



**PLACING THE KENYAN LAW ON BENEFIT-SHARING WITHIN ITS PROPER
SOCIAL, ECONOMIC AND POLITICAL CONTEXT: THE CASE STUDY OF
TURKANA OIL RESOURCES**

**BY
ODHIAMBO FELIX OTIENO
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**SUPERVISOR:
DR JANE DWASI**

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DECLARATION

I declare that this Dissertation is my original work and that the same has not been presented or is not currently being presented for a degree in any other University.

.....

Odhiambo Felix Otieno

.....

Date

This Dissertation has been submitted for examination with my approval as University of Nairobi Dissertation Supervisor,

.....

Dr. Jane Dwasi

Department of Public Law, University of Nairobi.

.....

Date

DEDICATION

This work is dedicated to;

The souls of my sweet Mum, Grace Mary Atieno, Grandma Prisca Oyieko, Paul and Regina Nadeau. May your dear souls find eternal rest in God's Heavenly abode. Amen.

And

My dear wife Lilian, and our lovely children Lance, Trevor and the yet to be born daughter, Graca Ethel. Your unconditional love, support and presence in my life has been a true inspiration.

And

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TABLE OF CONTENTS

Title Page.....	i
Declaration	ii
Dedication.....	iii
Acknowledgements.....	iv
Table of Contents	vii
List of Cases.....	xii
List of Municipal Laws and Conventions Referred to	xiii
Part A Conventions.....	xiii
Part B Kenyan Law.....	xiii
Part C Nigerian Law.....	xiii
Part D Norwegian Law.....	xiii
Bills Referred To.....	xiii
List of Abbreviations	xv
Thought-Provoking Reflection	xvii
CHAPTER ONE	1
1.0 Proposal.....	1
1.1. Introduction	1
1.2. Background and Statement of the Problem.....	3
1.3. Objectives of the Study.....	4
1.4. Scope of the Work	5
1.5. Research Question	5
1.6. Hypothesis	6
1.7. Significance of the Study	6
1.8. Theoretical Framework	9
1.8.1 Social Contract Theory	10
1.9 Literature Review	13
1.10 Research Methodology	16
1.11 Limitations of the Study	18
1.12 Description of Chapters	19
	vii

1.12.1 Chapter One	19
1.12.2 Chapter Two	19
1.12.3 Chapter Three	19
1.12.4 Chapter Four	20
1.13 Proposed Research Plan	20
CHAPTER TWO	21
2.0 Social, Economic and Political Context of Benefit-Sharing in Kenya	21
2.1 Benefit-Sharing	21
2.1.1 Introduction	21
2.1.2 Definition of Benefit-Sharing	21
2.1.3 Principles of Benefit-Sharing	24
2.1.3.1 Principle of Derivation	24
2.1.3.2 Principle of Need	25
2.2 The Social, Economic and Political Set-up of Turkana County.....	25
2.2.1 The Social and Geographical Set-up of Turkana County	25
2.2.2 The Economic Set-up of Turkana County	26
2.2.3 Land Tenure and Land Use Among the Turkana	28
2.2.4 The Interface of the Turkana Social Cultural and Economic Activities	29
2.2.5 The Inherent Political Dimension of Natural Resources	30
2.2.5.1 The Internal Political Dimension	31
2.2.5.2 The International Political Dimension	33
2.2.5.2.1 The Political and Economic Interests of MNCs	33
2.2.5.2.2 The Unsettled Question of the Ilemi Triangle	34
2.2.5.2.3 Kenya's Unsecured International Borders	37
2.3 Conclusion	39
CHAPTER THREE	40
3.0 Existing Legal Framework on Benefit-Sharing of Natural Resources	40
3.1 Introduction	40
3.1.1 Basis for Benefit-Sharing	40

3.2 Legal Framework on Benefit-Sharing	42
3.2.1 Domestic Legal Framework	42
3.2.1.1 The Constitution of Kenya 2010	42
3.2.1.1.1 Ownership of Oil Resources	42
3.2.1.1.2 Benefit-Sharing	43
3.2.1.1.3 Property in Petroleum Resources	45
3.2.1.2 Petroleum (Exploration and Production) Act	46
3.2.1.3 Land Act 2012	48
3.2.2 International Legal Framework	51
3.2.2.1 The African Charter for Human and Peoples Rights	51
3.2.2.2 ICESCR.....	54
3.3 Conclusion	54
CHAPTER FOUR	56
4.0 Conclusion and Recommendations	56
4.1 Introduction	56
4.2 Benefit-Sharing in a Comparative Context: The Case of Nigeria and Norway	57
4.2.1 The Nigerian Experience	57
4.2.1.1 The Social, Economic and Geographical Structure of Nigeria	57
4.2.1.2 Legal Architecture of Nigerian Oil Resources	59
4.2.1.3 Management of Nigeria’s Oil Resources	60
4.2.1.3.1 Revenue Benchmarking Model	61
4.2.1.3.2 Excess Crude Account	62
4.2.1.3.3 Nigerian Sovereign Investment Authority	62
4.2.1.4 Benefit-Sharing of Nigeria’s Oil Resources	63
4.2.1.5 Issues and Challenges	64
4.2.1.5.1 Authentic Indigenous Participation	65
4.2.1.5.2 Ownership and Control of Oil Resources	66
4.2.1.5.3 Corruption and Development Disparities	67
4.2.1.5.4 Deficiencies of Human and Institutional Capacity	68
4.2.1.5.5 Poverty	69

4.2.1.5.6	Land Conflicts	69
4.2.2	The Norwegian Experience	70
4.2.2.1	Social, Economic and Geographical Constructs of Norway	70
4.2.2.2	Legal Architecture of Norway’s Oil Resources	70
4.2.2.3	Management and Conservation of Norway’s Oil Resources.....	71
4.2.2.4	Benefit-sharing of Norway’s Oil Resources	72
4.2.2.4.1	Government Pension Fund Global	73
4.2.2.5	Institutional Structures in Oil Industry	74
4.2.2.5.1	Ministry of Petroleum and Energy	74
4.2.2.5.2	Norwegian Petroleum Directorate	75
4.2.2.5.3	Statoil	75
4.2.2.6	Norway’s Positives	76
4.2.2.6.1	Strong Regulatory Framework	76
4.2.2.6.2	Institutional Autonomy	77
4.2.2.6.3	Effective Public Participation	78
4.2.2.6.4	Mainstreaming Environmental Issues	79
4.2.2.6.5	Transparency in Oil Activities	81
4.2.2.6.6	Effectively Harmonised Regional Taxation Regime	82
4.3	Conclusion and Recommendation	83
4.3.1	Conclusion	84
4.3.1.1	Inadequate Legal Framework.....	84
4.3.1.2	Disparate and Weak Implementing Structures	85
4.3.2	Recommendations	86
4.3.2.1	Appropriate Spending Model.....	86
4.3.2.2	Develop Capacity Through Local Content Development	88
4.3.2.3	Investing in Research and Development	91
4.3.2.4	Establishment of Natural Resource Fund	92
4.3.2.5	Build Institutional Capacity	95
4.3.2.6	Operationalise Article 63 of the Constitution of Kenya.....	97
4.3.2.7	Secure the ‘Wild North’	97
4.3.2.8	Survey and Demarcate Kenya’s International Borders	98

Bibliography	100
Books	100
Journal Articles	102
Reports	107
Theses	114
Newspaper and Magazine Articles	114

LIST OF CASES

1. Case Concerning the Land and Maritime Boundary between Nigeria and Cameroon (Nigeria v Cameroon) [1999] ICJ Rep 31
2. Case of Ricardo Canese v Paraguay- Judgment of 31 August 31, 2004
3. Case of the Indigenous Yakye Axa Community v Paraguay- Judgment of 17 June 2005
4. CEMIRIDE (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya (Endorois Case)-Communication No. 276/2003.
5. Mabo v Queensland No. 2 1992 (Cth)
6. The Mayagna (Sumo) Awas Tingni v Nicaragua- Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).
7. The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria (The Ogoni Case)-Communication No. 155/1996
8. William Yatich Sitetalia & others versus Baringo County Council & another, High Court Miscellaneous Civil Case No. 183/2002

LIST OF MUNICIPAL LAWS AND CONVENTIONS REFERRED TO

PART A CONVENTIONS

1. African Charter on Human and Peoples Rights
2. Convention on Biological Diversity, 1992
3. International Covenant on Social, Economic and Cultural Rights
4. OSPAR Convention
5. UN Convention on the Law of the Sea, 1982.

PART B KENYAN LAW

1. Constitution of Kenya 2010
2. Land Act, No. 6 of 2012
3. Petroleum (Exploration and Production) Act

PART C NIGERIAN LAW

1. Constitution of Federal Republic of Nigeria 1999
2. Nigeria Petroleum Act 1969
3. Nigerian Oil and Gas Development Law of 2010

PART D NORWEGIAN LAW

1. Directive 97/11 and 2001/42/EC on Impact Assessments of 1999
2. European Union Licensing Directive
3. New Chapter 2a in the Petroleum Regulations – SEA Directive of 2005
4. New Chapter 9 in the Petroleum Regulations – EU Gas market Directive of 2003
5. New Chapter 11 regarding Petro of 2001
6. Petroleum Act (Act No. 72 of 29 November 1996)
7. Petroleum Regulations of 27 June 1997
8. Petroleum Regulations
9. Technical Regulations and the Safety (HSE) Regulations

LIST OF KENYAN BILLS OF PARLIAMENT REFERRED TO

1. Community Land Bill, 2015-Kenya

2. National Sovereign Wealth Fund Bill, 2014-Kenya
3. Natural Resources (Benefit-Sharing) Bill, 2014-Kenya
4. Petroleum (Exploration, Development and Production) Bill, 2015-Kenya

LIST OF ABBREVIATIONS

1. ACHPR- African Charter on Human and Peoples Rights
2. AU- African Union
3. CBD- Convention on Biological Diversity
4. CEMIRIDE- Centre for Minority Rights Development
5. CSR- Corporate Social Responsibility
6. EAC-East African Community
7. EACC- Ethics and Anti-Corruption Commission
8. ECA- Excess Crude Account
9. EITI- Extractive Industries Transparency Initiative
10. EU- European Union
11. FDI- Foreign Direct Investment
12. FGF- Future Generation Fund
13. GHG- Green-House Gases
14. GPF- Government Pension Fund
15. GPF- Government Pension Fund Global
16. IGAD- Inter-Governmental Authority on Development
17. MNC- Multinational Corporation
18. NCS- Norwegian Continental Shelf
19. NEMA- National Environmental Management Authority
20. NIF- Nigerian Infrastructure Fund
21. NOCK- National Oil Corporation of Kenya
22. NORAD- Norwegian Agency for Development Cooperation
23. NSIA- Nigeria Sovereign Investment Authority
24. OECD- Organisation for Economic Co-operation and Development
25. OPEC- Organisation of Petroleum Exporting Countries
26. OSPAR Convention- Convention for the Protection of Marine Environment of the North-East Atlantic
27. PIEA- Petroleum Institute of East Africa
28. PSC- Production Sharing Contract
29. PTO- Petroleum Tax Office

30. SDFI- State's Direct Financial Interest
31. SF- Stabilization Fund
32. SPV-Special Purpose Vehicle
33. SWF- Sovereign Wealth Fund
34. TNC-Transnational Corporation
35. UNCLOS- UN Convention on the Law of the Sea
36. UN-United Nations
37. WTO-World Trade Organisation

THOUGHT-PROVOKING REFLECTION

Kenyan politics closely mirrors pornography. In pornography, an idiot watches lustfully at two other individuals who are having their “good time”. The idiot remains glued to the screen with a false sense of sexual gratification whereas, in reality, s/he is completely excluded from that process.

In Kenyan politics, the masses are wired to think, and wrongfully believe, that political engagement between the ethnic elite is collectively beneficial to their corresponding ethnic causes. While the ethnic lords craft the diffuse “political agreements” they lead and trap the masses into the false hope and belief that such “agreements” are, indeed, ethnically-beneficial. Like pornography, the masses sit by and watch with a false sense of political gratification while the political elite have their “good eating time”.

In both instances, the people who believe they are having a good time are mere spectators to the real action. They are, in fact, victims of warped thinking. And the tragedy of it all is that they will always be manipulated to remain into bondage of victimhood.

An adapted version of a Sunday Sermon by **Rev Fr Lance Nadeau** in July 2013.

CHAPTER ONE

1.0 PROPOSAL

1.1 INTRODUCTION

Kenya is on the road towards commercial exploitation of the Turkana oil resources. Until now, management of benefits from Kenya's natural resources is particularly problematic. This assertion is demonstrated by the fact that such benefits have never trickled down to the local people in a very structured way. The failure has led to calls for the putting into place of ways through which natural resource-based benefits should be shared equitably. Picking a cue from the above experiences, Parliament recently published three relevant and interrelated Bills. These were the Natural Resources (Benefit-Sharing) Bill 2014, Petroleum (Exploration, Development and Production) Bill, 2015 and the National Sovereign Wealth Fund Bill 2014. If enacted, these pieces of legislation would deal with benefit-sharing in a more structured way so as to ensure that the country substantially minimises the present challenges relating to benefit-sharing of its natural resources.

Natural resources contribute immensely to economic growth, employment and to the country's fiscal revenue. However, the potential for realization of these benefits sometimes fail to materialize. Such failure usually arises from the fact that many resource-rich and resource-dependent countries are characterised by unconvincing growth rates, high inequality and widespread poverty, bad governance, as well as an ever present high risk of violence.¹ Often, natural resources are the highest cause of most of these deadly conflicts.² Usually, scarcity of natural resources has been noted to be responsible for causing a higher of conflicts.³ However, it is also the case that abundance of these resources also causes conflicts.⁴

¹ M Stormy-Anika, L Gitta and W Wiebke, 'Scarcity and Abundance Revisited: A Literature Review on Natural Resources and Conflict' (2011) 5(1) *International Journal of Conflicts and Violence*. <http://www.swp-berlin.org/fileadmin/contents/products/fachpublikationen/mdn_lag_wodni_scarcity_and_abundance_revisited_ks.pdf> accessed on 12 May 2015

² Paivi Lujala, 'Deadly Combat over Natural Resources: Gems, Petroleum, Drugs, and the Severity of Armed Civil Conflict' (2008) *Journal of Conflict Resolution*. <<http://www.svt.ntnu.no/iso/Paivi.Lujala/home/Papers/Lujala%20Deadly%20combat%20over%20natural%20resources%202008.pdf>>. See also Paivi Lujala, 'Natural Resources and Armed Conflict' (DPhil thesis Trondheim, Norwegian University of Science and Technology, June 2008) <http://brage.bibsys.no/xmlui/bitstream/handle/11250/267050/124526_FULLTEXT02.pdf?sequence=1&isAllowed=y> accessed on 12 May 2015

³ UN and the EU, 'Renewable Resources Conflict: Toolkit and guidance for preventing and managing land and natural resources conflict' (United Nations Interagency Framework Team for Preventive Action and European

Given the connection of natural resources with deadly conflicts, it therefore becomes incumbent upon states to implement proper legal and policy frameworks for the management of natural resources. One such way is for states to develop the mechanism to ensure that citizens have equitable access to such resources as well as a share in the benefits therefrom. Even though the need for equitable access to and sharing of benefits from natural resources is highly appreciated, most states have nevertheless been unable to implement the necessary mechanisms. As a result, management of natural resource benefits has been bungled.

Bungled natural resource management has been blamed for precipitating a number of vicious intrastate conflicts. Kenya has recently discovered commercial oil deposits in Turkana County and further prospecting is still ongoing both in Turkana as well as other neighbouring counties.⁵ When the government announced the discovery of the oil in 2012, it was then estimated that production would have commenced within five years from then.⁶ Although possible production timelines have tentatively been set, the country seems not to have invested in mechanisms to address the apparent inequities in access and benefit-sharing for the anticipated resources.

Despite the publication of the Petroleum (Exploration, Development and Production) Bill, 2015, it is however submitted that the country's efforts towards addressing all the underlying concerns on equitable benefit-sharing of the oil resources are still severely constrained. Towards this end, the study investigates the factors which are likely to undermine the implementation of adequate safeguards towards equitable benefit-sharing of the Turkana oil resources.

