks.*

## I. Causes and effects of armed conflicts

Armed conflicts, directly and indirectly, affect the natural and built environment, while climate risks amplify this effect on communities in the affected areas.<sup>379</sup> For instance, civilians in Yemen and Syria feel the effect of armed conflicts (as an amplifier of climate change).<sup>380</sup> While the International Committee of the Red Cross (ICRC) intervenes to assist the affected communities,<sup>381</sup> they barely have enough resources and capacity to help the exponentially growing populations whose lives and livelihoods are disrupted by war.<sup>382</sup> Moreover, ICRC does not have adequate capacity and faces contemporary challenges such as the armed conflicts becoming more urbanised and the emergence of sophisticated warfare technology.<sup>383</sup> Fortunately, ICRC can coordinate with other humanitarian actors such as United Nations High Commission for Refugees and other Non-Governmental Organisations. Importantly, the United Nations High Commission Office for the Coordination of Humanitarian Affairs (UNOCHA) exists to ensure a coordinated response against armed conflicts, autonomous weaponry, and the humanitarian needs of civilians in areas afflicted with conflict.<sup>384</sup>

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<sup>379</sup> Peter Maurer, 'Protecting the Natural Environment in Armed Conflicts: An ICRC View' (*Environmentalpolicyandlaw.com* 23 February 2021) <[https://environmentalpolicyandlaw.com/news-blog/protecting-natural-environment-armed-conflicts-icrc-view?mc\\_phishing\\_protection\\_id=28047-c0qkheadu81dqiq0bjpg](https://environmentalpolicyandlaw.com/news-blog/protecting-natural-environment-armed-conflicts-icrc-view?mc_phishing_protection_id=28047-c0qkheadu81dqiq0bjpg)> accessed 10 June 2023.

<sup>380</sup> International Committee of the Red Cross (ICRC), 'ICRC: Climate Change and Conflict Combine to Increase Humanitarian Needs in the Middle East – Red Cross Red Crescent Climate Centre' (23 May 2023) <<https://www.climatecentre.org/10310/icrc-climate-change-and-conflict-combine-to-increase-humanitarian-needs-in-the-middle-east/>> accessed 11 June 2023.

<sup>381</sup> ICRC, 'Who We Are' (28 July 2014) <<https://www.icrc.org/en/who-we-are>> accessed 11 June 2023

<sup>382</sup> ICRC, 'INTERNATIONAL HUMANITARIAN LAW and the CHALLENGES of CONTEMPORARY ARMED CONFLICTS RECOMMITTING to PROTECTION in ARMED CONFLICT on the 70 TH ANNIVERSARY of the GENEVA CONVENTIONS REPORT' (2019) 37-44, 65-71 <[https://www.icrc.org/sites/default/files/document/file\\_list/challenges-report\\_the-needs-of-civilians-in-increasingly-long-conflicts.pdf](https://www.icrc.org/sites/default/files/document/file_list/challenges-report_the-needs-of-civilians-in-increasingly-long-conflicts.pdf)>.

<sup>383</sup> *ibid* 15-34

<sup>384</sup> United Nations High Commissioner for Refugees (UNHCR), 'Civilian and Humanitarian Character of Asylum | UNHCR' (18 May 2020) <<https://emergency.unhcr.org/protection/legal-framework/civilian-and-humanitarian-character-asylum>> accessed 12 June 2023.

However, sometimes these humanitarian interventions in an armed conflict context may inadvertently prolong hostilities, exacerbating environmental damage and climate change.<sup>385</sup> This is usually the case when humanitarian actors fail to follow the principles of humanitarian law.<sup>386</sup> These principles are seen in action through ICRC's impartiality, neutrality and independence while providing humanitarian relief and intervening to safeguard the lives, livelihoods and dignity of the communities in areas affected by wars, environmental destruction and climate change.<sup>387</sup> Nils Melzer's research justifies ICRC's intervention by acknowledging that no community can be said to be protected adequately against the humanitarian consequences of war if the natural and built environment that they rely on for sustenance is poisoned, destroyed, or damaged severely by an ongoing war.<sup>388</sup>

By taking sides in an armed conflict, a humanitarian actor intensifies the effects of prolonged wars on the climate and the natural environment.<sup>389</sup> For instance, in 1994, the media and the Rwandan government criticised UNHCR and its contracted aid providers for fuelling the dire humanitarian situation by assisting war criminals in combat with the state.<sup>390</sup> The case was no different in similar in Bosnia, with the providers of humanitarian aid arguing that the safe zones that were supposed to supply humanitarian relief were ironically prolonging the war and leading to the deaths of over 20000 civilians in these enclaves of aid. Likewise, impartial and neutral humanitarian actors raised similar concerns in Cambodia, Afghanistan, Chechnya, Somalia and Tajikistan.<sup>391</sup> This affects the whole efforts to successfully seize fire, provide humanitarian needs

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<sup>385</sup> Neil Narang, 'Assisting Uncertainty: How Humanitarian Aid Can Inadvertently Prolong Civil War' (2015) 59 *International Studies Quarterly* 184  
<[https://www.jstor.org/stable/pdf/43868851.pdf?casa\\_token=8TyVdFIRtMMAAAA:ZrjavMPXvCgXJyYCDYQtbzd\\_o6uag6ztonoFXIfGt2ISUo\\_KaY7KsfHWHST7XAAt2ATeqit8ujCsqZpe\\_4b8JTRr8c6purQtXWCmhlACO\\_foHM4s-XY5qGw](https://www.jstor.org/stable/pdf/43868851.pdf?casa_token=8TyVdFIRtMMAAAA:ZrjavMPXvCgXJyYCDYQtbzd_o6uag6ztonoFXIfGt2ISUo_KaY7KsfHWHST7XAAt2ATeqit8ujCsqZpe_4b8JTRr8c6purQtXWCmhlACO_foHM4s-XY5qGw)> accessed 17 June 2023.

<sup>386</sup> Ibid.

<sup>387</sup> ICRC, 'Guidelines on Protection of Natural Environment in Armed Conflict' (25 September 2020)  
<<https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating>> accessed 12 June 2023.

<sup>388</sup> Nils Melzer and Etienne Kuster, *International Humanitarian Law : A Comprehensive Introduction* (International Committee of the Red Cross, 2016) 96.

<sup>389</sup> Pierre Perrin, 'The Impact of Humanitarian Aid on Conflict Development - ICRC' (30 June 1998)  
<<https://www.icrc.org/en/doc/resources/documents/article/other/57jpcj.htm>> accessed 29 June 2023.

<sup>390</sup> John Eriksson and others, 'The International Response to Conflict and Genocide: Lessons from the Rwanda Experience Synthesis Report' (1996) <<https://www.oecd.org/derec/50189495.pdf>> Accessed 17 June 2023.

<sup>391</sup> Narang (n385) 184.

and then ameliorate the destroyed environment while combating climate change in armed conflict-prone areas.<sup>392</sup>

Parties to an armed conflict (referring to belligerents) should respect the rules of war.<sup>393</sup> IHL rules apply notwithstanding non-reciprocity and equality of belligerents, necessitating the combatants to balance humanity and the military.<sup>394</sup> They do so by respecting the principles of precaution, distinction and proportionality, humane treatment, and unnecessary suffering in their conduct of hostilities.<sup>395</sup> Thus all attacks against civilian property, the natural and built environment inclusive, are prohibited under international humanitarian law.<sup>396</sup>

Of concern is also the fact that conflict-prone areas miss out on funding to combat climate change. Despite the ICRC report focused on the compounding effects of climate change in Yemen, Syria and Iraq that reveal the cocktail of humanitarian crises caused by climate change in the context of an armed conflict, these countries remain excluded from climate financing.<sup>397</sup> The database for climate funds, which organises information from 27 multilateral funds, the World Bank and UN inclusive, reveals that, out of the much-needed climate funding,<sup>398</sup> only nineteen projects had received funding approval as of January 2022.<sup>399</sup> Likewise, less than one per cent of the twenty million climate funds that had been disbursed had been sent on projects geared towards combating climate change worldwide.<sup>400</sup>

Findings from the report further revealed that these fragile and unstable areas, which conflict-prone areas fall under, are excluded from adequate and equitable distribution of current climate

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<sup>392</sup> Michael W Meier, 'Large-Scale Combat Operations Symposium – Protection of the Environment during an Occupation - Lieber Institute West Point' *Lieber Institute West Point* (12 May 2023).

<<https://lieber.westpoint.edu/protection-environment-during-occupation/>> accessed 17 May 2023.

<sup>393</sup> Geneva Convention (GV) I–IV, common Art. I; Customary International Humanitarian Law, Rule 139.

<sup>394</sup> Additional Protocol I, Preamble, para. 5.

<sup>395</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/Dordrecht, 1987, paras 1389–1397

<sup>396</sup> Nelzer and Kuster (n 388) 96.

<sup>397</sup> France 24, 'Arab Conflict Zones Missing out on Climate Funds: Aid Groups' (18 May 2023) AFP

<<https://amp.france24.com/en/live-news/20230518-arab-conflict-zones-missing-out-on-climate-funds-aid-groups>> accessed 13 June 2023.

<sup>398</sup> *Ibid.*

<sup>399</sup> *Ibid.*

<sup>400</sup> *Ibid.*



financing. In the Norwegian "Making Climate Adaptation to Work Report," Anne Bergh, the secretary general of the organisation, opined that "it is clear from a humanitarian point of view that things (referring to exclusion and/or inadequate climate financing of conflict-prone areas) must change."<sup>401</sup> Put into context, the University of Norte Dame's Global Adaptation Initiative (ND-Gain) Index found Yemen to be the Middle-East country most vulnerable to adverse effects of climate change because of civil wars that have been ongoing for eight years.<sup>402</sup> In all these, the civilians that rely on a tranquil climate and good soil quality for sustenance bear the brunt. The report also found Afghanistan and Sudan to follow Yemen regarding climate vulnerability, yet underfunded or un-funded.<sup>403</sup>

According to ICRC, in conflict-prone areas such as Afghanistan, Yemen, Suda,n Syria and Iraq, it is common for civilians, in fear for their lives to flee for safety far away from their homes.<sup>404</sup> Thinking that they have escaped death, these refugees are shocked that the land in their new location cannot support farming because of water scarcity, drought, and poor land quality.<sup>405</sup> This terrible cocktail of climate change and environmental degradation in an armed conflict situation has taken countries like Syria and Kosovo years to recover.<sup>406</sup> For example, the series of conflicts in Syria have adversely affected the climate causing decades of drought.

The disproportionate effects of war on countries plagued by conflicts are far-reaching. The ICRC report titled *When Rains Turn To Dust* revealed seven key findings. In addition to the excerpt from the ND-Gain index of how vulnerable countries are to global challenges, some

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<sup>401</sup> Al Jazeera, 'War-Torn MENA Nations Missing out on Much-Needed Climate Funds' (18 May 2023) Accessed 13<sup>th</sup> June 2023 <<https://www.aljazeera.com/news/2023/5/18/war-torn-mena-nations-missing-out-on-much-needed-climate-funds>>Accessed 17 June 2023.

<sup>402</sup> Notre Dame Global Adaptation Initiative, 'Country Index // Notre Dame Global Adaptation Initiative // University of Notre Dame' (2023) <<https://gain.nd.edu/our-work/country-index/>> accessed 13 June 2023.

<sup>403</sup> Josh Gabbatiss, 'Climate-Adaptation Funds Have Not Reached Half of "Most Vulnerable" Nations, Study Finds - Carbon Brief' (*Carbon Brief* 20 January 2022) <<https://www.carbonbrief.org/climate-adaptation-funds-have-not-reached-half-of-most-vulnerable-nations-study-finds/>> accessed 13 June 2023.

<sup>404</sup> ICRC, 'Climate Change and Conflict' (July 2020) <<https://www.icrc.org/en/what-we-do/climate-change-conflict>> accessed 15 June 2023.

<sup>405</sup> ICRC, 'A Drought so Severe It Has a Name' (26 September 2019) <<https://www.icrc.org/en/document/somalia-conflict-drought-so-severe-it-has-names>> accessed 15 June 2023.

<sup>406</sup> ICRC (n 3).

countries are particularly concerned about climate change.<sup>407</sup> Other countries needing support to build their climate are Somalia, DRC, and Mali.<sup>408</sup> The countries, combined with those mentioned above, are experiencing the disproportionate effects of war. Weakened by armed conflicts and, ironically, various actors interested in the continuity of war rather than seizing fire to combat climate change, these countries cannot cope with the effects of armed conflicts.<sup>409</sup> The concern by ICRC and other humanitarian actors is why the global community is more inclined to other aspects of war, such as sanctioning the belligerents while neglecting appropriate climate action for the communities in the conflict-prone civilian areas most vulnerable to climate woes.<sup>410</sup>

## II. The Nexus between climate change and armed conflicts

While climate change is not a direct war, it catalyses ongoing conflicts by intensifying environmental and socio-economic factors.<sup>411</sup> For instance, when a war compels agricultural farmers and cattle herders, for example, in Mali, to share the diminishing natural resources, for example, farming land, grazing land and water, as a result of climate change, this can brew tensions in the place, coupled by the fact that the war has weakened the governance and institutional structures in place.<sup>412</sup>

While peacekeeping missions and funding of wars by world superpowers are gaining traction, insecurity presented by armed conflicts in the areas affected continues to affect the communities' ability to cope with climate change shocks.<sup>413</sup> Mali is an ideal case study for purposes of illustration.

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<sup>407</sup> ICRC, 'Seven Things You Need to Know about Climate Change and Conflict' (9 July 2020) <<https://www.icrc.org/en/document/climate-change-and-con%EF%AC%82ict>> accessed 15 June 2023.

<sup>408</sup> ICRC (n 27).

<sup>409</sup> ICRC, 'WHEN RAIN TURNS to DUST UNDERSTANDING and RESPONDING to the COMBINED IMPACT of ARMED CONFLICTS and the CLIMATE and ENVIRONMENT CRISIS on PEOPLE'S LIVES' (2020) 38-46 [https://www.icrc.org/sites/default/files/topic/file\\_plus\\_list/rain\\_turns\\_to\\_dust\\_climate\\_change\\_conflict.pdf](https://www.icrc.org/sites/default/files/topic/file_plus_list/rain_turns_to_dust_climate_change_conflict.pdf) Accessed 17 June 2023.

<sup>410</sup> *ibid* 14-20.

<sup>411</sup> *ibid* 22-35.

<sup>412</sup> ICRC (n 405).

<sup>413</sup> Halvard Buhaug, 'Armed Conflict and Climate Change: How These Two Threats Play out in Africa - World' (9 November 2022) Reliefweb <<https://reliefweb.int/report/world/armed-conflict-and-climate-change-how-these-two-threats-play-out-africa>> accessed 16 June 2023.

Mali faced a prolonged drought in 1970 that created a long-term famine. But because of the disproportionate effects of conflict, the Mali communities, particularly in the war-prone South Gao, could not move freely in search of food and were forced to stay in place.<sup>414</sup> The fear of armed groups or bandits attacking them and stealing their herds forced them to assemble close to the scarce grasslands and shrinking water sources.<sup>415</sup> This caused tensions between the fishermen, nomadic pastoralists, and farmers.<sup>416</sup> The ripple effect of all these was the animals weakening, others dying while those surviving were sold at a throw-away price.<sup>417</sup> Had enough humanitarian intervention been done early enough, the famine could have been mitigated, and civilians salvaged their sources of livelihood.

Moreover, peacekeeping missions by various peace and humanitarian actors could have eradicated insecurity that led to the herds not reaching markets that were far away. Sadly, neither was the state support nor officials present due to the ongoing conflict. Likewise, the violence cuts civilians' channels to access humanitarian aid.<sup>418</sup> Because the focus was on supporting the belligerents rather than finding humanitarian ways of seizing fire, the herders saw their herds impoverished and withering, consequently leaving the communities struggling to feed themselves. This justifies the high prevalence of malnutrition diseases in areas affected by conflicts.

Climate change adaptation measures are surprisingly easy, but the various humanitarian actors tend to make them more complex. A simple act like changing crops being cultivated can suffice to combat climate change. The change sometimes demands a paradigm shift from normal cultural and socio-economic practices. The whole agriculture system might need an overhaul or new pathogenic illnesses in the eras that must be addressed.<sup>419</sup> Because the state's capacity to entrench

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<sup>414</sup> Mwangi Kimenyi and others, 'THE IMPACT of CONFLICT and POLITICAL INSTABILITY on AGRICULTURAL INVESTMENTS in MALI and NIGERIA' (2014) 4-12 <[https://www.brookings.edu/wp-content/uploads/2016/06/14-07-22-Impact-of-Conflict-MaliNigeria\\_FINAL.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/14-07-22-Impact-of-Conflict-MaliNigeria_FINAL.pdf)> Accessed 17 June 2023.

<sup>415</sup> Ibid.

<sup>416</sup> ICRC (n 409) 15.

<sup>417</sup> Ibid.

<sup>418</sup> ICRC, 'Caught between Extremes: Violence, Drought, Flooding, and Now a Locust Invasion' (5 February 2020) <<https://www.icrc.org/en/document/caught-between-extremes-violence-drought-flooding-and-now-locust-invasion>> accessed 19 June 2023.

<sup>419</sup> IPCC, 'RENEWABLE ENERGY SOURCES and CLIMATE CHANGE MITIGATION SPECIAL REPORT of the INTERGOVERNMENTAL PANEL on CLIMATE CHANGE SUMMARY for POLICYMAKERS and TECHNICAL

adaptive measures is limited in times of war due to a weakened governance structure, UNOCHA and other humanitarian organisations such as ICRC and UNHCR should quickly intervene to salvage the environment that communities depend on for sustenance.

### III. The environment is a frequent silent casualty of armed conflict

While IHL focuses on balancing military necessity, the natural environment remains largely neglected in an armed conflict situation despite communities' dependence on it for survival and sustenance. Statistically, between 1946 and 2010, armed conflicts were the sole cause of a decline in exotic wildlife. Coupled with the environment's intrinsic value to human sustenance and ecological biodiversity, environmental degradation is intrinsically connected to an armed conflict.<sup>420</sup> International Humanitarian Law prohibits belligerents from using the environment as a military objective and directing attacks against the natural environment.<sup>421</sup> The forbidden attacks encompass deliberate or indiscriminate natural resource destruction or the use of techniques such as herbicides to upset a region's ecological imbalance.<sup>422</sup>

Real-time examples of these prohibited attacks include the Iraqi troops setting ablaze Kuwait oil fields ablaze, releasing large volumes of carbon dioxide into the atmosphere. So dire were their actions that the United Nations Security Council<sup>423</sup> processed a claim whereby Kuwait was awarded three billion US Dollars as compensation to remediate and restore the environment for sustainable development.<sup>424</sup> Similarly, the environmental impacts of Agent Orange, a chemical the US military used in Vietnam to remove plant and tree leaves in the 1960s, continue to cause

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SUMMARY' (2012) <[https://archive.ipcc.ch/pdf/special-reports/srren/SRREN\\_FD\\_SPM\\_final.pdf](https://archive.ipcc.ch/pdf/special-reports/srren/SRREN_FD_SPM_final.pdf)> Accessed 16 June 2023.

<sup>420</sup> UNHCR, 'Climate Change and Disaster Displacement' (2022) <<https://www.unhcr.org/what-we-do/build-better-futures/environment-disasters-and-climate-change/climate-change-and>> accessed 15 June 2023.

<sup>421</sup> Article 35 of Additional Protocol I.

<sup>422</sup> ICRC, 'Practice Relating to Rule 45. Causing Serious Damage to the Natural Environment Section A. Widespread, Long-Term and Severe Damage' (2023) <<https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45>> accessed 15 June 2023.

<sup>423</sup> UNITED NATIONS SECURITY COUNCIL RESOLUTION S/RES/687 (8<sup>TH</sup> APRIL 1991).

<sup>424</sup> UNITED NATIONS COMPENSATION COMMISSION (UNCC), 'State of Kuwait' (1991) <<https://uncc.ch/state-kuwait>> Accessed 17 June 2023.

degenerative effects today and might continue causing adverse effects to future generations.<sup>425</sup> The above thus illustrates why environmental protection and combating climate change, despite being relegated during hostilities, are vital for human survival and sustenance. Hence, humanitarian actors such as the UNEP, ICRC, IFRC, and conflict-prone states should implement and enforce proper adaptation and mitigation measures.

Armed conflicts further cause natural resource strain based on the exploitation described above of natural resources in sustaining the economies of war. The context-in-play is seen in the case of Iraq, more specifically the South of Basra in the FAO region, whereby the communities fault their problems with the toxic agricultural land and water problems on the date palms that the combatants in the Iran-Iraq belligerents fell for military purposes in the cause of their armed conflict. This is despite IHL's above-analysed additional protocol I prohibiting any severe, widespread and long-term effect on the natural environment.<sup>426</sup>

#### IV. War as a catalyst of biodiversity hotspots decline

The weaponisation of the environment during an armed conflict or directing acts of aggression against a natural and/or built environment inevitably causes immense damage. Most attacks directed against the environment are, by nature, incidental. This is to say that attacks directed against military objectives may, sometimes, cause accidental environmental damage akin to incidental damage conflict-sustaining practices may cause, whose magnitude can be likened to poaching. Statistically, the Mozambique Civil War that lasted for fifteen years saw Gorongosa National Park losing over ninety per cent of the animal population. The number of buffaloes in the park drastically reduced from 14,000 to 100, while that of hippos plummeted from 3500 to 100.<sup>427</sup> The number of elephants reduced significantly from two thousand to two hundred. Against

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<sup>425</sup> United States Institute of Peace , 'Addressing the Harmful Legacy of Agent Orange in Vietnam; Analysis and Commentary' (7<sup>th</sup> January 2022) <<https://www.usip.org/publications/2022/01/addressing-harmful-legacy-agent-orange-vietnam>>Accessed 17 June 2023.

<sup>426</sup> ICRC , 'Natural Environment: Neglected Victim of Armed Conflict' (5 June 2019) <<https://www.icrc.org/en/document/natural-environment-neglected-victim-armed-conflict>> accessed 29 June 2023.

<sup>427</sup> Donedieu P, 'Conflict and Drought Threaten Mozambique's Gorongosa Park' (*Phys.org*26 August 2016) <<https://phys.org/news/2016-08-conflict-drought-threaten-mozambique-gorongosa.html>> accessed 29 June 2023.

the international wildlife protection regime, the meat of the elephants became a delicacy for the soldiers while the Ivory was traded for the supply of weaponry and ammunition.<sup>428</sup>

#### V. Deforestation as a pre, during and post-armed conflict effect

In the case of an armed conflict and in employing guerrilla war tactics, armed groups sometimes takeover forested regions that provide cover for the combatants and a base where they can execute their operations, a good example being the Al-Shabaab in Kenya's occupation of the Boni forest at the time they frequented attacks in retaliation against the Kenya Defence Forces.<sup>429</sup> While the inhabitation prevents people from frequenting the forests and exploiting the natural resources in these areas, the natural environment's protection is waived because it becomes a military objective and is subject to cross-fire.<sup>430</sup> When an armed conflict ends and society transitions from wars to peace, the people take advantage of the seized fire to exploit the natural resources that the armed conflict made out of reach. The negative aspect of this is that such exploitation is often environmentally degrading rather than sustainable, for example, the illegal logging of trees.

Conversely, when conflicts are ongoing, the environment can be degraded, and climate resilience can be adversely affected due to climate change. One of these highly detrimental ways regards conflict resources, whereby a state or a combatant in a non-international armed conflict exploits the natural resources to finance their armed conflicts.<sup>431</sup> For instance, the Al-Shabaab militia is said to burn down trees in Somalia to make charcoal, one of the many illicit businesses that finance their activities.<sup>432</sup> Likewise, the rebel groups in DRC Congo are said to do illegal tree-

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<sup>428</sup> Ibid.

<sup>429</sup> Kalume Kazungu and GALGALO BOCHA, 'KDF Bombs Boni Forest to Flush out Shabaab' (*The East African* 21 August 2017) <<https://www.theeastafrican.co.ke/tea/news/east-africa/kdf-bombs-boni-forest-to-flush-out-shabaab--1372004>> accessed 17 June 2023.

<sup>430</sup> Ibid.

<sup>431</sup> Daniëlla Dam-de Jong, 'Armed Opposition Groups and the Right to Exercise Control over Public Natural Resources: A Legal Analysis of the Cases of Libya and Syria' (2015) 62 3 <<https://link.springer.com/article/10.1007/s40802-015-0007-0>> Accessed 17 June 2023.

<sup>432</sup> Somalia Report, 'Charcoal Trade Stripping Somalia of Trees' (2023) <[https://piracyreport.com/index.php/post/1426/Charcoal\\_Trade\\_Stripping\\_Somalia\\_of\\_Trees](https://piracyreport.com/index.php/post/1426/Charcoal_Trade_Stripping_Somalia_of_Trees)> Accessed 17 June 2023.

logging to finance their wars with AMISOM and the DRC defence forces.<sup>433</sup> Rebel groups and States taking part in Wars, for example, in Iran and Syria, are using proceeds of sold crude oil to finance the never-ending conflicts.<sup>434</sup> These activities become directly and indirectly detrimental to environmental sustainability and climate resilience.

While all this is happening, the civilians bear the brunt. For instance, illegal logging, directly and indirectly, causes adverse impacts such as land and soil degradation, leading to land quality loss- indirectly widening the food shortage gap<sup>435</sup>- causing food shortage-these impacts cause adverse health effects to civilians because of malnutrition as a source of food shortage, iron and vitamin deficiency, stunting, and anaemia.<sup>436</sup> Likewise, most of these forests are water catchments hence tree-cutting /logging/deforestation cause the shrinking of water sources; for example, in the 2016-2019 Yemeni case shrinking of water shortage and wastewater management, triggering a humanitarian crisis.<sup>437</sup>

Lastly, desertification indirectly causes drought, for the trees that attract rainfall through the transpiration process have been chopped down, causing rain shortage. Such shortage negatively affects access to clean water for domestic, farm, and industrial use; hence, less agricultural productivity causes food shortage, further worsening the volatile humanitarian situation in the war-prone area.<sup>438</sup> Consequential from such a drought are health hazards inter-alia, including malnutrition, vector-borne, water, and communicable diseases, and impacts on the affected civilian population's mental health.

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<sup>433</sup> Rédaction Africa news with AFP, 'Armed Groups Benefit from Poaching, Logging in Congo Reserve, Say NGOs' (9 September 2021) <<https://www.africanews.com/2021/09/09/armed-groups-benefit-from-poaching-logging-in-congo-reserve-say-ngos/>> Accessed 17 June 2023.

<sup>434</sup> Ahmed Rasheed, 'Oil Smuggling Finances Islamic State's New Caliphate' (*Reuters* 23<sup>rd</sup> July 2014) <<https://www.reuters.com/article/iraq-security-oil-idINL6N0PX1KH20140723>> Accessed 17 June 2023.

<sup>435</sup> FAO, IFAD, UNICEF, WFP, WHO and ESCWA, 2021.

<sup>436</sup> Ibid.

<sup>437</sup> Simpson, R.B., Babool, S., Tarnas, M.C., Kaminski, P.M., Hartwick, M.A. and Naumova, E.N. (2022). 'Signatures of Cholera Outbreak during the Yemeni Civil War, 2016–2019', *International Journal of Environmental Research and Public Health*, Vol. 19(1), 378. Available at: <https://doi.org/10.3390/ijerph19010378>.

<sup>438</sup> FAO, IFAD, UNICEF, WFP, WHO and ESCWA (2021). *Regional Overview of Food Security and Nutrition in the Near East and North Africa 2020– Enhancing resilience of food systems in the Arab States*. Cairo: Food and Agriculture Organization of the United Nations. Available at: <https://www.fao.org/3/cb4902en/cb4902en.pdf> Accessed 17 June 2023.

## VI. The need to protect the environment during an armed conflict

Prevention, a fundamental IHL principle, forbids the belligerents from directing attacks against the environment except when the environment is an armed conflict military objective. While executing indiscriminate attacks, the rules of war mandate the warring parties to account for their actions, especially when they cause environmental damage hence exercising caution when executing armed attacks. Likewise, under the UNOCHA collaboration, ICRC should strive to make aware the belligerents of the military necessity principle in the course of armed conflict. Failure to take heed of the sanctions that befell the USA in their military and paramilitary activities in Nicaragua. ICRC regularly updates the military manuals, guidelines and instructions to safeguard the environment in the case of an armed conflict. Strengthening compliance with the rules of war would mitigate the damage wars do to the environment while expediting society's recovery from armed hostilities.

Thus there is a need for a multi-agency approach between the states and humanitarian groups under UNOCHA and ICRC, including mitigating the armed conflicts' effect on the environment and combating climate change. The coordination can merge the ICRC climate change and environmental protection into the domestic laws and policy frameworks while ensuring ICRC's effective implementation. For the belligerents, there are other ways they can explore to protect the environment. For example, if the combatants had avoided fragile ecosystems and civilian protected areas, the environmental damage the Russian military caused by invading Ukraine in the first year alone affected over 1.24 hectares of the nature reserve territory could have been avoided.<sup>439</sup>

The belligerents could also make a truce designating areas to be demilitarised zones barring either combatants from executing any military activities therein. Had this been done from the word go, the collapse of the Ukrainian Kakhovka dam due to Russian shelling,<sup>440</sup> the Sudan Sahel

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<sup>439</sup> Rosie Frost, 'This Map Shows the Environmental Consequences of the War in Ukraine' (euronews 21<sup>st</sup> February 2023) <https://www.euronews.com/green/2023/02/21/silent-victim-this-map-shows-the-environmental-destruction-done-by-a-year-of-war-in-ukraine> Accessed 17 June 2023.

<sup>440</sup> BBC News, 'Ukraine Dam: What We Know about Nova Kakhovka Incident' (6 June 2023) <https://www.bbc.com/news/world-europe-65818705> Accessed 17 June 2023.



and Khartoum region's wars<sup>441</sup> that have seen massive destruction of civilian property could have been avoided. Likewise, the innocent civilians of Bakhmout in Ukraine, protected under IHL, could not have lost their lives due to shelling by the Russian military.

## VII. The need for robust adaptive measures

The environmental damage and climate crisis exacerbated by armed conflict alter humanitarian woes' severity and nature. ICRC is already struggling in its humanitarian response and hence unable to respond to the exponential crises posed by a compounding effect of the afore-analysed issues, more so because of climate change that remains unmitigated. This environment remains largely unregulated and has disproportionate effects of an armed conflict. As a result, more effort regarding the structural and system changes is needed. Proper investment in climate resilience, good governance heralded by political good will, technical know-how and expertise, and a diverse mindset are core to limiting change.

Coordination can be through UNOCHA, which usually convenes all humanitarian stakeholders to see what is needed and distribute tasks to the various humanitarian entities—e.g. FAO to provide food, ICRC and IFRC to provide social amenities and health care through national Red crosses, ICRC to restore family links, ICRC and other humanitarian bodies to discuss with warring parties on creating safe passages/humanitarian corridors and days of cease fire for the provision of humanitarian assistance in occasions where environmental crises occur within an armed conflict.<sup>442</sup>

Adaptive humanitarian measures are also needed during urban fighting, such as in Khartoum in Sudan, Kabul in Afghanistan and Baghdad in Syria. For example, it is necessary to ensure that humanitarian organisations, for example, ICRC, are identified quickly by their emblems to be independent, neutral and impartial. Because they strive to rescue casualties and victims of war

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<sup>441</sup> Martina Schwikowski, 'How the Sudan Crisis Threatens the Entire Sahel' (9 May 2023)

<<https://www.dw.com/en/how-the-sudan-crisis-threatens-the-entire-sahel/a-65559514>> Accessed 17 June 2023.

<sup>442</sup> ICRC, 'ICRC to UN Security Council: Double Impact of Climate Change and Armed Conflict Harms People's Ability to Cope' (25 January 2019) <<https://www.icrc.org/en/document/icrc-un-security-council-double-impact-climate-change-armed-conflict-harms-peoples-ability-cope>> accessed 18 June 2023.

alike, they should not be delayed unnecessarily at the checkpoints. Moreover, the soldiers are not supposed to enter hospitals in search of wounded or belligerents forcibly. Ambulances, the natural and built environment the civilian population relies on for sustenance, should neither be targetted illegally nor used as military objectives exposing civilians to danger. Whatever the circumstances, the poor adaptive conditions in the majority of the world parts would mean that disproportionate armed conflict would leave the sick and wounded unable to access much-needed medical attention.<sup>443</sup>

Finally, a greater share of climate and environmental funding must be allocated and disbursed to places affected by climate change and environmental degradation. This would enable the citizens to cope and adapt to climate change changes and reverse environmental degradation in the context of an armed conflict.

## CONCLUSION

This 8-part essay has tackled how climate change and environmental degradation in the context of armed conflict aggravate humanitarian crises. Part II looks at the causes and effects of armed conflicts. It argued that armed conflicts, directly and indirectly, exacerbate climate change and environmental degradation. Based on the causes and effects of armed conflicts highlighted in Part II, Part III then analyses the Nexus between armed conflicts and climate change, whereby the essay argues that areas affected by conflicts find it hard to adapt or mitigate climate because of weakened institutional governance. Among the arguments advanced by part III were that the majority of regions mired in conflict are vulnerable to climate change, climate change indirectly triggers conflicts, insecurities in conflict-prone areas limit the ability of people to cope with climate shocks and the areas affected by climate change remain underfunded by climate financiers, for example, the World Bank and other NGOs. Part IV then illustrates and connects with climate change effects in the context of an armed through the lens of the environment being a silent victim of armed aggression. The subsequent parts V, VI and VII, illustrated how biodiversity hotspots sharply declined, and deforestation increased before, during and after armed conflicts.

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<sup>443</sup> ICRC, 'Practice Relating to 55 القاعدة. Access for Humanitarian Relief to Civilians in Need Section A. Access for Humanitarian Relief' (2023) <<https://ihl-databases.icrc.org/ar/customary-ihl/v2/rule55>> accessed 19 June 2023.

The essay concluded by advancing the argument on how IHL intervenes to protect the environment and combat climate.

However, the humanitarian intervention to combat climate change and environmental degradation is inadequate. But, new approaches and measures, such as increasing climate finances in areas mired by conflict and collaboration between humanitarian organisations such as UNOCHA. Moreover, humanitarian actors not taking sides help to resolve prolonged conflicts. Likewise, proper training of humanitarian actors on the principles of IHL and humanitarian intervention, such as neutrality, will resolve these challenges. The proposals herein also need scaling up and a collaborative approach in their implementation so that the various humanitarian stakeholders are conversant with them and apply them in their work, instead of such positive approaches only being sporadically used by individual humanitarian actors, for example, the ICRC.

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# REDRESSING ENVIRONMENTAL JUSTICE IN PURSUIT OF ATTAINING GENDER EQUALITY IN KENYA

By: Ontweka Yvonne Kwamboka<sup>444</sup>

## Abstract

*In the continuous strive to achieve environmental justice in Kenya, often we have experienced gender inequality despite of our constitution of 2010 placing great emphasis on the equality of both genders in such matters. Ensuring gender equality is a cornerstone for respecting, protecting and promoting human rights and not disadvantaging anyone in the process of conserving the environment including its biodiversity<sup>445</sup>. Article 27 of the constitution provides for Equality and freedom from discrimination and that both genders are equal before the law and must get equal benefit from it. This includes all the rights and freedoms associated with environment including the right to a clean and healthy environment. This is well stipulated in article 42 of the constitution of Kenya. This paper will clarify the provision of laws on different aspects of how gender equality is one of the greatest pillars in the journey to attaining environmental justice. This paper will also venture into how the laws have or have not been implemented giving a clear view of our current position as a country. Furthermore, it shall give the different perspectives of the society on how it views this whole issue concerning gender disparity in environmental matters laying emphasis particularly on climate change. The article in analyzing will give the author's recommendations on the aspect of gender inequality and the measures deemed fit to adopt for the greater good of the current and future generation in pursuit of bringing into fruition the Vision 2030 goals gender and environment justice inclusive.*

## I. Introduction

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<sup>445</sup>Jacqueline D Lau, 'Three Lessons for Gender Equity in Biodiversity Conservation' (2020) 34 Conservation Biology 1589 <<https://pubmed.ncbi.nlm.nih.gov/32104932/>> accessed 1 March 2024.

Environmental justice has been a topic of discussion in the world at large and different scholars have given their different definitions. A good example is Dr. Benjamin Chavis who describes environmental justice as the fair treatment and meaningful involvement of all individuals, regardless of their race, color, national origin, culture, education, or income, in the development, implementation, and enforcement of environmental laws, regulations, and policies. He emphasized that decisions related to environmental protection should consider the impact on communities and address any disparate effects regarding the same.<sup>446</sup> Essentially, environmental justice seeks to ensure that no group bears an unfair burden of environmental hazards or benefits thereby bringing an aspect of equality have. Gender inequality on environmental matters is an intricate episode worth delving wider into.<sup>447</sup> Have we addressed the issue of gender regarding the environment before? Which steps have been taken where there has been failure of implementation? Is the Rule of Law conformed to?

Gender equality is not a stand-alone objective but rather instrumental in achieving goals globally including those related to the environment justice. Ideally, the concept of gender inequality brings more harm than good and through this, negative impacts are realized in areas of health and the environment hindering the sustainable development. Gender inequality has been one of the greatest challenges and a crucial topic of discussion in achieving a just and sustainable future of our time and can hardly be gainsaid.<sup>448</sup> Therefore, this issue should be explored targeting the scope of sustainable development at large. Until recently, gender inequality was a peripheral subject but today the subject is a staple in the political, human rights and socio-economic discourses across the globe worth addressing.<sup>449</sup>

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<sup>446</sup> Noël Wise, 'To Debate or to Rectify Environmental Injustice: A Review of Faces of Environmental Racism' (2003) 30 Ecology Law Quarterly 353 <<https://www.jstor.org/stable/pdf/24114218.pdf>> accessed 17 February 2024.

<sup>447</sup> Fabiano De Andrade Correa, 'Gender Equality: A Cornerstone for Environmental and Climate Justice' (UNDP 2022) <<https://www.undp.org/blog/gender-equality-cornerstone-environmental-and-climate-justice>> accessed 1 February 2024.

<sup>448</sup> 'Gender and the Environment' (*Genevaenvironmentnetwork.org* 2024) <<https://www.genevaenvironmentnetwork.org/resources/updates/gender-and-the-environment/>> accessed 2 February 2024.

<sup>449</sup> Melissa Leach, 'GENDER EQUALITY and SUSTAINABLE DEVELOPMENT' (201 Introduction Section) <[https://escholarship.org/content/qt87f421b1/qt87f421b1\\_noSplash\\_1ff36cb3a8d8de010b6fce95282d4c1e.pdf](https://escholarship.org/content/qt87f421b1/qt87f421b1_noSplash_1ff36cb3a8d8de010b6fce95282d4c1e.pdf)> accessed 1 January 2024.

An integrated strategy should be adopted taking into exposition environmental matters, justice, and gender equality thereof. The move responds to the increasing recognitions of the implications of the phenomenon on equality of rights, resources, and the socio-cultural formations.<sup>450</sup> This paper address genders oppression, violence, discrimination, and patriarchy as the expressions of gender inequality as far as the environment is concerned. Environmental justice and gender matters should be aired out in a proper manner to protect rights from infringement and to promote peace as well. Hypothetically, the paper argues of the need for humans to prevent being left vulnerable due to negligence or ignorance brought about by failure to follow the guidelines on environment management and justice.

## II. Legal provisions of gender equality and involvement thereof on matters environmental justice

One question that often arises is whether there exist robust legal provisions tackling with matters to do with environmental justice. Has Kenya educated the public on issues to do with environmental justice and gender? What response has been given to all this? There have been laws addressing gender as far as equity and equality is concerned.<sup>451</sup> In the pursuit of addressing and dealing with environmental justice and at the same time promoting gender equality, various significant issues must be dealt with interdependently. These issues are interconnected and impact marginalized communities disproportionately. Women form the larger part of our society and at times have ended up unrecognized and deliberately not considered in matters to do with environmental justice.<sup>452</sup>

The Kenyan constitution has for the freedom of non-discrimination, one's gender notwithstanding under article 27 which decrees that everyone is equal before the law and has the right to equal protection and equal benefit of the law and that men and women have the right to

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<sup>450</sup> United Nations, 'GENDER EQUALITY and SUSTAINABLE DEVELOPMENT 132' (2015) <[https://sustainabledevelopment.un.org/content/documents/1900unwomen\\_surveyreport\\_advance\\_16oct.pdf](https://sustainabledevelopment.un.org/content/documents/1900unwomen_surveyreport_advance_16oct.pdf)> Accessed 17 February 2024.

<sup>451</sup> Kenya Kariuki and Francis Kariuki, 'Towards Environmental Justice In' (2015) Abstract, Introduction and Conclusion sections <<https://kmco.co.ke/wp-content/uploads/2018/08/Towards-Environmental-Justice-in-Kenya-January-2015.pdf>> accessed 1 March 2024.

<sup>452</sup> Karen Bell, 'Bread and Roses: A Gender Perspective on Environmental Justice and Public Health' (2016) 13 International Journal of Environmental Research and Public Health 1005 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5086744/>> accessed 1 March 2024.

equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.<sup>453</sup>

Even as environmental matters are concerned, this particular provision plays a major role. Article 69(2) stipulates that every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable environment.<sup>454</sup>

The issues below should thus be considered:

- (1) Access to resources – environmental degradation often exacerbates existing inequalities, with women in Kenya disproportionately affected. Addressing these issues not only promotes a healthier environment but also contributes to gender equality by safeguarding the wellbeing of women and families.<sup>455</sup>
- (2) Health impacts – Environmental injustices, such as inadequate waste management and pollution have direct health consequence affecting women and children.<sup>456</sup>
- (3) Community participation – redressing environmental justice involves empowering local communities, including women, to actively participate in decision making processes related to environmental policies and projects. Inclusive participation ensures that diverse perspectives, including those of women are considered in environmental governance.<sup>457</sup>
- (4) Education and awareness- Environmental literacy should be enhanced, particularly among both the genders is crucial. Through sensitization and educating on sustainable practices,

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<sup>453</sup> *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* [2017] eKLR.

<sup>454</sup> Kariuki Muigua and Kariuki Francis, 'Safeguarding Environmental Rights in Kenya' (2019) Section 2.1.4 Environmental Justice as either Distributive or Procedural Justice <<https://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Safeguarding-Environmental-Rights-in-Kenya.pdf>> accessed 1 February 2024.

<sup>455</sup> Moses Ikiara, Samuel Mwakubo and Godfrey Olukoye, 'Inequality, Poverty and the Environment in Kenya' [2009] KIPPRA Working Paper No. 16 Abstract <<https://repository.kippira.or.ke/bitstream/handle/123456789/2692/WP16.pdf?sequence=1&isAllowed=y>> accessed 1 February 2024.

<sup>456</sup> Ismaila Rimi Abubakar and others, 'Environmental Sustainability Impacts of Solid Waste Management Practices in the Global South' (2022) 19 International Journal of Environmental Research and Public Health 12717 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9566108/#:~:text=It%20also%20contributes%20to%20urban,biomarkers%2C%20injuries%2C%20and%20mortality.>> accessed 1 February 2024.

<sup>457</sup> Office, 'Environmental Justice' (HHS.gov | 1 May 2012) <<https://www.hhs.gov/civil-rights/for-individuals/special-topics/environmental-justice/index.html#:~:text=Environmental%20justice%20is%20the%20fair,laws%2C%20regulations%2C%20and%20policies.>> accessed 12 March 2024.

environmental conservation, and climate resilience which will aid in shaping and promoting gender equality.<sup>458</sup>

(5) Legal frameworks- enforcing and strengthening legal framework that address both environmental justice and gender equality is essential. This includes legislations that protect women's rights to access and control resources, safeguards against environmental injustices and ensure equitable participation in decision making process.<sup>459</sup>

(6) Intersectionality- Recognizing intersectionality of gender is very much crucial. Environmental justice efforts should consider how gender inequalities intersect with issues such as class, ethnicities and even urban disparities to develop holistic and inclusive solutions.<sup>460</sup>

Some international treaties have been ratified in issues on gender and environment. Examples include the UN women that advocates for standards and policies that promote gender justice. Plan international as a global organization intimately works with young people to discourage discrimination.<sup>461</sup>

It is of great importance if attention is drawn to this matters so that there can be a greater leeway in addressing such matters. Gender equality in environmental concerns should also be looked at from a human rights perspective as failure to comply to the provisions is equal to the violation, infringement and threatening of a human right.<sup>462</sup>

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<sup>458</sup> Muzhinga Kankinda, 'As We Celebrate World Environment Day Today, It Is Essential to Refresh and Remind Ourselves of Environmental Literacy and How It Is Vital for the Improvement of Our Environment. Environmental Literacy Is the Ability to Understand and Act on Environmental Issues.' (*Linkedin.com* 5 June 2023) <<https://www.linkedin.com/pulse/environmental-literacy-why-its-important-muzhinga-kankinda>> accessed 1 February 2024.

<sup>459</sup> 'GENDER-INCLUSIVE LEGISLATIVE FRAMEWORK and LAWS to STRENGTHEN WOMEN'S RESILIENCE to CLIMATE CHANGE and DISASTERS' (2021) 6-111 <<https://www.adb.org/sites/default/files/publication/761766/gender-inclusive-legislative-framework-laws-women-resilience.pdf>> accessed 14 January 2024.

<sup>460</sup> Ana T Amorim-Maia and others, 'Intersectional Climate Justice: A Conceptual Pathway for Bridging Adaptation Planning, Transformative Action, and Social Equity' (2022) 41 *Urban Climate* 101053 <<https://www.sciencedirect.com/science/article/pii/S2212095521002832>> accessed 1 March 2024.

<sup>461</sup> 'Gender-Responsive Law-Making Handbook for Parliamentarians No. 33 Sections 1-4' (2021) <<https://www.unwomen.org/sites/default/files/2021-11/Handbook-on-gender-responsive-law-making-en.pdf>> accessed 1 January 2024.

<sup>462</sup> Emmaline Soken-Huberty, '10 Reasons Why Gender Equality Is Important' (*Human Rights Careers* 9 February 2020) <<https://www.humanrightscareers.com/issues/10-reasons-why-gender-equality-is-important/>> accessed 1 March 2024.



### III. GENDER INEQUALITY AND CLIMATE CHANGE. AN OVERVIEW

Climate change can be well defined to mean long-term shifts in weather patterns and temperatures, and this can be due to different human activities or through natural variability. These two aspects are largely interconnected.<sup>463</sup> Climate change is majorly affected by the environment since if for instance there is emission of greenhouse gases which cause greenhouse effect this will cause extreme weather patterns. The climatic changes in turn pose a lot of difficulties there being an issue to do with health especially on the female gender and this brings threats to the way of life.<sup>464</sup>

Truth be told that as compared to men, women are more reliant on the environment and the natural resources therein for their livelihoods. Notably, women in Kenya are often more vulnerable to the impacts of climate change for example due to their roles in agriculture and resource management.<sup>465</sup> Sustainable environment policies and practices should consider and prioritize the needs of women, recognizing their contributions towards food security and community resilience.<sup>466</sup>

Additionally, due to the climate change and human activities there has been continued increase in sea levels causing decrease of the number of fish and by this, due to inadequate job opportunities women opt to sleep with fishermen in exchange of fish for trade. This has also led to transmission of diseases and viruses such HIV & AIDS, and this has contributed to deteriorated health and deaths.<sup>467</sup> Due to climate change poverty is often a byproduct. To buttress, women

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<sup>463</sup> KR Shivanna, 'Climate Change and Its Impact on Biodiversity and Human Welfare' (2022) 88 Proceedings of the Indian National Science Academy. Part A, Physical Sciences 160

<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9058818/>> accessed 1 March 2024.

<sup>464</sup> Kashif Abbass and others, 'A Review of the Global Climate Change Impacts, Adaptation, and Sustainable Mitigation Measures' (2022) 29 Environmental Science and Pollution Research 42539

<<https://link.springer.com/article/10.1007/s11356-022-19718-6>> accessed 1 March 2024.

<sup>465</sup> United Nations, 'Women...In the Shadow of Climate Change | United Nations' (*United Nations*2024)

<<https://www.un.org/en/chronicle/article/womenin-shadow-climate-change>> accessed 1 February 2024.

<sup>466</sup> Elizabeth Bryan and others, 'Addressing Gender Inequalities and Strengthening Women's Agency to Create More Climate-Resilient and Sustainable Food Systems' (2024) 40 Global Food Security 100731

<<https://www.sciencedirect.com/science/article/pii/S2211912423000615>> accessed 1 February 2024.

<sup>467</sup> Nobuo Mimura, 'Sea-Level Rise Caused by Climate Change and Its Implications for Society' (2013) 89 Proceedings of the Japan Academy. Series B, Physical and biological sciences 281

<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3758961/>> accessed 1 March 2024.

are negatively impacted through climate change related drought and girls are forced into early marriages and this increases the chances of early pregnancies and sexual and physical abuse.<sup>468</sup>

Climate change has to a greater extent led to deaths and this has been regardless of the gender. To illustrate further, one of the reasons for the deaths is that climate change compromises food security and increased climate-related and vector-related diseases that lead to deaths.<sup>469</sup> If food security is compromised then the supply will be minimal and other people will starve to death or rather consume foods that are not fit for consumption due to the poor environment, they are manufactured in.<sup>470</sup> Changes in environmental temperatures will also increase the risk of acquiring food borne diseases as food is transported, prepared and handled under warm ambient conditions.<sup>471</sup>

More knowledge is needed about the situation of women and men in relation to the state of the environment. A diagnostic research and analysis on the conjunction between gender system, their impact and environmental changes.<sup>472</sup> Therefore, there is need for all environmental law stakeholders to collectively to combat climate change as a prerequisite for achieving gender equality in environmental justice and strengthen global environmental governance.

