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FOREWORD

The Editorial Board of the SALAR Law Journal is the publication arm of the Students Association for Legal Aid and Research (SALAR). At its conceptualization, the Journal sought to provide the means for students to develop their research and writing capability by producing academic articles of publishable quality. Throughout its publication history, the Journal has sought to provide diversity in academic debate by producing themed journals and genera editions that canvass the contemporary issues swirling around the legal academy.

This edition marks the first online edition of the journal as we push towards Open Accessibility of our works and sustainable publication that have minimal carbon footprints. In line with SALAR's vision and the University of Nairobi mission of advancing intellectual debate amongst the academy, our journals should serve as a platform for mentoring young intellectuals and nourishing their thirst for informed debate on various legal issues. Debate and intellectual discourse can only be facilitated and enhanced when academic publications are easily accessible to the academy, it is our belief that this goal can be best attained by availing our journals online to reach the widest possible audience.

The Editorial Board remains open to collaboration with partner organization to advance academic debate on various issues through the issue of special editions and thematic editions of our journals.

THE EDITORIAL BOARD

SALAR LAW JOURNAL, 2016

ACKNOWLEDGEMENTS

As we mark the fourth consecutive edition of the journal, the Editorial Board extends its deepest appreciation to Mrs. Joy Asiema for her guidance, vision, and continuous inspiration that has served as the bedrock to the Board.

Our appreciation to the Prof. Patricia Kameri-Mbote, Dean, School of Law, for the assistance and frequent guidance that made this edition of the journal possible. Similar appreciation is extended to the Law School Faculty for their nurturing and mentorship that they ceaselessly provide to the student population, may your work be blessed.

To the Board, may you keep up the stellar work and the spirit of community imbued through this publication serve you well in your future endeavors.

We appreciate our authors whose work appears here as a testament of their capacity to rise to the occasion and provide their work for commentary and critique.

To our readers, your comments will be highly appreciated and we hope this journal serves to kindle your interest in the discourse permeating the academy.

Asanteni.

EDITORIAL

Change is the only constant in the contemporary world where yesterday's cutting-edge technology is rendered obsolete by todays innovations.

It is in this vein that Volume IV of the SALAR LAW JOURNAL goes digital in a bid to match technological developments that continuously push us to experiment and try new ways of delivering quality publication to the widest possible audience to stimulate academic debate within and outside the academy. Since the publication of Volume I in 2014, the Journal has maintained its yearly publications primarily in print form, though attempts have been made to avail portions of the journal online from time to time.

As an Editorial Board, we strive to ensure that our publication speaks to contemporary issues through the perception of budding legal intellectuals. As such, this edition is a general take on various issues facing the academy that young scholars have struggled to grasp and put forth their perceptive on them. In a nod to the constitutional teething challenges that continue to face the country, *Constitution of Kenya at 50* authored by Mr, **Christopher** serves as our opening article provide a chronicle of the development of constitutionalism in the country.

The constitutional debate is followed by a discourse on local community rights heralded by our current constitution. **Mr. Bett** attempts to breathe life to the environmental debate regarding oil exploration and exploitation through the perception of community interest

in the safeguarding of the environment. Our third article by **Ms. Simiren** takes a step back to provide an overview of the concept of environmental security under the current regulatory framework and its impact on the development trajectory of the country.

Away from the environmental debate, the fourth article turns to the salient debate regarding taxation of e-commerce by questioning whether the current legal framework is appropriate for the industry or whether we need a rethink of the regulatory framework as perceived by **Mr. Njaga**. **Mr. Ndekei's** article embarks on the international dimensions of the journal by focusing on the quest for a uniform rule in the admissibility of unlawfully procured evidence in international tribunals. Given the apparent disarray in the recent Kenyan cases at The Hague, the article provide a framework for adopting a uniform rule that would promote consistency and certainty in criminal trials at the international stage.

Still at the international level, the sixth article turns to the East Africa Community and analyses the Common Market Pillar of the EAC seeking to deliver **Mr. Wanyingi's** verdict on its role and position in the quest for greater integration amongst the member states. **Mr. Manyara and Mr. Mungai** provide a contemporary analysis of the relationship between national norms and international norms by critiquing Kenya's attempt to close the Dadaab camp. On legal-economics, **Mr. Nkarichia** attempts to canvass the nascent issue of illicit financial flows by providing a broad overview of the theoretical foundations underpinning IFFs and the major forms of IFFS.

The edition winds up with a case review by **Ms. Munyao and Ms. Ndungu** of the most controversial criminal case of

the year, the *Martin Charo Case* that raises significant questions on defilement, consent, and judicial activism vis-à-vis judicial pragmatism.

To our writers, thank you for the fantastic job that you have done in providing your perspectives on the issue.

To our readers, interact with the edition with an eye to providing your insight on the article in subsequent editions.

Thank you.

Dennis M. Nkarichia,

Editor-in-Chief,

SALAR Law JOURNAL

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The Constitution of Kenya at 50: A Scorecard

Christopher M. Ntogaiti***

"The Constitution was written very precisely. To restrain the power and force of government and to protect the liberties of each and every one of us."

Dr. Ronald Ernest 'Ron' Paul (American author and former politician)[1]

Abstract

Article 1 (1) of the constitution together with the preamble went on to vest power in the people and was clearly stated so in fine print. However, if anything of current or past events is to go by, then the truth behind that statement is largely hypothetical and theoretical. An in-depth analysis of Kenya's history spanning several decades since the three Lancaster House Conferences of 1960-1963 under the chairmanship of Ian Macleod, Secretary of State for the Colonies, with special focus on constitutional matters will unearth iconic triumphs and regrettable and forgettable transgressions. This far into Kenya's ever growing history, many questions have been and will continue to be asked on the status of Kenya's constitution as the source of Kenya's legitimacy in legislation as well as a tool to further progress ....."

1.0 Introduction

In understanding the constitution and the integral part it plays in the dynamics of governance in a sovereign jurisdiction, definitions of certain terms and phrases central

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[1] Stormfront, 'Ron Paul's speech at Iowa straw poll' (1995) <https://www.stormfront.org/forum/t411338/> accessed 22 September 2016

to this discussion should be in place. These include defining and distinguishing terms such as 'constitution' and 'constitutionalism' and an attempt at analyzing a connection between them as well as the niche they occupy in the grand scheme of things as regards the dispensation of proper administration over a sovereign jurisdiction. The constitution, by way of an inclusive definition[2] extends the same to also reflect the fact that save for the constitution being a document that enjoys distinct legal inviolability and which sets out the roles of government and an institutional framework within which to operate in, the fact that it is an embodiment of agreed upon systems of governance. This is regardless of whether this is contained in:

a.) a single codified document or

b.) sets of documents or annexed customs and other sources of unwritten authorities conveying the same (as is the system employed in the United Kingdom.)

It also follows that the document or instrument bearing these laws of a nation be afforded the highest level of supremacy[3] that can be accorded to any piece of legislation in that particular entity in order for its intended level of efficacy to be achieved and sustained. Constitutionalism on the other hand, according to notable scholars such as

[2] *A dissertation upon parties (1773)* as cited by AW Bradley and K Ewing(eds.) *Constitutional ad administrative law* (1994) 4 as cited by *The Constitution of Kenya Contemporary Readings* PLO Lumumba, MK Mbondenyi, SO Odero

[3] Randy E. Barnett, 'Constitutional legitimacy' (2003) 103(1) Columbia Law Review 111

Professor Nwabweze,[4] connotes a limitation of the arbitrariness of political power and in effect the government through mechanisms that are or should be enshrined in the constitution as well as a follow up to ensure that the same are being applied as stipulated[5]. It therefore follows that the few cardinal points of interest with regards to constitutionalism should be upheld.

Firstly, that the constraints need not be in a codified instrument in order to be taken as being operational, as evidenced in how the British constitution exists. Secondly, whether if at all the aforementioned constraints can effectively be construed as having an impact on issues such as accountability and transparency by the government of the day, high levels of political tolerance and encouragement of multi-party politics and enforceability of the guarantee of enjoyment of civil liberties by the judiciary and thirdly and just as equally important the fact that these constraints exist outside of the instruments that bear them and whether they are being put into practise and being upheld by the government of the day.

The significance of a constitution, its impact and the dynamics of how it works in conjunction with not just other legislations to specific thematic areas but also the institutional framework upon which it will be used to impress its necessity on the people hinges a lot on how it will be formulated and the treatment it will be accorded by citizens ascribed to it.

[4] A. N. Allott and B. O. Nwabueze, 'Constitutionalism in the emergent states' (1974) 50(1) International Affairs (Royal Institute of International Affairs 1944-) 103
[5] *Ibid*

This also includes placing it within a specific context and then from there basing an opinion on its level of efficacy or lack thereof based on preponderance of evidence. In looking at the Kenya situation, the historical context will bear heavily on the current situation and help paint a better picture of the constitution of Kenya from the point the notion was conceived in the minds of her citizens to recent developments and the way forward these developments are expected to project.

Kenya has come a long way in her efforts towards effecting democracy, the rule of law and embracing certain tenets and philosophies hitherto unknown to the country until recent times. Colonialism from the early 20th century with the advent of the early settlers who had been preceded by explorers and missionaries in the quest for "new lands" brought with it a rush of new ideas, ideals, thought processes, notions and connotations introduced to the indigenous occupants of the land at such rates that grappling with the mere presence of a race of people different to them seemed almost miniscule in retrospect.

From the onset indigenous occupants of the lands were introduced to the notion of division of land along geographical lines and demographical clustering using criteria that were not made obvious to the intended recipients of these actions by the colonial powers during the scramble and partition of Africa. What followed was introduction of governance and a system of revamped 'democracy' as the local populous were subjected to coercive central

governance and rule over them after relinquishing of autonomy in their scattered spheres of influence[6].

This led to a situation in the 1920s where albeit infantile but almost collectively nationwide political interests began to spring up with individuals agitating for independence from the unwelcomed rule of colonial master Britain. This led to the rise of entities like East African Association led by Harry Thuku, formed in 1920, as well as Young Kavirondo Tax Payers Association in 1923 under the leadership of Zabon Aduwo Nyandonje. Both of these were multiethnic entities formed to claim for, *inter alia,* independence and a return of land that had rightfully belonged to them.[7]

Unrelenting pressure in the subsequent years from like-minded institutions such as the Kenya African Union formed by Harry Thuku in 1944 led to a series of developments in both the legal as well as the political realm in Kenya. The snowball effect of this saw several attempts at drafting a first ever Kenyan constitution. This was coming from a position whereby rule in Kenya had been by decree, overseen by the Colonial Office since Kenya had been seen to be an extension of Crown colony[8]. Following the election of the first African, Eliud Mathu, to the LegCo (Legislative Council) in 1954, there were attempts to impose the Lyttleton constitution on the locals by the British.

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[6] David M. Anderson, 'Master and Servant In Colonial Kenya, 1895–1939' (2000) 41(3) The Journal of African History 459–485

[7] *Political History* Maina Kiarie <http://www.enzimuseum.org/after-the-stone-age/independent-kenya> accessed 15th July 2016

[8] Crown colony meaning territories excluding presidencies and provinces of British India and settlement of colonies that had been acquired through wars

It was not long before it ended up being rejected for the overwhelming reason that it continued to perpetrate a system of gross inequality and multiracialism that pitted Europeans as ghastly superior though vastly minor against the indigenous Africans who were statistically superior but legislatively at the bottom of the pecking order.

Part of the false notions that had informed these failed attempts at drafting a constitution had been the local Native Councils which had been operational since the 1920's as part of the colonialist machinery and not as a political forum and had thus failed in properly articulating their inherent issues to be addressed, leading to a situation where their input was invalidated. Coupled with his had been the fact that racialism was an integral factor of the draft legislation and this was a practise that had been carried out from the 1920's and had been characterized by issuance of the Kipande system among other things.

The Lennox-Boyd constitution was no different as it was seen by and large as a magnification of its predecessor in that Africans were still holding the least number of elective or representative seats in the LegCo despite not only being the original occupants of the land but also the ones bearing the heaviest brunt in terms of legislations passed by the council.

Constant pressure coming from emergence of a mix of young and old but passionate and charismatic African leaders such as the late Thomas Joseph Mboya and Jaramogi Oginga Odinga coupled with armed resistance notably form the leftist Mau Mau militia group led to an overall demand in the country for reforms that extended from inclusivity to self-governance. The period between 1950 and 1960, aside from more representation, witnessed the formation of many

political parties in Kenya mainly by the Africans to champion for African rights[9]. The two major parties at the time were the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU) formed by the then prominent African politicians and these pitted the various leaders along racial as well as ideological lines. These differences led to formulation and adoption of the 1963 constitution that ushered Kenya into independence.

There were many factors that informed the drafting of the 1963 constitution and that was mainly to do with the political inclinations and predispositions of the prominent African leaders at the time, as well as the vested interests each had with regards to the post-independence phase in Kenya. Essentially, the colonialists and the oppressed had had the same end goal in mind but were approaching it from different viewpoints.

The British had envisioned an orderly process where there were to be transitional authorities and legislations to help ease the new nation into self-governance whereas the Africana and soon to be citizens of the Republic of Kenya were of the opinion that the colonialists ought to have hastened their exit and left them to reclaim their lost independence and more importantly natural resources.

One of the most key talking points around this time period was the '*majimboism*' ideal that had mainly been advanced by proponents from the KADU faction. The term '*majimboism*' had been given an African context and had been seen as most closely linked to federalism/regionalism

[9] http://www.janda.org/ICPP/ICPP2000/Countries/9-CentralEastAfrica/96-Kenya/96-Kenya63-00.htm accessed 21 September 2016

whereby central governance was devolved into mini-governance units that were autonomous and synonymous with demarcated regions but answerable to the national command center. KADU's clamour for *majimboism*, led by P J H Obando who had been a parliamentary secretary to the treasury, had been seen to be a rejection of the 'Westminster'[10] style of parliament which had been seen to be the most likely of formats adopted due to its close ties to the British and was hinged on three factors.

The more vocal reason given was that the intention to have devolved government was to offer a system of checks and balances and reduce the total reaches of power that could be enjoyed by a solitary figure at the helm of power although the underlying factors and actual intention were more individualistic and of personal gratification since it was feared that KANU which had been seen to be the favourite of the two would most likely garner more parliamentary seats and thus have the upper hand in terms of dictating the proceedings of the August House and the leaders of KADU had wished to maintain relevance even after general elections.

It then followed that since the late Mzee Jomo Kenyatta was still detained, KANU which had won the 1961 election refused to form the government thus leaving the onus to KADU which very readily complied. In 1963 the

[10] Radical Centrist, 'The Westminster system of parliamentary government' (30 June 2013) <http://thoughtundermined.com/2013/06/30/the-westminster-system-of-parliamentary-government/> accessed 22 September 2016

constitution was passed as an Act of British Parliament[11] and contained in it certain features such as the bicameral system of parliament and provisions for the office of prime minister. The Queen was still heralded as the leader of the government although we had since become a self-governing state with greater representation in Parliament.

Thus in the subsequent year, what followed were some amendments to the constitution that conferred upon Kenya the status of being a sovereign country. It also carried with it certain important principles such as its supremacy over all other laws in Kenya and a chapter on securing the rights of the minority, fashioned after the European Convention on Human Rights[12]. It also created the institutional framework for certain critical services to be offered in Kenya such as the Judiciary and the civil service as part of the executive.

Also addressed was the issue of citizenship, with the status of a person being determined as a citizen being an operation of the law and lastly, creation of the independent Electoral Commission of Kenya to oversee the election process and ensure it was free, fair and periodic. This was the baseline as far as the constitution and constitutionalism was concerned and it was from here that any changes that could have or ended up being made were to be used as a yardstick as to their essence, efficacy and impact on the population.

With Kenya having successfully liberated herself from her colonial masters, the infantile country slowly started to

[11] P aula Kahumbu, 'What's so great about Africa Anyway?' (13 July 2010) https://wildaboutafrica.wordpress.com/tag/constitution-review accessed 15 July 2016

[12] The Convention was the first treaty based on and binding human rights instrument in the world and was adopted by the Council of Europe in 1950 later coming into force in 1953.

realise the daunting task that lay ahead of them, especially with regards as to how the already established colonial systems of governance could be tailored to promote sustainable governance in a manner that would suit Kenyans. In the midst of all this were also struggles for relevance, political mileage, corruption and a culture for impunity and the breeding of negative vices that had slowly started creeping in among the political elite.

Indeed, these formed the basis for many of the constitutional amendments at the time as they were seen to suppress certain individuals and their beliefs after having heaped more power onto the mantle of presidency such that protection of it at all costs became the order of the day.

The presidency had been conferred plenty of discretionary powers such that for example, the civil service was essentially operating at his mercy since he could hire and fire as well as abolish any office on a whim. The intricacies of power play, from Paul Ngei breaking away to form African People's Party, to having a smaller majority in the National Assembly coupled with the amendments to the constitution which had reduced the provisions on majority from 65% to 'simple majority' led to the dissolution of KADU and the later merge with KANU, thus making Kenya a *de-facto* single party state with the two principles[13] declaring that they were willing to lay their differences aside and work towards making the republic better.

Amendments such as Act number 38 of 1964 and Act number 14 of 1965 carried with them changes that the former KADU leadership felt were suppressive and pre-empted too much high handedness from the government of the day and

[13] The late Mzee Jomo Kenyatta and Jaramogi Oginga Odinga

this did not augur well with them. Their brainchild '*majimboism*[14]' had been officially scrapped off and replaced with a system of provincial administration. These led to a splinter of KANU led by the late Jaramogi Oginga Odinga and members strongly affiliated with him to form the rival party Kenya People's Union in 1966.

Following this, Amendment Act numbers 16 and 17 of 1966 were effected and this was seen by and large as a political intrusion more than an operation of legal necessity. The provisions held that any Member of National Assembly wishing to defect had to seek re-election (Turn Coat Rule) and also that any member who missed 8 consecutive sittings or been imprisoned for more than 6 months was to lose their seat. These were largely effected to try and quash the growth and popularity of KPU and to try and cower members into submission. *Amendment Act number 18 of 1966* was the final nail on the coffin as it enabled one's rights to be derogated by the State without due justification, mainly to enable limitations on freedom of expression and movement aimed at the KPU party members.

There was a flurry of amendments during this period and analysis of the same will yield that the practise of constitutionalism was at an all-time low. The period between 1963 and 1973 witnessed empowering of law to do the bidding of the government of the day and propagate self-interest. Also, the country was generally ignorant on such matters thus the government operated with severe impunity.

[14] David M Anderson, ''Yours in struggle for Majimbo'. Nationalism and the party politics of Decolonization in Kenya, 1955-64' (2005) 40(3) Journal of Contemporary History <https://www.jstor.org/stable/30036342?seq=1#page_scan_tab_contents> accessed 22 September 2016 547–564

Some amendments[15] altogether did away with multi-partyism and created a system whereby the election process was altered to support KANU and enable it to remain in power.

All the eleven amendments which had been done at the time were all codified and inserted into the constitution in 1969[16] through an amendment which sought to tally all the amendments done as of February of that year and annex them to the 1964 constitution. This thereby made it a reviewed legislation but with all the provisions (negative or positive depending on one's affiliations) in place.

The next lot of amendments came between the years 1974 and 1979. Generally speaking, some of them were aimed at establishing national identity as Kenya such as *the Constitution of Kenya (Amendment) Act No 5 of 1974* and the *Constitution of Kenya (Amendment) Act No 1 of 1979* which not only promoted Kiswahili as a national language but also made it a necessary requisite for those seeking an elective term in the national assembly. The amendments also provided for debates on the floor of the house to be done in Kiswahili thus elevating the language to being a symbol of national unity.

Other amendments at the time[17] also touched on the voting age, reducing it from 21 years to 18 years of age in a bid to increase the total number of electorate who could take place in elections. This was also in line with amendments that had been carried out on the now *Registration of Persons Act cap 107* to include women as well before setting the age of

[15] Constitution of Kenya (Amendment) (No 2) Act No 16 of 1968
[16] Constitution of Kenya (Amendment) Act No 5 of 1969
[17] Constitution of Kenya (Amendment) Act No 10 of 1974

issuance as 18 years 1980, in order to facilitate the voting process and make it as inclusive as possible.

Following the death of the founding president and the rise to power of his successor former president Daniel Toroitich Arap Moi, Kenya witnessed dark and terribly tragic events and an abuse of power never seen before. All this was triggered by the botched coup attempt in 1982 by the Kenya Air Force led by General Hezekiah Ochukah.[18] It was a scare that really nerved the president and this saw him move to effect constitutional changes that would rock the political as well as social and societal life of Kenyans at the time. Some of these included detentions without trial and provisions for torture, which were carried out in the infamous Nyayo House Chambers.

One of the most draconian rules and a serious cripple to freedom of expression and politics in Kenya was the *Constitution of Kenya (Amendment) Act No 7 of 1982* which introduced section 2A to the constitution, effectively making Kenya a one-party state by law. It also deleted the definition of political party and as such, KANU was granted leave to do as they please since the parameters within which a political party could be defined and operate in were non-existent. *Constitution of Kenya (Amendment) Act No 14 of 1986* removed security of tenure of office for state officials such as the Auditor and Controller General as well as the Attorney General. This was also followed by *Constitution of Kenya (Amendment) Act No 8 of 1988* which then did away with security of tenure of all Constitutional office holders.

[18] Benson Sewe Otieno, 'Raila Amolo Odinga and the august 1982 coup!' (18 January 2012) <https://hardtalkkenya.wordpress.com/2012/01/18/raila-amolo-odinga-and-the-august-1982-coup/> accessed 22 September 2016

These were seen as calculated attacks on strategic areas of government such as the legal and finance dockets as they were effectively reduced to being puppets being at the mercy of the president who could dispose of them as he wished if he at all felt that his will was not being reflected in their dispensation of duty. *Constitution of Kenya (Amendment) Act No 20 of 1987* legalised torture as a means of eliciting information from detainees and this was especially in the wake of general unrest that had arisen following the implementation of the earlier repressive amendments.

The rise of the 'Mwakenya'[19] movement and its growing popularity especially among university students and youth in general gave rise to this amendment, which was carried out with ruthlessness. Some of the prominent leaders of the day such as Koigi wa Wamwere, Kenneth Matiba and Raila Omolo Odinga were victims of such heinous actions as they were rooting for change that was desperately needed in order to live out the principles of democracy, governance and constitutionalism which had all but become words on paper during this period.

The period from 1991 saw the nation rise from a decade of very trying times following continuous pressure from internal as well as the western world which had started to flex its financial muscle in terms of reducing donor funding and this led to a concession of ground and political power by the KANU regime. *Constitution of Kenya (Amendment) Act No 12 of 1991* repealed section 2A of the constitution and

[19] denkyem, 'Mwakenya: An unfinished revolution' (18 February 2014) <https://jonathandavies.wordpress.com/2014/02/18/mwakenya-an-unfinished-revolution/> accessed 22 September 2016

gave rise to multi-party elections ocean more. This was closely followed with the mushrooming of political parties from different regions with different policies and visions for the country.

This was the beginning of the restorative and healing process that had ravished the country following the two regimes. 1996 also witnessed the formation of the National Convention Planning Committee (NCPC) which was tasked with agitating and planning for constitutional change. The subsequent year saw the National Convention Assembly as well as the National Convention Executive Council (NCEC) formed and they succeeded in forcing the government to consider relinquish some of its arbitrary powers to provide for free and fair elections. The same year saw the enactment of the Constitution of Kenya Review Commission Act (1997) to provide a frame work for constitutional change[20].