Union, 2012). <http://www.un.org/en/events/environmentconflictday/pdf/GN_Renewable_Consultation.pdf> accessed 12 May 2015

⁴ Stormy-Anika and others supra

⁵ J Gachiri, 'Tullow puts Turkana oil at a billion barrels after new find' *Business Daily* (Nairobi, 15 January 2014). <<http://www.businessdailyafrica.com/Corporate-News/Tullow-puts-Turkana-oil-at-a-billion-barrels-after-new-find/-/539550/2147558/-/bvbu4ez/-/index.html>> accessed on 12 May 2015. See also B Kinyanjui, 'Kenya strikes oil in Turkana County but drilling could take years' *Today Financial News* <<http://todayfinancialnews.com/trade-and-investment/1446-kenya-strikes-oil-in-turkana-county-but-drilling-could-take-years>> accessed on 12 May 2015

⁶ M Mutegi, 'Tullow sets 2017 date to start commercial oil production' *Business Daily* (Nairobi, 27 June 2014). <<http://www.businessdailyafrica.com/Corporate-News/Tullow-sets-2017-for-Kenya-crude-oil-output/-/539550/2363134/-/txq8vj/-/index.html>> accessed on 12 May 2014

It is submitted that unless proper safeguards are implemented, then the impacts upon which Kenya's oil resources would have upon the local people shall be quite limited. Whereas the enactment of the proposed legislation is a desirable step in addressing concerns of benefit-sharing, it shall not however be able to exhaustively deal with all the problems relating to benefit-sharing. Benefit-Sharing, while being a legal conception, however has a social, economic and political contextualization.

1.2 BACKGROUND AND STATEMENT OF THE PROBLEM

On Monday 26 March 2012, President Kibaki announced that Tullow Oil had discovered commercial oil deposits in Kenya's Ngamia 1 within Turkana County.⁷ This announcement has since caused a lot of jubilation and expectation on the benefits to be expected from the resources.⁸ However, there is varied conception regarding the nature of the benefits to be expected. For instance, the local Turkana people's conception of the expected benefits departs from the kind of benefits that the political elite, whether in Nairobi or Lodwar, anticipate.

As a result of these realities, it should be expected that Kenya needs to implement plans for the successful commercial exploitation of these resources.⁹ However, because Kenya has not engaged in exploitation of fossil fuels before, it is understandable that its legislative and policy frameworks are presently ill-prepared to deal with the avalanche of challenges that come with such exploitation. In addition, benefits from the country's resources have not previously been shared equitably amongst the citizens.

Therefore, this exploratory study investigates possible challenges which are likely to impede equitable access to benefits of Kenya's oil resources. The study proceeds against a background

⁷ See for instance, M Nsehe, 'Kenya Strikes Oil for the First Time' *Forbes* (Jersey City, 26 March 2012). <<http://www.forbes.com/sites/mfonobongnsehe/2012/03/26/kenya-strikes-oil-for-the-first-time/>> accessed on 16 May 2015. See also G Omondi, 'Tullow strikes new oil deposits in Turkana' *Business Daily* (Nairobi, 3rd July, 2013). <<http://www.businessdailyafrica.com/Tullow-strikes-new-oil-deposits-in-Turkana-/-/539546/1903846/-/37q6rtz/-/index.html>> accessed on 21st November, 2014

⁸ See for instance, GK Wachiuri, 'Just How Much oil deposits could there be in Kenya?' *Optiven Limited* (Nairobi, March 2013). <<http://www.georgewachiuri.com/commentaries/142-kenya-s-oil-deposits-can-run-her-for-300-years>> accessed on 16 May 2015.

⁹ M Mutegi, 'Tullow sets 2017 date to start commercial oil production' *Business Daily* (Nairobi, 27 June 2014). <<http://www.businessdailyafrica.com/Corporate-News/Tullow-sets-2017-for-Kenya-crude-oil-output-/-/539550/2363134/-/txq8vj/-/index.html>> accessed on 22nd November, 2014

of the fact that Turkana County is one of the poorest and least-developed regions in Kenya.¹⁰ Further, it also faces continuous inter-ethnic conflicts caused by factors like cattle rustling, inadequate water and pasture for livestock, and politics.¹¹ All these challenges need to be contextualised within the understanding that Turkana faces extreme climatic conditions which predispose it to severe famine so much so that it heavily relies on outside intervention.¹²

In addition, the region also witnesses an upsurge of incidents of deadly violence and conflicts. This upsurge in violence has partially been attributed to an attempt by neighbouring communities to “annex” part of the oil-rich areas of the Turkana.¹³ Such acts of violence are founded on fallacy that access to the anticipated benefits from oil resources is predicated on actual occupation of land where the mineral resources occur.¹⁴ It is therefore imperative that Kenya puts into place adequate safeguards to help deal with the thorny issue of benefit-sharing of the oil resources well before the country begins oil production. However, it is anticipated that certain challenges are bound to undermine the country’s efforts in implementing equitable benefit-sharing. This paper then investigates the possible challenges towards benefit-sharing.

1.3 OBJECTIVES OF THE STUDY

The objectives of this study shall be;

- a) To inquire into the sufficiency or otherwise of Kenya’s legal framework on benefit-sharing of Kenya’s oil resources;
- b) To examine Kenya’s legal framework on the exploitation of oil resources;

¹⁰ KIPPRA, ‘Kenya Economic Report 2013: Creating an Enabling Environment for Stimulating Investment for Competitive and Sustainable Counties’ (Kenya Institute for Public Policy Research Analysis, 2013).

<<http://www.kippira.org/downloads/Kenya%20Economic%20Report%202013.pdf>> accessed on 16 May 2015

¹¹ Pragya, ‘Conflict Assessment in Northern Kenya’ <http://www.pragya.org/doc/Conflict_Assessment_Report.pdf> accessed on 22 November, 2014. For further insight, see also Ruto Pkalya, Mohamud Adan, Isabella Masinde, and Martin Karimi (ed), ‘Conflicts in Northern Kenya: A Focus on the Internally Displaced Conflict Victims in Northern Kenya’ (ITDG-EA, DTP Martin Karimi Publisher, 2003)

<https://practicalaction.org/docs/region_east_africa/conflict_in_northern_kenya.pdf> accessed on 10th November, 2014

¹² See for instance, Salford Online, ‘UNICEF Executive Director Stresses need to scale up relief in drought-stricken Turkana, Kenya’ *Salford Online* for 23 July 2011. <http://www.salfordonline.com/editorschoice_page/29526-unicef_executive_director_stresses_need_to_scale_up_relief_in_drought-stricken_turkana_kenya.html> accessed on 15 May 2015

¹³ M Ndanyi, ‘Kenya: Local leaders claim conflict in Turkana region caused by natural resource discovery’ *The Star* (Nairobi, 12th November, 2014). <<http://business-humanrights.org/en/kenya-local-leaders-claim-conflict-in-turkana-region-caused-by-natural-resource-discovery>> accessed on 20th November, 2014

¹⁴ Ibid

- c) To examine Kenya's policy framework on the exploitation of oil resources;
- d) To identify possible social, economic and political challenges that may undermine Kenya's exploitation of its oil resources in Turkana; and,
- e) To propose possible solutions to the challenges that will have been identified;

1.4 SCOPE OF THE WORK

The geographical scope of this study is restricted to Turkana County. This County has previously been in the limelight for all the wrong reasons ranging from deadly conflicts that arise from cattle rustling to incessant famine caused by the extreme climatic conditions. However, since 2012, commercial oil resources have been discovered in the region. The discovery has caused renewed interest in the region with heightened activities of Multinational Corporations. Apart from oil, there have also been discovered large underground water resources in the same region.¹⁵ However, the study shall be restricted to the oil resources. It is intended to investigate the challenges that are believed to be likely to undermine Kenya's efforts towards creating an effective benefit-sharing mechanism for its oil resources.

1.5 RESEARCH QUESTION

- a) What social, economic and political factors are likely to undermine Kenya's implementation of effective equitable benefit-sharing mechanism for the Turkana County's oil resources?
- b) What best-practices in oil resource management could Kenya adopt from the Norwegian oil resources management system?
- c) What pitfalls should Kenya avoid in its quest towards putting into place an equitable benefit-sharing law for its Turkana oil resources?

1.6 HYPOTHESIS

Oil production has inherent challenges to the local people's livelihoods, their environment, as well as the overall national economy. Most often, exploitation of oil resources has the

¹⁵ See for instance, L Onyango and J Kariuki, 'Kenya strikes huge water reserve in arid Turkana region' *Africa Review* (Nairobi, 11 September 2013). <<http://www.africareview.com/News/Kenya-finds-huge-water-reserve-in-arid-Turkana-region/-/979180/1988644/-/81b6m2/-/index.html>> accessed on 16 May 2015. See also UNESCO, 'Strategic groundwater reserves found in Northern Kenya', (UNESCO Press, 11 September 2013). <http://www.unesco.org/new/en/media-services/single-view/news/strategic_groundwater_reserves_found_in_northern_kenya/#.VVcuTfC3F88> accessed on 16 May 2015

predisposition towards causing conflicts between the societies. Given challenges, Kenya needs to undertake a holistic appraisal of both its legal and policy frameworks in order to deal adequately with the potential challenges and also to implement an equitable benefit-sharing mechanism. It is encouraging to note that Parliament has published the Natural Resources (Benefit-sharing) Bill 2014 and Petroleum (Exploration, Development and Production) Bill, 2015 which are intended to address some of the concerns on benefit-sharing of natural resources. While this development is laudable, this study however proceeds on the premise that the existing legislation on benefit sharing of natural resources is grossly inadequate.

Kenya's legal framework on equitable benefit-sharing of natural resources is inadequate. A major problem is that benefit-sharing of natural resources is not being considered in a holistic and structured manner. This is illustrated by the fact that, in Kenya, benefit-sharing is considered to be an exclusive legal issue. The study proceeds on the view that legislative enactments relating to benefit sharing, if not backed by corresponding enabling social, economic and political framework, will fail to ensure equitability in the sharing of the benefits of the Turkana oil resources.

1.7 SIGNIFICANCE OF THE STUDY

Usually, the discovery and commercial production of oil in Sub-Saharan Africa pose challenges often lead to violent conflicts. Examples of such situations include conflicts in Angola's Cabinda Enclave, Nigeria's Niger Delta, the international conflict between Nigeria and Cameroon over the Bakassi Peninsula, among others. Owing to the predisposition of oil resources to fan deadly conflicts rather than economic improvement, the resource has come to be known as "black gold". Usually, most of these conflicts have arisen from the inability, or unwillingness of states to create structures that would ensure equitable benefit-sharing mechanisms.¹⁶ Indeed, nothing best illustrates this view than the following excerpt;

Managing resource wealth in developing countries requires not only good governance, in the sense of transparent management and absence of corruption, but also good policy, such that resource exploitation

¹⁶ See generally, Oxfam, 'Angola's Wealth: Stories of War and Neglect' (Global Policy Forum, September, 2001) <<https://www.globalpolicy.org/component/content/article/198/40272.html>> accessed 20th November, 2014. See also BBC, 'Nigeria's oil fuel Delta Conflict' in *BBC* <<http://news.bbc.co.uk/2/hi/africa/4617658.stm>> accessed 20th November, 2014

benefits the economy and society as a whole. Since Sachs and Warner (1995)¹⁷ identified an empirical relationship between resource abundance and lagging economic growth, explaining the resource curse has been a major concern in the development literature. A common theme in the early literature is that resource sectors have weak linkages with the rest of the economy because imported inputs and capital-intensive production generate little employment; therefore, the real impact on the overall economy depends on how the wealth is used.¹⁸

The underlying dark cloud which underscores the paradox of oil exploitation and corresponding underdevelopment in Africa has also been referred to as the resource curse.¹⁹ The resource curse describes the inverse relationship between development and the presence of natural resources.²⁰ It is the situation whereby despite the fact that the export-oriented natural resources sector generates large revenues into a country's economy, the revenue paradoxically leads to economic stagnation and even deadly conflicts.²¹ Contextually, therefore, the concept is commonly used to describe the negative development outcomes that are usually associated with non-renewable extractive resources such as petroleum.²²

The fact oil being a resource curse is reality in both the cases of Nigeria and Angola. In Angola for instance, the basis for the conflict is a separatist attempt by rebels who claim that the enclave has not benefited from Angola's oil resources despite the fact that it produces up to 60% of the country's oil resources.²³ The complaints of residents of the Niger Delta in Nigeria are similar. Even though the area produces most of the Nigeria's oil resources, the local communities complain that the oil revenues do not trickle down to impact positively into the local people's

¹⁷ J Sachs and A Warner 'Natural Resource Abundance and Economic Growth' in G. Meier and J. Rauch (eds.), *Leading Issues in Economic Development* (Oxford University Press, New York 1995)

¹⁸ C Fischer, 'International Experience with Benefit-Sharing Instruments for Extractive Resources' (Resources for the Future, 2007) <<http://www.environmentportal.in/files/RFF-Rpt-BenefitSharing.pdf>> accessed on 20th November, 2014

¹⁹ See generally the Report by the African Development Bank, 'Maximizing the Benefits from Africa's Oil and Gas Resources' (African Development Bank, 29 July 2009) <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Maximizing%20the%20Benefits%20from%20-%20Oil%20and%20Gas%20in%20Africa.pdf>>

²⁰ Ibid. For a further insight into this, see the Report by the Overseas Development Institute of 2006

²¹ Ibid

²² Ibid

²³ See for instance, Temba Museta, 'Cabinda-the unreported conflict' *The Southern Times* <http://www.southerntimesafrica.com/news_article.php?id=8133&type=64&title=Cabinda%20-%20the%20unreported%20conflict#.VHCCAWfaxMQ> accessed on 20th November, 2014

lives.²⁴ In fact, the Niger Delta is among the least-developed regions of Nigeria.²⁵ This, and the fact that the area bears the brunt of effects of pollution arising from the oil spills, have fomented discontent that has previously caused civil war pitting the Federal forces and the Ogoni militants. The height of the conflict saw the execution of writer, Ken Saro-Wiwa and nine other Ogoni human rights activists by the late General Sani Abacha in 1995.²⁶

Indeed, the jitters about direct causation between natural resources and conflict are not totally unfounded several researches have confirmed the connection.²⁷ The researches conceded that even though natural resources are a major source of national income, they are also a major source of conflict and instability, especially in instances where there is mismanagement of the resources. The connection between natural resources and conflict is said to be more pronounced in divided societies which have weak institutions as captured in the following words;

Natural resources (such as oil, natural gas, diamonds, minerals, forests and water) are often a major source of national income, and are also a major cause of conflict and instability if mismanaged or shared unfairly. Countries with weak institutions often struggle to handle the potentially destructive force of corruption and attempts by various actors to capture the wealth generated by natural resources. The governance of natural resources is especially important in the context of divided societies because control over the benefits from local natural resources is often a chief motivator of ethnic or identity-based conflicts.²⁸

From the above exposition, it is clear that effective equitable benefit-sharing of oil resources is critical to the exploitation of oil resources. Therefore, it is pertinent that before a country plunges full-throttle into commercial exploitation of its oil resources, it needs to carefully identify and

²⁴ Chris Newsom, 'Conflict in the Niger Delta-more than a local affair', (United States' Institute for Peace, Washington 2011). <http://www.usip.org/sites/default/files/Conflict_Niger_Delta.pdf> accessed on 22 November 2014

²⁵ Ibid

²⁶ See generally, Jad Mouawad, 'Ken Saro-Wiwa' *The New York Times* (New York, 22 May, 2009) <http://topics.nytimes.com/top/reference/timestopics/people/s/ken_sarowiwa/index.html> accessed 22nd November, 2014. See also Jad Mouawad, 'Oil Industry Braces for Trial on Rights Abuses' *The New York Times* (New York, 21 May 2009) <http://www.nytimes.com/2009/05/22/business/global/22shell.html?_r=0> accessed on 22nd November, 2014

²⁷ N Hayson and S Kane, 'Negotiating Natural Resources for Peace: Ownership, Control and Wealth-sharing- A Briefing Paper' (Centre for Humanitarian Dialogue, October 2009) <http://comparativeconstitutionsproject.org/files/resources_peace.pdf> accessed on 19th November, 2014

²⁸ Ibid

address all possible challenges relating to benefit-sharing. Such challenges are likely to impede the successful exploitation of the resources. Herein, therefore, lies the significance of this study.