#### IV. SOCIETAL PERSPECTIVE

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<sup>468</sup> 'Child Marriage on the Rise in Horn of Africa as Drought Crisis Intensifies' (*Unicef.org* 2022) <<https://www.unicef.org/press-releases/child-marriage-rise-horn-africa-drought-crisis-intensifies>> accessed 1 March 2024.

<sup>469</sup> Ruth McDermott-Levy and others, 'Factors That Influence Climate Change-Related Mortality in the United States: An Integrative Review' (2021) 18 *International Journal of Environmental Research and Public Health* 8220 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8345936/>> accessed 1 March 2024.

<sup>470</sup> Abdulazeez Hudu Wudil and others, 'Reversing Years for Global Food Security: A Review of the Food Security Situation in Sub-Saharan Africa (SSA)' (2022) 19 *International Journal of Environmental Research and Public Health* 14836 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9690952/>> accessed 1 March 2024.

<sup>471</sup> Jan C Semenza and others, 'Climate Change Impact Assessment of Food- and Waterborne Diseases' (2012) 42 *Critical Reviews in Environmental Science and Technology* 857 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3996521/>> accessed 12 February 2024.

<sup>472</sup> Patricia M Kristjanson and others, 'Addressing Gender in Agricultural Research for Development in the Face of a Changing Climate: Where Are We and Where Should We Be Going?' (2017) 15 *International Journal of Agricultural Sustainability* 482 <<https://www.tandfonline.com/doi/epdf/10.1080/14735903.2017.1336411?needAccess=true>> accessed 1 March 2024.

The quest for gender equality on the environment has been digested differently by different societies.

More often than not, whenever gender concerns are raised in regards to any subject, each gender self-victimizes. The conversations then turn in blame games with each party pointing fingers at the other. They often become very heated with parties insulting each other and raise various issues. Strong disagreements are presented, frequently based on varied ideological, religious, or other firmly held beliefs.<sup>473</sup> It is not only difficult to moderate such discussions but also becomes impossible to achieve the desired output. It necessitates knowing our own attitudes and beliefs and understanding how to support others to discuss these issues in a significant manner.<sup>474</sup> Conversations on gender equalities in environmental matters have not been left out either.

## V. CONCLUSION

In summary, redressing environmental justice in Kenya is a fundamental step towards achieving gender equality. By integrating gender perspectives into environmental policies and practices, addressing resource disparities, and empowering women in the face of environmental challenges, Kenya can work towards creating a more equitable and sustainable future.

Also, without forgetting, livelihood opportunities are addressed when dealing with gender and environment justice. Environment justice initiatives should create sustainable livelihood opportunities for women. This includes promoting eco-friendly economic activities, providing training for green jobs and ensuring that women have equal access to income-generating opportunities linked to environmental conservation.

## VI. RECOMMENDATIONS

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<sup>473</sup> Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241.

<sup>474</sup> LaRue Allen and others, *Transforming the Workforce for Children Birth through Age 8* (2015) <<https://nap.nationalacademies.org/read/19401/chapter/8>> accessed 12 March 2024.

When addressing issues on environment justice we should look through the eyes of the people of Kenya, their perspectives and that what is really needed or rather required for a better change for the interests of tomorrow. There being vision 2030 what has been achieved or what have we as a country done in respect to promoting environmental justice and gender equality? We ought to get answers to this question to achieve the required standards in environment justice.

Have the matters on environmental justice been adequately and sufficiently addressed? There has been a struggle to do away with environment injustices through provision of relevant laws and also we cannot overlook the fact that there has been limitations in the capacity to defend the cause.<sup>475</sup> Therefore, a country should work in unison to promote gender equity in environmental matters and this can be through creating equal job opportunities especially for women. This will help avoid issues such as women having to engage in unethical activities so as create jobs (author's emphasis).

Gender disaggregated data should be encouraged to aid the policy makers with relevant information needed to get evidence-based policies and responses to mobilize and look for solutions and weigh the efficiency towards improving gender equality.<sup>476</sup> Mainstreaming gender into the environment globally is key and essential in achieving a healthier universe for everyone to thrive in.<sup>477</sup>

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<sup>475</sup> Jeanne Marie and Zokovitch Paben, 'APPROACHES to ENVIRONMENTAL JUSTICE: A CASE STUDY of ONE COMMUNITY' S VICTORY' (2011)  
<<https://gould.usc.edu/students/journals/rjsj/issues/assets/docs/volume20/spring2011/2.Paben.pdf>> accessed 11 March 2024.

<sup>476</sup> 'Gender-Disaggregated Data - Organisation for Economic Co-Operation and Development' (Oecd.org2017)  
<<https://www.oecd.org/gender/governance/toolkit/government/assessment-of-gender-impact/disaggregated-data/>> accessed 12 March 2024.

<sup>477</sup> Ibid.

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# THE ROLE OF HUMANS IN ENVIRONMENTAL CONSERVATION AND SUSTAINABLE DEVELOPMENT

By Kelsey Roda Kiplagat<sup>478</sup>

## I. ABSTRACT

*The present generation is borrowing heavily from the future generations. It is not only incapacitating viability of life on earth but also the ability of future generations to enjoy their inherent rights. How likely is the present generation to compensate the future generation for the cost of their activities? Is the present human race a trustee for the future generations? If so what duties do, they have in regards to environmental conservation and ensuring the capacity of the future generations to meet their needs.? This paper interrogates the role of humans in the conservation and sustainability of the environment and investigates what the future holds if conservation practices are not embraced. It also discusses the human activities that impair sustainable development and their effects on climate change. The paper addresses the contemporary issues in climate change and recommends possible solution.*

## II. INTRODUCTION

Environmental conservation is a practice that paves the way for protecting the environment and natural resources on the individual, organizational as well as governmental levels.<sup>479</sup> Conversely, Sustainable development is defined by Section 2 of EMCA<sup>480</sup> to mean 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.<sup>481</sup> It is also how we must live today if we want a better tomorrow, by meeting present needs without compromising the chances of future generations to meet their needs.<sup>482</sup> In *John Muthui & 19 others v County Government of Kitui & 7 others* the court stated that:

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<sup>479</sup> Leverage Edu, 'Environmental Conservation: Definition, Importance, UPSC | Leverage Edu' (Leverage Edu 21 November 2022) <<https://leverageedu.com/blog/environmental-conservation/>> accessed 27 February 2024.

<sup>480</sup> Environment Management and Co-ordination Act (Cap 387) of 199.

<sup>481</sup> Ibid Section 2.

<sup>482</sup> Yinuo, 'Fast Facts - What Is Sustainable Development? - United Nations Sustainable Development' (United Nations Sustainable Development 8 August 2023) <https://tinyurl.com/mr2vwewe> accessed 28 February 2024.

*“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.”<sup>483</sup>*

Its realization requires integration of environmental considerations into economic projects and development plans, exploitation of resources in a sustainable manner, equitable use of resources and the preservation of natural resources for the benefit of future resources.<sup>484</sup> Noteworthy, environmental conservation and sustainable development are intertwined as one cannot exist without the other. Environmental sustainability requires that conservation practices are embraced. It is through environmental conservation that sustainable development can be achieved.<sup>485</sup> Therefore, human beings play a pivotal role in the conservation of the environment and sustainable development. They are the engines to run environmental conservation without whom the concept of sustainable development remains a mere fallacy.<sup>486</sup>

### III. WHY IS ENVIRONMENTAL CONSERVATION AND SUSTAINABILITY A NECESSARY CONVERSATION?

The Kenyan constitution recognizes the importance of conserving the environment in its preamble in stating the following:

*“Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations.”<sup>487</sup>*

The present generation is a trustee with the earth as the subject matter and the future generations as the beneficiaries. This is informed by the principle of intergenerational equity

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<sup>483</sup> [2020] eKLR.

<sup>484</sup> Bill Freedman, 'Chapter 12 ~ Resources and Sustainable Development' (Pressbooks.pub 27 August 2018) <<https://ecampusontario.pressbooks.pub/environmentalscience/chapter/chapter-12-resources-and-sustainable-development/>> accessed 1 March 2024.

<sup>485</sup> Gopi Upreti, 'Environmental Conservation and Sustainable Development Require a New Development Approach' (1994) 21 Environmental Conservation 18 <https://tinyurl.com/4rjsdpcf> accessed 1 March 2024.

<sup>486</sup> Kariuki Muigua, 'Nurturing Our Environment for Sustainable Development I © Nurturing Our Environment for Sustainable Development' (2017) <<https://kmco.co.ke/wp-content/uploads/2018/08/Nurturing-Our-Environment-for-Sustainable-Development-3rd-MAY-2017.pdf>> accessed 28 February 2024.

<sup>487</sup> Preamble of the Constitution of Kenya 2010.

which 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<sup>488</sup>

The court in *Adrian Kamotho Njenga vs. Council of Governors & 3 others*, held that:

“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 ...”<sup>489</sup>

Environmental conservation breaths life to human rights. Compromising sustainable development dictates that human rights will remain a mere delusion for the future generations. 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 universal enjoyment of human rights.<sup>490</sup>

It is not deniable that there is an important link between human rights and the protection and conservation of the environment.<sup>491</sup> The following sentiments emphasize on environmental conservation as a cornerstone for the realization of human rights:

*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 the basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.*<sup>492</sup>

Conservation practices should be embraced not only to ensure the security of future generations but also guarantee the realization of their human rights.

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<sup>488</sup> Section 2, Environment Management and Co-ordination Act of 1999 (CAP 387).

<sup>489</sup> [2020] eKLR.

<sup>490</sup> Muigua, K. *Achieving Sustainable Development, Peace and Environmental Security* (Glenwood Publishers Ltd, Nairobi, 2021; Kariuki Muigua. *Embracing Environmental Social and Governance (ESG) tenets for Sustainable Development*” (Glenwood, Nairobi, July 2023) pg 160.

<sup>491</sup> Ibid pg 164.

<sup>492</sup> Ibid pg 161.

#### IV. Human Activities Are Neither Sustainable nor Embracing Conservation Practices: Negative Effects of Human Activities Towards Environmental Conservation and Sustainability

Anthropogenic human activities, such as vegetation removal and chemical explosions, decrease the quality of environmental features. This results in the degradation of the environment. Continued environmental degradation can destroy the various aspects of the environment such as biodiversity, ecosystems, natural resources, and habitats.<sup>493</sup> A study by the UNEP Global Environment Outlook<sup>494</sup> reveals that excessive human consumption of the naturally occurring non-renewable resources can outstrip available resources soon and destroy the environment remarkably during extraction and utilization.

Deforestation results in the collapse of ecosystems, exposes communities to the risk of floods and extinction of endangered species. Equally, the conversion of forests and grasslands into farmlands not only reduces the quality of farmlands but also displaces wildlife from their habitats resulting in human-wildlife conflicts. It is also a key contributor to global warming and climate change.<sup>495</sup>

The release of chemical substances in the waters and on land contaminates the water and plants consumed by animals tampering with their interactive food chains.<sup>496</sup> When released into the air, compounds such as Sulphur oxides react to form acidic rain which endangers human life. Its ecological effects are most clearly seen in aquatic environments, such as streams, lakes, and marshes where it can be harmful to fish and other wildlife.<sup>497</sup> It affects their reproduction as most fish eggs cannot hatch. Furthermore, negative human activities such as deforestation destroy the

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<sup>493</sup> Plant With Purpose, 'Causes, Effects and Solutions to Environmental Degradation' (*Plant With Purpose* 15 March 2023) <<https://plantwithpurpose.org/causes-effects-and-solutions-to-environmental-degradation/>> accessed 1 March 2024.

<sup>494</sup> 'Visual Feature: The Global Environment Outlook' (*UNEnvironment* 2024) <<https://www.unep.org/interactive/global-environment-outlook/>> accessed 27 February 2024.

<sup>495</sup> 'Deforestation and Forest Degradation | Threats | WWF' (*World Wildlife Fund* 2022) <<https://www.worldwildlife.org/threats/deforestation-and-forest-degradation>> accessed 1 March 2024.

<sup>496</sup> 'Acid Rain Students Site: What Causes Acid Rain?' (*Epa.gov* 2024) <[https://www3.epa.gov/acidrain/education/site\\_students/whatcauses.html](https://www3.epa.gov/acidrain/education/site_students/whatcauses.html)> accessed 1 March 2024.

<sup>497</sup> 'Effects of Acid Rain' (USEPA, June 2023) <<https://www.epa.gov/acidrain/effects-acid-rain>> Accessed on 1/03/2024

various ecosystems and tamper with the viability of life on earth (emphasis). The future generations will lack the required resources to meet their basic needs and exist on earth.<sup>498</sup>

## V. Human Activities Undermining Environmental Conservation and Sustainable Development.

### a. Use of fossil fuels

Fossil fuels are made from decomposing plants and animals.<sup>499</sup> They include natural gas, petroleum, heavy oils, tar, bitumen, and coal. They are used as a source of energy for cooking, transportation *inter alia* as they contain carbon and hydrogen. Moreover, fossil fuels use is a huge threat to sustainable development.<sup>500</sup> In burning fossil fuels, the carbon dioxide stored in them is released into the atmosphere.<sup>501</sup> The burnt fossil fuels released more carbon than the existing carbon sinks can absorb. The released carbon is a greenhouse gas contributing to climate change (emphasis).

According to the National Academies of Sciences, 81% of the total energy used in the United States comes from coal, oil, and natural gas today<sup>502</sup> A study from the University of Oxford predicts that total electricity generation across the African continent will double by 2030, with fossil fuels continuing to dominate the energy mix.<sup>503</sup> Furthermore, economic development is a key agenda for most African countries with industrialization as the cornerstone. This predicts the

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<sup>498</sup> Rhett A Butler, 'The Impact of Deforestation' (*WorldRainforests.com* 6 June 2001) <<https://worldrainforests.com/09-consequences-of-deforestation.html>> accessed 1 March 2024.

<sup>499</sup> NGS, 'Fossil Fuels' (National Geographic Society, 19 October 2023) <<https://www.bing.com/ck/a?!&&p=63e322514e1fa99djmldHM9MTcwOTg1NjAwMCZpZ3VpZD0wNTM5ZmUIYiIhMTYlLTy2YTIhMWYzOCllYTYxYTBIMjY3MzUmaW5zaWQ9NTlwNg&pfn=3&ver=2&hsh=3&fclid=0539fe5b-a165-66a2-1f38-ea61a0e26735&psq=what+are+fossil+fuels&u=a1aHR0cHM6Ly93d3cubmF0aW9uYWxnZW9ncmFwaGijLm9yZy9lbnN5Y2xvcGVkaWEvZm9zc2lsLWZlZWxzLw&ntb=1>> accessed on 1/03/2024

<sup>500</sup> 'Fossil Fuels: The Dirty Facts' (*Nrdc.org* June 2022) <<https://www.nrdc.org/stories/fossil-fuels-dirty-facts>> accessed 1 March 2024.

<sup>501</sup> *Ibid.*

<sup>502</sup> Pace B, 'What are the pros and cons of fossil fuels?' (*Green Coast*, 23 March 2023) <<https://greencoast.org/fossil-fuels-pros-and-cons/>> Accessed on 1/03/2024

<sup>503</sup> 'Fossil Fuels To Continue Dominating Africa's Energy Mix Through 2030' (*Africa Com*, 15 January 2021) <<https://www.africa.com/fossil-fuels-to-continue-dominating-africas-energy-mix-through-2030/>> accessed on 1/03/2024

need and use of more energy.<sup>504</sup> Unless the continent is rescued from the situation, the use of fossil fuels will increase without and care or concern of its effects on the environment.

## VI. Unsustainable Mining Practices

Mining is the extraction of useful materials such as iron and gold from the earth. Destructive mining practices greatly impact the environment. Hard rock mining releases more toxic substances — such as mercury, arsenic, lead and cyanide.<sup>505</sup> Water pollution, release of toxic substances such as lead and wildlife destruction are just but a few side effects of mining. There is a rise in demand for metals resulting in the increase of unsustainable mining practices especially in Africa as it is endowed with a wide array of minerals. Addressing the sustainability of the mining practices is quite difficult.

### b. Destruction of Forests

Destruction of forests can take various forms which include, deforestation and burning. This affects the climate and ecosystems. Deforestation is the intentional clearing of forested land.<sup>506</sup> This happens so that forested land can be put into other uses such as agriculture, construction, An increase in the human population has also contributed to deforestation. This is because there is a constant need of more space to accommodate the ever growing population. Economic growth has resulted in the clearing of forests for commercial purposes such as construction of industries and rental units.

Massive destruction of forests is on the rise at an alarming rate. African countries are estimated to lose \$17 billion yearly to illegal logging, which feeds a cycle of opaque governance, exploitation, and insecurity that can erode the social contract and further instability.<sup>507</sup> Illegal logging is prevalent in the tropical rainforests where humans cut down the demanded hardwood trees. The

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<sup>504</sup> 'Africa Energy Outlook 2019 World Energy Outlook Special Report' <[https://iea.blob.core.windows.net/assets/2f7b6170-d616-4dd7-a7ca-a65a3a332fc1/Africa\\_Energy\\_Outlook\\_2019.pdf](https://iea.blob.core.windows.net/assets/2f7b6170-d616-4dd7-a7ca-a65a3a332fc1/Africa_Energy_Outlook_2019.pdf)> Accessed 12 March 2024.

<sup>505</sup> 'Mining' (*Biologicaldiversity.org* 2024) <[https://www.biologicaldiversity.org/programs/public\\_lands/mining/index.html](https://www.biologicaldiversity.org/programs/public_lands/mining/index.html)> accessed 1 March 2024.

<sup>506</sup> NGS, 'Deforestation'(National Geographical Society, 21 February 2024)<<https://education.nationalgeographic.org/resource/deforestation/>> accessed on 1/03/2024.

<sup>507</sup> 'Coordinating Security Sector Responses to Illegal Logging in Africa'(Africa Center, July 2023) <https://africacenter.org/wp-content/uploads/2023/06/2023-07-CTOC-Gabon-Info-Note-EN.pdf> accessed on 1/03/2024.

Amazon rainforest is being burnt down intentionally by human beings. This has severe effects to the forest ecosystem, biodiversity and the climate.

The Food and agriculture organization of the United Nations states that the world has lost more than 420 million hectares or about a billion acres of forest since 1990. Recently, the greatest amount of deforestation is occurring in tropical rainforests, aided by extensive road construction into regions that were once almost inaccessible.<sup>508</sup>

As will be discussed later forests play a key role in environmental conservation by curbing climate change. The destruction of forests through illegal logging, use of chemicals to upset forests deforestation and intentional forest fires is becoming a common human activity justified by the need to advance personal interests.

## VII. Pollution

Pollution refers to the release of harmful materials by human activities. It may take different forms namely; air pollution, water pollution and land pollution. Human beings are intentionally causing environmental pollution in ignorance of the laid down rules and procedures for safe waste disposal.<sup>509</sup> Illustratively, land pollution occurs through deforestation, use of harmful pesticides and chemicals, mining release of untreated sewage and industrial wastes. Landfills are managed improperly.<sup>510</sup> On the other hand, air pollution is caused by the release of certain solid, liquid, or gaseous substances which are suspended into the air. These may be from industries, automobile emission, electricity generation and dust.<sup>511</sup> For water pollution, it is because of the discharge of sewage, oil spills during water travel, industrial waste discharge, dumping and plastic pollution.<sup>512</sup>

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<sup>508</sup> Ibid 15.

<sup>509</sup> 'Pollution' (*Nationalgeographic.org* 2024) <<https://education.nationalgeographic.org/resource/pollution/>> accessed 1 March 2024.

<sup>510</sup> 'Topic-Land Pollution: Causes, Effects and Remedies Name of the Teacher: Kaberi Murmu 4. Land Pollution: Causes, Effects and Remedies' <[http://www.rnlkwc.ac.in/pdf/study-material/geography/4th\\_Sem\\_General\\_GEO\\_GE\\_03\\_TH\\_4.%20Land%20Pollution.pdf](http://www.rnlkwc.ac.in/pdf/study-material/geography/4th_Sem_General_GEO_GE_03_TH_4.%20Land%20Pollution.pdf)> Accessed 1 March 2024.

<sup>511</sup> 'Air Pollution and Your Health' (*National Institute of Environmental Health Sciences* 2024) <<https://www.niehs.nih.gov/health/topics/agents/air-pollution#:~:text=Vehicle%20emissions%2C%20fuel%20oils%20and%20natural%20gas,the%20air%2C%20such%20as%20smoke%20from%20wildfires%2C>> accessed 1 March 2024.

<sup>512</sup> 'Water Pollution: Everything You Need to Know' (*Nrdc.org* 11 January 2023) <<https://www.nrdc.org/stories/water-pollution-everything-you-need-know>> accessed 1 March 2024.



## VIII. Failure to Heed to Public Awareness on the Need for Environmental Conservation and Sustainability

The need for environmental conservation and sustainable development has been echoed by international organizations, government institutions and non-governmental organizations. Has there not been enough emphasis or is the information falling on deaf ears? So, human beings are just not listening to the concerns raised and the potential harm of their negligence. Perhaps the effects of lack of environmental conservation will speak more eloquently to them.<sup>513</sup>

## IX. Other human activities

Other human activities influencing climate change include human-environmental conflicts and the politics of carbon markets. 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 peace.<sup>514</sup> Carbon markets mean that more carbon dioxide will be emitted building up in the atmosphere.

## X. EFFECTS OF HUMAN ACTIVITIES ON CLIMATE CHANGE

### a. Destruction of forests

Forests act as carbon banks as they absorb carbon dioxide from the atmosphere. Once destroyed the stored carbon is released into the atmosphere as carbon dioxide which is the main greenhouse gas. Averaged over 2015—2017, global loss of tropical forests contributed about 4.8 billion tons of carbon dioxide per year (or about 8-10% of annual human emissions of carbon dioxide).<sup>515</sup> Why is the foregoing anthropogenic human activity adverse? Because forests regulate the climate. The destruction of forests mean that the earth will be more vulnerable to climate change. The effects will be felt for decades even by future generations.

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<sup>513</sup> Ritika Kumari, “NGOs Working for Environment Conservation: Protecting Our Planet’s Future” (*Medium* 2 August 2023) <<https://medium.com/@ritikakumari54939/ngos-working-for-environment-conservation-protecting-our-planets-future-83364267b0b3>> accessed 1 March 2024.

<sup>514</sup> UNEP, ‘Curbing negative environmental impacts of war and armed conflict’(UNEP,05 November 2019)<<https://www.unep.org/news-and-stories/statements/curbing-negative-environmental-impacts-war-and-armed-conflict>> Accessed on 2/03/2024.

<sup>515</sup> Annika, ‘Deforestation and Climate Change’(Climate Council,21 August 2019)<<https://www.climatecouncil.org.au/deforestation/>> accessed on 2/03/2024.

b. Ignorance of recommended practices

Since time in memorial, communities have not only acknowledged but also observed (ecological approaches) to conservation. However, rising levels of poverty and the ever shrinking parcels of land due to commercialisation of land has made them lean towards anthropocentricity at the expense of sustainability.<sup>516</sup> As survival for the fittest dictates you must possess certain characteristics to thrive in an environment with limited resources and for majority of the people this characteristic is the ignorance of recommended practices. It is in being 'fit' that people choose to ignore recommended environmental conservation practices and indulge in unsustainable ones.

There are prescribed practices and conduct during armed conflict in international legal instruments. Some of the practices seek to ensure conservation of the environment even in armed wars. However, states ignore the recommended practices and use some of the prohibited weapons with adverse environmental effects.<sup>517</sup> It is in ignoring the recommended practices that human beings burn fossil fuels and cut down trees raising the levels of greenhouse gases in the atmosphere which is a key driver of climate change.

XI. Contemporary Issues in Environmental Conservation and Sustainable Development: Challenges

a. 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 groups.<sup>518</sup> An international armed conflict arises when one State uses armed force against another State or States.<sup>519</sup> Non-international armed conflicts, also known as internal armed conflicts, take place within the territory of a State and do not involve the armed forces of any other State.<sup>520</sup>

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<sup>516</sup> Muigua, K., (*Achieving Sustainable Development, Peace and Environmental Security*), Glenwood Publishers Ltd-2021 pg 266.

<sup>517</sup> 'The Environment and International Humanitarian Law | How Does Law Protect in War? - Online Casebook' (*icrc.org* 2020) <<https://casebook.icrc.org/case-study/environment-and-international-humanitarian-law>> accessed 1 March 2024.

<sup>518</sup> ICRC, 'The Law of Armed Conflict'(Introduction to the Law of Armed Conflict,2002)<[https://www.icrc.org/en/doc/assets/files/other/lawI\\_final.pdf](https://www.icrc.org/en/doc/assets/files/other/lawI_final.pdf)> Accessed on 29/2/2024.

<sup>519</sup> Ibid.

<sup>520</sup> Ibid.

Impacts of war on ecosystems and natural resources is often overlooked when compared to the social and human harms of armed conflict.<sup>521</sup> Armed conflicts not only affect the ecosystems but also threaten the human right to a clean and healthy environment. Some of the prohibited weapons used during the conflicts have disastrous environmental impacts. Environmental damage caused by armed conflicts can be multifaceted, severe, long-lasting and mostly irreversible.<sup>522</sup> Unfortunately this effects traverse the boundaries of the areas in which they occur severely impacting nearby areas. Transboundary environmental damage mostly takes 3 forms: air pollution, pollution of a transboundary watercourse (or land in case of territorial/border changes between States), and transboundary shipment or dumping of waste.<sup>523</sup>

The theory of limited territorial sovereignty prescribes that states should be responsible for environmental damage beyond their boarders. However, this has not prevented states from indulging in these wars. Africa and the world at large has experienced a surge in staged coups, internal clashes and international armed conflicts. For example, the Democratic Republic of Congo (DRC; the Congo) experienced a spike in violence in the latter months of 2023, as the country anticipated national elections in December 2023.<sup>524</sup> This involved clashes over natural resources and territory. It is clear, from the foregoing, that the impacts of armed conflicts on environmental conservation need to be addressed with a lot of concern. The conflicts undermine sustainable development in that they have long lasting effects. The future generations will experience the effects even if they did not take part in the wars.

## XII. What does the future hold? Negligence of Humans to Play their Role in Environmental Conservation and Sustainable development

Failure to embrace environmental conservation practices will lead to environmental degradation. This compromises human security. Environmental degradation is in itself a severe

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<sup>521</sup> Lopes, 'The Environmental Impact of War and Armed Conflict'(Change the Chamber,6 November 2023)<<https://www.changethechamber.org/news-research/environmental-impact-of-war>> accessed on 29/2/2024

<sup>522</sup> Howell , 'Environmental impact of armed conflicts'(PACE,5 January 2023)< [Doc. 15674 - Report - Working document \(coe.int\)](#)>accessed on 29/2/2024.

<sup>523</sup> Ibid

<sup>524</sup> CFR , ' Conflict in the Democratic Republic of Congo'(Global Conflict Tracker, 21 February 2024)<<https://www.cfr.org/global-conflict-tracker/conflict/violence-democratic-republic-congo>> accessed on 29/2/2024.

threat to human security and all life on earth.<sup>525</sup> Human security will be compromised since ecosystem goods and services fundamentally underpin human wellbeing and human security and human beings depend on the earth's ecosystems and the services they provide, the degradation of the services often causes significant harm to wellbeing which explicitly includes human security.<sup>526</sup>

Environmental conflicts will be the order of the day. Environmental degradation can be both a cause and consequence of violent conflict.<sup>527</sup> It may lead to disputes within and between otherwise friendly countries.<sup>528</sup> As the quality of environmental features depreciates, the natural resources become scarce, and their governance becomes harder. The resulting effect will be communities fighting to access the scarce resources. This will in-turn worsen environmental degradation creating a vicious cycle.

### XIII. What Next? What's the way forward six years to 2030?

#### Good Environmental governance

Environmental governance includes rules, policy and norms that govern human behavior and address who makes decisions, how the decisions are made and implemented and how the public and major stakeholders can participate in decision making.<sup>529</sup> Appropriate legal frameworks on the global, regional, national and local level to pursue good environmental governance will lead to a healthy and prosperous planet for all living creatures, now and in the future.<sup>530</sup> Globally, it has been suggested that it is through good governance that sustainable development can be achieved in a fair and effective manner.<sup>531</sup>

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<sup>525</sup> Nina GrÅiger, 'Environmental Security?' (1996) 33 Journal of Peace Research 109

<<https://ideas.repec.org/a/sae/joupea/v33y1996i1p109-116.html>> accessed 1 March 2024.

<sup>526</sup> 'Environmental Security: Dimensions and Priorities' (*Global Environment Facility* June 2018)

<<https://www.thegef.org/publications/environmental-security-dimensions-and-priorities>> accessed 1 March 2024.

<sup>527</sup> Ibid.

<sup>528</sup> Ibid.

<sup>529</sup> UNEP, 'Environmental Governance'(UNEP,2020)< <https://www.unep.org/regions/west-asia/regional-initiatives/environmental-governance>> Accessed 28/2/2024

<sup>530</sup> Ibid .

<sup>531</sup> UN, 'Introduction to Environmental Governance'

(March,2017)<<https://globalpact.informea.org/sites/default/files/documents/International%20Environmental%20Governance.pdf>> Accessed on 28/2/2024

Ordinarily, components of good governance include equity and inclusiveness, effectiveness, accountability, transparency, adherence to the rule of law, participation, and responsiveness.<sup>532</sup> It necessitates that the decisions made should mirror the sustainable development goals. 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.<sup>533</sup> All scientific knowledge on the effects of human practices on the environment and sustainable development should form a basis for decision making. This calls for the financial support of national, regional and international environmental research institutions to increase their research capacity.

Everyone should be provided with the necessary information and allowed to express their views on the policies, laws and decisions affecting them. The enforcement of the laws and policies should be impartial and follow the laid down rules and regulations. The interests of the minority and vulnerable groups should be factored in when making environmental decisions to ensure the attainment of the best interest of the whole society at large. Each stakeholder should be held accountable for their actions.<sup>534</sup> The various institutions mandated to ensure the realization of sustainable development must work effectively and respond to the emerging environmental threats within a reasonable timeline.

The Intergovernmental Panel on Climate Change (IPCC) warns that without more robust policies across all sectors, the world is likely to surpass the critical 1.5°C tipping point by 2035.<sup>535</sup> Therefore, there an urgent need for all sector to review their environmental governance mechanisms to include the following;

- i. Policy advice for environmental decision making
- ii. Timely identification of emerging environmental threats for issuance off early warnings.
- iii. Access to environmental information and data by all the stakeholders.
- iv. Networking among all key stakeholders.

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<sup>532</sup> Ibid.

<sup>533</sup> Muigua, K., (Exploring Conflict Management in Environmental Matter), Glenwood Publishers-2022 pg 95.

<sup>534</sup> Michael Johnston, 'Good Governance: Rule of Law, Transparency, and Accountability' (2017) <<https://etico.iiiep.unesco.org/sites/default/files/2017-09/unpan010193.pdf>> accessed 26 February 2024.

<sup>535</sup> 'Fast Facts-What is Sustainable Development?'(SGD, 8 August 2023) <https://www.un.org/sustainabledevelopment/blog/2023/08/what-is-sustainable-development/> accessed 29/2/2024

- v. Provision of technical assistance for the enforcement of environmental law on conservation and sustainable development.
- vi. Public participation in policy dialogue.

Anthropocentric and ecocentric approaches to environmental governance need to be balanced. Impacts of climate change and resource extraction need to be addressed in eradicating poverty and ensuring food security.<sup>536</sup>

#### XIV. Collaboration

Collaboration between different stakeholders is key for humans to effectively carry out their roles in environmental conservation and sustainable development. It is recognized that achieving sustainable development would require the active participation of all sectors of society and all types of people since the Earth Summit.<sup>537</sup> The 2030 Agenda for Sustainable Development Goals recognises that the goals cannot be achieved without global cooperation.<sup>538</sup> It is therefore crucial for all the 'major groups' recognized in Agenda 21 to put in collective efforts towards environment conservation practices and sustainable development. State-centered Governance solutions should be revisited to involve all the parties in the environment.

It is only through mobilising the efforts of all relevant stakeholders that the constitutional provisions on the environment and natural resources can effectively be implemented and make it possible to achieve sustainable development.<sup>539</sup> The various sectoral laws and policies must be designed in a way that protects the environment from degradation and also involves communities through measures that encourage active participation in decision-making processes or benefit sharing whether through incentives or otherwise.<sup>540</sup> An example is the Kenyan Constitution 2010 which through devolution creates an opportunity where communities are supposed to be

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<sup>536</sup> Kariuki Muigua, 'Entrenching Ecocentric Approach to Environmental Management in Kenya | University of Nairobi' (Uonbi.ac.ke 2020) <<https://www.uonbi.ac.ke/news/entrenching-ecocentric-approach-environmental-management-kenya>> accessed 1 March 2024.

<sup>537</sup> UN, 'Introduction to Environmental Governance (March, 2017) <https://globalpact.informea.org/sites/default/files/documents/International%20Environmental%20Governance.pdf> Accessed on 28/2/2024.

<sup>538</sup> Muigua, K., (Achieving Sustainable Development, Peace and Environmental Security), Glenwood Publishers Ltd-2021 pg 267.

<sup>539</sup> Muigua, K., (Securing Our Destiny Through Effective Management of the Environment), Glenwood Publishers Ltd-2020 pg 11.

<sup>540</sup> Ibid.

empowered by devolving power from the state to local communities to manage natural resources and environmental matters.<sup>541</sup> It also envisages the participation of all stakeholders, both as right-holders as well as duty bearers as far as environmental matters are concerned.<sup>542</sup> Government agencies can work closely with communities to address the challenges through integrated approaches to poverty alleviation, agriculture, animal husbandry and generally the realisation of the sustainable development agenda to ensure the adoption of anthropocentric coupled with eco-centric approaches so as to strike a balance in safeguarding environmental, social and economic interests of the country.<sup>543</sup>

There's also a need to put in place a framework that clearly defines the roles of various stakeholders.<sup>544</sup> This will ensure that every person knows their duties and can be held accountable when they fall short through legal action.

Involvement of citizens and NGOs offers untapped potential for environmental policy.<sup>545</sup> This potential can only be realized if they both collaborate together.

Facilitation of the participation of communities necessitates the incorporation of customary approaches to environmental governance into the formal environmental governance frameworks.<sup>546</sup> 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 economic, social and governance needs of particular group or class of people.<sup>547</sup>

## XV. Embracing environmental security

Environmental security is the process of peacefully reducing human vulnerability to human-induced environmental degradation by addressing the root causes of environmental degradation

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<sup>541</sup> Ibid pg 13.

<sup>542</sup> Muigua, K., (Achieving Sustainable Development, Peace and Environmental Security), Glenwood Publishers Ltd-2021 pg 247.

<sup>543</sup> Ibid pg 267.

<sup>544</sup> Muigua, K., (Securing Our Destiny Through Effective Management of the Environment), Glenwood Publishers Ltd-2020 pg 13.

<sup>545</sup> Ibid pg 10.

<sup>546</sup> Ibid pg 11.

<sup>547</sup> Muigua, K., (Exploring Conflict Management in Environmental Matter), Glenwood Publishers-2022 pg 101.

and human security.<sup>548</sup>The Global Environment Facility(GEF), describes it as a bundle of issues which involves the role that the environment and natural resources can play in peace and security, including environmental causes and drivers of conflict, environmental impacts of conflict, environmental recovery and post-conflict peace building. Security and insecurity is not limited to violent conflict or it's absence but includes the roots of sustainable livelihoods, health and well-being.<sup>549</sup> In avoiding environmental insecurity the courses of environmental change need to be addressed, since it is these that expose groups to changes in the distribution, abundance and quality of resources on which they depend.<sup>550</sup>

Human beings need to play an active role in decreasing their vulnerability to the effects of their negative environmental practices. Climate change needs to be combatted to ensure there's environmental security and sustainable development.<sup>551</sup>

## XVI. Capacity Building

The United Nations defines capacity building as the process of developing and strengthening the skills, instincts, abilities, processes, and resources that organizations and communities need to survive, adapt, and thrive in a fast-changing world. It aims to strengthen parties' ability to work together for their mutual benefit by providing them with the skills and tools they need to define problems and issues and formulate solutions.<sup>552</sup>

There is an urgency to increase the leadership, resiliency, management and technical capacity of all the stakeholders in environmental conservation. This can be achieved through reconstructing people's attitudes towards environmental conservation and organizational practices, values and plans to guarantee sustainable development. It can also be achieved by

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<sup>548</sup> F.Rita, "The Environmental Security Debate and Its Significance for Climate Change," The International Spectator: Italian Journal of International Affairs, Vol.43, Issue 3, 2008, pg 56.

<sup>549</sup> 'Environmental Security: Dimensions and Priorities' (*Global Environment Facility* June 2018)  
<<https://www.thegef.org/publications/environmental-security-dimensions-and-priorities>> accessed 1 March 2024.

<sup>550</sup> Barnett J, 'Environmental Security and Peace' (2007) 3 Journal of Human Security, 12.

<sup>551</sup> United Nations, 'Actions for a Healthy Planet | United Nations' (*United Nations* 2019)  
<<https://www.un.org/en/actnow/ten-actions>> accessed 1 March 2024.

<sup>552</sup> Corissajoy, 'Capacity Building'(Beyond Intractability,6 July 2016)<  
<https://www.bing.com/ck/a?!&&p=440677c1216d9d8ajmltdHM9MTcwOTY4MzlwMCZpZ3VpZD0wNTM5ZmUIYiIhMTYlLTy2YTltMWYzOCIIYTYxYTBIMjY3MzUmaW5zaWQ9NTE4NA&ptn=3&ver=2&hsh=3&fclid=0539fe5b-a165-66a2-1f38-ea61a0e26735&psq=capacity+building+beyond+intractability&u=alaHR0cHM6Ly93d3cuYmV5b25kaW50cmFjdGFjaWVxdHkub3JnL2Vzc2F5L2NhcGFjaXR5LWVjaWVkaW5n&ntb=1>> Accessed on 2/03/2024.



empowering them economically so as to eradicate poverty. This may help eliminate the use of fossil fuels as a source of energy as communities will be able to afford environmental friendly energy sources deemed to be relatively expensive.

Technical capacity refers to the know-how, skills, tools, and facilities necessary to produce the desired output or deliverable.<sup>553</sup> There is a need to increase the capacity of green sources of energy as they are susceptible to climate change.

## XVII. Conclusion

Compensation to the existing generations for environmental damage caused in ignorance of environmental conservation practices is not a sustainable solution. Whereas it may help the current generation mitigate the effects, it cannot replenish the environmental features lost in the process. It can neither absorb the carbon dioxide build-up in the atmosphere nor grow back the natural forests lost.

As discussed in the paper, ignorance of recommended practices and destruction of forests have adverse effects on climate change. The conversation on sustainable development is very much needed. Unsustainable mining practices, pollution, destruction of forests and use of fossil fuels are all human activities jeopardizing environmental conservation and sustainable development. Good environmental governance, collaboration between all stakeholders, embracing environmental security and capacity building are some of the imperative steps to be taken.

Restoring the environment will take ages while its destruction takes seconds. It is, therefore, crucial if not important for humans to step up as trustees of the earth and fulfill their duties by embracing sustainable environmental conservation practices.

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<sup>553</sup> Angeline M, 'What is Capacity Building'(RUNN, Jun 17, 2022)<  
<https://www.bing.com/ck/a?!&&p=871110276b75ef56jmltdHM9MTcwOTY4MzlwMCZpZ3VpZD0wNTM5ZmUIYiIhMTYlLTUyYTYtMWYzOCllYTYxYTBIMjY3MzUmaW5zaWQ9NTM2OA&ptn=3&ver=2&hsh=3&fclid=0539fe5b-a165-66a2-1f38-ea61a0e26735&psq=what+is+capacity+building&u=a1aHR0cHM6Ly93d3cucnVubi5pby9ibG9nL2NhcGFjaXR5LWJlYWxkaW5n&ntb=1>> Accessed on 2/03/2024.

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*Arbitration Avenue: The Effectiveness and Efficiency in Resolving Tort*

*Law Disputes in Kenya*

By: Alex O. Moku<sup>554</sup>

Abstract

In looking into the place of arbitration in resolving disputes falling under the ambit of tort law, this paper, while tracing developmental history of the human society emphasizes on the need to identify expectations and norms that protected individuals and families from wrongful injuries, property damage, and takings. Going back to pre-law period, it delves into the status quo governing dispute resolution at the time. It specifically delves into the era of legal codification, identifying how those laws helped in protecting individuals from physical or financial insult, depredation of just deserts of labor, interference with the means of individual livelihood, and distortion of the fair distribution of wealth. The Article then investigates the corrective justice-morality underpinning of the law governing civil wrongs, or Torts, the common law has natured rules implicating economic and efficiency themes. All crimes resulting in injury to a person or property for instance theft are also tort and the plaintiff may bring a separate lawsuit to recover damages for injuries to this person or property. This article, will focus on how the role of arbitration in solving tort law will do better than filing a civil suit to recover the damages, hypothetically arguing that tort is well-suited to resolve majority of disputes under the law of torts.

Key word; Wrongful injuries, property damage, social contract theory, codification of law, corrective justice, civil wrong and damages.

## I. Introduction

The perception that arbitration provides refuge against the uncertainties of national courts is supported to some degree by the nature of arbitration and the degree control parties have in shipping arbitration proceedings.<sup>555</sup> Arbitration permits parties from two different countries to

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<sup>555</sup> Catherine A Rogers, 'The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China' (*Ssrn.com* 2016) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2764225](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764225)> accessed 1 March 2024.

exercise a great deal of control over how a dispute will be resolved. Parties can choose the place of arbitration, the nationality of qualifications of arbitrators and the language of arbitration. Together, these three factors can go a long way toward neutralizing the local biases that can influence a proceeding that is in a hostile jurisdiction, in a foreign language, and before an adjudicator who may be more sympathetic to the local party.<sup>556</sup> Moreover, arbitration occupies "a space between business and politics." Technically, arbitration is an arrangement for submitting disputes to an impartial decision-maker chosen by the parties.<sup>557</sup> What this definition fails to convey is that the term "arbitration" encompasses a vast array of processes that have long existed throughout the world as alternatives to judicial resolution of local disputes. Despite arbitration's popularity in resolving disputes within countries, until recently investors involved in disputes abroad relied primarily on formal diplomatic intervention from their home countries to protect their investments.

Reliably, the law, arbitration law inclusive is a representative of the society's revealed behaviors it wishes to encourage and the behaviors it wishes to discourage. From the cause of action for the simple tort of assault and battery to the more elegant tortious interference with prospective advantage, the way an individual can injure another seems limitless. The main objective of Tort law is to compensate the aggrieved party, the defendant to go through a corrective justice, deterrence of committing a tort and to protect the individual interest.<sup>558</sup>

Going back to early human history, arbitration provided a procedure which was far less complex than the court process. Its advantages are the designation of expert and impartial persons to decide issues and the convenience and speed of the procedure. The law's restriction on court review of arbitrators' decisions has promoted broad use of arbitration by the business

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<sup>556</sup> 'What Is Arbitration?' (Wipo.int 2024) <<https://www.wipo.int/amc/en/arbitration/what-is-arb.html>> accessed 1 March 2024.

<sup>557</sup> 'REALIST CORPORATE NATIONALITY in TRANSNATIONAL INVESTMENT LAW S( PhD Thesis ubmitted by Rimantas Daujotas' to Queen Mary University, London (2020)) Introduction. <[https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/71806/Daujotas\\_Rimantas\\_Law\\_CCLS\\_Final\\_061120\\_redacted-sig.pdf?sequence=3](https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/71806/Daujotas_Rimantas_Law_CCLS_Final_061120_redacted-sig.pdf?sequence=3)> accessed 13 March 2024.

<sup>558</sup> Sandra S Baron, Hilary Lane and David A Schulz, 'Tortious Interference: The Limits of Common Law Liability for Newsgathering' (William & Mary Law School Scholarship Repository 2024) <<https://scholarship.law.wm.edu/wmborj/vol4/iss3/7/>> accessed 1 March 2024.



community as an alternative to the courts.<sup>559</sup> Some courts have established programs whereby relatively small civil claims must go before a court administered arbitration tribunal before they can be tried in a traditional court. Interest arbitration, which deals with bargaining demands, offers an alternative to breakdown in public sector labor relations.<sup>560</sup> Community disputes resolution programs deal with many types of conflict and benefit both the disputant and the community. The combined use of arbitration and mediation offers a solution to the two main problems in the court system; the scarcity of court time and the court tendency to produce win-lose decisions rather than mutually beneficial compromise. When the loss is personal or property damage, a rough estimation of this waste may often be combined amount of the claimant's economic and non-economic damages.<sup>561</sup> This will enable the filament of the civil suit. Further, we will see how best arbitration can do rather than to file a suit which is costly.

Arbitration is used because it is often much less expensive than litigation due to its less stringent procedure requirements. Of the potential alternative dispute resolution method available, arbitration is the most like taking your case to court. Arbitrators are not subjected to rules of evidence; they nonetheless allow the parties in dispute to enter evidence when they deem it fair.<sup>562</sup> Arbitration is advantageous over litigation and identifies professional arbitration associations.<sup>563</sup> Depending on various fields there are types of tribunals available for parties who wish to arbitrate and then it analyses all the aspects of the grievance procedure, the emphasis that the matter should be taken to arbitration until all the possibilities of settlement have been

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<sup>559</sup> Steve Morgan, 'What Is Arbitration & Its Advantages & Disadvantages? - Burlingtons Legal' (*Burlingtons Legal* 20 August 2020) <<https://burlingtonslegal.com/insight/what-is-arbitration-all-you-need-to-know-about-the-process/>> accessed 1 March 2024.

<sup>560</sup> Vincent Powell-Smith, 'Settlement of Disputes by Arbitration under Sharī'ah and at Common Law' (1995) 34 *Islamic Studies* 5 <[https://www.jstor.org/stable/pdf/20840193.pdf?casa\\_token=A7uZmu2j\\_oYAAAAA:-tvofhcUWapcO32dKOOlQkYzlhPAf8zWWLcMmrVvFhQhPyatYq5Z9fVvmkUmYXkgW5G2zMv\\_15Sd4YvDinHVl-ZApq22lW3zF2kyezNidZln0L7TLczQ](https://www.jstor.org/stable/pdf/20840193.pdf?casa_token=A7uZmu2j_oYAAAAA:-tvofhcUWapcO32dKOOlQkYzlhPAf8zWWLcMmrVvFhQhPyatYq5Z9fVvmkUmYXkgW5G2zMv_15Sd4YvDinHVl-ZApq22lW3zF2kyezNidZln0L7TLczQ)> accessed 1 March 2024.

<sup>561</sup> Todd B Carver and Albert A Vondra, 'Alternative Dispute Resolution: Why It Doesn't Work and Why It Does' (*Harvard Business Review* May 1994) <<https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>> accessed 1 March 2024.

<sup>562</sup> Kariuki Muigua, "'Alternative Dispute Resolution and Article 159 of the Constitution'" (2018) <<https://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf>> accessed 2 January 2024.

<sup>563</sup> Kariuki Muigua, 'Overview of Arbitration and Mediation in Kenya; a Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) CONCEPTUAL CLARIFICATIONS Mediation' (2018) <<https://kmco.co.ke/wp-content/uploads/2018/08/Overview-of-Arbitration-and-Mediation-in-Kenya.pdf>> accessed 1 March 2024.

exhausted.<sup>564</sup> Traditionally, Judges granted motions to compel arbitration only after confirming that the parties had formed a valid agreement to arbitrate that applied to the underlying lawsuit.<sup>565</sup>

Another important development in Federal arbitration law has flown largely under the radar. By using “delegation clauses”, businesses are giving arbitrators the exclusive powers to decide these issues which include the critical question about arbitration. It is not an answer that the arbitrators are probably reasonable men and will probably do what is right between the parties.<sup>566</sup> Indeed, the thesis of this article can be rather succinctly stated: arbitral system organized and administered by private groups within our society, have grown up under our legal framework; these groups by steps at first imperceptible, or rather tolerated, under the tugs and pulls of an oligopolistic and pluralistic society, and then inexorably, because their acquired strength met only passive opposition, formulated rules of their own.<sup>567</sup>

Arbitration as a Private "Rule of Law" Investors' consistent selection of arbitration as the dispute resolution mechanism of choice in China reflects both an appreciation of the shortcomings of China's legal system and myopia about how those shortcomings affect arbitration in China. Headlines report daily that markets in Asia are the fastest growing in the world." As a result, foreign investors-perhaps "smitten by the same kind of opportunism that attracted Chinese immigrants one hundred years ago to the United States' 'gold mountain,' to continue to pour investment dollars into China.<sup>568</sup> Surprisingly, the boom of foreign investment in China has occurred despite what is generally regarded as inadequate legal protection for investors. Even more surprising, however, is investors' initially naive confidence that arbitration will protect their Chinese investments. Many investors appear astonished to learn that international arbitration

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<sup>564</sup> Edgar A Jones, 'The Labor Board, the Courts, and Arbitration. A Feasibility Study of Tribunal Interaction in Grievable Refusals to Disclose' (1968) 116 University of Pennsylvania Law Review 1185.

<sup>565</sup> Historical Development of Commercial Arbitration in United State, by *Sabra A. Jones*, *Minn L. J.* 2,240,1927

<sup>566</sup> David Horton, 'The Arbitration Rules: Procedural Rulemaking by Arbitration Providers' (*Ssrn.com* 25 March 2020) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3561137](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561137)> accessed 1 March 2024.