From 1998 onwards significant steps were taken in initiating the drive for a new constitution. They would all culminate in the formation of the Constitution of Kenya Review Commission which was to be headed by Professor Yash Pal Ghai in the year 2000 with the release of a draft constitution in 2004 (Bomas Draft). In 2005 there was a referendum held pitting much of the government on the 'yes' side but Kenyans in exercising their democratic right to vote rejected it. However, this did not halt the progress made as in August of 2010 a new constitution was promulgated and ushered in a new era in Kenya's push for constitutionalism.

The constitution at 50 years as of 2013 has elicited mixed reactions from the public generally. It has presented an opportunity to travel through the course of Kenya's history

[20] umu.diva-portal.org accessed 21 September 2016

and revisit times that are better left forgotten to some. For much of the older generation who lived through much of what the younger generation reads in the annals of history, the 2010 constitution is a source of unparalleled joy in that it carries within it freedom and empowerment of citizens that at one point in time seemed unattainable. It is a symbol of victory over oppression and false ideals as to what democracy was purported to be. For the younger generation, perhaps a moment for reflection as to what could have been had people not gallantly risen up to stand for a document that protected the liberty of the masses.

Giving Impetus To Local Community Rights: A Critical Analysis of the Framework Regulating Oil Exploration In Kenya

Frankline Bett***

Abstract

A comparative analysis of the majority of the top ten richest countries in Africa paints a picture of states whose vast economy is directly attributable to mining of minerals and exploration of oil and natural gas. However, Kenya's case is an exception as its economy is dominated by agriculture, tourism, and the service industry. It is only until recently that Kenya discovered oil in Turkana that prospects of a future economy with a direct nexus to oil exploration was conceived. Amid the excitement of the new discoveries is a grim picture of a country at crossroads entangled with hopes and at the same time with fears of a possible conflict due to ethnic violence, political patronage and the politics of oil. The underlying cause of concern especially with indigenous communities is being short changed on the potential benefits of what they perceive as their community rights. This paper seeks to discuss the existing legal regime regulating exploration of oil in Kenya and whether such existing legislations address the rights of local communities. What's their place and entitlements during this process? The gist of the study will then shift to the issue of the conflict of oil revenue allocation at the sub-national level and inter-ethnic boundary feuds among neighboring communities.

1.0 Introduction

The top ten leading economies in Africa are largely attributed to mining and exploration of natural resources. Over the years, Kenya has been recognised as the leading

economy in East Africa.[21] A comparative analysis of the majority of the top ten richest countries in Africa paints a picture of states whose vast economy is directly attributable to oil boom revenue.[22] However, Kenya's case is an exception. It is only until recently that Kenya discovered oil in Turkana that prospects of a future economy with a direct nexus to oil exploration was conceived.

Amid the excitement of the new discoveries is a grim picture of a country at crossroads entangled with hopes and at the same time with fears of a possible conflict due to ethnic violence, land conflicts, political patronage and the politics of oil and native land claims.[23] The underlying cause of concern especially with indigenous communities is being short-changed on the potential benefits of what they perceive as their community rights.

The problem was further compounded by the paucity of the Petroleum (Exploration and Production) Act of 1985 which having been enacted almost two decades ago, is largely inadequate as far as entitlements of local communities to local resources is concerned.[24] The idea that

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[21] Farai Gundan , 'kenya Joins Top 10 Economies After Rebasing of its Gross Domestic Product (GDP)' (2014) Forbes < http://www.forbes.com/sites/faraigundan/2014/10/01/kenya-joins-africas-top-10-economies-after-rebasing-of-its-gross-domestic-product/#676918263a25> [accessed on 2nd July 2016].

[22] Ian Garry and Terry Lynn Karl, *Bottom of the Barrel: Africa's Oil Boom and the Poor* (Catholic Relief Services 2003).

[23] Berry, Mary Clay, 'Alaska pipeline. 'The politics of oil and native land claims' (1975).

[24] Johnson Kariuki, 'How Kenyans Will Gain from Proposed Law to Regulate The Petroleum Sector' *Business Daily* (Nairobi, 21st September 2015).

local communities are entitled to incentives and job opportunities from the mining companies is a time bomb issue, which is at the heart of the grievances of oil exploration especially at Ngamia 1 oil well in Turkana and some areas within the expansive Kerio Valley.

Land conflict is also a major issue for example; the government of Kenya issued a license to Tiomin, a Canadian company, on land that did not belong to the government contrary to the law.[25] The affected locals objected to the mining activities and filed a case challenging the allocation of land to the company.[26]Tiomin eventually stopped its mining activities to allow the government to acquire the parcels of land in compliance with the law.[27]

2.0 Conceptualising Community Rights

The concept of community rights has been given legal gloat under the Constitution of Kenya (2010) within the context of holding property rights in land.[28] It thus follows that in conceptualising the term "community rights", the terms "Community" and "property rights" must be defined.

Community

This concept initially developed from the point of view that private ownership is the ideal mechanism of owning property. Over time, this position became unsupported and difficult to hold and thus it led to the development of the concept of community approaches to property

[25] K Muigua and D Wamukoya and F Kariuki , *Natural Resources and Environmental Justice in Kenya* (Glenwood Publishers Limited 2015) .
[26] *Rodgers M. Nzioka & 7 Others* v *Attorney General & Others*, High Court Petition No. 613 of 2006 eKLR.
[27] *Ibid.*
[28] Patricia Kameri Mbote, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press 2013).

relationships.[29] Consequently, terms such as Community Based Resource Management (CBRM) were intentionally coined to bring on board the input of native communities in managing resources whereby local communities are involved in the management of natural resources.

However, this approach has proved futile and limited since it was conceived on the idea that the community would be involved in the management of resources but the land on which those resources were based are owned by the state.[30] As a result of the above, the term "Community-Based Property Rights" was conceived so as to describe community-based tenure systems.[31] These rights are derived from the community not the state.[32]

The constitution envisions that community land shall vest in and be held by communities identified based on ethnicity, culture or similar community of interest.[33]

The Concept of Property

Property can be described depending on the context in which it is used. Accordingly, property can be viewed in three perspectives; as an economic concept, legal concept and as a social relationship. However, to a layperson, property is simply a thing that has been represented in the physical *res.*[34]

Property as an Economic Concept

[29] *Ibid.*
[30] Lynch, O.J and Harwell. *Whose Natural resources? Whose Common Good?: Towards a New Paradigm of Environmental Justice and the national interest in Indonesia* (CIEL, 1992) at 2.
[31] *Ibid*, at 5.
[32] *Supra* note 9, at 19.
[33] Constitution of Kenya 2010, Article 63.
[34] Supra note 9.

Economists hold the view that problems exist when resource allocations are inefficient or expected to leave future generations worse off.[35] In this regard, they contend that inefficiency results from nontransferability in the market or absence of incentives to sustainably manage resources.[36]

It is their contentment that persons with the strongest incentives should be assigned property rights to minimise transaction costs while at the same time maximising social returns.[37] The expectation is that the market will balance competing uses and force participants to use property in the most efficient way.[38] It then follows that it is possible to transact in the market all values ascribed to property.[39]

Property as a legal Concept

Property represents the legal relationship among people with regard to the res or even an intangible subject such as an idea, which can be in the form of a patent or copyright. Jeremy Bentham stated that property is nothing but a basis of expectations.[40] The expectation of deriving certain advantages from a thing that we are said to possess; in consequence of the relation in which we stand towards it.

Property can also be said to be the relationship between individuals and the community with regard to the use and

[35] Patricia Kameri Mbote, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press 2013).
[36] Durand Rodolphe, *The Relative Contributions of Inimitable, Non Transferable and Non Substitutable Resources to Profitability and Market Performance* (Emory University 1999).
[37] Demsetz Harold, *Demsetz, H. (1974). Toward A Theory of Property Rights. In Classic Papers in Natural Resource Economics* (Palgrave Macmillan UK 1974).
[38] Supra note 16.
[39] Kameri Mbote., *Property Rights and Biodiversity Management in Kenya* .ACTS press (Nairobi 2002).
[40] Jeremy Bentham, *The Concept of Property* (Harvard Law Review).

exploitation of resources and is dependent on enforcement mechanisms of the state.[41] Ownership of land being one of the main categories of property rights confers the right to extract minerals from the land, to use and dispose of as the property holder wills.[42] Put simply, property is a legal relationship. Thus, ownership of property is a creation of law in that law against all other persons sanctions a bundle of entitlements.[43]

This means that rights over any given property can be construed to mean that right in a property is that bundle of rights and expectations in a tangible or intangible thing that is enforced against third parties including governments. It is worth noting that in Kenya, official policy openly encourages private individual rights and at the same time, it strongly supports the idea of transforming community rights into private individual rights. A perfect example is the Swynnerton Plan of 1954.[44]

Property as a social relationship

Here, the law not only grants ownership rights over a property but it also regulates relationship among diverse holders. This is aimed at ensuring that the rights of everyone are safeguarded. Thus, a property system plays a critical role in shaping social relations among the different segments of the society.[45]Today, the role of communities in the management of communal land and local natural resources

[41] Kameri Mbote. P. & Migai Aketch . 'Ownership and regulation of land rights in Kenya: Balancing Entitlements with the public Trust' (2008) 4 Law Journal.
[42] *See* Robert E. Megarry, *The law of Real Property* ((5th ed 1984).
[43] *Supra* note 9, at 21.
[44] The plan was based on the assumption that in order for African agriculture to become productive, the tenure system needed to be converted from collective to individual so as to afford farmers incentives.
[45] *Supra* note 9.

has been greatly recognised especially in Sub-Saharan Africa. This has been predicated upon by the increased recognition of communal land ownership rights.[46] It then follows that even in the extractive sector within the larger Kerio Valley Basin and Turkana County, the land tenure largely remains communal and this poses difficulties as far as local community participation in the extractive process is concerned.

3.0 Overview Of The Legal Framework Governing Oil Exploration In Kenya[47]

Oil exploration in Kenya began during the pre-independence period in the 1950s and the first well was drilled in 1960.[48]Kenya has four petroleum exploration basins namely Lamu, Tertiary Rift Valley, Anzu and Mandera.[49] Despite the availability of stains of oil in these wells, they were not fully evaluated for commercial purposes.[50]

The laws governing oil exploration in Kenya are the Constitution[51] and the Petroleum (Exploration and

[46] *See generally* The Constitution of Kenya, 2010 Article 61 & 63; Patricia Kameri Mbote, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press 2013).

[47] The energy sector is generally covered by a number of statutes but for purposes of this article, the laws touching specifically on oil and natural gas will be discussed.

[48] National Oil Corporation of Kenya Official Website <www.nationaloil.co.ke> [accessed on 1st July 2016]

[49] National Oil Corporation of Kenya website < http// www. Nationaloil.co.ke > [accessed 1st July, 2016].

[50] Emerging Oil and Gas Developments in East Africa, US Energy Information Administration.

[51] 2010.

Production) Act[52] and regulations made under the Petroleum Act.[53]

The Constitution of Kenya 2010

The constitution of Kenya 2010 is the supreme law of the republic[54] and binds all persons and all state organs at both levels of government.[55] Land in Kenya is classified as public, community and private land.[56] Mineral resources discovered can fall within any of the three classifications of land. Article 62 (2) & (3) is to the effect that all mineral resources including oil are classified under public land which shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

The Constitution obligates the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources.[57] In tandem with the foregoing, the state shall also ensure equitable sharing of all the accruing benefits of the resource.[58]

Oil exploration in many developing countries, including Kenya, is done by multinational companies and as such, it is incumbent upon every state to grant exploration concessions to these companies due to their superior and technical capacity to undertake exploration of such magnitudes.

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[52] Cap 308, Laws of Kenya.
[53] Kalhid Salim,. Overview of the legal framework governing the exploration oil and gas in Kenya . available at <https://www.academia.edu/6349654/Overview_of_the_Legal_Framework_Governing_the_Exploration_of_Oil_and_Gas_in_Kenya> [accessed 1st July 2016].
[54] The Constitution of Kenya, Article 2 (1).
[55] National and County Governments.
[56] The Constitution of Kenya 2010, Article 61 (2).
[57] Article 69 (1) (a).
[58] *Ibid.*

Therefore, the Kenya Parliament must ratify any transaction that involves the grant of a right or concession by or on behalf of any person or the state to another person for the exploitation of any natural resource.[59] However, it is still not yet clear as to the classes of transactions that will require parliamentary ratification as parliament is yet to pass legislation providing for the classes of transactions.[60] The legislation is required to be enacted within five years of the coming into force of the Constitution (This period started running on Aug 27, 2010).

The petroleum (Exploration and Production) Act

This primary legislation governs oil production and exploration in Kenya. The Act came into force in the year 1985 and it repealed the Mineral Oil act[61] and the Oil Production Act.[62]

The main object of this act was to regulate the negotiation and the conclusion of petroleum agreements between the government and exploration companies on matters touching on exploration, development, production and transportation of petroleum.[63] Under PEPA, the minister has been given vast powers including the power to enter into and sign petroleum agreements with a contractor and to negotiate on behalf of the government.[64] The minister is also empowered to grant nonexclusive exploration permits to persons to enter

[59] *See generally* The Constitution of Kenya Article 71; Johnson Kariuki, 'How Kenyans Will Gain from Proposed Law to Regulate The Petroleum Sector' *Business Daily* (Nairobi, 21st September 2015).
[60] Article 71 (2).
[61] Cap 307, Laws of Kenya.
[62] Cap 308, Laws of Kenya.
[63] Johnson Kariuki, 'How Kenyans Will Gain from Proposed Law to Regulate The Petroleum Sector' *Business Daily* (Nairobi, 21st September 2015); See generally the preamble of the Petroleum (Exploration and Production) Act, 1985.
[64] Petroleum (Exploration and Production) Act, S. 5.

into a particular area and carry geological and geophysical surveys.[65]

The act provides that exploration blocks cover all the land within the areas under the block.[66] Property in petroleum existing in its natural condition in strata lying within Kenya and the continental shelf is vested in the government of Kenya subject to any rights, which have been or are granted or recognised as vested in any other person by or under any written law.[67] Concisely, the act regulates petroleum operations and provides for petroleum agreements and access to private land for purposes of petroleum operations.[68]

4.0 Contemporary Issues Among The Local Community In The Extractive Sector In Turkana

Environmental degradation

Among the Turkana community, environmental degradation is a threat to their normal way of life as majority of them only gets to know that their grazing lands have been taken when they see fences around the blocks being erected. The fences curtail their movement and this restricts grazing fields to a small area, which is often not enough due to their nomadic way of life.[69]

The major cause of concern among the Turkana is that even after oil drilling started, Environmental Impact Assessment is still a mystery to them. Majority are unaware of existing Environmental Impact Assessment reports. Put

[65] *Ibid*, S. 5 (2).
[66] *Supra* note 45, S. 7.
[67] *Supra* note 45, S. 3.
[68] *Supra* note 45, S. 10.
[69] Eliza Johannes, Leo Zulu and Ezekiel Kalipeni, *Oil Discovery in Turkana County, Kenya: A Source of Conflict or Development?* (African Geographical Review 2015).

differently, the oil exploration companies have not done Environmental Impact Assessment and if they have done it then the locals have not been availed the documents. Even in situations where there are existing EIA reports, they are not reassuring.[70]

Sound resource governance requires governments to first conduct a strategic environmental and social assessment to protect water supplies and ecological habitats. For the case of Turkana, the law requires that the drilling company has to commission an Environmental Impact Assessment before receiving permission to commence drilling in any designated area (block). The assessment will anticipate potential damages to the local community and the environment and spell out plans for mitigating these effects through a process that includes input from all the stakeholders including the local community. Under the Environmental Management and Coordination Act, [71]the government must make public the EIA and seek public comments[72] before issuing an Impact Assessment License.

Land conflicts

Mineral resources are found within the land surface, or in the sea, or under water surfaces. In this regard, there is usually the need to use land for extraction or exploration purposes by acquiring land from their owners for these purposes.[73] Among the Turkana, land is still communally owned and this poses a problem as far as acquisition of such

[70] Eva Constantara, 'After Oil Drilling Started, Environmental Impact Is Still a Mystery' *Internnewskenya* (9th January 2014). Available at <http://landquest.internewskenya.org/environmental-impact-of-oil-drilling-a-mystery-to-citizens-and-civil-society/> [accessed 22nd September 2016].
[71] Cap 387 Laws of Kenya.
[72] *See generally* The Constitution of Kenya 2010, Article 10.
[73] *Supra* note 9.

land is concerned. The same is problematic when the land is privately owned. It is even more complicated when the government tries to compel involuntary transfer of property in land to itself or to other entities for exploration. At this point, the land question takes legal dimensions. Legal in the sense that the land issue is now a question of juridical concern.[74]

Employment of Locals

Given the complexity and technicality of the oil industry, oil companies create comparatively fewer job opportunities for native communities.[75] The industry requires high levels of technical skills and given the low literacy levels of many indigenous African communities, the companies are forced to source for employees from outside the local communities. Majority of the locals are only employed to provide short-term manual labour, which is largely restricted to construction.[76] For the local community, all they want is employment. This is one of the few things that will make the difference in terms of their perception towards the drilling company.

In Turkana, the issue of unemployment of locals is so sensitive that even those who were employed but coming from the rest of the country are considered outsiders.[77] Employment of the local Turkana men and women fits their definition of local employment.

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[74] *Supra* note 6.

[75] *Human Rights Risks And Responsibilities: Oil And Gas Exploration Companies In Kenya* (Institute for Human Rights and Business 2013).

[76] *Ibid.*

[77] *Supra* note 50.

Legally, companies do not have specific responsibility to offer employment but given the nature of the potential risks of not offering employment, many companies explicitly commit to prioritising employment of locals in their hiring policies.

Over the years, the major employer in Turkana County has been the Government, followed by NGOs run by international organisations such as the UN and the Kakuma refugee Camps, Oxfam and the World Vision.[78] The small number and uneven distribution of such government and NGO jobs to nonlocal educated Kenyans have served only to increase the discontentment of the Turkana People.[79] The community feels neglected and discriminated against and thus, when oil was discovered in Turkana County they broke into song and dance. The new local "black gold" would alleviate their mystery and suffering.[80] The native thinking is that they have been neglected because those in government think they are not contributing anything to the GDP. However, with the discovery of oil, things are bound to change for the better.[81]

Unmanaged expectations pose a great risk to smooth operations of oil companies. It is generally contended that many Turkana residents were promised high-level jobs only to end up being given menial jobs like road marshals while others were tasked to keep goats away from Tullow areas or

[78] *Ibid*.
[79] *Supra* note 57.
[80] Jenny Hauser, 'Kenya's first oil discovery prompts dreams of riches' (Storyful, 27th march 2012). Available at <http://storyful.com/stories/23900-kenya-s-oil-discovery-prompts-dreams-ofriches> [accessed 3rd July 2016].
[81] *Ibid.*

direct traffic flow of trucks.[82] However, the generally low levels of education explain the lowly jobs they have been subjected to by the mining corporations. Political leaders often lament that the government has been unresponsive and dragging its feet by not taking charge of the plight of the community especially on matters pertaining to unemployment.[83] The presence of high-level government officials is perceived as the ones who stand to benefit from the discovery of the oil at the expense of the already destitute Turkana people.[84]

Corporate Social Responsibility

Corporate Social Responsibility entails actions of firms that contribute to social welfare beyond what is required for profit maximisation.[85] Generally, it takes the form of corporate self-regulation integrated into a business model.

Tullow Oil as a company has been involved in a number of life changing initiatives among the Turkana Community. These initiatives entail providing discretionary investments in social projects. Accordingly, Tullow Oil recognises that water is inevitably going to be an issue and a sustainable solution has to be found. In this regard, the company has conducted hydro geological and hydrological studies to

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[82] Eliza Johannes, Leo Zulu and Ezekiel Kalipeni, *Oil Discovery in Turkana County, Kenya: A Source of Conflict or Development?* (African Geographical Review 2015).

[83] *Ibid.*

[84] Kisero, J, 'Minister's firm sold Turkana oil block for Sh800 m' Daily Nation Daily (Nairobi, 23rd March 2012)
<
http://www.nation.co.ke/News/Minister+s+firm+sold+oil+block+for+Sh800m
> [Accessed July 7, 2016].

[85] McWilliam Abigail, 'Corporate Socila Responnsibility' (Wiley Encyclopedia of Management 2000).

evaluate and identify water sources for its operations and to an extent, the local community.[86] Tullow provides scholarship scheme, which helps beneficiary students advance their studies.[87]

It is worth noting that in late 2013, there were numerous demonstrations by the local Turkana community against Tullow Oil regarding employment. In response to the increasing demonstrations, the company temporarily halted its operations in Block 10BB and Block 13T in Turkana East and Turkana South sub-counties as a precautionary measure in order to put an end to the locals' demonstrations while the matter is resolved.[88]

The company later started a return to work agreement signed between it and the government in presence of local leaders. The memorandum of Understanding (MoU) required the company to double its Corporate Social responsibility immediately. Thereafter the projects selected for investment were to be driven by community needs and are agreed upon because of consultative process between the company and the community.[89] Tullow Oil and its partners have also invested in education, water and health.[90]

A study commissioned by United Kingdom Department of International Development warned on Kenya's preparedness for resource management and recommends

[86] Tullow Oil PLC, Corporate Responsibility Report (2014). .

[87] Tullow Oil Scholarships available at < https://tullowgroupscholarshipscheme.org/ > [accessed July 7th, 2016]

[88] Lucas Nga'asike, 'Tullow Oil Suspends Operations over Conflicts with Locals' *Standard Digital* (Nairobi, 28th October 2013).

[89] *See* Official Website of Oil Review Africa < http://oilreviewafrica.com/exploration/exploration/tullow-oil-employs-residents-for-turkana-operations > [accessed July 7, 2016]

[90] Official website of Tullow Oil PLC www.tullow.oil.com [accessed July 8, 2016]

that the country emulates community investment models in countries such as Mozambique and Peru where they have been successful.[91] It warns of the dangers of companies simply making direct investments or payments to the local government for social projects.

5.0 Rethinking The Law Governing The Petroleum Sector In Kenya

The existing legal regime governing oil exploration in Kenya is outdated and does not fully cater for current trends in the energy sector. This has been occasioned by the fact that historically the petroleum industry in Kenya has been underdeveloped. It is only until recently when oil discoveries were made in neighbouring Uganda that Investors became interested in both onshore and offshore exploration in Kenya.[92]

Elsewhere in this article, it has been contended that the Petroleum (Exploration and Production) Act of 1985 only provides for negotiation and conclusion of petroleum agreements. However, current trends point to a need for a more comprehensive and detailed legal framework. In Light of the above, The Petroleum (Exploration, Development and Production) Bill, 2015 will pave way for the country to move closer to production. The Act will mainly apply to upstream operations.[93]

The bill seeks to provide a framework for the contracting, exploration, and production of petroleum. The bill further provides for a ceasing or discontinuance of upstream

[91] *Ibid.*

[92] Uganda confirmed to have economically viable oil reserves in the year 2006 in its Western Rift Valley near Lake Albert. This boosted and fuelled renewed hope that traces of oil can exist within the larger East Africa region.