This study inquires into the possible social, economic and political challenges relating to access to and benefit-sharing. It offers critical insights into what Kenya needs to do in order to avoid the pitfalls that may make its oil to become resource curse. With the fertile ground for long-term deadly conflict already prepared by the vicious and incessant inter-ethnic conflicts, the government needs to apply its mind and energy towards implementing a holistic process for ameliorating the possible root causes of conflicts relating to the oil resources. Unless this is done in a structured manner prior to the commencement of the oil production, there is very little doubt that Kenya's oil may not only be blacker, but the curse arising from its exploitation may be more spell-binding than anywhere else in Africa. A structured way would need that the legal context of benefit-sharing be placed within the proper social, economic and political contexts.

1.8 THEORETICAL FRAMEWORK

Article 15(1) of the UN Convention on Biological Diversity provides that access to the natural resources be predicated upon state sovereignty. Consequently, the rights of such access rests with the national government and the same is subject to national legislation. In addition, this Article requires that any access of such benefits be based on prior informed consent and also upon mutually agreed terms.²⁹ State sovereignty is therefore a critical aspect of access to benefit-sharing of all forms of natural resources.

Sovereignty is the supreme dominion, authority or rule.³⁰ State sovereignty is the supreme political authority of an independent state.³¹ It is the basis upon which the state derives its authority and complete freedom to govern its subjects.³² State sovereignty is premised on the existence of a social contract between the citizens and the state, through the government as the agent of the state. Through the social contract, the citizens cede some of their rights to the state in exchange for the state to provide certain services which people cannot provide for themselves.

²⁹ Sub-article 15(3) and 15(4)

³⁰ BA Garner (editor in chief), *Black's Law Dictionary* (8th edition West Publishing Co, Minnesota 2004) 1430

³¹ *Ibid*

³² S Bullon (ed), *Longman Dictionary of Contemporary English* (new edition, Pearson Education Publishers 2003) 1583

Contextualized within the title of this study, natural resources, being land-based, belong to the citizens of the state. Indeed, the Constitution of Kenya illustrates this position under Article 61(1) by declaring that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. Owing to the benefits arising from the access and use of such resources, coupled with the substantial financial outlay in both the exploitation and extraction of the resources, the citizens give up their claims over such resources to the state in exchange for the state to provide equitable share to the benefits accruing from the resources. Herein therefore arises the Social Contract Theory.

1.8.1 SOCIAL CONTRACT THEORY

Benefit-sharing of natural resources presupposes equitability of access to and utilisation of a country's natural resources. The processes for the implementation of equitable access is an obligation placed on the state. This responsibility accrues to the state from state sovereignty. This is because access to and benefit-sharing of natural resources, like tax policy, ought to reflect the relationships between the market, the citizen and the state.³³ Consequently, like taxation, a country's benefit-sharing policy should be a question within the exclusive jurisdiction of every state.³⁴ The Social Contract is the express or implied agreement between citizens and their government in which the citizens agree to surrender certain freedoms in exchange for mutual protection.³⁵ It is the foundation of every political society.³⁶ The theory is associated with political philosophers such as Thomas Hobbes, John Locke and Jean Jacques Rousseau.

Thomas Hobbes lived between 1588 and 1679 and is credited with being the father of classical positivism. According to him, in the state of nature, there is a war of every man against every man. Such a state is characterised with constant strife in the society and the human life is solitary, poor, nasty, poor, brutish and short.³⁷ In his view, law and government are necessary so as to promote order and personal security. According to him, social contract arises in order to

³³ A Christians, 'Sovereignty, Taxation and Social Contract' (2009) 18 *Minnesota Journal of International Law* <<http://www.law.umn.edu/uploads/BV/63/BV632lf9MBv3WUrgnwAVA/Christians-Final-Online-PDF-03.30.09.pdf>> accessed 17th January, 2015

³⁴ Ibid.

³⁵ Garner *supra* at 1424

³⁶ Ibid

³⁷ MDA Freeman, *Lloyd's Introduction to Jurisprudence* (8th edition, Sweet & Maxwell 2002)

enable citizens to sign away their rights to the sovereign.³⁸ Once the citizens sign away their rights to the sovereign, the sovereign acquires unfettered powers to preside over governmental powers and authority over them.³⁹

According to Hobbes, laws are rules which the government, as the sovereign, has commanded by word, writing or through any other sufficient sign of the will.⁴⁰ In his view, the function of the law is to enable citizens to distinguish right from wrong. Further, he posits that law is man-made and not a divine being as propounded by the Natural Law theorists. In the context of access and benefit-sharing of natural resources, the purpose of the law is to be viewed as in helping to regulate the access while also providing the platform for ensuring equitable sharing of the resources among the citizens.

On his part, John Locke argued that when human beings are born, they are in the state of nature, free and equal yet they are quite insecure in that state of freedom.⁴¹ In the circumstances, when man enters the society, they surrender such rights as are necessary for their security and for their common good.⁴² However, even as man surrenders those rights, individuals still retain the fundamental prerogatives drawn from natural law and are relating to the integrity of the person and property. Such surrender of rights, coupled with the obligation of the sovereign to ensure the security and common good of the citizens, is akin to the Hobbesian Social Contract theory. Locke termed the fundamental prerogatives retained by the individual as the natural rights.⁴³

For Jean Jacques Rousseau, the social contract between the sovereign and the citizens must be subjected to the general will of the people.⁴⁴ Further, it was his view that man has natural inalienable rights which cannot be taken away.⁴⁵ For him, if the social contract is in tandem with

³⁸ Ibid

³⁹ BH Bix, *Jurisprudence: Theory and Context* (6th edition, Sweet & Maxwell 2012)

⁴⁰ Ibid

⁴¹ Freeman supra

⁴² Ibid

⁴³ Daudi Mwita Nyamaka, 'Social Contract Theory of John Locke (1632-1704) in the Contemporary World' (June 2011) in *Selected Works*.

<<http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=dmnyamaka>> accessed on 2 November 2015

⁴⁴ Ibid

⁴⁵ Jean-Jacques Rousseau *Social Contract* (Jonathan Bennett, 2010).

<<http://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf>> accessed on 3 November 2015

the people's will, then legislative power cannot take away the natural rights of the people.⁴⁶ Even though several theorists have advanced the social contract theory, this study adopts the viewpoint advanced under the Hobbesian theory because it is positivist. Presently, the rules that govern access and benefit-sharing are legislated in the manner contemplated by the Hobbesian's social contract theory. In fact, the UN Convention on Biological Diversity has been predicated upon national legislation by dint of Article 15(1).

The nexus between Hobbesian's Social Contract Theory and the question of access and benefit-sharing of the Turkana oil is twofold. First, the Turkana County region, and its neighbouring counties are arid and the local people are largely nomadic pastoralists. Usually, the vagaries of the weather continually cause famine and the residents rely on relief food from the Government and other relief agencies. In addition, the local people engage in violent cross-border attacks during cattle rustling.⁴⁷ This has led to near-lawlessness in the region in a manner that undermines the residents' ability to fully access and utilise land resources.

Secondly, the spate of violence has been linked to a conscious concerted attempt by members of the Pokot community to "annex" part of the Turkana land and access to oil deposits. If this is indeed true, then it is to be understood from Kenya's skewed ethnicisation of its resources. Out of this mindset, neighbouring communities tend to consider all natural resources as belonging to those who inhabit the localities from where the resources are extracted. Thus the oil resources in Turkana are ordinarily considered to belong to the local community. Even though the local people have a stake in the local resources, citizens from the rest of the country also have legitimate claims to the benefits from such resources. The "ethnic" ownership of the oil resources shall have a direct impact upon the issue of the sharing of the benefits accruing from the oil resources. This view, if not addressed in good time in a structured manner, shall drive the chaos to a point where there would be no meaningful exploitation of the oil resources.

⁴⁶ Ibid

⁴⁷ J Leff, 'Pastoralists at War: Violence and Security in the Kenya-Sudan-Uganda Border Region' (2009) 3(2) *International Journal of Conflict and Violence*.

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDcQFjAC&url=http%3A%2F%2Fwww.ijcv.org%2Findex.php%2Fijcv%2Farticle%2Fdownload%2F5%2F5&ei=01q6VN3IKoG6UtOjhNgB&usq=AFQjCNFzDC3Ce5AC8Um2l2OZZqTw7sQ_hg&bvm=bv.83829542.d.d24> accessed on 17th January, 2015

1.9 LITERATURE REVIEW

Benefit-sharing is a concept which has been entrenched in International Law since 1992 via the Convention on Biological Diversity (CBD).⁴⁸ It is understood that its formalisation was necessitated by the need to address sticky issues concerning the governance of socio-ecological systems within the Developing Countries.⁴⁹ Originally, it was understood to mean the distribution of financial benefits only among the local people. However, it has since evolved and is today understood to extend beyond financial benefits alone because it now encompasses broader forms of social accountability and responsibility.⁵⁰

The CBD defines Access and Benefit-Sharing (ABS) as the way in which genetic resources may be accessed, and how the benefits that result from their use are shared between the resource users and providers.⁵¹ According to the convention, ABS is particularly important because it ensures that benefits which accrue from the exploitation of natural resources are shared out equitably between both the users and providers.⁵² The CBD contemplates benefits as encompassing both monetary benefits and non-monetary benefits like the development of research skills and knowledge, i.e. capacity building.⁵³

Hayden defines benefit-sharing as the different forms of social accountability and responsibility requiring that returns from the use of natural resources, whether monetary or non-monetary, be made back to a range of designated participants within socially stipulated arrangements.⁵⁴ Indeed, section 2 of the Natural Resources (Benefit-sharing) Bill, 2014 defines a benefit as any gains, proceeds or profits that arise from the exploitation of natural resources, whereas benefit-sharing is the sharing of benefits which arise from the utilisation of natural resources in a fair and equitable manner.

⁴⁸ Pham Thu Thuy *et al*, 'A Working Paper on Approaches to benefit-sharing: A preliminary comparative analysis of 13 REDD+ countries' (Center for International Forestry Research, 2013)

<http://www.cifor.org/publications/pdf_files/WPapers/WP108Pham.pdf (accessed 22 November 2014)

⁴⁹ AB Nkhata, C Breen and AC Mosimane 'Engaging common property theory: implications for benefit-sharing research in developing countries' (2012a) 6 *International Journal of the Commons*

⁵⁰ Pham Thu Thuy, *et al*

⁵¹ See Secretariat of the Convention on Biological Diversity, *Introduction to Access and Benefit-sharing* (2010). <<http://www.cbd.int/abs/infokit/all-files-en.pdf>> accessed on 19th November, 2014

⁵² *Ibid*

⁵³ *Ibid*

⁵⁴ C Hayden 'From market to market: Bio-prospecting's idioms of inclusion' (2003) 30(3) *American Ethnologist*.

Nkhata has argued that to a great extent, benefit-sharing approaches can be considered as being part the growing trend intended at promoting the idea of ecosystem services.⁵⁵ Ecosystem services is defined by the Millennium Ecosystem Assessment as the benefits that the society derives from nature.⁵⁶ Indeed, it is instructive to note that most authors today tend to consider the approaches to benefit-sharing as being a way through which the values of ecosystems are exhibited and highlighted to humans.⁵⁷

For Fischer, successful implementation of Benefit-sharing requires that a country adopts certain general guidelines which have been adopted from best practices of Norway and Botswana.⁵⁸ The general guidelines include; first, states need to design central budgets with long-term planning and without explicit earmarking; secondly, states need to use expenditures to invest in public infrastructure, health, and education, as foundations for economic growth; thirdly, she offers that the states need to save revenues to smooth public expenditures and then invest such revenues in diverse portfolios with foreign assets.

Fourthly, Fischer also suggests that states need to avoid incurring excess expenditures beyond the economy's current ability to absorb the same productively. In addition, she also argues that states need to incorporate mechanisms that would ensure they co-opt principles of transparency and accountability in their governance structures. Finally, she suggests that states need to

⁵⁵ BA Nkhata, 'Engaging common property theory: implications for benefit-sharing research in developing countries' (2012) 6(1) *International Journal of Commons*
<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CFMQFjAG&url=http%3A%2F%2Fmercury.ethz.ch%2Fserviceengine%2FFiles%2FISN%2F139325%2Fchaptersection_singledocument%2F2ad22b0e-72c7-47cc-8d31-8eaa92d3b7bb%2Fen%2Fart03.pdf&ei=w_9uVNe-JcPeauWogCg&usq=AFQjCNGXFkrI1DIdbkMIjrJw36-GdtPlig&bvm=bv.80185997.d.d2s> accessed 20th November, 2014

⁵⁶ Millennium Ecosystem Assessment (MEA) 'Ecosystems and human wellbeing' (Washington, DC, USA, Island Press 2005)

⁵⁷ R Costanza, R d'Arge, R de Groot, S Farberk, M Grasso, B Hannon, K Limburg, S Naeem, RV O'Neill, J Paruelo, RG Raskin, P Suttonkk, and M van den Belt, 'The value of the world's ecosystem services and natural capital' (1997) 253 *Nature*. See also J. Boyd and S Banzhaf 'What are ecosystem services? The need for standardized environmental accounting units' (2007) *Ecological Economics*; KJ Wallace, 'Classification of ecosystem services: Problems and solutions' (2007) 139 in *Biological Conservation*; RB Norgaard, 'Ecosystem services: From eye-opening metaphor to complexity blinder' (2010) 69 *Ecological Economics*; and GC Daily, S Polasky, J Goldstein, PM Kareiva, HA Mooney, L Pejchar, TH Ricketts, J Salzman, and R Shallenberger, 'Ecosystem services in decision-making: Time to deliver' (2009) 7 *Frontiers in Ecology*.

⁵⁸ Fischer supra at p. 65

formulate resource tax and participation regimes that allow the government to capture a reasonably large share of the rents without necessarily discouraging investments.

It is however imperative to note that Fischer is alive to the fact that the guidelines may not be prescriptive and therefore applicable to all countries in similar circumstances. In her view, some of these circumstances are only applicable in the presence of three prerequisite conditions. The conditions are; first, the government must have a clear title and authority to engage in the resource development; secondly, the government needs to be strong and effective in the provision of public goods and services; and finally, the government must be able to effectively regulate and enforce environmental compliance without any conflicts of interest.⁵⁹

She opines further that in circumstances where the characteristics of a country's government do not meet the three conditionalities, then such a country ought to proceed on the premise of second-best practices.⁶⁰ The second-best practices derive from several international experiences which suggest that guidelines on resource revenue management need to be tailor-made to the circumstances.⁶¹ Such circumstances include issues such as the beneficiaries, the appropriate managers of the programs, the benefits to be allocated, and the source of revenue.⁶² All of these depend on the specific situation.⁶³

Fischer asserts that in instances where the state fails to incorporate the right policies to inform its benefit-sharing programmes, then the available alternatives would be dire. This is because such an oil economy would remain vulnerable from the resource curse syndrome. Whereas a natural resource boom is an important catalyst for growth and development, such booms could also tend to set in motion reverse economic activities.⁶⁴ Indeed, the failure of the natural resource booms in African economies to spur the countries' economic growth is attributable to several factors.

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

⁶⁴ See the Report by the African Development Bank, *supra*

The first factor is the “Dutch Disease” which is the syndrome of rising real exchange rates and wages which ultimately drives out the pre-existing export and import competing industries.⁶⁵ The second factor is the tendency by elites to seek rent, as opposed to putting energies into profit-making activities. The third factor is price volatility and the corresponding asymmetry of adjustment. According to the Report, this factor makes it easier for the ramping up of public expenditure rather than its winding down again. Fourthly, the resource curse is also attributable to the inflexibility within labour, product and asset markets. Finally, it is also attributable to the tensions that exist between the oil-producing and non-oil producing regions within the respective countries.⁶⁶

While the literature reviewed above comprehensively deals with the subject of Benefit-sharing, this study would, nonetheless, still be of relevance. This study’s relevance arises from the fact that it seeks to contextualize the problem of benefit-sharing by placing it into its proper social, economic and political context within the Kenyan circumstances. This is task that none of the published literature deals with. Much of the literature on this subject tends to restrict discourses on benefit-sharing to the prism of standalone legal issues. Such views completely ignore the realities that social, economic and political contexts play in shaping policy and law on benefit-sharing.