<sup>567</sup> *Ibid.*

<sup>568</sup> LE Trakman, 'Confidentiality in International Commercial Arbitration' (2002) 18 *Arbitration International* 1.

clauses in their multimillion dollar contracts do not necessarily provide a viable means for resolving disputes or protecting their investments.<sup>569</sup>

## II. Role of Arbitration

Arbitration plays an important role in the society. It works better than litigation in the following ways;

Cost efficiency – Arbitration can be more cost effective than traditional litigation, as it often involves fewer procedural complexities and allows a more focused and efficient resolution of the dispute. Arbitration enables the parties to agree mutually without filing a suit.<sup>570</sup>

Limited judicial involvement – while arbitration awards are judicially enforceable, the process itself often involves limited court intervention, allowing for a more streamlined resolution.<sup>571</sup>

Confidentiality – arbitration proceedings are often confidential, protecting sensitive business information and maintaining the privacy of the disputing parties. This allows sensitive information from not leaking but remained between the three parties.<sup>572</sup>

Flexibility – arbitration allows parties to choose their arbitrators, the rules governing the process and the location, providing flexibility in tailoring the resolution to the specific needs.<sup>573</sup>

Decision making authority – arbitrators have authority to make binding decisions, providing a final resolution to the dispute that the parties are obligated to follow.<sup>574</sup>

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<sup>569</sup> See Pat K. Chew, Political Risk and U.S. Investments in China: Chimera of Protection and Predictability? 34 VA. J. IMR'L L. 615, 616 (1994) (noting that "despite the potential for political instability and the lack of protection, foreign investment in China continues to escalate dramatically").

<sup>570</sup> James Wiesel, 'Cost-Effective Construction Arbitration ALTERNATIVE DISPUTE RESOLUTION' <[https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlawCost\\_effective\\_Construction\\_Arbitration\\_By\\_James\\_Wiesel\\_Construction\\_Lawyer\\_Spring2011.pdf](https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlawCost_effective_Construction_Arbitration_By_James_Wiesel_Construction_Lawyer_Spring2011.pdf)>.

<sup>571</sup> Mitch Zamoff, 'Safeguarding Confidential Arbitration Awards in Uncontested Confirmation Actions' (2022) 59 American Business Law Journal 505 <<https://onlinelibrary.wiley.com/doi/full/10.1111/ablj.12211>> accessed 1 March 2024.

<sup>572</sup> Ibid.

<sup>573</sup> Ibid.

<sup>574</sup> Ibid.

Speedier Resolution – arbitration typically offers faster resolution compared to traditional litigation, reducing the time and cost associated with resolving disputes.<sup>575</sup>

Less formal procedures - arbitration allows for less formal procedures compared to court proceedings, offering a more flexible and efficient process for resolving conflict.<sup>576</sup>

The perception that arbitration provides refuge against the uncertainties of national courts is supported to some degree by the nature of arbitration and the degree of control parties have in shaping arbitration proceedings. Arbitration permits parties from two different countries to exercise a great deal of control over how a dispute will be resolved. Parties can choose the place of arbitration, the nationality or qualifications of the arbitrators, and the language of arbitration.<sup>577</sup>

Together, these three factors can go a long way toward neutralizing the local biases that can influence a proceeding that is in a hostile jurisdiction, in a foreign language, and before an adjudicator who may be more sympathetic to the local party (or even hostile to the foreign party). Additionally, parties can choose the applicable substantive law, thus sidestepping a country's fledgling commercial law that may not provide the predictability investors seek.<sup>578</sup> Finally, almost all types of arbitration proceedings remain confidential.<sup>579</sup> Through these controls over the dispute resolution process, parties appear able to insulate themselves, at least partially, from real and perceived local biases of national courts. In this way, parties see arbitration as a form of "private rule of law."<sup>580</sup>

### III. Demystifying tort law

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<sup>575</sup> 'Arbitration vs. Litigation: Making the Right Choice' (*Community* 2024) <<https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/arbitration-vs-litigation>> accessed 1 March 2024.

<sup>576</sup> Brandon Pimentel, 'Arbitration vs. Litigation: The Differences | Legal Blog' (*Thomson Reuters Law Blog* 4 October 2022) <<https://legal.thomsonreuters.com/blog/arbitration-vs-litigation-the-differences/>> accessed 1 March 2024.

<sup>577</sup> George Bermann, 'ARTICLES the ROLE of NATIONAL COURTS at the THRESHOLD of ARBITRATION\*' (2017) Section I and II <[https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=4018&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=4018&context=faculty_scholarship)>.

<sup>578</sup> Thomas M Franck, 'Some Psychological Factors in International Third-Party Decision-Making' (1967) 19 *Stanford Law Review* 1217.

<sup>579</sup> *Ibid*

<sup>580</sup> Shouhua Yu, 'Recognition and Enforcement of International Commercial Recognition and Enforcement of International Commercial Arbitration Awards Arbitration Awards' (2004) Conclusion section <[https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1057&context=stu\\_llm](https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1057&context=stu_llm)> accessed 27 January 2024.

Tort Law is the branch of law that majorly (in scope) deals with civil suits, except for disputes involving contracts. It is form of restorative justice whereby a claimant (or in this case, a disputant) seeks to remedy losses or injury by providing monetary compensation. Negligence torts are harms done to people through the failure to exercise a certain level of care, usually defined as a reasonable standard of care for instance, an accident is a standard example of negligence tort.<sup>581</sup>

When an individual decides to file a civil suit in a court of law, the court will ensure that the following elements are satisfied<sup>582</sup>;

- a) The plaintiff was owed duty of care.
- b) There was a breach of duty of care.
- c) The plaintiff suffered damages because of the breach.
- d) The damages suffered was not remote.

Generally, duty of care is an obligation to either do or not do something that will harm someone else. We all have a duty or obligation to act reasonably or refrain from certain actions so as not to cause injuries to other person. The development of duty of care are cited in,<sup>583</sup> Donoghue V Stevenson, provides a theoretical basis for duty of care and necessary to be familiar with the case. From this, you can identify who is your neighbor according to the neighbor principal.<sup>584</sup> In a case of Breach of duty of care by the defendant, instead of the plaintiff filling a civil suit, the court will give time so that the parties settle the matter among themselves by arbitration.

#### IV. Tort Reform Measures vis ADR and access to justice

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<sup>581</sup> Tushar Sharma, 'Introduction in the Complex Tapestry of Legal Systems around the World, the Law of Torts Occupies a Significant and Indispensable Role. Derived from the Latin Term "Tortum," Which Means "Wrong," Tort Law Pertains to Civil Wrongs That Result in Harm to an Individual, Their Property, or Their Rights.' (LinkedIn.com 14 September 2023) <<https://www.linkedin.com/pulse/unveiling-law-torts-understanding-liability-tushar-sharma>> accessed 1 March 2024.

<sup>582</sup> Richard A Buckley, 'Negligence—Key Elements to Establish a Negligence Claim' (Lexisnexis 15 October 2019) <<https://www.lexisnexis.co.uk/legal/guidance/negligence-key-elements-to-establish-a-negligence-claim>> accessed 1 March 2024.

<sup>583</sup> 'Donoghue v Stevenson Case Resources | Case Report' (Scottish Council of Law Reporting 2021) <<https://www.scottishlawreports.org.uk/resources/donoghue-v-stevenson/case-report/>> accessed 1 March 2024.

<sup>584</sup> Ibid.

Tort reform initiatives typically prioritize several key objectives, each addressing specific concerns within the civil justice system. These objectives may include Reducing frivolous lawsuits: Tort reform aims to deter the filing of meritless claims by implementing procedural hurdles, such as heightened pleading standards or mandatory pre-trial screenings; limiting liability exposure<sup>585</sup>: Proponents advocate for measures such as damage caps or joint-and-several liability reform to mitigate the financial burden on defendants and insurers. In Promoting predictability and consistency: Tort reform seeks to establish clear legal standards and guidelines to facilitate more consistent outcomes in tort cases, thereby enhancing judicial efficiency and reducing uncertainty.<sup>586</sup>

Tort reform encompasses a broad array of legislative and policy initiatives, each addressing distinct aspects of the civil justice system. Some common types of tort reform include damage caps: Statutory limits on the amount of compensatory or punitive damages that plaintiffs can recover in tort actions, intended to reduce liability exposure for defendants and insurers. Statutes of limitations: Time limits imposed by law on the period within which plaintiffs must file lawsuits, aimed at promoting efficiency and preventing stale claims.<sup>587</sup>

For joint-and-several liability reform: Changes to the rules governing apportionment of damages among multiple defendants, often to prevent defendants from being held disproportionately liable for damages caused by others. Offer of judgment rules: Procedural mechanisms allowing parties to make settlement offers or demands, with potential cost-shifting consequences for rejecting or accepting such offers, intended to encourage settlement and discourage frivolous litigation.<sup>588</sup>

## V. Examples of Cases Where Mandatory Arbitration Clauses Were Invoked

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<sup>585</sup> David Hyman and Charles Silver, 'Vanderbilt Law Review Vanderbilt Law Review Stupid Stupid' (2006) Introduction Section <<https://core.ac.uk/download/pdf/270263267.pdf>> accessed 1 March 2024.

<sup>586</sup> James Blumstein, Randall Bovbjerg and Frank Sloan, 'Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury' (1992) Abstract <<https://core.ac.uk/download/pdf/72838304.pdf>> accessed 1 March 2024.

<sup>587</sup> David Logan, 'Juries, Judges, and the Politics of Tort Reform' (2015) Abstract Section <<https://core.ac.uk/download/pdf/56706687.pdf>> accessed 1 March 2024.

<sup>588</sup> Larry Pressler and Kevin Schieffer, 'Joint and Several Liability: A Case for Reform Joint and Several Liability: A Case for Reform' (1988) Abstract <<https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=2716&context=dlr>> accessed 11 January 2024.

Numerous high-profile cases illustrate the impact of mandatory arbitration clauses on tort law and consumer rights. For instance, in the realm of consumer disputes, arbitration clauses have been invoked to prevent class-action lawsuits against corporations accused of deceptive practices, effectively shielding them from mass litigation and potentially limiting their financial liability. Similarly, in the employment context, mandatory arbitration agreements have been used to compel employees to arbitrate claims of discrimination, harassment, and wage violations, often leading to outcomes perceived as favorable to employers due to the lack of transparency and public scrutiny.<sup>589</sup>

Essentially, the intersection of mandatory arbitration and tort law underscores the tension between contractual freedom and fundamental principles of justice and accountability. As policymakers, legal scholars, and advocacy groups continue to debate the merits and drawbacks of mandatory arbitration, the need for transparency, fairness, and access to effective remedies remains paramount in shaping the future of dispute resolution in the modern legal landscape.<sup>590</sup>

## VI. Conclusion

Mandatory arbitration has emerged as a significant factor in shaping the evolution of tort law precedent, as courts grapple with the enforceability and implications of arbitration clauses in various contexts. Arbitration awards, which are typically final and binding, may establish precedents that influence future litigation outcomes and judicial interpretations of legal standards. However, the lack of appellate review and limited public access to arbitration decisions may undermine the development of robust legal precedent, raising concerns about consistency, transparency, and accountability within the legal system. Moreover, the proliferation of mandatory arbitration clauses across industries may create a fragmented landscape of legal standards and practices, further complicating efforts to promote uniformity and fairness in tort law jurisprudence.

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<sup>589</sup> Joel Valenti, 'The Case against Mandatory Consumer Arbitration Clauses' (*Center for American Progress* 2 August 2016) <<https://www.americanprogress.org/article/the-case-against-mandatory-consumer-arbitration-clauses/>> accessed 1 March 2024.

<sup>590</sup> Cynthia L Estlund, 'Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law' (2006) 155 *University of Pennsylvania Law Review* 379.

In summary, the effects of mandatory arbitration on tort reform extend beyond individual disputes, shaping the broader landscape of consumer rights, corporate accountability, and legal precedent. As policymakers, legal scholars, and advocacy groups grapple with the implications of mandatory arbitration, the need for thoughtful analysis, public debate, and evidence-based reforms becomes increasingly imperative in safeguarding the principles of fairness, justice, and accountability within our legal system.

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# THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN EVADING ILLEGAL EVICTION OF THE INDIGENOUS PEOPLE FROM THE NATURAL FORESTS

By Brian Kipkurui<sup>591</sup>

## *Abstract*

The continual unlawful expulsion of Indigenous communities from natural forests presents a significant danger not only for Indigenous peoples' rights but also for environmental conservation efforts. This article reviews ADR and its utility in resolving this fundamental problem. Social displacement is one of the areas that is looked at in the context of difficulties faced by the indigenous people in relation to eviction and the results that come with such eviction. In this regard, we explore ADR's role in evading illegal eviction of the indigenous people. It also discusses ADR mechanisms and their advantage in addition to the obstacles they have in their critical role. Furthermore, the article comprehensively presents more practical solutions that address the challenges faced by ADR in resolving eviction disputes. Through this comprehensive analysis of the ADR concept, this paper outplays the role ADR can play in evading the illegal eviction of indigenous people from natural forests.

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## I. Introduction.

Every year in Kenya, hundreds of indigenous families are forcibly removed by the government from their ancestral lands within natural forests, losing their homes, livelihoods, and cultural heritage due to illegal evictions such as the forcible eviction of the Ogiek from their lands in the Mau Forest<sup>592</sup>. These evictions violate the fundamental rights of indigenous communities and jeopardize the delicate balance of Kenya's fragile ecosystems, which the indigenous people tend to balance as they co-exist in the diverse ecosystem<sup>593</sup>. As Kenya grapples with this complex challenge, ADR emerges as a promising tool for preventing illegal evictions and safeguarding the rights of indigenous communities, having potential benefits such as flexibility, community-driven nature, and cost-effectiveness<sup>594</sup>. This article examines the potential of ADR in safeguarding indigenous groups' land rights and cultural heritage amid a wave of illegal evictions of indigenous communities from natural forests in Kenya. Can ADR be an effective tool to guard their lands and restore their connection to the forest? By examining ADR's strengths, obstacles, and ability for robust implementation in the Kenyan legal framework, we seek to answer this critical question.

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<sup>592</sup> Ogiek Case: Protection of an Indigenous Community in Kenya' (Amnesty International 25 June 2023)

<sup>593</sup> Kenya: Imminent forced eviction threatens indigenous communities' human rights and ancestral forests - IWGIA - International Work Group for Indigenous Affairs. (2014, January 9). [Www.iwgia.org. https://www.iwgia.org/en/kenya/1941-kenya-imminent-forced-eviction-threatens-indigenou.html](https://www.iwgia.org/en/kenya/1941-kenya-imminent-forced-eviction-threatens-indigenou.html)

<sup>594</sup> Kariuki Muigua, 'Preparing for the Future: ADR and Arbitration from an African Perspective Kariuki Muigua' (2023).

### III. Understanding the Context of Illegal Evictions in Kenya

#### a. Legal Framework

#### b. Constitutional Protections

The CoK, 2010, recognizes culture as the nation's foundation,<sup>595</sup> and it provides for the protection of cultural heritage<sup>596</sup>, respect for cultural diversity<sup>597</sup>, and rights regarding access to and control over spiritual and cultural sites. It also recognizes that community land includes ancestral lands and lands that hunter-gatherer groups have usually lived on.<sup>Further,</sup> it ensures that everyone's rights to land and property are protected<sup>598</sup>. The illegal evictions of the indigenous communities, therefore, are a violation of their land rights and their cultural rights.

### IV. The African Charter on Human and Peoples' Rights

It recognizes that every person is entitled to the right to property,<sup>599</sup> and where such interest in land wants to be acquired, there should be consent and adequate compensation. It also recognises the right to freedom of conscience<sup>600</sup>, which provides that every individual has a right to worship. It further provides for the right to culture,<sup>601</sup> outlining the right of people to participate in their culture. Through the eviction of the indigenous people from the natural forests, which have been their abode for many decades, the state violates the articles of the African Charter.

### V. Challenges Faced by Indigenous Communities

The fight for land rights that the Ogiek, Endorois and Sengwer communities in Kenya have had is the consequence of the historical dispossessions, which continue to manifest through complicated legal and bureaucratic hurdles. Knowledge of these obstacles is fundamental in evaluating ADR's capability of solving their own aggravations.

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<sup>595</sup> Article 11, CoK 2010.

<sup>596</sup> Ibid 4.

<sup>597</sup> Ibid.

<sup>598</sup> Article 40, CoK 2010.

<sup>599</sup> Article 14, ACHPR.

<sup>600</sup> Ibid, Article 8.

<sup>601</sup> Ibid, Article 17(2) & (3).

## a. The Historical Dispossession

Ogieks, historically inhabiting the Mau Forest complex, faced forced evictions and assimilation policies under British colonial rule and subsequent Kenyan governments<sup>602</sup>. Despite displacement and marginalization, they continue to fight for recognition of their customary land rights. Before 1973, the Endorois lived within the Lake Bogoria basin, practising traditional pastoralism and depending on the land for spiritual and cultural well-being<sup>603</sup>. However, they were forcibly evicted to create a wildlife reserve, leading to decades of displacement and legal battles, which they eventually won, and the State was ordered to compensate and restitute them for their land<sup>604</sup>. However, struggles for full land rights continue! The Sengwer people have inhabited the Embobut-Maralal forest region for generations, relying on its resources for their livelihoods and cultural practices<sup>605</sup>. However, they have faced numerous evictions due to conservation initiatives and government development projects, often deemed discriminatory and lacking proper consultation<sup>606</sup>.

### VI. Lack of formal documentation

These communities primarily rely on customary land tenure systems, passed down through generations orally, lacking formal documentation required for legal recognition under the Land Act 2012<sup>607</sup>, read with the Community Land Act<sup>608</sup>.

### VII. Complex legal procedures

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<sup>602</sup> Dominic Kirui, 'Kenya's Ogiek People Fight on against Eviction from Mau Forest' (Al Jazeera 24 November 2023)

<sup>603</sup> Maurice Makoloo and Yash Ghai, 'Report Kenya: Minorities, Indigenous Peoples and Ethnic Diversity' (2005)

<sup>604</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (2010) ACHPR 276

<sup>605</sup> 'Kenya: Sengwer Evictions from Embobut Forest Flawed and Illegal' (www.amnesty.org 15 May 2018)

<sup>606</sup> Ibid 14

<sup>607</sup> Section 37, Land Act, 2012

<sup>608</sup> Section 7 of the Community Land Act, 2016



Registering customary land rights under the Act involves lengthy and expensive procedures, often inaccessible to resource-limited communities with limited legal representation<sup>609</sup>.

#### VII. Lack of awareness

Most indigenous groups still don't know about the new law or how to apply for land registration, even though the Act came into effect in 2016<sup>610</sup>.

#### VIII. Power imbalances

Marginalization and lack of political representation make it difficult for these communities to effectively advocate for their rights and challenge policies detrimental to their land tenure security<sup>611</sup>.

#### IX. The Consequences of the Illegal Evictions

The consequences of evicting indigenous people from natural forests can be profound and multifaceted, affecting their livelihoods, cultural practices, and connection to their ancestral lands in various ways:

#### IX. Livelihoods

Indigenous communities such as the Ogieks and the Sangwer rely on forests for hunting, fishing, gathering medicinal plants, and practicing traditional agriculture<sup>612</sup>. Evictions can disrupt these activities, leading to loss of income and food insecurity<sup>613</sup>. Forced displacement often pushes indigenous people into marginal lands or urban areas where they may struggle to find employment opportunities that align with their traditional skills and knowledge.

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<sup>609</sup> 'Is Kenya's New Land Law Strengthening Indigenous Peoples' Land Rights? - IWGIA - International Work Group for Indigenous Affairs' (www.iwgia.org 14 August 2019) <https://www.iwgia.org/en/kenya/3387-kenya-community-land-act.html>

<sup>610</sup> Ibid 18

<sup>611</sup> 'Regional Disparities and Marginalisation in Kenya' <https://library.fes.de/pdf-files/bueros/kenia/09859.pdf>

<sup>612</sup> Desmond T Owuoth, 'The Role of Legal Aid in the Realisation of the Rights of Indigenous Peoples in Kenya' (erepository.uonbi.ac.ke 1 November 2016) <http://erepository.uonbi.ac.ke/handle/11295/99727> accessed 15 February 2024.

<sup>613</sup> Jebiwott, A., Morara Ogendi, G., Kazaba, P.K., Akintunde Alo, A. (2023). An Assessment of the Process and Impacts of Evictions on Livelihoods in Mau Forest, Kenya. In: The Palgrave Handbook of Global Social Change. Palgrave Macmillan, Cham. [https://doi.org/10.1007/978-3-030-87624-1\\_354-1](https://doi.org/10.1007/978-3-030-87624-1_354-1)

## A. Cultural Practices

Forests are not just sources of material resources for indigenous communities but also integral to their cultural identity and spiritual beliefs<sup>614</sup>. Evictions sever the connection between indigenous people and their cultural heritage, disrupting ceremonies, rituals, and other cultural practices tied to the forest<sup>615</sup>. Traditional knowledge about the forest, passed down through generations, is at risk of being lost when communities are displaced. This knowledge encompasses an understanding of plant and animal species, the medicinal properties of plants, and sustainable resource management practices.

## B. Connection to Ancestral Lands

Indigenous people have deep ancestral connections to their lands, including forests<sup>616</sup>. Evictions sever this connection, leading to a loss of identity and sense of belonging. For many indigenous communities, the forest is not just a place where they live but a part of their identity and history. Displacement can lead to a sense of displacement and alienation from their cultural heritage<sup>617</sup>.

## C. Loss of Biodiversity and Environmental Impact

Indigenous peoples often act as land protectors, practising sustainable resource management that helps preserve biodiversity and maintain ecosystem balance<sup>618</sup>. Evictions can lead to increased deforestation, habitat destruction, and biodiversity loss as land is converted for commercial purposes<sup>619</sup>. Indigenous communities often also possess valuable traditional ecological knowledge

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<sup>614</sup>Siham Drissi, 'Indigenous Peoples and the Nature They Protect' (UNEP8 June 2020)

<sup>615</sup> Ibid 23

<sup>616</sup> Elizabeth Hewitt, 'For Indigenous Peoples with Deep Ties to the Land, Climate Change Is Personal' (Reasons to be Cheerful28 August 2023)

<sup>617</sup> Ibid 25

<sup>618</sup> Tanya C Tran, Natalie C Ban and Jonaki Bhattacharyya, 'A Review of Successes, Challenges, and Lessons from Indigenous Protected and Conserved Areas' (2019) 241 *Biological Conservation* 108271.

<sup>619</sup> Alice Jebiwott and others, 'An Assessment of the Process and Impacts of Evictions on Livelihoods in Mau Forest, Kenya' [2023] Springer eBooks 1.

contributing to biodiversity conservation and sustainable land management<sup>620</sup>. Displacement can result in the loss of this knowledge, further exacerbating environmental degradation.

Overall, evictions of indigenous people from natural forests not only threaten their immediate well-being and livelihoods but also have broader implications for cultural heritage, biodiversity conservation, and sustainable land management. Recognizing and respecting indigenous land rights and involving indigenous communities in decision-making is essential to mitigate these negative consequences and promote equitable and sustainable development.

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<sup>620</sup> Ndidzulafhi Innocent Sinthumule, 'Traditional Ecological Knowledge and Its Role in Biodiversity Conservation: A Systematic Review' (2023) 11 *Frontiers in Environmental Science* <https://www.frontiersin.org/articles/10.3389/fenvs.2023.1164900>

## X. Exploring the Alternative Dispute Resolution (ADR) Mechanisms

### a. What is ADR?

While there is no explicit definition of the ADR mechanisms, it is important to note that the Constitution of Kenya, 2010, identifies the following forms of ADR: mediation reconciliation, arbitration, and traditional justice systems<sup>621</sup>.

### b. Why ADR?

In the past and still up to recent times, we have been witnesses of illegal eviction of the indigenous communities from their ancestral lands, for instance, the Ogieks from the Mau forests, the Endorois from the Lake Bogoria basin, and the Sengwer from the Embobout forest. In all these instances of evictions, the local communities have engaged in litigation. It has all pointed to little or no success at all, as evidenced by the enforceability of the litigation outcomes, as the people who are to enforce the same are the same people who are evicting these people; as they say, you cannot beat the system! As illustrated by the Endorois case<sup>622</sup> where, the African Commission gave many recommendations, and 14 years later, only one recommendation has been implemented: one to register the Endorois Welfare Community<sup>623</sup>. Another obstacle such litigation faces is the backlog of court cases, negatively impacting its success as cases take very long in the courts<sup>624</sup>. As it was in the case of the Endorois, where it was filed in 2003 in the African Commission Court, and the ruling was delivered in 2009<sup>625</sup>. It is against such backdrops that the ADR comes in to mitigate such challenges and offers a platform to resolve illegal eviction disputes.

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<sup>621</sup> Article 159(2)(c)

<sup>622</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (2010) ACHPR 276

<sup>623</sup> 'ESCR-Net Stands with Endorois and Ogiek Communities: Urging Justice from the Kenyan Government' (ESCR-Net2 February 2024).

<sup>624</sup> Kariuki Muigua, 'Empowering Kenyan People through Alternative Dispute Resolution Mechanisms' [2015],79.

<sup>625</sup> 'ESCR-Net Stands with Endorois and Ogiek Communities: Urging Justice from the Kenyan Government' (ESCR-Net2 February 2024).

## XI. Legal Framework of ADR in Kenya

### a. Constitution of Kenya, 2010

The CoK 2010<sup>626</sup> mandates that courts be guided by the principle of ADR when exercising judicial authority. This implies that before courts consider hearing cases, they should consider using ADR to resolve the disputes and resort to courts when such methods prove futile.

### b. Charter of the United Nations

The Charter of the United Nations<sup>627</sup> provides the foundation for implementing ADR methods in conflicts between parties, whether States or individuals. It gives a precise description of conflict management techniques. It describes the several conflict resolution techniques that participants in a disagreement or conflict can use<sup>628</sup>. Being a state party to the United Nations and by virtue of article 2(6) of the constitution of Kenya, the above law forms part of the Kenyan laws.

## XII. Forms of ADR and their role in evading illegal evictions of indigenous communities

### a. Mediation

The Civil Procedure Act<sup>629</sup> has defined mediation as an unofficial, non-adversarial procedure in which a neutral mediator facilitates the settlement of a disagreement between parties but excludes attempts by a judge to mediate a conflict during connected court procedures<sup>630</sup>. It has been stated that one of the best and most efficient ADR techniques for settling disputes involving land and natural resources is mediation<sup>631</sup>. Mediation, except court-manded mediation, is usually conducted informally. Therefore, it will allow for more engagement between parties to a dispute as opposed to the formal litigation process, which tends to limit parties' involvement due to its

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<sup>626</sup> Article 159(2)(c)

<sup>627</sup> Article 33

<sup>628</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

<sup>629</sup> Cap 21, Laws of Kenya

<sup>630</sup> Ibid Section 59B & D

<sup>631</sup> Alvin Gachie, 'Natural Resource Dispute Resolution: Promoting Peace and Security through Alternative Dispute Resolution' (2017).

strict adherence to the rules. Mediation also entails the involvement of neutral third parties who tend to help parties not only realize their shared interests and thereby maximize their shared benefits but also address the challenges faced altogether<sup>632</sup>. Given that mediation involves parties giving their solutions with the mediator's help, the solutions that are agreed upon are generally out of both parties' acceptance<sup>633</sup>, and therefore, the conflicting parties will always enforce what they agreed on as there is always a win-win situation as opposed to litigation where only one-party wins.

Mediation also encourages a situation where relationships are restored to their former status quo<sup>634</sup>. A successful application of mediation can be seen in the Olkaria IV Project, where the KenGen and Project Affected Persons (PAPs) used mediation to resolve their conflict. In turn, mediation neutralized their conflicts, repaired their relationships, improved PAP's livelihoods and smoothed project operations<sup>635</sup>. From the foregoing, we can now conclude that mediation will play a significant role in resolving the illegal eviction dispute.

#### A. Arbitration

The Arbitration Act 1995<sup>636</sup> defines arbitration as every arbitration, regardless of whether a permanent arbitral body runs it or not<sup>637</sup>. Arbitration has also been described as a private, consensual procedure whereby disputing parties consent to take their complaints to a third party for settlement<sup>638</sup>. As argued by Njuguna,<sup>639</sup> arbitration in the management of community land disputes is tied to the legal process, and arbitral awards are binding and can be appealed against, resulting in delays in resolving such conflicts. He further argues that expertise in the field is required to be

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<sup>632</sup> Francis Kariuki, Geoffrey Kerecha, and James Kirwa, Handling Extractives Grievances in Kenya: A Guide for Judicial Officers (Extractives Baraza 2019)66.

<sup>633</sup> D Kariuki Muigua, 'Resolving Environmental Conflicts through Mediation in Kenya' (repository.uonbi.ac.ke2011)

<sup>634</sup> Nadja Alexander, 'The Mediation Metamodel: Understanding Practice' (2008) 26 Conflict Resolution Quarterly 97.

<sup>635</sup> Lilian Namuma S Kong'ani, Raphael G Wahome, and Thuita Thenya, 'Managing Geothermal Project Implementation Conflicts through Mediation: A Case of Olkaria IV Project, Nakuru County, Kenya' (2022) 5 Journal of Sustainability, Environment, and Peace 96.

<sup>636</sup> Laws of Kenya, No.4 of 1995.

<sup>637</sup> Ibid Section 3

<sup>638</sup> Farooq Khan, *Alternative Dispute Resolution*, A paper presented to Chartered Institute of Arbitrators-Kenya Branch

<sup>639</sup> Arbitration as a tool for management of Community Land Conflicts in Kenya. A research paper was submitted in partial fulfilment of the award of a Master of Laws Degree at the University of Nairobi, School of Law, in November 2018.

an arbitrator, something ADR tries to evade, and thereby concludes that arbitration is ineffective when resolving community land disputes and, in our case, indigenous people's land. Due to the informal nature of the indigenous communities' lifestyle, formal arbitration as an ADR method might not be successful compared to mediation and TDRM due to its legal nature. However, informal arbitration, as Muigua discusses,<sup>640</sup> where community leaders act as arbitrators and thereby use the local language and rely on the communities' customs and values, provides some form of public legitimacy, thus providing a sense of local ownership of the process and the outcomes<sup>641</sup> and therefore can foster dispute resolution.

## B. Traditional Dispute Resolution Mechanisms

During the pre-colonial period, local communities had their way of dealing with conflicts<sup>642</sup>. The disputants could engage in discussions if a dispute emerged. In other cases, the Council of Elders or aged men and women can mediate the dispute as third parties. Furthermore, elders and close family members could mediate on disputes and counsel disputants on the importance of living in harmony with one another<sup>643</sup>. It has also been noted that this practice is indeed very effective, as scholars state that court litigation is only but a fraction of disputes that arise<sup>644</sup>. This mechanism has been employed since time immemorial by the indigenous communities such as the Ogiek, Endorois and the Sangwer. Given that this form of ADR uses the customs and beliefs of a particular community, it will receive acceptance, and therefore, any outcome that arises will be taken. As Muigua notes<sup>645</sup>, TDRM has shown to be quite successful in settling disputes, particularly those involving natural resources and pastoralist communities in Kenya.

These disputes are unsolvable because of their intricate cultural aspects, and the official conflict resolution procedures might not deal with the root reasons of the problem<sup>646</sup>. Among its advantages are its flexibility, cost-effectiveness, expedience, fostering of relationships, and non-

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<sup>640</sup> Kariuki Muigua, *Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation*.

<sup>641</sup> FAO, 'Negotiation and mediation techniques for natural resource management,'

<sup>642</sup> Kariuki Muigua, *Traditional Dispute Resolution Mechanisms Under Article 159 Of the Constitution Of Kenya 2010*

<sup>643</sup> *Ibid* 51.

<sup>644</sup> Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law", *Journal of Legal Pluralism*, (1981) Vol. 19, p.3.

<sup>645</sup> Kariuki Muigua, *Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya*.

<sup>646</sup> *Ibid* (n 54).

coerciveness, which result in mutually satisfying outcomes<sup>647</sup>. They are, therefore, best suited for improving public access to justice and reducing court case backlogs. TDRM will, therefore, play a significant role in preventing the illegal eviction of the indigenous communities from the natural forests in Kenya. However, there exists a limitation on the use of TDRM. The CoK provides mandatory terms that the TDR mechanism will not be used in a way that is in contravention of the Bill of Rights or repugnant to morality and justice<sup>648</sup>. TDRM should also not contradict the Constitution or any other written law.

## XII. Negotiations

Refers to a process where parties get together to identify and talk about the issues at hand in order to get to a mutually agreeable resolution without the assistance of a third party<sup>649</sup>. Interest-based negotiation, positional negotiation, and principled negotiation are some of the approaches to negotiation<sup>650</sup>. Positional negotiation is linked with distancing individuals from the issue, emphasizing interests over positions, creating opportunities for reciprocal benefit and demanding objective standards<sup>651</sup>. Instead of focusing too much on the reasons why the disagreement occurred, the intention is to develop solutions that meet everyone's needs as well as their own<sup>652</sup>. Conversely, principled negotiation resolves disputes based on their merits as opposed to a back-and-forth process centred on what each party promises to and won't do. It implies that a negotiator should seek mutual gains and that when different interests conflict, they should be encouraged to reach a decision based on fair criteria apart from either party's desires<sup>653</sup>. Interest-based negotiation moves the conversation from positions to interests, enabling the parties to consider a variety of innovative solutions in order to reach a solution that will meet their requirements and interests<sup>654</sup>.

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<sup>647</sup> Ibid (n 54).

<sup>648</sup> Article 159(3)

<sup>649</sup> Kariuki Muigua, *Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation*

<sup>650</sup> R. Fisher, et al., 'Getting to Yes: Negotiating an Agreement without Giving In', *op cit*, pp. xxvi-xxvii

<sup>651</sup> Roger Fisher and Ury, W., 'Getting to Yes-Negotiating Agreement Without Giving in' *Op cit.*, p. 42

<sup>652</sup> Ibid n 56

<sup>653</sup> Ibid n 61

<sup>654</sup> UNESCO-IHP, 'Alternative Dispute Resolution Approaches And Their Application In Water Management: A Focus On Negotiation, Mediation And Consensus Building'



Due to their unstructured nature and absence of formal procedures, negotiations are viewed as preferable. This suggests a framework that takes into account the particulars of each negotiation<sup>655</sup>. This is significant because it means that parties can decide what is best for them in a particular situation because of the flexibility of the process. To enable parties to develop innovative solutions, negotiation hands them power over the process and the final product<sup>656</sup>. Through collaborative negotiation, Parties might try to reach a solution that satisfies them both and makes them feel like victors<sup>657</sup>. Collaboration during negotiations yields several benefits, including enhanced relationships, increased likelihood of establishing trust and respect, boosted self-esteem, less stress, increased enjoyment, and more satisfied outcomes<sup>658</sup>. Therefore, with a correct approach, negotiation has much potential in resolving disputes concerning the illegal evictions of the indigenous people from the natural forests as it involves ensuring the communities participate in decision-making where such communities are afforded a chance to raise their concerns in the forum and have them addressed as parties seek to reach a consensus. There, at times, arises a situation where both parties cannot agree on some issues and thereby reach a deadlock. When such is arrived at, third parties called mediators are always called upon to help the parties comprise their stands<sup>659</sup>. This is referred to as mediation, as discussed above.

#### A. Challenges facing ADR in Kenya in relation to resolving eviction disputes

Despite ADR's capabilities in resolving complex land disputes in Kenya, such as the illegal eviction of the indigenous people, its full realization is crippled with several challenges. This includes:

#### B. Power imbalances

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<sup>655</sup> FAO, 'Alternative Conflict Management: The Role of Alternative Conflict Management in Community Forestry.'

<sup>656</sup> Muigua K, 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation'

<sup>657</sup> A. French, 'Negotiating Skills,' (Alchemy, 2003), p. viii.

<sup>658</sup> Ibid n 66

<sup>659</sup> M. Mwangi, 'Conflict in Africa; Theory, Processes and Institutions of Management', (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

Power imbalance is a state of imbalance between the parties wherein one is comparatively powerless to protect its own interests<sup>660</sup>. Parties to ADR, especially in our context of illegal eviction, are often not equal. This state of inequality affects the resulting outcome of ADR, as the powerful party has a better chance of controlling the outcome to favour its interests at the expense of the other party. As such, power imbalances hinder the effectiveness of ADR.

### C. Lack of enforcement mechanisms

To be considered effective, any outcome must be enforced. Without enforcement mechanisms, ADR cannot be said to be effective. As such, it does not have a way of ensuring that its outcomes are followed. However, some types of ADR, like court-mandated mediation and arbitration, have some form of enforcement due to their binding nature<sup>661</sup>. The other types of ADR, like private mediation, negotiation, and TDRMs, continue to face the challenge of enforcement, which hinders ADR's effectiveness. Moreover, there are limited numbers of mediators, arbitrators, and elders who are experts in the TDRMs. This has hindered ADR's effective implementation.

#### I. Potential cultural and language barriers

Most indigenous people have a deeply rooted way of life with their own norms, values, and customary laws. Some methods of ADR might conflict with their ways of resolving conflicts and thereby face some resistance from the people<sup>662</sup>. For instance, formal ADR methods may be resisted as people prefer resolving disputes informally through elders.

Language may also pose a challenge as many indigenous communities are used to their local dialect, and thereby, arbitrators, mediators, and conciliators may be subjected to some resistance

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<sup>660</sup> 'What Is Power Imbalance | IGI Global' (www.igi-global.com) <https://www.igi-global.com/dictionary/power-imbalance/75081>

<sup>661</sup> Muigua K, 'Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future.'(2018)

<sup>662</sup> Osi, Carlo, "Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods In Lieu Of Litigation." *Cardozo J. Conflict Resol.* 10 (2008): 163.

from the communities as most of them will have a challenge in communicating with the members of the communities.

## 2. Limited Awareness and Trust

Many people in the indigenous communities are still unaware of the existence of other ADR methods, such as mediation, arbitration and conciliation. They also might not trust the formal institutions that offer the ADR methods. They would often prefer informal dispute resolution within themselves whenever a dispute arises. This unawareness and lack of trust eventually hinder the successful implementation of ADR methods.

## 3. Resource Constraints

Inadequacy of financial resources can impede the successful implementation of ADR mechanisms within the rural settings where indigenous communities reside<sup>663</sup>. This includes funding the mediators, setting up mediation centres and providing logistical support for the dispute resolution sessions. Such will compromise the success of the ADR mechanisms.

### Conclusion and Recommendations.

In conclusion, it is clear that ADR has an undeniable role in the prevention of illegal evictions of indigenous communities from natural forests because of its nature. In this article, we have analysed the problems indigenous communities face in the context of forced evictions, i.e., power imbalances and indigenous people's lack of formal documentation, and the consequences of unlawful eviction, i.e., adverse effects on the indigenous people's livelihoods and biodiversity loss. In addition, this article has also considered the ADR mechanisms and whether they could solve the identified problems, as well as the overall consequence of eviction. Using ADR processes adapted for each unique cultural setting, we bridge the gaps, build communication channels, and empower indigenous people to assert their rights and safeguard their ancestral territory. With inclusive mechanisms highlighting the importance of mutual respect and tolerance, ADR will have

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<sup>663</sup>Muigua, K. "Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems." Nairobi: Published online (2017).

the capability to prevent forcible eviction and, in addition, will be able to send a message of lasting peace and harmony.

It is critical that ADR is developed and supported further in the advancement of future ADR by continuing with capacity building, raising awareness, strengthening the enforcement mechanisms and making sure it is well accepted. There must be a consideration for collaboration among all stakeholders to fully benefit from ADR, thus prohibiting such illegal evictions and thereby upholding indigenous peoples' rights.

From the foregoing challenges, to enhance the effectiveness of ADR mechanisms in preventing the illegal eviction of indigenous people from the natural forests, I recommend the following:

1. There is a need to implement training programs for ADR practitioners on recognizing and addressing power imbalances during the resolution process. Both parties should also be accorded opportunities to voice their concerns and interests without fear of reprisal with the help of neutral facilitators.
2. Accordingly, the legal enforcement of ADR results is also very much needed, especially where both parties voluntarily took part in the ADR. Doing this might be very helpful, both to the ADR providers and judicial institutions, to enable the parties to the process to enforce ADR agreements.
3. The government should also fund training schemes to increase the availability of appropriately trained ADR specialists. Establish mentorship programmes that will see mature ADR professionals impart their knowledge and skills to new ones trying to be practitioners in the field.
4. The profession should have good cultural sensitivity training to understand and respect the way of nature of the indigenous people better. The community leaders, as well as the elders, should also be engaged in facilitating tasks to eliminate the cultural gap and make the methods of ADR more accepted.
5. Media-based awareness campaigns ought to be launched to educate different social segments about the existence of formal ADR methods and their benefits. Organizing community forums, workshops, and outreach events may be a key factor in addressing the myths, misconceptions and the lack of trust in the ADR process.

6. Advocate for increased government funding and support through ADR programs and establish partnerships with agencies, donors, philanthropic organizations, and corporate sponsors to share additional resources for ADR training, infrastructure development and outreach activities.

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# UNLOCKING OPPORTUNITIES: THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS IN THE ERA OF CLIMATE BONDS AS A MEANS OF FACILITATING ENVIRONMENTAL JUSTICE

*\*By Christopher Kinyua Mwai<sup>664</sup>*

## *Abstract*

*Over recent decades climate change has posed itself as the next existential threat to human existence. In the wake of these escalating environmental challenges, the pursuit of environmental justice has emerged as a paramount objective. This paper examines the pivotal and critical role of Alternative Dispute Resolution (ADR) mechanisms within the contemporary landscape of climate finance, particularly in the context of climate bonds. As growing and developing nations increasingly turn to climate bonds as a financial instrument for sustainable development, the integration of ADR methodologies presents an opportunity to address disputes and challenges arising from environmental initiatives funded by the proceeds of climate bonds.*

*Drawing upon a legal framework and already established practices, this paper explores the synergistic potential between the ADR and climate bonds in fostering environmental justice. By providing a flexible and consensual platform for conflict resolution, ADR mechanisms offer stakeholders a forum to voice concerns, negotiate solutions, and ensure equitable outcomes in the allocation, development, evolution, and management of climate financial resources. Moreover, the sound utilization of ADR in conjunction with climate bonds not only facilitates expedited dispute resolution but also enhances transparency, accountability, and stakeholder engagement in environmental decision-making processes.*

*Furthermore, this paper delves into the practical challenges associated with the green bonds sector, including issues of greenwashing, and lack of clear reporting and performance tracking metrics. The explosive growth of green bonds in the capital markets is increasingly attracting attention from investors<sup>665</sup>, this surge is poised to create challenges as is the case for any human interaction. These challenges slow down the development and evolution of green bonds.*

*In conclusion, this paper advocates for a paradigm shift toward a holistic approach to environmental justice, wherein ADR serves as a catalyst for fostering consensus, resolving conflicts, and promoting*

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<sup>665</sup> World Bank, what are Green Bonds? (World Bank 2023).

*inclusivity within the burgeoning landscape of climate finance. By harnessing the synergies between ADR and climate bonds, policymakers, practitioners, and stakeholders can unlock new opportunities for advancing environmental sustainability and social equity in the face of global climate challenges.*

## 1.0 Introduction

### 1.1 What are Bonds?

A bond is a form of debt security, which is a legal contract for money owed that can be bought and sold between parties.<sup>666</sup> A bond can also be termed as an investment security where an investor lends money to a company or a government for a set period in exchange for regular interest payments, once the bond reaches maturity, the bond issuer returns the investor's money.<sup>667</sup>

Issuers of bonds can be private companies, supranational institutions (such as multilateral banks), and public entities (municipal, state, or federal).<sup>668</sup> Different issuers of bonds have different types of bonds that are influenced by different factors including; purpose and use of funds, risk tolerance, interest rate, market condition and demand, tax consideration, project-specific requirements, and regulatory compliance.<sup>669</sup>

Different bonds exist to serve different purposes, they include; Government Bonds, issued by a public entity to finance its activities; Corporate Bonds, issued by a company for either institutional investors (banks, hedge funds among others) and retail investors; and Multilateral Development Bank Bonds, issued by multilateral development banks and other supranational or international agencies such as World Bank.<sup>670</sup>

### 1.2 Understanding Green Bonds

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<sup>666</sup> Ibid

<sup>667</sup> E. Napolitano & B. Curry, 'Fixed-Income Basics: What Is A Bond?' (2021) Forbes Advisor <https://www.forbes.com/advisor/investing/what-is-a-bond/> accessed 13 February 2024.

<sup>668</sup> World Bank, What are Green Bonds? (World Bank 2023).

<sup>669</sup> Stanton E., 'Types of Bonds: Seven Types of Bonds Explained' The Street [Types of Bonds: 7 Bond Types Explained - TheStreet](#) accessed 13 February 2024

<sup>670</sup> World Bank, What are Green Bonds? (World Bank 2023).

A green bond is alternatively known as a climate bond. A green bond is a debt security that is used to raise capital specifically to support climate-related environmental projects.<sup>671</sup> Green bonds can also be referred to as fixed-income instruments whose proceeds are earmarked exclusively for projects with environmental benefits, mostly related to climate change mitigation or adaptation but also natural resource depletion, loss of biodiversity, and air, water, or soil pollution.<sup>672</sup> The specific use and objective of green bonds distinguish them from other types of bonds, they enable capital-raising and investment for new and existing projects with environmental benefits.<sup>673</sup>

The key differentiator between a green bond and a conventional bond is the underlying project that is financed with the proceeds. Green bonds are issued exclusively to finance projects that positively impact the environment. On the other hand, conventional bonds are primarily issued to finance general projects, general working capital purposes or refinance existing debt.<sup>674</sup>

Green bonds deliver several benefits to both issuers and investors, including; enhanced risk management and improved long-term financial returns, addressing climate risk, a chance to direct capital to climate change solutions, investments in green bonds match long-term liabilities helping build a sustainable society for pensioners to retire into for investors; and investor diversification across regions and types, lower cost of capital, stickier pool of investors, reputational benefits and tighter yields for issuers.<sup>675</sup>

Today, more than 50 countries have issued green bonds, with the United States being the largest source of green bond issuances. According to the organization Climate Bonds Initiative, global green bond issuance in 2020 was estimated to be \$250 billion.<sup>676</sup> Over the last decade,

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<sup>671</sup> Ibid

<sup>672</sup> 'Green Bonds' (2024) NSE (Nairobi Securities Exchange) <https://www.nse.co.ke/green-bonds/#:~:text=Green%20Bonds%20are%20fixed%20income,air%2C%20water%20or%20soil%20pollution> accessed 17 February 2024

<sup>673</sup> 'Green Bond Principles,' ICMA (International Capital Market Association) <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/green-bonds/green-bond-principles/> accessed 17 February 2024

<sup>674</sup> 'Green Bonds,' CFI Team ( Corporate Finance Institute) <https://corporatefinanceinstitute.com/resources/esg/green-bond/> accessed on 17 February 2024

<sup>675</sup> 'Green Bonds' (2024) NSE (Nairobi Securities Exchange) <https://www.nse.co.ke/green-bonds/#:~:text=Green%20Bonds%20are%20fixed%20income,air%2C%20water%20or%20soil%20pollution> accessed 17 February 2024

<sup>676</sup> Ibid

green bond issuance has increased exponentially, reaching a value of nearly \$500 billion worldwide in 2022 and becoming a key instrument to hedge climate change.<sup>677</sup>

### 1.3 Climate Bonds as a Means for Achieving Environmental Justice

Environmental justice is 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 policies.<sup>678</sup> Fair treatment means that no population bears a disproportionate share of negative environmental consequences resulting from industrial, municipal, and commercial operations or from the execution of federal, state, and local laws; regulations; and policies.<sup>679</sup>

Climate bonds are one of the strategies that helps target redistribution of the gains of a warming earth around the world to offset the losses of global warming, overall, helping map climate justice within society, between countries, and over time finding a targeted fair, just and feasible climate change benefit transfers and burden sharing strategy.<sup>680</sup> Climate bonds help to enact intergenerational fairness: bonds finance today's climate mitigation through an intertemporal fiscal policy mix backed by a carbon tax. As a debt instrument, by which investors lend money to an entity, bonds enable the borrowing of funds from the populace for a defined period at a variable or fixed interest rate. Over time, climate bonds offer an intergenerational climate change burden-sharing strategy. This current generation can raise funds via debt that is paid back by future generations who inherit a favorable climate in lieu.<sup>681</sup>

Climate change impacts are felt unevenly within countries due to structural inequalities based on factors such as race, gender, and socioeconomic status. For instance; women, persons living with disabilities, as well indigenous people are disproportionately affected because they often

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<sup>677</sup> 'Green Bonds World-Wide Statistics & Facts,' (2023) Statista Research Department <https://www.statista.com/topics/9217/green-bonds-market-worldwide/#topicOverview> accessed 17 February 2024

<sup>678</sup> 'What is Environmental Justice?' United States Department of Energy, Office of Legacy Management <https://www.energy.gov/lm/what-environmental-justice#:~:text=Environmental%20justice%20is%20the%20fair,laws%2C%20regulation%2C%20and%20policies> accessed on 17 February 2024

<sup>679</sup> Ibid

<sup>680</sup> 'Financing Climate Justice: Taxation and Bonds Strategy,' (2022) The FinReg Blog <https://sites.duke.edu/thefinregblog/2022/03/03/financing-climate-justice-taxation-and-bonds-strategy/> accessed on 17 February 2024

<sup>681</sup> Ibid.

have few resources to adapt to abrupt changes in climate conditions. Green bonds address these structural inequalities by funding projects that benefit marginalized groups. For instance, investing in renewable sources of energy such as wind and solar in underprivileged and underserved areas ensures access to clean energy for these groups.

Green bonds are commonly used to finance projects including; energy efficient projects, renewable energy projects, pollution prevention and control projects, natural resources and land management projects, clean transportation projects, wastewater and water management projects, and green building projects.<sup>682</sup> These projects recognized under the Green Bond Principles (GBP) which are a set of voluntary guidelines framing the issuance of green bonds encourage transparency, disclosure, and integrity in the development of the green bond market.<sup>683</sup> These guidelines and principles help to guarantee distribution and issuance of proceeds of green bonds adhere to the concept of environmental justice.