[93] The Petroleum (Exploration, Development and Production) Bill 2015, S. 3.

petroleum operations.[94] The greatest beneficiaries are the local communities. The Bill mandates contractors and sub-contractors to give priority to local content requirements.[95] It also explicitly provides that priority to be accorded to the employment of qualified skilled Kenyans.[96] There shall be established a Training Fund for training Kenyans in Upstream petroleum operations.[97]

The National government's share of the profits derived from upstream petroleum operations shall now be apportioned between the National Government, the County Government and the Local Community. The County Government's share shall be equivalent of twenty percent share of the National Government's share while the local community's share shall be equivalent to five percent of the Government's share.[98]

Proper management of resources requires the government to build its capacity to manage its petroleum sector and wealth for sustainable development impacts. In October 2014, the World Bank undertook to fund a project to be known as Kenya Petroleum Technical Assistance Project (KEPTAP). KEPTAP has four major components, which entail mainly reforms and capacity building in; the petroleum sector, revenue and investment management, sustainable impact of oil and gas industry and finally project management.[99] This initiative will help in formulation of

[94] *See generally*, the Preamble of The Petroleum (Exploration, Development And Production) Bill,2015.
[95] *Supra* note 74, S. 77.
[96] *Supra* note 74, S. 77 (c).
[97] *Supra* note 74, S. 79.
[98] *See generally* The Petroleum (Exploration, Development And Production) Bill 2015, S. 85
[99] Official website of the Ministry of Energy and Petroleum <www.energy.go.ke/index.php/keptap.html> [accessed July 8, 2016].

sound public and private sector policies to capitalise on resource development.[100]

Community rights are best protected if there is a specific legislation governing proprietorship of community land. Though the Constitution recognises community land as a category of land, absence of legislation to give effect to this categorisation continues to scuttle the rights of many communities with no private land tenure systems. The Community Land Bill, which if passed by parliament gives effect to article 63 (5) of the constitution, provides for the recognition, protection and management of community land.

6.0 Conclusion

The petroleum sector in Kenya is still underdeveloped owing to the fact that it is only until recently when oil was discovered in Turkana that the industry attracted attention from both the government and investors. The discovery came at a time when the existing legal framework is hugely outdated and out of favour with key players in the industry, the notable ones being the local communities in whose areas the oil fields are located. The gaps in the legal framework have led to high-profile disagreements between exploration companies and native communities.[101] The misunderstandings have been fuelled by the perceived feeling that local communities have been short-changed as a far as resource benefits are concerned. Among the Turkana, systemic marginalisation and neglect by the government gives them a more reason to agitate for a share in the petroleum revenues. Unless a robust legal and institutional

[100] *Ibid.*
[101] *Supra* note 63.

framework is put in place, feuds over resources are bound to escalate even more.

From the foregoing, it is in the best interest of the state, concerned local communities and the oil exploration companies that the various energy laws be consolidated into a single, robust and comprehensive legislation. This will ensure efficient management and coordination of the petroleum industry in Kenya with the net effect being the satisfaction of all concerned parties.

The Earth Is Speaking, Humans Won't Just Listen: Conceptualizing Environmental Security In Kenya

Peninnah N. Simiren***

Abstract

The Constitution of Kenya 2010, in its preamble recognizes that the citizens should be respectful of the environment, which is their heritage, and they should be determined to sustain it for the benefit of the future generations. Clean and healthy environment is recognised in the Constitution of Kenya as a right under Article 43. This illustrates the eco-centric approach to environmental security which also advocates for strong sustainability of both the environment and its impact on human beings, as opposed to the anthropocentric approach that focuses on the environmental degradation harmful impact on individual human beings, rather than focusing on the impact caused to the environment itself.

Environmental degradation negatively affects the ability of a State to feed its people, therefore world leaders, recognizing the connection between people and planet, have set goals to ensure global environment security goals are included in international policies and treaties that place objectives of environmental security in greater profiles.

It is argued that environmental security is central to national security and it is therefore, crucial to have a balance between ecology and the prevention and management of conflicts that are brought about by human actions leading to environmental degradation

1.0 Introduction

Environmental security has been defined to as the balance between ecology and the prevention and management of conflicts that are brought about by human actions leading to environmental degradation.[102]

Environmental security is a word that consists of different terms, which on their own would mean totally different things. The term security connotes peace and stability. [103]Security as already mentioned is central to environmental matters.[104] Principle 25 of Rio Declaration on Environment and Development recognises that peace and environmental protection are interdependent and indivisible.[105]

Environmental security is central to national security, comprising the dynamics and interconnections among the natural resource base, the social fabric of the state, and the economic engine for local and regional stability.[106] According to Prof Sachs, who advocates for the widespread understanding that environmental sensitive objectives should have a higher profile in international and national policies.[107]

This is because of the important aspect in the relationship between environment and security. Mainly includes the

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[102]Kariuki Muigua, "*Achieving Environmental Security," (*2015).

[103]Jon Barnett, 'The Meaning of Environmental Security: Ecological Politics and Policy in the New Security Era,' (2001)

[104]*Ibid* note 106.

[105] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

[106] N. Myers, "Environmental Security: What's New and Different?" Available at http://www.envirosecurity.org/conference/working/newanddifferent.pdf [Accessed on 25/06/2016], p.4.

[107] Jeffrey D. Sachs, "*From Millennium Development Goals to Sustainable Development Goals*," (The Lancet) 379(9832) 2012.

effect of violent conflict on the environment. As mentioned above, environmental security is central to national security. The impact of ongoing environmental degradation, surging populations, deforestation, soil erosion, climate change, water and air pollutions, can lead to scarcity of resources.[108]

However, it should be noted that it is not only scarcity of resources that spur up insecurity, in some cases abundant of resources has also caused internal strife.[109] A case scenario is the Democratic Republic of Congo civil war crisis that was caused as a result of resource capture[110]

According to Collin Powell,[111] "Poverty, environmental degradation and despair are destroyers of people, of societies, of nations." "This unholy trinity can destabilise countries, even entire regions." Nations break up over the overflow of refugees from environmental, natural and social disasters.[112]

Human security is thus connected to other critical thinking and evaluation of contemporary forms of security, that later in transforms to human rights.[113] There is therefore, need to rethink security covering environmental issues.

2.0 Recognition Of Environmental Security In Kenya

[108]Simon Dalby, 'Environmental Security,' (*University of Minnesota Press*), 2002.
[109]*Ibid* note 102.
[110] Resource capture occurs when the supply of a resource decreases due to either depletion or degradation and/or demand increases due to population and/or economic growths. This encourages the more powerful groups in a society to exercise more control and even ownership of the scarce resource, thereby enhancing their wealth and power.
[111]Former United States of America Secretary of State.
[112]*Ibid* note 108.
[113]*Ibid* note 108.

The Constitution of Kenya, in its preamble recognizes that the citizens should be respectful of the environment, which is their heritage, and they should be determined to sustain it for the benefit of future generations.

Human beings have the right to life. Right to life is a protected right both domestically[114] and internationally.[115] Therefore, to be able to fully exercise and recognise the right to life, human beings need to have a clean and healthy environment.[116] Judge Weermantry expressed in his dissenting opinion that,[117] "*the protection of the environment… is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments*."

Under international law, the right to a clean environment is recognized and protected.[118] Human rights advancement provided an incentive to developing countries, that, viewed environmental degradation as a problem for the developed countries, to participate in environmental debates.[119]

During the Stockholm Conference, the international community agreed and declared that 'human beings have the

[114] Article 26, Constitution of Kenya.
[115]For instance, conventions such as Article 3 of*Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 6 of *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[116]*Ibid* note 102.
[117] Gabcikovo-Nagymaros Case (Hungary-Slovakia), I.C.J., Judgement of 25th September, 1997.
[118] Article 24, Universal Declaration of Human Rights.
[119]Alexandre Kiss & Dinah Shelton, 'International Environmental Law,' (*United Nations Environmental Programme, 3rd Edition*) 2004.

fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and they bear a solemn responsibility to protect and improve the environment for present and future generations.'[120]

Regionally, the African Charter on Human and Peoples' Rights provides for environmental rights, it protects both the right of peoples to the highest attainable standard of health[121] and their right to a general satisfactory environment favourable to their development.[122]

Kenya is a signatory to all these international legal instruments.[123] The Constitution of Kenya provides that, the general rules of international law shall form part of the law of Kenya[124] and any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.[125] Therefore, Kenya is bound to abide, observe and respect the provisions of the above mentioned international legal instruments.

Clean and healthy environment is recognised in the Constitution of Kenya as a right.[126] This illustrates the ecocentric approach to environmental security,[127] as

[120] Principle 1, Stockholm Declaration on the Human Environment, Report of the United Nations Conference on the Human Environment (New York, 1973), UN Doc. A/CONF.48/14/Rev.1.
[121]Article 16 of *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, 21 I.L.M. 58 (1982).
[122]Article 24 of *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, 21 I.L.M. 58 (1982)
[123]Kenya ratified the African Charter on 24th January, 1992, Stockholm Declaration was ratified on 24th September, 2004, International Convention on Civil and Political Rights was ratified on 12th December, 2003.
[124]Article 5, Constitution of Kenya.
[125]Article 6, Constitution of Kenya.
[126]Article 42, Constitution of Kenya.
[127]*Supra* note 102.

opposed to the anthropocentric approach that focuses on the harmful impact on individual humans, rather than on the environment itself.[128]

The Constitution also recognizes the right to the highest attainable standard of health and the right to clean and safe water in adequate quantities.[129] A clean and healthy environment that is secure is central for the implementation and enforcement of the right to: the highest attainable standard of health; accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; and to social security.[130]

These rights can only be attained if the State and every other person would adhere to the obligations as set out in Article 69 of the Constitution. These obligations include; ensuring sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensuring the equitable sharing of the accruing benefits; working to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protecting and enhancing intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.[131]

It also includes encouraging public participation in the management, protection and conservation of the environment; protecting genetic resources and biological diversity; establishing systems of environmental impact assessment, environmental audit and monitoring of the

[128]Alan Boyle, "*Human Rights and the Environment: A Reassessment,"* (University of Edinburg) 2011.
[129]Article 43, Constitution of Kenya.
[130]*Ibid.*
[131] Article 69, Constitution of Kenya.

environment; eliminating processes and activities that are likely to endanger the environment; and utilising the environment and natural resources for the benefit of the people of Kenya.[132]

Further, the Constitution provides for locus standi to anyone who alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.[133]

Enforcement of environmental rights led to the establishment of the Environment and Land Court that solely deals with environmental and land related matters. These gives special focus on environmental issues and as a result it promotes environmental security. When dealing with matters concerning land, one cannot avoid talking about the environment. The Constitution in Article 60 provides for principles of land policy, these include sustainable and productive management of land resources and sound conservation and protection of ecologically sensitive areas among others.

These provisions are the reflections of Article 10 of the Constitution that provides for the national values and principles of good governance. Sustainable development is among the national values and principles that bind all State organs, State officers, public officers and all persons.[134]

[132] *Ibid.*
[133]Article 70, Constitution of Kenya.
[134]Article 10 (1), Constitution of Kenya.

3.0 Role Of Sustainable Development In Environmental Security

The relationship between environmental security and sustainable development, is that, sustainable development involves, resource use and environmental management that are combined with increased and sustained production, secure livelihoods, food security, equity, social stability, and people's.[135]

The sustainable use of natural resources and joint measures to protect the environment across national borders and social systems can contribute to conflict prevention and peace building. In addition to, various forms of cross-border water cooperation are contributing to stability and peace in regions of conflict.[136]

Sustainable development, is about minding the rights of not only the present generation but also, of the future generations. It advocates for working towards the goals of preventing tragedy of the commons as propounded by Professor Okoth Ogendo.[137]

The African Commission in addressing the issue of sustainable development in the Ogoni Case stated that, Article 24 of the Charter imposes an obligation on the State to take reasonable measures 'to prevent pollution and ecological degradation, to promote conservation, and to

[135]*Ibid* note 102.
[136] N. Myers, "Environmental Security: What's New and Different?" Available at http://www.envirosecurity.org/conference/working/newanddifferent.pdf [Accessed on 25/06/2016], p.4.
[137]Tragedy of the Commons occurs where an individual only sees the good for himself forgetting that he lives in a finite land that not only accommodates him but also other members of the community. See, H.W.O. Okoth-Ogendo ''The *Tragic African Commons*; A century of expropriation, suppression and subversion,'' (2000).

secure ecologically sustainable development and use of natural resources.[138]

Principle 1 of Rio Declaration states that, human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. Principle 4 of Rio Declaration further states, in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.[139]

Globally, the international community agreed on the Sustainable Development Goals.[140] These goals are achievable with partnership amongst States and its people. Political good will from the international community will also help achieve the set goals.

4.0 Role Of Environmental Security In Poverty Reduction

Principle 5 of Rio Declaration provides that, all States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living.

[138] http://www.righttoenvironment.org/ip/uploads/downloads/OgoniCaseProf.Coomans.pdf. Accessed on 25th June, 2016.
[139] *Ibid* note 105.
[140] The international community came up with 17 Sustainable Development Goals. They include; No poverty, Zero hunger, Good health and well-being, Quality education, Gender equality, Clean water and sanitation, Affordable and Clean energy, Decent work and Economic growth, Industry, Innovation and infrastructure, Reduced inequalities, Sustainable cities and communities, Responsible consumption and production, Climate action, Life below water, Life on land, Peace, justice and strong institutions and partnerships for the goals.

It has been argued that poverty eradication contains four ingredients which include: food and nutritional security; income security; social security; and human security.[141] The sustainable development goals have tried to capture each and every aspects of poverty eradication mentioned above. For instance, the Sustainable Development Goals aim to conserve and restore the use of terrestrial ecosystems such as forests, wetlands, dry lands and mountains by 2020.[142] These are environmental resources relied by humans and other animals on other forms of life on land for food, clean air, clean water, and as a means of combating climate change. [143]

In achieving the goal on food security and improved nutrition and promote sustainable agriculture the international community will promote sustainable agriculture and support small farmers.[144]

Environmental degradation negatively affects the ability of a State to feed its people, therefore world leaders, recognizing the connection between people and planet, have set goals for the land, the oceans and the waterways in response to ending all forms of poverty.[145]

5.0 Global Environmental Security

Some of the efforts by the international community have already been mentioned earlier in the paper. However, there

[141] *Ibid* note 102.
[142] United Nations Development Program, 'Introducing the new Sustainable Development Goals. What's your Goal?' (2000). http://www.undp.org/content/dam/undp/library/corporate/brochure/SDGs_Booklet_Web_En.pdf. Accessed on 25th June, 2016.
[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid.*

are various international legal instruments that specifically protect sustainable development of the specific environmental resources.

Ramsar Convention

This is an international legal instrument that provides State parties' legal framework on wetlands conservation and use. Wetlands include water catchment areas, as already mentioned everyone has the right to clean and adequate water. Therefore, if the wetland areas are not protected the right to a clean and safe water cannot be realised.[146]

Everyone on earth should have access to safe and affordable drinking water. That's the goal for 2030. Water scarcity affects more than 40 percent of people around the world, and that number is projected to go even higher as a result of climate changes. International cooperation, protecting wetlands and rivers and sharing water-treatment technologies[147] will ensure reduction in water scarcity.

United Nations Framework Convention on Climate Change

United Nations Framework Convention on Climate Change is an intergovernmental treaty developed to address the problem of climate change.[148] Emission reductions provisions in the Convention were inadequate. As such, there was need to strengthen the measures in addressing problems concerned with climate action. Later, negotiations were launched to strengthen the global response to climate

[146] Convention on Wetlands of International Importance especially as Waterfowl Habitat: entered into force on, 21 December 1975, 996 UNTS 245; TIAS 11084; 11 ILM 963.
[147] *Ibid.*
[148] UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.

change that transformed to the adoption of the Kyoto Protocol. The Kyoto Protocol legally binds developed countries to emission reduction targets recognizing that states have common but differentiated responsibilities.[149]

Convention on the Law of the Non-Navigational Uses of International Watercourses

Article 5 of the Convention provides that, watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner.[150] In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits there from, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.

This reflects the collaboration and partnerships between States in ensuring the use of watercourses in a sustainable manner and reflects the spirit of Principle 2 of Rio Declaration which provides that, States have, in accordance with the Charter of the United Nations and the principles of international law the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction[151] The same is also reflected in

[149] This is a principle by United Nations Framework Convention on Climate Change that acknowledges the different capabilities and differing responsibilities of individual countries in addressing climate change.
[150] Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).
[151] *Ibid* note 105.

Article 7 of the Convention on the Law of the Non-Navigational Uses of International Watercourses.[152]

The Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (Forest Principles)[153]

The subject of forests is related to the entire range of environmental and development issues and opportunities, including the right to socio-economic development on a sustainable basis. The guiding objective of these principles is to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses.[154]

Principle 2 provides for sustainable use of all types of forests to meet the social, economic, ecological, cultural and spiritual needs of present and future generations. In its preamble it also provides that, forestry issues and opportunities should be examined in a holistic and balanced manner within the overall context of environment and development, taking into consideration the multiple functions and uses of forests, including traditional uses, and the likely economic and social stress when these uses are constrained or restricted, as well as the potential for development that sustainable forest management can offer.[155]

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[152]Article 7 states that, Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.9

[153] The Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (Forest Principles)A/CONF.151/26 (Vol. III).

[154]Preamble (a) & (b).

[155] *Ibid.*

Convention on Biological Diversity

Article 1 of the convention sets out the objectives of the convention to include, promoting the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources.[156] In Article 6, it obligates every Member State to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for the purpose of the Convention existing strategies, plans or programmes which shall reflect the measures set out in the Convention.

6.0 Conclusion

Threats to environmental security can only be dealt with by joint management and multilateral procedures and mechanisms.[157] Safeguarding environmental resources is fundamental to the values of modern international community. As illustrated various international, regional and local legal instruments have been put in place for the purposes of protection of environmental resources. States are working in cooperation to ensure sustainable use of these environmental resources.[158] As a result, the world is slowly able to achieve total eradication of environmental degradation and at the same ensuring development that is sustainable for the people.

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

[157] World Commission on Environment and Development, Our Common Future: Report of the World Commission on Environment and Development, 1987, A/42/427.

[158] For instance, Colombia and Panama have a series of nature parks established along their common border to reduce tension. See *supra* note 119.

In countries seriously affected by environmental stress and poverty, the sums required to alleviate these conditions are small in relation to what is now spent on disaster relief, let alone military activities. However, these sums must be spent quickly, before deteriorating conditions require much larger expenditures.[159]

[159] Ibid 157.

VAT and E-Commerce in Kenya: A Possibility or A Fallacy?

Erastus W. Njaga***[160]

Abstract

The inception and the development of the internet have undeniably unprecedented impact to the human life. The internet has revolutionized all spheres of the human life including the business, the health, education, and the transport and communication sectors among many others. In the corporate sector, the internet has led the emergence of the e-commerce that has significantly influenced the way people conduct their transactions. As a result, the various e-commerce models have had an unprecedented impact on the taxation regimes. It is a result of the fact, e-commerce has influenced the conventional ways that individuals used to access and consume products and services. Subsequently, the imposition of the VAT on the goods and services is proving a pertinent issue among many states globally.

The following article seeks to discuss the growth of the e-commerce in Kenya and its impact on the existing legal regimes. In explaining, the article will evaluate whether the system is adequate and efficient in imposing VAT on the e-commerce. The article is divided into various sections. Part one forms the introduction of the article, and the second part will discuss the concept of electronic commerce including the different models, the defining features of e-commerce and the e-commerce in Kenya. The third section will explain the concept of the VAT and the defining principles. The fourth section examines the impact of the E-commerce to the VAT regime. The fifth part is the conclusion offering the relevant recommendations.

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1.0 Introduction

The growth and development of the internet are certainly one of the greatest events in the modern society. Indeed, the modern society is significantly characterized by multiple technological advancements. To an extent, the internet is undeniably an integral part of the modern world. The fundamental nature of the internet is manifested by the unprecedented impact of the internet on the human life in the various spheres of human life including business, education, security, health, medicine, communication and business among many others.

Undoubtedly, the internet is revolutionizing the human life, and the internet is no longer a luxury but a basic need in the modern society. The impact of the internet has been significant in the business world, where it has led to the growth and the development of the new business models e-commerce. The concept of e-commerce is undoubtedly a buzzword in the modern society.

Consequently, the multiple business models are posing an imminent challenge to the taxing authorities' capacities to impose consumption taxes such as the VAT on the online transactions. Many of the global tax regimes are based on the traditional models that are based on jurisdiction, originating principle, the area of location among other conventional principles. The systems just adhere to the traditional principles of taxes that were designed to operate for the physical transactions.

However, the virtual nature of the e-commerce and the cross-borderless is a significant challenge to the taxing authority to impose taxes on the digital goods and services that are capable of being gotten and consumed without any

physical delivery or meeting of the transacting authorities. Consequently, there is the huge possibility of the states losing massive amounts of revenue from untaxed transactions. Moreover, e-commerce has the undeniable probability of exacerbating tax evasion and tax avoidance among the taxpayers.

2.0 The Concept of E-Commerce

E-commerce is certainly a buzzword in the modern society. The growth and development of the internet have undeniably resulted in the considerable development of the e-commerce. The population of the internet users globally has been arguable to be about four billion, and it is rapidly growing owing to the accessibility of mobile phones and the internet across the world. There is no universal definition of the concept of e-commerce, though; there are some consensus on the advantages, features and the disadvantages of e-commerce among authors[161]. Some have described it as conducting commercial activities via electronic data and the most importantly, the internet[162].

According to others, e-commerce is the buying and selling of goods and services over the World Wide Web or Internet[163]. According to United Nations Convection on

[161] Pinto (2002) E-Commerce and Source Based Income Taxation, Doctoral Series, Volume 6, International Bureau of Fiscal Documentation, Academic Council, at P.1

[162] Kinuthia, J. N. K., & Akinnusi, D. M. (2014). 'The Magnitude of Barriers Facing E-commerce
Businesses in Kenya'. Journal of Internet and Information Systems, 4(1), 12–27.

[163] Nath, P. (2013). 'The Impact of E-Commerce in Modernization of Traditional Enterprises with Special Reference to The Entrepreneurship Development In BTAD Of Assam.' *Global Research Methodology Journal*, *2*(Feb-Mar-Apr), 1–9.

International Trade Law (UNICTRAL), e-commerce refers to commercial activities conducted through an exchange of information of generated, stored, or communicated by electronic, optical or analogous means[164]. According to a report by the Australian Attorney General Office, E-commerce is a broad concept that covers commercial transactions that are effected via electronic means and would include such means such as facsimile, telex, EDI, the Internet, and telephone[165].

According to the OECD, E-commerce refers to the sale or purchase of goods or services, conducted over computer networks[166]. Consequently, one can conclude that e-commerce is the process where the transacting parties conduct and complete their transactions via Internet-based platforms that significantly relies on technology. E-Commerce can be used in the ordering of goods and services that are later delivered through the conventional offline means or in the ordering ad the delivering of the digital goods and services. E-commerce covers an array of business models. There is no doubt that the internet is turning out to be a global marketing platform that has real altercations to the market structure.