1.10 RESEARCH METHODOLOGY

This study is conducted as desk research through secondary research. Desk research involves gathering and analyzing information which is available in print form, published form or on the Internet.⁶⁷ As a result, the researcher shall summarise, collate and/or synthesize existing research data from the primary sources.⁶⁸ Desk research is preferred in this study because the study is exploratory in nature. It inquires into the possible occurrences in future based on what has been

⁶⁵ Raghuram G Rajan and Arvind Subramanian, ‘Aid, Dutch Disease, and Manufacturing Growth’ (2009) *Journal of Development Economics*

⁶⁶ Nancy C Benjamin, Shantayanan Devarajan and Robert J Weiner, ‘The “Dutch” Disease in a Developing Country: Oil Reserves in Cameroon’ (1989) 30 *Journal of Development Economics* pp. 71-92.

http://www.researchgate.net/profile/Nancy_Benjamin/publication/229445879_Oil_revenues_and_the_Dutch_disease_in_a_developing_country_Cameroon/links/54f48e060cf2f28c1361e00a.pdf accessed on 3 November 2015

⁶⁷ Daniel Kasomo, *Research Methods in Humanities and Education*, (Zapf Chancery Publication, revised edition, 2007).

⁶⁸ Sunny Crouch and Matthew Housden, *Marketing Research for Managers: The marketing series* (Chartered Institute of Marketing, Butterworth-Heinemann 2003) 22.

observed to be happening in other jurisdictions that have embarked on the production of oil products. Therefore, because the oil production has not began, the contemplated challenges are not in existence as of now. Consequently, primary research would not be feasible. In the circumstances, desk research would be the most ideal.⁶⁹

This study shall be qualitative in nature as it entails the analysis of qualitative data.⁷⁰ Qualitative analysis of data is of three classes, namely; grounded theory analysis, content analysis, and hermeneutic analysis.⁷¹ For the purposes of this study, reliance shall be placed on both the content and hermeneutic analyses. Content analysis involves the systematic analysis of the content of a text in either a qualitative or quantitative manner.⁷² The study will sample and analyse the contents of several texts on benefit-sharing of natural resources, hence the necessity of the Content Analysis. In addition, the content of the texts studied shall have to be contextualised within the proper social, economic and political circumstances of Turkana County.

The need for contextualization lays a basis for the hermeneutic analysis. The hermeneutic analysis is a special type of content analysis in which a study interprets the subjective meaning of a given text within its social and historical context.⁷³ The social and historical context into which this study is proposed to be conducted is founded on the need to place the law on benefit-sharing within its proper social, economic and political context. The economic context involves examining the right economic framework within which the law on benefit-sharing for the Turkana people can best operate.

For instance, the study shall examine whether the right economic factors presently exist in Turkana to enable Kenya to manage the commercial exploitation of its oil resources. In case the study establishes that the right economic factors do not exist for the implementation of an

⁶⁹ Donald Kisilu Kombo and Delno LA Tromp, *Proposal and Thesis Writing- An Introduction* (Paulines Publications Africa, 2006)

⁷⁰ A Bhattacharjee, 'Social Science Research: Principles, Methods, and Practices' (2012) in *Textbooks Collection Book 3*. <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1002&context=oa_textbooks> accessed on 28 May 2015.

⁷¹ Ibid

⁷² Ibid.

⁷³ Ibid

effective benefit-sharing mechanism of the oil resources, then it will recommend possible remedial measures that Kenya needs to put into place in order for the process to be undertaken successfully.

Similarly, the study shall contextualise the law on benefit-sharing within the social circumstances of the Turkana community. In this respect, the study will examine how factors like the community's cultural practices including the communal land tenure system, the nomadic pastoral lifestyle, and widespread cattle rustling activities shall impact upon both the commercial exploitation of the oil resources as well as the law on benefit-sharing. This social context would be necessary because it shall put into perspective the role that the incessant conflicts among the local people shall have on both the processes of oil exploitation and the law on benefit-sharing.

Finally, the study shall examine the role that politics plays in connection with oil exploitation and the sharing of benefits therefrom. It is anticipated that both the local and national political dynamics will have huge impact on the exploitation and the sharing of benefits accruing from the oil resources. Another important political consideration is the question of how the oil benefits shall be shared between the national and county government. Thus, the blend of the social, economic and political issues of the oil resources shall found a rich milieu that will define aspects of the law on benefit-sharing of the anticipated oil resources.

1.11 LIMITATIONS

The limitations of this study may include;

- a) The study would be limited to the County of Turkana and, as a result, the circumstances attaining to that region may not necessarily be applicable to all regions of the country;
- b) The study will be conducted long before the country commences on commercial exploitation of oil resources. Therefore, its findings may depart from those could be achieved if the study had been undertaken during actual production.

1.12 DESCRIPTION OF CHAPTERS

1.12.1 CHAPTER ONE

This is the Proposal. It lays down the process through which the study is to be undertaken.

1.12.2 CHAPTER TWO

Among the natural resources that Kenya currently produces include Titanium from Kwale, Fluorspar from Kerio Valley, fish, and cement. In the recent past, significant deposits of fossil fuels have also been discovered. Significant among these include coal from the Mui Basin of Kitui County, crude oil from the Turkana County, and the offshore natural gas off the coast of Lamu.

Notably, most areas from where mining activities are undertaken experience abject poverty among the local people. In addition, most such areas are also characterised by high levels of underdevelopment, and a breakdown of social order. This has led to a breakdown of law and order which is manifested through rampant insecurity. The interplay of these factors, coupled with negative ethnicity and politics, has produced a cocktail characterised with a fragile economic environment.

Consequently, there is need for Kenya to put into place proper legal safeguards to help it deal adequately with benefit-sharing of its oil resources. To achieve this, the policy makers need to acknowledge that sound legal frameworks have to be anchored within certain social, economic and political parameters. Therefore, in addition to legislative enactments, the government shall need to deal with other related factors such as politics, ethnicity, insecurity and general development needs of the Turkana community. Unless such a holistic approach is undertaken, then the oil resources may as well turn out to be a time bomb which shall explode onto the country.

1.12.2 CHAPTER THREE

This chapter will analyse the existing laws intended to address the issue of benefit-sharing. In addition, it will identify the gaps and/or weaknesses that inhere in the existing laws. Among the laws that will be analysed include the Constitution of Kenya 2010, the Petroleum (Exploration and Production) Act, and relevant international conventions such as ACHPR.

1.12.3 CHAPTER FOUR

In this chapter, the study will propose how the existing legal challenges could be addressed. The study will endeavour to undertake a comparative study from Norway, Nigeria, Sudan and South

Sudan. Except for Norway, the other countries have previously witnessed strained political challenges due to their failure to implement equitable and holistic benefit-sharing mechanisms.

1.13 PROPOSED RESEARCH PLAN

This study is proposed to be conducted within the following proposed timelines;

DATE	ACTIVITY
30 Oct 2014	Proposal
1 Dec 2014	Commencement of Research
1 Feb 2015	Chapter Two
1 April 2015	Chapter Three
15 July 2015	Submit complete loosely bound document
15 Aug 2015	Make corrections required by the supervisor
31 Aug 2015	Submit the final document to the office of the Academic Programmes Committee

CHAPTER TWO

2.0 THE SOCIAL, ECONOMIC AND POLITICAL CONTEXT OF BENEFIT-SHARING IN KENYA: CASE STUDY OF TURKANA

2.1 BENEFIT-SHARING

2.1.1 INTRODUCTION

Every state is exclusively entitled to the benefits of its natural resources. This understanding has previously informed the adoption of various UN General Assembly Resolutions such as the 1962 Resolution on Permanent Sovereignty over Natural Resources. The benefits of natural resources accruing to a state are, *ipso facto*, those of its citizens. However, even within the state, there are varied expectations concerning entitlements to the state's natural resources. One factor that may be responsible for the variation in expectation is the location of the resources. Quite often, local

communities have placed higher expectation regarding benefits from natural resources occurring within their neighbourhoods. Such expectation has been that the members of the communities own the natural resources occurring in their localities.

However, it is of essence to note that these expectations are largely in conflict with the law. This is especially illustrated by the fact that both the Constitution and legislation vest natural resources in the state, through the government as its agent. This then gives every citizen a basis to claim entitlement to such resources. Nevertheless, despite such expectations, it is also noteworthy that natural resource-related activities usually have disproportionate impacts on the local communities. This should therefore entitle local communities to more benefits from such resources as compared to the rest of the citizens. The mechanism through which these expectations are handled is that of Benefit-Sharing.

2.1.2 DEFINITION OF BENEFIT-SHARING

Benefit-sharing is the idea that the benefits derived from the utilisation of particular resources, to which one has access, should be shared between the local people and the other citizens.⁷⁴ It has been defined as the commitment to channel some kind of returns, whether of monetary or non-monetary nature, back to the locality from which natural resources have been exploited from.⁷⁵ The philosophical underpinning of benefit-sharing is the need for the integration of the economic, social and environmental considerations in the management of natural resources.⁷⁶

Benefit-sharing is premised upon two underlying philosophies. These are the philosophy of Public Trust Doctrine and that of the Principle of Permanent Sovereignty over Natural Resources.⁷⁷ The Public Trust Doctrine historically derives from the public commons. It is the principle that all human commons be preserved for the public use, and that the state is responsible for the protection of the public rights to the

⁷⁴ Bram De Jonge, 'Towards a Fair and Equitable ABS Regime: Is Nagoya Leading us in the Right Direction?' (2013) 9(2) *Law Environment and Development Journal* P. 241. <<http://www.lead-journal.org/content/13241.pdf>> accessed 15 June 2015

⁷⁵ --P2P Foundation. <http://p2pfoundation.net/Benefit_Sharing> accessed on 13 June 2015

⁷⁶ Government of Kenya, *Sessional Paper No. 3 of 2009 on the National Land Policy*, Government Printer, Nairobi, p. 3

⁷⁷ C Nyamwaya, 'Benefit-sharing on Extractive Natural Resources with Society in Kenya' by *Kenya Human Rights Commission*. A Research for and on Behalf of Friedrich Ebert Stiftung, Nairobi, Kenya. November 2013. <<http://www.fes-kenya.org/media/publications/Benefits%20Sharing%20on%20Extractive%20Natural%20Resources%20with%20Society%20in%20Kenya%202013.pdf>> accessed on 14 June 2015

use of such resources.⁷⁸ Therefore, viewed against the backdrop of this study, the doctrine imputes an obligation of the state to ensure that the right to the environmental and natural resources be ensured.⁷⁹

Ordinarily, benefits from the natural resources are targeted at the local communities. However, the local community has been understood to encompass the population which lives close enough to the mine so much so that their livelihood, way of living or environment is directly or indirectly impacted upon by the mining project.⁸⁰

The principal unit for benefit-sharing is the mine area. However, the scope of the benefits could also stretch beyond the immediate reaches of the mine area so as to include further local administrative regions such as the districts, provinces, or even the whole country.⁸¹ Apart from the mine area, communities could also be defining units of benefit-sharing. This is especially the case in instances where whole communities become the focus of benefit-sharing projects. This is especially the case in instances where the benefits target indigenous communities.⁸²

Benefit-sharing programmes can be implemented through monetary or non-monetary programmes. Monetary benefit-sharing involves putting into place mechanisms for ensuring that monetary flows arising from the operation of the infrastructure projects are shared with the affected communities through predetermined ways.⁸³ Examples of such ways include revenue sharing, preferential rates, property taxes, equity sharing/full ownership, and development funds.⁸⁴ The underlying philosophy in the implementation of benefit-sharing is the need for the inclusion of the citizens into the participation within the economic, environmental, scientific, social or cultural benefits which arise from both the access and use of extractive natural resources under mutually-agreed terms.⁸⁵

⁷⁸ BA Garner (editor-in-chief), *Black's Law Dictionary*, (volume 8, West Publishing Company 2004) 1268

⁷⁹ Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997)

⁸⁰ Vanessa Petkova, Stewart Lockie, John Rolfe and Galina Ivanova, 'Mining Developments and Social Impacts on Communities: Bowen Basin Case Studies' (2009) 19(3) *Rural Society*.

<<http://rlarrdc.org.in/images/Mining%20Development%20adn%20SIA.pdf>> accessed on 3 November 2015

⁸¹ Patrik Söderholm and Nanna Svahn, 'Mining, Regional Development and Benefit-Sharing Mining and Sustainable Development' (Luleå University of Technology 2014).

<http://www.ltu.se/cms_fs/1.124549!/file/rapport%20mining%20and%20regional%20development_low.pdf> accessed on 3 November 2015

⁸² Ibid

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Ibid

Non-monetary benefit-sharing, involves integrating project benefits into local development strategies.⁸⁶ This could be implemented through several ways such as livelihood restoration and enhancement, community development, as well as catchment development.⁸⁷ Catchment development is taken to include the undertaking of activities such as reforestation, afforestation, planting of fruit trees, and enhancement for wildlife resources.⁸⁸ The benefits are targeted at affected communities, source communities or source nations, among others.⁸⁹

In this regard, benefit-sharing is considered as being the process which seeks to compensate the costs borne by the different stakeholders while sharing the proceeds arising from their contribution.⁹⁰ The subject costs could be in the form of benefits foregone.⁹¹ Fundamentally however, the benefit flow to the various stakeholders should be equitably distributed to the target group(s). Equitable distribution of resources requires that the distribution is done in a manner consistent with the principles of justice and right.⁹²

2.1.3 PRINCIPLES OF BENEFIT-SHARING

There are two principal principles of benefit-sharing. These are the principle of derivation and the principle of need.⁹³

2.1.3.1 PRINCIPLE OF DERIVATION

Under this principle, a percentage of the revenue from the natural resources is allocated upfront to the targeted group. This principle implies that the targeted communities ought to receive allocations from the central pool in strict proportion to their contribution into the pool.⁹⁴ The philosophical underpinning of this principle is that the communities within the area from where

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ D Egre, United Nations Environment Programme Dams Development Project: Compendium on Relevant Practices-2nd Stage-Revised Final Report Benefit-sharing Issue.

<http://www.unep.org/dams/files/Compendium/Report_BS.pdf> accessed on 15 June 2015

⁸⁹ Nyamwaya, supra

⁹⁰ Ibid

⁹¹ Ibid

⁹² Garner, 578

⁹³ Angelani Ange Kayumba, *Challenges and Prospects of Benefit-sharing in Mining Sector in Kenya*.

<<http://angelanikayumba.blogspot.com/2014/04/challenges-and-prospects-of-benefit.html>> accessed on 15 June 2015

⁹⁴ SR Akinola and A Adesopo, 'Derivation Principle Dilemma and National (Dis)Unity in Nigeria: A Polycentric Planning Perspective on the Niger Delta' (October 2011) 4(5) *Journal of Sustainable Development*. See also C Ashwe, (1986) *Fiscal Federalism in Nigeria* Research Monograph No 46, Centre for Research on Federal Financial Relations at The Australian National University, Canberra.

the natural resource is being exploited must have suffered in some way in terms of external costs, over and above people from the rest of the country.⁹⁵

Such external costs are usually manifested in form of phenomena like pollution, disruption of social and economic life as well as other undesirable consequences which arise from the mining activities.⁹⁶ Due to such external effects, the members of the affected communities are then understood to have become entitled to compensation in order to enable them to benefit from the revenues generated from the resources.⁹⁷ However, the implementation of benefit-sharing programmes through this principle raises one fundamental question: how are the figures determined in the upfront arrived at? In other words, what basis informs the allocation of the pre-determined figures, and not another set of figures? Some of the countries which have adopted this principle to implement their benefit-sharing policies include Bolivia, Brazil, Indonesia, Nigeria, Mexico, Papua New Guinea and Ghana.⁹⁸

2.1.3.2 PRINCIPLE OF NEED

Under this principle, the benefits from the natural resources are distributed based upon the needs of the community which is targeted.⁹⁹ Therefore, the resources the community is entitled to have a direct proportionality with the community's social and economic needs.¹⁰⁰ Unlike the former principle, this principle takes cognisance of the unique and peculiar needs of the targeted group. Consequently, it is a more suitable mechanism to check against possible waste and/or underfunding and has been applied by Botswana in sharing of benefits from its diamond resources.¹⁰¹

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ IH Abubakar, *Public Finance and Budgeting: Principles, Practice and Issues with Particular Reference to Nigeria* (1986). An Unpublished Manuscript.