Also, by directing green bond proceeds toward projects in low-income communities, it can reduce disparities in climate resilience and adaptation. In conclusion, climate bonds bridge the gap between environmental projects and capital markets, promoting sustainable development while considering equity and justice.<sup>684</sup>

## 2.0 Alternative Dispute Resolution (ADR) Mechanisms

Alternative dispute resolution 'ADR' refers to any method of resolving disputes without litigation.<sup>685</sup> ADR is an alternative to litigation as a method of resolving conflicts. ADR often

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<sup>682</sup> 'Green Bonds,' CFI Team (Corporate Finance Institute)  
<https://corporatefinanceinstitute.com/resources/esg/green-bond/> accessed on 17 February 2024

<sup>683</sup> 'Green Bond Principles,' ICMA (International Capital Market Association)  
<https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/green-bonds/green-bond-principles/> accessed 17 February 2024

<sup>684</sup> 'What you Need to Know About IFC's Green Bonds,' (2021) World Bank  
<https://www.worldbank.org/en/news/feature/2021/12/08/what-you-need-to-know-about-ifc-s-green-bonds> accessed 17 February 2023

<sup>685</sup> 'Alternative Dispute Resolution,' Cornell Law School  
[https://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](https://www.law.cornell.edu/wex/alternative_dispute_resolution) accessed 19 February 2024

employs the services of a neutral third party to help the disputed parties come to an agreement. The most famous ADR methods are; mediation, arbitration, negotiation, and conciliation.<sup>686</sup>

All ADR methods have common characteristics which include enabling the parties to find admissible solutions to their conflicts outside of traditional legal/court proceedings, but are governed by different rules.<sup>687</sup> This paper concentrates on Mediation and Arbitration in the context of the opportunities provided to the two ADR mechanisms in the era of climate bonds as a means for achieving climate justice.

In the context of mediation and arbitration, an alternative dispute resolution mechanism is a process by which a neutral third party, a mediator or arbitrator helps parties who are embroiled in a dispute come to an agreement.<sup>688</sup>

## 2.1 Mediation

Mediation means the informal and non-adversarial process conducted physically or virtually where a mediator encourages and facilitates the resolution of a dispute between two or more parties but does not include any attempt by a judge or magistrate to settle a dispute within the course of judicial proceedings.<sup>689</sup> In mediation, a neutral third party tries to help disputants come to a consensus on their own, rather than imposing a solution, a professional mediator seeks to assist the conflicting sides in exploring the interests underlying their positions, working with parties together and sometimes separately to try hammer out a resolution that is sustainable, voluntary and non-binding.<sup>690</sup>

Mediators can be largely facilitative, engaging primarily in shuttle diplomacy and keeping their own views hidden, others are more evaluative, offering their knowledge and opinions to guide parties toward an agreement, others blend the two techniques according to the nature of the problem and stage of the mediation.<sup>691</sup> Mediation sessions are private and confidential, with

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<sup>686</sup> Constitution, Article 159 (2)(c)

<sup>687</sup> 'Alternative Dispute Resolution,' Cornell Law School [https://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](https://www.law.cornell.edu/wex/alternative_dispute_resolution) accessed 19 February 2024

<sup>688</sup> Katie S., 'Dispute Resolution' (2023) Harvard Law School <https://www.pon.harvard.edu/daily/dispute-resolution/what-is-alternative-dispute-resolution/> accessed on 19 February 2024

<sup>689</sup> Civil Procedure (Court Annexed Mediation) Rules (2022), Section 2

<sup>690</sup> Katie S., 'Dispute Resolution' (2023) Harvard Law School <https://www.pon.harvard.edu/daily/dispute-resolution/what-is-alternative-dispute-resolution/> accessed on 19 February 2024

<sup>691</sup> Sanders, 'Mediation,' Negotiation Briefings

information and discussions pertinent to mediation being privileged and inadmissible in any adversarial proceedings with the exceptions of a few circumstances.

The principal characteristics of mediation include that mediation is a non-binding procedure controlled by parties, a party to a mediation cannot be forced to accept an outcome that it does not like, unlike an arbitrator or a judge, the mediator is not a decision maker. The mediator's role is, rather, to assist the parties in reaching a settlement. Indeed, even when the parties have agreed to submit a dispute to mediation, they are free to abandon the process at any time after the first meeting if they find that its continuation does not meet their interests.<sup>692</sup>

Mediation is a confidential process. In mediation, the parties cannot be compelled to disclose information that they prefer to keep confidential. If, in order to promote the resolution of the dispute, a party chooses to disclose confidential information or make an admission, that information cannot be provided to anyone, including in subsequent court litigation or outside the context of mediation. Mediation's confidentiality allows the parties to negotiate more freely and productively without fear of publicity.<sup>693</sup>

Mediation is an interest-based procedure.<sup>694</sup> In mediation, the parties can be guided by their interests whether personal or business. As such, parties are free to choose an outcome that is oriented as much to the future of their business relationships as their past conduct.<sup>695</sup> When the parties refer to their interests and engage in dialogue, mediation often results in a settlement that creates more value than would have been created if the underlying dispute had not occurred.<sup>696</sup>

The legal framework for mediation in Kenya includes the Constitution of Kenya, 2010 Article 159 (2)(c) which recognizes the different forms of alternative dispute resolution, the Civil Procedure Act, and the Mediation Rules which are a product of the Civil Procedure.

Because mediation is non-binding, interest-based, and confidential, it offers the best solutions for disputes and conflicts arising out of the context of climate bonds as it involves minimal risk

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<sup>692</sup> 'What is Mediation,' WIPO (World Intellectual Property Organizations)  
<https://www.wipo.int/amc/en/mediation/what-mediation.html> accessed 19 February 2024

<sup>693</sup> Ibid

<sup>694</sup> Kariuki Muigua, 'Making Mediation Work for all: Understanding the Mediation Process'

<sup>695</sup> 'What is Mediation,' WIPO (World Intellectual Property Organizations)  
<https://www.wipo.int/amc/en/mediation/what-mediation.html> accessed 19 February 2024

<sup>696</sup> Ibid



for the parties and generates significant benefits. Indeed, one could say that, even when a settlement is not achieved, mediation never fails, as it causes the parties to define the facts and issues of the dispute, thus in any event preparing the ground for subsequent arbitration or court proceedings.<sup>697</sup>

## 2.2 Arbitration

Arbitration is a non-judicial process for the settlement of disputes where an independent third party, an arbitrator, makes a binding decision.<sup>698</sup> Arbitration is also referred to as a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute.<sup>699</sup> In choosing arbitration, the parties opt for a private dispute resolution instead of going to court.<sup>700</sup>

The principal characteristics of arbitration include; Arbitration is consensual. Arbitration can only take place if there is an arbitration agreement agreed by both parties. An arbitration agreement refers to an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.<sup>701</sup> In the case of future disputes arising under a contract, the parties insert an arbitration clause in the relevant contract, an existing dispute can be referred to arbitration by means of a submission agreement between the parties.<sup>702</sup> In contrast to mediation, a party cannot unilaterally withdraw from arbitration.<sup>703</sup>

Under an arbitration agreement, the parties can jointly appoint a sole arbitrator or, if they choose to have a three-arbitral tribunal each party can appoint one arbitrator each and the two appointed arbitrators then agree on the third arbitrator. Alternatively, the parties can request an

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<sup>697</sup> Ibid

<sup>698</sup> 'Arbitration,' CIARB Kenya (Chartered Institute of Arbitrators) <https://www.ciarbkenya.org/arbitration/> accessed 19 February 2024

<sup>699</sup> 'What is Arbitration?' WIPO (World Intellectual Property Organization) <https://www.wipo.int/amc/en/arbitration/what-is-arb.html#:~:text=Arbitration%20is%20a%20procedure%20in,instead%20of%20going%20to%20court> accessed 19 February 2024

<sup>700</sup> Ibid

<sup>701</sup> Arbitration Act (1995), Section 3

<sup>702</sup> 'What is Arbitration?' WIPO (World Intellectual Property Organization) <https://www.wipo.int/amc/en/arbitration/what-is-arb.html#:~:text=Arbitration%20is%20a%20procedure%20in,instead%20of%20going%20to%20court> accessed 19 February 2024

<sup>703</sup> Ibid

authorized body to appoint arbitrator(s) on their behalf. Parties in arbitration decide what applicable law, language, and venue of arbitration to apply in the proceedings. This ensures the neutrality of the proceedings.

The decision of an arbitral tribunal is final and easy to enforce. International awards are enforced by national courts under the New York Convention, which permits them to be set aside only in very limited circumstances. More than 165 states are party to the convention.<sup>704</sup>

The salient features of arbitration allow the parties to settle their disputes privately, and with no minimal delay while avoiding the publicity associated with court settings. The role of an arbitrator in the proceedings is similar to that of a judge, though the procedures are less formal, and arbitrators are often experts in their field, in this instance financial matters as well as climate issues.<sup>705</sup> The arbitration process can be tailored to suit the parties' particular needs.

### 3.0 Conflicts and Disputes Arising in the Context of Climate Bonds

Climate bonds play a critical role in financing climate-friendly initiatives, but disputes are inevitable. In 10 years, green bonds have gone from being an esoteric fringe product to being accepted and used in the mainstream of the international capital markets.<sup>706</sup> These instruments are critical in helping bridge the massive investment gap required to meet the targets set out in the 2016 Paris Agreement on Climate Change in the 2015 Sustainable Development Goals (SDGs).<sup>707</sup> however, several concerns could undermine the credibility and evolution of green bonds as a much-needed market product, these include a surprising lack of green contractual protection for investors, so-called, greenwashing, the quality of reporting metrics and transparency, issuer confusion<sup>708</sup>, disputes over eligibility criteria, and legal challenges to issuer claims.

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<sup>704</sup> Ibid

<sup>705</sup> 'Arbitration,' CIARB Kenya (Chartered Institute of Arbitrators) <https://www.ciarbkenya.org/arbitration/> accessed 19 February 2024

<sup>706</sup> 'Critical Challenges Facing the Green Bond Market,' (2019) IFLR (International Financial Law Review) <https://www.iflr.com> accessed 19 February 2024

<sup>707</sup> Ibid

<sup>708</sup> Ibid

Green bonds are today widely accepted and used to finance projects ranging from renewable energy, energy efficient (including efficient buildings), sustainable waste management, sustainable land use (including forestry and agriculture), biodiversity and conservation, clean transportation, sustainable waste management (including clean and/or drinking water) and climate change adaptation.<sup>709</sup> The United Nations states that the world needs \$90 trillion in climate investment by 2030 to achieve the goals set under the Paris Agreement and the United Nations Sustainable Development Goals.<sup>710</sup>

Reporting standards, metrics, and transparency remain a major challenge in relation to green bonds. Green bond reporting is built on two simple pillars; the pre-issuance use of proceeds disclosure used to sell green bonds and disclosed post-issuance ongoing reporting on the actual use of proceeds. Current green bond principles developed by the International Capital Markets Association (ICMA) do not outline what use of proceeds will be considered green, leaving this analysis to the issuer of the bonds, advisers, and reviewers offering second opinion to issuers. Issuers design their own criteria or definitions of an eligible green project resulting in maximum room to maneuver the issuer, with the investor then looking to the post-issuance to see what its money was in fact used for. This is rather opaque and can be a dissuading factor for an investor concerned that the use of proceeds does match with their own investment guidelines.<sup>711</sup> This will in turn create disputes between the issuer, investor, beneficiaries, and persons connected therein.

Greenwashing is a term used to describe a false, misleading, or untrue action or set of claims made by an organization about the positive impact that a company, product, or service has on the environment.<sup>712</sup> Greenwashing refers to the deceptive promotion of the perception that an organization's products, aims or policies are environmentally friendly.<sup>713</sup> Although greenwashing

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<sup>709</sup> 'Green Bond Principles,' ICMA (International Capital Market Association) <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/green-bonds/green-bond-principles/> accessed 19 February 2024

<sup>710</sup> 'The Trillion Dollar Climate Finance Challenge and Opportunity,' (2021) United Nation News [The trillion dollar climate finance challenge \(and opportunity\) | UN News](#) accessed 19 February 2024

<sup>711</sup> 'Critical Challenges Facing the Green Bond Market,' (2019) IFLR (International Financial Law Review) <https://www.iflr.com> accessed 19 February 2024

<sup>712</sup> Sean M., 'Greenwashing?' TechTarget <https://www.techtarget.com/whatis/definition/greenwashing#:~:text=Greenwashing%20happens%20when%20a%20company,positive%20effect%20on%20the%20environment> accessed 19 February 2024

<sup>713</sup> 'Critical Challenges Facing the Green Bond Market,' (2019) IFLR (International Financial Law Review) <https://www.iflr.com> accessed 19 February 2024

is largely a corporate issue it potentially taints green bonds. By this, green bonds are described as green despite not following commonly accepted use of proceedings/requirements for green bonds.<sup>714</sup> Disputes may arise between issuers and investors when investors get wind of green bonds being advertised as green investments without genuinely meeting sustainability standards.

#### 4.0 Opportunities & Role of Alternative Dispute Resolution (ADR) Mechanisms (Mediation and Arbitration) in managing conflicts in the Era of Green Bonds.

In a fast-growing and yet greatly important aspect of climate financing, green bonds offer several opportunities for the application of alternative dispute resolution both domestically and internationally. With also the inevitability of disputes ADR will play a leading role in managing such disputes as they may arise in the evolution and development of the field. The paper takes a look at several opportunities presented to ADR mechanisms by the evolution and growth of green bonds and the role ADR plays in managing disputes and conflicts that arise in the evolution and growth of the bonds. The paper emphasizes on Mediation and Arbitration.

##### 4.1 Integration of Alternative Dispute Resolution Mechanisms into Green Bonds-Related Policies and Guidelines

One of the major real concerns impacting green bond credibility is the lack of clear guidelines and policies of international magnitude regulating and providing directions for disputes arising with the space of green bonds. The integration of ADR into green bonds policies and guidelines is a significant step towards ensuring sustainable and environmentally responsible financial practices.<sup>715</sup> This integration presents an opportunity for employment of the services of mediation and arbitration as alternative dispute resolution mechanisms.

In the issuance stage where the issuers determine the criteria for the awarding of the green bonds, incorporating ADR mechanisms as a requirement for the issuance of green bonds will ensure that any disputes arising relating to the project and implementation are handled swiftly

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<sup>714</sup> Ibid

<sup>715</sup> 'Resolving Climate Change Related Disputes Through Arbitration and ADR,' (2019) International Chamber of Commerce Commission on Arbitration and ADR <https://www.iccwbo.org/climate-change-disputes-report> accessed 19 February 2024

and efficiently. With the salient features of mediation and arbitration being that parties agree to submit disputes arisen or arising in the future, this allows all parties involved in bond bond-issuing process and the receiver to agree to the means and ways of resolving some and all disputes that may arise in the issuing and implementation of the green bond. This will also offer the parties a chance to select the best fit ADR mechanisms to apply in the different disputes that may arise along the transactions of the green bond.

Disclosure regulations in the green bonds context seek to trigger the green transition of the global economy and ask whether such interventions are likely to bring about sufficient market discipline to achieve socially optimal climate targets.<sup>716</sup> Green bond reporting still remains a vague process with the International Capital Markets Authority (ICMA) Green Bond Principles, the only reporting guidelines in place at the moment, do not outline what use of proceeds will be considered green.<sup>717</sup> The lack of clear guidelines facilitates green bond proceeds being directed to other uses, this in turn may lead to disputes between the issuers and the investors.

A climate bond initiative study of March 2019 shows out of 367 green bond issuers only 251 of the 367 did post-issuance reporting, out of the 1805 green bonds issued by issuers 1190 of the 1805 did not do post-issuance reporting, translating to 62% of unaccounted bonds. The 1805 green bonds issued, translated to about \$281 billion worth of green bonds with \$58 billion worth of the bonds not being accounted for their use.<sup>718</sup> The lack of clear disclosure requirements will inevitably lead to the collapse of one of the major sources of climate financing. Incorporating ADR provisions in the disclosure requirements allows the parties involved to engage in a resolution-finding conversation on their own terms without invoking litigation as the first option. This saves time, and resources and allows parties to engage in a non-adversarial setup allowing for swift resolution.

One of the stipulated green bond principles includes the provision of a second opinion by an independent third-party reviewer certifying the green aspects of the bond.<sup>719</sup> Certification means

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<sup>716</sup> Sebastian S. & Tobias H., 'The Role of Disclosure in Green Finance,' (2022) Journal of Financial Regulation, Volume 8, Issue 1 <https://academic.oup.com/jfr/article/8/1/1/6539733> accessed 19 February 2024

<sup>717</sup> 'Critical Challenges Facing the Green Bond Market,' (2019) IFLR (International Financial Law Review) <https://www.iflr.com> accessed 19 February 2024

<sup>718</sup> Ibid

<sup>719</sup> Ibid

that a product or project has been independently verified as meeting certain standards for sustainability and environmental performance, the certifications are administered by third-party organizations.<sup>720</sup> This third party certifies the use of certification standards generally agreed with the context of a particular field, for example, green building standards.<sup>721</sup> A comprehensive green bond framework for certification standards for bodies responsible for conducting the certification process can include alternative dispute resolution criteria in their assessment framework. This will ensure disputes arising between third-party certifiers and the beneficiary of the green bond proceeds are resolved quickly and efficiently. The major dispute arises when third-party certifiers fail to certify a project on the basis 'it's not green'.

#### 4.2 Alternative Dispute Resolution Mechanisms Introduce an Element of Conferring Actionable Rights Upon Bondholders.

ICMA Green Bond Principles introduces elements common across many standards which include; use of proceeds disclosure stating the cash raised will finance new or existing projects that have positive environmental or climate benefits; ongoing reporting on the foregoing green use of proceeds; and the provision of a second opinion by an independent third-party reviewer certifying the green aspects of the bond.<sup>722</sup> However, the green bond market has developed in such a way that none of the above product-critical elements confer actionable rights on bondholders.<sup>723</sup>

An actionable right refers to a right to take legal action against someone in a court of law, for instance, a landlord has a right of action against the tenant for any breach.<sup>724</sup> A bondholder on the other hand is an entity that invests in or owns bonds. Bondholders hold debt securities that are typically issued by corporations and the government. They essentially lend money to bond issuers by giving them capital, in return, bond investors receive their principal or initial investment

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<sup>720</sup> 'What is Green Product Certification?' (2023) Third View <https://thirdview.info/2023/02/10/what-is-green-product-certification/> accessed 19 February 2024

<sup>721</sup> The Hnin 'Green Building Standards and Certifications: Building the Best with Green,' (2023) Novatr Blog <https://www.novatr.com/blog/green-building-standards-and-certifications> accessed 19 February 2024

<sup>722</sup> 'Critical Challenges Facing the Green Bond Market,' (2019) IFLR (International Financial Law Review) <https://www.iflr.com> accessed 19 February 2024

<sup>723</sup> Ibid.

<sup>724</sup> 'Right of Action,' Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english/right-of-action> accessed 19 February 2024

back when the bond matures. For most bonds, bondholders also receive periodic interest payments.<sup>725</sup>

The lack of conferment of actionable rights was understandable back then as the product's first steps were relatively non-confrontational (and so easy for issuers to digest) to encourage market growth. But as the market matures, problems have arisen, use of proceeds, ongoing maintenance or withdrawal of the published (and relied upon) second opinion review, and annual reporting are not often included as direct covenants in the terms and conditions of green bonds.<sup>726</sup> Failures to use the bond proceeds for stated green projects (or deliberate use for non-green purposes) are accordingly not events of default or put events that would enable the bondholders to accelerate or redeem their bonds in the event of breach, nor are they step-up events, which trigger an increase in the coupon payable by an insurer.<sup>727</sup>

The question that largely arises in this particular scenario is, can a bondholder take a legal claim against a bond issuer if the issuer directs the proceeds of the bond to other purposes rather than green and sustainable development projects that the bondholder was believed to have invested in, or can the bondholder withdrawal his bond for such circumstances. This provokes a dilemma. Bondholders who are still being paid interest and principal on time per the terms of the green bonds may be unable to show a loss, and so may be unable to have effective redress.<sup>728</sup>

Alternative Dispute Resolution Mechanisms such as mediation and arbitration offer an opportunity and a redress to this problem by introducing an element of conferring actionable rights to the bondholder. Inserting an arbitration or mediation clause in a green bond agreement between the issuer and the bondholder introduces an aspect where both parties can assert rights and claims that they can claim in case any of the parties fail to comply with the agreement. For example, a mediation clause invoking mediation if the bondholder is led to believe that the green bond proceeds are not directed to the expected cause. At this point, the bondholder may invoke

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<sup>725</sup> James Chen, 'Bondholder: Definition, Risks, Rewards and Taxes,' Investopedia <https://www.investopedia.com/terms/b/bondholders.asp#:~:text=A%20bondholder%20is%20an%entity.back%20when%20the%20bonds%20mature> accessed 19 February 2024

<sup>726</sup> 'Critical Challenges Facing the Green Bond Market,' (2019) IFLR (International Financial Law Review) <https://www.iflr.com> accessed 19 February 2024

<sup>727</sup> Ibid

<sup>728</sup> Ibid

the arbitration or mediation clause. The resolution of both mediation and arbitration can be enforced in the majority of the jurisdictions.

In the above case, alternative dispute resolution mechanisms almost accord the bondholder actionable rights that they may enforce, it also ensures that the relationship between the bondholder and the issuer of the bond is not terminated in the process unless there is a dire need to, at the same time it serves to ensure green bonds serve their true objectives, being financing for climate and environmentally friendly initiatives.

#### 4.3 Alternative Dispute Resolution Mechanisms Facilitate Global Cooperation and Cross-Border Management of Conflicts.

The correct application of the ADR mechanism can help investors, issuers, bondholders, and beneficiaries of green bonds to reap ADR benefits including lower costs, quicker dispute resolutions, and outcomes that preserve and sometimes even improve relationships. The green bond process usually involves many different parties usually domiciled in different jurisdictions. This means disputes arising out of green bond issuing, application, reporting, and other dealings involving green bonds are cross-border disputes. Cross-border disputes refer to a dispute where a client is domiciled or habitually resident in a member state where the court is sitting or where the decision is to be enforced.<sup>729</sup>

First, cross-border mediation and its role in facilitating global and cross-border cooperation by helping manage cross-border conflicts arising in the context of green bond dealings. In modern technological terms and human advancements bond dealings are largely operated in digital spaces, but in these spaces, disputes are not immune. Globalization and the quasi-ubiquity of technologies associated with these have led to an exponential increase in interhuman and interinstitutional communication.<sup>730</sup> This paradigm shift requires a change in the way and means of managing conflicts, without burning bridges or losing sight of the big picture of what green bonds are aimed to achieve. Mediation in cross-border space as an alternative dispute resolution method of conflict resolution, starts, right from the beginning, with the principle of counterbalancing the

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<sup>729</sup> 'Cross-Border Dispute Definition,' Law Insider <https://www.lawinsider.com/dictionary/cross-border-dispute> accessed 20 February 2024

<sup>730</sup> Zeno D., Jamie W., Claudia, Elisabeta A., & Sanda E., 'Overview on the Mediation in Cross-Border Conflicts – Sources and Application Areas,' Mediate <https://mediate.com/overview-on-the-mediation-in-cross-border-conflicts-sources-and-application-areas/> accessed 20 February 2024



parties' interests, of the remanence of an agreement obtained based on their free will, sustainable, and perceived as mutually beneficial.<sup>731</sup> This fact, in the context of the globalization phenomenon, confers mediation the quality of being a cross-border and often cross-cultural method with a universal value, of conflict approach and resolution.<sup>732</sup>

In disputes arising out of the green bonds context, mediation method brings the possibility of introducing a neutral and impartial third party who draws up the general lines in the conflict between parties, in the attempt to identify a beneficial resolution for all parties involved, all the more in the field of cross-border mediation.<sup>733</sup> In addition mediation allows the parties to agree on who and how many of the neutral third-party(s) to appoint in the event a dispute arises. This gives room for specialization and appointment of expertise within the context of financial and green bonds context.

Second, cross-border arbitration as a means of resolving commercial cross-border disputes is a go-to for any serious-minded company or person, it offers several significant benefits for resolving commercial cross-border disputes, making it an attractive choice for businesses involved in international transactions.<sup>734</sup> Arbitration is also important in cross-border disputes due to challenges with the issue of different jurisdictions and international laws which may make the resolution process more complicated.<sup>735</sup> Enforcing an arbitral award internationally is easier, thanks to conventions like the United Nations Convention on the Recognition and Enforcement of Foreign Awards, which provides for the recognition and enforcement of foreign arbitral awards in 168 countries.<sup>736</sup>

Both cross-border and mediation and arbitration allow parties involved in green bonds to engage and manage conflicts that arise within the same context. This allows the objectives and purposes of the green bonds not to be overshadowed by litigation in every jurisdiction across

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<sup>731</sup> Ibid

<sup>732</sup> Ibid

<sup>733</sup> Ibid

<sup>734</sup> 'The Benefits of Arbitration for Resolving Cross-Border Commercial Disputes,' (2023) The Trusted Advisors <https://trustedadvisorslaw.com/the-benefits-of-arbitration-for-resolving-cross-border-commercial-disputes/#:~:text=Arbitration%20as%20means%20of,businesses%20involved%20in%20international%20transactions> accessed 20 February 2024

<sup>735</sup> Ibid

<sup>736</sup> 'UNICTRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,' (2016) UNICTRAL (United Nations Commission on International Trade Law)

the globe. It also allows parties to engage and work towards evolving and developing to address the shortcomings that arise. In this way, alternative dispute resolution helps promote global cooperation and helps manage cross-border conflicts within the context of green bonds.

## Conclusion

Environmental justice is an important part of the struggle to improve and maintain a clean and healthy environment, especially for developing nations, and that are closely connected to the environment. Rarely does the meaning of environmental justice become a reality to groups and countries in low-income and developing states. Green bonds aim to bridge the gap to access to environmental justice by all persons without discrimination, especially by income. However, as the paper highlights, they are critical challenges in terms of deployment and access to green bonds, these challenges threaten the development and evolution of green bonds to fully achieve and meet their objectives.

Alternative dispute resolution mechanisms such as mediation and arbitration play and will play a critical role in shaping the development and evolution of green bonds in the future, while helping manage disputes and conflicts arising out of the same context. ADR guarantees and keeps alive the dream of green bonds and protects the basic objectives of green bonds being to fund environmental and sustainable projects and policies. Salient features unique to ADR such as the ability to allow specialization and expertise when it comes to managing disputes within the green bond's context, timely and efficient facilitation of win-win resolution, will ensure that disputes are managed to keep alive the dream of green bonds.

ADR mechanisms unlike traditional litigation are best suited to handle the complex bond market that is usually closely connected with green bonds, allowing for confidentiality that the market needs and at the same time not losing sight of the bigger picture, and that's what green bonds can usually deliver?

A lot of resources and funds are required to actualize the dream of environmental justice, especially in developing countries, green bonds will continue to bridge the financial gap by providing the critically needed funds to help actualize the dream.

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*The Loom of Tomorrow: Weaving Environmental Justice with the Threads of AI and the Needle of ADR*

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Abstract

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In the quest for environmental equilibrium, this law review article examines the intersection of environmental justice, alternative dispute resolution (ADR), and artificial intelligence (AI). It posits that AI, when harnessed with ADR principles, can transcend traditional boundaries, offering a transformative approach to resolving environmental disputes. Through a critical analysis of case studies and AI methodologies, this study illuminates the potential for AI to enhance the efficacy of ADR in achieving equitable outcomes in environmental justice. The findings suggest a paradigm shift in environmental law and policy, advocating for the integration of AI to foster a more just and sustainable future.

## I. Introduction

In the heart of Africa, where the red soil whispers tales of resilience, there exists a narrative that intertwines the roots of environmental justice with the burgeoning branches of technology.<sup>739</sup> This is the story of a land where the quest for ecological harmony is as ancient as the baobabs that stand sentinel over the savannah.<sup>740</sup> Our tale begins in the cradle of humanity, where the struggle for a just environment is not merely a matter of policy but a pulsating beat in the heart of every community.<sup>741</sup> Here, the scars of exploitation and the promise of restoration are etched into the landscape, a testament to battles fought and the hope for peace with nature.

Enter the era of alternative dispute resolution (ADR), a beacon of hope in a world wearied of conflict. ADR emerges as a peacemaker, offering a path to reconcile human aspirations with the rhythms of the earth. It is a dance of diplomacy, where every step is measured, every movement

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<sup>739</sup> Ripon Bhattacharjee and Bhupal Bhattacharya, 'The Intersection of Technology and Environmental Law: Recent Developments and Future Challenges' 14 <[https://ir.nbu.ac.in/bitstream/123456789/5069/1/Intersection%20of%20Technology%20and%20Environmental%20Law%20Recent%20Developments%20and%20Future%20Challenges\\_12.pdf](https://ir.nbu.ac.in/bitstream/123456789/5069/1/Intersection%20of%20Technology%20and%20Environmental%20Law%20Recent%20Developments%20and%20Future%20Challenges_12.pdf)> Accessed 1 February 2024.

<sup>740</sup> 'The Eternal Tree – Jori Lewis' (*Emergence Magazine* 17 March 2022) <<https://emergencemagazine.org/essay/the-eternal-tree/>> accessed 1 March 2024.

<sup>741</sup> 'SPECIAL ISSUE on ENVIRONMENTAL DEFENDERS CONSERVATION and the NEED for GREATER DEFENDERS PROTECTION' (2021) <<https://portals.iucn.org/library/sites/library/files/documents/Policy-Matters-Issue-22-vol3.pdf>> accessed 11 February 2024.

calculated to achieve the delicate balance of justice.<sup>742</sup> Amidst this dance, artificial intelligence (AI) rises like the dawn, casting a new light on old problems. AI is the lens that brings the distant horizon into focus, revealing patterns in the chaos, finding solutions woven into the fabric of life itself.<sup>743</sup>

This is the backdrop against which our research unfolds: a journey through the verdant fields of environmental justice, guided by the steady hand of ADR, and illuminated by the transformative power of AI.<sup>744</sup> It is a narrative of convergence, where technology meets tradition, and where every voice finds a chorus in the symphony of sustainability (author's emphasis).

## II. Environmental Justice, dispute resolution, and AI in Africa and beyond, where is the nexus?

The nexus between environmental justice, dispute resolution, and AI in Africa and beyond lies in the harmonization of technology with human-centric approaches to address ecological grievances. Environmental justice seeks to ensure that all communities enjoy the same degree of protection from environmental and health hazards.<sup>745</sup> Dispute resolution provides the mechanisms for addressing conflicts that arise from environmental management and policy decisions. AI, as a tool, can critically analyze vast amounts of environmental data, predict outcomes,<sup>746</sup> and propose equitable solutions.

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<sup>742</sup> 'Preparing for the Future: ADR and Arbitration from an African Perspective Kariuki Muigua' (2023) <<https://kmco.co.ke/wp-content/uploads/2023/10/Preparing-for-the-Future-ADR-and-Arbitration-from-an-African-Perspective.pdf>> accessed 1 February 2024.

<sup>743</sup> Alain A, 'Beyond Human — the Dawn of Artificial Super Intelligence' (*Medium* 6 August 2023) <<https://medium.com/predict/beyond-human-the-dawn-of-artificial-super-intelligence-16ff7eef07c5>> accessed 8 February 2024.

<sup>744</sup> Natasha Kahungi, 'Dawn of Artificial Intelligence in Alternative Dispute Resolution; Expanding Access to Justice through Technology' (*Ssrn.com* 28 October 2022) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4389547](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389547)> accessed 1 March 2024.

<sup>745</sup> Wayan Vota, '6 Artificial Intelligence Examples for Climate Justice in Kenya' (*ICTworks* 2 May 2023) <<https://www.ictworks.org/artificial-intelligence-climate-justice-kenya/>> accessed 1 March 2024.

<sup>746</sup> *Ibid.*



In Africa, where resources may be scarce and the burden of environmental degradation often falls on the most vulnerable, the integration of AI into dispute resolution processes can offer a more accessible and data-driven path to justice.<sup>747</sup> It can help identify patterns of inequality, forecast environmental impacts, and facilitate more informed decision-making (author's emphasis).

Globally, this nexus represents a shift towards a more proactive and predictive form of environmental governance. By leveraging AI, stakeholders can anticipate conflicts and address them before they escalate, ensuring that environmental justice is not just reactive but a fundamental part of planning and policymaking.<sup>748</sup> Essentially, the nexus is at the intersection of innovation and equity, where AI empowers communities to navigate the complexities of environmental disputes with informed confidence,<sup>749</sup> ensuring that justice extends beyond borders and reaches into the future.

### III. Why is there a need to integrate AI into the environmental dispute resolution practice?

The integration of AI into environmental dispute resolution is driven by the need for enhanced efficiency, accuracy, and accessibility in addressing complex environmental issues. AI can process vast amounts of data rapidly, identify patterns, and provide predictive analytics that can inform

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<sup>747</sup> Solidity Law, 'Presented By: Daniel Bron in the Dynamic Intersection of Law and Technology, Artificial Intelligence (AI) Is Emerging as a Powerful Tool That Promises to Transform Various Aspects of Legal Practice. One Area Where AI's Impact Is Particularly Profound Is Dispute Resolution.' (*LinkedIn.com* 8 June 2023) <[<sup>748</sup> Marie Francisco and Björn-Ola Linnér, 'AI and the Governance of Sustainable Development. An Idea Analysis of the European Union, the United Nations, and the World Economic Forum' \(2023\) 150 \*Environmental Science & Policy\* 103590.](https://www.linkedin.com/pulse/role-ai-dispute-resolution-transforming-mediation-arbitration#:~:text=AI%20tools%20can%20assist%20mediators,as%20they%20become%20more%20advanced.> accessed 18 February 2024.</a></p></div><div data-bbox=)

<sup>749</sup> Elias Simon Bibri and others, 'Smarter Eco-Cities and Their Leading-Edge Artificial Intelligence of Things Solutions for Environmental Sustainability: A Comprehensive Systematic Review' (2024) 19 *Environmental Science and Ecotechnology* 100330 <<https://www.sciencedirect.com/science/article/pii/S2666498423000959>> accessed 1 March 2024.

decision-making processes.<sup>750</sup> This capability is particularly valuable in environmental law enforcement, where AI can automate inspections through analysis of satellite or drone images, leading to more effective regulatory oversight.<sup>751</sup>

Moreover, AI can support dispute resolution by offering intelligent support systems that help manage cases, triage issues, and provide advisory tools.<sup>752</sup> These systems can improve the quality of outcomes by ensuring that decisions are based on comprehensive data analysis and are not limited by human cognitive biases. Furthermore, in regions like Africa, where environmental challenges are often magnified by resource constraints, AI can democratize access to justice by making dispute resolution more accessible and less reliant on scarce expert human resources.<sup>753</sup> It can also help in predicting where manual inspection resources would be most beneficial, optimizing resource allocation (author's emphasis).

Globally, the use of AI in dispute resolution could lead to a reduction in court backlogs and increase access to justice, as it allows for more effective assessment of claims and avoidance of disputes.<sup>754</sup> Essentially, AI has the potential to transform the practice of environmental dispute resolution by making it more proactive, equitable, and aligned with the principles of environmental justice.

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<sup>750</sup> Solidity Law, 'Presented By: Daniel Bron in the Dynamic Intersection of Law and Technology, Artificial Intelligence (AI) Is Emerging as a Powerful Tool That Promises to Transform Various Aspects of Legal Practice. One Area Where AI's Impact Is Particularly Profound Is Dispute Resolution.' (*Linkedin.com* 8 June 2023) <<https://www.linkedin.com/pulse/role-ai-dispute-resolution-transforming-mediation-arbitration>> accessed 1 March 2024.

<sup>751</sup> Norhan Bayomi and John E Fernandez, 'Eyes in the Sky: Drones Applications in the Built Environment under Climate Change Challenges' (2023) 7 *Drones* 637 <<https://www.mdpi.com/2504-446X/7/10/637>> accessed 8 February 2024.

<sup>752</sup> John Zeleznikow, 'Using Artificial Intelligence to Provide Intelligent Dispute Resolution Support' (2021) 30 *Group Decision and Negotiation* 789 <<https://link.springer.com/article/10.1007/s10726-021-09734-1>> accessed 1 March 2024.

<sup>753</sup> Kariuki Muigua, 'The Reality of AI and Arbitration in Africa: A Challenge or an Opportunity?' (*TheLawyer.africa* 27 September 2023) <<https://thelawyer.africa/2023/09/27/the-reality-of-ai-and-arbitration/>> accessed 1 February 2024.

<sup>754</sup> Natasha Kahungi, 'DAWN of ARTIFICIAL INTELLIGENCE in ALTERNATIVE DISPUTE RESOLUTION; EXPANDING ACCESS to JUSTICE through TECHNOLOGY' (2023) 2 *University of Nairobi Law Journal* <<https://uonjournals.uonbi.ac.ke/ojs/index.php/unlj/article/view/1581#:~:text=This%20paper%20postulates%20that%20the,Peace%2C%20Justice%20and%20Strong%20Institutions.>> accessed 1 March 2024.

AI is being utilized in various innovative ways to advance environmental justice, some of which include a. environmental Intelligence whereby Artificial Intelligence is used to track climate change, manage land, and water resources, predict air and groundwater pollution, and optimize natural resources for human health and well-being<sup>755</sup>; b. for Open-Source AI tools, the Mozilla Foundation supports projects using open-source AI to monitor methane emissions, expose harmful mining operations, and improve air quality.<sup>756</sup> Likewise, for climate prediction and Management for AI assists in gathering data on temperature changes, predicting weather events, managing energy consumption through smart grids, and contributing to smart recycling and carbon capture.<sup>757</sup> Contextually, and regarding disaster prevention, the World Meteorological Organization employs AI to prevent natural disasters, reduce greenhouse gas emissions, and develop clean energy and green transport.<sup>758</sup> Similarly, urban planning testifies that AI is used in projects like the Windy project, which utilizes Earth remote sensing satellites for environmental monitoring.<sup>759</sup> Such illustrations attest of AI's potential to provide critical insights and solutions for environmental justice challenges, making it a valuable ally in the fight for a more sustainable and equitable planet.

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<sup>755</sup> Francesco Bassetti, 'What Is Environmental Intelligence? - Foresight' (*Foresight* 20 April 2023) <<https://www.climateforesight.eu/articles/what-is-environmental-intelligence/#:~:text=%E2%80%9CIn%20the%20simplest%20of%20terms,as%20hydrology%20food%20and%20energy%2C>> accessed 1 March 2024.

<sup>756</sup> 'Mozilla Technology Fund Seeks Projects at Intersection of AI, Environmental Justice' (*Mozilla Foundation* September 2023) <<https://foundation.mozilla.org/en/blog/mozilla-technology-fund-seeks-projects-at-intersection-of-ai-environmental-justice/>> accessed 1 March 2024.

<sup>757</sup> TechCurators, 'Explore the Transformative Role of Artificial Intelligence in Combating Climate Change. Dive into How AI Optimizes Energy Consumption, Integrates Renewable Energy, Predicts Climate Patterns, and Revolutionizes Agriculture.' (*LinkedIn.com* 28 November 2023) <[https://www.linkedin.com/pulse/climate-change-ai-tech-driven-strategy-sustainability-techcurators-o9dtc?trk=public\\_post\\_main-feed-card\\_feed-article-content#:~:text=A%3A%20Yes%2C%20AI%20plays%20a,reducing%20reliance%20on%20fossil%20fuels.](https://www.linkedin.com/pulse/climate-change-ai-tech-driven-strategy-sustainability-techcurators-o9dtc?trk=public_post_main-feed-card_feed-article-content#:~:text=A%3A%20Yes%2C%20AI%20plays%20a,reducing%20reliance%20on%20fossil%20fuels.)> accessed 1 March 2024.

<sup>758</sup> Lin Chen and others, 'Artificial Intelligence-Based Solutions for Climate Change: A Review' (2023) 21 *Environmental Chemistry Letters* 2525 <<https://link.springer.com/article/10.1007/s10311-023-01617-y>> accessed 2 March 2024.

<sup>759</sup> Salvatore Manfreda and others, 'On the Use of Unmanned Aerial Systems for Environmental Monitoring' (2018) 10 *Remote Sensing* 641 <<https://www.mdpi.com/2072-4292/10/4/641>> accessed 8 February 2024.

Alternative Dispute Resolution (ADR) can be applied to climate change disputes in several ways:

a. Arbitration

Parties can agree to resolve disputes through arbitration, which can be faster and more flexible than court proceedings. Arbitrators with expertise in climate change can provide informed decisions.<sup>760</sup>

b. Mediation

Mediation allows parties to negotiate a settlement with the help of a neutral third party. It is particularly useful in complex climate change disputes where relationships need to be preserved.<sup>761</sup>

c. Expert Determination

This involves appointing an expert to make a binding decision on specific technical aspects of a dispute, which is common in climate change-related contracts.<sup>762</sup>

d. Dispute Boards

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<sup>760</sup> 'By Muiruri Ngugi L. -Registrar/CEO TRACKING CLIMATE ACTION in ARBITRATION in AFRICA' (2022) 1-8 <<https://ncia.or.ke/wp-content/uploads/2022/07/Tracking-Climate-Action-in-Arbitration-in-Africa-.pdf>> accessed 11 February 2024.

<sup>761</sup> Calliope Makedon Sudborough, 'Mediation' [2023] European yearbook of international economic law 67 <[https://link.springer.com/chapter/10.1007/978-3-031-46787-5\\_3](https://link.springer.com/chapter/10.1007/978-3-031-46787-5_3)> accessed 1 February 2024.

<sup>762</sup> 'Use of Expert Determination Mechanisms' (Nortonrosefulbright.com2023) <<https://www.nortonrosefulbright.com/en/knowledge/publications/470a3448/use-of-expert-determination-mechanisms>> accessed 5 February 2024.

These are panels of experts established at the start of a project to help resolve disputes as they arise, ensuring ongoing projects are not delayed by conflicts.<sup>763</sup>

#### e. Emergency Proceedings and Interim Measures

ADR can provide rapid responses to urgent issues, which is crucial in climate change disputes where time may be critical.<sup>764</sup>

#### f. Application of Climate Change Commitments and Law

ADR processes can incorporate international climate change commitments and laws, ensuring that resolutions are aligned with global standards.<sup>765</sup> By using ADR, parties involved in climate change disputes can find more specialized, efficient, and amicable solutions,<sup>766</sup> which is essential for addressing the urgent and complex nature of climate-related issues.

Furthermore, when comparing Alternative Dispute Resolution (ADR) to climate change litigation, several core reasons justify the growing preference for ADR. Regarding efficiency, ADR processes, such as mediation and arbitration, are typically faster than litigation. This is crucial in climate change disputes where timely solutions are often necessary to prevent further

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<sup>763</sup> Kariuki Muigua, 'Dealing with Conflicts in Project Management' (2011) Section on the abstract <<https://kmco.co.ke/wp-content/uploads/2018/08/Dealing-with-Conflicts-in-Project-Management.pdf>> accessed 1 February 2024.

<sup>764</sup> 'The Value of Arbitration and ADR in Resolving Climate Change Related Disputes: A View into the ICC Commission's Report| ArbitrationLinks | Blogs | Insights | Linklaters' (Linklaters.com 2020) <<https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/march/the-value-of-arbitration-and-adr-in-resolving-climate-change-related-disputes>> accessed 1 February 2024.

<sup>765</sup> Catherine Higham and others, 'Accountability Mechanisms in Climate Change Framework Laws' (2021) 6-30 <<https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/11/Accountability-mechanisms-in-climate-change-framework-laws.pdf>> accessed 6 February 2024.

<sup>766</sup> Ibid.

environmental harm.<sup>767</sup> For expertise, alternative dispute resolution mechanisms allow for the selection of arbitrators and mediators with specialized knowledge in climate change, which can lead to more informed and effective resolutions.<sup>768</sup>

In terms of flexibility, alternative dispute resolution mechanisms offer more flexible procedures that can be tailored to the specific needs of the parties involved in climate change disputes. Confidentiality, ADR proceedings are generally private, which can encourage parties to be more open in their negotiations and can protect sensitive environmental data.<sup>769</sup> In the case of cost-effectiveness of cost-effectiveness, litigation can be expensive due to its lengthy process. Sometimes ADR can be more cost-effective, making it accessible to a wider range of parties.<sup>770</sup>

The comparison becomes more evident when it comes to global enforcement, why? Arbitration awards are widely enforceable internationally under the New York Convention, which is not always the case with court judgments. Moreover, ADR promotes the preservation of relationships, how? ADR, especially mediation, can preserve relationships between parties, which is beneficial for ongoing partnerships in climate change initiatives.<sup>771</sup> Contrastingly, climate change litigation can offer some advantages. They encompass precedent setting whereby court decisions can set legal precedents, which is important for developing climate change

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<sup>767</sup> Michael Lockhart, 'Alternative Dispute Resolution in Environmental Disputes' (*Australian Disputes Centre* 6 June 2019) <<https://disputescentre.com.au/alternative-dispute-resolution-in-environmental-disputes/>> accessed 1 March 2024.

<sup>768</sup> Rachel Chepkoech and Biomndo Ngetich, 'EFFECTIVENESS of ALTERNATIVE DISPUTE RESOLUTION MECHANISM (ADR) in CASE BACKLOG MANAGEMENT in KENYAN JUDICIAL SYSTEM: FOCUS on MILIMANI HIGH COURT COMMERCIAL DIVISION' (2019) <<http://erepository.uonbi.ac.ke/bitstream/handle/11295/152852/RACHEL%20CHEPKOECH%20BIOMNDO%20NGETICH%20FINAL%20THESIS%20.pdf?sequence=1>> accessed 1 March 2024.

<sup>769</sup> Kariuki Muigua, 'Current Status of Alternative Dispute Resolution Justice Systems in Kenya Current Status of Alternative Dispute Resolution Justice Systems in Kenya 2 Current Status of Alternative Dispute Resolution Justice Systems In' (2018) <<https://kmco.co.ke/wp-content/uploads/2018/10/CURRENT-STATUS-OF-ADR-JUSTICE-SYSTEMS-IN-KENYA-Kariuki-Muigua-5TH-OCTOBER-2018-00000002.pdf>> accessed 15 February 2024.

<sup>770</sup> Which Path, 'Litigation: ADR vs: Litigation: Which Path Is Best for Resolving Disputes - FasterCapital' (*FasterCapital* 2023) <<https://fastercapital.com/content/Litigation--ADR-vs--Litigation--Which-Path-is-Best-for-Resolving-Disputes.html>> accessed 1 February 2024.

<sup>771</sup> Francis Kariuki, 'Challenges Facing the Recognition and Enforcement of International Arbitral Awards within the East African Community' (2018) Abstract and conclusion sections <<https://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Recognition-and-Enforcement-of-Foreign-Arbitral-Awards.pdf>> accessed 1 March 2024.

jurisprudence.<sup>772</sup> Such kind of litigation can also help raise awareness regarding the issue of climate change, how? Through the public nature of court proceedings.<sup>773</sup> This also ensures various stakeholders to environmental stewardship remain accountable, a good example being the government. This is because litigation can hold governments and large corporations accountable in ways that ADR may not, as court judgments are public and can lead to systemic changes.<sup>774</sup>

It could be said that whereas ADR offers a more private, specialized, and potentially faster and cost-effective means of resolving disputes, climate change litigation can play a critical role in setting legal precedents and fostering public and governmental accountability. The choice between ADR and litigation may depend on the specific circumstances and goals of the parties involved (author's emphasis).

*g. Environmental injustices; needed interventions of ADR and AI*

The critical environmental and climate change injustices demanding urgent attention are:

a. Firstly, we have the disproportionate impact on vulnerable communities whereby climate change exacerbates inequalities, with the poorest communities, often in developing countries, facing the brunt of environmental degradation despite contributing the least to the problem.<sup>775</sup>

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<sup>772</sup> David B Hunter, 'The Implications of Climate Change Litigation for International Environmental Law-Making' [2007] Social Science Research Network <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1005345](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005345)> accessed 1 March 2024.

<sup>773</sup> 'Chapter 22 Trial Observation and Monitoring the Administration of Justice MANUAL on MONITORING TRIAL OBSERVATION and MONITORING the ADMINISTRATION of JUSTICE' <<https://www.ohchr.org/sites/default/files/Documents/Publications/MonitoringChapter22.pdf>> accessed 1 March 2024.

<sup>774</sup> Kariuki Muigua, 'Empowering the Kenyan People through Alternative DisEmpowering the Kenyan People through Alternative Dispute Resolution Mechanisms Kariuki Muigua Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms' (2015) <<https://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf>> accessed 1 March 2024.

<sup>775</sup> 'Social Dimensions of Climate Change' (World Bank 2023) <<https://www.worldbank.org/en/topic/social-dimensions-of-climate-change>> accessed 1 March 2024.

b. Land Grabbing is another emotive issue that further exacerbates climate injustices. Illustratively, large-scale acquisition of land by corporations often leads to displacement of local communities and loss of livelihoods, particularly in regions with booming palm oil production.<sup>776</sup>

c. The case of water Scarcity and pollution manifests in that unequal access to clean water is intensified by climate change, with pollution and overuse of water resources affecting millions globally.<sup>777</sup>

d. As regarding air quality and health, poor air quality disproportionately affects marginalized communities, leading to health issues such as respiratory diseases.<sup>778</sup>

e. Loss of biodiversity cannot be overlooked as climate change is accelerating the loss of species and habitats, impacting ecosystems that are vital for local communities' survival.<sup>779</sup> This also affects food security whereby changes in climate patterns threaten agriculture, leading to food shortages and increased vulnerability for communities dependent on farming.<sup>780</sup>

As for the issue of forced migration, climate change and environmental degradation remain the leading causes of displacement considering that climate change catastrophes force people to leave their homes, and to some extremes, abandon their culture.<sup>781</sup> Similarly, environmental

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<sup>776</sup> Samuel Chukwudi Agunyai and Lere Amusan, 'Implications of Land Grabbing and Resource Curse for Sustainable Development Goal 2 in Africa: Can Globalization Be Blamed?' (2023) 15 Sustainability 10845 <<https://www.mdpi.com/2071-1050/15/14/10845>> accessed 1 March 2024.