As opined by the OECD Ministerial Report of 1998, E-commerce offers a radically new way of conducting

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[164]. Richard Hill and Ian Walden, The Draft UNCITRAL Model Law for Electronic Commerce: Issues and Solutions, No. 3 COMPUTER Law 18, 18 (March 1996)

[165]. Report of the Electronic Group to the Attorney General(Australia), "Electronic Commerce: Building the Legal Framework," 1998, available at < www.law.gov.au/aghome/advisory/ecag/single.htm>

[166] OECD (2015), Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20
Base Erosion and Profit Shifting Project, OECD Publishing, Paris<.http://dx.doi.org/10.1787/9789264241046-en at Pg. 55

commercial transactions, and is potentially a key engine to increase economic growth, and enhance development around the globe. The e-commerce is globalizing the world with various models of online-based businesses. However, the subsequent part discusses the most prominent models that have gained universal recognition.

2.1 E-COMMERCE MODELS

Business to Business (B2B) Model

It is where two registered companies engage in selling and buying of products and services from each other. The business can be territorial or extraterritorial. The goods and services may include physical deliverable goods and digital goods. It might also include the outsourcing and provisions of technical and management skills by one company to another.

Business to Consumer (B2C) Model

According to this model, a company transacts goods and services directly to the consumer. It is argued to have the capacity of reducing the transaction costs as it reduces the intermediaries and other third parties in the selling and purchasing of goods such as retailers, distributors among others. However, the model requires a lot of advertisement and outreach to increase customer information access.

Consumer to Consumer (C2C) Model

It is where two customer engages in the selling and purchasing of the goods and services directly without involvement of any third party. Accordingly, any businesses in place only act as an intermediary to facilitate the access of goods and services between the parties. The model is

significantly gaining ground owing to the growth of entrepreneurs.

The various e-commerce models have significant reliance on the Internet and technology. It thus makes it possible for people in different locations to transact their goods and services without any form of physical meeting. In fact, the technological advancements have also led to the growth of the digital forms of payments including mobile money transfer, and internet money transfer among many others[167].

2.2 E-Commerce in Kenya

E-commerce is undeniably an integral part of the modern world. In Kenya for instance, the concept is gaining ground with many Kenyans preferring to purchase goods and services from online platforms. The products and services may range from the tangible and deliverable to the intangible that are digitally delivered. According to a recent study, the Kenyan population using the internet has significantly grown in the previous years, standing at 21.3 million in 2015[168]. Moreover, according to the same study, the Kenyan online shopping is on the rise with at least 18% to 24% of the citizens preferring to buy music, video, games, e-books, downloads, software, online maintenance services over the online platforms. The trends indicate the considerable growth of the e-commerce in Kenya, which will continue growing rapidly owing to the penetration of internet and accessibility of Android phones among the citizens. It is thus prudent to examine some of the defining features of the e-commerce.

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[167] Ibid 4 at Page

[168] Judy Mwende," Kenya has 26.1 Million Internet User " Business review 7th April 2015 http://www.kenyanbusinessreview.com/701/internet-users-in-kenya/ Accessed on 30th July 2016

2.3 Defining Features of E-Commerce

E-commerce greatly relies on the data transmission and cloud computing in the transacting of goods and services. The data reliance make the e-commerce virtual in nature[169] and thus no need for physical presence of the transacting parties neither any intermediary. Consequently, many shoppers prefer it owing to the efficiency and the low costs incurred in the online transaction as opposed to the traditional business.

However, the virtual nature prevents the transacting parties from knowing each other or understanding the other's location. Moreover, the virtual nature makes it difficult for any taxing authority to examine the trail of the transaction, as they are no trail left by the parties. Therefore, it exacerbates the anonymity in the e-commerce. The e-commerce also engages various people across the globe. In fact, it embraces people from different jurisdictions and states.

The high number of the individuals involved in online transactions enables the purchaser to have a broad range of options and to be able to choose the prices that are within his or her budget. The cross-border nature of the e-commerce is arguable as possible for improving the quality of goods and services as opposed to the traditional business where the buyer might be subjected to the domineering monopoly of a single supplier. Therefore, the highlighted features of E-Commerce are certainly rendering the traditional taxation regimes inefficient and impossible to impose the taxes. The next part discusses the concept of the VAT tax and the

[169] Kilian Heller, *How to Deal with Digital Economy in International Taxation,* 2015

concomitant challenge posed by the e-commerce on the VAT regimes.

3.0 The Concept of VAT

VAT is one of the greatest tax development in the 21st Century[170]. It seeks to increase the state revenue base. According to the OECD, VAT tax has continually gained global acceptance. Indeed, according to them, VAT has a global acceptance and implementation of more than 140 states and the number is significantly growing rapidly[171]. VAT as one of the primary taxes constitutes one of the largest sources of the government revenues. In Kenya for instance, it is estimated that the VAT represent more than a fifth of the total revenue taxes[172]. The number is estimated to rise in the future with the increase in the government efforts enhance taxation regimes[173].

VAT is an indirect, multi-stage consumption taxes that is levied on the articles of trade before they reach the customers, who pay the taxes inclusive the market prices[174]. The VAT targets the final consumer of a product. It is only upon the consumption that the taxing authority is capable of

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[170] Organisation For Economic Co-Operation And Development, *International VAT/GST Guidelines*; February 2006,http://www.oecd.org/tax/consumption/36177871.pdf accessed 17th July 2016

[171] Ibid

[172] David Ndii, "*Why bid to tax informal sector might be a challenge* "Daily Nation, Friday, July 16, 2016. Available at; http://www.nation.co.ke/oped/Opinion/why-bid-to-tax-informal-sector-might-be-a-challenge/-/440808/3296672/-/k7mhfnz/-/index.html Accessed on 18th July 2016

[173] The Government of Kenya, Estimates of Revenues Grants and Loans Book for FY 2016 2017

[174] Basu Subhajit *'Global Perspective on E-Commerce Taxation Law'* Ashgate Publishing Ltd., 2007

accruing their dues. Principally, the VAT applies across the divide in all commercial transactions that involve production and distribution of goods and services among the residents of a given jurisdiction. VAT is, therefore, a territorial tax that accrues to the state where the consumption of the goods and services occurs. VAT as multi-staged tax allows the taxing authority to impose the tax at all stages of production and distribution[175].

As a consumption tax, VAT not only aims ta taxing the final consumption but also at taxing it at the place of consumption[176]. Being a consumption tax, many tax authorities have been abiding by the traditional principles of the taxation including the origin principle, the principle of destination, permanent establishment, and area of location among many others.

3 .1 The Principles of VAT

Principle of Fixed Establishment

The principle has critical significance to the VAT just as the principle of Permanent Establishment is essential in the imposition of the income tax. There is no precise definition of the principle though the European Union has had some efforts trying to come up with a definition. Nevertheless, the principle of Fixed Establishment herein referred to as FE is of great significance in the determination of the place of supply of services for VAT. Moreover, FE is essential in establishing the right to VAT refund where taxes are

[175] Schenk, Alain and Oldman, Oliver (2000) Value Added Tax, 26 (Transnational Publishers ed. 200 at P.29)
[176] Ibid at p. 260

incurred in another country other than the one the business is established[177].

Accordingly, Article 11 of section 1 of the Implementing Direction of the Council Implementing Regulation No. 282/2011 offers a definition of FE. The article stipulates that, "a fixed establishment" means any place, other than the taxpayer's place of establishment of a business, which is characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its needs.[178]

Furthermore, according to the Swedish Tax Agency and the Court of Justice of the European Union CJEU, FE refers to an establishment having sufficient permanence and a suitable structure concerning human and technical resources[179]. The establishment must be considered as sufficiently independent for goods or services to be consigned from it. It is not mandatory for the goods or services to be originating from the fixed establishment. The existence of any potential suffices[180]. Therefore, the FE plays a pivotal role in determining the place of supply of services and goods.

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[177] Rita de la Feria, 'Permanent Establishments in Indirect Taxation Forthcoming Chapter in IBFD (ed.) Permanent Establishment's (IBFD, 2016)

[178] Sylwia Kulczycka, "Poland: Tests For Having A Fixed Establishment In Poland For VAT Purposes" Mondaq, 30th July 2015, Available at http://www.mondaq.com/x/416736/sales+taxes+VAT+GST/Tests+for+having+a+fixed+establishment Accessed on 28th August 2016

[179].Baker & McKenzie," CJEU Ruling - Fixed Establishment for VAT Purposes" Lexology November 2, 2012, Available at http://www.lexology.com/library/detail.aspx?g=f897f04f-67ba-4ee9-9c3e-6297750a0816 Accessed 30th August 2016

[180] Ibid

The location of supply has been defined as the place where a service is deemed to be being supplied, and it is the place that VAT accrues in[181]. Section 8 of the VAT Act provides that, a supply of services is made in Kenya if the place of business of the supplier from which the services are provided is in Kenya[182]. Subsection two of the same provision, however, enumerates instances where a service may be deemed to be supplied in Kenya notwithstanding the place of supply is not in Kenya. They include, where services are physically done by a person who is in Kenya and where the services are directly related to an immovable property in Kenya. It can also be in instances where the services are radio or television broadcasting services to an address in Kenya.

The Destination Principle

Under this principle, the tax is ultimately levied only on the final consumption within the jurisdiction where such consumption is deemed to occur. The principle ideally provides that the VAT shall be accrued in the jurisdiction where the final consumer is a resident. The principle empowers the jurisdiction where the customer has its usual residence the right to collect VAT on the goods and services delivered[183]. Goods and services exported from a particular jurisdiction are not subjected to VAT to avoid double taxation. The VAT only accrues in the importing jurisdiction where the actual consumption of the goods and services occur. The exporting country is only entitled to a tax rebate.

[181] Accessed from < https://www.gov.uk/government/publications/vat-notice-741a-place-of-supply-of-services/vat-notice-741a-place-of-supply-of-services> on 1st Sept 2016

[182] VAT Act No. 35 of 2013.

[183] OECD Report 2015 N.4

The Time of Supply of Goods and Services

The VAT Act provides for the consideration of the time of supply of the goods and services as an essential component in determining the accruement of the Tax[184]. It enumerates various consideration such as, the date, which the goods are delivered, or the services are performed, the date of issuance of the invoice, the date of payment among many others.

The Place of Supply of Goods and Services

It refers to the place where a service is deemed to have been supplied. It is in that place where the VAT is deemed liable. According to the Kenyan regime[185], the place of supply is in Kenya, where the goods and services are made available in Kenya, the installation is rendered in Kenya or the service or the goods are delivered from Kenya to another jurisdiction from a Kenyan origin[186]. Where a registered person receives imported services, the person is deemed to have supplied services to himself[187].

The Impact of the E-commerce to Traditional Principles of VAT

There is no doubt of the considerable implications of the ICT globalization to almost all aspects of the human life. In fact, the revolutions and dynamisms have had a significant impact to the various tax regimes that were inherently designed to operate in the territory of the transacting parties. The inception of the ICT has therefore led to massive online transactions among people from different jurisdictions. The subsequent impact of the ICT developments and the growth

[184] Section 12 of Ibid 20
[185] Section 11 of the VAT ACT,2012
[186] Ibid
[187] Section 10 of the Act

and development of the e-commerce is making tax evasion, avoidance, and intricately possible reality. Further, many governments, which lacks sufficient regulations and policies to tap the income derived from the e-commerce activities continue losing massive amounts of revenue.

In the absence of physical territories and the virtual nature of the e-commerce poses pertinent issues to the taxation regimes. The ability of the e-commerce to be conducted cross-border exacerbates capacity to amend such activities to the VAT regimes[188]. The e-commerce renders the traditional principles of taxation inefficient and inadequate in subjecting goods and services acquired over the online platforms to VAT. As discussed above, the three models of the e-commerce are susceptible to tax evasion and avoidance.

However, specialist asserts regarding the first two examples of B2B and B2C taxation are possible owing to the fact that the business are incorporated corporation licensed with a VAT certificate[189]. There are therefore required to file their VAT returns with the taxing authority. The most glaring problem exists where two consumers transact intangibles over the online platforms. The majority of the taxing authorities lack the capability to subject such transactions to VAT regimes.

Concerning the fixed establishment, the e-commerce is rendering the principle challenging to apply owing to the virtual nature of operations. Indeed, it is possible for an individual to earn an income for a particular jurisdiction

[188] M.M.K. Sardana, Evolution Of E-Commerce In India Taxation of e-Commerce Transactions (Part 3)
[189] OECD Report of 2015

without residing in that place. Regarding the location of supply of the goods and services, e-commerce makes it inherently difficult to figure out the place of transaction.

Indeed, it is almost a futile endeavor to locate the place of the transaction. Enforcement of the regulation regarding the VAT on e-commerce is also tough owing to the anonymity of the transacting parties and the virtual nature of the system[190]. The internet has enabled transacting parties to conduct their transactions without the need for either physical identity or the actual location of the parties.

The ultimate effect is the almost impossibility of the taxing authority to impose the tax accordingly. The parties are capable of using the superficial anonymity that the internet offers to conceal their transactions hence denying the imposition of such transactions to taxes. Moreover, the fact that there is no form of identity nor any documents required in the transactions of the digital e-commerce makes it tough for any enforcement by the taxing authority.

The digital e-commerce has also rendered the principle of the supply of goods and services inefficient and inapplicable in the digital modern. Conventionally, the place of provision of goods and services is of critical importance in the imposition of the VAT. For the provision of goods, the goods are considered to be supplied where the supplier deliver them to the buyer.

However, concerning the supplies of services, there is many controversies since the place of supply can either be where the supplier or customer is located depending on the particular type of services is being delivered. The place of supply of services is deemed the place of the supplier

[190] Ibid 23

business or the fixed establishment from, which the service is provided. The ICT integration is thus making it difficult to determine the Fixed Establishment exclusively for the purpose of the VAT. The virtual nature of the e-commerce undeniably makes it hard to pinpoint the FE explicitly and thus making it impossible for the taxing authority to subject such transactions to VAT.

The growth of e-commerce has had also influenced the emergence of new products that are difficult to categorize as either services or goods. Under the current tax regimes, VAT is only amenable to goods and services that are derived or obtained from a particular place.

The emergence of the digital products such as the computer software, eBooks, music, downloads, apps, videos, games, databases, websites, online advertising, and others makes it tough to categorize a given product as either good or service[191]. The products are obtainable online, and the payment is via online platforms hence the pertinent demanding of classifying them for the purpose of VAT. Indeed, the OCED have asserted that digital e-commerce is the most significant challenge facing many taxing authorities[192]. The digital products have no physical existence and hence the conventional tax regimes are inapplicable[193].

[191].Hinnekens, Luc (1998) 'The Challenge of Applying VAT and Income Tax' at p.57

[192] OECD (1997)Electronic Commerce: The Challenge to Tax Authorities and Taxpayers, Nov. 18, 1997

[193] Emilie Fridensköld (2004),'VAT and the Internet: the Application of Consumption Taxes to E-Commerce Transactions, *Information & Communications Technology Law*, 13:2, 175-203 <http://dx.doi.org/10.1080/13600830410001687273>

Jurisdictional and Territoriality Challenge of E-commerce

VAT is inherently territorial in nature, and it is charged on a given citizenry with a particular territory[194]. Only the sovereign state vides its legislative arm that can impose the tax. The enforcement of the tax rules is also territorial in nature as only the sovereign within the particular territory has the jurisdiction to enforce all tax obligations and liabilities among the citizens[195]. The phenomenal growth of the e-commerce is undoubtedly a critical challenge to the territorial sovereignty and the jurisdictional powers of the state to adopt and enforce the VAT.

As discussed above, the e-commerce and particular the digital B2C and C2C model are practiced across borders by citizens from various countries which their identity and localities are anonymous[196]. The cross-border nature makes it difficult for a single state to impose conclusively any tax on various transactions. Moreover, the anonymity of the transacting parties heightens the difficulty of the territorial sovereignty and the jurisdictional powers of the states.

The Pokémon GO- A case in point of the challenges of the VAT taxation on E-commerce

Recently, the world has been in a frenzy following the invention of the famous Pokémon GO a free download app that has an in-app purchase for players who wishes to be Pokémon masters. The application is significantly gaining fame across the globe with an estimated of a million

[194] Subhajit Basu, ' Global Perspective on E-commerce Taxation Law' Ashgate Publishing Ltd., 2007

[195] Article 209 and Article 210 of the Constitution of Kenya Stipulates that only the Parliament can enact a legislation imposing tax

[196] Ibid 28

downloads every day. The manufacturing company is earning at least $1.6 million every day[197].

The applications are posing an imminent question to the global taxing authorities on who to impose the VAT on the purchases made. Moreover, there is the perturbing issue of whether the application is either tangible property or intangible property or whether it is a service[198]. The difficulties of classifying the app exemplify the impassibility met by the taxing authorities in imposing the tax. Besides, the global nature of the app infers the jurisdictional and the sovereign issue of, which state to impose VAT on the sales by its residents and when to do so. The case of the Pokémon is one of the many perturbing situations in the quest for the taxing authorities to tap the phenomenal e-commerce. The subsequent part will discuss some of the possible measures that can be applied to tax the e-commerce adequately.

4.0 Analysis of the VAT Act in the Scope of E-commerce

The enactment the VAT Act was certainly adhering to the conventional principles of the VAT that have been discussed in Chapter 3. Consequently, the act is considerably applicable in the ambit of supply of physical goods and services for any accruement of the VAT. However, the phenomenal growth of the e-commerce in Kenya as discussed in the foregoing chapters has certainly posed a

[197] Joe-Stanley Smith and Amelia Swanchke, 'Pokémon GO Could Get in Tax Bubble',(2015) International Tax Review <http://www.internationaltaxreview.com/Article/3573821/Latest-News/Pokmon-GO-could-get-caught-in-tax-bubble.html >2016) Accessed 29th July 2016

[198] Ibid

threat to the sufficiency of the VAT Act to impose tax on electronic transactions.

The problem is exacerbated by the presence of the digital goods and services, which are very complex to categorize for the purpose of the invocation of the conventional principles of the VAT. The Act has significantly failed to offer precise mechanisms for the imposition of VAT in e-commerce transactions. Indeed, save for section 8 that defines and enlists the various activities that comprise the e-commerce transactions, the Act is mum regarding the budding sector.

The Act further does not offer any panacea regarding the different e-commerce models that are quite difficult to impose VAT efficiently. In fact, the Act merely stipulates that the supply of e-commerce to a Kenyan resident shall be subject to VAT. The critical issue is how to determine the place of supply owing to the virtual nature of the e-commerce that undoubtedly renders the conventional principles inadequate.

Moreover, the difficulty of establishing the fixed establishment in electronic transactions is significantly unaddressed. Consequently, the Kenyan regime is inefficient and inadequate in imposing VAT on e-commerce. KRA will continue losing huge sums of revenue from e-commerce transactions. It is therefore, paramount to enact sound policies and mechanisms to tap the ever-growing sector that is proving to be the ideal mode of conducting business transaction among the majority of Kenyans.

5.0 Recommendations and Conclusions

In Kenya, the online purchase of goods and services is significantly gaining ground and preference among the

citizens. The attitude is considerably attributable to the array of merits of e-commerce as compared to the traditional business modes. The growth of e-commerce in Kenya will continue growing to such extents that the majority of the commercial transactions will be online-based. It is therefore, paramount to have sound policies to ensure the VAT imposition on the electronic commerce.

Various commentators have argued on the possibility of subjecting e-commerce transactions to taxation. Indeed, according to some, the venture is impossible, however as it is, manifested by EU, USA, India, Australia and other developed states VAT tax is a possible reality. In fact, statistics indicate that at least 40 countries are charging or intending to impose VAT on e-commerce[199]. The concept of e-commerce in Kenya as discussed above is gaining ground, and it is estimated that the growth will be rapid in the future years. Consequently, there is the dire need for the relevant authorities to put regulations, rules, and policies in place to guarantee adequate benefit from the massive e-commerce transactions.

Adhering to Ottawa Principles

The existing challenges of e-commerce taxation are inherently attributable to the technological advancements and the ICT globalization. Subsequently, it is only the embracement of the technology and ICT can offer a panacea to the troubling global issue[200]. The global response towards the taxation of e-commerce reflects the acknowledgment of the states to promote electronic commerce and to enhance

[199] Tom Borec, 'World Of The Digital E-Commerce Taxation' (ebiz.tax, 2015) <http://ebiz.tax/overview-global-digital-ecommerce-tax/> accessed 25 September 2016.
[200] M.M.K. Sardana ibid 23

their tax base to increase their individual revenues. Consequently, in 1998 during the Ottawa Conference, OECD Committee on Fiscal Affairs (CFA) and the participating state parties unanimously approved the Ottawa Convention that stipulated that;

"The taxation principles that guide governments concerning conventional commerce should also guide them about e-commerce…. Existing tax rules can implement these principles. The application of these principles to e-commerce should be structured to maintain the fiscal sovereignty of countries, to achieve fair sharing of the tax base from e-commerce between countries and to avoid double and unintentional non-taxation."[201] Though some of the e-commerce models discussed above was not in existence, the Ottawa principles continue to be applicable in the digital commerce with some adaptations and modifications[202].

Consequently, all efforts and systems that seek to impose VAT on e-commerce should strive to ensure that there is simplicity, cost-effectiveness and neutrality among the different persons and jurisdictions[203].

Digital Permanent Establishment

There are also various scholars who have endeavored to propose different mechanisms that can be used to tax e-commerce. They include Sagar Wagh, who has proposed the Digital Permanent establishment (Digital PE).[204] The

[201] Ottawa Taxation Framework Conditions (OECD, 2001).
[202] OECD Report, Pg. 20-23
[203] Ibid 39
[204] Wagh, Sagar (2013), "Digital Permanent Establishment: A Road Ahead for E-commerce Taxation,"academia.edu Accessible from https://www.academia.edu/3797885/Digital_Permanent_Establishment_Digital_PE_A_Road_Ahead_for_E-Commerce_Taxation Accessed on 8th Sept 2016

concept of the Fixed Establishment (FE) as discussed above plays a critical role in enabling the imposition of the tax.

It is, therefore, paramount to have a digitally FE, which is capable of operating within the digital e-commerce as opposed to the conventional FE that significantly relies on the physical establishment of the business. Moreover, the OECD in its Action 7 has also recommended the modification to the exceptions to PE status in order to ensure that they are available only for activities that are in fact preparatory or auxiliary in nature[205].

International Cooperation

According to Emilie Fridensköld (2004), there is the need for concerted efforts by the international community to formulate policies and regulations that can adequately ensure the taxation of the e-commerce[206]. She proceeds to argue that there is the need for reconciling tax policies to promote the mutual relationship between the states. E-commerce is a cross-sovereign process and hence there is the need for consensus among the states. In specific, there is the need to agree on which country has the right to collect the VAT from a particular transaction.

The agreement assists in avoiding double taxation or unintentional non-taxation. States must also agree to a mutual respect for each other's right to collect VAT from certain digital transactions. Besides, there is the need for cooperation of the states to develop international mechanisms for mutual assistance to promote individual's territorial sovereignty.

[205] OECD (2015) Report at Page 136
[206] Ibid 28

Mandatory VAT Registration of Suppliers

Regarding the location of the supply of the digital products, there is the need for the mandatory registration of every supplier. The registration should include the physical location of the online store and the name of the individual as well as the website URL where the business is carried out among other details. The registration will enhance easy identification of the source and origin principle that is critical in the imposition of the VAT.