⁹⁸ M Morgandi, *Extractive Industries Revenues Distribution at the Sub-National Level: The experience in seven resource-rich countries*, Revenue Watch Institute for June 2008.

<http://www.resourcegovernance.org/sites/default/files/Extractive%20Industries%20Revenues%20Distribution%20at%20the%20Sub-National%20Level.pdf>> accessed on 15 June 2015

⁹⁹ Kayumba supra

¹⁰⁰ Ibid

¹⁰¹ Ibid

2.2 THE SOCIAL, ECONOMIC AND POLITICAL SET-UP OF TURKANA COUNTY

2.2.1 THE SOCIAL AND GEOGRAPHICAL SET-UP OF TURKANA COUNTY

Turkana County, with an estimated area measuring 68,680 km² is the second largest county after Marsabit.¹⁰² It is predominantly occupied by the Turkana ethnic community of the Plains Nilotic group.¹⁰³ Apart from the Turkana, the county also hosts thousands of refugees who are housed at the Kakuma Refugee Camp. The county borders Uganda to the west, South Sudan to the North, Ethiopia to the North-East, Lake Turkana to the East, West Pokot and Baringo and Samburu Counties to the East.

According to the 2009 Kenya Housing and Population Census Report, the county's population was established at 860,000 people.¹⁰⁴ However, it is noteworthy to point out that this population, together with that of the counties of the former North Eastern, are among those that were considered as being inconsistent.¹⁰⁵ The expansive land mass of the county, weighed against its population, makes it be a sparsely populated area.

The County has an arid climatic pattern with temperatures ranging between 24 and 38°C.¹⁰⁶ Its rainfall ranges between 120 and 600mm per year and is characterised by moisture deficit for most of the year since the evaporation rates far much outstrip the rainfall amounts. Because of the low rainfall amounts coupled with the high temperatures, the region witnesses prevalent

¹⁰² See Jamhuri Team, 'Kenya 47 Counties & Business Opportunity' in *Jamhuri Magazine* (Nairobi 2 October 2012) <<http://jamhurimagazine.com/index.php/business/3662-kenya-47-counties-business-opportunity.html>>

¹⁰³ Ocro Company Limited, Opportunities and Threats of Irrigation Development in Kenya's Drylands, Volume VI: Turkana County 2013. <http://www.disasterriskreduction.net/fileadmin/user_upload/drought/docs/Volume%206-Turkana-IrrigationInDrylands-Opportunities&Threats.pdf> accessed on 16 June 2015

¹⁰⁴ See generally, Kenya National Bureau of Statistics, 'The 2009 Kenya Population and Housing Census: Counting Our People for the Implementation of Vision 2030 at Volume IC.

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAAahUKEwil2fe-m5LGAhUTL9sKHTggAGY&url=http%3A%2F%2Fwww.knbs.or.ke%2Findex.php%3Foption%3Dcom_phocadownload%26view%3Dcategory%26download%3D584%3Avolume-1c-population-distribution-by-age-sex-and-administrative-units%26id%3D109%3Apopulation-and-housing-census-2009%26Itemid%3D599&ei=GQp_VeXoJ5Pe7Aa4wICwBg&usq=AFQjCNELqxsU1EeHg7YonJNVyuuig8rdyw&bvm=bv.95515949,d.ZGU> accessed on 15 June 2015

¹⁰⁵ A population is considered as inconsistent if it demonstrates the following characteristics; its rate of increase is higher than the population dynamics (birth and death rates) would support; its age and sex profiles deviate from the norm; and if significant growth is observed in household size without accompanying growth in the number of households.

¹⁰⁶ Agricom Consultants Ltd, 2012. Feasibility Study for Rehabilitation of Morulem Irrigation Scheme

levels of drought. This leads to high levels of food insecurity which is manifested through impoverishment, acute food scarcity, malnutrition, and high child mortality.¹⁰⁷

2.2.2 THE ECONOMIC SET-UP OF TURKANA

The main economic activity of the Turkana County is nomadic pastoralism. However, some little irrigated crop farming is also being introduced to mitigate against the vulnerabilities arising from the vagaries of the hostile climatic changes upon their livestock.¹⁰⁸ Crop agriculture is practiced in irrigation schemes and along the flood plains. Flood recession agriculture is practiced along the River Turkwel and River Kerio. In addition to the two economic activities, the residents also undertake mining of natural resources like gemstones, saltlicks and alluvial gold, fishing, weaving, charcoal burning and tourism.¹⁰⁹ Besides, a few others are also in formal and informal forms of employment.

Overall however, Turkana County is one of Kenya's poorest counties.¹¹⁰ Recent economic survey reports indicate that Turkana, Kitui, Marsabit, Mandera, West Pokot, Tana River, and Samburu Counties are among Kenya's poorest counties with poverty levels above 70%.¹¹¹ The high poverty level, coupled with the extreme climatic conditions, have been continually manifested through famine and starvation. This has necessitated incessant external intervention of food aid from such organisations as both levels of government, and other organisations such as Kenya Red Cross, Food and Agriculture Organisation, the United Nations, as well as other private sector players through initiatives such as the Kenyans for Kenya Initiative of 2011.¹¹²

In addition to the exceeding poverty levels, Turkana County is also characterised by relatively poor infrastructural development. This reality is manifested through poor road network,

¹⁰⁷ Pragma, *Conflict Assessment in Northern Kenya*. <http://www.pragya.org/doc/Conflict_Assessment_Report.pdf> accessed on 17 June 2015.

¹⁰⁸ Oca supra

¹⁰⁹ Ibid

¹¹⁰ Kenya Institute for Public Policy Research and Analysis, *Kenya Economic Report 2013: Creating an Enabling Environment for Stimulating Investment for Competitive and Sustainable Counties*, Kenya Institute for Public Policy Research and Analysis

¹¹¹ Ibid

¹¹² See for instance: I Barnes, 'A Call to Act before Starvation Demands It Why Turkana, Kenya?' in *World Relief* of 23 August 2011. <<http://worldrelief.org/blog/why-turkana>> accessed on 16 June 2011. See also BBC, 'Kenya drought: Starvation claims 14 lives in Turkana' in *BBC News* for 5 August 2011. <<http://www.bbc.com/news/world-africa-14417545>> accessed on 16 June 2015

communication connectivity, and poor access to public services such as schools for the children, security, among others.¹¹³ The seriousness of the region's underdevelopment was underscored in late 2014 when the rest of the country was in the dark, for close to a whole day, concerning the massacre of over twenty policemen in Kapedo Valley of Turkana County.¹¹⁴ The Kapedo incident was later to be replayed in Baragoi, Samburu County just a few months later.¹¹⁵

A critical public service that has been severely affected, but with a direct bearing on benefit-sharing, is that of education. The region's educational infrastructure is in a sorry state. This has resulted in high illiteracy levels.¹¹⁶ The net result of this is that most members of the community would automatically be locked out of the high cadre jobs for the organisations and corporations that will pitch tent in the area for the oil production activities. This reality shall severely restrict the available options for the non-monetary forms of benefit-sharing of the oil resources.

The poor state of development in the county is likely to undermine the exploitation of the petroleum resources and the possible policy decision on benefit-sharing in several ways. For instance, how would such state of development impact upon the petroleum resource benefits that the region should be entitled to? Under the circumstances, which would be the more appropriate principle of benefit-sharing? Further, it shall be necessary to evaluate how the petroleum production activities would impact upon the community's pastoral way of life and their fishing activities. This is especially so in light of the reality of acquisition of large tracts of land for the mining activities, coupled with the pollution of the Lake Turkana and other surface water bodies from the oil percolating underground. How would these realities affect the dynamics of the local community's entitlements from the oil resources?

¹¹³ P Omonge, 'Northern Kenya: Mobile Phones and Green Energy, A Congruence?' in *This Kenyan* for 21 April 2015.

<<https://omongepaul.wordpress.com/2014/04/21/northern-kenya-mobile-phones-and-green-energy-a-congruence/>> accessed on 16 June 2015.

¹¹⁴ K Some, 'Kapedo killings were second highest loss to police' *Standard Digital* (Nairobi 9 November 2014).

<<http://www.standardmedia.co.ke/article/2000140840/kapedo-killings-were-second-highest-loss-to-police>> accessed on 16 June 2015

¹¹⁵ B Kipngeno, 'Baragoi massacre: Kenya government yet to recover guns stolen from slain officers' *Standard Digital* (Nairobi 15 September 2013). <<http://www.standardmedia.co.ke/lifestyle/article/2000093603/baragoi-massacre-kenya-government-yet-to-recover-guns-stolen-from-slain-officers>> accessed on 16 June 2015

¹¹⁶ Kippra *ibid.*

2.2.3 LAND TENURE AND LAND USE AMONG THE TURKANA

Communal land tenure system is the most prevalent within the arid and semi-arid areas such as Turkana, Samburu, Kajiado, Narok, Marsabit, among others.¹¹⁷ In addition to the communal tenure, members of the community also have traditional ownership rights on plots of land located along the flood plains where they practice rain-fed and irrigated crop farming within the irrigation schemes.¹¹⁸

Much of the Turkana communal land is unregistered. Article 63(1) of the Constitution of Kenya 2010 vests all community land in communities which are identifiable on the basis of ethnicity, culture or similar community of interest. Quite importantly, Article 63(3) obliges county governments to hold all unregistered community land in trust on behalf of the communities for which it is held. With this provision, it is clear that most of the Turkana land is being held in trust and managed on behalf of the Turkana people by the County Government of Turkana.

Petroleum products are minerals within the meaning of Article 62(1) (f). Therefore, on the basis of the terms of Article 62(3), the Turkana land with the petroleum deposits vests in the National Government. This then presents a challenge especially in regard to how the two levels of government are to relate with respect to the petroleum resources in question. Will the National Government be able to exploit and manage these resources without a contentious constitutional challenge from the local County Government? How would the interests of the County Government of Turkana be extinguished?

2.2.4 THE INTERFACE OF THE TURKANA SOCIAL CULTURAL PRACTICES AND ECONOMIC ACTIVITIES

The ethnic communities who live within and around Turkana County include the Turkana, the Samburu, the Pokot, the Merille of Ethiopia, the Toposa and Nyangatom of South Sudan, and the Karamojong of Uganda. The regions where members of these communities occupy are largely arid or semi-arid.¹¹⁹ The principal economic activity for the Turkana and its neighbouring

¹¹⁷ E Fratkin, 'Pastoral Land Tenure in Kenya: Maasai, Samburu, Borana, and Rendile Experience, 1950-1990' (1994) 34/35 *Nomadic Peoples*, at pp. 55-68

¹¹⁸ Oca supra

¹¹⁹ R Pkalya and others (ed), *Conflicts in Northern Kenya: A Focus on the Internally Displaced Conflict Victims in Northern Kenya*, a report by ITDG in October 2013.

communities is pastoral nomadism.¹²⁰ Implicit in this economic activity is the requirement of abundant pasture and water for the livestock owned by these communities. However, given the fact that these regions are largely of arid or semi-arid nature, the pasture and water are always in an inadequate supply and are under a lot of pressure. This has caused conflicts arising from resource competition. These conflicts have made these areas to be quite insecure and volatile.¹²¹

The extreme changes in the region's weather conditions continually eat into the community's livestock resources. Herein, therefore, is the entry point of the interface of the communities' social, cultural and economic way of life. To the pastoralists livestock ownership constitutes a source of pride. Therefore, reduction in the community's herd is considered to found sufficient basis for conducting inter-ethnic raids so as to replenish the depleted stocks. This is the foundation of the abhorrent social-cultural practice of cattle rustling.¹²²

Cattle rustling is both a social cultural activity, as well as an economic activity.¹²³ On the one hand, its social and cultural conceptions arise from the fact that it was originally named *razzia* and practiced as a rite of passage among the young warriors.¹²⁴ In this respect, it arose as a response to the breakdown of the inter-community social controls defining sustainable access and use of the pasture and water resources for the livestock among the different pastoral communities.¹²⁵ On the other hand, it is considered to be an economic activity because it is a basis for building onto a people's livestock which constitutes personal and community wealth.

With the present realities of extreme weather changes caused through Climate Change phenomenon, the pressure on pasture and water resources have become even more acute.¹²⁶ Such pressure has taken a huge toll on both the livestock herds as well as their quality. This situation has been further exacerbated by population explosion among the communities. Consequently, the frequency of the raids and their intensity have increased. Very significantly, the impacts of the

<https://practicalaction.org/docs/region_east_africa/conflict_in_northern_kenya.pdf> accessed on 19 June, 2015

¹²⁰ Ibid

¹²¹ Ibid

¹²² Ibid

¹²³ Collins *supra*

¹²⁴ Ibid

¹²⁵ Ibid

¹²⁶ Kalya *et al supra*

cattle rustling-related conflicts have become more vicious and destructive due to increasing levels of poverty together with the proliferation of illegal firearms, as well as the influence of external political and economic motives.¹²⁷

The recent massacres of members of the security forces in Kapedo Valley and the neighbouring Baragoi are clear illustrations of the problem at hand. The tragedy of it all is however that there are no indications that the spate would be abating anytime soon. Unless the problem is addressed in the not so distant future, its effects will greatly hamper the oil production activities in the area. In addition, the insecurity will hugely affect the production costs. As a result, the corresponding allocations for benefit-sharing programmes will most likely be negatively impacted upon.

2.2.5 THE INHERENT POLITICAL DIMENSION OF NATURAL RESOURCES

There are two political dimensions to the question of natural resources, especially within the Developing Countries. On the one hand is the internal political dynamics while, on the other hand, is the international dimension.

2.2.5.1 THE INTERNAL POLITICAL DIMENSION

...oil resources in the county are a national resource but it must “first and foremost benefit the residents”. In the Energy portfolio, I will appoint a Turkana to head the Ministry of Energy in the next Government. My Government will give first priority to locals to manage the oil resources that have been discovered in this area.¹²⁸

The above caption is a statement attributed to the then Deputy Prime Minister, Uhuru Kenyatta while campaigning for the Presidency in July 2012 at Lodwar, in Turkana County. Candidate Uhuru promised to appoint a Turkana his Cabinet Secretary for Energy if he won the elections which were due early the following year. Leading the Jubilee Coalition juggernaut, Mr Kenyatta won the Presidency in said elections. However, when he unveiled his Cabinet line-up, not only was a Turkana not named the Cabinet Secretary for Energy and Petroleum, but also that no

¹²⁷ Pragya, *Conflict Assessment in Northern Kenya*. <http://www.pragya.org/doc/Conflict_Assessment_Report.pdf> accessed on 20 June 2015

¹²⁸ L Ng’asike, ‘Uhuru calls for equity in resource allocation’ in *Standard Digital* (Nairobi, 22 July 2012). <http://www.standardmedia.co.ke/?articleID=2000062388&story_title=Uhuru-calls-for-equity-in-resource-allocation> accessed on 16 June 2015

Turkana made the Cabinet cut at all. Instead, President Kenyatta named Mr Davis Chirchir to the Ministry of Energy and Petroleum.

The position taken by President Kenyatta on this issue is not peculiar or unique to him. Rather, it is a populist political statement that was meant to buy him support from that constituency during those elections. Such populist statements are common to Kenya's political elite as they help them connect with the target audience during political rallies. However, the reliance by politicians on such populist statements raise several fundamental issues.

The first of these is the level of expectation from the members of the public, regarding the possible returns that they would receive from the exploitation of such resources. In addition, most political statements have been couched into statements of incitement. As a result, the same have contributed into ethnocentrism and violence.¹²⁹

The second issue is that of "common (communal) ownership" of natural resources. The kind of statements such as that attributable to President Kenyatta above are tacit assertions that natural resources are exclusive properties of the local communities. Besides, such statements build expectations which run counter to the country's legal framework. Consequently, the access to and benefit from such resources are not issues of national concern but of the respective communities. The third issue is the economic policy that may result from such populist political statements.

By and large, internal political dynamics have contributed to a discordance between the expectations of members of the local community and those from the rest of the country. Consequently, it is not uncommon to witness tension between members of the local community and those from the rest of the country in areas where mining activities are being undertaken. In addition, flashes of tension also occur between members of the local community and the companies involved in the exploitation.