<sup>777</sup> 'The Effects of Climate Change on Water Shortages' (*Stanford Doerr School of Sustainability* 2019) <<https://sustainability.stanford.edu/news/effects-climate-change-water-shortages#:~:text=Diminished%20flows%20in%20rivers%20and%20streams%20can,places%20may%20become%20more%20vulnerable%20to%20contamination.>> accessed 2 March 2024.

<sup>778</sup> Sahana Mathiarasan and Anke Hüls, 'Impact of Environmental Injustice on Children's Health—Interaction between Air Pollution and Socioeconomic Status' (2021) 18 International Journal of Environmental Research and Public Health 795 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7832299/>> accessed 9 February 2024.

<sup>779</sup> Joan Igamba, 'Greenpeace Africa' (*Greenpeace Africa* 2023) <<https://www.greenpeace.org/africa/en/blogs/53486/threats-to-biodiversity-biodiversity-loss-climate-change/>> accessed 9 February 2024.

<sup>780</sup> FAO, 'Climate Change and Food Security: Risks and Responses' (2015) <<https://www.fao.org/3/i5188e/i5188E.pdf>>.

<sup>781</sup> Oli Brown, 'Human Development Human Development Report Office Climate Change and Forced Migration: Observations, Projections and Implications' (2007) <[https://www.iisd.org/system/files/publications/climate\\_forced\\_migration.pdf](https://www.iisd.org/system/files/publications/climate_forced_migration.pdf)> Accessed 2 February 2024.



degradation and climate change are leading causes of displacement, forcing people to leave their homes and cultures.<sup>782</sup>

For the case of waste management and toxic exposures, it should be known that inadequate waste management leads to toxic exposures, often in low-income areas or countries where waste is dumped.<sup>783</sup> This is further worsened by energy justice whereby there is unequal access to clean and affordable energy, with many communities relying on harmful energy sources due to lack of alternatives.<sup>784</sup> Surprisingly, indigenous peoples who are often on the front lines of environmental destruction's rights and knowledge are frequently overlooked in environmental policies, a discriminatory practice that further exacerbates environmental degradation and climate change.<sup>785</sup> Therefore, tackling such issues and injustices thereof demands a multifaceted approach as encompassing technological innovation, empowerment of affected communities and other considerations that would ensure a just transition to a more sustainable tomorrow (authors' emphasis).

Corridors of justice have immensely contributed to the climate and environmental justice conversation. A good case in point is that of *Milieudefensie et al. v. Royal Dutch Shell* (Netherlands, 2021) where the Hague District Court ordered Shell to reduce its emissions by 45% by 2030, marking the first time a company was held responsible for mitigating climate change.<sup>786</sup> Furthermore, in *Notre Affaire à Tous and Others v. France* (France, 2021), the Administrative Court of Paris ordered France to take immediate actions to comply with its commitments on cutting carbon emissions.<sup>787</sup> The *Urgenda Foundation v. The State of the Netherlands* (Netherlands, 2019)

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<sup>782</sup> The White House, 'REPORT on the IMPACT of CLIMATE CHANGE on MIGRATION the WHITE HOUSE' (2021) <<https://www.whitehouse.gov/wp-content/uploads/2021/10/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf>> accessed 1 February 2024.

<sup>783</sup> Navarro Ferronato and Vincenzo Torretta, 'Waste Mismanagement in Developing Countries: A Review of Global Issues' (2019) 16 *International Journal of Environmental Research and Public Health* 1060 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6466021/>> accessed 12 March 2024.

<sup>784</sup> Margaretha Wewerinke-Singh, 'A Human Rights Approach to Energy: Realizing the Rights of Billions within Ecological Limits' (2021) 31 *Review of European, Comparative and International Environmental Law* 16 <<https://onlinelibrary.wiley.com/doi/full/10.1111/reel.12412>> accessed 1 March 2024.

<sup>785</sup> 'Climate Change | United Nations for Indigenous Peoples' (*Un.org* 2019) <<https://www.un.org/development/desa/indigenouspeoples/climate-change.html>> accessed 1 March 2024.

<sup>786</sup> <sup>786</sup> *Milieudefensie et Al. V. Royal Dutch Shell Plc. - Climate Change Litigation* (Climate Change Litigation 25 May 2022) <<https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/>> accessed 1 March 2024.

<sup>787</sup> 'Notre Affaire à Tous and Others v. France - Climate Change Litigation' (Climate Change Litigation 22 November 2022) <<https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v->

saw the Supreme Court upholding a lower court's ruling that the Dutch government must reduce emissions by at least 25% by the end of 2020.<sup>788</sup>

There are also other cases that delve deep into the climate change litigation issue. Among these cases would be the ongoing case of *Juliana v. United States*<sup>789</sup> whereby a group of young plaintiffs filed a lawsuit asserting that the U.S. government's failure to address climate change violates their constitutional rights to life, liberty, and property. Moreover, in *Future Generations v. Ministry of the Environment and Others (Colombia)*, the Supreme Court recognized the Amazon rainforest as an "entity subject of rights" and ordered the government to take action to reduce deforestation.<sup>790</sup> In the ongoing German case of *Lliuya v. RWE*, a Peruvian farmer sued the German energy company RWE, demanding it pay for safety measures to protect his town from flooding due to glacial melting caused by climate change.<sup>791</sup> In the case of *Leghari v. Federation of Pakistan (Pakistan, 2015)*, the Lahore High Court ruled in favor of a farmer who argued that the government's inaction on climate change violated his human rights.<sup>792</sup>

In *Friends of the Irish Environment v. Ireland (Ireland, 2020)*, the Supreme Court ruled that the government's National Mitigation Plan was not specific enough to meet Ireland's climate change commitments. For the ongoing Norwegian case of *Greenpeace Nordic and Nature and Youth v.*

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[france/#:~:text=On%20October%2014%2C%202021%2C%20the%20administrative%20court.by%20its%20inaction%20by%20December%2031%2C%202022.>](#) accessed 2 March 2024.

<sup>788</sup> Margaretha Wewerinke-Singh and Ashleigh McCoach, 'The State of the Netherlands v Urgenda Foundation: Distilling Best Practice and Lessons Learnt for Future Rights-Based Climate Litigation' (2021) 30 *Review of European, Comparative and International Environmental Law* 275 <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/reel.12388#:~:text=Abstract-.On%2020%20December%202019%2C%20the%20Supreme%20Court%20of%20the%20Netherlands,of%202020%20compared%20to%201990>> accessed 1 March 2024.

<sup>789</sup> 'Juliana v. United States - Climate Change Litigation' (*Climate Change Litigation* 6 March 2024) <<https://climatecasechart.com/case/juliana-v-united-states/>> accessed 7 March 2024.

<sup>790</sup> 'Future Generations v. Ministry of the Environment and Others - Climate Change Litigation' (*Climate Change Litigation* 27 March 2022) <<https://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/#:~:text=On%20April%205%2C%202018%2C%20the,Amazon%20as%20a%20%E2%80%9Csubject%20of>> accessed 2 March 2024.

<sup>791</sup> 'Luciano Lliuya v. RWE AG - Climate Change Litigation' (*Climate Change Litigation* 5 July 2023) <<https://climatecasechart.com/non-us-case/liuya-v-rwe-ag/>> accessed 1 March 2024.

<sup>792</sup> 'Leghari vs. Federation of Pakistan | ESCR-Net' (*ESCR-Net* 2 September 2015) <<https://www.escr-net.org/caselaw/2023/leghari-vs-federation-pakistan>> accessed 27 February 2024.

Norway, a ripe law lawsuit challenging the Norwegian government's decision to grant oil exploration licenses in the Arctic is under judicial scrutiny and consequent interventions thereof.<sup>793</sup> Lastly, and in *Ashgar Leghari v. Pakistan (Pakistan, 2015)*, the Lahore High Court recognized the threat posed by climate change and ordered the creation of a climate change commission.<sup>794</sup>

The cases discussed above reflect the global nature of environmental justice issues and the role of courts in addressing them, from holding governments and corporations accountable for their contributions to climate change to recognizing the rights of future generations and natural entities.

*h. Harnessing the power of AI and dispute resolution mechanisms to foster climate and environmental justice; case studies of the progress made*

Here are ten critical case studies where AI has been harnessed alongside other dispute resolution mechanisms to address environmental injustices:

- a. UNEP's World Environment Situation Room (WESR) utilizes AI to analyze and visualize earth observation data for real-time analysis and future predictions on environmental factors.<sup>795</sup>

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<sup>793</sup> 'Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy (People v Arctic Oil) - Climate Change Litigation' (*Climate Change Litigation* 21 February 2022) <<https://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/>> accessed 1 March 2024.

<sup>794</sup> 'Leghari v. Federation of Pakistan - Climate Change Litigation' (*Climate Change Litigation* 21 February 2022) <<https://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/>> accessed 1 March 2024.

<sup>795</sup> 'How Artificial Intelligence Is Helping Tackle Environmental Challenges' (*UNEP* 2022) <<https://www.unep.org/news-and-stories/story/how-artificial-intelligence-helping-tackle-environmental-challenges>> accessed 1 March 2024.

- b. International Methane Emissions Observatory (IMEO) employs AI to monitor and mitigate methane emissions, providing a global public database of empirically verified methane emissions.<sup>796</sup>
- c. Puerto Mauricio Development Conflict: A negotiation role-play simulation where AI was used to simulate outcomes of land use decisions between environmental groups and developers.<sup>797</sup>
- d. Water Use Adaptation to Climate Change: A multi-party negotiation role-play that incorporates AI to enhance scenario-planning and guide decision-making in water resource management.<sup>798</sup>
- e. AI Regulation and ADR: Studies how evolving AI regulation impacts ADR, with AI being used to interpret large datasets and inform policy decisions.<sup>799</sup>
- f. Environmental Mediation Case Studies: Showcases how AI can support environmental mediation by providing data analysis for more informed decision-making.<sup>800</sup>
- g. Australian Disputes Centre Environmental Case Study: Illustrates how interdisciplinary knowledge systems, including AI, offer opportunities to resolve environmental disputes.<sup>801</sup>
- h. AI for Climate Prediction and Management: AI systems are used to gather climate data, predict weather events, and contribute to smart energy consumption and recycling initiatives.<sup>802</sup>

<sup>796</sup> UN Environment, 'International Methane Emissions Observatory' (UNEP - UN Environment Programme 2024) <<https://www.unep.org/topics/energy/methane/international-methane-emissions-observatory>> accessed 1 March 2024.

<sup>797</sup> 'Puerto Mauricio Development Conflict Simulation - Parts I & II' (PON - Program on Negotiation at Harvard Law School 4 December 2019) <<https://www.pon.harvard.edu/shop/puerto-mauricio-development-conflict-simulation-parts-i-and-ii/#:~:text=Part%20I%20The%20coastal%20town,land%20is%20very%20different%20ways.>> accessed 1 March 2024.

<sup>798</sup> Ariel Dinar, 'Challenges to Water Resource Management: The Role of Economic and Modeling Approaches' (2024) 16 Water 610 <<https://www.mdpi.com/2073-4441/16/4/610>> accessed 1 March 2024.

<sup>799</sup> Ryan Abbott and Brinson S Elliott, 'Putting the Artificial Intelligence in Alternative Dispute Resolution' (2023) 4 Amicus Curiae Series 685.

<sup>800</sup> Shahriar Akter and others, 'Unleashing the Power of Artificial Intelligence for Climate Action in Industrial Markets' (2024) 117 Industrial Marketing Management 92 <<https://www.sciencedirect.com/science/article/pii/S0019850123002390>> accessed 1 March 2024.

<sup>801</sup> Stephen Woroniecki and others, 'Nature Unsettled: How Knowledge and Power Shape "Nature-Based" Approaches to Societal Challenges' (2020) 65 Global Environmental Change 102132 <<https://www.sciencedirect.com/science/article/pii/S0959378020307159>> accessed 2 March 2024.

<sup>802</sup> Shahriar Akter and others, 'Unleashing the Power of Artificial Intelligence for Climate Action in Industrial Markets' (2024) 117 Industrial Marketing Management 92

- i. AI in Urban Planning: Projects like the Windy project leverage AI for environmental monitoring and urban planning to mitigate environmental impacts.<sup>803</sup>
- j. AI in Disaster Prevention: The World Meteorological Organization uses AI to prevent natural disasters and develop clean energy and green transport solutions.<sup>804</sup>

These case studies demonstrate the potential of AI to provide critical insights and solutions for environmental justice challenges, making it a valuable ally in the fight for a more sustainable and equitable planet. Therefore, Integrating AI, ADR, and environmental justice into global advocacy can be achieved through the following 15 critical and practicable ways:

- a. Open-Source AI Tools: Develop and distribute open-source AI tools to track emissions and monitor environmental impacts, making technology accessible to all advocacy groups.<sup>805</sup>
- b. Data-Driven Campaigns: Use AI to analyze environmental data, creating compelling narratives for campaigns that highlight injustices and drive policy change.<sup>806</sup>
- c. AI-Powered Legal Analysis: Implement AI to assist in legal research and analysis, providing advocates with powerful tools to challenge environmental injustices in court.<sup>807</sup>

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<https://www.sciencedirect.com/science/article/pii/S0019850123002390#:~:text=By%20analyzing%20the%20historical%20data,flood%2C%20wildfire%20and%20their%20potential> accessed 1 March 2024.

<sup>803</sup> 'AI in Urban Planning' (ESS Global Training Solutions 19 February 2024) <<https://esoftware.com/ai-in-urban-planning/#:~:text=By%20utilizing%20AI%20technologies%20to,challenge%20posed%20by%20climate%20change.>> accessed 1 March 2024.

<sup>804</sup> Gary Bryner, *Environmental Justice* (Oxford University Press 2017)

<<https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-167?d=%2F10.1093%2Facrefore%2F9780190846626.001.0001%2Facrefore-9780190846626-e-167&p=emailAoP9HYDfW3vc2>> accessed 1 March 2024.

<sup>805</sup> Josh Cowsils and others, 'The AI Gambit: Leveraging Artificial Intelligence to Combat Climate Change—Opportunities, Challenges, and Recommendations' (2021) 38 AI & SOCIETY 283  
<<https://link.springer.com/article/10.1007/s00146-021-01294-x>> accessed 1 March 2024.

<sup>806</sup> Ramit Debnath and others, 'Grounded Reality Meets Machine Learning: A Deep-Narrative Analysis Framework for Energy Policy Research' (2020) 69 Energy Research & Social Science 101704  
<<https://www.sciencedirect.com/science/article/pii/S2214629620302796>> accessed 1 March 2024.

<sup>807</sup> Florence Ogonjo and others, 'Utilizing AI to Improve Efficiency of the Environment and Land Court in the Kenyan Judiciary Leveraging AI Capabilities in Land Dispute Cases in the Kenyan Environmental and Land Court System' (2021) <<https://ceur-ws.org/Vol-2888/paper9.pdf>> accessed 1 February 2024.

- d. Community Engagement Platforms<sup>808</sup>: Create AI-driven platforms that facilitate community engagement in environmental decision-making, ensuring inclusive and equitable participation.<sup>808</sup>
- e. Global Emissions Database: Support initiatives like the International Methane Emissions Observatory to provide a global public database of empirically verified emissions, leveraging AI for accuracy and transparency.<sup>809</sup>
- f. AI in Environmental Education: Integrate AI into educational programs to raise awareness about environmental justice and climate change, fostering a new generation of informed advocates.<sup>810</sup>
- g. Predictive Analytics for Risk Assessment: Utilize AI to predict environmental risks and impacts, enabling proactive advocacy and intervention before injustices occur.<sup>811</sup>
- h. Smart Contracting for Sustainability: Use AI to develop smart contracts that automatically enforce environmental regulations and commitments, reducing the need for litigation.<sup>812</sup>
- i. Enhanced Monitoring of Deforestation: Deploy AI to monitor deforestation and land use changes, providing evidence for advocacy against illegal and unsustainable practices.<sup>813</sup>

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<sup>808</sup> Shahrukh Khalid and others, 'Community Empowerment and Sustainable Tourism Development: The Mediating Role of Community Support for Tourism' (2019) 11 Sustainability 6248 <<https://www.mdpi.com/2071-1050/11/22/6248>> accessed 12 March 2024.

<sup>809</sup> hanin.ab, 'How Artificial Intelligence Is Helping Tackle Environmental Challenges - NCEJ' (NCEJ - National Center for Environmental Justice 8 November 2022) <<https://ncej.org.io/?p=17687>> accessed 1 March 2024.

<sup>810</sup> FeiFei Cao and Yirong Jian, 'The Role of Integrating AI and vr in Fostering Environmental Awareness and Enhancing Activism among College Students' (2024) 908 Science of The Total Environment 168200 <<https://pubmed.ncbi.nlm.nih.gov/37918744/#:~:text=The%20research%20demonstrates%20that%20using,to%20carry%20on%20environmental%20advocacy.>> accessed 1 March 2024.

<sup>811</sup> 'ARTIFICIAL INTELLIGENCE for CLIMATE SECURITY Possibilities and Challenges Kyungmee Kim and Vincent Boulanin' (2023) <[https://www.sipri.org/sites/default/files/2023-12/2312\\_sipri\\_policy\\_report\\_ai\\_for\\_climate\\_security\\_1.pdf](https://www.sipri.org/sites/default/files/2023-12/2312_sipri_policy_report_ai_for_climate_security_1.pdf)> accessed 1 February 2024.

<sup>812</sup> Wolfram Groschopf, Mario Dobrovnik and Christian Herneth, 'Smart Contracts for Sustainable Supply Chain Management: Conceptual Frameworks for Supply Chain Maturity Evaluation and Smart Contract Sustainability Assessment' (2021) 4 Frontiers in blockchain <<https://www.frontiersin.org/articles/10.3389/fbloc.2021.506436/full>> accessed 1 March 2024.

<sup>813</sup> Adriana Erthal Abdenur, 'How Can Artificial Intelligence Help Curb Deforestation in the Amazon?' (IPI Global Observatory 23 November 2020) <<https://theglobalobservatory.org/2020/11/how-can-artificial-intelligence-help-curb-deforestation-amazon/>> accessed 1 March 2024.

- j. AI-Enhanced Mediation Services: Offer AI-enhanced mediation services to resolve environmental disputes efficiently, preserving resources for further advocacy efforts.<sup>814</sup>
- k. Climate Action Planning: Employing AI to optimize climate action plans, ensuring that they are effective, equitable, and aligned with environmental justice principles.<sup>815</sup>
- l. AI for Resource Allocation: Use AI to optimize the allocation of resources in environmental projects, ensuring that the most impacted communities receive the necessary support.<sup>816</sup>
- m. Crowdsourcing Environmental Data: Encourage crowdsourcing of environmental data using AI to analyze and validate contributions, empowering citizen science.<sup>817</sup>
- n. AI in Policy Development: Leverage AI to analyze policy outcomes, providing advocates with insights to push for stronger environmental and climate justice measures.<sup>818</sup>
- o. Disaster Response Coordination: Implement AI systems to coordinate disaster response efforts, ensuring that aid is distributed justly and efficiently to affected communities.<sup>819</sup>

These approaches can help weave AI, ADR, and environmental justice into a cohesive strategy for global advocacy, driving systemic change and promoting a more sustainable and equitable world.

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<sup>814</sup> Teresa De and Jesus Candeias, 'Artificial Intelligence's Role in Enhancing Conflict Resolution within the Online Dispute Resolution (ODR) System' (2023) <<https://hal.science/hal-04194478/document>> accessed 1 February 2024.

<sup>815</sup> Ricardo Vinuesa and others, 'The Role of Artificial Intelligence in Achieving the Sustainable Development Goals' (2020) 11 Nature Communications <<https://www.nature.com/articles/s41467-019-14108-y>> accessed 1 March 2024.

<sup>816</sup> Harshita Jain and others, 'AI-Enabled Strategies for Climate Change Adaptation: Protecting Communities, Infrastructure, and Businesses from the Impacts of Climate Change' (2023) 3 Computational Urban Science The Abstract Section <<https://link.springer.com/article/10.1007/s43762-023-00100-2>> accessed 1 March 2024.

<sup>817</sup> Christian, 'Crowdsourcing and the Power of Citizen Science Technologies' (*Ignitec - Product Design Consultancy, Creative Technology and R&D Lab - Ignitec Product Design, Bristol* 5 December 2023) <<https://www.ignitec.com/insights/crowdsourcing-and-the-impact-of-citizen-science-technologies-on-environmental-monitoring/>> accessed 1 March 2024.

<sup>818</sup> Marie Francisco and Björn-Ola Linnér, 'AI and the Governance of Sustainable Development. An Idea Analysis of the European Union, the United Nations, and the World Economic Forum' (2023) 150 Environmental Science & Policy 103590 <<https://www.sciencedirect.com/science/article/pii/S1462901123002393>> accessed 1 March 2024.

<sup>819</sup> Prof. Ahmed Banafa, 'Natural Disasters, from Hurricanes and Earthquakes to Wildfires and Floods, Have Wreaked Havoc on Our Planet for Centuries. These Catastrophic Events Can Lead to Immeasurable Loss of Life and Property, and They Often Leave Communities in Ruins.' (*Linkedin.com* 10 September 2023) <<https://www.linkedin.com/pulse/artificial-intelligence-natural-disasters-prof-ahmed-banafa>> accessed 1 March 2024.

i. Challenges faced or expected to be faced

Integrating AI, ADR, and environmental justice into global advocacy presents several challenges, which can be addressed through strategic and thoughtful approaches:

1. **Data Privacy and Security:** The use of AI requires handling large datasets, which may include sensitive information. Ensuring data privacy and security is paramount. This can be addressed by implementing robust encryption methods, anonymizing data, and adhering to international data protection regulations.<sup>820</sup>

2. **Bias and Discrimination:** AI systems can perpetuate biases if not properly designed. To combat this, it's essential to use diverse training datasets and employ algorithms that are transparent and explainable. Regular audits and updates can help mitigate bias.<sup>821</sup>

3. **Access and Inclusivity:** There's a risk that AI tools may not be accessible to all advocacy groups, especially in under-resourced regions. Addressing this involves providing training, resources, and support to ensure equitable access to technology.<sup>822</sup>

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<sup>820</sup> Akash Takyar, 'Data Security in AI Systems' (*LeewayHertz - AI Development Company* 19 June 2023) <<https://www.leewayhertz.com/data-security-in-ai-systems/>> accessed 1 March 2024.

<sup>821</sup> Dr. Varsha P. S, 'How Can We Manage Biases in Artificial Intelligence Systems – a Systematic Literature Review' (2023) 3 *International Journal of Information Management Data Insights* 100165 <<https://www.sciencedirect.com/science/article/pii/S2667096823000125>> accessed 1 March 2024.

<sup>822</sup> Andy Nguyen and others, 'Ethical Principles for Artificial Intelligence in Education' (2022) 28 *Education and Information Technologies* 4221 <<https://link.springer.com/article/10.1007/s10639-022-11316-w>> accessed 1 March 2024.



4. Complexity of Environmental Issues: Environmental justice issues are complex and multifaceted. AI must be complemented with human expertise to understand the nuances of each case. Interdisciplinary teams can ensure that AI supports rather than oversimplifies the issues.<sup>823</sup>

5. Technological Literacy: The effective use of AI requires a certain level of technological literacy. Building capacity through education and training programs can empower advocates to leverage AI tools effectively.<sup>824</sup>

6. Integration with Existing Systems: Integrating AI into existing advocacy and legal frameworks can be challenging. Developing interoperable systems and ensuring that AI tools can work within the current infrastructure is crucial.<sup>825</sup>

7. Ethical Considerations: The deployment of AI raises ethical questions, particularly around decision-making in environmental justice. Establishing ethical guidelines and involving ethicists in the development process can help address these concerns.<sup>826</sup>

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<sup>823</sup> Elias Simon Bibri and others, 'Smarter Eco-Cities and Their Leading-Edge Artificial Intelligence of Things Solutions for Environmental Sustainability: A Comprehensive Systematic Review' (2024) 19 *Environmental Science and Ecotechnology* 100330 <<https://www.sciencedirect.com/science/article/pii/S2666498423000959>> accessed 1 February 2024.

<sup>824</sup> Karin Stolpe and Jonas Hallström, 'Artificial Intelligence Literacy for Technology Education' [2024] *Computers and Education Open* 100159 <[https://www.sciencedirect.com/science/article/pii/S2666557324000016#:~:text=The%20results%20show%20that%20AI,role%20of%20humans%20in%20AI\).](https://www.sciencedirect.com/science/article/pii/S2666557324000016#:~:text=The%20results%20show%20that%20AI,role%20of%20humans%20in%20AI).>)> accessed 17 February 2024.

<sup>825</sup> Marc Dimmick, 'Introduction in the Fast-Evolving Landscape of Artificial Intelligence (AI), the Marvels of Innovation Consistently Push the Boundaries of What We Once Thought Impossible. From Self-Learning Algorithms to Intelligent Automation Transforming Industries, AI's Advancements Paint a Future Brimming With' (*Linkedin.com* 28 November 2023) <<https://www.linkedin.com/pulse/blockchain-gatekeeper-revolutionizing-ai-regulation-marc-5tbac>> accessed 1 March 2024.

<sup>826</sup> 'Ethics of Artificial Intelligence' (*Unesco.org* 2024) <<https://www.unesco.org/en/artificial-intelligence/recommendation-ethics>> accessed 11 March 2024.

8. Regulatory Hurdles: AI in advocacy may face regulatory hurdles, as laws may not have kept pace with technological advancements. Advocates must work with policymakers to update regulations that facilitate the responsible use of AI.<sup>827</sup>

9. Funding and Resources: Developing and maintaining AI systems can be costly. Securing funding through grants, partnerships, and collaborations is essential to sustain these initiatives.<sup>828</sup>

10. Public Trust and Perception: There may be skepticism about the use of AI in advocacy. Transparent communication about how AI is used, and its benefits can help build public trust.<sup>829</sup>

11. Environmental Impact of AI: AI itself has an environmental footprint. Advocates must ensure that the AI systems they use are energy-efficient and have a minimal environmental impact.<sup>830</sup>

12. Interoperability with ADR: Ensuring that AI tools are compatible with ADR processes requires careful design and customization. Collaboration between technologists and ADR professionals can facilitate this integration.<sup>831</sup>

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<sup>827</sup> Bulelani Jili, 'Kenya Must Update Its Regulatory Frameworks to Keep Pace with AI' (*Tech Policy Press* 2 October 2023) <<https://www.techpolicy.press/kenya-must-update-its-regulatory-frameworks-to-keep-pace-with-ai/>> accessed 1 March 2024.

<sup>828</sup> Allison Gardner and others, 'Ethical Funding for Trustworthy AI: Proposals to Address the Responsibilities of Funders to Ensure That Projects Adhere to Trustworthy AI Practice' (2021) 2 *AI and Ethics* 277 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8197676/>> accessed 1 March 2024.

<sup>829</sup> *Ibid.*

<sup>830</sup> Alokya Kanungo, 'The Real Environmental Impact of AI | Earth.Org' (*Earth.Org* 18 July 2023) <<https://earth.org/the-green-dilemma-can-ai-fulfil-its-potential-without-harming-the-environment/>> accessed 12 March 2024.

<sup>831</sup> Prabhu Stanislaus, 'Introduction: Alternative Dispute Resolution (ADR) Has Emerged as a Preferred Method for Resolving Disputes outside of the Court System, and ADR Processes Have Been Utilized for Decades to Resolve Disputes. Over Time, Technology Has Allowed ADR Processes to Evolve from In-Person Mediation or Arbitra' (*Linkedin.com* 4 May 2023) <<https://www.linkedin.com/pulse/advancing-justice-role-ai-empowering-adr-parties-prabhu-stanislaus>> accessed 1 March 2024.

13. Scalability: AI solutions must be scalable to address global issues. This involves using cloud-based platforms and ensuring that AI systems can handle large-scale data processing.<sup>832</sup>

14. Continual Learning and Adaptation: Environmental issues are dynamic. AI systems must be designed for continual learning and adaptation to remain relevant and effective.<sup>833</sup>

15. Outcome Evaluation: It's important to regularly evaluate the outcomes of AI integration to ensure that it's meeting the goals of environmental justice advocacy. This can be done through impact assessments and feedback loops.<sup>834</sup>

By acknowledging and proactively addressing these challenges, the integration of AI, ADR, and environmental justice into global advocacy can be more seamless and effective, leading to a more just and sustainable future.

## Conclusion

In summary, the integration of Artificial Intelligence (AI) and Alternative Dispute Resolution (ADR) into environmental justice advocacy represents a transformative convergence of technology and human-centric approaches. AI's capacity to process vast datasets and provide predictive analytics can significantly enhance the efficiency and effectiveness of environmental campaigns and legal actions. ADR offers a flexible, efficient, and often less adversarial means of

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<sup>832</sup> Naomi Haefner and others, 'Implementing and Scaling Artificial Intelligence: A Review, Framework, and Research Agenda' (2023) 197 *Technological Forecasting and Social Change* 122878 <<https://www.sciencedirect.com/science/article/pii/S0040162523005632>> accessed 1 March 2024.

<sup>833</sup> Ibid.

<sup>834</sup> Sajid Ali and others, 'Explainable Artificial Intelligence (XAI): What We Know and What Is Left to Attain Trustworthy Artificial Intelligence' (2023) 99 *Information Fusion* 101805 <<https://www.sciencedirect.com/science/article/pii/S1566253523001148>> accessed 12 March 2024.

resolving disputes, which is particularly valuable in the complex and urgent context of climate change.

The synergy between AI and ADR can lead to more informed decision-making, equitable outcomes, and proactive measures in environmental justice. However, this integration is not without challenges. Issues such as data privacy, technological literacy, bias in AI, and the need for interdisciplinary collaboration must be addressed. Ensuring access and inclusivity, maintaining ethical standards, and navigating regulatory landscapes are also critical.

The best way forward involves a collaborative effort to develop open-source AI tools, enhance capacity building, ensure ethical deployment of AI, and foster global partnerships. By leveraging AI responsibly and enhancing ADR processes, we can aspire to a future where environmental justice is not just an ideal but a tangible reality for all communities across the globe. The path ahead is one of innovation, equity, and relentless advocacy, guided by the compass of technology and the map of human wisdom.

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## Navigating Green Conflicts: Innovative Paths to Environmental Justice in Kenya

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*I. Prologue*

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The United Nations Development Program defines Environmental justice as 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 policies.<sup>836</sup> It aims to address environmental inequalities and ensure that vulnerable and marginalized communities are not affected by the environmental challenges as opposed to the upper class in the society<sup>837</sup>. Fair treatment means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies.

Meaningful involvement means:

- a) *People have an opportunity to participate in decisions about activities that may affect their environment and/or health.*
- b) *The public's contribution can influence the regulatory agency's decision.*
- c) *Community concerns will be considered in the decision-making process; and*
- d) *Decision-makers will seek out and facilitate the involvement of those potentially affected.*

In the pursuit towards achieving the environmental justice, the courts have played a huge role in settling of disputes concerning the citizens regarding the environment. In several instances, many people have not been able to access justice in time because of the bulkiness of cases in courts and other shortcomings that litigation has. This is why Article 159 goes forth to provide for the ADR system of settling disputes which is more affordable to all persons as compared to the court process.<sup>838</sup> The characteristics associated with ADR in environmental cases include: parties voluntarily agree to participate; direct participation of the parties in the process; parties can withdraw from the process; a facilitative approach is used by a neutral party with no decision making authority; and the decision and solutions reached are made by the parties.<sup>839</sup>

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<sup>836</sup> Kariuki Muigua, 'Putting the Concept of Environmental Justice in Context' (*TheLawyer.africa* 10 October 2023) <<http://tinyurl.com/yeyj6yvz> accessed 23 February 2024.

<sup>837</sup> Patricia Kameri-Mbote and Philippe Cullet, 'Environmental Justice and Sustainable Development Integrating Local Communities in Environmental Management' (1996) <<https://www.ielrc.org/content/w9601.pdf>> accessed 25 February 2024.

<sup>838</sup> Constitution 2010, Article 159 (2)(c) & 3.

<sup>839</sup> Joseph A Siegel, 'Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use' (2007) 24(1) *Pace Environmental Law Review* 187.

This article will expound more into the different causes of Environmental injustice identifying how ADR can help curb the challenges. They include:

- Pollution
- Public participation
- Gender discrimination
- The future of ADR in Environmental justice

i. Introduction

Environmental justice means that no community should be saddled with more environmental burdens and less environmental benefits than any other.<sup>840</sup> This is where Article 27 of the constitution comes in; providing that every person is equal before the law and should access equal benefits and protection from the law.<sup>841</sup> Just like any other sphere of the law, injustice in the environment is paramount. The bourgeoisies are on their pursuit to making sure that they get the upper hand in benefiting more than the rest of the people from common things like the environment. Which is something that is a total disgrace to humanity especially since Article 42 provides for the right to a clean environment to all persons.<sup>842</sup> By this then it means that Every person has the right to live in an environment that is free from pollution, hazards, and degradation. Article 33 of the UN Charter gives the conflict management mechanisms in clear terms and it creates the legal basis for the application of ADR mechanisms in disputes between parties be they states or individuals. It provides the various conflict mechanisms that parties to a dispute may resort to. They include negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, or even Traditional forms of Dispute Resolution [TDRMs].<sup>843</sup>

The National Environment Tribunal set up in the Environmental Management and Coordination Act [EMCA], serves various functions inter-alia including receiving, hearing, and deciding appeals arising from decisions made by the National Environment Management

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<sup>840</sup> Majora Carter interpretation of terms section, specifically the term environmental justice.

<sup>841</sup> Constitution 2010, Article 27.

<sup>842</sup> Constitution 2010, Article 42.

<sup>843</sup> United Nations, Charter of The United Nations, 24 October 1945, I UNTS XVI.

Authority under Section 7 of EMCA 1999. Before delving and interrogating Section 20 of the Environment and Land Court [ELC] Act and the opportunities it offers in settling environmental disputes through ADR, it should be noted that as a specialized court, the ELC is expected to provide a better forum than the general courts in solving environmental disputes and enhance jurisprudence on the use of environmental ADR.<sup>844</sup>

Furthermore, Kariuki Muigua's research argues that the overriding objective serves as 'a basis for the court to employ rules of procedure that provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the ends of the overriding objective.'<sup>845</sup> This overriding objective is provided by the Civil Procedure Act [CPA] which is the ELRC and is bound to facilitate the just, expeditious, proportionate and affordable resolution of disputes as provided for in the governing environmental regime and the CPA. This brings me to the some of the causes of environmental injustices and how the courts and the NET tribunals can use ADR forms as a mode of accessing environmental justice to all.

## ii. Pollution

EMCA defines pollution as the addition of any substance (solid, liquid, or gas) or any form of energy (such as heat, sound, or radioactivity) to the environment at a rate faster than it can be dispersed, diluted, decomposed, recycled, or stored in some harmless form.<sup>846</sup> This concept encompasses various types of pollution, each affecting different aspects of our surroundings. That is water, air, land and any other kind of pollution. The *Draft Principles on Human Rights and the Environment of 1994* provides that all persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, wellbeing or sustainable development within, across or outside national boundaries.<sup>847</sup> In the Stockholm conference in 1972 the right to a clean healthy environment was explicitly recognized in an international environmental law document which declared that *man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a*

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<sup>844</sup> C Stukenborg 'The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts' (1994) 19 University of Dayton Law Review 1305. 25 Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 Journal of Environmental Law 365.

<sup>845</sup> Kariuki Muigua, 'Court Annexed ADR in the Kenyan Context' accessed 30 January 2018.

<sup>846</sup> Ibid.

<sup>847</sup> Ibid, Principle 5

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.<sup>848</sup>

In *Odando & another (Suing on their Own Behalf and as the Registered Officials of Ufanisi Centre) v National Environmental Management Authority & 2 others; County Government of Nairobi & 5 others* the court held that the Respondents are directed to prescribe measures and formulate methods for the management and safe disposal of waste from the City County of Nairobi in accordance with Section 86 of EMCA read with Part 2 (2) (g) of the Fourth Schedule to the Constitution.<sup>849</sup> That polluting Nairobi and Athi River is a risk to those depending on the river for water and other uses as much as it is considered to be a riparian property.

Health deterioration is one of the major effects of pollution. It is also not healthy for the aquatic organisms bearing in mind that most people do depend on them. It behooves every person to ensure that the environment is not degraded or polluted through the proper disposal of solid and hazardous wastes, limiting the use of non-biodegradable items such as plastics and not disposing solid and hazardous materials into the river.<sup>850</sup> In the *Certain Activities carried out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River* case, the International Court of Justice (ICJ) addressed the issue of compensation for transboundary harm. Nicaragua was found to have breached international obligations by excavating canals that affected the rich biodiversity of the disputed area. The ICJ held that Nicaragua had an obligation to compensate Costa Rica for material damages caused by these unlawful activities.<sup>851</sup>

In such cases, ADR can be used in the following ways;

- I. Negotiation: In water and air pollution cases, negotiation involves parties discussing their interests and concerns to reach an agreement. For

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<sup>848</sup> Ibid Principle I

<sup>849</sup> *Isaiah Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR*

<sup>850</sup> *Isaiah Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR*

<sup>851</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*

instance, stakeholders (such as industries, communities, and governments) can negotiate pollution reduction targets or allocate water usage rights.

2. Mediation: The CPA defines mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates resolution of a dispute between two or more parties to a dispute but does not include the attempts made by a judge before to settle the dispute.<sup>852</sup> A mediator facilitates communication between conflicting parties, helping them explore mutually beneficial solutions. In pollution cases, mediation can address issues like contaminated water sources, emissions, or land use conflicts. The citizens whose social or economic rights have been infringed can be invited for a mediation process together with the bodies responsible for the infringement and come up with a common ground so that those responsible can carry out their duties as it shall be decided by the mediator.
3. Consensus building aims to create shared understanding and collaborative decision-making. In pollution cases, it involves bringing together diverse stakeholders (e.g., local communities, businesses, environmental organizations) to find common ground. For example, consensus-building processes can lead to agreements on pollution control measures or sustainable resource management.

In Kenya, the polluter pays principle plays a crucial role in environmental law.<sup>853</sup> This principle, which has been dominant since the 1970s, states that the costs of pollution should be borne by the person responsible for causing it. In other words, those who produce pollution must bear the expenses associated with managing it to prevent harm to human health and the environment. For instance, if a factory produces a potentially harmful substance as a by-product, it is held

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<sup>852</sup> Civil Procedure Act, Cap 21 Laws of Kenya.

<sup>853</sup> OECD, *Environmental Principles, and concepts*, [organization for Economic Co-operation and Development, Paris, 1995], op cit., Para.37.

accountable for its safe disposal. The polluter pays principle serves as the foundation for regulating pollution affecting land, water, and air.<sup>854</sup>

Section 3 (5) (e) of the Environmental Management and Conservation Act, No. 8 of 1999 in Kenya guides courts in enforcing the right to a clean and healthy environment.<sup>855</sup> This principle is a vital tool in natural resources management, aiming to prevent environmental harm through a liability mechanism. Specifically, it encompasses costs related to:

- Cleaning up environmental damage caused by pollution
- Compensating victims of pollution
- Loss of beneficial uses due to pollution
- Other costs incidental to pollution

When the tribunal and the courts use such pacific methods of disputes settlement in solving rampant pollution causes that has been a great harm to the livelihoods of those affected, then the persons who are facing environmental injustices will reach a point of enjoying equal benefits from the environment as provided for in Article 27 of the Constitution.<sup>856</sup>

### iii. Public Participation

The 1994 Draft Awareness Declaration on Human Rights and Environment describes the procedural rights, such as the right to participation, necessary for realization of the substantive rights.<sup>857</sup> It is believed that environmental procedural rights such as the access to information, public participation and access to justice may be one of the ways to a realistic way for attaining the environmental justice in conjunction with sustainable development.<sup>858</sup> Procedural

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<sup>854</sup> 1972 OECD Guiding Principles on the International Economic Aspects of Environmental Policies, OECD, C [72]128[As quoted in OECD, *Environmental Principles, and concepts*, [organization for Economic Co-operation and Development, Paris, 1995], op cit., Para.33].

<sup>855</sup> EMCA, Section 3(5)(e).

<sup>856</sup> Constitution 2010, Article 27.

<sup>857</sup> Draft Awareness Declaration on Human Rights and Environment's Part 3[Principles 15-24].

<sup>858</sup> Mohammad, N., 'Environmental Rights for Administering clean and Healthy Environment towards Sustainable Development in Malaysia: A Case study, *International journal of Business and Management*; Vol.9, No 8;2014, pp.191-198 at p 192.



rights prescribe the formal steps to be taken in enforcing legal rights. These rights include three fundamental access rights:

**Access to information:** Ensures that individuals have the right to obtain relevant information related to their legal rights and obligations.

**Public participation:** Allows individuals to participate in decision-making processes that affect their rights, especially in matters related to the environment.

**Access to justice:** Ensures that individuals have the right to seek legal remedies and redress when their rights are violated or when they face legal disputes.

Substantive rights refer to basic human rights that individuals possess within an organized society. These rights encompass both those granted by natural law and those defined by substantive law. Additionally, in *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok*, the court gave a much wider description of the public by stating that it is “the individual who has sufficient interest in the issue over which the public body is exercising discretion, or where the exercise of that discretion is likely to adversely affect the interests of the individual or even where it is shown that the individual has a legitimate expectation to be consulted before the discretionary power is exercised.”<sup>859</sup>

The meaningful involvement of people in environmental matters requires effective access to decision makers for all and the ability in all communities to make informed decisions. Principle 10 of the 1992 Rio Declaration on Environment and Development gives life to Principle 17, which states that “environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority”, and Principle 15, which states that “in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage,

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<sup>859</sup> HC Judicial Review No. 122 of 2011, [2012] eKLR.

lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".<sup>860</sup>

Public participation in environmental justice becomes meaningful when concerned stakeholders including citizens get involved in every decision-making process earlier before the decisions are made and have knowledge of the subject matter that is in consideration, as well as the procedural framework of the decision-making process.

This calls for free prior and informed consent from the affected communities in relation to exploitation of natural resources. It is thus not a stand-alone right, but an expression of a wider set of human rights protection that secure indigenous peoples right to control their lives.

The constitution provides for participation of persons with disabilities, youths, minorities and marginalized groups and older members of the society in governance and other spheres of lives.<sup>861</sup>

In relation to the county government act, citizen participation shall be based on the following principles;

- iv. Timely access to information data, documents

Article 35 of the constitution guarantees the right to access to information held by the state and information held by another person and required for the exercise or protection of any fundamental freedom .It also obligates the state to publish and publicize any important information affecting the nation.<sup>862</sup> Access to information helps in facilitating access to environmental justice .Citizens are able to make an informed decision for example where the government declares the percentage of forest coverage in the country then citizens can exploit ,use and plant trees with a clear vision in their minds.

In *Friends of lake Turkana trust v attorney general and 2 others* the court was of the view that access to environmental information was prerequisite to effective public participation in decision making and monitoring governmental and public sector activities on the environment .the court observed that article 69 [1][d] of the constitution placed an obligation on the state to encourage public participation in the management ,protection and conservation of the environment .Access

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<sup>860</sup> Rio Declaration on Environment and development of 1995, Principles 15-17.

<sup>861</sup> Articles 53-57 of the Constitution of Kenya, 2010.

<sup>862</sup> Constitution 2010, Article 10 on transparency being one of the national values and principles.

to information can be done through community based forums and baraza's .This forum can enhance access to environmental information and in turn promote environmental justice .

- v. Reasonable access to the process of formulating n implementing policies, laws, and regulations.
- vi. Protection and promotion of interest of the minorities and marginalized groups.<sup>863</sup>

This means that the devolved government must not purport to make unilateral decisions especially with regards to the management of natural resources. They must recognize the centrality of people in natural resource management, since these resources have an impact on the economic, social, cultural and even spiritual lives of these diverse communities in Kenya. The process is therefore seen to be fairer if those who are affected have an opportunity to participate in a meaningful way and their opinions are taken seriously.

Those affected by environmental problems must be included in the process of remedying those problems through talks, negotiations, mediation and other peaceful modes of resolving disputes. It is worth noted for that SDGs seek to promote participation of local communities in maintaining the environment.<sup>864</sup> Negotiation and mediation have more value to the local communities than just being means of conflict management. They are also means of sharing information and participating in decision making. They have the unique and positive attributes which include their participatory nature that can be used to manage environmental injustices and ensure that Kenyans achieve sustainable development. The affected communities in cases of decision making can have guaranteed and meaningful participation in the process presenting proof and good arguments in their favor as tools for obtaining the justice.<sup>865</sup>

- vii. Gender discrimination

Environmental justice cannot be achieved without tackling the problem of gender discrimination in relation to access to natural resources in Kenya. Gender discrimination is when

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<sup>863</sup> County Government Act,2012

<sup>864</sup> Ibid, Goal 6b.

<sup>865</sup> Ristanic, A.,'Alternative Dispute Resolution and Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resource; [Lund University, April 2015]

someone is treated unequally or disadvantageously based on their gender. Gender discrimination in law and policy particularly in access to natural resources and property ownership is an instance of environmental injustice. Women for example have been discriminated especially when it comes to land associated resources. Discrimination by both the state and private actors denied women equal participation civil, political and economic social and cultural life. The intricate interplay between gender discrimination, environmental justice, and access to natural resources is a critical lens through which we can examine the complex challenges facing societies globally. It has been documented by the United Nations Conference on Trade and Development (UNCTAD)<sup>866</sup> revealing that the proportion of women registered as landowners in Kenya is less than seven percent, compared to 30 percent of men who hold land titles.

Unfortunately, Kenya's female land ownership ranks lowest among East African countries<sup>867</sup> This results into Kenya being discriminated not only in practice but also in law since it does not actively implement the economic and social rights in relation to the access to environmental justice to both genders as it is required. Gender discrimination intersects with environmental justice as women often bear disproportionate burdens from environmental issues. Limited access to resources, coupled with discriminatory practices, can exacerbate gender inequalities. Addressing both issues simultaneously is crucial for creating sustainable and equitable solutions. It has been recognized that women make crucial contributions in agriculture and rural enterprises, and they play a key role in rural economies, where the fight against hunger and poverty is most pressing as this is where the large majority of the world's poor live.<sup>868</sup>

The constitution of Kenya has incorporated different provisions that can facilitate the creation of a society where women not only participate in decision making in matters touching on environmental but are also given an opportunity to own and enjoy the natural resources related to the environment. These provisions are important in ensuring that all person's including women have access, use and manage natural resources.

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<sup>866</sup> United Nations Conference on Trade and Development (UNCTAD).

<sup>867</sup> [Who owns land in Kenya? Unpacking what the KDHS 2022 data tells us about men and women's land ownership \(africadatahub.org\)](#).

<sup>868</sup> Food and Agriculture Organization of the United Nations, 'FAO Policy on Gender Equality: Attaining Food Security Goals in Agriculture and Rural Development,' Rome, 2013.

viii. Article 27 (1) of the CoK

Every person is equal before the law and has the right to equal protection and equal benefit of the law. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, social and cultural spheres.<sup>869</sup>

Article 27(4): The state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy.<sup>870</sup>

Article 40: Every person has the right, either individually or in association with others to acquire an own property of any description, in any part of Kenya.(2) Parliament shall not enact a law that permits the State or any person (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4). This gives everyone in Kenya despite their gender the right to acquire a title of land anywhere and control the natural resources on that land. On the other hand, the legislature cannot enact any law that deprive a person of the right to own land anywhere in Kenya on the basis of their gender.<sup>871</sup>

Article 60 (1) Principles of land policy- equitable access to land, security of the land rights and elimination of gender discrimination law, customs and practices relating to land and property ownership. These principles envisage the removal of gender discrimination in access, use, management and ownership of property as this is one of the best ways of achieving environmental justice for all including women.<sup>872</sup>

The constitution of Kenya has provision that make an obligation of the state to ensure that there is meaningful participation by women of governance.

Article 260 The state has been obligated to put in place affirmative action programmes designed to ensure that minorities and marginalized groups, participate and be represented in governance and other spheres.<sup>873</sup> The intersectionality of gender discrimination, environmental justice, and access to natural resources unveils a web of interconnected challenges that demand

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<sup>869</sup> Constitution of Kenya 2010, Article 27(1).

<sup>870</sup> Constitution of Kenya 2010, Article 27(4).

<sup>871</sup> Constitution of Kenya 2010, Article 40.

<sup>872</sup> Constitution of Kenya 2010, Article 60(1).

<sup>873</sup> Constitution of Kenya 2010, Article 260.

comprehensive solutions. Achieving a sustainable and equitable future necessitates dismantling gender-based barriers, ensuring equal resource access, and prioritizing inclusive policies that address the nuanced complexities of these intertwined issues. Only through such integrated efforts can societies forge a path towards environmental justice and gender equality.