The registration will also annihilate the concomitant challenge of the anonymity of the transacting parties. Besides, the IP address of the transacting parties would greatly assist in avoid tax evasion, tax avoidance or non-taxation from e-commerce transactions. The tracking technology can certainly overcome the virtual nature of the e-commerce.

Compliance and Reporting

Upon the registration of the suppliers, they have the inherent obligation to furnish continuously the tax authority with the relevant tax returns[207]. They should maintain periodical VAT and other statistics failure to which they should be amenable to sanctions. It will guarantee that the tax authority can easily follow up those persons neglecting their tax obligations.

Therefore, VAT taxation of electronic commerce in Kenya is a possibility that just requires the relevant authorities to come up with sound rules and policies. Owing

[207]Nehal Radia, 'VAT Considerations For E-Commerce | International Tax Review' (Internationaltaxreview.com, 2013) <http://www.internationaltaxreview.com/Article/3252311/VAT-considerations-for-e-commerce.html> accessed 25 September 2016.

to the growth of the concept, the country stands to benefit immensely from the vast revenue that will accrue from the e-commerce. In the pursuit of the state to tax e-commerce transactions, there is the need to balance the need for the promotion of the e-commerce with the need for taxes. In fact, the regime should ensure none is compromised but are given due consideration.

Admissibility of Unlawfully Obtained Documentary Evidence under International Law: The Search for a Uniform Rule.

Leon Kiarie Ndekei***[208]

Abstract

This article aims at deriving a rule for the admissibility of unlawfully obtained documentary evidence under international law. This is in consideration that there is no treaty governing this area of International Law. Consequently, the domestic laws of states and decisions of both domestic and international courts will play an important role in the search for uniform international rules governing this area. Domestic laws governing the admissibility of unlawfully procured evidence are not uniform. The approach by courts can be divided into three approaches:(i) Mandatory inclusion approach under common law, (ii) Mandatory exclusion approach followed in the United States of America and (iii)the discretionary approach followed in other jurisdictions. The article will examine all three approaches, focusing on their content and the justification for their application.

In conclusion, it will look at the approach adopted by international courts and tribunals. It will argue that they take a hybrid approach consisting of a combination of the mandatory inclusion approach and the discretionary approach.

1.0 Introduction

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This paper seeks to examine the admissibility of unlawfully obtained evidence under international law in the absence of a governing treaty.

The paper is divided into six parts. The first part is the introduction, which lays out the problem that the paper seeks to address and define the key terms. The second part sets out the rule regarding the admissibility of unlawfully obtained documentary evidence under the Common Law. The third part examines the approach adopted in the United States of America (USA). The fourth part, examines the discretionary approach that has been adopted by some jurisdictions. The fifth part focuses on the treatment of such evidence in cases before international courts and tribunals. It is important to note that under the International Court of Justice Statute (ICJ Statute), Article 38 (1) (d) the authority attached to these cases is the same as those adjudicated before domestic courts. Both represent a subsidiary source of international law. Lastly, part six is a conclusion and recommendations.

1.1 Definition of Key Terms.

The admissibility of any piece of evidence must be determined before such evidence can be relied upon by a court of law. It is a matter of law, this means that they are specific legal rules that govern the question of admissibility, it is not determined on fact-by-fact basis. It refers to the legal test that is used to determine whether a piece of evidence can be relied upon to determine the existence or non-existence of a fact in issue.[209] It is incidental but non-concomitant to the issue of relevance.

[209] Kyalo Mbobu, *The Law and Practice of Evidence in Kenya* (1st edition, Law Africa Publishing 2011) 15.

Relevance: refers to whether a document is logically probative or disapprobative of a matter that requires proof.[210] The distinction between admissibility and relevance can be summarised as follows, although all admissible evidence must be relevant, not all relevant evidence is admissible. Relevance and admissibility are akin to the stages in a filtration system. At the first stage, evidence that is not legally relevant is filtered out. At the second stage where only the relevant evidence remains, legally inadmissible is filtered out of the system. What remains is both relevant and admissible and can be relied on by a court.

Documentary evidence: refers to evidence that it is recorded in the form of a document.[211] However, this type of evidence is not limited to written documents and may include videos and photographs.[212] The expansiveness of the definition was captured in *R v Daye* where the court held that a document refers to **any** written thing and it does not matter where the writing may be.[213] Documentary evidence can be classified into either public documents or private documents; each has different rules regarding their admissibility.

Unlawfully obtained evidence: it refers to evidence that has been obtained through violation of the law. For example, evidence obtained through hacking a person's email account, evidence obtained by unlawful surveillance violating an individual's right to privacy or confessions obtained through torture.

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[210] Rupert Cross and Colin Tapper, *Cross on Evidence* (8th edition, Butterworth Publishers 1990) 65; *DPP v Kilbourne* [1973] AC 729, 756.
[211] Kyalo Mbobu (n1) at 3.
[212] Adrian Keane, *The Modern Law of Evidence* (5th edition, Butterworth Publishers 2000) 226.
[213] *R v Daye* [1908] 2 KB 333, 340.

International law: it refers to the law that provides the legal framework for the conduct of interstate relations.[214] It provides the legal framework for sovereign states to relate with each other. Some legal philosophers have questioned whether international law is law; they argue that the absence of a legislature, courts with compulsory jurisdiction and the lack of an enforcement mechanism rob international law of its status as law.[215] However, these arguments do not suffice as in the modern world; both state and non-state actors constantly invoke the international law to justify their actions and condemn the actions others.

The International Court of Justice Statute (ICJ Statute) contains the most authoritative lists of sources of international law under Article 38(1).[216] It provides a list of four sources namely: International Conventions, Customary International Law, General Principles of Law and Judicial Decisions and teachings of the most highly qualified publicists. These sources constitute the sources of international law.[217]

Conventions, also known as treaties, may be either bilateral or multilateral.[218] They are binding to those states that have ratified them.[219] However, it should be noted that for dualist states a further step of domestication is required.

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[214] Ian Brownlie, *Brownlie's Principles of Public International Law* (James Crawford Ed. 8th edition Oxford University Press, 2012) 21.
[215] H.L.A. Hart, *The Concept of Law* (Penelope Bulloch and Joseph Raz ed, 3rd edition Oxford University Press, 2012) 214.
[216] Ian Brownlie (n6).
[217] Article 38(1), Statute of the International Court of Justice, 33 UNTS 993.
[218] Anthony Aust, *Handbook of International Law* (2nd ed Cambridge University Press, 2010) 6.
[219] Article 2(1)(b),Vienna Convention on the Law of Treaties, 1155 UNTS 331.

Customary International Law consists of two elements the state practice and *opinion juris.*[220] State practice is expressed through states actions in relation to other states. The UN General Assembly may evidence this in legislation, diplomatic notes, ministerial and other official statements, government manuals, and certain unanimous or consensus resolutions.[221] *Opinion juris*, on the other hand, refers to the general recognition by states that the said practice is a legal obligation on them.[222] Nevertheless, uniform practice by all states is not required; the practice, however, needs to be followed by a substantial number of states.[223] Customary International Law binds all states provided the state was not a persistent objector to the formation of the custom or a subsequent objector to its application.[224]

General Principles of law as a source of international law refers to principles of domestic law to the extent that they are applicable to international law.[225] The source, allows the international courts and tribunals to borrow from the domestic laws of states and apply the same as international law.

Regarding judicial decisions, it is notable that the rule of *stare decisis* does not apply in international law. Indeed, Article 59 of the ICJ Statute rules out the application of the rule, it provides that the decisions of the Court are not binding on any other state or person apart from the parties to a particular state, even then it is only binding with respect to

[220] Article 38(1)(b) (n9).
[221] Antony Aust (n10) 7.
[222] Ibid.
[223] Ian Brownlie, (n6) 24.
[224] Ibid at 28.
[225] Ian Brownlie (n6) 35.

the particular issues litigated before it. However, in practice international courts and tribunals rely heavily on previous decisions to maintain consistency in the application of international law. This is clear from their decision some of which quote in *verbatim* previous decisions.

As noted above, the provision makes no distinction between decisions of international courts and tribunals and decisions of domestic courts. The ICJ itself has relied on domestic court decisions. This is demonstrated by the Court's decision in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Request for Advisory Opinion)[226] where it relied heavily on the Canadian's Supreme Court decision in the *Re Quebec*[227] case.

Regarding the admissibility of unlawfully obtained documentary evidence, there is no guiding treaty. Furthermore, owing to the inconsistency in the practice of domestic courts there is lack of uniformity in state practice, consequently, there is also no applicable customary rule. .

Therefore, in finding a rule of international law reliance must be placed on the general principles of law, the judicial decisions and the teachings of teachings of the most highly qualified publicists. It should be noted that with the exception of the decisions of international courts and tribunals, the rules developed regarding the admissibility of such evidence apply to both documentary evidence and other types of evidence. The focus is primarily on the unlawful

[226] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Request for Advisory Opinion) 2010 ICJ Report 43.
[227] *Reference Re Secession of Quebec* [1998] 2 S.C.R

manner in which they were obtained as opposed to their documentary nature.

2.0 Admissibility under Common Law/ Mandatory Inclusion Approach/ Relevance Focused Approach.

The rule under Common Law focused on relevance. As noted earlier, relevance refers to whether a document is logically probative or disapprobative of a matter that requires proof. Under Common Law, a document was admissible provided it was relevant to the case notwithstanding how it was obtained.

The position was expressed in the *locus classicus* case of *R v Leatham*, where Crompton J, held that even evidence obtained through theft was admissible provided it was legally relevant.[228] The holding was buttressed in the case of *Karuma s/o Kaniu v R* by Lord Goddard, C.J where he held that the primary question was whether the document was relevant, if it was then it would be admitted regardless of how it was obtained.[229]

The Common Law rule has been described as a rule motivated by the need for expediency.[230] It is argued that unless the manner in which evidence was obtained affects its veracity, expediency demands that it be used. Furthermore, it is argued that the means, through which the evidence was obtained, even if it was obtained unlawfully, does not justify the wrongful acts of the accused.

However, one must note that the rule does not extend to unlawfully obtained confessions. In the case of *R v Sang* the Court maintained that in spite of the relevance focused

[228] *R v Leatham* (1861) 8 Cox Co 498, 501.
[229] *Karuma s/o Kaniu v R* [1955] 1 All ER 236.
[230] Kyalo Mbobu (n1) at 185.

approach, courts retained discretion and had the power to refuse to admit evidence where its prejudicial effect outweighed its probative value.[231] Specifically, the court held that the discretion should be exercised where a confession or other evidence obtained from the accused personally was obtained unlawfully.[232] The reason is that it affects the veracity of such unlawfully obtained evidence. The reliability of confessions should be called into question whenever it has been obtained unlawfully. For example, where a confession is obtained through threats or torture, it is highly likely that the individual confessed to ensure the threats are not materialized and to stop the torture from continuing

Consequently, in these circumstances, under Common Law no evidentiary weight is attached to such evidence, it is considered inadmissible. The above approach has been criticized due to its apparent disregard for the rights of accused persons and its (implied) sanctioning of unlawful actions. As noted above, even the exception concerning unlawfully obtained confessions focuses on the veracity of such evidence as opposed to the rights of the accused person.

3.0 The Traditional Approach to Admissibility in the USA/ Mandatory Exclusion Approach.

There is a clear dichotomy between the approach adopted under the Common Law and the approach adopted in the USA. In fact, the rules are opposites of each other. In the USA, unlawfully obtained evidence and any other evidence obtained as a result of an initial illegality (fruit of a poisonous tree) is inadmissible and cannot be relied upon by

[231] *R v Sang* [1972] 2 All ER 1222.
[232] Ibid.

a court.[233] The origin of this rule is the United States Supreme Court case of *Weeks v The United States*, which considered the admission of evidence obtained by illegal or improper conduct by law enforcement officials; in that case the court found such evidence to be inadmissible regardless of its relevance.[234]

The application of this rule was extended in subsequent cases to include indirect evidence or derivative evidence; such evidence was termed as the fruit of a poisonous tree and also rendered inadmissible.[235] The scope of this rule was further extended in the case of *Wong Sun v the United States* to include verbal evidence. Previously, it had not been applied in cases regarding oral evidence. It was mostly applied to cases involving evidence obtained through unlawful arrests or entry.[236]

The approach reflects the desire of Courts to ensure respect for constitutional rights that prohibit illegal searches and entry. Furthermore, it demonstrates a policy approach that frowns upon official arbitrariness and seeks to discourage such actions by removing the incentive for such actions. It is argued that the approach is required to admit into evidence unlawfully obtained evidence would encourage and in fact countenance official rule breaking. It involves a balancing between two objectives, that of ensuring that criminals are sanctioned for their unlawful actions and that of promoting the rule of law.

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[233] Yuval Merin, *'Lost between the fruits and the tree: In search of a coherent theoretical model for the exclusion of derivative evidence'* (2015) 18(2) New Criminal Law Review: An International and Interdisciplinary Journal 273 at 274.
[234] *Weeks v United States* (1914) 251 U.S. 383.
[235] See generally Yuval Merin (n26).
[236] *Wong Sun v United States* (1963) 371 US 471.

Justice Holmes in *Olmstead v the United States* put it succinctly when he held that a choice must be made between the desire to detect crime through all the available evidence and the desire to ensure that the government should not participate in rule breaking, he concluded that the lesser evil was to allow some criminals to escape prosecution. [237]

The above reasoning was has been criticised as being too favorable to guilty persons and for producing absurd results. Cardozo J made this point in *The People v Defoe* in the following analogy:

"A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free."[238]

From the above, it is clear that there is a delicate balance between the two competing objectives. Both objectives are important, none out rightly prevails over the other. If all unlawfully obtained evidence is admissible the rights of individuals will be violated. Government officials and indeed private citizens will be encouraged to obtain evidence through any means. This has negative implications for good governance and the rule of law. However, if all unlawfully obtained evidence is inadmissible criminals will escape justice. In the next part an approach that seeks to strike an appropriate balance will be discussed.

4.0 Discretionary approach

Under this approach, courts are granted discretion to determine the admissibility of unlawfully obtained evidence.

[237] *Olmstead v United States* (1928) 277 US 438.
[238] *The People v Defoe* (1926) 242 NY 413.

The upshot of this is that courts can either admit or refuse to admit such evidence. In deciding, courts have to balance between different competing considerations. It is not a 'one size fits all' approach but one that depends on the circumstances of the case. For this reason it can be said to be a fact based approach as opposed to a rule based approach. Many jurisdictions have adopted this approach. Most of these jurisdictions previously adopted the mandatory inclusion approach under common law. Therefore, the discretionary approach allowed them, in certain circumstances to refuse to admit unlawfully obtained evidence.

The exclusion was justified on one or a combination of three theories namely: the integrity of the justice system, rights protection and deterrence.[239] Under the first approach, courts can exercise discretion to exclude unlawfully obtained evidence where this would result in judicial complicity in unlawful conduct.[240]It is the prevailing theory in Australia[241], Canada[242], the United Kingdom[243], Israel[244], and Germany[245] among other countries.

Under this theory, the admission of such evidence may be refused where it would be detrimental to the administration of justice. The Courts in making their determination consider

[239] See generally Yuval Merin (n 26).
[240] Ibid.
[241] *Burning v Cross* (1978) 141 CLR 54 at 74, per Stephen and Aickin JJ.
[242] Canadian Charter of Rights and Freedoms Article 24(2); *R v Collins*[1987] 1 SCR 265 at 31.
[243] Police and Criminal Evidence Act, 1984, Section 78.
[244] *Issacharov v Chief Military Prosecutor* (2006), Crim A 5121/ 98, 61(1) P.D. 461.
[245] Stephen Thaman, *'Fruits of the Poisonous Tree in Comparative Law'* (2010) Swedish Journal of International Law 356.

the manner in which the evidence was procured, whether the rule breaking was a result of a mistake or deliberate.[246]

Where the rule breaking is deliberate, the evidence is more likely to be excluded because doing otherwise would be to condone the unlawful activity.[247] Under this approach, courts admitting unlawfully obtained evidenced are viewed to be participants in the illegality as their decisions benefit from the receipt of such evidence.

Under the second approach, the focus is on the respect for human rights. For example, in Australia[248]Canada[249]South Africa[250] and England[251] all grant their Courts discretion with regard to the admissibility of illegally obtained evidence focusing on the question of violation of the accused's rights. Specifically, emphasis is on the right to fair trial of the accused person. It is appreciated that the manner in which evidence was obtained may affect the realization of this right. To prevent this, the courts in their discretion refuse to admit such evidence.

The position of courts is perhaps best captured by the Canadian case of *R v Law* where the Court held that, the decision turns on whether the violation of the right is so

[246]*Burning v Cross* (n34) at 79.
[247] Yuval Merin (n239) at 280.
[248] *R v Ireland* [1970] 126 CLR 321 at 335, per Barwick CJ; James Spigelman, *'The Truth Can Cost Too Much: The Principle of Fair Trial'* (2004) 78 Australian Law Journal 38.
[249] *Burning v Cross* (1978) 141 CLR 54 at 74; Canadian Charter of Rights and Freedoms, Section 24(2).
[250] Constitution of the Republic of South Africa, 1996, section 35 (5); Wouter Le R De Vos, *'Illegally or Unconstitutionally Obtained Evidence: A South African Perspective'* (2011) Journal of South African Law *270*.
[251]*A and Others v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221; Andrew Choo and Susan Nash, *' Evidence Law in England and Wales: The Impact of the Human Rights Act 1998'* (2003) 7 Evidence and Procedure Journal 31.

serious that it outweighs the State's interest in admitting the evidence.[252] Where this is the case, such evidence should not be admitted. This approach has a human rights focus, it considers the effect of the illegality on the accused rights and balances this against the desire to hold the accused responsible for their actions. Where the violation is serious or gross, the evidence is less likely to be admitted.

Under the deterrence approach, the Court views its role as to discourage rule breaking. This role is intended to punish rule breakers (mainly police officers) for violating the law and is intended to remove any incentive they may have for violating the law. Courts in the US now follow the approach in *Herring v the United States* where it was held that the conduct must have been deliberate and must be such that the cost of refusing to admit it is outweighed by the need to deter such conduct. [253]

Under this approach, the court considers both the nature of the conduct and whether it is in the public interest for such conduct to be deterred. It is therefore a tool used to encourage adherence to the rule of law which is a hallmark of good governance. Regardless of which of the three justifications are given, this approach fetters the more traditional approaches described under part 2 and 3. The admissibility or inadmissibility of evidence is not determined automatically. Courts are granted discretion to determine this question based on the facts of the particular case.

The question that remains is whether such approaches should be adopted in international disputes involving states.

[252] *R v Law* [2002] 1 SCR 227 at 40.
[253] *Herring v United States* (2009) 555 U.S. 135 at 144.

It is argued that the above approaches are based on the legal principle that a wrongdoer must not acquire an advantage from his wrongful actions (deterrence and integrity of the judicial system) and the need to protect the human rights of natural persons (rights approach)[254] For this reason it is argued that they are inapplicable to state

5.0 Approach adopted by International Courts and Tribunals.

There is a paucity of cases before international courts and tribunals that have dealt with the question of admissibility of unlawfully obtained evidence. The few cases were before international tribunals with their own specific evidentiary rules in the treaties that created them. However, from these decisions we can derive a rule that can be adopted as the rule under international law. In making the argument I am cognisant of the fact that judicial decisions are recognised as only subsidiary source of international law under Article 38 1 (d) of the ICJ Statute. However, in the absence of rules in the other three sources or rather until such rules are developed, these decisions acquire special importance.

The subsequent cases are instructive because they deal with unlawfully obtained documentary evidence. Specifically, documents obtained through unlawful hacking or confidential documents released and posted on the WikiLeaks website. The general approach of the Courts is requiring the documents to meet certain standards of veracity before they can be admitted.

In *Prosecutor v Salim Jamil Ayyash, Mustafa Amine Badreddine, Hassan Habib Oneissi and Assad Hassan*

[254] William Worster, *'The effect of leaked information on the rules of international law'*, (2012) 28 Am. U. International Law Review 447.

Sabra (*Prosecutor v Salim Jamil Ayyash)*, the Special Tribunal for Lebanon held that in order to be admissible the document must have adequate indicia of reliability; this includes both its authenticity and accuracy.[255] It is noteworthy that the test assumes that the documents meet the test of relevance. Authenticity refers to whether a document is what it claims to be in origin and authorship.[256] This means that it must be proved that such a document is from where it claims to be and was created by the person it claims to be authored by.

While reliability refers to whether a document accurately describes the facts, it represents.[257] This means that the document must contain correct information. A document that is authentic but full of falsehoods does not satisfy this threshold.

The test is cumulative, relevance, reliability, and authenticity must all be proved in order for a document to be admitted. The burden of proof is on the party wishing to rely on the evidence. Of particular interest to unlawfully obtained public documents is the test of authenticity.

In *Prosecutor v Salim Jamil Ayyash* the Tribunal relied on the American case of *the American Civil Liberties Union v Department of State*, it held that to prove authenticity the government had to have formally acknowledged the leaked

[255] *Prosecutor v Salim Jamil Ayyash, Mustafa Amine Badreddine, Hassan Habib Oneissi and Assad Hassan Sabra*, STL-11-01/T/TC, Decision on the Admissibility of Documents Published on the Wikileaks Website, 21st May 2015,¶ 35.

[256]*Prosecutor v Prlic and Others*, ICTY, IT-04-74-AR73, Decision on Jadranko Prlic's Interlocutory Appeal against the Decision on Prlic Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3rd November 2009, ¶33-34.

[257] *Prosecutor v Salim Jamil Ayyash, Mustafa Amine Badreddine, Hassan Habib Oneissi and Assad Hassan Sabra*, (n47) ¶ 40.

documents and disclosure on the WikiLeaks website could not substitute formal disclosure.[258] Furthermore, it was clear that the Prosecutor could not rely on general comments by government officials regarding the provenance of the leaked documents to prove their authenticity, a clear statement was required.[259]

This means that where the document is a public document the government must identify the document as such. This requirement has been criticised for giving too much power to the state against whom the document is presented. Such a state needs only to deny such a document and this would render it inadmissible.

Alternatively, it is argued that this approach is in congruence with evidentiary rules regarding admissibility of documentary evidence. These require the original document itself or a certified copy thereof whether the document is a public document is required. It is argued that this requirement is important in that it ensures that the purpose of this rule, preventing the court from being misled by forgeries, is respected [260]

From the above, it is clear that the manner in which evidence is obtained does not automatically render the evidence inadmissible. It is confirmed by The ICJ in the *Corfu Channel Case (United Kingdom v Albania)* did not hesitate to include evidence even though it found Britain to have violated Albania's territorial sovereignty in obtaining

[258] *the American Civil Liberties Union v Department of State,* United States District Court for the District of Columbia, 2012 ,Civil Action No. 11-01072 (CKK), Memorandum Opinion at 10.
[259]*Prosecutor v Salim Jamil Ayyash, Mustafa Amine Badreddine, Hassan Habib Oneissi and Assad Hassan Sabra,* (n 47) ¶ 38.
[260] *Prosecutor v Katanga and Ngudjolo Chui,* ICC-01/04-01/07, Decision on Prosecutor's bar table motions, 17th December 2010, ¶ 13.

the evidence.[261] Therefore, illegality on its own is not a bar to admissibility. The focus is on the veracity of the documentary evidence, its satisfaction of the three-part test set out above.