¹²⁹ Pragma, supra. For further insight, see also R Pkalya, M Adan, I Masinde, and M Karimi (ed), in *Conflicts in Northern Kenya: A Focus on the Internally Displaced Conflict Victims in Northern Kenya*. <https://practicalaction.org/docs/region_east_africa/conflict_in_northern_kenya.pdf> accessed on 17 June, 2015

The latter type of tension arises in instances where members of the local community feel shortchanged with respect to the opportunities from the exploitation process. Quite often, the forms of tension arise from political incitements against the target groups who are seen as posing a threat to the interests of the local community. Tullow Oil has already witnessed such nuanced political hostility from Turkana residents who have complained of discrimination in job opportunities.¹³⁰ The disruption precipitated a two-week shutdown of the company's operations.¹³¹ Such kinds of disgruntlement, if not addressed holistically, will possibly mutate into full-fledged civil wars such as those witnessed in the Niger Delta of Nigeria and the Cabinda Enclave of Angola.

One point that needs to be stressed is that the Turkana region is already restive. It witnesses bouts of violence between members of the community against neighbouring communities. For instance, the community has continually clashed with the Samburu and the Pokot over pasture and cattle rustling activities.¹³² Similarly, the community has also violently clashed with Ethiopian and Sudanese communities such as the Merille and the Topasa over similar reasons.¹³³

2.2.5.2 THE INTERNATIONAL POLITICAL DIMENSION

Commercial exploitation of the Turkana oil resources will be greatly affected by certain international political dimensions. These include the following;

2.2.5.2.1 THE POLITICAL AND ECONOMIC INTERESTS OF THE MNCs

MNCs have a huge role to play in natural resource exploitation and the benefits that accrue therefrom, especially among the Developing Countries. Quite often, their involvement in these

¹³⁰ See for instance, W Akumu, 'Tullow Oil's woes in Turkana expose the soft underbelly of East Africa' in *The East African* (Nairobi, 9 November 2013). <<http://www.theeastafrican.co.ke/business/Tullow-Oil-woes-in-Turkana-expose-the-soft-underbelly-of-EA/-/2560/2066904/-/4jyjr9z/-/index.html>> accessed on 16 June 2015

¹³¹ Ibid

¹³² See generally, Ryan Triche, Pastoral conflict in Kenya: Transforming mimetic violence to mimetic blessings between Turkana and Pokot communities.

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CC8QFjACahUKEwiS45THn5TGAhXJshQKHYNZA4M&url=http%3A%2Fwww.ajol.info%2Findex.php%2Fajcr%2Farticle%2Fdownload%2F113364%2F103081&ei=zBqAVZLNB8nlUomzj5gI&usq=AFQjCNGrGg6jB2g-7Rft_0OWVAyd_AARAA&bvm=bv.96041959.d.d24> accessed on 16 June 2015

¹³³ L Ngaasike, 'Foreign militia killing Kenyans for rituals' in *Standard Digital* (Nairobi, 10 February 2010). <<http://www.standardmedia.co.ke/?2000003431=2000003431&459=459&articleID=2000003431>> accessed on 16 June 2015. See also Sudan Tribune, 'Sudan Toposa Kill 8 Kenyans' in *Sudan Tribune* of 31 August 2008. <<http://www.sudantribune.com/spip.php?article28461>> accessed on 16 June 2015

countries is usually through in the guise of the Foreign Investments. However, they tend to pursue political and economic interests that are favourable to their countries' of nationalities.¹³⁴ This has for instance been the reason why MNCs are being accused of being imperialistic.¹³⁵ To a great extent, the MNCs are considered exploitative because they influence the adoption of policies which tend to undermine the productive utilisation of the natural resource benefits among the developing countries.¹³⁶ The basis for this claim is that the nature of the operations of MNCs is such that they decapitalize the economy of the host countries through the practice of profit repatriation back to their countries of nationality.¹³⁷

A second point of interest that needs to be examined is the fact that oil production is a capital and technology-intensive process. Therefore, the MNCs investments in both aspects are expected to be much higher despite the fact that the legislation contemplates a sharing of costs through the PSCs' regime. Perhaps, Kenya shall have to borrow heavily in order to meet its obligations under the PSCs. In order to recoup their investments and also make some profit, the MNCs recover much bigger shares and leave the developing states with very little amounts of the natural resource revenue inflows into their economies.

The above scenarios would then tend to reduce the amount of money that Kenya shall be appropriating for its benefit-sharing programmes. Consequently, the anticipated, intended and the expected development programmes for the county shall not be achieved. As a result, Turkana County's expectations of the benefits from the oil resources shall be so marginal that the locals would not feel the impact of benefits significantly.

2.2.5.2.2 THE UNSETTLED QUESTION OF THE ILEMI TRIANGLE

The Ilemi Triangle is the triangular-shaped land mass measuring between 10,320 and 1,400 km² and is strapped between Kenya, Ethiopia and South Sudan.¹³⁸ The land mass derives its name

¹³⁴ GO Osuagwu and E Obumneke, 'Multinational Corporations and the Nigerian Economy' (2013) 3(4)

International Journal of Academic Research in Business and Social Sciences

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ RO Collins, *The Ilemi Triangle*.

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CDsQFjAEahUKEwiGr7mf65bGAhXpFdsKHR0IALA&url=http%3A%2F%2Fwww.history.ucsb.edu%2Ffaculty%2FCollinsmaterial%2Fbooks%2F>

from an Anuak Chief, Ilemi Akwon.¹³⁹ The area is occupied by nomadic pastoralist communities consisting of the Turkana of Kenya, the Topasa, Didinga and the Nyangatom of South Sudan, and the Dassanech of Ethiopia.¹⁴⁰

By the very nature of these communities' nomadic-pastoral cultural practices, the nature of their interactions have largely been out of extreme changes in the weather patterns within and around the region. Therein therefore lies the first problem that the Ilemi Triangle poses to the possible exploitation of the Turkana region's oil resources. The extreme changes in the weather patterns reduce livestock pasture and water for the animals. This necessitates frequent relocations of members of these communities from one end to the other in search of water and pasture for their livestock.

Such movements precipitate incessant violent conflicts over clash for the limited resources among the communities. In the event that the causes of such conflicts are not addressed in time, then they will continue to affect the oil production efforts within the Turkana area. This is because of the fact that the conflicts create security volatility and increase production overhead costs.¹⁴¹ Very high production costs will whittle down the resources available to be shared as benefits with the local communities.

The second challenge posed by Ilemi Triangle arises from the unsettled question of its territoriality. Presently, the disputed region is claimed by both Kenya and South Sudan.¹⁴² However, it currently remains under *de facto* Kenyan control.¹⁴³ The dispute over the area arose from the unclear wording of a 1914 treaty which had attempted to permit the movements of the

[The%2520Ilemi%2520Triangle.pdf&ei=mXaBVcb-GOMr7AadkICACw&usg=AFQjCNHIomYzaVzp7wuAz2NQxMTJkrPR2w&bvm=bv.96041959,d.ZGU](#)> accessed on 17 June 2015

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Nene Mburu, 'Delimitation of the Elastic Ilemi Triangle: Pastoral Conflicts and Official Indifference in the Horn of Africa' (no date) *African Studies Quarterly*.

[http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CFQOFjAHahUKEwix89vr65bGAhUoP9sKHTrIAJk&url=http%3A%2F%2Fasq.africa.ufl.edu%2Ffiles%2FMburu-Vol-7-Issue-1.pdf&ei=OXeBVfHyFaj-7Aa6kIPICQ&usg=AFQjCNGTSHPKfs6md21WrheF_bEFqIVSSA&bvm=bv.96041959,d.ZGU](#)> accessed on 18

June 2015

¹⁴² Collins supra

¹⁴³ Ibid

Turkana people into the area. As a result, the Turkana settled in the area and Kenya extended its control over the region. However, despite the fact that some Ethiopian nomadic communities also crisscross into the area during the dry season, Ethiopia has not made any territorial claims over the area.¹⁴⁴

Even though the dispute over the Ilemi has been “silent”, the same cannot be guaranteed in future. It is to be reasonably anticipated that with Kenya’s positive commercial oil finds in Turkana, there is going to be a renewed interest concerning Ilemi’s oil potential. In this regard, it is to be expected that soon, the multinational oil companies will soon seek to obtain exploration licences over blocks in the area. However, the possible issuance of such licences would be a potential flashpoint between Kenya and South Sudan. This is because issuance of licences should be contaminant with state sovereignty. This view is premised on the overarching principle of permanent state sovereignty over natural resources in line with the 1962 UN General Assembly Resolution on Permanent State Sovereignty over their Natural Resources.¹⁴⁵

Therefore, unless Kenya and South Sudan resolves the question of Ilemi Triangle’s territoriality, there is every likelihood that it will come to undermine Kenya’s oil production efforts in Turkana area. In fact, there is possibility that even Ethiopia too could get interested in the area. There are several illustrative examples about how territorial disputes negatively impact upon the exploitation of natural resources. These include the Nigeria-Cameroon dispute over the oil-rich Bakassi Peninsula, the Sudan-South Sudan dispute over the oil-rich Abyei, South Kordofan and Blue Nile regions, the Angolan civil conflict over the Cabinda Enclave, among others.

While the Bakassi Peninsula dispute has since been resolved in favour of Cameroon by the International Court of Justice,¹⁴⁶ the dispute nonetheless impeded all efforts towards any form of exploitation.¹⁴⁷ The peaceful resolution of the dispute over the Bakassi Peninsula has however not been able to inspire the two Sudans to adopt a similar approach in the resolution of their

¹⁴⁴ Ibid

¹⁴⁵ RPSNR, GA Res 1803 (XVII), UN GAOR, 17th session 1194th plenary meeting, UN Doc A/RES/1803(XVII) (14 December 1962)

¹⁴⁶ Judgement of 11th June 1998 in the Case concerning the Land and Maritime boundary between Nigeria and Cameroon (Nigeria v Cameroon) [1999] ICJ Rep 31

¹⁴⁷ UN ‘Bakassi Peninsula: Recourse to the law to prevent conflict’ in *Ten Stories* <<http://www.un.org/events/tenstories/06/story.asp?storyID=900>> accessed 18 June 2015

dispute in the Abyei region.¹⁴⁸ Instead, their troops have continually clashed over the disputed territory.¹⁴⁹ In addition, the dispute has even led to long spell disruptions of the South's oil flow and exportation plans through the North's pipeline infrastructure.¹⁵⁰ On its part, the Cabinda Enclave story is equally that of a tragic and expensive civil war which is threatening to lead to the cessation of oil-production in the region.¹⁵¹

These eventualities in other areas should serve as telltale signs to encourage Kenya, South Sudan and Ethiopia to forge a mutually beneficial and peaceful path towards the resolution of the festering dispute concerning the Ilemi Triangle's territorial jurisdiction. Unless this is done, then the country risks having to enlarge its military capacity in order to bulwark the potential threat of military confrontation against the other neighbouring countries. This will have far reaching economic consequences and other direct impacts on the oil production as well as benefit-sharing policies.

This is because it has, for instance, been established for a fact that countries rich in mineral resources, but whose exploitation of such resources is undermined by violence, invest heavily on military infrastructure and resources.¹⁵² Therefore, should Kenya and its neighbours fail to deal with this dispute in good time, the expending of the country's oil resources will be strongly

¹⁴⁸ SMA Salman, 'The Abyei territorial dispute between North and South Sudan: Why has its resolution proven difficult?' (2013) in J Unruh and RC Williams (editors), *Land and post-conflict peacebuilding* (London, Earthscan 2013).

¹⁴⁹ See for instance, BBC News, 'Sudan deal to end Abyei clashes' *BBC News* (London, 14 January 2011). <<http://www.bbc.com/news/world-africa-12190101>> accessed on 19 June 2015. See also, Thomson Reuters Foundation, 'Sudan Conflicts' in *Thomson Reuters Foundation* (New York City, 4 November 2013). <<http://www.trust.org/spotlight/Sudan-conflicts/>> accessed on 18 June 2015. See also, Zane Larwood, 'It is all about oil in South Sudan' in *Fordham Political Review*. <<http://fordhampoliticalreview.org/its-all-about-oil-in-south-sudan/>> accessed on 18 June 2015

¹⁵⁰ See for instance, US Energy Information Administration, *Country Analysis Brief: Sudan and South Sudan* in US Energy Information and Administration for 3 September 2014. <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CFMQFjAH&url=http%3A%2F%2Fwww.eia.gov%2Fbeta%2Finternational%2Fanalysis_includes%2Fcountries_long%2FSudan_and_South_Sudan%2Fsudan.pdf&ei=XfGCVebRIMa17Ab_j4ToAQ&usq=AFQjCNHuDwuNG357kvnK7oi3J88UohaQ8Q&bvm=bv.96041959.d.ZGU> accessed on 18 June 2015.

¹⁵¹ See generally, Oxfam, 'Angola's Wealth: Stories of War and Neglect' *Report by Global Policy Forum* in September, 2001 <<https://www.globalpolicy.org/component/content/article/198/40272.html>> accessed 19 June 2015. See also BBC, 'Nigeria's oil fuel Delta Conflict' *BBC* (London, 25 January 2006) <<http://news.bbc.co.uk/2/hi/africa/4617658.stm>> accessed 20th November, 2014

¹⁵² See for instance, Africa Ranking, *Top 20 Most Powerful Militaries in Africa in 2015*. <<http://www.africaranking.com/most-powerful-militaries-in-africa/>> accessed on 18 June 2015

skewed in favour of the defence budget, instead of enhancing social welfare programmes for the oil-producing regions. As a result, intended benefit-sharing programmes will suffer immensely.

2.2.5.2.3 UNSECURED INTERNATIONAL BORDERS

Security across a country's borders with its neighbours ought to be among every country's principal priorities and concerns. This is not only because security has implications on the country's national security, it also has a bearing on the underlying political issue of state sovereignty. Former colonies inherited their borders as had been drawn by the former colonial masters through the principle of *uti possidetis juris* which defines borders of newly sovereign states on the basis of their previous administrative frontiers.¹⁵³

Due to the humongous costs for surveying of their borders, most Developing Countries such as Kenya, have never demarcated their international borders. Consequently, these borders are lacking the necessary beacons that would clearly define their frontiers with their neighbours.¹⁵⁴ Coupled with the challenge of poor demarcation of our borders is the problem of porousness of these unsecured frontiers. As a result, people do cross into and outside these states' borders without any hindrance at all. This poses security challenges to these states as they lack the capacity to man the borders and screen entries and exits.

The best illustration the challenges is best captured by Kenya's present predicament. Along its porous border with Somalia, the Al Qaeda-linked Al Shabaab terrorist group has literally created an ungovernable buffer inside Kenya's own territory.¹⁵⁵ Similarly, cross-border incursions by both Uganda's Karamojong and Kenya's Pokot herdsmen have made put paid to Kenya's

¹⁵³ E Hasani, 'Uti Possidetis Juris: From Rome to Kosovo' in *Fletcher Forum of World Affairs* for Summer/Fall, 2003. <<http://operationkosovo.kentlaw.edu/symposium/resources/hasani-fletcher.htm>> accessed on 18 June 2015

¹⁵⁴ AU, *Delimitation and Demarcation of Boundaries in Africa: General Issues and Case Studies* by AU Border Programme for September 2013.

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CCwQFjAD&url=http%3A%2F%2Fwww.peaceau.org%2Fuploads%2Fau-2-en-2013-delim-a-demar-user-guide.pdf&ei=A_qCVeWxOaXW7AbR2YKACg&usg=AFQjCNH4Muk0-L_MCd6OL0XRv3Gr5E5OHA&bvm=bv.96041959.d.ZGU> accessed on 18 June 2015

¹⁵⁵ Jeremy Lind, Patrick Mutahi and Marjoke Oosterom, 'Violence Tangled Ties: Al-Shabaab and Political Volatility in Kenya' (2015) *Institute of Development Studies*.