Principle 8 of the Rio principles states that to achieve sustainable development and a higher quality of all life for all people, states should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.<sup>874</sup> Principle 10 provides that environmental issues are best handled with participation of all concerned citizens at the relevant level. It is in this regard that it has been observed that women commonly face higher risks and greater burdens from the impacts of climate change in poverty situations thus leading to the highest rate in poverty when compared to men. Women's unequal participation in decision making processes and labour markets compound inequalities and often prevent women from fully contributing to climate related planning, policy making and implementation.<sup>875</sup>

Women and girls, especially those in crisis-affected contexts, rural areas, minority groups, or Indigenous communities, bear a disproportionate burden. Gender inequality and limited access to land, natural resources, and assets hinder their ability to cope with environmental crises and fully enjoy their environmental rights. For this reason, there is the need to ensure access to justice in order to respond and prevent the challenges and the violence against women in contexts of environmental injustices.<sup>876</sup>

In the West Bank, a joint UNDP-UN Women-UNICEF project supported the opening of a specialized court for violence against women in the Nablus Court, which applies conciliation as a mode of resolving the disputes, the first of its kind in the occupied Palestinian territories. In the Nablus Court, the first of its kind in the occupied Palestinian territories. Conciliation refers to a formal process where a neutral third party helps parties in conflict reach a settlement without going to court. The conciliation committee provides privacy access and allowing partners,

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<sup>874</sup> Rio Declaration of 1992, Principle 8.

<sup>875</sup> Ibid.

<sup>876</sup> FABIANO DE ANDRADE CORREA, 'Gender equality: A cornerstone for environmental and climate justice | United Nations Development Programme (undp.org).

particularly the Public Prosecution Office, the Ministry of Social Development through its social worker, to be present and accompany women during the litigation process including during court hearings and appearances before a judge.<sup>877</sup> When such pacific modes of resolving disputes are used to help mitigate the conflicts that arise from the gender discrimination in regards to the environment, environmental justice strategy will be a cornerstone of a more integrated approach to deliver climate justice on the ground, ensuring that gender equality and the realization of women's environmental rights are priorities in advocacy and programming efforts.

#### ix. The future of ADR in Environmental Justice

Jacqueline M. Nolan-Haley says that 'As ADR settlement processes have come into greater use in commercial disputes resolution, there is need for the same to be applied in divergent perspectives such as in regard to the purpose of these processes.'<sup>878</sup> These purposes include implementing the ADR mechanisms so as to curb different challenges that are facing the environment caused by human activities or be it Acts of God. This article clearly outlines how the Alternative Dispute Resolution mechanisms can be used to deal with challenges like Pollution; where it broadly explains how mediation, negotiation, arbitration, and consensus can be used to mitigate this, it also provides how public participation can be used as a perfect way of achieving environmental justice. Mainly because of its nature, where citizens and concerned persons take part in decision making thus contributing to negotiation as a form of resolving disputes.

Finally, on how ADR can be of impact to Gender discrimination in environmental justice. It delves more on the conflicts that arise affecting a specific gender such as women in their day to day interaction with the environment. Since environmental injustice deals with how the social and economic rights of the respective genders are infringed. Yes, it is agreed that most cases have been reported but the court litigation process has failed in providing immediate justice to those affected thus the need to uphold ADR system in the implementation.

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<sup>877</sup> [Inauguration of a Specialized Court for Violence Against Women Cases in Nablus by the High Judicial Council and Sawasya Programme II \[EN/AR\] - occupied Palestinian territory | ReliefWeb.](#)

<sup>878</sup> Jacqueline M. Nolan-Haley; *Alternative Dispute Resolution in a nutshell* (5<sup>th</sup> Edition, West Academic Publishing, 2023).

Because a lot of systems were altered by the global pandemic, COVID 19, there has been a shift in terms of how environmental conflicts are solved both in litigation and ADR.

Kenya has been able to embrace the virtual proceedings, which I believe most legal personnel's have been desiring to achieve all along.<sup>879</sup> This is where the processes are heard virtually due to the different barriers; distance or even availability. The virtual sessions can be either through videos or audio or any other electronic mode that is accessible. To realize equitable, sustainable, and efficient management of the environment injustice disputes, the constitution in Article 252 gives power to commissions and independent bodies[in this case Environmental and Land Court and other quasijudicial tribunals]to participate in mediation and negotiation in resolving disputes.<sup>880</sup>

Mediation as one of the Alternative Dispute Resolution mechanisms has helped in settling Environmental injustice cases. An example is the Maasai Community which has had several disputes over land. The committee in charge of resolving which is the *Oloibor-enkene* brought the parties to reconciliation .This system does exist in the communities as Traditional Dispute Resolution forms.<sup>881</sup> This has further led to inclusiveness and public participation among the community thus leading to massive growth both socially and economically. Thus, the need of educating masses and the courts on the use of ADR since as seen it is an effective way of resolving disputes relating to environment even as we desire as a country to journey towards the 2030 Vision.

While conflicts cannot be avoided, there is need to effectively resolve the in a peaceful manner to avoid a lot of injustices as has been observed before. Once ADR is embraced in mitigating these Environmental injustices, then paradigm shift shall be brought about in the field of conflict resolution thus promoting justice in those affected by the injustices from the environment and also, effective and efficient maintenance of the natural resources and the environment shall be

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<sup>879</sup> Fredric I Lederer, 'The Road to the Virtual Courtroom? A Consideration of Today's -- and Tomorrow's -- High Technology Courtrooms' (*William & Mary Law School Scholarship Repository* 2024) <<https://scholarship.law.wm.edu/facpubs/212/>> accessed 27 February 2024.

<sup>880</sup> Constitution of Kenya 2010, Article 252.

<sup>881</sup> *Ibid.*



observed without a lot of technicalities.<sup>882</sup> For this reason, ADR should be considered as the best way to resolve environmental disputes and should be given a wider opportunity to resolve more of such disputes in Kenya.

#### x. Conclusion

This paper has exhaustively dealt with the navigation of green dispute resolution, arguing the use of dispute resolution mechanisms for purposes of resolving disputes over natural resources. It argued that alternative dispute resolution and environmental justice are inadvertently intertwined, hence could be merged to promote environmental justice. The next found such a nexus critical in ensuring environmental justice, entailing equitable of environmental resources, benefits, and not only harms as is the current status quo in Kenya, the horn of Africa and beyond. Finding discrimination because of gender to be alarming in Africa, particularly regarding land ownership, the paper found mediation to potentially help in ameliorating the situation while protecting the presently available resources-for the sake of both the present and future generation. In Kenya, the paper delved into the broad scope of NET and ELRC in resolving disputes relating to the environment and natural resources use. Lastly, the paper has looked into the future horizon, influenced by contemporary issues such as technology, a notable example being virtual courtrooms. However, proper entrenchment of various ideas and proposals herein demand feasible suggestions, hence the recommendations deponed hereinbelow.

### RECOMMENDATIONS

1. Promote ADR Awareness: The ELC should actively raise awareness among environmental litigants about the benefits of ADR. Encouraging parties to consider ADR methods such as mediation, negotiation, or arbitration can lead to more efficient and amicable resolution of disputes.
2. Embracing the Court-Annexed ADR: The ELC has establish court-annexed ADR mechanisms. By doing so, the courts are able to refer cases to ADR processes at an early

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<sup>882</sup> Constitution of Kenya, Article 159(2)(c) & (3).

stage, allowing parties to explore non-adversarial solutions. This approach aligns with the constitutional principle of promoting ADR<sup>883</sup>

3. Environmental Expertise: Given the specialized nature of environmental disputes, the more judicial officers should possess environmental knowledge and expertise. This expertise enables them to select the most suitable ADR method for specific environmental cases.
4. Overriding Objective: The ELC should apply the overriding objective when employing ADR rules. ADR mechanisms should serve the ends of justice, fairness, and environmental protection. By integrating ADR into its procedures, the ELC can enhance access to justice while addressing environmental concerns<sup>884</sup>.
5. Collaboration with Stakeholders: The ELC should collaborate with environmental agencies, NGOs, and community organizations. These stakeholders can contribute to the development and implementation of effective ADR processes tailored to environmental disputes.
6. Training and Capacity Building: Regular training programs for judges, lawyers, and court staff on ADR techniques will enhance their understanding and ability to guide litigants toward ADR options.

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<sup>884</sup> Professor Kariuki Muigua, 'National Environment Tribunal, Sustainable Development and Access to Justice in Kenya' (Ssrn.com 12 September 2022) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4312542](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4312542)> accessed 27 February 2024.

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# THE ROLE OF MEDIATION IN SOLVING CONFLICTS OVER NATURAL RESOURCES

\*By Margaret Akinyi<sup>885</sup>

## Abstract

*Alternative Dispute Resolution mechanisms possess a great potential when it comes to resolving of environmental conflicts. With well-established legal frameworks on the use of ADR as a method of dispute resolution, it is a concept that remains elusive to many Kenyans. Considering the above, this paper unfolds the concepts of Alternative Dispute Resolution, Traditional Dispute Resolution Mechanisms and Environmental Justice, their legal framework, and the importance of upholding these concepts. This paper goes further to give a brief overview on environmental conflicts and the management of environmental conflicts. This paper also looks at the connection between ADR and environmental justice with a focus on the role of mediation in solving conflicts over natural resources and the challenges faced in solving conflicts over natural resources by use of mediation. This paper concludes by looking at the ways of enhancing ADR mechanisms in management of environmental conflicts.*

## I. Introduction

Alternative Dispute Resolution refers to the process of solving and/or settling disputes without resorting to court.<sup>886</sup> The Judiciary is required to use ADR as a guiding principle in exercising its judicial authority. The legal framework for ADR in Kenya is provided for under Article 159 (2) (c) which recognises use of methods other than litigation in settling disputes which include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.<sup>887</sup> These forms of alternative dispute resolution shall be promoted provided that they do not contravene the Bill of Rights, they are not repugnant to justice or morality and are consistent with the

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<sup>886</sup> Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (Greenwood Publishers Limited, 4th edn, 2022) 1.

<sup>887</sup> Constitution of Kenya, 2010, article 159(2)(c).

Constitution or any written law.<sup>888</sup> Article 33 of the United Nations Charter also recognises the use of ADR in settling disputes and states as follows;

*“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall, first, 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.”*<sup>889</sup>

Therefore, fair access to justice through ADR has emerged as a highly effective approach in settling disputes by reducing the overwhelming backlog of cases in courts and mitigating the expenses associated with litigation therefore promoting access to justice.<sup>890</sup>

Traditional Dispute Resolution Mechanisms are methods of solving disputes that were used by communities to settle their disputes before the advent of colonialism which proved to be effective at the time and are still used to date as envisaged under the Constitution provided, they are not repugnant to justice and morality and are consistent with the Constitution.<sup>891</sup> Forms of TDRM include use of consensus approaches, informal mediation, negotiation, problem solving workshop and council of elders and posed several advantages such as encouragement of decision-making by local communities based on local collaboration, easily accessible due to their low cost, acknowledges the right of communities to manage their own affairs and contributes to community empowerment thus very efficient and effective.<sup>892</sup>

## 2. Brief overview of environmental justice

Environmental justice is an emerging issue that is aimed at curbing abuse of power that results in the poor and vulnerable groups of people lacking equal opportunity to access and benefit from

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<sup>888</sup> Ibid., Article 159(3).

<sup>889</sup> United Nations. *Charter of the United Nations*. 24 October 1945. 1 UNTS XVI.

<sup>890</sup> Ernest Uwazie, ‘Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability – Africa Center for Strategic Studies’ (*Africa Center for Strategic Studies* 14 February 2020) <<https://africacenter.org/publication/alternative-dispute-resolution-in-africa-preventing-conflict-and-enhancing-stability/>> accessed 27 February 2024.

<sup>891</sup> Constitution of Kenya, 2010, article 159(2)(c)

<sup>892</sup> FAO, ‘Negotiation and Mediation Techniques for Natural Resource Management’ available at <<https://www.fao.org/3/a0032e/a0032e00.htm>>

natural resources.<sup>893</sup> It is a concept that deals with the fairness in distribution of natural resources with an emphasis on how these resources are managed ensuring that marginalised communities are not affected by lack of access to these resources.<sup>894</sup> Natural resources refer to the raw materials derived from the environment while environmental justice on the other hand is concerned with the fairness in utilisation of these resources and fair treatment and meaningful involvement of all people regardless of race or colour with regards to implementation and enforcement of environment laws.<sup>895</sup>

Environmental justice is based on article 42 which entitles every person the right to a clean and healthy environment.<sup>896</sup> In enforcing this right, an applicant does not have to demonstrate that any person has incurred loss or suffered injury<sup>897</sup> and therefore this provision is aimed at promoting access to environmental justice to all citizens in Kenya by abolishing the need for *locus standi* in environmental cases as further provided under section 3(3) of the Environment Management and Co-ordination Act which states that anybody who alleges that his entitlement to a clean and healthy environment has been or is likely to be contravened may apply to the High Court for redress.<sup>898</sup>

Environmental justice entails three major principles which are access to environmental information,<sup>899</sup> public participation,<sup>900</sup> and access to justice.<sup>901</sup> These principles are directly linked to each other in that for public participation to take place, the public must first have reasonable access to environmental information which in turn enables all concerned citizens to access justice and therefore each principle cannot function independently. This is further reiterated under

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<sup>893</sup> United Nations Development Programme; *Environmental Justice Comparative Experiences in Legal Empowerment*, June 2014 available at <http://tinyurl.com/2kfwn237> accessed 27 February 2024.

<sup>894</sup> Kariuki Muigua, 'Exploring Conflict Management and the Environment: The Kenyan Journey Kariuki Muigua Exploring Conflict Management and the Environment: The Kenyan Journey' (2020) <<http://kmco.co.ke/wp-content/uploads/2020/04/Exploring-Conflict-Management-and-the-Environment-The-Kenyan-Journey-Kariuki-Muigua-16th-April-2020.pdf>> accessed 24 February 2024.

<sup>895</sup> Gary Bryner, *Environmental Justice* (Oxford University Press 2017) <http://tinyurl.com/27jaey7n> accessed 27 February 2024.

<sup>896</sup> Constitution of Kenya, 2010, Article 42.

<sup>897</sup> *Ibid*, article 70(3).

<sup>898</sup> Environment Management and Co-ordination Act, Act No 8 of 1999, section 3(3).

<sup>899</sup> Constitution of Kenya 2010, Article 35.

<sup>900</sup> *Ibid*, Article 10.

<sup>901</sup> *Ibid*, Article 48.



principle 10 of the Rio Declaration on Environment and Development which provides that;” *Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*<sup>902</sup>

Access to justice in this case is a fundamental right that has been defined by the United Nations to mean that;

*“All individuals and communities, particularly the poor and vulnerable, have equal access to justice and that justice is delivered without discrimination or delay.”*<sup>903</sup>

Components of access to justice were stated by Justice Majanja in the case of *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* where he stated as follows:

*“Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights ; equal right to protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory process availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”*<sup>904</sup>

Though there are several legal frameworks that aim to enhance access to environmental justice, there are some significant barriers that hinder people from enjoying this right and they include corruption, lack of access to environmental information, expensive costs of legal action and complex regulations.

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<sup>902</sup> United Nations Conference on Environment and Development: *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992, available at <<https://www.un.org/en/conferences/environment/rio1992>>Accessed 27 October 2024.

<sup>903</sup> United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (25 September 2015) available at <<https://sustainabledevelopment.un.org/post2015/transformingourworld/publication>>

<sup>904</sup> *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* (2012) eKLR [High Court Constitutional Petition No 328 of 2011] para. 110.

### 3. Concept of environmental conflicts

Environmental conflicts can be described as social conflicts that are brought about by the deterioration of the environment and the unequal distribution and access to natural resources due to depletion or imbalance of power. These are conflicts that arise due to competing interests over the ownership, access, and management of natural resources as everyone has their own perception as to how natural resources such as water and minerals should be utilised.

Environmental conflicts can take the form of political, social, economic, ethic, religious or territorial conflicts. Politics has been the centre stage of environmental conflicts with different regions contesting for the scarce natural resources which may have negative impacts such as displacement, violence, and disagreements and in extreme cases may even lead to loss of lives. This arises since people's livelihoods highly depend on the presence of these natural resources. There are several legal frameworks and institutions put in place to resolve and manage environmental conflicts which include the Environment and Management Co-ordination Act<sup>905</sup>, the Public health Act<sup>906</sup>, the Forest Act<sup>907</sup>, the Water Act<sup>908</sup>, and institutions such as the Environment and Land Court Act<sup>909</sup>, the National Environment Management Authority<sup>910</sup>, the National Environmental Complaints Committee<sup>911</sup>, the Public Complaints Committee<sup>912</sup>, the National Environment Tribunal,<sup>913</sup> and other tribunals established under various acts. The Constitution requires the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources.<sup>914</sup>

There are several reasons why it is important to address environmental effects. Other than avoiding the negative impacts of environmental conflicts, it is important to address environmental conflicts as it promotes economic stability. Environmental issues such as pollution can disrupt

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<sup>905</sup> Cap 8 of 1999.

<sup>906</sup> Cap 242.

<sup>907</sup> Cap 7 of 2005.

<sup>908</sup> Cap 8 of 2002.

<sup>909</sup> No 19 of 2011.

<sup>910</sup> Established under S. 7 of the EMCA (Cap 8 of 1999).

<sup>911</sup> *Ibid*, S. 31-36.

<sup>912</sup> *Ibid*, S. 3.

<sup>913</sup> *Ibid*, Part. XII sections 125-136.

<sup>914</sup> Constitution of Kenya, 2010, article 69(1)(a).

ecosystems leading to loss of biodiversity therefore addressing such is vital for maintaining stable ecosystems. It is also important to resolve and manage environmental conflicts as it leads to peace and harmony in that conflicts that would have otherwise led to violence and loss of lives when resolved creates a balance between all concerned parties therefore fostering peace and harmony.<sup>915</sup> Furthermore, effective resolution of environmental conflicts fosters equitable exploitation of natural resources.

Kenya has been faced with multiple environmental conflicts over natural conflicts. Environmental conflicts are critical and need to be resolved and managed effectively as the livelihoods of people highly depend on them. A great example of an environmental conflict in Kenya is the 2015 conflict between the Maasai and Kipsigis in Narok county which resulted in human casualties and displacement.<sup>916</sup>

#### 4. Environmental Conflict Management

Environment conflict management is an area that focuses on how best environmental conflicts arising from resource allocation can be resolved and settled for effective environmental governance by creating a collaborative process that effectively addresses environmental issues. This is a process that aims at preventing the escalation of a conflict. In management of environmental conflicts, principles such as participatory approaches, equitable representation, capacity building and increased access to information come into play for the sake of balancing interests of the parties involved.<sup>917</sup>

In Kenya, the implementation of sound environmental conflict management practices is imperative depending on the stage of the conflict. Techniques that are applied in management of environmental conflicts include: Involving a Third-Party Mediation; Party to Party Conflict Management; Compromise, Avoidance; Yielding; Negotiation and Fighting It Out.<sup>918</sup> ADR has

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<sup>915</sup> See, Muigua, K., 'Environmental Conflict Management in the Kenyan Context: Enhancing the use of Alternative Dispute Resolution Mechanisms.' A paper presented at the Nairobi Club on 27<sup>th</sup> March 2009.

<sup>916</sup> See, Muigua, K., 'Managing Natural Resources Conflicts in Kenya Through Negotiation and Mediation.' February 2016.

<sup>917</sup> Suzan Hazen (1998) *Supra*.

<sup>918</sup> Fisher, R., "Sources of Conflict and Methods of Conflict Resolution." *International Peace and Conflict Resolution*, School of International Service, The American University (2000); Tyler, S. R., "Policy Implications of Natural Resource Conflict Management." *Cultivating Peace: Conflict and Collaboration in Natural Resource Management* (1999).

proved to be a highly effective method of solving environmental conflicts with negotiation and mediation taking the lead.

Solving of environmental conflicts through litigation has been the most applied form of environmental conflict management though has not given the best outcomes due to various barriers that surround the whole process such as technicality in the procedures to be followed, delay in administration of justice due to backlog of cases, costs of undertaking the litigation process are high therefore leading to inaccessibility of the process by the poor and the marginalised communities. This therefore poses as a great opportunity for people to explore to the use of ADR mechanisms to deal with such conflicts as it provides for a more informal and confidential process that is cost effective and inclusive and ensures that Kenyans achieve Sustainable Development.

## 5. The link between ADR and Environmental Justice

Alternative Dispute Resolution mechanisms were earlier defined in this paper to refer to settling of disputes by means other than litigation while Environmental Justice on the other hand refers to a concept that deals with the fairness in distribution access and ownership of natural resources with an aim of curbing abuse of power and corruption with regards to natural resources.<sup>919</sup> In an era marked by increase in environmental conflicts, the intersection between ADR and environmental justice has emerged as a pivotal point in addressing these issues. The Constitution creates an opportunity for the use and exploration of ADR and TDRM in administration of justice and provides that the courts and tribunals shall be guided by Article 159(2)(c) in application of ADR mechanisms.<sup>920</sup> The context of administration of justice in this case puts into consideration justice with regards to matters of the environment. Therefore, the nexus between ADR and environmental justice lies in the ability of ADR mechanisms to address environmental conflicts in a fair and inclusive manner.

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<sup>919</sup> United Nations Development Programme; *Environmental Justice Comparative Experiences in Legal Empowerment*, June 2014, available at <<https://www.undp.org/publications/environmental-justice-comparative-experiences-legal-empowerment#:~:text=This%20report%20outlines%20challenges%20and,natural%20resources%20and%20the%20evironment>>

<sup>920</sup> Constitution of Kenya, 2010, article 159(2)(c).

ADR mechanisms have not been fully exploited with regards to resolution of environmental disputes within the Kenyan framework. ADR mechanisms such as mediation and negotiation are preferred in solving environmental conflicts due to their ability to enable the communities involved to participate in the decision-making process by voicing concerns and negotiating solutions without having to go through the technical and lengthy process of litigation which at the end of it all does not afford the parties affected to participate in finding a long-lasting solution.<sup>921</sup> ADR aims to ensure that marginalised groups and the poor in society have equal access to dispute resolution mechanisms thus promoting environmental justice and environmental sustainability.

ADR possesses several positive attributes and advantages which include presenting the involved communities with a platform for exchanging information and participating in decision-making. It is also more flexible to meet the needs of the affected parties as compared to the fixed and coercive nature of the litigation process. ADR is a confidential process and is faster and less costly.<sup>922</sup> ADR also plays an important role in fostering cooperation as it tends to preserve the relationships of the affected parties and tends to give more room for involved parties to give their side of the story and come up with viable solutions which best serve their interest.<sup>923</sup> Therefore, with all these attributes Kenyans should give ADR mechanisms a better chance and should harness the opportunities offered by ADR to enhance access to environmental justice as natural resources play a vital role in the daily livelihoods of the Kenyan people.

A real-world example of how ADR mechanisms have proved to be effective in solving environmental conflicts is the Paris Climate Change Agreement 2015(Paris Agreement).<sup>924</sup> The United Nations Conference in Paris on climate change saw 195 nations in negotiating a framework to curb emissions and take common action on climate change. The use of negotiations led to the

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<sup>921</sup> Muigai, K., "Environmental Conflict Management Institutions and Approaches in Kenya." September 2022.

<sup>922</sup> Njuguna, N. J., "Mediation as a tool of Conflict Management in Kenya: Challenges and Opportunities." (2020) *Journal of cmsd* Volume 5(2) available at <<https://journalofcmsd.net/wp-content/uploads/2020/10/Mediation-as-a-Tool-of-Conflict-Management-in-Kenya.pdf>>

<sup>923</sup> Muigua, K., "Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation." February 2016.

<sup>924</sup> United Nations Framework Convention on Climate Change, The Paris Agreement, 12 December 2015, available at <<https://unfccc.int/process-and-meetings/the-paris-agreement>> Accessed 22 February 2024.

reaching of an agreement by participating nations in a highly diverse multi-stakeholder environment.

While ADR poses as an effective method of resolving environmental conflicts, it faces several challenges which include application of ADR mechanisms such as mediation where there are power imbalances may cause one party to have an upper hand in the process thus causing the outcome to unfavourably address his or her interests at the expense of the other.<sup>925</sup> Also lack of awareness regarding the existence of ADR mechanisms poses as a major challenge facing ADR in resolving of environmental conflicts. This is evident where disputes are brought to court for resolution yet other viable forms of resolution such as ADR are being overlooked.<sup>926</sup> Consequently, ADR is not widely acknowledged as the preferred mode of dispute resolution mainly due to the dominance of the litigation process in the legal sector. This is a clear indication that Kenyans lack information as to the existence and operation of ADR.

#### 6. The role of mediation in solving conflicts over natural resources

There are several ADR mechanisms that may be applied in solving disputes over natural resources, but this paper will specifically investigate in-depth at mediation as a form of conflict resolution and the role it plays in solving conflicts over management of natural resources.

Mediation is a voluntary collaborative process where individuals who have a conflict with one another identify issues, develop options, consider alternatives and reach a consensual agreement.<sup>927</sup> It has also been referred to as a voluntary conflict resolution process in which a third party known as a mediator assists the parties to a conflict to reach tangible and mutually acceptable agreements.<sup>928</sup> The Civil Procedure Act defines mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto.<sup>929</sup> Fenn also goes ahead to describe mediation as a voluntary, non-binding dispute resolution process in which a neutral third party

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<sup>925</sup> Claire Baylis and Rolyn Carroll, "Power Issues in Mediation." ADR Bulletin, Vol 7, No 8 (2005), Article 1, p.135.

<sup>926</sup> See, Chepkemoi R, 'Effectiveness of Alternative Dispute Resolution Mechanisms (ADR) in case backlog management in Kenyan Judicial System' (LLM Thesis, University of Nairobi, 2019).

<sup>927</sup> J.G. Merrills, *International Dispute Settlement*, (Cambridge University Press, Cambridge, 1991).

<sup>928</sup> Moore. C, W., *The mediation process: Practical Strategies for resolving conflict*, (John Wiley & Sons, 2014), p.1.

<sup>929</sup> Civil Procedure Act, 2010, S.2.

helps the parties to reach a negotiated settlement which, when reduced into writing and signed by all parties, becomes binding.<sup>930</sup>

From the above definitions, it can be summarised that mediation is voluntary and informal process that involves the use of third parties to help conflicting parties to resolve a dispute where the negotiators have hit a deadlock.<sup>931</sup> Mediation is recognised in the Constitution as a form of alternative dispute resolution under Article 159(2)(c).<sup>932</sup> Mediation has proved to be an effective ADR mechanism in solving environmental conflicts and in relation to natural resource conflicts, it is arguable that an approach that seeks to eliminate the root causes of conflict are to be preferred considering the great importance attached to these resources.<sup>933</sup> Mediation offers a win-win situation for all the concerned parties and has various salient features such as the fact that it is cost-effective, informal, private, flexible, it emphasizes the interests of the parties rather than the legal rights and it is easily accessible to parties to conflicts.<sup>934</sup> For a mediation process to be legitimate, it must be able to deal fairly with disputes involving significant power differences.

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.<sup>935</sup> The use of mediation in resolving environmental conflicts has several advantages. First, natural resources form a vital part of people's daily livelihoods therefore when conflicts arise over the management of these resources, the conflicting parties normally have an aim of resolving the dispute while still preserving relationships among themselves and mediation offers such a platform for resolving disputes while still preserving relationships among stakeholders.

Mediation also offers a mechanism for public participation. The Constitution under Article 10 on national values and the principle of good governance provides for public participation as a

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<sup>930</sup> P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CiArb, London, 2002), p.10.

<sup>931</sup> Muigua. K., "Resolving Conflicts Through Mediation in Kenya." Glenwood Publishers Limited, 2<sup>nd</sup> Edition, 2007.

<sup>932</sup> Constitution of Kenya, 2010, article 159(2)(c).

<sup>933</sup> Muigua. K., "Managing Natural Resource Conflicts through Negotiation and Mediation." February 2016.

<sup>934</sup> *Ibid* p.20.

<sup>935</sup> Lon L. Fuller, Mediation, its forms, and functions, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases' *Utah Law Review*, No. 3, 2009 pp.802-803.

principle of good governance<sup>936</sup> and therefore mediation promotes public participation by allowing for the inclusion of the affected communities in the resolution process which also plays a key role in enhancing community empowerment. Furthermore, mediation is a cost-effective method of resolving disputes therefore reducing the overall financial burden on the parties involved making it a more accessible and practical method of dispute resolution. Being an informal method of dispute resolution, it has an advantage of providing the affected parties with the autonomy to come up with solutions that apply to their specific needs and circumstances.<sup>937</sup> This flexibility acts as a valuable concept in environmental conflicts.

Kenya faces several complex challenges in relation to the ownership, utilisation, and distribution of natural resources and in the face of all these challenges, mediation emerges as an asset that offers significant advantages in resolving of such conflicts and should therefore be fully exploited by the people of Kenya. This can only be done through strengthening of the legal framework governing mediation and promoting awareness on how mediation is suitable method of conflict resolution with an emphasis on resolution of conflicts over natural resources.

#### 7. Challenges faced in solving conflicts over natural resources through mediation.

Despite the existence of the positive attributes associated with solving of conflicts over natural resources by use of mediation, there are several challenges associated with this method of conflict resolution which hinder the people of Kenya from realising the full potential of ADR.

The first challenge is the non-binding nature of mediation in that mediation is a voluntary process that depends on the good will of the parties to a dispute for its acceptance.<sup>938</sup> Therefore, this poses a risk on non-compliance by parties thereby undermining the productiveness of the whole process as the agreements reached through mediation are not legally binding. There is need to guarantee the enforceability of the mediated agreement to ensure that mediation competes meaningfully with the formal and binding dispute settlement mechanisms such as courts and arbitral tribunals.<sup>939</sup>

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<sup>936</sup> Constitution of Kenya, 2010, article 10.

<sup>937</sup> Muigua, K., "Managing Natural Resource Conflicts through Negotiation and Mediation" (February 2016) Kariuki Muigua and Advocates, Nairobi, Kenya.

<sup>938</sup> Muigua. K., *Resolving Conflicts through Mediation in Kenya* (2<sup>nd</sup> Edition, Glenwood Publishers, 2017) p.4.

<sup>939</sup> *Ibid.*



The aspect of power imbalance may also pose as a challenge in the application of mediation as a method of conflict resolution. It is generally assumed that in conflicts associated with power imbalance between parties, the outcome will normally be in favour of the powerful party. Power imbalance in the process of mediation may cause one party to have an upper hand in the process therefore causing the outcome to unfavourably address his or her concerns and interests at the expense of the other.<sup>940</sup>

The Constitution recognises the need for the application of mediation in solving disputes<sup>941</sup>, but it has not been fully used due to the lack of information and low levels of awareness on mediation as a viable form of conflict resolution and management. This is evident in the number of conflicts that are submitted to litigation for resolution while other forms of conflicts are being overlooked,<sup>942</sup> a good example being the mediation. Article 48 of the Constitution states that the state shall ensure access to justice for all persons, and, if any fee is required, it shall be reasonable and shall not impede access to justice.<sup>943</sup> The state can, therefore, uphold this right by providing the public with the necessary information on how they can access justice through other means other than litigation. This can aid in reducing the backlog of cases thus promoting citizens right to access justice.

Mediation can serve as a very effective method of conflict resolution over natural resources if only given the chance and if its benefits are fully realised. This will go a long way in promoting access to justice thus enhancing communities right to environmental justice by providing long-lasting solutions to conflicts over natural resources while still preserving relationships.

#### 8. Enhancing the use of ADR mechanisms in management of environmental conflicts

ADR is the essential transformation necessary for management of conflicts over natural resources, but its benefits have not been fully realised therefore the need for enhancing ADR mechanisms to contribute to environmental justice in Kenya and to make it effective in the face of the ever-increasing environmental conflicts.<sup>944</sup> There are several statutes and laws which are

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<sup>940</sup> See generally, Fiss. O., "Against Settlement" (1984) 93 *Yale Law Journal*, 1073.

<sup>941</sup> Constitution of Kenya, 2010, article 159(2)(c).

<sup>942</sup> See, Chepkemoi R, 'Effectiveness of Alternative Dispute Resolution Mechanisms in case backlog management in Kenyan Judicial System.' (LLM Thesis, University of Nairobi, 2019).

<sup>943</sup> Constitution of Kenya, 2010, article 48.

<sup>944</sup> Muigua. K., "Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation." February 2016.

concerned with management of natural conflicts in Kenya such as the Environment Management and Coordination Act.<sup>945</sup> The Constitution already recognises the need for the application of ADR mechanisms and therefore to enhance the use of ADR in solving environmental conflicts, there needs to be continuous modification of the legal and institutional frameworks in Kenya to be in compliance with the new Constitution.<sup>946</sup>

Promotion of environmental democracy also comes into play when there is need to enhance the use of ADR mechanisms in management of environmental conflicts. Environmental democracy in this case is majorly concerned with the following principles: the call for public involvement in environmental issues, access to knowledge and access to justice.<sup>947</sup> As earlier stated, natural resources play a pivotal role in the day-to-day livelihoods of various communities and therefore it is important to involve them in decision-making process when conflicts over such resources arise. The Constitution under Article 69(1)(d) recognises the need for public participation when it comes to environmental matters and states that the state shall encourage public participation in the management, protection and conservation of the environment.<sup>948</sup>

Public participation in environmental matters goes hand in hand with access to information. Public education on environmental matters is necessary if Kenya is to manage its natural resources properly and avoid environmental conflicts and thus Kenyans should be educated right from the primary school level on how to manage environmental resources sustainably to ensure an intergenerational and intergenerational equity.<sup>949</sup>

Learning from other jurisdictions that have well established legal and institutional frameworks on the use of ADR mechanisms as a means of enhancing the use of ADR in management of environmental conflicts in Kenya since such lessons can enable us as a nation to boost our dispute resolution capabilities. Kenya can learn and benefit from Rwanda's mandatory mediation framework were carrying the agenda of local ownership of conflict resolution, the Rwandan

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<sup>945</sup> Cap 8 of 1999.

<sup>946</sup> Constitution of Kenya, 2020

<sup>947</sup> Ibid.

<sup>948</sup> Constitution of Kenya, 2020, article 69(1)(d).

<sup>949</sup> Environment Management and Co-ordination Act, No 8 of 1999, S. 2.

government passed *Organic Law No. 31/2006* which recognizes the role of local mediators in conflict resolution of disputes and crimes.<sup>950</sup>

Participatory approaches for environment and sustainable development decision-making should extend beyond the realms of advocacy, academic focus and institutional discourses into the realm of real-life implementation.<sup>951</sup>

## 9. Conclusion

ADR is a beacon of hope for Kenyans when it comes to matters of managing and resolving environmental conflicts. With positive attributes such as cost effectiveness, preservation of relationships, inclusivity, and its flexibility in giving the parties the autonomy to come up with solutions that address their specific circumstances, emphasizing the practical application of ADR mechanism is crucial in resolving environmental disputes. Full realization of ADR mechanisms will go a long way in offering long-lasting solutions on environmental solutions. Different ideologies on how natural resources should be used and who should own these resources is a clear indication that environmental conflicts are inevitable and thus ADR may not serve to completely end these conflicts but will be effective in managing these conflicts which is what we as a country that is faced with numerous environmental challenges and a judicial system that is heavily packed with undecided cases need.

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<sup>950</sup> Mutisi, M., "Local conflict resolution in Rwanda: The case of abunzi mediators", in M. Mutisi and K. Sansculotte-Greenigde (eds), *Integrating Traditional and modern conflict resolution: Experiences from selected cases in Eastern and the Horn of Africa*, pp, 41-74 ACCORD, Africa Dialogue Monograph Series No. 2/2012

<sup>951</sup> 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.

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# EVALUATING THE EFFICACY OF CARBON MARKETS AS PROPOSED IN THE (NOW) CLIMATE CHANGE (AMENDMENT) ACT, 2023, FOR MITIGATING CLIMATE CHANGE: OPPORTUNITIES, CHALLENGES, AND IMPLICATIONS

By Edwin Kola Muwanga<sup>952</sup> and Nyamboga George Nyanaro<sup>953</sup>  
Abstract

Carbon markets present a critically potential tool in reducing greenhouse gas emissions as part of fulfilling obligations of the Paris Agreement. Significantly, they pose trade-offs and risks, particularly developing states and vulnerable (often marginalised communities). From the foregoing, the paper appraises carbon markets' efficacy as proposed in the 2023 Climate Change (Amendment) Act whose aim was to provide a forward-looking comprehensive regulation of carbon markets in Kenya. It will first examine the legal background of the Kenyan Climate Change (Amendment) Act of 2023. This would shed light on the opportunities and challenges which carbon trading will face in Kenya, and to which the amended Act is supposed to address. Importantly, the paper will analyse how well-equipped is the enforcement mechanism to realise the Kenyan and global climate change mitigation agenda. The paper would then appraise the Act's impact on sustainable development and climate change. Gaps in the regulatory framework will allow the research to provide evidence-based recommendations and inclusiveness of carbon markets in similar contexts. The goal is to build a regulatory framework and an enforcement mechanism that would promote a green and energy-clean development.

## i. The socio-legal background of the Climate Change (Amendment) Act, 2023

The Climate Change (Amendment) Bill, 2023, which received presidential assent to an Act (hereinafter "the Amended Act") came into effect on 15<sup>th</sup> September 2023. It was poised to

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be a blueprint to address the effects of climate change.<sup>954</sup> It forms part of Kenya’s commitment to the Paris Agreement’s Article 6-dealing with, among other issues, carbon credits as supported by the Nairobi Declaration.<sup>955</sup> The landmark legislation, framed in line with the foundation set by the 2016 Climate Change Act, embodies a vast array of amendments geared towards the nation meeting its obligation cast under the Paris Agreement, particularly Article 6 providing for carbon markets participation and regulation.<sup>956</sup> The paper analyses opportunities, challenges and implications brought by the bill’s passage into law and the consequent Act’s implementation.

## ii. Demystifying the “Carbon Credits and Markets” Concept

The amended interpretation section of the Act construes the carbon credits to mean;

*“a credit created when the equivalent of one metric tonne of carbon dioxide is prevented from entering the atmosphere and is equal to one tonne of carbon dioxide or the equivalent amount of a different greenhouse gas reduced, sequestered, or avoided,”* while defining the carbon market to imply; *“a mechanism that enables and allows public and private entities to transfer and transact emission reduction units, mitigation outcomes or of sets generated through carbon*

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<sup>954</sup> Section 1 (Short title) of The Climate Change (Amendment) Act, 2023 No. 9 of 2023 decrees that: “This Act may be cited as the Climate Change (Amendment) Act, 2023.”

<sup>955</sup> ‘The African Leaders Nairobi Declaration On Climate Change’ (Adopted by All African Head of States 2023), Declaration 12 reads that; “We call upon the global community to act with urgency in reducing emissions, fulfilling its obligations, keeping past promises, and supporting the continent in addressing climate change, specifically to: a. Accelerate all efforts to reduce emissions to align with goals set forth in the Paris Agreement, b. Honor the commitment to provide \$100 billion in annual climate finance, as promised 14 years ago at the Copenhagen conference, c. Uphold commitments to a fair and accelerated process of phasing down coal, and abolishment of all fossil fuel subsidies, and d. Swiftly operationalize the Loss and Damage facility agreed at COP27;” while Declaration fourteen read that ;

“We urge global leaders to join us in seizing this unprecedented opportunity to accelerate global decarbonization, while pursuing equality and shared prosperity...”

<[https://www.afdb.org/sites/default/files/2023/09/08/the\\_african\\_leaders\\_nairobi\\_declaration\\_on\\_climate\\_change\\_rev-eng.pdf](https://www.afdb.org/sites/default/files/2023/09/08/the_african_leaders_nairobi_declaration_on_climate_change_rev-eng.pdf)> Accessed 17 October 2023.

<sup>956</sup> Cindy Oraro and Don Ouma, ‘The Climate Change (Amendment) Act, 2023’ (Oraro & Company Advocates 12 September 2023) <<https://www.oraro.co.ke/the-climate-change/>> accessed 11 October 2023.



*initiatives, products, programmes and projects subject to compliance of national and international laws...*<sup>957</sup>

Kerr's research on international carbon markets' legal liability finds carbon markets-trading carbon credits to reflect the salient features of climate mitigation initiatives enshrined under various national and international legal instruments. The concept is contemplated under the clean mechanism of development enshrined under the Kyoto Protocol, the mechanism of sustainable development under the Paris Agreement, and International Aviation scheme geared towards offsetting carbon emissions (drafted and adopted by the International Civil Aviation Organisation).<sup>958</sup> The creation of carbon markets, undoubtedly, serves to enable private investors trade in carbon credits. The reduced emissions of greenhouse gases, in the wake of quantifiable carbon credits incentives attached to reductions in such emissions, if successful implemented, will offset the impacts on the environment.

Thus, must the Act's proactive approach to establishing carbon do so considering role of the stakeholders in the schemes of carbon trading. For the National Climate Change Council (NCCC),<sup>959</sup> whose strengthened responsibilities inter-alia include; to enforce after developing the regulations in the market, with which the Constitutional right to enforcement of environmental rights<sup>960</sup> (and by annexation climate change) is in full agreement, the emphasis should be that such enforcement should adhere to the constitutional values and principles of fairness, transparency, and accountability.<sup>961</sup>

Naturaljustice.org appreciates the enormous potential of a well-designed Kenyan carbon markets' system. It credibly, effectively, and transparently enables the achievement of low-cost, eco-friendly reductions, and emissions; and earning returns in form of carbon credits. They, however, argue that the carbon markets only enrich developed economies who have attained "developed status", hence able to meet (without strain of) their carbon emission

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<sup>957</sup> The Climate Change (Amendment) Act, 2023 No. 9 of 2023, Section 2.

<sup>958</sup> Baine P Kerr, 'Mitigating the Risk of Failure: Legal Accountability for International Carbon Markets' (2022) 18 *Utrecht law review* 145 <<https://utrechtlawreview.org/articles/10.36633/ulr.810>> accessed 24 October 2023.

<sup>959</sup> Climate Change Act, 2016, section 5.

<sup>960</sup> Constitution of Kenya, 2010, Article 70.

<sup>961</sup> *ibid.*, Article 10.

goals and budgets to the detriment of the global South (Kenya included).<sup>962</sup> Eventually, Kenya, being one of the countries in the global south, becomes affected by climate change's woes, further implicating the efficacy of the proposed carbon markets.<sup>963</sup> Establishing the carbon markets, the Climate Change Council's strengthened role, the action plan of climate change,<sup>964</sup> creating a climate change fund, and other enhanced austerity measures introduced to the 2016 Climate Change Act.

iii. Enhanced responsibilities of the Climate Change Council in relation to carbon markets

In entrenching the carbon trading regulatory framework, the amended Act expands the scope of the climate change council's functions as provided under the Climate Change Act to inter-alia include.

*“ a. mainstreaming the national and county governments’ climate change functions; b. approving overseeing the National Climate Change Action Plan’s implementation; c. advising the national and county governments on legislative, policy, and other measures necessary for climate change response and attaining low carbon climate change and resilient development; d. approving the national gender and intergenerational responsive public education awareness strategy and implementation program; e. providing policy direction on research and training on climate change as encompassing information’s collation and dissemination concerning climate change to the national and county governments, the public and other stakeholders; f. providing guidance on the review, amendment, harmonization of sectoral laws and policies for purposes of achieving the Act’s objectives; administering the Change funding established under the Climate Change Act 2016 (and extrapolated under the Amended Act of 2023); and h. Set targets for the regulation of greenhouse gas emissions.”<sup>965</sup>*

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<sup>962</sup> Salome Muiruri, 'Kenya's Climate Change Bill: Paving the Way for Sustainable Development and Carbon Markets' (*Natural Justice* 5 June 2023) <<https://naturaljustice.org/kenyas-climate-change-bill-paving-the-way-for-sustainable-development-and-carbon-markets/>> accessed 14 October 2023.

<sup>963</sup> *Ibid.*

<sup>964</sup> Clinton, 'The Climate Change (Amendment) Act 2023' (*CM Property Digest* 19 September 2023) <<https://cmpropertydigest.com/the-climate-change-amendment-act-2023/>> accessed 15 October 2023.

<sup>965</sup> Climate Change Act, 2016, Section 6.

Under “setting the targets for the regulation of the greenhouse gas emissions”<sup>966</sup> as part of affirming Kenya’s resilience to promote decarbonization, the council’s regulatory scope stretches beyond the act to encompass supervising the ideation and working of carbon markets.<sup>967</sup>

ii. Challenges facing implementation of carbon trading in Kenya

However, implementing the carbon markets demands meaningful stakeholder consultation, pursuant to the Constitution of Kenya 2010. The Community Development Agreement (DPA) enshrined the amended Act mandates affected communities’ meaningful public participation before the approval of a particular carbon trading project that would disrupt their way of life (often adversely).<sup>968</sup> Such an agreement caters the affected communities’ grievances through stipulating their liberties, duties, and connections between proponents of a particular project vis-à-vis the affected communities, moreso those affected for purposes of promoting sustainable yet equitable development.

Carbon projects are not immune to disputes; moreso those between the affected communities versus the government or a project proponent. They can be resolved through the prescribed dispute resolution method contemplated under the Community Development Agreement (CDA). The Constitution of Kenya 2010’s Article 159(2)(C) permits matters not pertaining to land to be subjected to alternative justice systems (such as mediation and traditional dispute resolution). Where local remedies as enshrined in the *Dawda K Jawara v The Gambia*<sup>969</sup> case are inadequate, unavailable, or insufficient, disputants’ right to a fair trial allows them try and resolve the matters within the corridors of the National Environmental Tribunal (NET) or refer file a matter in the Environmental and land courts.

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<sup>966</sup> *ibid.*, section 6(h).

<sup>967</sup> Climate Change (Amendment) Act, 2023, Section 4 (Amendment of section 6 of No . 11 of 2016) decrees that; “Section 6 of the principal Act is amended by inserting the following new paragraph immediately after paragraph (f)—(fa) provide guidance and policy direction on carbon markets to the national and county governments, the public and other stakeholders...”

<sup>968</sup> Climate Change (Amendment) Act, 2023 Section 5.

<sup>969</sup> 147/95 and 149/96 - Sir Dawda K Jawara / The Gambia.

iii. Pros and cons of the Climate Change (Amendment) Act, 2023, regarding the Carbon markets

In her 14-year-old Tedtalk themed the “*Dangers of a Single-sided story*,” Chimamanda Ngozi Adichie finds humans vulnerable and impressionable in the face of. The danger of a single sided story creates bias, sells half-truths, perpetuates lie and creates a wrong impression hence why the English leuterate Chinua Achebe advocated for a balance of stories. For the Climate Change (Amendment) Act 2023 promising proper management, development, regulation, and enhance decarbonization while enhancing sustainable development in Kenya, is only promising if only implemented properly. The lesson learnt from previous precedents; the Act will find scant in real-life implementation. Thus, for the be meeting of stakeholders’ minds and firm resolve if the legislatively architected proverbial benefits of carbon-markets are to be firmly imprinted and gritfully etched in the relevant stakeholders DNA and sustainable development agenda.

iv. Beyond the statutory confines; Carbon markets opportunities in mitigating climate change

If the National Climate Change Council and other stakeholders hold the carbon-markets to higher environmental integrity standards, they have the accelerating and transformational power the much dreamt of “green economy.” In this case, not only will putting a price on the polluter through the “polluter pays principle,” encourage environmental sovereignty but also incentivizing the preventive principle hence reduction in the greenhouse gas emissions. The revenue generated in form of the traded carbon credits can be used to build climate resilience. The critics’ major worry, alas too concerningly, is the tendency of developed countries using fossil fuels, contributing to global warming, and then salvaging themselves from buying carbon credits from the developing countries. This means the effects of global warming will be more devastating with the global south feeling the effect more. This was not the initial plan of the Paris Rulebook, whose finalization stressed on having a global community conversation on

how to effectively implement its article 6 for purposes of maintaining the sustainable growth momentum vis-à-vis upholding environmental integrity.<sup>970</sup>

The International Monetary Fund (IMF)'s research finds the initiatives such as carbon markets and credit bringing "innovation to a point of inflection; hence the future will be decisive."<sup>971</sup> The goal is to power growth that is neither detrimental to the environment nor causes adverse climate change effects.<sup>972</sup> It goes without say that the implementation of the Amended Act faces demands a quick and careful exploration of the carbon markets; this is the surest way of ensuring the establishment of the said carbon markets maximise their envisaged potential.<sup>973</sup>

v. The negative side of carbon markets; the overlooked negative aspects/implications

While the key enablers of such a project were the rules the agreed in Egypt's COP26 and the 2015 Paris' agreement's Article 6, lack of standardised single trading market remains a huge challenge.<sup>974</sup> The major challenges posed by carbon markets, despite not contemplated under the amended act regards the volatility of the market and fluctuation of the price, lack

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<sup>970</sup> 'What Are Carbon Markets and Why Are They Important?' (*UNDP Climate Promise*2022)

<[<sup>971</sup> Kelly Levin and Andrew Steer, 'Fighting Climate Change with Innovation' \(\*International Monetary Fund \(IMF\)\* 2 September 2021\) <<https://www.imf.org/en/Publications/fandd/issues/2021/09/bezos-earth-fund-climate-change-innovation-levin>> accessed 15 October 2023.](https://climatepromise.undp.org/news-and-stories/what-are-carbon-markets-and-why-are-they-important#:~:text=lf%20held%20to%20high%20standards,ums%20needed%20to%20build%20resilience.> accessed 10 October 2023.</a></p></div><div data-bbox=)

<sup>972</sup> 'Accelerating Africa's Carbon Markets Can Power Sustainable Development' (*Rti.org* 6 September 2023) <<https://www.rti.org/insights/africas-carbon-markets-drives-sustainability>> accessed 12 October 2023.

<sup>973</sup> Christina Nduba-Banja and others, 'What the Carbon – Series 2: Kenya Opens a Path to Carbon Trading: Proposed Climate Change (Amendment) Bill, 2023 - Bowmans' (*Bowmans* 9 June 2023) <<https://bowmanslaw.com/insights/energy/what-the-carbon-series-2-kenya-opens-a-path-to-carbon-trading-proposed-climate-change-amendment-bill-2023/>> accessed 15 October 2023.