However, the presence of the authenticity requirement, specifically the manner in which it is satisfied leads the writer to conclude that the approach is a hybrid, discretionary approach. This is because authenticity is an additional barrier that must be overcome in order for the evidence to be admitted. The upshot of this is that although such evidence may be admitted it is an uphill task,

6.0 Conclusions and Recommendations

The need to regulate the admissibility of unlawfully obtained evidence has never been more apparent than in the digitalized modern world, where new technologies are rendering information less and less secure every day. Furthermore, groups such as Anonymous and WikiLeaks that actively work to obtain confidential information further exacerbate the need to think seriously about these issues. Moreover, states routinely engage in espionage and surveillance activities that violate individuals' rights to privacy.

Taking either the mandatory exclusionary approach or the mandatory inclusionary approach is not the answer. A proper balance must be struck. International law has attempted to strike such balance concerning unlawfully obtained documentary evidence. *Prima facie,* the hybrid approach appears to be an inclusionary approach. However, on closer

[261] *Corfu Channel Case (United Kingdom v Albania* (1949) ICJ Reports 35; see also Micheal Reisman and Eric Freedman, '*The plaintiff's dilemma: illegally obtained evidence and admissibility in international adjudication*' (1982) American Journal of International Law 747.

inspection it reveals itself as more akin to a discretionary approach strictly regulated by legal rules. This appears to be an appropriate balance between deterrence of unlawful activity and the desire of courts to reach just decisions guided by the available evidence.

Regional Integration & the EAC: A Critical Analysis of the Common Market Pillar.

Anthony G. Wanyingi***

Abstract

Just like any other intergovernmental organization in the world, the East African Community (EAC) comprises of the Republic of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda organized themselves and signed a treaty establishing the Community. Led by the community slogan "one people, one destiny" the EAC has established at least four pillars that are calculated to bring about inter-state integration. The writer herein will endeavor to critically analyze the economic pillar and the sectors therein, in an attempt to assess the progress, initiatives made and the challenges facing the sectors in relation to the partner states.

The article will also suggest the possible panacea to the problems experienced in the economic sector in the EAC. A critical look on the lessons to be learnt from the manner in which the state parties have been able to surmount the challenges in a legal and political perspective.

Introduction

The idea of East African integration dates back to the pre-colonial period. The local tribes were engaging in economic interactions. After some time, the tribes trading between then East African British Colonies composed of Kenya, Uganda and Tanzania[262] brought the impression of a possible

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integration. The colonies[263] later formed a customs union to facilitate commerce among its members.

The three member states had been subjected to the British rule under the Imperial British East Africa Company[264]. In the early 1960's, East African Common Service Organization (EACSO) was formed to replace East African High Commission[265]. The organization[266] was mostly associated with pre-independence structures[267]. This integration culminated into the establishment of EAC in 1967[268]. However, the project[269] was faced by numerous challenges, which resulted into its collapse in 1977. Grant[270] attributed the failure and collapse of the integration to four factors[271]

i. Lack of steering functions and clear directive
ii. Unequal distribution of benefits among member states[272]
iii. Intergovernmental and supranational structures

[262] Note that Tanzania then Tanganyika was under German rule before they gave way to British rule.
[263] *Ibid.*

[265] See the history of the East Africa Community available at http://eacgermany.org/eac-history/ (accessed last on 28/06/2016).
[266] *Ibid.*
[267] See generally Grant Eyster ; Economic Development And Regional Integration In The East African Community: Policy Analysis Indiana University Spring 2014 available at https://spea.indiana.edu/doc/undergraduate/ugrd_thesis 2014_pol_eyster. pdf (last accessed on 28/06/2016).
[268] *Id*, n 1. Also, see the history of East African Community available at http://eacgermany.org/eac-history/ (accessed last on 21/09/2016).
[269] *Ibid.*
[270] *Ibid.*
[271] *Ibid.*
[272] See Daily Monitor Newspaper Uganda. Available at http://www.monitor.co.ug/OpEd/Letters/Why-the-first-EA-Community-collapsed-/806314-1653726-arwsdy/index.html (accessed last on 21/09/2016).

iv. Irreconcilable differences of opinion among the key players[273]

However, after a long period of unilateral state regulations of economic integrations, in the year 1999, the three member states[274] signed a treaty re-establishing East African Community, which came into force on 7 July 2000[275]. In the year 2007, Rwanda and Burundi joined the community making five member states[276].

Among the main objectives of the EAC were to establish a common market[277]. It was contemplated that the community would endeavor to have free movement of goods, labour, services, capital and the right of establishment. Strides have been made into realizing the above objectives including among other things enactment of the protocol on common market[278]. The treaty is the main framework upon which reference into the common market objective can be traced.

Common market[279]

The five member states of EAC signed the protocol establishing the common market in compliance with the

[273] The main differences between economical and political philosophies were seen between the then president of Uganda Idi Amin and his counterpart from Tanzania president Julius Nyerere.
[274] *Id.*
[275] See n 1.
[276] See the African union website available at http://au.int/en/recs/eac (accessed last on 21.09.2016).
[277] *Id*, n 1 at Art. 76.
[278] Protocol on the Establishment of the East African Community Common Market available at http://www.eac.int/commonmarket/index.php?option=com_docman&task=cat_view&gid=30&Itemid=6 (accessed on 21/09/2016) .
[279] *Ibid*, Art 2.

treaty[280]. The principle forms the integral part of the integration and makes it the more critical stage of the realization process, of the objectives of the member states.

The common market provide for the following key principles[281]

i. Free movement of goods
ii. Free movement of persons
iii. Free movement of labor
iv. Right of establishment
v. Right of residence
vi. Free movement of services
vii. Free movement of capital

The member states agreed to eliminate tariff barriers to trade, ease cross border movement of persons, and remove restrictions on movement of labour, right of establishment and residence, movement of services and capital[282]

The protocol anticipates entry of the citizens of the party states into the territory of another without visa, stay in such other states, prosecute or extradite offenders among other things[283].

East African Community Vision 2050[284]

To realize the principles set out by the member states, the community has set its aspirations, which it looks forward to achieve by the year 2050. There are among other pillars

[280] *Id* at art. 5.
[281] *ibid* Art 2(4) .
[282] *Ibid*, Art 5.
[283]*Ibid*, Art 7.
[284] East African Community Vision 2050; Regional Vision for Social-Economic Transformation and Development, (Arusha Tanzania 2015) available at http://www.eac.int/sites/default/files/docs/eac_vision_2050_final_draft_oct-_2015.pdf (accessed last on 28/06/2016).

infrastructure, energy, agriculture and food security and rural development, industrialization, science technology and innovations, tourism, trade and service development.

The realization of the above pillars requires commitment and dedication by the member states. Integrity combined with good governance shall be key player thereto. The community vision 2050[285] came in the wake of realization of independent party states' different visions[286]

Burundi Vision 2025[287]

The Republic of Burundi has a strategic vision majorly on attaining peace and stability. To achieve the vision, she has committed to deal decisively with poverty reduction, reconstruction and institutional development. The need to have peace and stability is informed by the fact that Burundi borders a war-torn Congo, which is also marred with internal conflicts among other factors. Recently the country was involved in post-election violence because of a change of the constitution which gave a lee way for the sitting president Pierre Nkurunziza to vie for a third term. Dispute contributes negatively and affects the country's obligations towards economic integration under the community.

Rwanda Vision 2020[288]

Rwanda's economy in the early 1990's was ravaged by genocide that left more than a million-people dead. The country has been recuperating gradually in the economic sector; Rwanda is one of the emerging promising economies in East Africa. The country has prioritized attaining a

[285] *Ibid*
[286] *Ibid* , at pg 42-43.
[287] *Ibid.*
[288] *Ibid.*

middle-income country status by 2020. This is intended to be done by concentrating mainly on economic transformation, human resource development and integration,

Tanzania Vision 2025[289]

The Republic of Tanzania has had a different approach to numerous issues of policy governance, economic and political development from the other party states. It is not surprising that she has based her vision and approaches on the best principles of governance inter alia peace, stability, good governance, rule of law and purpose to achieve the same after inculcating hard work, creativity and innovation.

Kenya Vision 2030

Kenya is arguably an economic giant compared with other East African Community states. It has been for sometime the economic hub of East Africa attracting investors from everywhere. She has been preferred by international organizations as their headquarters or major offices to act as a door into East Africa. She has a vision of prosperous and globally competitive country by achieving her sectoral goals and international commitments.

Uganda Vision 2040

Uganda bases her vision on the need to transform her people from being peasants, she envisages Uganda as a prosperous country. She has aspired to create more economic opportunities and enhancing economy based knowledge.

It is hard for parties with differing needs to turn their economy from the current position to their aspired status to agree on the multilateral economic issues. The way leaders

[289] *Ibid.*

approach and harmonize the differences therefore becomes critical. However, several initiatives have been undertaken and some economic integration can be felt.

Economic Achievements

i. Institutional achievements[290]

The EAC treaty established the East African Court of Justice[291]and East African Legislative Assembly[292] . The court has issued numerous judgments, rulings and advisory opinions concerning cross border application of the laws, agreements and protocol under the EAC Treaty[293]. In the case of *East African Law Society V Secretary General of the East African Community*, **[294]** the court was called upon to make a determination whether some provisions of the East Africa Community Common Market and Customs Union Protocol were in contravention of and inconsistence with the EAC Treaty. In affirming the court's jurisdiction, a three-judge bench held thus,

> "*The dispute settlement mechanisms created under the Customs Union and Common Market Protocols do not exclude, oust or infringe upon the interpretative jurisdiction of this Court. Further, the impugned provisions of both Protocols are not in contravention of or in contradiction with the relevant provisions of the Treaty.*

[290] Diodorus Buberwa Kamal, Mp Deputy Minister for East African Community Co-Operation: An Open Lecture at Business School University of Hull; May 2006: available at http://www2.hull.ac.uk/hubs/pdf/memorandum58.pdf .(accessed last on 28/06/2016)
[291] Art, 9(1)(e).
[292] *Ibid* at (f).
[293] *Id.*
[294] [2013] eKLR

> *In the premises any submission that this Court lacks jurisdiction over disputes arising out of the interpretation and application and implementation of the Protocols cannot be sustained, and we have given our reasons elsewhere above.***"**

The same point was reiterated by a five-judge bench in the case of *East African Centre for Trade Policy and Law V Secretary General of the East African Community*[295]**.** The judgments have cleared the confusion on the jurisdiction of the court in case of the economic or other disputes among the state parties**.** The legislative assembly has seen several Acts passed and enacted into law[296]. They include among other statutes

- Appropriation Act
- East African Negotiations Act[297]
- East African Community Customs Management Act [298]

ii. Custom union

Goods produced in EAC member states move across the borders without taxation because of the signing of the Customs Union Protocol as long as they qualify under the rules of origin. Trade has also been enhanced due to the signing of Double Taxation Avoidance Agreement[299]. The agreement has brought up so many advantages for inter-trade, For example

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[295] [2013] eKLR

[296] Available at http://kenyalaw.org/kl/index.php?id=4206 (accessed last on 28/06/2016)

[297] 2008

[298] 2005

[299] Available at http://eac.int/legal/index.php?option=com_docman&task=doc_download&gid=161&Itemid=28. (accessed last on 28/06/2016).

a. Article 7[300] provides that enterprise profit shall only be taxed in a state of resident unless the resident has another enterprise in another state under permanent establishment. This means that if a Kenyan owning a business enterprise in Kenya opens a branch in Uganda under permanent establishment, he shall be taxed for an enterprise in Uganda by the Ugandan tax authority and the same enterprise shall not be taxed again in Kenya.
b. Article 10[301] provides that a dividend paid by a company of a resident contracting state to a resident of the other state maybe taxed in the state where the company paying the divided is resident or to the other state provided that the tax shall be at the rate of 5% of the gross amount of dividends.
c. Article11 [302] provides for the taxing of the interest paid by a resident of a contracting state to a resident of another state. Interest may be taxed on either state if the recipient of the interest is the beneficial owner; tax shall be fixed at 10% of the gross interest[303].

iii. Transport and communication

According to Diodorus[304] Kenya, Uganda and Tanzania agreed on a framework which was approved by all parties on the improvement of the infrastructure especially trans-border infrastructure. Some of the agreed items include,

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[300] *Ibid.*
[301] *Ibid.*
[302] *Ibid* .
[303] See generally the discussion of **Enoch Barata** *and* **Cephas K Birungyi** *of* **Birungyi Barata & Associates** on the effect of the double taxation avoidance agreement available at http://www.iflr1000.com/NewsAndAnalysis/The-EAC-Double-Taxation-Treaty-explained/Index/1664 (accessed last on 28/06/2016).
[304] *Id,* n 26.

- Dar –es-Salaam - Dodoma-Isaka-Mutukula-Masaka (2020km)
- Malaba/Busia-Katuna (636km)
- Mombasa-Malaba

Kenya is constructing standard gauge railway from Mombasa to Nairobi. The Arusha-Namanga-Athi River road, which was, completed in the year 2006 the African Development Bank and the Japan International Cooperation Agency financed the construction of the road at a tune of USD 56.3 million.[305] The costs of operation on transborder traders and motorists have reduced significantly[306] due to the improvement of the quality of roads and expansion of transport network.

The transport sector has also benefited from the integration of the COMESA Yellow Card Scheme where motorists performing trans-border businesses are not required to subscribe to the insurance policy of each country member of COMESA, but the scheme provide one universal insurance policy for third parties[307].

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[305] See information on the East Africa Community Directorate of Infrastructure website available at http://www.eac.int/infrastructure/index.php?option=com_content&view=article&id=50:arusha-athi&catid =45:featured (accessed on the 28/06/2016).

[306] *Ibid*, see the comments of one businessman "with the improvements that have taken place on the road between Nairobi and Arusha, our cost of operations has come down……"

[307] Common Market for Eastern and Southern Africa (COMESA) consist membership states of Kenya, Uganda, Rwand, Burundi, DRC, Eritrea, Ethiopia, Malawi, Zambia, and Zimbabwe. In 1986 the member states signed a protocol for the establishment of third party motor vehicle insurance scheme which brought about the COMESA Yellow Card Scheme. Tanzania though not a member of COMESA has subscribed into the scheme. All East African Community member states are therefore covered by the scheme and its integration into the EAC economic pillar is a great achievement as it ease the working environment of the transborder motorists. Available at

Tourism promotion initiatives

The states parties have heretofore managed to ratify protocols that intend to make the integration between the parties on tourism sector are as effective as possible[308]. Several initiatives have been put into place to ensure that East African Community is competitive in the tourism sector[309]. They include;

a. Regional tourism conference
b. Training of assessors for restaurant establishments
c. Scholarship opportunities for east Africans
d. Classification of tourism facilities.

There has been also an establishment of East Africa Tourist Visa[310], which allows persons in possession of this type of visa to go to Kenya, Uganda and Rwanda for purposes of tourism. It is valid for ninety days. This has enhanced cross-border tourism even among members of the concerned states.

However, Diodorus[311] pinpoints some challenges that had faced the EAC community, which he list as including:

- Economic challenge

It is acknowledged that the previous EAC collapsed due to differences on benefit sharing[312]. Kenya is considered as

http://www.comesa.int/wp-content/uploads/2016/06/The-Yellow-Card-1.pdf (accessed last on 29/07/2016).

[308] See the Protocol on Environment and Natural Resources Management . Available at http://www.eac.int/environment/index.php?option=com_content&view=article&id=122&Itemid=212(accessed last on 21/09/2016).

[309]Available at http://www.eac.int/travel/index.php?option=com_content&view=article&id=114&Itemid=85 (accessed last on the 28/06/2016).

[310] See generally http://www.immigration.go.ke/Information.html (accessed last on 28/06/2016)

[311] *Id*, n 11.

[312] *Id.*

an economic giant compared with the other partners in the community. This portrays her as unrivalled and unmatched party making undue benefits from the community disadvantaging the others. The Committee of Experts Report on Addressing the Fears, Concerns and Challenges of East African Federation further acknowledged this [313]

- Political good will

Every, legal notice, protocol, legislation or agreement must attain the consent of the political leaders representing the partner states. This requires utmost goodwill and dedication. In some instances, there have been express disagreements between the leaders over differences in policies, which turn out to be detrimental to the wellbeing of the EAC as an economic bloc.

- Corruption ‘

Transparency international have ranked EAC parties among the highest states in the corruption perception index. Kenya was ranked at 27, Burundi 21, Rwanda 53, Uganda 26 and Tanzania 33[314]. This connotes a very dangerous trend among the parties and unless the vice is curbed, it will fatally affect the economic pillar.

Bribery in the justice system or service delivery is rampant where East Africans offer bribes to access services[315].

- Political instability

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[313] Available at http://federation.eac.int/index.php?option=com_content&view=article&id=179&Itemid=140 (last accessed on 29/06/2016).

[314] Transparency international corruption perceptions index 2013;Sub Saharan Africa. Available at http://www.subsahara-afrika-ihk.de/wp-content/uploads/2013/12/CPI2013_Sub-SaharanAfrica_english_embargoed-3-Dec.pdf accessed last on 20/09/2016).

[315] See generally State of East Africa Report 2013: available at http://inequalities.sidint.net/soear/ (accessed last on 28/06/2016).

East African region has been most often affected by politically instigated violence, which creates an unfavorable environment for progress. In Kenya, for example there has been political violence mainly in 2007 post election violence where 1,133 people were killed and huge number of properties destroyed. In Rwanda economic activities were disrupted after President Pierre Nkurunziza was elected for a third term. These instabilities discourage investors, or even trans-border economic activities.

- Insecurity

East African member states have been faced by the challenge of insecurity including trans- boundary cattle rustling between the Pokots in Kenya-Uganda, ethnic tensions in Burundi against Tutsi, porous borders (Kenya-Ethiopia,) and terrorism. An insecure nation cannot develop economically[316].

Recommendations

Stable political and financial institutions[317]

To operationalize the economic pillar, state parties[318] should be stable politically by ensuring peace is maintained. The political leaders should also be elected democratically to avoid election related violence. Once and when the community attains a political federation status with one central power, all endeavors must be put into place to ensure the rule of law is applied.

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[316] Annie Barbara Chikwanha, The Anatomy of Conflicts in the East African Community (EAC): Linking Security With Development:(Keynote speech to Development Policy Review Network-African Studies Institute, Leiden University, The Netherlands) available at https://www.issafrica.org/uploads/EACANNIE.PDF (last accessed on 28.06.2016).

[317] *Id*, at n 6.

[318] *Id*.

The financial institutions must be strong enough to handle the increasing demand for services. The expansion of financial institutions under the permanent establishment shall be most preferable.

Transparency and accountability

The management and control of EAC resources should be inclusive in a manner that involves the states' residents in the project. Money allocated to projects intended to achieve the community's objects must be utilized in a clear and transparent manner. People involved in the resource management must account on their utilization. This will reduce mistrust among the state parties.

Conclusion

EAC economic pillar is the most progressive aspect of development that will widen the scope of economic interaction among the state parties. If the principles underpinning the pillar are well effected and the political class exhibits good will and pursue good governance, there is no reason why East Africa Community should not attain the status like that of European Union.

Trade-Based Money Laundering: Canvassing the Nascent Frontier in IFF's.

Dennis M. Nkarichia***

Abstract

From denial to denouncement, the swirling legal and economic debate within the academy on money laundering tends to conceptualize the phenomena from an isolated perch, with money laundering viewed as a distinct and separate entity from other forms of illicit financial flows. In developing countries with constrained resources calling for prudence in resource allocation, state reaction to the permissiveness of money laundering has been largely restricted to legislative enactment criminalizing money-laundering offences while requiring greater transparency in the financial sector. The reactive approach of legislating in has resulted in legislations tailored to curb specific elements of money laundering while creating legal lacunas and safe havens for criminals to exist.

This paper attempts to provide a greater understanding of a nascent form of money laundering in two parts. In the Part One, the paper explores the conceptual and theoretical understanding of illicit financial flows, which is essential in appreciating the evolution and fast pace of development of illicit financial, flows. In Part Two the paper focuses on Trade-Based Money Laundering as a nascent form of money laundering, and in extension the largest form of illicit financial flow from developing countries.

1.0 Introduction

Since the discovery of the New World by Christopher Columbus in 1492, and the resultant colonialism of the Americas, the extent and amount of financial flows has been historically viewed through the paradigm of capital

accumulation theory and the portfolio choice motive[319]. Under the capital accumulation theory, economists posited that investors tend to invest in countries and regions where they stand to secure higher returns with minimal risks[320]. Hence, when the New World and Africa were colonized the flux of capital into such regions was perceived as a result of the potent mix of numerous opportunities available, the high returns envisioned, the political stability of colonies, and the relatively low risks attendant in investing in the new regions[321].

Subsequent development in the colonies, particularly the struggle for independence and the indigenization of the local industries, resulted in capital flows out of the newly dependent states into developed nations[322].

Moreover, even amongst the European market there was a tendency for capital to flow in favour of particular nations to the detriment of others. Such developments led to the extrapolation of the capital accumulation theory into a specific subset of portfolio choice motive, to account for the bias and motivation of investors to move their finances in favour of particular nations[323].

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[319] S Ibi Ajayi and Léonce Ndikumana, *Capital Flight from Africa: Causes, Effects, and Policy Issues* (Oxford University Press 2015).

[320] Ibid

[321] Célestin Monga and Justin Yifu Lin, *The Oxford Handbook of Africa and Economics: Policies and Practices* (Oxford University Press 2015).

[322] Ibid

[323] Herkenrath M, 'Illicit Financial Flows and their Developmental Impacts: An Overview' [2014*] International Development Policy | Revue internationale de politique de développement* 1 < https://poldev.revues.org/1863> accessed 9 August 2016.

The portfolio choice motive posited that investors tend to shift their finances abroad in an effort to secure better returns, with minimal risks, in response to hostile business environment in the host country[324]. As such, the term capital flight reflects the tendency by investors to transfer funds to ideal portfolios of choice for increased profit making or fear of political risks in the source country. Therefore, capital flight has been perceived as a rationally motivated financial reaction to the development of investment inhibiting condition in the source country, gaining ethical, moral, and legal justification for its occurrence[325]. The source nation is viewed as responsible for causing the flows and addressing the continued leakages.

In response to continued capital flight and to promote industrialization, newly independent nations undertook market liberalization strategies and offered huge incentives to investors to attract and retain investments[326]. While there were incremental increases for finances channelled into developing nations, there was minimal change in the level and extent of capital outflows from developing countries. In Africa, such capital flows have even tended to increase despite state intervention to create investor friendly markets.

Hence, the continued outflow of large amounts of finances from developing nations no longer fits the model postulated under the portfolio of choice school of thought[327]. Despite the various high-yield low risk opportunities, investors continue to migrate their funds to developed countries. Under the portfolio choice theorem, such a scenario is

[324] Herkenrath, *Illicit Financial Flows*, (n 15).
[325] Herkenrath, *Illicit Financial Flows*, (n 15).
[326] Herkenrath, *Illicit Financial Flows*, (n 15).
[327] Herkenrath, *Illicit Financial Flows*, (n 15).

economically disadvantageous to them as developed nations have comparatively lower returns.[328]

The only logical postulation inferable is that the continued flow of capital is due to illicit motives. While some of the financial flows continue to be influenced by the portfolio choice motive, the large percentage of financial leakages from developing countries can only be accounted for by illicit motives.