<<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CEsQFjAG&url=http%3A%2F%2Fchrips.or.ke%2Fdocs%2Fpublications%2Ftangled-ties-al-shabaab-and-political-volatility-in-kenya.pdf&ei=fQCDVbXZGYS27gbCnbn4BA&usg=AFQjCNHUUDcvmDXbTRtQjHKW2KR2JPbnEQ&bvm=bv.96041959.d.ZGU>> accessed on 18 June 2015

security efforts within the West Pokot region.¹⁵⁶ The same challenges have also been witnessed with frequent incursions by Ethiopian military into Kenya without the Kenya Government's consent.¹⁵⁷

However, the most relevant circumstance to this study is the case of incursions into Kenya by South Sudan's Topasa and Ethiopia's Merille pastoralists. Quite often, armed members of the two communities have crossed into Kenya and massacred members of Kenya's Turkana community with wanton abandon.¹⁵⁸ These clashes have all contributed towards making the region highly volatile and no meaningful economic activities will be witnessed in the region unless and until the security situation will have been dealt with.¹⁵⁹ As a result, investments in the production of the Turkana oil will certainly be either impossible, or too expensive if undertaken at all. In the latter scenario, the same shall impact very negatively upon possible benefit-sharing mechanisms that could be put into place by the government.

2.3 CONCLUSION

The idea of benefits sharing aims to ensure equitability in the distribution of benefits from natural resources. Kenyan natural resources are owned by Kenyans collectively through the government. The Constitution vests these resources in the National Government which is to hold and manage them in trust for the people of Kenya. Because of this collective ownership, every Kenyan has legitimate expectation to derive some benefit from these resources. However, in order for the government to successfully implement effective benefit-sharing programmes, there are other related social, economic and political issues that need to be addressed. These issues are the framework within which the law and policy on benefit-sharing needs to be anchored.

¹⁵⁶ S Lambroschini, 'Technical Brief: Using cross border programming to address cross border dynamics in Karamoja (Uganda) and Pokot (Kenya)' *Agency for Technical Co-operation and Development (ACTED)* February 2011.

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CEgQFjAG&url=http%3A%2F%2Freliefweb.int%2Fsites%2Freliefweb.int%2Ffiles%2Fresources%2FF_R_203.pdf&ei=CgKDVbDhNOPP7gaey4K4CQ&usg=AFQjCNFvjMQupEpGzX9C-2ZPHza4D0_bqw&bvm=bv.96041959,d.ZGU accessed on 19 June 2015

¹⁵⁷ Ali Abdi, 'Ethiopian Armed Forces invade Kenya in Border Row' in *Standard Digital* (Nairobi, 20 May 2015).

<http://www.standardmedia.co.ke/article/2000162820/ethiopian-armed-forces-invade-kenya-in-border-row> accessed on 13 October 2015

¹⁵⁸ Pragma, supra

¹⁵⁹ Ibid

The discussion herein has demonstrated that Kenya's social, economic and political landscape is not prepared for the implementation of an effective benefit-sharing programme for the Turkana oil resources. Therefore, Kenya needs to deal with the issues identified herein holistically if its attempts to address benefit-sharing shall bear any fruit. It is the view of this study that any attempts to deal with benefit-sharing from a purely legal perspective will bungle attempts towards the implementation of an effective benefit-sharing mechanism. It is to be appreciated that benefit-sharing is not just a legal issue because it has social, economic and political characterisations which also have to be given due consideration in equal measure to the legal aspect.

CHAPTER THREE

3.0 LEGAL FRAMEWORK ON BENEFIT-SHARING OF NATURAL RESOURCES

3.1 INTRODUCTION

This chapter examines the applicable laws to the issue of Benefit-sharing of Kenya's Natural Resources, especially the oil resources as are applicable to the situation in Turkana County. This task shall involve a critical appraisal of the applicable municipal laws on the one hand, as well as other applicable international conventions which Kenya has ratified. Under the rubric of the municipal laws, the study shall, among others, examine the Constitution of Kenya 2010, the Land Act 2012,¹⁶⁰ and the Petroleum (Exploration and Production) Act.¹⁶¹

The relevance of the international conventions hinges upon the provisions of Article 2(5) and (6) of the Constitution of Kenya 2010. The import of these provisions is to make the general rules of international law, as well as all conventions and treaties ratified by Kenya to become part of the corpus of its laws. As a result, the study shall examine provisions of relevant international law already ratified by Kenya and project how their obligations will impact upon the implementation of benefit-sharing of the oil resources.

¹⁶⁰ Number 6 of 2012

¹⁶¹ Chapter 308 Laws of Kenya

In the final analysis, the study shall outline the current practice on benefit-sharing in the country. In this regard, the study will, for instance, discuss the prominent practice of CSR. The study will lay bare, how companies have misapplied the CSR as a benevolent favour to the local and neighbouring communities so as to avoid legal obligations on implementation of benefit-sharing mechanisms for the natural resources which they exploit in the areas in question.

3.1.1 BASIS FOR BENEFIT-SHARING CLAIMS BY LOCAL COMMUNITIES

A common recurrent question that is often posed on the issue of benefit-sharing is that of what necessitates the quest for the said claims by the local communities. In other words, what is the justification for the entitlement to a share of the benefits from the natural resources by the local communities? In addition, there is also the question of who is supposed to provide for the benefits to the local communities. Is it to be the Central or National Government? Or should it be the Devolved or Local units of government? Or should the responsibility be tasked upon the companies engaged in the exploitation of such resources? Or better still, could the responsibility be apportioned to all the three entities proportionately?

It is given that whereas every form of mining has the potential of anchoring significant economic development to both the country's economy, as well as the local communities' livelihoods. However, it is also to be acknowledged that mining presents the risk of visiting a curse upon the national economy, as well as upon the members of the local population.¹⁶² The curses are considered to arise from the negative impacts that mineral discovery visits upon the local communities and the environment.¹⁶³ This is because the exploitation of natural resources often leads to the physical damage to the environment and natural resources.

Such damages have impacted upon the local water resources, forests and wildlife upon which the local communities depend for their livelihood.¹⁶⁴ Further, mining is also known to cause

¹⁶² T Murombo, 'Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation' (2013) 9(1) *Law, Environment and Development Journal* p. 31. <<http://www.lead-journal.org/content/13031.pdf>> accessed on 31 August 2015

¹⁶³ Ibid

¹⁶⁴ International Finance Corporation, *The Art and Science of Benefit-sharing in the Natural Resource Sector: A Discussion Paper*, IFC February 2015.

destruction of the environment, reduction of arable lands, and pollution of water and the air for breathing.¹⁶⁵ Away from the environmental destruction, it is noteworthy that sometimes, that mining activities can precipitate massive social disruptions and cultural shocks to the local communities.¹⁶⁶

The impacts and effects of these damages are real upon both the environment and people. However, the impacts and effects are much more pronounced upon the local communities, i.e. people who are in closer geographical proximity with the mineral resources which are being exploited. As a result, there is disproportionate impact of the mining activities between the local communities and the rest of the country. The former group bears the greatest burden of the impact of the damages upon the environment as compared to the rest of the people. This skewed apportionment of the effects of the mining activities has been considered as the basis for local communities' claims for benefit-sharing of the natural resources.¹⁶⁷

3.2 LEGAL FRAMEWORK ON BENEFIT-SHARING

3.2.1 DOMESTIC LEGAL FRAMEWORK

3.2.1.1 THE CONSTITUTION OF KENYA 2010

The Constitution has far-reaching provisions with direct relevance to question touching on the environment. Some of these most relevant provisions include Article include those on ownership of natural and mineral resources, public participation, equitable benefit-sharing, among others. In this regard, some of the most relevant provisions include Article 62(1) (f) and (3) on ownership of minerals and mineral oil, Article 63(1) and (2) (d) (iii) on community lands, Article 69(1) (a) on benefit-sharing, Article 69(1) (d) on public participation, Article 69(1) (h) on the need for the utilisation of environment and natural resources for the benefit of the people of Kenya, Article 42(a) on protection of the environment, Article 35(1) (a) on the right to information held by the state, and Article 10(2) (b) and (c) on national values and principles of governance.

<http://commdev.org/userfiles/IFC_Art%20and%20Science%20of%20Benefits%20Sharing_Final.pdf> accessed on 31 August 2015

¹⁶⁵ Murombo supra

¹⁶⁶ Ibid

¹⁶⁷ Ibid

3.2.1.1.1 OWNERSHIP OF OIL RESOURCES

At the root of the question of benefit-sharing lies the question of ownership of such resources. Attendant to this issue is land as the focal point because mineral resources, such as petroleum resources, are land-based in nature. Under Article 61, the Constitution decrees that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. Article 61(2) then classifies land as being either public land, community land or private land. Implicit in this categorization, therefore, is the understanding that people can own land either collectively as members of the public, or members of a community, or even as individuals.

The categories of land that falls within the purview of Public Land are listed in Article 62. Under Article 62(1) (f), as read together with sub-article (3), the Constitution categorises all land containing minerals and mineral oils, as defined by an Act of Parliament, as being part of public land. For the purposes of this paper, the relevant Act of Parliament which defines oil resources is the Petroleum (Exploration and Production) Act.¹⁶⁸

However, such land is vested in the National Government in trust for the people of Kenya. Administratively, all public land is to be administered by the National Land Commission on behalf of both levels of Government, as the case of ownership may be. Going by the above provisions of the Constitution, the areas of land within Turkana County containing oil deposits could therefore be considered as belonging to the realm of Public Land. Thus, such lands belong to the National Government and are administered by the National Land Commission.

Even though the provisions of Article 62(1) (f) and (3) seem to neatly pigeonhole land in Turkana County within the Public Land domain, the provisions of Article 63 pose some serious problems to the previous categorisation. Article 63(1) predicates categorisation of community land to ownership on the basis of ethnicity, culture or similar community of interest. Under sub-article 63(2) (d) (i), Community Land consists, inter alia, of land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines. The Turkana is a pastoral community and much of the area's arid lands are used as grazing areas. Consequently,

¹⁶⁸ Chapter 308 Laws of Kenya

this provision founds a constitutional basis for the categorisation of the subject Turkana County lands into Community Land as well. This conclusion leads to a clash of land ownership roles between the two levels of Government.

Under sub-article 63(3), the Constitution vests all unregistered community land into the relevant county governments. Such landholding by the county governments is to be in trust of the communities for which the respective lands are held. Most of the Turkana County lands are not registered. As a result, the land is held by the County Government of Turkana in trust for members of the Turkana Community. Because land that vests in either level of government is administered by the National Land Commission, it could be argued that the unregistered Turkana Community land as contemplated under Articles 63(3) and 62(2) of the Constitution is also administered by the Commission.

3.2.1.1.2 BENEFIT-SHARING

Equitability in the sharing of benefits is a cornerstone obligation that the Constitution imposes upon the state with regard to the exploitation of natural resources. This requirement aptly captured under Article 69(1) (a) of the supreme law. This sub-article obligates the state to put into place mechanisms for the sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and further that the sharing of the benefits accruing from such resources be done equitably. It is however instructive to note that issues of sustainable exploitation, use, management and conservation of natural resources do not have mathematical precision. Therefore, without clear legal and policy guidelines on how these should be executed, these constitutional principles remain a mirage whose implementation would, at best, be problematic.

In addition to Article 69, the provisions of Article 71 also have a significant bearing on the subject of benefit-sharing, albeit indirectly. Under sub-article (1), the Constitution decrees that certain types of agreements involving transactions touching on natural resources be subjected to ratification by Parliament. The kind of agreements contemplated are those entered into after the

Effective Date¹⁶⁹ and which involve the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya. Article 71(2) grants Parliament the power to enact legislation that specifically provides for the classes of transactions which are contemplated under clause (1) of the Article.

Under the provisions of the Fifth Schedule of the Constitution, the legislation contemplated under Article 71 should have been enacted by 27 August 2015. However, it is noteworthy to point out that with barely one month before the deadline lapses, Parliament has neither passed nor published a proposed legislation for debate. The corollary can therefore only mean that the agreements involving the kind of transactions contemplated by the Constitution would continue to be entered into by the Executive Arm of the state without the requisite legislative framework. In the circumstances, the grant of rights or concessions over natural resources would continue in much the same breath as it exists presently.

It is instructive to note that the express constitutional obligations on benefit-sharing within the meaning of Article 69(1) constitute a fundamental departure from the provisions of the repealed Constitution. Under the said Constitution, there was no explicit requirement for the Government to mainstream benefit-sharing mechanisms in the exploitation of natural resources. In fact, the High Court sitting in Nakuru dismissed a suit by members of the Endorois Community who sought to compel the government to share with them the benefits which accrued from the Lake Bogoria game Reserve. The land on which the game reserve is situated had been compulsorily acquired from the community without adequate compensation.

In dismissing the suit for the community's claims in *William Yatich Sitetalia & others versus Baringo County Council & Another*,¹⁷⁰ the High Court emphatically asserted that there is no one who becomes entitled to the benefits of that the benefits of natural resources simply because of geographical proximity to such resources. The court sadly put paid to the community's argument for benefit-sharing in the following manner;

¹⁶⁹ Article 260 of the Constitution defines the Effective Date as the date when the Constitution came into force, i.e. 27 August 2010

¹⁷⁰ High Court Case Number 183/2000

What is in issue is a national natural resource. The law does not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource.

3.2.1.1.3 PROPERTY IN PETROLEUM RESOURCES

Section 3 of the Petroleum (Exploration and Production) Act vests property of petroleum in the Government. However, for the avoidance of any ambiguity into such ownership, it can only be surmised that such ownership vests in the National Government, as opposed to County Governments as outlined under Article 62(1) (f) and (3). However, it is interesting to note that this section of the Act makes it permissible for any other written law to vest the property of Kenya's petroleum resources into any other person other than the National Government.

Clearly, this provision is problematic and is outrightly out of sync with the express constitutional provisions availing through Article 62(1) (f) and (3). This is because the Constitution does not contemplate any other any other ownership of the country's petroleum resources otherwise than through the National Government. If this provision were left to stand, then there is every reasonable chance that this section could be construed to mean that other legal persons and institutions such as County Governments could legitimately claim ownership of mineral resources found within their geographical limits. Such a scenario would complicate intended benefit-sharing programmes because of lack of co-ordination and harmonisation of structures. This is because of the possibility that each person owning the petroleum resources would be at liberty to determine their own benefit-sharing structures, if any.

It is interesting to note that in the published Petroleum (Exploration, Development and Production) Bill, 2014 the proposed law avoids to deal with the issue of ownership of oil resources. Such "omission" is likely to be informed by the fact that this issue has already been sufficiently dealt with by the Constitution. If enacted in the proposed form, the provisions of section 4 of the Bill shall, very importantly, make the Act to supersede all other laws in all matters involving upstream oil operations. Such a provision would be particularly important because of the need to open up likelihood of having parallel written laws becoming applicable concurrently. Such possibility could, as has been examined above, be conflicting and have the effect of impeding the implementation of such key programmes like benefit-sharing mechanisms.

3.2.1.2 PETROLEUM (EXPLORATION AND PRODUCTION) ACT

Presently, this is the principal legislation that deals with the upstream petroleum activities in Kenya. A particularly relevant provision on benefit-sharing is section 11 of the Act. The section provides on training through the establishment of the training fund. This Fund is financed through contributions from contractors who are involved in petroleum operations in the country. The extent to which how much each of the contractors is to contribute to the Fund is only determinable by the respective Petroleum Agreement(s). Under section 11(1) the Fund exists for the purpose of training Kenyan nationals in matters involving petroleum operations.

The establishment of the Fund is a significant measure in enhancing benefit-sharing programmes within the petroleum sector. Among the most outstanding of such benefits is that of capacity building and technological transfer which constitute critical empowerment tools within the petroleum sub-sector. However, as presently constituted, there are inherent flaws in the Training Fund as a benefit-sharing mechanism.

Among such flaws includes, first, the fund's limiting nature. This is illustrated by section 11(4) which restricts the use of resources from the Fund only for training purposes. As a result, it is impossible to expend such resources into other forms of benefit-sharing such as social and economic welfare programmes for the local communities. In this regard, it therefore means that the impact of this Fund is very marginal.

Secondly, whereas this study concedes that training programmes constitute opportunities for benefit-sharing, it is nonetheless argued that such opportunities are insufficient in providing effective benefit-sharing solutions within the context of this study. This study examines benefit-sharing mechanisms within the prism of localized benefits to members of the community from whose neighbourhoods the petroleum resources are exploited. However, the benefit-sharing mechanisms envisaged through the training fund are of national outlook. There is nothing in the law to suggest that applications for training opportunities received from members of the local community would receive a higher consideration than those from the rest of the country.