<sup>974</sup> Mehling, Michael A. "Advancing International Cooperation under the Paris Agreement: Issues and Options for Article 6." Discussion Paper ES 2021-10. Cambridge, Mass.: Harvard Project on Climate Agreements, October 2021. <[https://www.belfercenter.org/sites/default/files/files/publication/harvard\\_project\\_enel\\_foundation\\_mehling\\_article\\_6\\_oct\\_2021.pdf](https://www.belfercenter.org/sites/default/files/files/publication/harvard_project_enel_foundation_mehling_article_6_oct_2021.pdf)> Accessed 14 October 2023.

of the regulatory frameworks' consistency, imbalance of power and likelihood of greed and deceit, and often controversial impacts of distribution and social equity.

Inflated or false claims concerning reduction in carbon emissions, or the carbon offset projects cannot be overruled. Such inflated or false doing undoes the carbon markets' credibility vis environmental integrity. This why the statutory gaps in the amended Act regarding effective monitoring, reporting and verification potentially render inefficacies on the carbon offset' projects-more so the carbon reductions. Statutorily and policy-wise, it is unclear how the indigenous community will benefit from the carbon markets-in the trading of carbon credits.<sup>975</sup> Still, the carbon markets' complexity,<sup>976</sup> given majority of the governing regulation are written in a technical terms-hence incomprehensible to the lay persons-will make the stakeholders not to participate meaningfully in such markets, further crippling transparency.<sup>977</sup>

#### Vi. Concerns of social equity vis-à-vis impacts of distribution

Neither does the amended Act provide a robust mechanism of carbon pricing nor address the implication of distributions hence the issue of social equity.<sup>978</sup> This is why an operational policy framework regarding the raised carbon pricing was vital-because the current statutory status quo finds this less-regulated emission trading system, despite not being fully operational

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<sup>975</sup> Brandon Otieno and Clarice Wambua , 'Benefit Sharing in Carbon Projects: Reflections on Recent Legal Developments in Kenya' (*Cliffedekkerhofmeyr.com* 2023)  
<<https://www.cliffedekkerhofmeyr.com/news/publications/2023/Practice/Environmental/environmental-law-alert-27-july-Benefit-sharing-in-carbon-projects-Reflections-on-recent-legal-developments-in-Kenya>> accessed 12 October 2023.

<sup>976</sup> Jiuli Yin, Yan Zhu and Xinghua Fan, 'Correlation and Causality between Carbon and Energy Markets: A Complexity Perspective' (2022) 30 *Environmental Science and Pollution Research* 28597-28608

<sup>977</sup> Olivia Rumble and Andrew Gilder, 'African Countries Move to Regulate Domestic Carbon Markets and Claim Revenue - African Climate Wire' (*African Climate Wire* 13 June 2023)  
<<https://africanclimatewire.org/2023/06/african-countries-move-to-regulate-domestic-carbon-markets-and-claim-revenue/>> accessed 11 October 2023.

<sup>978</sup> Ian W.H. Parry, Simon Black and Karlygash Zhunussova, 'Carbon Taxes or Emissions Trading Systems?: Instrument Choice and Design' (2022) 2022 *International Monetary Fund* I, 10  
<<https://www.elibrary.imf.org/view/journals/066/2022/006/article-A001-en.xml>> accessed 5 October 2023.

currently, would potentially lead to fossil-fuels-intensive industries incurring high costs in the carbon markets given that they must trade for carbon credits.<sup>979</sup> The aftermath effects encompass job losses and reduced competitiveness, negatively affecting various sectors and the stakeholders therein such as the government (in form of tax revenue), owners (profits), the employees (salary), and the public (access to basic products for use). Given that majority of low-income households rely on carbon fuels for sustenance,<sup>980</sup> they remain proportionally affected, further exacerbating the existential inequalities.

Given the aspect of Carbon trading transcends beyond the Kenyan borders, the markets' efficacy is equally dependent on the highly emitting countries' public participation.<sup>981</sup> The carbon markets, apart from the developed countries also promoting decarbonisation, they should be part of the global carbon markets and credits engagements. Such remains the surest way of ensuring meaningful reduction of carbon emissions while promoting the global campaign of combating climate change.<sup>982</sup> Quite frankly, the implications of speculation and market volatility remain unaddressed in the amended Act. These credits being traded in the carbon markets are often quantified in units premised on offset credits or allowances in a market that is susceptible to speculation and volatility.<sup>983</sup>

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<sup>979</sup> Organisation for Economic Co-operation and Development (OECD), 'Carbon Market Platform 2nd Strategic Dialogue Designing Carbon Pricing Instruments for Ambitious Climate Policy' (2017) 1,10.

<sup>980</sup> Arild Angelsen and others, 'Environmental Income and Rural Livelihoods: A Global-Comparative Analysis' (2014) 64 World Development Environmental Part 2. Environmental Income on Rural individuals <<https://www.sciencedirect.com/science/article/pii/S0305750X14000722>> accessed 26 October 2023.

<sup>981</sup> UNEP, 'SYNTHESIS REPORT: CARBON PRICING APPROACHES in EASTERN and SOUTHERN AFRICA a Report Submitted under the COLLABORATIVE INSTRUMENTS for AMBITIOUS CLIMATE ACTION (CI-ACA)' (2019) 11-

18 <<https://wedocs.unep.org/bitstream/handle/20.500.11822/28237/Carbon.pdf?sequence=1&isAllowed=y>>.

<sup>982</sup> Alexandra Soezer, 'Carbon Justice for All: How Carbon Markets Can Advance Equitable Climate Action Globally' (UNDP2022) <<https://www.undp.org/africa/blog/carbon-justice-all-how-carbon-markets-can-advance-equitable-climate-action-globally>> accessed 12 October 2023.

<sup>983</sup> Reimund Schwarze and others, 'Economics, Finance, and the Private Sector' [2018] Cambridge University Press eBooks 225 <<https://www.cambridge.org/core/books/abs/climate-change-and-cities/economics-finance-and-the-private-sector/FE9C4F7E12DFDDA39F9C3765F1701966>> accessed 13 October 2023.

## vii. Conclusion

In the vast expanse of the Carbon markets issue contemplated in literature, and, more importantly, the Climate Change (Amendment) Act of 2023 lies the legislative drafters' firm resolve for Kenya to address decarbonisation. Like a skilled athlete displaying a mastered skill, the amended act embodied their international commitment, moreso the Paris Agreement, creating a platform for an effective revolutionary space where quantifiable reductions in carbon emissions are traded in a carbon market. Whereas the bold intent of the Act backed by the Nairobi declaration echoes a firm resolve, actions remain silent in a country whose stakeholders purport to have ignited a flame which are yet to shine the effective rays that reverberates through the continent. A review of literature in the first part found the concept of carbon markets to have its roots in Article 6 of the Paris Agreements wherein the international community to be the best approach to decarbonisation and avoiding carbon emissions. The development became more vocal with the drafting and passing of the Climate Change (Amendment) Bill, 2023. The major argument by critics is the fact that carbon markets are yet to gain traction in Kenya nor are there any elaborate measures in Kenya and/or other jurisdictions to ensure their effective implementation.

### *Recommendations*

Recommendations are akin to a qualified medical practitioner's prescription after diagnosing the patient's medical issue. Quite frankly, the carbon market idea is still at its infancy hence demanding of a robust monitoring mechanism. The additional operational framework would address an array of issues inter-alia; *a. participation rules and standards in the carbon market participation, a robust monitoring framework* vis an effective approach in verifying the various projects underpinning the carbon offset while tackling the concerning fraud issue during carbon trading. Efficiency equally demands a third-party regular audit report for purposes of stamping carbon-markets' integrity and transparency.

*No man is an island* resonates with the ideation of carbon markets efficacy, even under the statutory contemplation to strive for the exchange of information through collaboration. So vital will this exchange of information that the governments, civil society, business, private investors, international community, and investors get to symbiotically exchange knowledge and expertise for purposes of promoting the best carbon trading practices. Not only does



this collaboration align with the prescribed objectives of carbon markets, but also ensures the regulations of carbon markets are well-understood, but also ensure the methodologies of carbon reporting are harmonised. Such corresponds the bid of building capacity in Kenya as a developing country. Advantageously, the collaboration creates an atmosphere where dialogue thrives, ideas are exchanged and implemented, consequently enforcing efficient mechanisms in the carbon markets.

Public participation and awareness remain core in meaningfully engaging the affected members of the public or a community to ensure acceptance and implementation of the amended Act's provisions, specifically the carbon markets. Crucially, sensitizing the public of the carbon markets' importance merits the aspects of inclusivity for: The public would contribute towards the reduction in carbon emissions; they can do so by embracing clean and non-renewable energy-hence taking party in protecting their party in creating a clean and healthy environment. The current status quo, albeit the constitutional decree, remains detached from the objective. The situation can be ameliorated through undertaking rigorous public campaigns, entrenching climate change learning in the school curriculum, and the efforts of outreach. By engaging the above stakeholders, the indigenous community, and the non-governmental organisations would guarantee the implemented carbon market policies observe the inclusive concerns of social equity.

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# GREEN MEDIATION: THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN SHAPING ENVIRONMENTAL LAW

By Alamyn Omondi<sup>984</sup>

## Abstract

*Resolving/settling environment-related disputes, where required, through alternative justice systems presents numerous merits. This is especially the case when resolving disputes amicably. Moreover, the level of compliance of environmental disputes resolved through ADR compared to the controversially litigious process. This is the reason why various nations across the world such as Kenya, Australia, and New Zealand to resolve disputes through ADR. However, ADR's appreciation and applicability has not been appreciated enough. Because of such appreciation level, this paper delves deep into alternative dispute resolution mechanisms, specifically at the national and international level while suggesting that; a. at the national level, efforts are supposed to maximise the use of ADR mechanisms. The goal is to find an effective enforcement mechanism to facilitate environmental justice.*

### i. Introduction

The issue on climate change and environmental degradation is one that continues to rage on each and every passing day.<sup>985</sup> As such, the need for effective resolution of environmental conflicts has become of profound importance.<sup>986</sup> Traditionally, litigation as a means of conflict resolution, often leaves parties embroiled in lengthy court battles, draining much needed resources and overshadowing the urgent need for sustainable solutions.<sup>987</sup> However, the emergence of Alternative Dispute Resolution mechanisms offers a glimmer of hope. With it comes the power to foster meaningful collaborations, preserve relationships and promote dialogue which has led it to become a promising avenue for resolving environmental conflicts while also forging paths for sustainable development and environmental conservation.<sup>988</sup>

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<sup>985</sup> Patrik Sörqvist and Linda Langeborg, 'Why People Harm the Environment Although They Try to Treat It Well: An Evolutionary-Cognitive Perspective on Climate Compensation' (2019) 10 *Frontiers in Psychology* 18 <<https://www.frontiersin.org/journals/psychology/articles/10.3389/fpsyg.2019.00348>> accessed 20 February 2024.

<sup>986</sup> *ibid* 11.

<sup>987</sup> Kariuki Muigua, 'Conflict Management Mechanisms for Effective Environmental Governance in Kenya' 2018 *Kariuki Muigua and Co. Advocates* 5.

<sup>988</sup> Sörqvist and Langeborg (n 1) 10.

Environmental conflicts ranging from land use disputes to pollution control bear complexities that require innovative approaches in order to tackle them effectively. The traditional courtroom setting, which provides for winners and losers, fails to grasp the tapestry of interests and values that are woven into these conflicts. It is at this juncture that ADR steps forward and provides an amicable solution to these conflicts by embracing a more collaborative path.

Article 159 [2] of the constitution provides for various mechanisms but this article picks one: mediation. In an attempt to define it, P. Fenn defined mediation as a voluntary, non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated settlement which, when reduced into writing and signed by all the parties, becomes binding.<sup>989</sup> Mediation provides for dialogue between different stakeholders holding opposing views to deliberate on the issue affecting them and come up with an amicable solution to their query. It is for this very reason that this article picks mediation to be its focal point. It seeks not only to resolve disputes but to delve even deeper into the crux of the matter, promote sustainable development and preserve relationships. In here, everybody is a winner!

In the same breath, we explore how ADR informs environmental justice in Kenya with a keen interest in mediation. This will be done through the use of case studies, a keen look on set precedents and a deep dive into the future. Join us as we dissect how mediation sets its foot in environmental matters from resolving local disputes all the way to the international arena.

## ii. Legal And Institutional Framework Governing Mediation in Kenya

Kenya is yet to formulate comprehensive laws governing the application of mediation in resolving disputes. The framework in place is largely derived from international law and practice reduced into guidelines by institutions undertaking mediation in Kenya such as the Nairobi Centre for International Arbitration and the Chartered Institute of Arbitrators. However, ADR is now effectively provided for under Article 159 [2] [c] of the constitution which states;

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<sup>989</sup>P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), p.10.

“—In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)”

Further mediation is also provided for under section 81 of the Civil Procedure Act<sup>990</sup> which bestows upon the Rules Committee the power to make rules relating to, inter alia, the selection of mediators and the hearing of matters referred to mediation under the Act.<sup>991</sup>

In addition to the above-mentioned provisions, the Civil Procedure Rules, 2010 specifically under Order 46, Rule 20 provides for the adoption of ADR mechanisms by Kenyan courts. It provides;

(1) Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections IA and IB of the Act.

(2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.

(3) Where a court mandated mediation adopted pursuant to this rule fails, the court shall forthwith set the matter down for hearing and determination in accordance with the Rules.

#### a. Legal and Institutional Framework Governing Environmental Law in Kenya

Just like water is to fish, the environment is also a fundamental component of man’s life as it forms the very fiber of their being. This essential component brought about the need to protect its sanctity and in turn necessary laws were formulated in order to protect it. In Kenya there are a number of legal frameworks put in place for environmental protection but this article picks two

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<sup>990</sup> Cap 21 of the Laws of Kenya

<sup>991</sup> Ibid; see also K. Muigua on ‘Overview of Arbitration and Mediation in Kenya’ A paper presented at a Stakeholder’s Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations in Kenya held on 4<sup>th</sup> – 6<sup>th</sup> May, 2011, Nairobi.



that are ripe for discussion: Constitution of Kenya, 2010 and the Environmental Management and Coordination Act, 1999(EMCA).

iii. Constitution

To start with, the constitution provides for sustainable development as one of the key principles of governance in Kenya.<sup>992</sup> This seeks to safeguard the interests of future generations. It further goes on to list the state's obligation towards the environment to include inter alia elimination of processes that are likely to endanger the environment, establish systems of environmental impact assessments and encourage public participation on matters regarding the environment.<sup>993</sup> In addition to the above, it goes on to provide for the enforcement of environmental rights by affording people the right to institute court proceedings or any other legal remedies available to the matter upon the infringement of their rights provided for under Article 42.<sup>994</sup> 'Any other legal remedies' as mentioned in Article 70 of the constitution can be taken to include the ADR mechanisms that are well provided for in the constitution under Article 159 [2] [c] for which mediation is inclusive of. As such, it can play a key role in coming with solutions to disputes affecting the conflicting parties.

iv. EMCA, 1999

Alongside other sectoral laws, EMCA stands out as the guiding statute on matters regarding the environment. It is meant 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.<sup>995</sup> In line with its mandate to provide for institutional framework, it establishes National Environmental Management Authority (NEMA) with the mandate of, among many others, ensuring that environmental laws are complied with to the

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<sup>992</sup> Constitution of Kenya, Article 10.

<sup>993</sup> Constitution of Kenya, Article 69.

<sup>994</sup> Constitution of Kenya, Article 70.

<sup>995</sup> Muigua K. on 'Enhancing Environmental Governance through Law and Other Tools: The Efficacy of Kenya's Environmental Management and Coordination Act (EMCA)', published in January 2023.

letter.<sup>996</sup> The role of NEMA was also echoed in the case of *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR<sup>997</sup> in the following words:

*72. Nevertheless, NEMA is not just an investigator and a prosecutor. Its success cannot be measured in terms of successful investigations and prosecutions. It has a bigger mandate: to be the principal instrument of government and the people of Kenya in the implementation of all policies relating to the environment. Indeed, under section 9 (2), NEMA has mandatory obligations to among others co-ordinate with lead agencies to ensure the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya and to render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection.*

In addition to NEMA, Section 125<sup>998</sup> of the Act establishes the NET Tribunal which is clothed with the mandate of settling environmental disputes. However, its decision is not final as disgruntled parties can move to appeal to superior courts starting with the Environment and Land Court.

In conclusion, there is a well-established legal and institutional framework governing environmental law in Kenya. This framework advances our argument on how ADR mechanisms such as mediation seek to play a crucial role in informing environmental law in Kenya.

#### v. Mediation and The Environment

Mediation, despite being a relatively green area, has cast its wide net on a variety of contemporary issues with environmental law being at the heart of its discourse. To start with, Article 162 of the constitution of Kenya bestows upon the parliament the latitude to establish courts with similar status as that of the High court to deal with matters regarding the environment and occupation and title to, land.<sup>999</sup> It is from this that the Environment and Land Court (ELC) was birthed to deal with disputes relating to the environment. Additionally, the ELC Act of

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<sup>996</sup> Environmental Management and Coordination Act (EMCA), No. 8 of 1999, Laws of Kenya.

<sup>997</sup> *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR, Petition No. 53 of 2012.

<sup>998</sup> Environmental Management and Coordination Act (EMCA), No. 8 of 1999, Laws of Kenya.

<sup>999</sup> Article 162 (2) of the Constitution of Kenya.

2011<sup>1000</sup> has a legal objective to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act.<sup>1001</sup>

Section 20 of the said Act critically elucidates on ADR and this can be exercised two-fold; one is when the court refers the matter to ADR and secondly is when the parties themselves request the matter to be referred to ADR.<sup>1002</sup> Section 20 (1) grants the ELC the power to refer the parties to ADR however, while invoking this, the parties to the dispute must agree on this. This is in line with the term 'with the agreement of' which implies consensus.<sup>1003</sup> The second way denotes that parties can request for their matter to be referred to ADR. When this occurs, the Court should not oppose such a position unless in its view, justice would not be achieved. Further, the parties should furnish the Court with sufficient reasons as to why the matter should be ably resolved through mediation. The same has been applied in New South Wales where the Land and Environment court, in settling environmental disputes, adopts both in-house mechanism and external where in-house mechanism includes mediation inter alia.<sup>1004</sup>

The use of mediation, as earlier mentioned, is a relatively new field fostered by the constitution. As such, we should look for inspiration from other countries that have embraced this for longer periods in order to learn of its pros and cons and to know how best to implement it in our judicial system.

- vi. Case Studies;
  - a) New Zealand RMA

Being a country that is surrounded by an ocean, New Zealand's economic prosperity is largely dependent on the environment. As such, it is important for it to find ways in which it could resolve its disputes both internally and with its neighbors. This led to the birth of the Resource Management Act (RMA) in 1991 making it one of the first countries to use ways that balance environmental, social, and economic goals in their environmental legislation. Section 247 of the

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<sup>1000</sup> Environment and Land Court (No. 19 of 2011)

<sup>1001</sup> Section 3 of the Environment and Land Court Act

<sup>1002</sup> Admin, 'When Can the Environment and Land Court (ELC) Refer Environmental Disputes to ADR??' (18 August 2023) <<https://thelawyer.africa/2023/08/18/when-can-elc-refer-environmental-disputes-to-adr/>> accessed 2 January 2024.

<sup>1003</sup> Ibid.

<sup>1004</sup> Ibid.

said act establishes the Environment Court which on top of the normal adjudication process, incorporates Alternative Dispute Resolution (ADR) mechanisms including mediation. The court offers a mediation service run by Environment Commissioners who are trained for that specific purpose. Upon conclusion of the mediation session, the parties record the outcome in a Memorandum of Understanding. When a settlement is reached, the Court must approve the consent by the parties themselves. However, if the dispute is not resolved, then the case is scheduled for a hearing in the court.

A thorough evaluation of the court's use of mediation in 2004 showed that 80% of the cases referred to mediation were successful resulting in the widespread use of mediation in the country. Further, it was incorporated to deal with the simpler matters while the complex matters were left to the expertise of the courts. In conclusion, the use of mediation was found to display an expeditious way of preventing, and peacefully settling environmental disputes.<sup>1005</sup>

#### b) BLM Bridgeport Land Sale Mediation

This was a dispute involving the Bureau of Land Management (BLM) and members of the Bridgeport Indian Colony (tribe) in Northeastern California USA involving the sale of land belonging to the tribe. A deal was initially reached between the two parties but an objection from the homeowners stalled the process with appeals having been filed at the Federal District Court in the 9<sup>th</sup> Circuit. Pending those appeals, the parties decided to explore mediation as a means of resolving the disputes between them. The U.S Institute for Environmental Conflict Resolution (USIECR) drafted the mediation plan and conducted a three-day assessment of the issues in order to reach a negotiation. At the end of it all, the parties reached a settlement and the mediators helped push the parties to think outside the box.

As a result, the filed appeals were ended and a binding agreement regarding the sale of the land was reached. Additionally, mediation helped save both time and cost that would have been much more expensive. Surprisingly, participants reported that mediation would be their “tool of

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<sup>1005</sup> Oliver, Marlene. Implementing Sustainability – New Zealand's Environment Court Annexed Mediation. Indian Society of International Law (ISIL) Fifth International Conference on International Environmental Law, 8 - 9 December 2007, New Delhi, India. See also, 'Mediators Beyond Borders - Case Studies Demonstrating the Use of Mediation, Consensus Building and Collaborative Problem Solving in Resolving Environmental and Climate-related Conflicts'.

choice if faced with a similar type of conflict in the future.” As if that was not enough, it helps build trust that had been long lost between the parties.<sup>1006</sup> This goes to show the significant impact that mediation has not only in resolving cases, but also in restoring human interactions and this is why this article advocates for its use.

vii. Acta de Brasilia negotiations between Peru and Ecuador

In resolving cross-border disputes, mediation was applied when resolving a dispute between Peru and Ecuador. The territorial dispute could be traced back to the 1800s with the major conflict taking place in 1942 when Peru invaded Ecuador. As a result, the Rio de Janeiro protocol was established but soon chaos quickly started again due to poorly defined borders in the protocol. Consequently, in 1998, following third party help from Argentina, Chile, Brazil and the U.S, the Acta de Brasilia was signed with an aim to reduce the ongoing tensions between the two factions. In the contested area, “peace parks” were established by both countries not only as a means for conservation but also to allow the local communities within the area to flourish.

The establishment of the act allowed for cooperative talks between the countries, promoting diplomacy across borders and strengthening international relations. Further, it has inspired other areas of border conflicts including Syria, North Korea and South Korea by resorting to transforming contested areas into conservation zones.<sup>1007</sup>

The above-mentioned case studies go forth to showcase the profound impact that Alternative Dispute Resolution and Mediation in particular has in resolving not only local disputes, but also plays a key role in the international landscape. But it doesn’t stop there, it goes above and beyond to restore relationships that had for so long had been scattered.

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<sup>1006</sup> U.S. Institute for Environmental Conflict Resolution. BLM Bridgeport Land Sale Mediation. <<http://www.ecr.gov/cases/pdf/Bridgeport.pdf>> See also, ‘Mediators Beyond Borders - Case Studies Demonstrating the Use of Mediation, Consensus Building and Collaborative Problem Solving in Resolving Environmental and Climate-related Conflicts’.

<sup>1007</sup> Halle, Silija, ed. United Nations Environment Programme. From Conflict to Peacebuilding. 2009. Page 25. Alcalde, Martín et al. Peace Parks in the Cordillera del Cóndor Mountain Range and Biodiversity Conservation Corridor. <http://www.wilsoncenter.org/events/docs/ponce.pdf>. Accessed 16<sup>th</sup> January, 2024. See also, ‘Mediators Beyond Borders - Case Studies Demonstrating the Use of Mediation, Consensus Building and Collaborative Problem Solving in Resolving Environmental and Climate-related Conflicts’

## viii. Conclusion

In conclusion, the influence of mediation in Kenya and the world as a whole cannot be overstated. It has significantly emerged as a powerhouse in resolving environmental disputes and promoting cooperation between conflicting parties by coming up with sustainable solutions ensuring everyone benefits from it. However, being a new area, a lot of awareness, capacity building and policies need to be formulated in order to make it grow even further. As Kenya continues to grapple with complex environmental challenges, the role of mediation in environmental law will undoubtedly become even more significant.

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## Marrying Alternative Dispute Resolution Mechanisms with Environmental Justice; a much-needed sustainable development matrimony

Lisper Muchomba<sup>1008</sup> and Abigail Chepkoech<sup>1009</sup>

### Abstract

*Alternative dispute resolution stands as a fortress in guaranteeing justice, particularly environmental justice. The goal is to ensure the realisation of sustainable development goals whereby the needs of both the present and future generations are met and not compromised in any way whatsoever. However, entrenchment of ADR has faced various challenges in the context of environmental justice, such as rights of indigenous communities, lack of awareness, and other political and socio-economic challenges. Addressing such issues demands an interdisciplinary and multistakeholder approach which the paper aims to discuss. A conversation about an ideal enforcement mechanism of the robust Kenyan legal system is further discussed, identifying the challenges of problems thereof faced, progress made and how the future of ADR and environmental justice could be harmonised to protect the environment for future posterity. Hypothetically, the paper argues that Kenya faces a lot of environmental related issues that are better solved through proper entrenchment of alternative justice systems.*

#### i. Introduction

Oxford University quick reference finds Alternative Dispute Resolution (ADR) to a spectrum of methodologies designed to resolve conflicts outside the traditional judicial processes. These alternative mechanisms aim to address the inefficiencies inherent in litigation, which is often

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characterized by protracted duration and cumbersome procedures.<sup>1010</sup> Environmental disputes, in particular, frequently emerge from the management and allocation of natural resources—our planet’s vital assets. Resources such as water, pasture, forests, and land are frequently at the heart of these contentions.<sup>1011</sup> As individuals and communities engage with these resources, their disparate perspectives, and interests often precipitate conflicts. ADR offers a pragmatic and expedient approach to reconciling such divergences, fostering consensus and sustainable stewardship of the environment.”<sup>1012</sup>

In Kenya, the prevalence of environmental disputes, particularly those centered on land, reflects the deeply ingrained socio-cultural and economic value attributed to this resource.<sup>1013</sup> The Akiwumi Report on tribal confrontations elucidates the combustible nature of land-related issues, where land is not merely a physical asset but a repository of communal identity and heritage.<sup>1014</sup> This intrinsic value often ignites conflicts, as underscored by the report’s findings that many land disputes stem from governmental policies perceived to be partial.

The constitutional endorsement of Alternative Dispute Resolution (ADR) in Kenya, as enshrined in Article 159(2)(c) and (3), underscores the nation’s commitment to fostering harmonious conflict resolution.<sup>1015</sup> ADR is not just a legal framework but a cultural shift towards embracing reconciliation, mediation, arbitration, and indigenous dispute resolution mechanisms. This approach is particularly potent in environmental contexts, where it serves as a conduit for

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<sup>1010</sup> ‘Alternative Dispute Resolution’ (Oxford Reference 2024)

<<https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095406291>> accessed 1 March 2024.

<sup>1011</sup> ‘Alternative Dispute Resolution: Why It Doesn’t Work and Why It Does’ (Harvard Business Review May 1994) <<https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>> accessed 6 March 2024.

<sup>1012</sup> John Faris, ‘AN ANALYSIS of the THEORY and PRINCIPLES of ALTERNATIVE DISPUTE RESOLUTION’ (DOCTOR OF LAWS Thesis Submitted at the UNIVERSITY OF SOUTH AFRICA, June 1995) <<https://core.ac.uk/download/pdf/43175988.pdf>> Accessed 2<sup>nd</sup> March 2024.

<sup>1013</sup> Kariuki Muigua, ‘Environmental Conflicts Management: A Kenyan Perspective Environmental Conflicts Management: A Kenyan Perspective’ (2022) Section on Environmental Conflicts <<https://kmco.co.ke/wp-content/uploads/2022/09/Environmental-Conflicts-Management-A-Kenya-Perspective-20th-Sept.pdf>> accessed 6 March 2024.

<sup>1014</sup> ‘TRIBAL CLASHES in the RIFT VALLEY PROVINCE’ as detailed in the 85-page Akiwumi Report Accessible at <[https://www.hrw.org/sites/default/files/related\\_material/Akiwumi.Rift%20Valley.pdf](https://www.hrw.org/sites/default/files/related_material/Akiwumi.Rift%20Valley.pdf)>.

<sup>1015</sup> Kariuki Muigua, ‘Alternative Dispute Resolution and Article 159 of the Constitution’ (2018) <<https://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf>> accessed 1 March 2024.

inclusive public engagement in pivotal environmental decisions.<sup>1016</sup> Furthermore, the efficacy of environmental ADR in Kenya is substantiated by scholarly analysis, which posits that ADR circumvents the protracted and expensive litigation process, thereby offering a more accessible and community-oriented path to environmental justice.”<sup>1017</sup>

The Constitution of Kenya 2010, under Article 42, enshrines the right of every Individual to a clean and healthy environment. This right is further supported by the state’s obligations outlined in Articles 69 & 70, which mandate the state to ensure environmental protection and provide legal remedies for any threatened or actual environmental rights violations.<sup>1018</sup> Notably, Article 69(2) empowers individuals to protect and conserve the environment, reflecting a progressive approach to environmental justice.<sup>1019</sup> The Environmental Management Coordination Act (EMCA) of Kenya reinforces this by relaxing the stringent requirements traditionally associated with locus standi, thereby broadening access to the courts for environmental matters.<sup>1020</sup>

While Alternative Dispute Resolution (ADR) may not be a panacea for all environmental disputes, its integration into the Kenyan legal framework, as per Article 159(2)(c) of the Constitution, suggests a robust mechanism for amicable conflict resolution. ADR’s potential to complement other dispute resolution methods could significantly contribute to the peaceful

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<sup>1016</sup> Kariuki Muigua, ‘Baseline Assessment, Situational Analysis & Recommendation Report of Kenya’s ADR Mechanisms towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes Nairobi Centre for International Arbitration (NCIA) in Collaboration with the Judiciary of Kenya and the International Development Law Organization (IDLO) Prepared and Submitted By’ (2018) <<https://kmco.co.ke/wp-content/uploads/2022/09/BASELINE-REPORT-compressed.pdf>> accessed 1 March 2024.

<sup>1017</sup> Kariuki Muigua, ‘Reflections on ADR and Environmental Justice in Kenya’ (2018) <<https://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-ADR-and-Environmental-Justice-in-Kenya.pdf>> accessed 2 March 2024.

<sup>1018</sup> Kariuki Muigua, ‘Enforcing the Right to Clean and Healthy Environment in Kenya through the Polluter Pays Principle Kariuki Muigua Enforcing the Right to Clean and Healthy Environment in Kenya through the Polluter Pays Principle I Enforcing the Right to Clean and Healthy Environment in Kenya through the Polluter Pays Principle’ (2023) <<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 27 January 2024.

<sup>1019</sup> Patricia Kameri-Mbote, Robert Kibugi and Nkatha Kabira, ‘Implementing the Constitutional Framework Environmental Governance in Kenya’ (2021) <<https://www.ielrc.org/Content/b2301.pdf>> Accessed 27 February 2024.

<sup>1020</sup> ‘National Environment Management Authority (NEMA) - Environmental Act (EMCA)’ (Nema.go.ke 2014) <[https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=24&Itemid=163](https://www.nema.go.ke/index.php?option=com_content&view=article&id=24&Itemid=163)> accessed 1 March 2024.

resolution of environmental conflicts, fostering community cohesion and national unity.<sup>1021</sup> It is imperative for Kenya to leverage ADR's capabilities to mitigate environmental disputes, thereby safeguarding the societal fabric and promoting sustainable development (author's emphasis).

Alternative Dispute Resolution (ADR) has indeed transcended its role in environmental matters to become a pivotal element in the broader spectrum of conflict resolution within Kenya.<sup>1022</sup> The Kofi Annan Initiative of 2008 stands as a testament to the power of mediation, a subset of ADR, in navigating the nation through the tumultuous aftermath of the 2007 general elections.<sup>1023</sup> The initiative's success in fostering peace and stability at a critical juncture in Kenya's history underscores the potential of ADR to resolve disputes that threaten the fabric of society (author's emphasis).

The essence of ADR lies in its ability to offer autonomy, informality, and inclusivity, setting the stage for a democratic approach to environmental governance and contributing to global peace. Its preference over litigation is rooted in the creation of a "win-win" outcome, where all parties can find satisfaction and resolution without the zero-sum game often associated with court decisions.<sup>1024</sup> The complexity of environmental disputes often makes litigation an unsuitable path, with ADR providing a more effective, informal, and confidential alternative. The Kenyan legal landscape has witnessed the efficacy of ADR for its principles facilitated the legal process concerning a claim of adverse possession.<sup>1025</sup> Illustratively, instances hereinabove exemplify the

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<sup>1021</sup> John Gichuhi, 'Revisiting Article 159 (2)(C) of the Constitution of Kenya: How the Judge Sees It' [2018] Social Science Research Network Abstract <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3235391](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3235391)> accessed 27 February 2024.

<sup>1022</sup> Helmut Weidner, 'Alternative Dispute Resolution in Environmental Conflicts - Promises, Problems, Practical Experience' [2024] Econstor.eu | | <<https://www.econstor.eu/handle/10419/122446>> accessed 6 March 2024.

<sup>1023</sup> Elisabeth Lindenmayer and Josie Kaye, 'A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya' (2009) <[https://peacemaker.un.org/sites/peacemaker.un.org/files/KenyaMediation\\_IPI2009.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/KenyaMediation_IPI2009.pdf)> accessed 17 February 2024.

<sup>1024</sup> Agatha Okeke, 'Exploring Alternative Dispute Resolution for Settlement of Exploring Alternative Dispute Resolution for Settlement of Criminal Disputes in Nigeria Criminal Disputes in Nigeria' (2021) <<https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=11798&context=dissertations>> accessed 17 February 2024.

<sup>1025</sup> Benson Mulele Igonga, 'When Can the Environment and Land Court (ELC) Refer Environmental Disputes to ADR??' (*TheLawyer.africa* 18 August 2023) <<https://thelawyer.africa/2023/08/18/when-can-elc-refer-environmental-disputes-to-adr/>> accessed 3 March 2024.

growing recognition and application of ADR in Kenya, highlighting its significance not only in environmental disputes but as a cornerstone for national harmony and legal recourse.

## ii. Various Alternative Dispute Resolution Mechanisms

The realm of Alternative Dispute Resolution (ADR)\*\* encompasses a variety of mechanisms, each distinct in its approach to facilitating amicable settlements outside the conventional court system. For instance, arbitration is a formal ADR process where disputing parties present their case to an arbitrator, who renders a decision that is typically final and binding.<sup>1026</sup> The process is governed by the Arbitration Act of 1995 in Kenya, which ensures that the proceedings are conducted fairly and impartially. Mediation offers a more informal and collaborative approach, where a mediator assists the parties in reaching a mutually satisfactory agreement. It is a confidential process that fosters a “win-win” outcome, allowing parties to maintain relationships post-dispute.<sup>1027</sup>

Negotiation involves direct discussions between the parties, often facilitated by a neutral intermediary, to reach a voluntary and mutually beneficial resolution. It allows parties to retain control over the outcome, making it a flexible and personalized form of dispute resolution.<sup>1028</sup> Conversely, reconciliation is a process aimed at restoring harmony between parties through facilitated communication and compromise. It is particularly valuable in disputes where ongoing relationships are important, as it seeks to address underlying issues and promote understanding.<sup>1029</sup> Each of these mechanisms serves the purpose of resolving conflicts efficiently and equitably, providing alternatives to the often time-consuming and adversarial nature of

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<sup>1026</sup> “What Is Arbitration?” (Wipo.int 2024) <<https://www.wipo.int/amc/en/arbitration/what-is-arb.html#:~:text=Arbitration%20is%20a%20procedure%20in,instead%20of%20going%20to%20court.>> accessed 1 March 2024.

<sup>1027</sup> PON Staff, ‘What Is Mediation?’ (PON - Program on Negotiation at Harvard Law School 4 March 2024) <<https://www.pon.harvard.edu/tag/mediation/>> accessed 1 March 2024.

<sup>1028</sup> Dispute Resolution Methods - FasterCapital, ‘Dispute Resolution Methods’ (FasterCapital 2024) <<https://fastercapital.com/startup-topic/Dispute-Resolution-Methods.html>> accessed 2 March 2024.

<sup>1029</sup> Linda Radzik and Colleen Murphy, ‘Reconciliation (Stanford Encyclopedia of Philosophy)’ (Stanford.edu 2015) <<https://plato.stanford.edu/entries/reconciliation/>> accessed 3 March 2024.

litigation (author's emphasis). They are integral to fostering a culture of dialogue and consensus in Kenya's legal landscape.

Importantly, Alternative Dispute Resolution (ADR) has gained significant traction globally due to its numerous benefits. ADR fosters a collaborative environment where all parties can reach a mutually satisfactory resolution, often referred to as a 'win-win' situation.<sup>1030</sup> A prime example of ADR's application on a global scale is the Paris Climate Change Agreement of 2015. This landmark agreement,<sup>1031</sup> resulting from negotiations among 195 nations, aimed to reduce harmful emissions and was hailed as a monumental success for global unity and environmental stewardship.

ADR methods, including mediation and negotiation, are lauded for their cost-effectiveness compared to traditional litigation. They eliminate the need for expensive legal representation and court fees, which can be particularly burdensome in criminal cases.<sup>1032</sup> Additionally, ADR can significantly expedite the resolution process, often concluding within weeks or months, thereby alleviating the backlog of cases in the judicial system. Confidentiality is another cornerstone of ADR, providing a private setting for dispute resolution, which contrasts with the public nature of court proceedings.<sup>1033</sup> This aspect of ADR engenders trust among parties, facilitating open and honest communication without the concern of public disclosure. Evidently, the realm of environmental conflicts, ADR is instrumental in harmonizing the interests of conservation, displacement, and community. It empowers stakeholders to engage constructively, address

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<sup>1030</sup> Cambridge ADR, 'Introduction: Alternative Dispute Resolution (ADR) Has Gained Significant Prominence as a Preferred Method of Resolving Legal Disputes. In This Article, We Explore the Numerous Advantages of ADR over Traditional Litigation in Civil Court.' (*Linkedin.com* 28 September 2023)  
<<https://www.linkedin.com/pulse/advantages-adr-over-court-comprehensive-analysis-cambadr#:~:text=ADR%20focuses%20on%20fostering%20communication,strained%20by%20adversarial%20court%20proceedings.>> accessed 1 March 2024.

<sup>1031</sup> 'Paris Climate Agreement: Everything You Need to Know' (*Nrdc.org* 19 February 2021)  
<<https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know>> accessed 2 March 2024.

<sup>1032</sup> Gay R Clarke and Iyla T Davies, 'ADR — Argument for and against Use of the Mediation Process Particularly in Family and Neighborhood Disputes' (1991) 7 QUT Law Review Section the Introduction.

<sup>1033</sup> Administrative Appeals Tribunal, 'Confidentiality in Alternative Dispute Resolution Processes Guidelines for Applicants, Respondents and Representatives' (2014) Introductory section.  
<<https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/ConfidentialityInADRProcesses.pdf>> Accessed 02 March 2024.

environmental issues, and devise solutions that serve the collective good,<sup>1034</sup> thereby promoting environmental democracy and sustainable development.

### iii. Challenges and limitations facing ADR

Alternative Dispute Resolution (ADR) has indeed become a cornerstone in the resolution of disputes, offering unparalleled flexibility and convenience in handling intricate issues. Yet, it is not without its challenges and limitations, particularly in the environmental sector.<sup>1035</sup> Complex environmental disputes often require mediators and arbitrators to possess specialized knowledge, which, if lacking,<sup>1036</sup> can impede the resolution process as parties grapple with technical nuances. A significant challenge in ADR is the potential power imbalance between disputing parties, such as a local community versus a multinational corporation. This disparity can skew negotiations, potentially resulting in outcomes that favor the more powerful entity.<sup>1037</sup> Moreover, the enforceability of ADR agreements presents another hurdle; unlike court judgments, ADR settlements lack a robust mechanism for enforcement,<sup>1038</sup> allowing parties to disregard agreements with little consequence.

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<sup>1034</sup> Kariuki Muigua, 'Environmental Conflict Management Institutions and Approaches Kariuki Muigua Environmental Conflict Management Institutions and Approaches Environmental Conflict Management Institutions and Approaches' (2022) <<https://kmco.co.ke/wp-content/uploads/2022/09/Environmental-Conflict-Management-Institutions-and-Approaches.pdf>> accessed 1 March 2024.

<sup>1035</sup> 'Alternative Dispute Resolution for Disputes Related to Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources \* Background Brief No. 8' <<https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-5-8-en-alternative-dispute-resolution-for-disputes-related-to-intellectual-property-and-traditional-knowledge-traditional-cultural-expressions-and-genetic-resources.pdf>> accessed 1 March 2024.

<sup>1036</sup> In Resolving, 'The Role of Arbitration in Resolving Environmental Conflicts - FasterCapital' (*FasterCapital* 2015) <<https://fastercapital.com/topics/the-role-of-arbitration-in-resolving-environmental-conflicts.html>> accessed 27 February 2024.

<sup>1037</sup> In Song Kim and Helen Milner, 'Multinational Corporations and Their Influence through Lobbying on Foreign Policy' (2019) <[https://www.brookings.edu/wp-content/uploads/2019/12/Kim\\_Milner\\_manuscript.pdf](https://www.brookings.edu/wp-content/uploads/2019/12/Kim_Milner_manuscript.pdf)> accessed 2 March 2024.

<sup>1038</sup> Pietro Ortolani, 'Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin' (2016) 36 *Oxford Journal of Legal Studies* 595 <[https://www.jstor.org/stable/pdf/26363509.pdf?casa\\_token=41irfn87JUEAAAAA:jUpe7WYyYbWJUKzr2dmmLCFIGr2hVWwL32vU\\_x2vYJ6EgNepwSjIC6eTKTyZkK7M84rxOCD-6J9yVxYPsUTS-bDvOrc9bfHFZ8fa-8lLbbMKsBwwMIKYf2w](https://www.jstor.org/stable/pdf/26363509.pdf?casa_token=41irfn87JUEAAAAA:jUpe7WYyYbWJUKzr2dmmLCFIGr2hVWwL32vU_x2vYJ6EgNepwSjIC6eTKTyZkK7M84rxOCD-6J9yVxYPsUTS-bDvOrc9bfHFZ8fa-8lLbbMKsBwwMIKYf2w)> accessed 1 March 2024.

Public involvement in environmental disputes adds another layer of complexity, as it is often challenging to ensure democratic participation and consider the diverse perspectives of the community. Additionally, the absence of legal precedents in ADR can lead to uncertainty and a lack of clear guidelines for resolving future environmental disputes, potentially stymieing the development of a consistent legal framework.<sup>1039</sup> Despite these challenges, ADR has proven effective in resolving environmental disputes, as evidenced by the landmark Storm King Mountain and River dispute. This complex case was successfully resolved through mediation,<sup>1040</sup> exemplifying ADR's potential to achieve consensus in even the most intricate of conflicts. In Kenya, ADR played a pivotal role in the Margarini Inquiry in Malindi, where the Kenya Association of Manufacturers and Fadhili Trust mediated between mining companies and the local community. The mediation process facilitated a constructive dialogue, leading to a successful resolution of the dispute.<sup>1041</sup> These instances underscore the efficacy of ADR in fostering amicable settlements and highlight its importance in the realm of environmental conflict resolution (author's emphasis).

The application of Alternative Dispute Resolution (ADR) in environmental disputes has been demonstrated in several key instances, reflecting its effectiveness in resolving complex issues through dialogue and consensus. In the Magarini inquiry in Malindi, the Kenya Association of Manufacturers engaged Fadhili Trust to mediate between mining companies and the community.<sup>1042</sup> This mediation facilitated a constructive dialogue platform, addressing conflicts related to land disputes, labor practices, and environmental impacts. The Storm King Mountain

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<sup>1039</sup> Abdul Haseeb Ansari, Muhamad Hassan Bin Ahmad and Sodiq Omoola, 'Alternative Dispute Resolution in Environmental and Natural Resource Disputes: National and International Perspectives' (2017) 59 *Journal of the Indian Law Institute* 26 <[https://www.jstor.org/stable/pdf/26826589.pdf?casa\\_token=f9ZaO99uhCQAAAAA:MP-2\\_wSrR-7jHBCL04u-cNAKI\\_5vqK9Alq4J6lI BzcvOoFRzDhadMxIGYDmL3nrIdZPjSy8f0vITGurcesuEz7Hcj0-HSDYIzMA5jG9T64nXXBJ2wq32sg](https://www.jstor.org/stable/pdf/26826589.pdf?casa_token=f9ZaO99uhCQAAAAA:MP-2_wSrR-7jHBCL04u-cNAKI_5vqK9Alq4J6lI BzcvOoFRzDhadMxIGYDmL3nrIdZPjSy8f0vITGurcesuEz7Hcj0-HSDYIzMA5jG9T64nXXBJ2wq32sg)> accessed 6 March 2024.

<sup>1040</sup> Ibid.

<sup>1041</sup> Bernard M Nyaga, Joy Cheruto Ondego and Mogesi Joel, 'Mediation and Data Protection Law in Kenya: Appraising ADR for Optimal Access to Justice under the DPA 2019' [2023] *Social Science Research Network The Abstract Section* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4424688](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4424688)> accessed 2 March 2024.

<sup>1042</sup> Betty Asunah, 'UNIVERSITY of NAIROBI SCHOOL of LAW a RESEARCH PROJECT PAPER SUBMITTED in FULFILMENT of the REQUIREMENTS for the AWARD of the MASTER of LAWS (LL.M) DEGREE a CASE STUDY on the APPLICATION of ALTERNATIVE DISPUTE RESOLUTION MECHANISMS in the NANDI-LUO COMMUNITIES' BORDER CONFLICT' (2020) <[http://erepository.uonbi.ac.ke/bitstream/handle/11295/153925/Asunah%20B\\_A%20Case%20Study%20on%20the%20Application%20of%20Alternative%20Dispute%20Resolution%20Mechanisms%20in%20the%20Nandi-luo%20Communities%E2%80%99%20Border%20Conflict.pdf?sequence=1](http://erepository.uonbi.ac.ke/bitstream/handle/11295/153925/Asunah%20B_A%20Case%20Study%20on%20the%20Application%20of%20Alternative%20Dispute%20Resolution%20Mechanisms%20in%20the%20Nandi-luo%20Communities%E2%80%99%20Border%20Conflict.pdf?sequence=1)> accessed 6 March 2024.



and River dispute is another notable example, often cited as one of the most challenging environmental disputes.<sup>1043</sup> Using ADR, a resolution was reached that preserved the environmental integrity of the area.

The Paris Climate Change Agreement of 2015 stands as a global testament to the power of negotiation, an ADR mechanism. At the United Nations conference on climate change in Paris, 195 nations participated in negotiations to establish a framework for reducing emissions and taking collective action against climate change.<sup>1044</sup> In Kenya, a robust legal and institutional framework exists to address environmental disputes. This includes courts of law and tribunals operating under various acts, such as national Environmental Management Authority, National Environmental Complaints Committee, and National Environment Tribunal.<sup>1045</sup> The legal framework comprises statutes like the Environmental Management and Coordination Act (EMCA), The Public Health Act cap 242, The Forest Conservation and Management Act, 2016, and The Water Act, No 43 of 2016. These institutions and laws provide the structure within which ADR can operate, offering alternative pathways to litigation for the resolution of environmental disputes.

In Kenya, despite the presence of robust environmental laws and institutions, conflicts persist, highlighting the limitations of traditional court systems in resolving such disputes. Courts, being formal and rigid, often lack the flexibility needed for effective negotiation, leading to a growing recognition of Alternative Dispute Resolution (ADR). The Kenyan Constitution, specifically Article 159(2)(c), endorses ADR, encompassing reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms as viable alternatives to litigation.<sup>1046</sup> The Mining Act's

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<sup>1043</sup> 'Mediation and Negotiation in Environmental Conflicts - FasterCapital' (*FasterCapital* 2024) <<https://fastercapital.com/topics/mediation-and-negotiation-in-environmental-conflicts.html>> accessed 2 March 2024.

<sup>1044</sup> 'ICC Knowledge 2 Go | International Chamber of Commerce (ICC)' (*ICC Knowledge 2 Go | International Chamber of Commerce (ICC)* 2019) <<https://2go.iccwbo.org/dispute-resolution-and-climate-change.html>> accessed 16 February 2024.

<sup>1045</sup> Kariuki Muigua, 'ENVIRONMENTAL CONFLICT MANAGEMENT in the KENYAN CONTEXT - ENHANCING the USE of ALTERNATIVE DISPUTE RESOLUTION MECHANISMS I' <<https://land.igad.int/index.php/documents-1/countries/kenya/conflict-3/554-environmental-conflict-management-in-the-kenyan-context-enhancing-the-use-of-alternative-dispute-resolution-mechanisms/file>> accessed 6 March 2024.

<sup>1046</sup> Kariuki Muigua, 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation' (2018) Introductory section <<https://kmco.co.ke/wp-content/uploads/2018/08/Managing-Natural-Resource-Conflicts-in-Kenya-through-Negotiation-and-Mediation.pdf>> accessed 21 February 2024.

Section 154(b) further mandates mediation for mineral rights disputes when negotiations fail (author's emphasis).