Such an understanding has led to a change in perception and a shift in conceiving the responsibility for continued and elimination of such capital flows. Once the underlying presumptions of portfolio choice motivation have been debunked, a re-evaluation of the global financial systems indicates that developing countries have been responsible for continued flows of finances due to their "harmful" policies[329].

While capital flight was caused and addressed by developing nations, the rest of the capital flows was a two-way street with both developing and developed nations responsible for its continuance[330]. For developed nations, they have solicited, facilitated, transferred, and managed licit and illicit flows out of developing nations. Conversely, developing nations have failed to arrest such flows by insufficient, or non-existent, policies regarding the regulation of financial flows from the local economy.

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[328] Stephanie Blankenburg and Mushtaq Khan, 'Governance and Illicit Flows', *Draining Development?: Controlling Flows of Illicit Funds from Developing Countries* (World Bank Publications 2012).

[329] Reuter Peter, *Draining Development?: Controlling Flows of Illicit Funds from Developing Countries* (Weltbank ed, Illustrated, World Bank 2012).

[330] Herkenrath, *Illicit Financial Flows*, (n 15).

Conceptually, despite the change in perception amongst economists regarding the nature and context of financial flows from developing countries, the concept of IFF's continues to be mired by lack of conclusive terminological clarity. Insufficient clarity on terminology has inhibited state and non-state actors from developing effective policy options.[331] Amongst the financial flows from developing nations, a distinction has been made between the licit and illicit flows of finances by both the Organization for Economic Cooperation and Development (OECD), and the Global Financial Integrity (GFI)[332].

Under the OECD approach, the distinction between licit and illicit flows is primarily based on the association of illicit flows with illegal activities. To the OECD, illicit flows refer to cross-border capital transactions that either conceal or facilitate illegal activities. By equating illicit with illegal, OECD approach is conservative and opens its definition to two counterarguments. Firstly, it overlooks aggressive tax avoidance undertaken by multinationals to shift profits to nations with favourable corporate taxes, irrespective of the location where profits are derived[333]. However, such profit shifting is legit *per se*, as it exploits legal loopholes in the taxation regime and the regulatory ambiguities in domestic legal systems.

However, profit shifting accounts for a huge amount of loss in tax revenues for developing countries and dents the policy basis for taxation regimes. Secondly, the OECD approach fails to take into account the lack of global

[331] Herkenrath, *Illicit Financial Flows*, (n 15).
[332] Herkenrath, *Illicit Financial Flows*, (n 15).
[333] Herkenrath, *Illicit Financial Flows*, (n 15).

consensus and the under-developed nature of legal systems in developing countries to address financial flows[334]. It is flawed to assume that all nations have developed a legal system that encompasses societal and economic interests through societal consensus on what amounts to illicit financial flows.

An alternative approach proposed by Blakenburg and Khan, contends that IFF's are all financial flows that have a detrimental impact on the sustained economic growth in the country of origin, irrespective whether such impact is (in)directly evidenced[335]. Only if financial flows can be proven to have negatively affected on the country of origin development can it be regard as illicit[336]. This approach, nevertheless, is defective as it requires for the impact of financial flows to be determined before they can be categorized; a difficult proposition to empirically undertake to tabulate the effect of an indeterminate phenomena[337].

2.0 TRADE-BASED MONEY LAUNDERING

2.1 The Shift from 'Traditional' Money Laundering to Trade-Based Money Laundering

When one undertakes in a criminal enterprise, the monetary rewards play a significant role in determining the extent of their involvement and their willingness to perpetrate the offence. However, once the financial gains are realized, the offender is faced with the daunting task of enjoying the benefits while remain undetected by law

[334] Herkenrath, *Illicit Financial Flows*, (n 15).
[335] Blankenburg and Khan, *Governance and Illicit* Flows, (n 31).
[336] Blankenburg and Khan, *Governance and Illicit* Flows, (n 31).
[337] Herkenrath, *Illicit Financial Flows*, (n 15).

enforcement agencies. Such finances, moreover, must also be hidden away from the taxation authority, failure to which they may be susceptible to taxation or outright confiscation where the owner is unable to account for them.

Hence, the criminal has to contrive a means of converting their illicitly acquired proceeds into a form that hides the illicit source and integrate the proceeds into the financial system so as to benefit from it. Hence, that forms the genesis of "cleaning money" as illicitly acquired wealth is transformed and integrated into the financial system while evading the detection and monitoring system put in place by taxation agencies and law enforcement officials.

Money laundering refers to the process through which illicitly acquired wealth is masked to conceal its criminal origin from law enforcement agencies. According to the United Nations Convention against Transnational Organized Crime (UNTOC), money laundering involves three major distinctive stages; (I) the transfer of the illicitly acquired funds, (ii) attempt at concealing the source of the funds, and (iii) the acquisition or use of property with the knowledge it was illicitly funded.

Typically, money laundering involves three steps; placement, layering, and integration.[338] During placement, the perpetrator attempts to introduce the money into the financial services as deposits.[339] Subsequently, they try to induce multiple complex transactions that are meant to obscure the source and final destination of the money. Finally, the perpetrators attempt to convert the cash into

[338] Dennis Cox, *Handbook of Money Laundering,* (Chicago, John Wiley & Sons 2014), p. 15.
[339] Ibid

wealth by investing it in legitimate ventures. Irrespective of the varying degrees of complexity adopted to facilitate the three steps, criminals ultimately either physically transferred funds across states or used the financial systems to transfer them across states.

As states gained a modicum understanding of the impact of money laundering on the economy, attempts were made to limit the physical and digital transfer of money across national boundaries.[340] Under such an arrangement, law enforcement agencies are capable of combating money laundering by focusing on the integration of funds in the financial services. By paying attention to financial transactions and detecting suspicious activities, the police can spot and stop money laundering at the source.

Due to the scrutiny of physical and electronic deposit of cash into the financial system, criminals have turned into an innovative and intricate process of rendering their "dirty" cash clean through the international trading system.[341] By misstating the true value of exports vis-à-vis imports criminals are able to siphon off the difference and convert it into legitimate funds. According to the Financial Action Task Force, trade-based money laundering (TBML) refers to the process through which criminals disguise the proceeds of their activities and transfer the value of such proceeds through the international trade transactions to legitimize their origin.[342]

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[340] Ibid

[341] William M. Sullivan & Fabio Leonardi, *New Frontier for Bank Secrecy Act Prosecutions: Trade-Based Money Laundering*, Law360, July 14 2016.

[342] Financial Action Task force, 'Trade-Based Money Laundering' (Financial Action Task Force Secretariat 2016) <http://www.fatf-gafi.org/media/fatf/documents/reports/Trade%20Based%20Money%20Laundering.pdf> accessed 27 September 2016.

2.2 Vulnerabilities in the International Trade System

Presently, the international trade system remains vulnerable to continued multiple money laundering schemes due to its vast potential and low risk of detection. These include,[343]

I) The volume of trade flows at the international level remains very high making it difficult for enforcement agencies to isolate individual transactions and review them for compliance with the law. In developing countries, like Kenya, the customs officials are burdened with high caseload and tight deadlines that render them unable to fully examine the provided documentation to determine their authenticity. Officials are restricted to only ensuring custom duties are paid, without exploring the legality of the financing of the trade commodities.

II) In addition, due to their international nature, foreign exchange transactions involve multiple complex and overlapping transactions that customs officials are unable to comprehend and fully trace to the actual financiers of a given transaction. By adding layers of transactions, money launderers can evade detection by increasing the complexity of a transaction.[344]

III) Thirdly, most custom agencies have a limited legal mandate and resources to facilitate their

[343] Miller, Rena S.; Rosen, Liana W. & Jackson, James K. *Trade-Based Money Laundering: Overview and Policy Issues*. (Washington D.C. UNT Digital Library) .http://digital.library.unt.edu/ark:/67531/metadc855905/. Accessed September 27, 2016.
[344] Ibid

> ability to detect and act on illegal trade. With limited resources, the agencies are forced to prioritise their enforcement procedures, forcing them to concentrate on ensuring custom duties are paid, and commodities meet the local specifications before they are cleared from the importing port.[345]

2.3 Attractiveness of Trade-Based Money Laundering

While the primary motivation for undertaking trade-based money laundering is to conceal the illicit source of money while integrating the profits into the legitimate financial system, other factors have rendered TBML more attractive to criminals than traditional forms of money laundering.

Trade-Based Money Laundering is viewed as a low risk and high return venture due to the aforementioned vulnerabilities in the international trade systems that minimise the risk of detection while providing a legitimate cover for trafficked funds.

Moreover, where under-invoicing and under-shipment occurs, the trading parties can evade customs duties as they pay duty on the quoted value of commodities, further increasing their profit margin.[346] Unlike physical transfer of funds that generates no return by itself, systematic TBML provides room for structured profit marking from illicit funds.

In addition, TBML may be used to generate additional funds through claiming of tax incentives by the trading companies, which are set-up to abuse the existing export tax

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[345] Ibid

[346] 'Trade Misinvoicing « Global Financial Integrity' (*Global Financial Integrity*, 2016) <http://www.gfintegrity.org/issue/trade-misinvoicing/> accessed 27 September 2016.

incentives.[347] By over-invoicing and falsifying trade documents to depict high volume of exports, criminals not only succeed in laundering their proceeds but also get the state to "reward" them for the laundering.

TBML has also been used as a tool for evading capital controls from developing countries that have strict limitations on the transfer and exchange of foreign currencies.[348] By falsifying the value of their trade, money launderers are in a position to evade the capital controls requirements in their country.[349]

2.4 Techniques adopted in Trade-Based Money Laundering

Like conventional money laundering, trade-based money laundering process varies in complexity and scope depending on the capabilities of the parties involved and the size of funds being transmitted. However, regardless of the uniqueness of each operation trade-based money laundering tends to occur either through over-and-under-invoicing, over-and-under-shipment, or through the trade diversion of the description of goods

a) Mis-invoicing

Over-and-under-invoicing enables the contracting party to transfer value to the other party once the commodities are sold on the open market. In under-invoicing, the exporter contrives to transfer the difference in value between the invoiced price and the market price to the importer by

[347] Ibid
[348] Ibid
[349] Ibid

quoting a below market value price for the goods exported.[350]

A simple scheme of under-invoicing would occur where Mr. T and Mr. H had going concerns in Kenya and Tanzania respectively involved in import and export of cement. If Mr. T in Kenya claimed to export low-quality cement to Mr. H in Tanzania worth 500,000/= while the actual value of the cement exported was 800,000/=, Mr. H in Tanzania would gain 300,000/= once the goods were sold. For such an arrangement to be successful, both parties would have to collude to falsify trade-based documents.[351]

For over-invoicing, the importer attempts to transfer the difference in the market value and the quoted price to the exporter by quoting a high price for imported goods.[352] As per the example above, Mr. T in Kenya would claim to have sent a consignment of high-grade cement to Mr. H in Tanzania worth 800,000/=, while in fact there was no consignment sent (phantom consignment) or the value of the sent consignment would only be worth 500,00/=. The difference in value between the quoted price and the market value is transferred to Mr. T in Kenya. Whether in under or over-invoicing, the contracting parties collude to falsify a series of trade documents leading to loss of tax revenue in either the importing state or the exporting state.

b) Mis-shipment

Over-and-under shipment occurs in a similar manner to over-and-under-invoicing scheme as it involves the

[350] John A Cassara, *Trade-Based Money Laundering: The Next Frontier in International Money Laundering Enforcement* (New York; Wiley 2015) p. 13-35; 116-118.
[351] Ibid
[352] Ibid

contracting parties' collusion to transfer value amongst them by falsifying trade documents. However, unlike over-and-under-invoicing where the parties misstate the value of commodities being traded, under-and-over shipment occurs through the misstatement of the quantity of the commodities being traded. The difference between the stated quantity and the actual quantity being traded is the value being laundered. In extreme cases, there may be no actual shipments with the traders exchanging documents and the alleged monetary worth for phantom shipments.

c) Trade Diversion

Trade Diversion occurs where a company involved in international trade is induced to offer a discount to a new partner to unlock a foreign market.[353] The new partner company, however, pays for the discounted goods and diverts them to a third country where they are sold at the market value enabling the partner firm to declare the difference in value as profits, hence masking the illicit origin of the funds. Typically, company A in Kenya exports commodities to a company B in Egypt worth 2,000,000/= at a discount in a bid to penetrate the Egyptian market. Company B pays at the discounted price, say 1, 500, 00/=, but diverts the goods to Somalia rather than Egypt where they sell them at the actual market price.

d) Black Market Peso Exchange

However, money launderers usually tend to combine the various techniques to evade detection by law enforcement agencies through a two-tier system known as Black Market Peso Exchange (BMPE).[354] Successfully used by drug

[353] Cassara, *Trade-Based Money Laundering,* p. 112.
[354] Cassara, *Trade-Based Money Laundering,* p. 38-42.

traffickers in Latin America, Black Market Peso Exchange involves suing illegally acquired funds to purchase commodities that are exported into the trafficker's home nation for sale in the legal market, hence masking the illicit origin of the funds.[355]

2.5 Red Flags Indicative of Trade-Based Money Laundering

Unlike other forms of money laundering where the transactions are primarily currency-based, TBML has unique challenges since financial institutions and enforcement agencies access is limited to the trade documents, not the goods themselves. Hence, to determine if a violation has occurred, enforcement agencies are forced to assess the documentation provided by the complicit parties. However, according to the FATF, there are specific indicators that may point at TBML. These indicators include,[356]

a) The use of letters of credit in the transfer of funds between countries or regions inconsistent with the customer's prior business activity. By issuing a letter of credit, the parties attempt to hide the consignment details from scrutiny while according legitimacy to the transaction.
b) Where a client requests for a method of payment that is inconsistent with the discernible risks of the trade transaction, it may be an attempt by the parties at "insuring" against a phantom trade.

[355] Financial Action Task Force, *Trade Based Money Laundering*, June 23, 2006, p. 8
[356] Cassara, *Trade-Based Money Laundering,* p. 33-42.

c) A transaction that involves the transfer of funds to or from a third party with no apparent connection to the present transaction. Additionally, any transfer of funds to firms that were not reflected in the transactions documentation should be accorded further investigation.
d) Uncommon deposits aimed at keeping transactions below the reporting threshold may be indicative of TBML.
e) Carousel transactions, where the trading parties are repeatedly involved in the repeated import and export of one high-value commodity.
f) Double invoicing and other forms of falsified reporting.
g) Repeated transhipment of a commodity through high-risk jurisdictions.[357]

3.0 Conclusion

Only by understanding the underlying theoretical and economic motives for illicit financial flows from developing countries can affected states undertake targeted measures that fully addresses both the causes and the motivations for illicit transfer of funds form their jurisdiction. This paper is an attempt at appreciating the intricate and fluid nature of illicit financial flows, specifically TBML as a nascent form of money laundering.

[357] Asia/Pacific Group on Money Laundering, Typology Report on Trade Based Money Laundering, 20th July 2012

The International Obligations on Non-Refoulment Principle Vis-à-vis National Security: Closure of Dadaab Camp.

Joseph M. Manyara & Stephen N. Mungai***[358]

Abstract

The Universal Declaration of Human Rights provides that all human beings shall be free from discrimination and are equal in dignity. The provision covers the vast number of refugees that exist in the world today due to varied factors among them being civil strife and drought. In May 2016, the government of Kenya deliberated and decided to deport refugees from the two main camps: Kakuma and Dadaab Refugee Camps to their home countries. This paper shall look into the legal standing of the government directive of deporting all refugees in Dadaab in line with the Refugees Act. We shall dissect the government directive Vis a Vis the existing legal framework governing refugees.

The paper shall conclude by giving recommendations on how the world shall handle the refugee crisis. Probably, the existing legal and institutional framework for refugees is insufficient to address the problem of refugees in Kenya and the world over. We shall also discuss the doctrine of equity with regards to Europe and the US imposing sanctions on countries that fail to offer asylum for refugees.

Introduction

It will be crucial if we start by defining who a refugee is and give a brief history of Dadaab Camp before delving on

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the issue of whether time is ripe for its closure. We will adopt this definition for the purpose of this paper.

A refugee is one, who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who not having a nationality and being outside the country of his former habitual residence, is unable or owing to such fear is unwilling to return to it.[359]

Current statistics show that, major refugee populations include Palestinians (4.8 million), Afghans (2.9 million), Iraqis (1.8 million), Somalis (700,000), Congolese (456,000), Burmese (407,000), Colombians (390,000), and Sudanese (370,000)[360] all of whom have sought asylum across their motherland borders. Statistics show that Dadaab camp is currently hosting 343,043 refugees out of which 326,611, which translates to 95.21%, are of Somali origin[361].

Dadaab camp stands as the largest camp in the world and is comprised of four settlements. The camp was established in the early 1990's and annually, the number of asylum seekers has been on the rise. As earlier indicated, the highest population of refugees in Dadaab is of Somali origin who fled the endless civil war in their country in the early 1990's.

The emergence of radical religious groups have aggravated the civil wars. Al Shabaab, which is an affiliate

[359] Article 1(2) of 1967 Protocol relating to the status of Refugees.
[360] UN, 'United Nations Global Issues - Refugees' http://www.un.org/en/globalissues/briefingpapers/refugees/ accessed 13 July 2016
[361] UN Refugee Agency Statistics as 31, May 2016.

of infamous radical Al-Qaeda militia, is a jihadist group whose main agenda is mass and merciless execution. The turmoil and political intolerance forced many to flee their motherland and seek solace somewhere else. After its immediate establishment, the camp was managed by Cooperative for Assistance and Relief Everywhere (CARE), an international humanitarian organization which provides emergency relief. Thereafter, German Technical Cooperation (GTZ) stepped in and played a vital role in the provision of health care facilities. In addition, it ensured that the camp sanitation is in accordance with the highest attainable health standards. Other relief organizations, for instances, Red Cross offers services that try to mitigate the harsh living conditions in the camps. As at now, the Kenya Government, International Agencies, and other relief agencies play the forefront role in regulating, controlling and offering support to the refugees in the camp.

The Legal Framework and its nexus to the Dadaab Refugee Camp

The state responsibility for admitting asylum seekers in its borders is informed by the need for humanitarian assistance, the principle of non-refoulment; the doctrine of human dignity et al. Humanitarian assistance might not be the crux imposition of that role but can be highlighted in a nutshell. Humanitarians' intervention informs the need for man to use their rational perspective by performing merciful actions that are designed to alleviate sufferings, beneficence principle and the need to protect person's dignity. Informed by that drive, there is the need to offer assistance when calamities and crisis arise.

There are several International Conventions that safeguards the plight of the refugees. Kenya has made attributable progress by legislation on the Refugees via enactment of the Refugee Act, 2006. The Act makes provisions on the entitlement and privileges of asylum seekers in Kenya. The doctrine of **non-refoulment** has been anchored on International Instrument and domestic legal framework**.**

The principle is the cornerstone of the protection of refugees under international law. It bars the states from returning (refouling) a refugee to the territories where their lives are under threat or there a possibility of limitation on their freedoms and rights. The only instance when refoulment should be exercisable is when the refugees pose threat to national security of the host nation or it is a means of public order. Even on, such circumstances, the due process of law must be followed and he/she ought to be given reasonable time before repatriation takes place[362]

The definition of refoulment is also prohibited explicitly or by implication in other various conventions[363][364]. Non-

[362] Article 32,1951 Convention Relating to the Status of Refugees

[363] Refoulment is also prohibited explicitly or through interpretation by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), the Fourth Geneva Convention of 1949 (Art. 45, para. 4), the International Covenant on Civil and Political Rights (Article 7), the Declaration on the Protection of All Persons from Enforced Disappearance (Article 8), and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 5).

[364] In addition, refoulment is prohibited explicitly or through interpretation in a number of regional human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3), the American Convention on Human Rights (Article 22), the OAU Refugee Convention (Article II),

Refoulement is part of the customary international law[365]. In effect, even states that are not party to the relevant conventions are bound by the principle[366]. The European Union Court of Human Rights offers a broad definition of Article 3 of the Geneva Convention against Torture to include the principle of non-refoulment[367]. Stayanova notes that even though international law grants asylum seekers the right to leave their countries, it does not grant them an express right to enter other countries[368]. In addition, Goodwin Gill argues that the right to asylum seeking is not granted expressly[369].

Such an argument seems to be held by the Advisory Opinion of UNHCR on Advisory Opinion dealing with the Extraterritorial Application of Non-refoulment Obligations as provided under the Convention relating to the Status of Refugees, 1951 and the 1967 Protocol[370]. Paragraph 8 of the advisory opinion intimates that despite the fact that such

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and the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World (Article 2)

[365] This argument is enhanced by the argument of UNHCR advisory opinion at paragraph 14 and 15. The advisory opinion is found at http://www.unhcr.org/4d9486929.pdf

[366] http://www.ipu.org/pdf/publications/refugee_en.pdf

[367] Stoyanova V, 'The Principle Of Non-Refoulment And The Right Of Asylum-Seekers To Enter State Territory' (2009) <http://www.americanstudents.us/IJHRL3/Articles/Stoyanova.pdf> accessed 13 July 2016

[368] Ibid

[369] Guy Goodwin Gill, The Refugee In International Law 202 (Clarendon, 1996).

[370] Advisory Opinion on the Extraterritorial Application of Non-Refoulment Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol *' (2007) http://www.unhcr.org/4d9486929.pdf accessed 13 July 2016

persons do have a right to seek asylum in that particular state, the state may not expatriate them to a state where they may face persecution of physical integrity[371]. It remains debatable whether Article 33 of the Refugee Convention has limits state sovereignty and whether it forces states to host refugees contrary to their interests.

Other conventions that support the principle of non-refoulment include the Convention on Civil and Political Rights (1966) which prohibits extradition of a person to a territory where there is reasonable belief that there is a risk of irreparable incident. Harm includes; threat to life as provided in article 6 of the convention as well freedom from torture as provided in Article 7 of the same 1966 Convention.

National Legal framework on Refugees

The Constitution of Kenya provides that each individual has inherent dignity which must be get legal protection[372].The word person legally defined means a human being[373]. This impliedly has an effect of extending towards the protection of the dignity of the refugee by the virtue that they are human beings. Article 2(3) of the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) of which Kenya is Party to prohibit the expulsion, or return to the frontiers where the refugee's life would be threatened. Article 2(4) of the same Convention also provides mechanisms under which a

[371] Ibid
[372] Article 28,The Constitution of Kenya,2010
[373] Black's Law Dictionary.

country is unable to provide asylum for refugees to seek help from other African countries through the African Union.

Article 2(6) provides that such refugees should be settled at a reasonable distance from the frontier of their country of origin for the security purposes. Article 5 provides that no refugee shall be repatriated against their will. Article 6 provides that host states of refugees shall provide the refugees with travel documents. Refoulment is also barred by several international convention (In addition, refoulment have been prohibited explicitly or through interpretation of several regional human rights instruments, for instance, the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3), the American Convention on Human Rights (Article 22), the OAU Refugee Convention (Article II), and the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World (Article 2))

The commissioner for refugees may withdraw refugee status if he believes that such a person is a threat to national security[374]. Section 21 permits the Minister, in pursuit of the due process of the law to expel members of the family of a refugee if he believes that they are a threat to national security or public order. Section 47 of Refugees (Reception, Registration, and Adjudication) Regulations, 2009 also permits the minister to issue an expulsion order in accordance with section 21 of the Refugees Act.