Internationally, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ratified by Kenya in 1989, supports the enforcement of arbitral awards, encouraging the resolution of disputes through arbitration. Similarly, Article 36 of the International Court of Justice (ICJ) statute and Article 14 of the United Nations Framework Convention on Climate Change (UNFCCC) allow arbitration only with the consent of the states involved.<sup>1047</sup> The United Nations Development Program emphasizes the mediator's role in gathering comprehensive information about the natural resources involved in a dispute to facilitate an informed resolution process. Environmental disputes are urgent matters that impact human habitation and resource allocation.<sup>1048</sup> If not addressed promptly, they can lead to loss of livelihoods, evictions, or even violence. ADR offers a quicker, more flexible resolution mechanism compared to the formal and time-consuming court processes, making it a crucial tool for environmental conflict management (author's emphasis).

The Kenyan government plays a crucial role in environmental conflict management, as delineated by Article 69(I) of the Constitution. This article mandates the state to:

- a. *Ensure sustainable exploitation, utilization, management, and conservation and sustainability natural resources, while guaranteeing the equitable distribution of the resulting benefits.*
- b. Achieve and maintain a minimum tree cover of ten percent across Kenya's land area, which is pivotal for ecological balance and climate regulation.

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<sup>1047</sup> 'The Landscape of International Arbitration in Kenya' (*The In-House Lawyer | The Legal 5000* October 2018) <<https://www.inhouselawyer.co.uk/legal-briefing/the-landscape-of-international-arbitration-in-kenya/>> accessed 3 March 2024.

<sup>1048</sup> 'Volume I: Compilation of Discussion Papers from the E-Conference on Addressing Natural Resource Conflicts through Community Forestry' (*Fao.org* 2024) <<https://www.fao.org/3/AC696E/AC696E06.htm>> accessed 12 January 2024.

- c. Protect and enhance intellectual property and indigenous knowledge related to biodiversity and genetic resources, acknowledging the value of traditional wisdom in environmental stewardship.
- d. Encourage public participation in environmental management, protection, and conservation, fostering a sense of ownership and responsibility among citizens<sup>1</sup>.
- e. Protect genetic resources and biological diversity, ensuring the preservation of Kenya's rich natural heritage for future generations.
- f. Establish systems for environmental impact assessment, environmental audit, and monitoring, to proactively manage and mitigate the environmental footprint of development activities.
- g. Eliminate processes and activities likely to endanger the environment, taking a preventive approach to environmental degradation.
- h. Utilize the environment and natural resources for the benefit of the people of Kenya, ensuring that development does not come at the cost of environmental health.

These responsibilities underscore the government's commitment to proactive and inclusive environmental governance, aiming to harmonize economic development with ecological sustainability.

#### iv. Public Participation

Public participation is a fundamental aspect of environmental democracy, ensuring that those affected by environmental decisions have a say in the management and use of natural resources. Article 10 of the Kenyan Constitution enshrines public participation as a national value and principle, obligating all state organs and officers to engage the public in the constitutional, legal, and policy-making processes.<sup>1049</sup> The Aarhus Convention Article I and Principle 10 of the Rio Declaration on Environment and Development underscore the importance of involving citizens

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<sup>1049</sup> Kariuki Muigua, 'Towards Meaningful Public Participation in Natural Resource Management in Kenya' (2014) The Introductory Session <<https://kmco.co.ke/wp-content/uploads/2018/08/TOWARDS-MEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCE-MANAGEMENT-IN-KENYA.pdf>> accessed 19 February 2024.

in environmental matters.<sup>1050</sup> They advocate for public access to information, participation in decision-making, and the provision of judicial and administrative remedies.

The Supreme Court of Kenya, in the Matter of the National Land Commission, emphasized that public participation is intertwined with other constitutional rights, such as access to information and equality. It serves as a safeguard and accountability mechanism for state organs and promotes democracy, transparency, and integrity.<sup>1051</sup> This holistic approach to public engagement is crucial for effective and equitable environmental governance. Moreover, draft Public Participation Guidelines for County Governments in Kenya underscore the pivotal role of public engagement in governance. These guidelines aim to:

a. Increase accountability by ensuring that government actions are subject to public scrutiny. Manage social conflicts through inclusive dialogue, thereby fostering societal harmony. Improve the process, quality, and results in decision-making by incorporating diverse perspectives. Strengthen democracy and governance, as public participation is a cornerstone of democratic practices.<sup>1052</sup> There is also a need to enhance the process' legitimacy, affirming that decisions are made with the consent and input of the governed.

While these guidelines are not yet finalized, they resonate with the objectives of public participation as outlined in the Kenyan Constitution and the County Governments Act. They set forth conditions for meaningful public participation, which include:

a. Clarity of subject matter by ensuring that the public understands the issues at hand; by Clear structures and processes for conducting participation, providing a predictable framework for engagement; same should be the case for opportunities for balanced influences from the public, allowing for a wide range of voices to be heard; and Commitment to the process, demonstrating a genuine interest in considering public input.<sup>1053</sup> Moreover, there is need for inclusive and effective representation, reflecting the

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<sup>1050</sup> UN Environment, 'Principle 10' (UNEP - UN Environment Programme 2018) <<https://www.unep.org/civil-society-engagement/partnerships/principle-10>> accessed 2 March 2024.

<sup>1051</sup> 'NLC UNDERTAKES PUBLIC PARTICIPATION on the DRAFT NATIONAL LAND POLICY - National Land Commission' (National Land Commission 13 October 2023) <<https://landcommission.go.ke/portfolio/stakeholders-virtual-engagement-on-national-land-policy-recommendationon-copy/>> accessed 2 March 2024.

<sup>1052</sup> DESA, 'Creating an Inclusive Society: Practical Strategies to Promote Social Integration' (2019) Chapter 1 <<https://www.un.org/esa/socdev/egms/docs/2009/Ghana/inclusive-society.pdf>> accessed 24 February 2024.

<sup>1053</sup> Neil Jeffery, 'Stakeholder Engagement: A Road Map to Meaningful Engagement' (2019) Strategies to effective stakeholder engagement

diversity of the community in the decision-making process. Same should be the case for integrity and commitment to the value of public input, honoring the contributions of participants.

b. Regarding the capacity to engage, ensuring that participants have the necessary resources and information to contribute meaningfully. A similar standard should apply to transparency, making the proceedings and outcomes accessible to all. In consideration of social status, economic standing, religious beliefs, and ethnicity, acknowledging the varied backgrounds of community members.<sup>1054</sup> The said conditions align with the constitutional values of democracy, transparency, accountability, and integrity, reinforcing the importance of public participation in the democratic governance of Kenya.

v. Conclusion and the way forward

The evolution of Alternative Dispute Resolution (ADR) reflects a paradigm shift in managing environmental disputes. Traditionally relegated to litigation or political maneuvering, ADR has now emerged as a widely accepted and effective means of dispute resolution. Its integration alongside the court system marks a significant development in legal practice. Environmental law, with its focus on the consequences of human impact on the environment, serves as the bedrock for addressing issues stemming from climate change, pollution, and resource exploitation. Given the complexity of environmental disputes and their profound effects on communities and individuals, ADR offers a streamlined and less adversarial approach. It affords parties the flexibility to find common ground, preserve relationships, and reach confidential resolutions that are mutually determined<sup>1</sup>.

For ADR to reach its full potential, public awareness is key. This can be achieved through concerted efforts by government bodies, community leaders, and conflict resolution professionals to educate and train the public on the benefits of ADR. The judiciary's embrace of

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<<https://www.fundacionseres.org/lists/informes/attachments/1118/stakeholder%20engagement.pdf>> Accessed 7 February 2024.

<sup>1054</sup> Thomas Carothers and Saskia Brechenmacher, 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus?' (*Carnegie Endowment for International Peace* 20 October 2014) <<https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968>> accessed 6 March 2024.

ADR in its various forms, coupled with support from international organizations, will further bolster its effectiveness. As ADR continues to gain traction, it stands as a testament to the evolving nature of dispute resolution, advocating for inclusivity, participation, and the empowerment of even the most marginalized in decision-making processes. Its growing popularity underscores the need for its adoption in the pursuit of environmental justice and sustainable conflict management.

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Weidner H, 'Alternative Dispute Resolution in Environmental Conflicts - Promises, Problems, Practical Experience' [2024] *Econstor.eu* 11 <<https://www.econstor.eu/handle/10419/122446>> accessed 6 March 2024

‘What Is Arbitration?’ (*Wipo.int* 2024) <<https://www.wipo.int/amc/en/arbitration/what-is-arb.html#:~:text=Arbitration%20is%20a%20procedure%20in,instead%20of%20going%20to%20court.>> accessed 1 March 2024

# COMPULSORY RESOLUTION OR AUTONOMY EROSION? THE DEBATE ON MANDATORY SPORTS ARBITRATION

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## **Abstract**

The sports world is rife with disputes, and the resolution of these disputes is a matter of both urgency and importance. The debate on whether mandatory arbitration should be the norm in sports is akin to a tug-of-war between efficiency and autonomy. This paper delves into the contentious issue of mandatory sports arbitration, questioning its role as a potential future pathway for dispute resolution. This research examines the implications of compulsory arbitration on athletes' autonomy, juxtaposing it with the benefits of expedited dispute resolution. The discussion extends to the principles of fairness and justice within the sports arbitration framework, scrutinizing whether the current system aligns with the ideals of sportsmanship and equity. Through a comparative analysis of various arbitration models and their outcomes, this study seeks to illuminate the nuances of mandatory arbitration and its impact on the global sports community. We aim to provide a comprehensive overview that will foster a more profound understanding among stakeholders and contribute to the ongoing discourse on the evolution of sports law. The debate surrounding mandatory sports arbitration is a complex and multifaceted issue at the heart of athlete autonomy and the nature of dispute resolution within the sports industry. This article seeks to delve into the intricacies of this contentious topic, examining the delicate balance between the need for a streamlined, specialized dispute resolution mechanism and the preservation of athletes' rights to self-determination.

### **i. Introduction**

In sports, arbitration has long been heralded as the preferred avenue for resolving disputes, offering a semblance of expediency and expertise ostensibly absent in conventional judicial processes. The Court of Arbitration for Sport (CAS), established in 1984, epitomizes this specialized approach, commanding a central role in adjudicating sports-related disputes.<sup>1057</sup> However, beneath the surface of this well-intentioned system lies a critical debate: does mandatory sports arbitration serve the collective good of the sports community, or does it erode

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<sup>1057</sup> 'Getting Sports Arbitration to Better Serve Athletes. – CiArb Kenya' (*Ciarbkenya.org* 22 August 2023) <<https://ciarbkenya.org/getting-sports-arbitration-to-better-serve-athletes/>> accessed 1 March 2024.

the individual autonomy of athletes?<sup>1058</sup> The case of Paul Pogba, the renowned footballer who faced a four-year ban in a doping case,<sup>1059</sup> brings this debate into sharp relief. Pogba's situation is not an isolated incident; it echoes the experiences of numerous athletes ensnared in the web of mandatory arbitration, often without a clear understanding of the implications or alternatives.<sup>1060</sup> With its mandatory arbitration configuration, the Portuguese Court of Arbitration for Sport provides a pertinent example of the potential future trajectory of sports arbitration.<sup>1061</sup>

From the foregoing, this article will explore the philosophical underpinnings of mandatory sports arbitration, scrutinize its practical applications, and assess its implications through the lens of high-profile cases like Pogba's. It will also consider the perspectives of various stakeholders, including athletes, sports governing bodies, and legal practitioners, to present a comprehensive overview of the mandatory sports arbitration landscape. As this research embarks on this exploration, it is essential to recognize that the stakes are high: the outcomes of these debates and the evolution of arbitration practices will shape the future of sports law and the rights of athletes for generations to come. The question remains: can a balance be struck that honours both the efficiency of dispute resolution and the sanctity of athlete autonomy? Or are we witnessing the gradual erosion of athletes' rights under the guise of compulsory resolution?

## ii. Historical Evolution of Sports Arbitration

The historical evolution of sports arbitration is a testament to sports disputes' growing complexity and international nature. This section will trace the origins and development of arbitration in sports, culminating in establishing and raising the Court of Arbitration for Sport

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<sup>1058</sup> Melissa Hewitt, 'Regulate Doping in Sport' (2015) 22 *Indiana Journal of Global Legal Studies* 16 <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1598&context=ijgls>> accessed 1 February 2024.

<sup>1059</sup> AFP, 'Pogba's Career in Jeopardy as France Star Handed Four-Year Doping Ban' (*Citizen Digital* 29 February 2024) <<https://www.citizen.digital/sports/pogbas-career-in-jeopardy-as-france-star-handed-four-year-doping-ban-n337617>> accessed 1 March 2024.

<sup>1060</sup> Aditya Gokhale, "'Sad, Shocked and Heartbroken" - Paul Pogba Breaks Silence on Four-Year Ban That Sees Football Career Put in Jeopardy as Juventus Midfielder Vows to Appeal "Incorrect" Verdict' (*Goal.com* 29 February 2024) <<https://www.goal.com/en-ke/lists/paul-pogba-breaks-silence-on-four-year-ban-sees-football-career-put-in-jeopardy-juventus/bltcda001c05382b4ec>> accessed 5 March 2024.

<sup>1061</sup> José Manuel Meirim and Marta Vieira, 'The New Portuguese Court of Arbitration for Sport' (*Lexology* 29 September 2015) <<https://www.lexology.com/library/detail.aspx?g=3156b902-f15c-46e2-881f-229159d4e940>> accessed 29 February 2024.



(CAS).<sup>1062</sup> The concept of sports arbitration can be traced back to the early 20<sup>th</sup> century, but it was not until the 1980s that the need for a specialized body became apparent.<sup>1063</sup> Therefore, the increasing number of international sports-related disputes and the absence of an independent authority capable of binding decisions prompted the top sports organizations to seek a solution (author's emphasis?)

### iii. Installation of the Court of Arbitration for Sport

The Court of Arbitration for Sport (CAS) was established in 1984 in Lausanne, Switzerland, by the International Olympic Committee (IOC). The idea was to create a supreme instance for sports disputes, moving them away from the jurisdiction of national courts and into a specialized, sport-centric arbitration body.<sup>1064</sup> The CAS was designed to offer a flexible, quick, and inexpensive procedure for resolving sports disputes, with an initial structure allowing free proceedings, except in financial disputes.

Since its inception, the CAS has undergone several reforms to enhance its independence and procedural fairness. Notably, the International Council of Arbitration for Sport (ICAS) creation in 1994 marked a significant step in establishing the CAS's autonomy from the IOC and other sports organizations.<sup>1065</sup> The CAS has registered thousands of arbitration proceedings, reflecting its central role in the sports dispute resolution landscape. It would suffice to say that the creation of the CAS represents a critical development in the sports law field, providing a tailored dispute resolution mechanism that addresses the unique needs of the sports community.<sup>1066</sup> As research continues to explore the themes of mandatory sports arbitration and athlete autonomy, the

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<sup>1062</sup> Tossaporn Sumpiputtanadacha and Aaron Murphy, 'Sports Arbitration - CAS, TCAS and Everything in Between' (*Lexology* 28 November 2022) <<https://www.lexology.com/library/detail.aspx?g=9fd3008d-c62e-4512-9615-95be9bd8a1d4>> accessed 28 February 2024.

<sup>1063</sup> 'History of the CAS' (*Tas-cas.org* 4 July 2022) <<https://www.tas-cas.org/en/general-information/history-of-the-cas.html>> accessed 25 February 2024.

<sup>1064</sup> Faraz Shahlaei, 'The Collision between Human Rights and Arbitration: The Game of Inconsistencies at the Court of Arbitration for Sport' [2024] *Arbitration International* Sections on the Abstract and Introduction <<https://academic.oup.com/arbitration/advance-article-abstract/doi/10.1093/arbint/aiae005/7609939?redirectedFrom=fulltext>> accessed 2 March 2024.

<sup>1065</sup> Rachele Downie, 'IMPROVING the PERFORMANCE of SPORT'S ULTIMATE UMPIRE: REFORMING the GOVERNANCE of the COURT of ARBITRATION for SPORT' Sections I-III <[https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0009/1687167/Downie.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0009/1687167/Downie.pdf)> Accessed 17 February 2024.

<sup>1066</sup> James AR Nafziger, 'International Sports Law: A Replay of Characteristics and Trends' (1992) 86 *American Journal of International Law* 489.

historical context of the CAS's rise will serve as a foundation for understanding the current challenges and debates in this area.<sup>1067</sup>

#### **iv. Philosophical underpinnings**

The philosophical underpinnings of mandatory arbitration in sports are deeply rooted in the quest for a fair and specialized dispute resolution system. This section will explore the principles that support mandatory arbitration and the critical concepts of autonomy and consent within sports law.<sup>1068</sup>

#### **v. Principles Underpinning Mandatory Arbitration**

Mandatory arbitration in sports is predicated on the principle that sports disputes require a tailored approach that reflects the unique nature of sports and relationships. The rationale is that a specialized forum, such as the Court of Arbitration for Sport (CAS), is better equipped to understand and adjudicate complex sports-related issues than traditional courts.<sup>1069</sup> This system is designed to provide swift and expert resolutions, which is particularly important given the time-sensitive nature of many sports disputes.

However, the non-consensual basis of this arbitration has been a point of contention. Critics argue that the lack of voluntary adherence, especially from athletes often seen as the weaker party, undermines the legitimacy of the arbitration process.<sup>1070</sup> The debate centres on whether

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<sup>1067</sup> Michael Straubel, 'Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better Recommended Citation Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better' (2005) *Loyola University Chicago Law Journal* 36 <<https://lawcommons.luc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1207&context=luclj>> accessed 5 March 2024.

<sup>1068</sup> Tijana Cuk, 'The Role of Arbitration in Sports Dispute Resolution' (*Youssef + Partners* 14 December 2023) <<https://youssef.law/insights/sports-dispute-resolution/>> accessed 1 March 2024.

<sup>1069</sup> Antonio Rigozzi, 'EXPEDITED PROCEDURES in INTERNATIONAL ARBITRATION Sports Arbitration and the Inherent Need for Speed and Effectiveness How Does Sports Arbitration Work and What Lessons Can Be Drawn from It in Seeking to Streamline and Expedite Arbitration in the Broader Sense?' <<https://lk-k.com/wp-content/uploads/2017/12/RIGOZZI-in-LEVY-POLKINGHORNE-Eds-Expedited-Procedures-in-Intl-Arb.-2017-Sports-Arb.-Inherent-Need-for-Speed-Effectiveness-pp.-88-109.pdf>> Accessed 1 March 2024.

<sup>1070</sup> Margareta Baddeley, 'The Extraordinary Autonomy of Sports Bodies under Swiss Law: Lessons to Be Drawn' (2019) 20 *The International Sports Law Journal* 3 <<https://link.springer.com/article/10.1007/s40318-019-00163-6>> accessed 29 February 2024.

the foundational principle of consent is genuinely present in sports arbitration or if athletes are compelled into a system with little alternative.<sup>1071</sup>

## vi. **Autonomy and Consent in Sports Law**

Autonomy and consent are cornerstones of legal systems, ensuring that individuals have control over their legal rights and obligations. In sports law, these concepts are equally vital but face unique challenges.<sup>1072</sup> The autonomy of sports organizations to govern their affairs is often cited as a justification for mandatory arbitration, suggesting that these bodies have the expertise and experience to regulate their internal disputes effectively.<sup>1073</sup>

Yet, the imposition of mandatory arbitration clauses in athletes' contracts raises questions about the true freedom of athletes to choose their dispute resolution method. The tension between the autonomy of sports bodies and the individual consent of athletes is a delicate balance.<sup>1074</sup> While sports organizations may prefer the predictability and control of mandatory arbitration, athletes may view this as an infringement on their autonomy and a forced relinquishment of their right to seek justice through traditional legal avenues.<sup>1075</sup>

Therefore, the philosophical foundations of mandatory sports arbitration involve a complex interplay between the need for specialized dispute resolution and the fundamental rights of athletes.<sup>1076</sup> As the sports world evolves, so must the conversation around these foundational

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<sup>1071</sup> Antonio Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' (2010) 1 Journal of International Dispute Settlement 217 <<https://academic.oup.com/jids/article/1/1/217/879395>> accessed 25 May 2024.

<sup>1072</sup> E. Gefenas, 'Informed Consent' [2012] Elsevier eBooks 721 <<https://www.sciencedirect.com/topics/medicine-and-dentistry/informed-consent>> accessed 27 March 2024.

<sup>1073</sup> Richard Parrish, 'The Autonomy of Sport: A Legal Analysis - Sport et Citoyenneté' (*Sport et citoyenneté* 10 June 2016) <<https://www.sportetcitoyennete.com/en/articles-en/the-autonomy-of-sport-a-legal-analysis>> accessed 1 March 2024.

<sup>1074</sup> Lloyd Freeburn, 'Forced Arbitration and Regulatory Power in International Sport - Implications of the Judgment of the European Court of Human Rights in Pechstein and Mutu v Switzerland' [2020] SSRN Electronic Journal Section Abstract.

<sup>1075</sup> 'Getting Sports Arbitration to Better Serve Athletes. – CI Arb Kenya' (*Ciarbkenya.org* 22 August 2023) <<https://ciarbkenya.org/getting-sports-arbitration-to-better-serve-athletes/>> accessed 21 March 2024.

<sup>1076</sup> Zachary Burley, 'Arbitration Law Review Ethics and Sport Dispute Resolution in Sport: Athletes, Law and Arbitration ETHICS and SPORT DISPUTE RESOLUTION in SPORT: ATHLETES, LAW and ARBITRATION' (2015) <<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1048&context=arbitrationlawreview>> accessed 24 February 2024.

principles, ensuring that the system remains fair and just for all parties involved (author's emphasis).

### **vii. Mandatory Arbitration Mechanisms**

Mechanisms of mandatory arbitration in sports are deeply embedded within the contractual framework that governs the relationship between athletes and sports organizations.<sup>1077</sup> This section will examine how mandatory arbitration clauses are integrated into athletes' contracts and how sports governing bodies enforce these arbitration processes.<sup>1078</sup>

### **viii. Arbitration Clauses in Athletes' Contracts**

Mandatory arbitration clauses are a common feature in athletes' contracts, serving as a pre-emptive agreement to resolve disputes through arbitration rather than litigation. These clauses are often non-negotiable and present as a condition for participating in sporting events and leagues.<sup>1079</sup> The benefits touted for such clauses include privacy, certainty of outcome, and expedited resolution compared to traditional court proceedings.<sup>1080</sup> However, the enforceability of these clauses can be a subject of legal scrutiny, especially when athletes challenge them based

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<sup>1077</sup> Hilary Findlay, 'Marquette Sports Law Review Rules of a Sport-Specific Arbitration Process as an Instrument of Policy Making Repository Citation RULES of a SPORT-SPECIFIC ARBITRATION PROCESS as an INSTRUMENT of POLICY MAKING' 16 <<https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1340&context=sportslaw>> Accessed 06 March 2024.

<sup>1078</sup> Hilary Findlay, 'Marquette Sports Law Review Rules of a Sport-Specific Arbitration Process as an Instrument of Policy Making Repository Citation RULES of a SPORT-SPECIFIC ARBITRATION PROCESS as an INSTRUMENT of POLICY MAKING' (2005) 16 <<https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1340&context=sportslaw>> accessed 11 March 2024.

<sup>1079</sup> Tsubasa Shinohara, 'Human Rights in Sports Arbitration: What Should the Court of Arbitration for Sport Do for Protecting Human Rights in Sports?' [2023] Liverpool Law Review <https://tinyurl.com/yx2i57ys> accessed 20 March 2024.

<sup>1080</sup> Faster Capital, 'Arbitration in Sports Contracts: Fair Play on and off the Field - FasterCapital' (FasterCapital 2023) <<https://fastercapital.com/content/Arbitration-in-Sports-Contracts--Fair-Play-on-and-off-the-Field.html>> accessed 2 March 2024.

on the lack of bilateral consent and the potential for an imbalance of power between the athlete and the sports organization.<sup>1081</sup>

### ix. The Role of Sports Governing Bodies

Sports governing bodies have a significant role in enforcing arbitration. They establish the rules and regulations that include mandatory arbitration provisions, effectively requiring athletes to agree to these terms as a condition of their participation in the sport. These bodies often favour arbitration due to its expertise in sports-related matters and its ability to provide a consistent approach to dispute resolution across different jurisdictions.<sup>1082</sup> However, this enforcement can lead to controversies, particularly when it intersects with human rights and discrimination issues, as seen in high-profile cases adjudicated by the Court of Arbitration for Sport (CAS).<sup>1083</sup>

Thus, mandatory arbitration mechanisms in sports are a complex interplay of contract law, regulatory enforcement, and the pursuit of a fair and efficient dispute resolution system. While these mechanisms offer certain advantages, they also raise questions about the autonomy and consent of athletes,<sup>1084</sup> highlighting the need for ongoing evaluation and potential reform to ensure that the rights of all parties are adequately protected.

Furthermore, high-profile cases involving renowned athletes have significantly impacted sports arbitration.<sup>1085</sup> This section will provide an in-depth analysis of the Paul Pogba case and its implications for sports arbitration, followed by a comparative study of other notable athletes subjected to mandatory arbitration.

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<sup>1081</sup> Azadeh Mohamadinejad and others, 'Assumption of Risk and Consent Doctrine in Sport' (2012) 55 *Physical Culture and Sport. Studies and Research* 30.

<sup>1082</sup> Mansour Vesali Mahmoud, 'Proposals to Amend the Code of the Court of Arbitration for Sports: Three Selected Issues – American Review of International Arbitration' (*Columbia.edu* 23 November 2022) <<https://aria.law.columbia.edu/proposals-to-amend-the-code-of-the-court-of-arbitration-for-sports-three-selected-issues/>> accessed 3 March 2024.

<sup>1083</sup> Faraz Shahlaei, 'The Collision between Human Rights and Arbitration: The Game of Inconsistencies at the Court of Arbitration for Sport' [2024] *Arbitration International Conclusion & Recommendations* <<https://academic.oup.com/arbitration/advance-article-abstract/doi/10.1093/arbint/aiac005/7609939?redirectedFrom=fulltext>> accessed 6 March 2024.

<sup>1084</sup> Girish Deepak, 'Compulsory Consent in Sports Arbitration: Essential or Auxiliary - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog* 12 April 2016) <<https://arbitrationblog.kluwerarbitration.com/2016/04/12/compulsory-consent-in-sports-arbitration-essential-or-auxiliary/>> accessed 2 March 2024.

<sup>1085</sup> Tim Zubizarreta, Shivang Yadav and Harshit Gupta, 'Arbitration in the Realm of Sports Law – Need of the Hour or Not?' (*Jurist.org* 29 April 2020) <<https://www.jurist.org/commentary/2020/04/yadav-gupta-sports-arbitration/>> accessed 2 March 2024.

## x. Paul Pogba's case

Paul Pogba's four-year ban from football for a doping offence has sent shockwaves through the sports world. The French and Juventus Football Club midfielder tested positive for testosterone after a league match against Udinese Football Club. Pogba's appeal to the Court of Arbitration for Sport (CAS) highlights the critical role of sports arbitration in resolving such disputes.<sup>1086</sup> The case underscores the potential career-altering consequences of arbitration decisions and raises questions about the fairness and transparency of the arbitration process, especially in doping instances in which athletes' careers and reputations are at stake.<sup>1087</sup>

Comparing Pogba's situation with that of other athletes subjected to mandatory arbitration reveals a pattern of challenges that individuals face against the backdrop of powerful sports institutions. For instance, the case of Claudia Pechstein, a German speed skater, brought to light the issues of consent and the non-consensual basis of arbitration in sports.<sup>1088</sup> Similarly, the decision of the CAS in the case of Russian figure skater Kamila Valieva, who was allowed to compete at the 2022 Olympic Games despite a positive drug test, sparked debate over the role of CAS and its decision-making process.<sup>1089</sup>

These cases illustrate the complexities and controversies surrounding mandatory sports arbitration. They highlight the need for a system that effectively resolves disputes and respects athletes' rights. As sports arbitration continues to evolve, the experiences of Pogba and others

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<sup>1086</sup> Jacob Steinberg and Angela Giuffrida, 'Paul Pogba "Shocked and Heartbroken" at Four-Year Ban for Positive Drugs Test' (*the Guardian* 29 February 2024) <<https://www.theguardian.com/football/2024/feb/29/paul-pogba-ban-doping-offence-juventus-france>> accessed 6 March 2024.

<sup>1087</sup> France 24, "'Extraordinary' Pogba's Doping Ban Loss for Football, Says Allegri' (*France 24* 2 March 2024) <<https://www.france24.com/en/live-news/20240302-extraordinary-pogba-s-doping-ban-loss-for-football-says-allegri>> accessed 6 March 2024.

<sup>1088</sup> Vjekoslav Puljko, 'Arbitration and Sport' [2014] Core.ac.uk <[https://core.ac.uk/display/6255853?source=1&algorithmId=15&similarToDoc=41340258&similarToDocKey=COR&recSetID=03e31625-17c0-4bce-be03-dc6e900fc958&position=4&recommendation\\_type=same\\_repo&otherRecs=228610468,54521209,188742087,6255853,200222458](https://core.ac.uk/display/6255853?source=1&algorithmId=15&similarToDoc=41340258&similarToDocKey=COR&recSetID=03e31625-17c0-4bce-be03-dc6e900fc958&position=4&recommendation_type=same_repo&otherRecs=228610468,54521209,188742087,6255853,200222458)> accessed 6 March 2024.

<sup>1089</sup> Olympics.com, 'Court of Arbitration for Sport Hands Kamila Valieva Four-Year Suspension for Anti-Doping Rule Violation' (*Olympics.com* 29 January 2024) <<https://olympics.com/en/news/court-arbitration-sport-kamila-valieva-four-year-suspension-anti-doping-rule-violation#:~:text=In%20its%20ruling%2C%20CAS%20stated,failed%20test%20have%20been%20disqualified.>>> accessed 6 March 2024.

serve as a reminder of the importance of ensuring fairness, transparency, and justice within this specialized field of law.

#### **xi. Architecture of mandatory sports arbitration; legal and ethical implications**

It is a fact in the public domain that the system of mandatory sports arbitration, while designed to provide a specialized and efficient means of resolving disputes, has been met with both support and criticism.<sup>1090</sup> This section will explore the critiques and controversies surrounding mandatory sports arbitration, focusing on the arguments for and against it and its impact on athletes' rights and freedoms.

Arguably, proponents of mandatory sports arbitration find it to offer several advantages over traditional litigation. They encompass expertise whereby arbitrators often have specialized knowledge in sports law, which can lead to more informed decisions.<sup>1091</sup> In terms of efficiency, arbitration can be faster than court proceedings, minimizing disruptions to athletes' careers.<sup>1092</sup> This betokens consistency whereby a centralized arbitration body can provide uniformity in decision-making across different sports and jurisdictions.<sup>1093</sup>

Critics, however, raise significant concerns. They include a lack of consent, whereby athletes may be compelled to agree to arbitration without genuine consent, raising questions about the fairness of the process.<sup>1094</sup> From the lens of transparency, they find arbitration's private nature likely to obscure openness and public scrutiny.<sup>1095</sup> Stressing the limitations of appeal, they critique

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<sup>1090</sup> M. Diaconu, S. Kuwelkar and A Kuhn, 'The Court of Arbitration for Sport Jurisprudence on Match-Fixing: A Legal Update' (2021) 21 *The International Sports Law Journal* 27 <<https://link.springer.com/article/10.1007/s40318-021-00181-3>> accessed 6 March 2024.

<sup>1091</sup> SAC Attorneys LLP, 'The Advantages and Disadvantages of Arbitration | San Jose Corporate Lawyers' (*Sacattorneys.com* 2018) <<https://www.sacattorneys.com/the-advantages-and-disadvantages-of-arbitration.html>> accessed 1 March 2024.

<sup>1092</sup> Daniel Meagher, 'The Advantages and Disadvantages of Arbitration within the Sporting Context' (@*lexisnexis* 27 July 2020) <<https://tinyurl.com/4hy7ym47>> accessed 21 March 2024.

<sup>1093</sup> *Ibid.*

<sup>1094</sup> Faraz Shahlaei, 'The Collision between Human Rights and Arbitration: The Game of Inconsistencies at the Court of Arbitration for Sport' [2024] *Arbitration International Abstract* <<https://tinyurl.com/3fd2nytk>> accessed 11 March 2024.

<sup>1095</sup> Fabio Núñez and Del Prado, 'Emory International Law Review Emory International Law Review the Fallacy of Consent: Should Arbitration Be a Creature of the Fallacy of Consent: Should Arbitration Be a Creature of

the limited grounds for appeal, which are likely to leave athletes with little recourse if they believe the arbitration decision was unjust.<sup>1096</sup>

The impacts of mandatory arbitration are apparent, the critiques notwithstanding. They profoundly affect the fundamental rights and freedoms of athletes. Access to justice is among the affected areas of compulsory arbitration that can deprive athletes of their right to a public hearing in a regular court of law.<sup>1097</sup> Regarding human rights, concerns always arise that the arbitration process may not adequately protect athletes' rights, such as the right to a fair trial and non-discrimination.<sup>1098</sup> Moreover, athletes may feel they have no choice but to accept arbitration clauses to compete, which can impact their autonomy and bargaining power.<sup>1099</sup>

From the foregoing, it is safe to say that while mandatory sports arbitration has its merits, the critiques highlight the need for a careful balance between the benefits of a specialized dispute resolution mechanism and the protection of athletes' fundamental rights.<sup>1100</sup> The controversies suggest that reforms may be necessary to ensure the system is fair, transparent,<sup>1101</sup> and respectful of athletes' rights and freedoms.

## **xii. Intersection of Law, Ethics, and Sports Arbitration**

Sports arbitration operates at the confluence of law and ethics, where the game's rules meet the principles of moral conduct. The legal frameworks within which sports arbitration systems

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Contract? Contract?' (2021)

<<https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1255&context=eilr>> accessed 3 March 2024.

<sup>1096</sup> Antonio Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' (2010) 1 *Journal of International Dispute Settlement* 217 <<https://academic.oup.com/jids/article/1/1/217/879395>> accessed 17 March 2024.

<sup>1097</sup> Katherine VW Stone and Alexander JS Colvin, 'The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights' (*Economic Policy Institute* 2015) <<https://www.epi.org/publication/the-arbitration-epidemic/>> accessed 1 March 2024.

<sup>1098</sup> Ben Cisneros, 'Challenging the Call: Should Sports Governing Bodies Be Subject to Judicial Review?' (2020) 20 *The International Sports Law Journal* 18 <<https://link.springer.com/article/10.1007/s40318-020-00165-9>> accessed 17 March 2024.

<sup>1099</sup> Antonio Rigozzi and Fabrice Robert-Tissot, 'Chapter4 "Consent" in Sports Arbitration: Its Multiple Aspects• Lessons from the Canas Decision, in Particular with Regard to Provisional Measures' <<https://lk-k.com/wp-content/uploads/2015/10/RIGOZZI-ROBERT-TISSOT-in-ASA-Special-Series-41-Sports-Arb.-A-Coach-for-Other-Players-2015-Consent-in-Sports-Arb.-Its-Multiple-Aspects-pp.-59-94.pdf>> accessed 6 March 2024.

<sup>1100</sup> Shaun Star and Sarah Kelly, 'A Level Playing Field in Anti-Doping Disputes? The Need to Scrutinize Procedural Fairness at First Instance Hearings' (2020) 21 *The International Sports Law Journal* 94 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7453375/>> accessed 2 March 2024.

<sup>1101</sup> Ibid.



operate are designed to ensure that disputes are resolved in a manner consistent with the sport's specific regulations and the broader principles of justice.<sup>1102</sup> Ethical considerations come into play when addressing issues such as athlete welfare, anti-doping regulations, and the rights of participants to a fair trial.<sup>1103</sup> The challenge lies in ensuring that the arbitration process upholds the highest standards of both legal and ethical conduct, mainly when dealing with cases that have far-reaching implications related to politics, athlete safety, doping, corruption,<sup>1104</sup> and human rights.

### **xiii. Balance Between Fairness and Efficiency**

The balance between fairness and efficiency is a central concern in dispute resolution.<sup>1105</sup> While efficiency is crucial in delivering timely decisions, especially in the fast-paced world of sports, it must not come at the expense of fairness. Fairness encompasses the parties' rights to be heard, present evidence, and receive an impartial judgment.<sup>1106</sup> It also involves considerations of transparency and the opportunity for appeal. The challenge for sports arbitration bodies like the Court of Arbitration for Sport (CAS) is to design and implement dispute resolution processes that maintain this delicate balance,<sup>1107</sup> ensuring that the outcomes are reached efficiently and are also perceived as just and equitable by all stakeholders involved.

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<sup>1102</sup> Mukesh Rawat, 'Choice of Law in Court of Arbitration for Sport: An Overview' [2020] Social Science Research Network Abstract and recommendations section <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3665586](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665586)> accessed 1 March 2024.

<sup>1103</sup> Shaun Star and Sarah Kelly, 'Examining Procedural Fairness in Anti-Doping Disputes: A Comparative Empirical Analysis' (2022) 22 *The International Sports Law Journal* 217 <<https://link.springer.com/article/10.1007/s40318-022-00222-5>> accessed 1 March 2024.

<sup>1104</sup> Antonio Rigozzi, 'Sports Arbitration and the European Convention of Human Rights -Pechstein and Beyond' <<https://k-k.com/wp-content/uploads/2020/12/RIGOZZI-in-M%C3%9CLLER-et-al.-Eds-New-Developments-in-Intl-Comm.-Arb.-2020-2020-Sports-Arb.-ECHR-Pechstein-beyond-pp.-77-130-1.pdf>> accessed 6 March 2024.

<sup>1105</sup> Kariuki Muigua, "Alternative Dispute Resolution and Article 159 of the Constitution" (2018) Abstract <<https://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf>> accessed 11 March 2024.

<sup>1106</sup> Todd B Carver and Albert A Vondra, 'Alternative Dispute Resolution: Why It Doesn't Work and Why It Does' (*Harvard Business Review* May 1994) <<https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>> accessed 27 February 2024.

<sup>1107</sup> Rachele Downie, "Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport " [2011] *MelbJIntLaw* 12; (2011) 12(2) *Melbourne Journal of International Law* 315'

Therefore, sports arbitration's legal and ethical considerations are complex and multifaceted. They require a careful approach that respects the legal rights of the parties involved, adheres to ethical standards, and strives for a fair and efficient resolution.<sup>1108</sup> As sports continue to evolve, so must the frameworks and practices of sports arbitration to ensure they remain fit for purpose in a changing world.

#### **xiv. Real-world manifestations**

The subsequent sections will delve deeper into these considerations, examining how they manifest in real-world scenarios and what they mean for the future of sports arbitration and the protection of athletes' rights. The legal and ethical considerations in sports arbitration are not merely theoretical; they manifest in real-world scenarios with significant implications for athletes' rights.<sup>1109</sup> In recent years, several cases have highlighted the intersection of law, ethics, and sports arbitration.

A classic example of the case hereinabove regards the case of Claudia Pechstein, a German speed skater who challenged the very foundation of sports arbitration by questioning the voluntary nature of her consent to arbitrate.<sup>1110</sup> Similarly, the case involving Caster Semenya and the regulation of testosterone levels in female athletes raised complex ethical questions about gender identity, human rights, and the role of sports governing bodies.<sup>1111</sup>

These cases demonstrate the tangible impact of sports arbitration on athletes' lives and careers. They show that while arbitration can offer a streamlined approach to dispute resolution, it can also lead to outcomes that profoundly affect athletes' personal and professional lives. The

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(Austlii.edu.au 2015) <<https://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/MelbJLL/2011/12.html>> accessed 1 March 2024.

<sup>1108</sup> 'Arbitration: Sports Arbitration' (BODENHEIMER 8 January 2018) <<https://www.changing-perspectives.legal/arbitration/types-of-arbitration/sports-arbitration/>> accessed 17 March 2024.

<sup>1109</sup> Nancy Vargas-Mendoza and others, 'Ethical Concerns in Sport: When the Will to Win Exceed the Spirit of Sport' (2018) 8 Behavioral sciences 78 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6162520/>> accessed 1 March 2024.

<sup>1110</sup> Mathias Wittinghofer and Sylvia Schenk, 'A Never Ending Story: Claudia Pechstein's Challenge to the CAS - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog* 14 June 2016) <<https://arbitrationblog.kluwerarbitration.com/2016/06/14/a-never-ending-story-claudia-pechsteins-challenge-to-the-cas/>> accessed 1 March 2024.

<sup>1111</sup> Doriane Coleman, 'Semenya and ASA v IAAF: Affirming the Lawfulness of a Sex-Based Eligibility Rule for the Women's Category in Elite Sport' <<https://core.ac.uk/download/pdf/322820145.pdf>> accessed 1 March 2024.

decisions made in these arbitration proceedings often go beyond the immediate parties involved and set precedents that affect the entire sports community (author's emphasis).

#### **xv. Looking into the future**

The future of sports arbitration will likely be shaped by the ongoing dialogue between the need for specialized dispute resolution mechanisms and the protection of athletes' rights. As sports evolve, so must the arbitration processes that govern them. For greater transparency, there is a clarion call for more openness in the arbitration process, which could lead to reforms that allow for public scrutiny and understanding of decisions or enhanced Consent.<sup>1112</sup> Efforts to ensure that athletes' consent to arbitration is informed and voluntary could reshape the contractual landscape of sports are core.<sup>1113</sup> More integration of human rights principles into sports arbitration could lead to a more holistic approach to resolving disputes that consider the broader implications for athletes' rights.

This undoubtedly demands that the Court of Arbitration for Sport (CAS) ensures impartiality in its arbitrations through several mechanisms. For independence and Impartiality of Arbitrators, CAS's arbitrators must be independent and have no financial interest in the case or outcome.<sup>1114</sup> They must also be impartial, not favouring any party over the other. The same should be the case for disclosure requirements whereby arbitrators must disclose any information relevant to their independence and impartiality.<sup>1115</sup> Such should encompass any past professional or personal engagements that might affect their objectivity.

The International Bar Association's (IBA) Guidelines for Conflicts of Interest in International Arbitration apply to CAS arbitration. They can assist arbitrators in determining what information

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<sup>1112</sup> 'Promoting Sports Arbitration in Africa Kariuki Muigua a Discussion Paper for the Chartered Institute of Arbitrators (Kenya Branch) 2 Nd Annual Lecture on the Theme "Promoting Sports Arbitration in Africa" Held on Thursday 28th November, 2019 in Nairobi' (2019) <<https://kmco.co.ke/wp-content/uploads/2019/12/Paper-on-Promoting-Sports-Arbitration-in-Africa.pdf>> accessed 11 March 2024.

<sup>1113</sup> Indian Institute of Industrial and Professional Studies, 'Arbitration in Sports-Why It Is Not so Popular among Indian Athletes-Technical and Social View' (*Linkedin.com* 26 June 2022) <[https://www.linkedin.com/pulse/arbitration-sports-why-so-popular-among-indian-athletes-technical->](https://www.linkedin.com/pulse/arbitration-sports-why-so-popular-among-indian-athletes-technical-) accessed 2 March 2024.

<sup>1114</sup> Nathalie Bernasconi-Osterwalder and others, 'IV Annual Forum for Developing Country Investment Negotiators' <[https://www.iisd.org/system/files/publications/dci\\_2010\\_arbitrator\\_independence.pdf](https://www.iisd.org/system/files/publications/dci_2010_arbitrator_independence.pdf)> Accessed 2 March 2024.

<sup>1115</sup> ECHR, 'HUDOC - European Court of Human Rights' (*Coe.int* 2024) <<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-186828%22%5D%7D>> accessed 1 March 2024.

to disclose to avoid conflicts of interest.<sup>1116</sup> However, CAS should continually review its processes to address potential challenges to its arbitrators' independence and impartiality.

#### **xvi. Global Perspectives on Sports Arbitration**

The approach to sports arbitration varies significantly across different jurisdictions. In some countries, sports arbitration is deeply integrated into the sports legal framework, with bodies like the Court of Arbitration for Sport (CAS) playing a central role in resolving disputes.<sup>1117</sup> The CAS, seated in Switzerland, benefits from the Swiss legal system's arbitration-friendly approach, which limits the review of awards to due process matters.<sup>1118</sup> Other jurisdictions may have less formalized or developed systems, relying more on internal dispute resolution mechanisms within sports organizations or national courts (authors' emphasis).

Internationally, there is a trend towards harmonizing arbitration practices to ensure consistency and fairness in sports law.<sup>1119</sup> This includes adopting common standards for arbitration proceedings and recognizing and enforcing arbitral awards across borders, facilitated by instruments like the New York Convention (author's emphasis).

#### **xvii. Future Directions in Sports Arbitration**

Potential reforms to the current sports arbitration system could include increasing transparency, enhancing the consent process for athletes, and ensuring greater protection of

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<sup>1116</sup> Umang Bhat Nair, 'The IBA Guidelines on Conflicts of Interest: Time for a Relook? - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog* 29 March 2023) <<https://arbitrationblog.kluwerarbitration.com/2023/03/29/the-iba-guidelines-on-conflicts-of-interest-time-for-a-relook/>> accessed 2 March 2024.

<sup>1117</sup> 'Promoting Sports Arbitration in Africa Kariuki Muigua a Discussion Paper for the Chartered Institute of Arbitrators (Kenya Branch) 2 Nd Annual Lecture on the Theme "Promoting Sports Arbitration in Africa" Held on Thursday 28th November, 2019 in Nairobi' <<https://kmco.co.ke/wp-content/uploads/2019/12/Paper-on-Promoting-Sports-Arbitration-in-Africa.pdf>> Accessed 06 March 2024.

<sup>1118</sup> Aurélie Conrad Hari, Nadja Jaisli and Pascal Hachem, 'International Arbitration Laws and Regulations Switzerland' [2023] *International Comparative Legal Guides International Business Reports* <<https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/switzerland>> accessed 6 March 2024.

<sup>1119</sup> Ken Foster, 'Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport's Jurisprudence' (2016) 3 *The Entertainment and Sports Law Journal* <<https://www.entsportslawjournal.com/article/id/722/>> accessed 2 March 2024.

athletes' rights.<sup>1120</sup> Innovations might involve decentralizing institutions like the CAS to make them more accessible to different regions and embracing technology to improve the efficiency of arbitration proceedings.<sup>1121</sup> Furthermore, future challenges in sports arbitration will likely revolve around maintaining impartiality and independence in decision-making, adapting to changes in international law, and addressing ethical considerations such as diversity and inclusion within arbitration panels.<sup>1122</sup> As the field continues to evolve, it will be essential to balance the need for specialized expertise with the principles of justice and fairness for all parties involved in sports disputes.

### **xviii. Conclusion**

This conversation has traversed the multifaceted landscape of mandatory sports arbitration, dissecting its complexities through a critical and academic lens. We embarked on this journey by framing the debate around the dichotomy of compulsory resolution and the potential erosion of athlete autonomy, using the case of Paul Pogba as a focal point for discussion. Delving into the historical evolution of sports arbitration, noting the establishment of the CAS and its rise as a pivotal institution in sports law. Philosophical foundations were examined, highlighting the tension between mandatory arbitration principles and athletes' autonomy and consent. Mechanisms of mandatory arbitration were scrutinized, particularly how they are embedded within athletes' contracts and the role of sports governing bodies in enforcing these clauses.

Through case studies and comparative analysis, the research explored the real-world implications of sports arbitration, considering high-profile cases like Pogba's and others. The critiques and controversies section weighed the arguments for and against mandatory sports arbitration, assessing its impact on athletes' rights and freedoms. Addressing legal and ethical considerations, the other part emphasized a balance between fairness and efficiency in dispute

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<sup>1120</sup> Oskar van Maren, 'Asser International Sports Law Blog | Time for Transparency at the Court of Arbitration for Sport. By Saverio Spera' (Asser.nl 2017) <<https://www.asser.nl/SportsLaw/Blog/post/transparency-at-the-court-of-arbitration-for-sport-by-saverio-spera>> accessed 2 March 2024.

<sup>1121</sup> 'Online Dispute Resolution and Electronic Hearings | Global Law Firm | Norton Rose Fulbright' (Nortonrosefulbright.com 2017) <<https://www.nortonrosefulbright.com/en/knowledge/publications/71e0aa1e/online-dispute-resolution-and-electronic-hearings>> accessed 2 March 2024.

<sup>1122</sup> Ken Foster, 'Global Sports Law Revisited' (2019) 17 The Entertainment and Sports Law Journal <<https://www.entsportslawjournal.com/article/id/851/>> accessed 2 March 2024.

resolution. We then considered how these considerations manifest in real-world scenarios, reflecting on their implications for the future of sports arbitration and athlete protection.

The discussion of global perspectives observed the diverse approaches to sports arbitration across jurisdictions and the trend toward harmonization. Looking into the future directions section contemplated potential reforms and innovations that could shape the field alongside the challenges that lie ahead. In conclusion, this research critically engaged with the intricate dynamics of sports arbitration, offering a comprehensive analysis that underscores the need for a fair, transparent, and respectful system of athletes' rights. The ongoing discourse and potential reforms in this domain will undoubtedly continue to influence the evolution of sports law and the safeguarding of athlete autonomy in the years to come.

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# ENVIRONMENTAL JUSTICE & ALTERNATIVE DISPUTE RESOLUTION

The University of Embu's Law Review embarks on an academic voyage with its inaugural issue, meticulously peer-reviewed and steered by the astute minds of its students. This edition, under the theme "The Nexus Between Environmental Justice and Alternative Dispute Resolution," serves as a beacon of scholarly discourse, dissecting the intricate relationship between the stewardship of the environment and the mechanisms of resolving disputes beyond traditional litigation.

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The review also ventures into the realm of sports arbitration, revealing the dynamic interplay between environmental considerations and the world of athletics. At its core, the pursuit of environmental justice is championed, advocating for equitable access to a healthy environment as a fundamental human right.

This pioneering issue is a testament to the University of Embu School of Law's dedication to fostering critical thinking and legal innovation. The Law Review extends its heartfelt appreciation to the student contributors, whose rigorous research and insightful analyses have significantly enriched this publication.

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