The same principle of non-refoulment of refugees was upheld in *Petition No.628 of 2014*, Milimani Law Courts[375].

[374] Section 19

[375] Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR

In this case, the Security Law Amendment Act was declared unconstitutional in section 48 where it purported to insert section 16A to the Refugees Act. This would have limited the number of refugees in Kenya to one hundred and fifty thousand subject to variance by Parliament. In effect, the number of refugees in the country would have been forcefully repatriated to conform to the present laws.

International obligations

Article 14 of the Universal Declaration of Human Rights backs The Convention Relating to the Status of Refugees. This provision gives people the right to seek asylum in another country when they face persecution in the country of nationality or habitual places of residence. However, it should not be invoked in instances where one is in contradiction of the principles of United Nations. The Convention lays down principles of *non-refoulment* and leaves no reservations to it.

Article 25 provides for administrative assistance from the host country. This includes setting up of administrative institutions that aid in the resettlement, registration and ensuring the welfare of refugees in the host countries.

In Kenya, the Department of Refugees, the Commissioner for Refugees and other NGOs like the Refugee Consortium of Kenya purport to perform such functions. Of core importance is Article 32 of the convention that prohibits expulsion of refugees from the host countries save from two reservations: Public order and national security. Subsection 2 of the same section gives the refugee the opportunity to provide evidence to clear themselves from the accusation to the competent authority (Department of refugees).

Subsection 3 provides the contracting state shall provide reasonable time to the refugees to seek admission in another country[376].

Real and perceived challenges

Despite the swift response of International Community to the refugee crisis in the last century, the last few decades have seen most states take a step back in the admission of refugees.[377] Some of the reasons why generous countries in the past have closed doors of admitting refugees include the fact that they may aid people smuggling, uncontrolled immigration as well as jeopardize national security.

Asylum countries across the world have moved swiftly to harmonize their refugee admission with the economic times given the fact there is no even sharing of the menace across the international community.[378] It is true that most countries of the first asylum end up bearing the cost of sustaining the refugees even with strained budgets. The UNHCR itself has a yawning budget on the welfare of refugee and has, on numerous occasions,[379] been forced to abandon some programs for providing humanitarian aid to refugees. Kate Jastram et al. argue that Parliament has a critical role in

[376] The same section is bolstered by section 33 which also prohibits refoulment. However, the section gives room for refoulment to persons who are considered a danger to national security. However, for one to be a danger to national security, he/she must be convicted by a final judgement by a court of law of a serious crime.

[377] Feller E and others, 'REFUGEE PROTECTION: A Guide to International Refugee Law' http://www.ipu.org/pdf/publications/refugee_en.pdf accessed 13 July 2016

[378] Ibid

[379] Ibid

ensuring the protection and dignified treatment of the refugees[380].

At the Verge of Closure: A Critical Analysis of the Move

Early 2016, the Government of Kenya communicated its plans to close the Dadaab Refugee camp that has existed for over the last two countries. The Government through the Ministry of Interior Coordination and Foreign Affairs revealed that matters of national security prompted its move to repatriate and close door for refugee admission. "As a country we have been glad to help our neighbors and all those in need sometimes at the expense of our security[381]." "But there comes moment when we must give utmost consideration to the security consideration of our people. Ladies and Gentlemen, that time, is now." The remarks led to decry by aid agencies and the United Nations and sparked outrage from international Organizations

Kenya had faced a series of terrorist of attacks that had left scores of injuries: psychological, physical and mental and a huge number succumbing. The most infamous are Bombings of United Status Embassy, 1998, Bombing of Kikambala Hotel,Mombasa attacks in 2002,Westgate Mall Siege,2013), Mpeketoni gun shots (2014),Garissa University attack (April 2015),Thika Road Bus Grenade attack, Gikomba Market Grenade attack and the continued attacks in Mandera Region.

The Government of Kenya have alleged that all these attacks were executed by Al Shabaab militia. More often,

[380] ibid

[381] Remarks attributable to the Ministry of Interior over its intention to close Dadaab Camp, on the grounds of national security.

than not the Ministry for interior have termed Dadaab camp as harbors for these terrorist groups. In their statement, they allege that Dadaab camp, which hosts Somali Refugees (95.2%) is a breeding ground for the planning of these heinous acts. The Camp has also been blamed for the proliferation of illegal weapons in Kenya. The Interior Ministry once made these sentiments "Our intelligence has shown us that some of the major terror attacks in this country have been planned at the Dadaab camp. Terrorists take advantage of the big number of refugees at the camp to do their planning unnoticed. Our primary responsibility is securing the lives of Kenyans and that we will do at any cost,[382]"

The Camp has also been termed as a financial burden and environmental treat since it surpasses the number of refugee it ought to accommodate. Kenya has found itself constrained in providing for the necessities of the refugee. On regular occasions, it has called for international bodies' intervention citing the need to apply the principle of burden sharing. Ambassador Amina Mohammed has indicated that repatriation time is ripe as the matter involves balancing between national security interests and its international responsibilities. She opines that National interest prevails over the international obligations borne by any state.

There have been calls from several international agencies and local non-government entities urging the Government to rethink on its intention. They stress that the closure has a far-reaching effect which stretches even to the corpus of peace and stability in the region. Human Rights Agencies have

[382] Remarks by Joseph Nkaisssery,Cabinet Secretary:Ministry of Interior and Coordination.

slapped Kenya's move as a violation of international obligation attached by the principle of non-refoulment as per Article 33 of 1951 Refugee Convention.

Human Rights Watch and Amnesty International, have termed the action as betrayal to the consensus[383] reached between United Nations High Commissioner for Refugee and the Somali Government for voluntary, dignified and humane repatriation procedure that lies within Article 32(2) of 1951 Convention on Refugee[384]

Many of the asylum seekers have expressed their fears over the repatriation process. They are appealing to Kenyan Government to back-pedal its plan for forceful repatriation. To date, Somali continue to witness political upheavals and social instability. The political instability which forced them out of their country is still prevalent. On several, cases, for instance, Africa Union Mission in Somalia (AMISOM) troops have engaged in live bullet battles with the militia group which have led to the bloody killing of scores of, Kenya Defense Forces (KDF)troupes who are trying to pacify the region.[385]

What of unarmed civilian? No conclusive report has been tabled showcasing the stability of Somali Government.

[383] Tripartite Agreement between Kenya, Somali and UNHCR in which all parties committed themselves to the principle of voluntary return.
[384] The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
[385] Aljazeera Reports indicated that IN Al-Ade an estimate of 2OO soldiers were killed by Al Shabaab militia. There have also been other series of killings.

Article 33 of 1951 Refugee Convention provides that the repatriation should not in any manner expose the refugee to frontiers of territories where there is imminent danger of threat of life or freedoms. When interviewed, most refugees expressed their fears over the continuing turbulences and political profiling. Section 18 of the Refugee Act, Kenya also prohibits the expatriation of refugees if it would hinder their physical integrity, life or even occupation. Such a position is also held by the Refugee Bill 2011.[386]

The Closure of the window for Refugee admission and registration is another initiative by the Government to tame refugee entrance in Kenya. Impliedly, its central target is the refugees of Somali origin who have and/or are in most cases, if not all, perceived as the possible terrorist and a deterrence of national security.

On several instances they have been rounded up and forcefully caged in Lorries and deported back to their home country. Article 8 of the 1951 Refugee Convention bars discriminative treatment for asylum seekers based on their origin. There is an apparent indication that putting measures that targets Somali origin refugee is discriminative, unmerited and unwarranted and only meant to amplify the issue. So far, there is no substantial or material evidence to proof that Somali refugees are synonymous to Terrorism activities.

Issue of National Security and public order as provided for in Article 32 of 1951 Refugee Convention has been the argument championed by the Government in support of its repatriation move. In an attempt to curtail the insurgence of Constant acts of terrorism, Parliament amended its national

[386] Section 15

security law by passing National Security Amendment Bill whose later on some sections were declared unconstitutional.[387] In its ruling, the High Court held the section that averted non-refoulment as unconstitutional; which held inter alia;

''Section 48 of the Security Laws (Amendment) Act which introduced Section 18A to the Refugee Act, 2006 is hereby declared unconstitutional for violating the principle of non-refoulment as recognized under the 1951 United Nations Convention on the Status of Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.[388]''

Notwithstanding this,[389]With regards to Kenya, the provisions of section 33(2) of the Refugee Convention as interpreted by UNHCR in its advisory opinion require the government to provide substantive evidence through final judgments from a competent court of the fact the refugees in question are a threat to national security.

The Government of Kenya is mandated to explore alternative in beefing its national security since there seems no apparent evidence on how Dadaab Camp is a threat to national security. It needs be noted that nothing bars the contracting state from enacting measures internally that they deem necessary from public order and national security. States may make reservations as to the articles of the

[387] Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR
[388] Petition No.628 of 2014,Coalition for Reform and Democracy(CORD) & 2 other vs. Republic of Kenya & 8others,
[389] Ibid

conventions save from among others, Article 33 discussed herein.[390]

Such measures should include spotting and deal with individual on their criminal records but not collectively simply by stereotyping on the basis of refugee status. The fact that the convention does not apply to individuals who have committed nonpolitical crimes and persons who are a serious threat to national security offers a loophole for the Kenyan government to expatriate some refugees believed to be members of Al-Shabaab

The principle of non-refoulment is non-derogatory and extends to all circumstances including instances where a state is fighting terrorism.[391]Therefore, the principle negates Kenya's argument of closing the Dadaab camp for reasons of averting recurrent terrorism incidences. What remains now is, whether this would have been a valid move on International obligations in light to the ICJ ruling in *Nigeria v Cameroon*[392] where the court held that national law cannot be used to subvert obligations under the international law.

In conclusion, the intended closure of Dadaab camp can be termed as a move contrary to the International obligation, which subverts the non-refoulment principle. It will aggravate the situation and inflict more suffering to the Refugee. In contrast, it will not be the best therapeutic

[390] Article 42(1) of the convention

[391] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulment Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol *' (2007) http://www.unhcr.org/4d9486929.pdf accessed 13 July 2016 at para 20

[392] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)

measures of the terrorism menace in Kenya. The Kenyan state ought to embrace its international obligation and when the time will be ripe; undoubtedly, justifiable repatriation will be unopposed. Security Bodies in Kenya should, therefore beef put stringent measures in Kenya to curb insecurity as expelling refugee is just a scapegoat of Security bodies' laxity.

However, the doctrine of repatriation is acceptable under the international laws. If well administered, the repatriation and closure of Dadaab Refugee Camp could toe the principles, spirit and letter of the law. The repatriation strategy is the only problem. If the government sets proper and realistic timelines like two or three years, the closure could be feasible and free of human rights violations.

Also, parliament should restructure security the management of refugees in Kenya by creating an expert and professional team to manage the refugees in Kenya. This team ought to engage with the National Intelligence Service as well as the National Police Service in enhancing security for its citizens and refugees. Otherwise, the prime responsibility for every government is ensuring security for its citizens.

A Critical Analysis of *Martin Charo Vs Republic* ad Its Legal Implications.

Mercy M. Munyao & Diana M. Ndung'u[393]

Abstract

From denial to denouncement, the swirling legal and economic debate within the academy on money laundering tends to conceptualize the phenomena from an isolated perch, with money laundering viewed as a distinct and separate entity from other forms of illicit financial flows. In developing countries with constrained resources calling for prudence in resource allocation, state reaction to the permissiveness of money laundering has been largely restricted to legislative enactment criminalizing money-laundering offences while requiring greater transparency in the financial sector. The subjective reactive approach of legislating in developed countries has consequently resulted in legislations tailored to curb specific elements of money laundering creating legal lacunas and safe havens for criminals to exist. This paper attempts to provide a greater understanding of a nascent form of money laundering in two parts. In the Part One, the paper explores the conceptual and theoretical understanding of illicit financial flows, which is essential in appreciating the evolution and fast pace of development of illicit financial, flows. In Part Two the paper focuses on Trade-Based Money Laundering as a nascent form of money laundering, and in extension the largest form of illicit financial flow from developing countries.

Introduction

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Martin Charo vs. Republic was an appeal from the conviction and sentencing in criminal case no 16 of 2012 at Kilifi. The facts were that appellant [Martin Charo] was charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act. He on diverse dates between 2nd December 2011 and 3rd January 2012 at an area in Kilifi County, within Coast Province, intentionally and unlawfully caused penetration of his genital organ namely into the genital organ of E N a girl of 13 years. The court freed the appellant on the basis that the complainant had continuously and willingly enjoyed the sexual relations and thus that could not be termed as defilement.

The legal framework for defilement in Kenya

Defilement is governed by the Sexual Offences Act 2006. It is an act in which a person causes penetration with a child. A child, in this context, is any person below the age of 18 years[394]. On the other hand, *penetration is the partial or complete insertion of the genital organs of a person into the genital organs of another person*[395].

The key elements of proving or disproving a defilement case are age and penetration. Penalties for defilement vary depending on the age of a child. For those below 11 years, the penalty is a mandatory life sentence, for children aged 12- 15 years the minimum sentence is 20 years and for ages between 16- 18 years the minimum is 15 years[396]. The Children's Act also requires the consideration of the best interests of the child at all times in children matters.

[394] Section 2 Children Act 2001
[395] Section 2 Sexual Offences Act 2006
[396] Section 8 [2][3][4] Sexual Offences Act 2006

Kenya has ratified international treaties and conventions on the protection of the child. They include but not limited to; *Convention on the Rights of the Child, African Charter on the rights of the Child and the Convention on the Elimination of all Forms of Discrimination Against Women*.

In the current practice, consent is deemed immaterial. Accused persons cannot, therefore, rely on it as a defence. Section 43 of the Sexual Offences Act reiterates that *children are not capable of appreciating the nature of sexual acts hence incapable of giving consent*. Section 8 of the Sexual Offences Act was enacted to protect minors from coercive and involuntary sexual activities[397]. The assumption behind it was that only individuals who exceeded the age of consent could make informed decisions about engaging in sexual behaviour[398].

However, the contrary is increasingly happening.[399]. The courts have expressed the same in their decisions. In *Bonu vs. Republic*[400].The appellant alleged that he had a love affair with the complainant, and she was a willing and an active participant in sexual relations. The court, however, held that minors had no capacity to give informed consent in sex matters irrespective of their desire to do so.

Defilement incidents in the country are on the rise. Young girls are the most vulnerable. Statistics show that almost 1 in every 3 Kenyan girls below 18 years experiences sexual

[397]Winifred Kamau, *"Legal Treatment Of Consent In Sexual Offences In Kenya*" (2013) 5-10
[398]Brittany Smitha and Glen A. Kercher, 'Adolescent Sexual Behavior and the Law' (2011) 3-6
[399]Ibid
[400][2010] eKLR.

violence[401]. Most are defiled by people close to them. Such perpetrators include; family members, community members, the police and even teachers[402]. A recent report by the National Crime Research Centre indicated that Mombasa County had the highest defilement cases at 60%[403].

As mentioned above, the courts have been aggressive in developing rich jurisprudence on the age of consent. However, a close look at the Kenyan adversarial system reveals that in most defilement cases, the prosecution fails to discharge the burden of proof beyond reasonable doubt[404]. This failure is the common reason why most defilers go free because there is no sufficient evidence to convict them. The Martin Charo vs. Republic judgment is unique and raises critical issues which merit the following analysis.

Can children consent to sex?

In his judgment, the Honourable Judge Chitembwe tries to capture and illustrate how the Kenyan society has changed. With minors engaging in sex at a very young age, the circumstances surrounding the issue of defilement are also changing[405]. According to Judge Chitembwe, a child who willingly goes into men houses for sex should be seen as

[401] Violence against Children in Kenya: Findings from a 2010 National Survey. Summary Report on the Prevalence of Sexual, Physical, and Emotional Violence, Context of Sexual Violence, and Health and Behavioral Consequences of Violence Experienced in Childhood. Nairobi, Kenya

[402] Fiona Sampson and Sasha Hart, '160 girls' making legal history: *overview of the development and implementation of a strategic equality initiative to achieve legal protection from defilement for all girls in Kenya*.'

[403] Nancy Agutu, '*Kenya: Mombasa leads in defilement and rape cases, Nyeri lowest- survey' the star* [10th April 2015]

[404] Ibid [9]

[405]Civil Appeal No. 32 of 2015 Martin Charo vs. Republic

engaging in the behaviour of an adult[406]. In such instances, the conviction of an accused should not be based on the strict liability rules. Rather, the conviction should be based on the actual circumstances of the case and proof that the complainant was indeed defiled[407].

In this case, the judgment issued by the Honourable Judge is saddening. He strongly emphasizes that a child who engages in sex should be treated as an adult who knows what she is doing[408]. Consequently, the statutory protection guaranteed for lack of consent is discounted. Despite the changing societal values, the issue of consent should not be disregarded. In this context, the term consent refers to giving permission for something. Under Section 42 of the Sexual Offences Act 2006, a person consents if he or she agrees by choice, and has the freedom and *capacity* to make that choice. In both definitions, the question of capacity is a glaring fact. In law, capacity is assumed to denote age and mental capacity[409]. Irrespective of the circumstances of a case, the relevant matter to be considered is whether the complainant can make a choice on whether or not to engage in a sexual activity[410].

In *Roper vs. Simmons*, the US Supreme Court stated that courts should not assume full capacity where science shows that adolescents are immature and still developing capacity[411]. Since capacity deals with perception, feelings, and reactions, scientific evidence provides the best

[406]Ibid
[407]Ibid
[408]Ibid
[409]Ibid
[410]Ibid
[411][12005] 543 U.S 551

foundation for determining once ability to formulate consent[412]. Neuroscientific evidence has revealed that the frontal cortex, the area of sober second thought, response inhibition, emotional regulation, planning, and organization, is underdeveloped in adolescents[413]. As a result of this underdevelopment, teenagers become impulsive and exercise imprudent judgment.

In addition to the changes in the brain, adolescents experience cognitive changes. The issue of cognitive change in human development deals with advanced reasoning and thinking skills, an aspect that is evidently not developed in adolescents[414].

Therefore, adolescents become "risk-takers." They believe that they are invincible thus causing them to engage in risky behaviours such as unprotected sex, drunk driving, and smoking[415]. They believe that these negative influences cannot affect them. They also experience aggregated emotions that cause them to think that others have not felt the way they do[416]. As such, they conclude that no one can understand them.

This attitude is evident in the Martin Charo case. The complainant dodges her brothers and sneaks into the home of the accused to have sex[417]. In fact, she goes back home and tells her father that she was indeed at the home of the

[412]Ibid
[413]Pbs.org, 'Work In Progress - Anatomy Of A Teen Brain ' Available at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/anatomy.html [Accessed 07/07/2016]> accessed 7 July 2016
[414]Jennifer Ann, '"Developing Capacity": Adolescent "Consent" at Work, at Law, and in the Sciences of the Mind' (2006) 10:1UC Davis Journal of Juvenile Law & Policy 12-60
[415]Ibid
[416]Ibid
[417]Ann (n 21)

accused having sex[418]. Sadly, instead of seeing these occasions as acts of defiance in an adolescent, the Honourable Judge pronounces this behaviour as one of an adult. In fact, he argues that the court cannot conclude that the accused defiled the Complainant since it was her brother who raised the initial complaint in her stead[419].

It is fallacious to argue that minors, in the current society, lack the ability to appreciate the consequences of having sex. Some have extensive knowledge of contraceptives and the effects of unprotected sex including unwanted pregnancies and the risks of contracting HIV/AIDS and STDs. But it leaves one to wonder whether they truly appreciate the nature and extent of the probable consequences. The law exists to protect such uncertainties, and although the society is changing, our legal systems should appreciate the nature of adolescent development. The law should be aligned to reflect these changes to offer better protection for our children who are still developing capacity.

Comparative Analysis

In many states, the consenting age is set at 15 or 16 years. In *Stanford vs. Kentucky*, the state of Alabama established 16 as the age in which an individual could have criminal responsibility[420]. Spain has recently increased the age of consent from 13 to 16[421]. Other countries such as Germany, U.K, Hungary, Belgium, and Switzerland among other states

[418]Ibid
[419]Ibid
[420][1898] 492 U.S 361
[421] BBC, 'Spain raises marrying age from 14 to 16' (23 July 2015) <http://www.bbc.com/news/world-europe-33636920> accessed 7 July 2016

provide that a girl or boy can marry at the age of 16 with parental consent[422]. In South Africa, Estonia, Slovakia, and Denmark the marriageable age is 15 years with parental consent[423].

In Kenya, the moral standard of sexual relations is set at 18. Living in the 21st Century, it would be unwise to ignore that societal values are changing. Our system can no longer rely on the morality of sex as the foundation of legal protection. Looking at scientific evidence, a 16-year-old can build flexible relations with abstract concepts such as responsibility which is an indication of maturity[424].

Therefore, owing to societal changes, it would be prudent to amend the Kenyan law and have the age of consent set at sixteen years. These amendments will be an acknowledgment that our teenagers are not being "defiled" but rather engaging in sex voluntarily. Further, a person who engages in sexual relations with a child under the age of 15, regardless of the prevailing circumstances, ought to be convicted of defilement as a strict liability offence. The Honourable Judge Chitembwe cannot argue that the complainant's actions are equivalent to an adult's behaviour. Surely, the girl was ten years when the relations commenced.

Effects of the judgment to the current jurisprudence

The decision is likely to impact negatively on the rights of the child. To a large extent, this will lead to numerous instances of defilement in the country. For example, Malindi

[422]Jessica Best, 'What is the age of consent around the world? From Angola at 12 to Bahrain at 21' (mirror 2013) <http://www.mirror.co.uk/news/uk-news/what-age-consent-around-world-2802173> accessed 7 July 2016
[423]Ibid
[424]Best (n 29)

is a town known for sex tourism and child pornography. BBC News reported on 15th may 2014 that child prostitution was very rampant in Malindi[425]. The number of children in the area who drop out of school to practice prostitution and sex tourism is on the rise. The adoption of this judgment would mean that adults will be engaging in sex with children and using consent as a defence.

In other words, reporting of defilement cases will only happen when the deal goes sour. The law's intention was to forestall such activities happening to children. The judgment does not seek to promote the spirit of the law and is instead exposing children to more risk. Adolescents are not in a position to give fully informed consent[426]. Therefore making a presumption that a minor who continuously engages in sex is behaving like an adult is simply wrong and misplaced.

Conclusion

In the upshot, it is safe to argue that under the current Kenyan law, consent is not considered as an element in defilement cases. This measure was meant to bar defilement cases in the country. However, the contrary is happening, and more children are getting into consensual sexual activity at a younger age. In a bid to reflect these social changes, many countries such as Germany, Belgium, and United Kingdom have reviewed their age of consent setting it at sixteen. It is, therefore, prudent for the Kenyan legislators to borrow from these countries and align the law with the reality. In essence, for the judgment to be deemed acceptable

[425] *BBC,'* Kenya's hidden sex tourism in Malindi' Available at <http://www.bbc.com/news/world-africa-27427630 > accessed 10 July 2016
[426] Ibid

there is need to first amend the age of consent in Kenya to a suitable one as the society dictates. As it stands, the decision puts the rights of Kenyan children at stake and particularly those children in places with high cases of defilement.

IN PARTNERSHIP WITH