It is possible to make the assumption that the opportunities would be predicated on meritocracy for all the applicants from across the country. Therefore, the stress would most likely be premised on the principle of equality, as opposed to equity. Such an approach would be wanting in one principal respect. It does not take into account the fact that, due to the several years of social, economic and political marginalisation of the Turkana region, members of the Turkana Community cannot compete on an equal platform with people from other regions of the country.

The Turkana region lacks proper social and economic infrastructure, hence a poorly developed education system. Therefore, compared to most other regions of the country, the region has fewer educational opportunities and thus, fewer educated members. In this regard, if the training opportunities were to be on merit and equality, as opposed to equity, then they would be beneficial to people from the rest of the country as compared to the local community. In essence, such an approach would tend to perpetuate the present state of social, economic and political marginalisation of the region.

It is therefore clear that training opportunities premised upon equality would not properly implement a favourable benefit-sharing programme, it is asserted that a more suitable option could be a formula that apportions such opportunities in an equitable manner. In other words, this study argues for the implementation of affirmative action programmes in the sharing out of the available training slots. Affirmative action plans for training opportunities would ensure that the authorities take into account the disability that years of social, economic and political marginalisation has visited upon the region and members of the community. As a result, it would stress access to the opportunities based not just on meritocracy, but within the context of history and the existing realities of the day.

Thirdly, section 11(5) of the Act pegs the amount that each pays as contributions into the training fund to as shall be specified into the petroleum agreement. Section 5(1) of the Act then empowers the Cabinet Secretary to negotiate, enter into and sign petroleum agreements on behalf of the Government. The permissive nature of the section 5(1) makes the payment of the training contribution a hugely discretionary obligation, based on the outcome of the negotiations with the Cabinet Secretary.

Similarly, because no figures are prescribed for the training fund, such vagueness can serve to undermine the operations of the fund. In order to deal with the lacuna, it is suggested that the Act prescribes the minimum percentage of payment that each petroleum agreement should specify as constituting payment into the training fund. Such prescription would foreclose the likelihood that an erratic Cabinet Secretary could abuse their power to negotiate for the government by using the vagueness of the law to cut deals and hand the government raw deals.

The fourth flaw is that the control of the fund is at the absolute control that the Cabinet Secretary has over how it is to be expended. This limitation is illustrated by section 11(3) which predicates all withdrawals upon ministerial authorization. This makes the Fund to be at the whims of the Minister and, as a result, its reach might not be premised on merit and genuine training needs, but on political whims and convenience.

3.2.1.3 LAND ACT 2012

The relevance of the Land Act 2012¹⁷¹ within this discourse founds on two bases. The first basis is that it makes reference to the Community Lands within the meaning of Article 63 of the Constitution of Kenya 2010. The second basis is that the legislation that lays down the procedure for compulsory acquisition of land within the contemplation of Article 40 of the Constitution of Kenya.

Under the first limb, section 37 of the Land Act mentions, in passing, that community land is to be managed in accordance with the law relating to community land enacted pursuant to Article 63 of the Constitution. Article 63 of the Constitution obligates Parliament to enact legislation that would operationalize this Article on community land. Under the Fifth Schedule of the Constitution, Parliament is obligated to enact the relevant legislation on Community Land within 5 years from the Effective Date. Pursuant to this obligation, the National Assembly has since published the Community Land Bill, 2015 through a Special Issue of Kenya Gazette Supplement Number 129.

¹⁷¹ Act Number 6 of 2012

However, the National Assembly was not able to beat the deadline stipulated under the Fifth Schedule. In instances where Parliament does not meet the deadline, then Article 261 empowers Parliament to extend such deadline by up to one year. This is the basis upon which Parliament resolved on 25 August 2015 to extend the deadline for the passage of the Community Land Bill, together with other legislation, by another one year.¹⁷² Therefore, as of now, the country is lacking in the requisite legislative framework on community land. This therefore leaves a lot of *lacunae* in the management aspects of community lands such as those of Turkana where there are ongoing petroleum exploration activities by both Tullow Oil and Africa Oil Corporations.¹⁷³

Apart from section 37 of the Land Act, another equally significant provision of this Act is section 9 which deals with conversion of community land to other categories of land. Of specific importance in this regard is section 9(2) (d) of the Act which permits the conversion of community land into either private or public land. However, such conversion is required to be in accordance with the law relating to community land which is enacted pursuant to Article 63(5) of the Constitution.

The significance of this provision founds on the fact that the upstream petroleum activities on any land would require that the subject land be converted into public land. This is because Article 62(1) (f) as read together with 62(3) of the Constitution categorises all minerals and mineral oils as being public land. However, given that the Community Land Bill has not been enacted until now, this therefore leaves a vacuum. With this subsisting vacuum, the incidental question to ponder is that of what legislation the national Government has relied upon to provide permits for the present upstream petroleum activities such as the petroleum exploration within the Turkana County.

However, central to the issue of conversion of the target community land into public land is the extinguishment of the community's land rights. Community land rights entitle members of the

¹⁷² See for instance, J Ngirachu, 'MPs extend deadline for constitutional Bills to August 2016' *Daily Nation* (Nairobi, 25 August 2015). <<http://www.nation.co.ke/news/MPs-extend-deadline-for-constitutional-Bills-to-August-2016/-/1056/2845864/-/hxt4ctz/-/index.html>> accessed on 27 August 2015.

¹⁷³ J Hatcher, 'From Gushers to Glue: Should Kenya's Oil be Coming Out of the Ground at All?' *Newsweek* (London, 7 January 2015). <<http://pulitzercenter.org/reporting/africa-kenya-lodwar-gushers-glue-economy-oil-extraction-business-energy>> accessed on 27 August 2015

community, whether individually or collectively, to the possession, occupation, the use and enjoyment of the relevant land. This position has been judicially illustrated in the Australian *locus classicus* case of *Mabo versus Queensland No. 2* 1992 (Cth). The net effect of extinguishment of a community's property rights in their land is the deprivation of the right to property in the manner contemplated by Article 40 of the Constitution.

Deprivation of the right to property is therefore to be considered as being an exception to the general rule on the right to property. Article 40(3) of the Constitution excepts deprivation of property under either two very strict circumstances. One such circumstance is that the deprivation be in accordance with Chapter Five of the Constitution. Secondly, the deprivation must be informed by a public purpose or public interest and that the same be carried out in accordance with both the Constitution and any Act of Parliament.

Where such deprivation is permissible, the Government has to comply with two antecedent conditions. First, there has to be prompt payment in full of just compensation to the person(s) affected. Secondly, the affected person(s) must have access to a court of law. The deprivation of a person's right to their property is conducted within the framework of compulsory acquisition. The Land Act 2012 is the relevant legislation which provides on the procedure for the compulsory acquisition of land through Part VIII of the Act.

3.2.2 INTERNATIONAL LEGAL FRAMEWORK

The basis for the applicability of international law and conventions relating to benefit-sharing in Kenya founds upon the provisions of the Constitution of Kenya 2010. This foundation is more specifically laid down through Article 2(5) and (6). Under sub-article 2(5) of the Constitution, the general rules of international law are considered as to be forming part of the law of Kenya. On its part Article 2(6) domesticates into the Kenya's legal framework, all treaties or conventions which the country has ratified. This therefore makes all international legal instruments which provide on benefit-sharing of natural resources, coupled with those on proprietary rights over land, to become part of Kenya's legal framework.¹⁷⁴ Consequently, the

¹⁷⁴ See generally, Kenya National Commission on Human Rights, *Making The Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations: Occasional Report by Kenya National Commission on Human Rights*, October 2011.

provisions of such law should inform the direction of debate on benefit-sharing of the target oil resources of Turkana.

3.2.2.1 AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS

The ACHPRs, also known as the Banjul Charter is an intra-continental human rights treaty which is intended to guide human rights conduct among the African states. It has two enforcement institutions, namely, the African Commission on Human and People's Rights, and the African Court of Human Rights. Kenya ratified the Charter on 23 January 1992.¹⁷⁵ Therefore, pursuant to the provisions of Article 2(6) of the Constitution, the Charter forms part of the Kenyan law.

There are two Articles which are particularly relevant to this study. The first of these is Article 14 on the right to property. This Article requires states to guarantee a people's rights to property. The Charter predicates states' encroachment onto private property onto two preconditions. The first such precondition is public interest whereas the second one is the general interest of the community. In addition, such encroachment needs to be in accordance with the appropriate laws of the land, i.e. the Land Act 2012 and the yet to be passed Community Land Act in Kenya's case.

In interpreting this Article of the Charter, the Commission has previously cited, very approvingly, the position adopted by the Inter-American Court of Human Rights (IACtHR) in the *Case of the Indigenous Yakye Axa Community v. Paraguay*¹⁷⁶ and the *Case of Ricardo Canese v. Paraguay*.¹⁷⁷ In the two decisions, the IACtHR while interpreting a similar provision held that there are four permissible circumstances for a State to restrict the use and enjoyment of the right to property. The circumstances are; first, where there are restrictions which are previously established by law. Secondly, where the restrictions are considered to be necessary;

<http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf> accessed on 1 September 2015

¹⁷⁵ See generally, *Ratification Table: African Charter on Human and Peoples' Rights*.

<<http://www.achpr.org/instruments/achpr/ratification/>> accessed on 28 August 2015

¹⁷⁶ Judgment of 17 June 2005

¹⁷⁷ Judgment of 31 August 31, 2004

thirdly, where the restrictions are proportional; and finally, where the restrictions are intended at achieving a legitimate objective in a democratic society.

The African Commission has previously deliberated on a community's right to property under this Article through its decision on CEMIRIDE (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Endorois Case).¹⁷⁸ The Commission, while citing the decision of the Inter-American Court of Human Rights (IACtHR) in *The Mayagna (Sumo) Awas Tingni v Nicaragua*,¹⁷⁹ asserted that the Charter protects rights of indigenous communities in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.¹⁸⁰

It was the finding of the Court that the international human right to enjoy the benefits of property, must be understood to include the right of indigenous peoples to the protection of their customary land and resource tenure.¹⁸¹ This interpretation by the IACtHR was adopted by the African Commission in the *Endorois Case*. Consequently, the interpretation applies in the interpretation of the international protection of the right to property under Article 14 of the ACHPRs. The import of this interpretation is therefore to make the provisions of Article 14 become complementing provisions to a State Party's domestic legislation on the right to property. The corollary, therefore, is that even where there is no such domestic legislation, a people's customary tenure would remain securely protected through this Article.¹⁸²

The second Article of the Charter considered to be particularly relevant to the study is Article 21 on the right of people to freely dispose of their wealth and natural resources. The Charter obligates states to ensure that the right is to be exercisable in the exclusive interests of the people and that and that under no circumstances should the people be deprived of the right. In its

¹⁷⁸ Communication Number 276/2003

¹⁷⁹ Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

¹⁸⁰ SJ Anaya and C Grossman, 'The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples' (2002) 19(1) in *Arizona Journal of International and Comparative Law*.
<<http://www.arizonajournal.org/ajicl/archive/AJICL2002/vol191/introduction-final.pdf>> accessed on 28 August 2015

¹⁸¹ Ibid

¹⁸² See for instance, W Wicomb and H Smith, 'Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the *Endorois* decision' (2011) *African Human Rights Law Journal*.
<http://www.ahrlj.up.ac.za/images/ahrlj/2011/ahrlj_vol11_no2_2011_wicomb_smith.pdf>

decision in the *Endorois Case* already cited, the Commission also had the opportunity to examine and interpret the obligation that Article 21 of the Charter imposes upon States Parties to the Charter.

It is instructive to note that while interpreting Article 21 in the *Endorois Case*, the Commission adopted its own earlier decision in *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria (The Ogoni Case)*.¹⁸³ In the Ogoni Case, the Commission made an interesting finding that natural resources contained within traditional lands vests in the indigenous communities of the region. Such a finding therefore removes natural resources from the purview of the control and management of the central or national government as is usually the approach among most countries.

Within the Kenyan context, what this means is that all natural resources and mineral oils would not vest in the State through the National Government, but rather, into the respective communities. Therefore, the Turkana oil resources would belong to the people of Turkana, and not the Kenyan people collectively. As a result, section 3 of the Petroleum (Exploration and Production) Act¹⁸⁴ would also be invalid because it vests petroleum resources in the government. In essence, the import of that respective portion of the ruling is such as to controvert the provisions of Article 62(1) (f) and (3) of the Constitution. Because of this inconsistency, such an interpretation would be void and inapplicable in the Kenyan context by virtue of Article 2(4) of the Constitution.

Besides the above findings, the court further asserted, impliedly, that local communities' claims for the sharing in the benefits from the natural resources occurring in their localities is founded on Article 21 of the Charter. Therefore, from the Commission's perspective, local communities' claims for the sharing in the benefits from natural resources is a principal claim which overrides the state's claim to those same resources. This position is to be considered as being in total contradistinction to the presently existing view in which benefit-sharing claims by local communities is considered to be subservient to the state's claims to those same resources.

¹⁸³ Communication Number 155/1996

¹⁸⁴ Chapter 308 Laws of Kenya

3.2.2.2 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

This Convention was adopted on 16 December 1966 but came into force on 3 January 1976.¹⁸⁵ However, Kenya only ratified it on 1 May 1972.¹⁸⁶ Therefore, by virtue of Article 2(6) of the Constitution, the provisions of the ICESCRs are applicable in Kenya. The most relevant provision of this Covenant is Article 25 which provides that nothing in the Covenant is to be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

The foregoing provision of the Covenant seems to resonate very well with that of Article 21 of the African Charter on Human and Peoples Rights. However, a question to be posed is that of whether the import of this provision is to completely exclude the state from any management and exploitation of natural resources. However, it is to be acknowledged that it is completely impractical to exclude states in the management and exploitation of natural resources within their jurisdictions. Therefore, the attendant issue would be how much of the accruing benefits the local communities would be entitled to claim from the state.

3.3 CONCLUSION

Clearly, exploitation of natural resources within any area portends positive economic impacts to the country. However, such activities cause local communities to bear relatively hugely disproportionate burden as compared to people from the rest of the country. Such impacts are felt in the social, economic, cultural fabric of the communities. In addition, there are also serious environmental effects that come with such activities. These impacts, coupled with the fact of the location of the natural resources, are often considered to constitute justifiable bases for local communities to have a sense of entitlement to the benefits of the resources flowing therefrom.

However, in most jurisdictions, domestic laws vest the natural resources into the state. The government is then tasked to manage such resources on behalf of the citizens of the states. Quite

¹⁸⁵ United Nations, *United Nations Treaty Collection*.
<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-3&chapter=4&lang=en> accessed on 1 September 2015

¹⁸⁶ Ibid

often, there is usually no obligation that is placed upon the government to give preferential treatment to the local communities with respect to the sharing of benefits accruing from the natural resources. This reality tends to precipitate tension between the local communities' expectations and the country's economic and social policies. This is the scenario which existed in Kenya prior to the promulgation of the Constitution of Kenya 2010.

The Constitution heralded an era in which the state has been obligated to put into place mechanisms through which benefits accruing from natural resources are equitably shared among the people of Kenya. However, whereas the Constitution has created such succinct obligations on benefit-sharing, it is noteworthy that the legislative framework on benefit-sharing is largely weak and insufficient. Even though Parliament has proposed new laws to regulate benefit-sharing of natural resources, the same have not been enacted. Even then, these proposed legislation also have inadequacies. This has resulted in a legal void which has not even been filled up even by the relevant international conventions on the same.

CHAPTER FOUR

4.0 CONCLUSION AND RECOMMENDATIONS BASED ON COMPARATIVE JURISDICTIONS OF NIGERIA AND NORWAY

4.1 INTRODUCTION

Kenya presently produces different mineral resources such as titanium from Kwale, fluorspar from Kerio Valley in Elgeyo Marakwet County, soda ash from Lake Magadi, cement from coral rocks of Indian Ocean, among others. Previously, contestations by local communities about exploitation of natural resources were rarer than they are now. The country has recently witnessed a strong wave of opposition by local communities against investments relating to the exploitation of local natural resources. This could be attributable to the expansion of civil rights and liberties in the country, increased public awareness of people's rights, economic hardships

and disenfranchisement, influence from other jurisdictions, increasing openness in governance and public administration, among others.

Among mining-related projects whose implementation has faced opposition from local communities include the Lake Bogoria National Park by the Endorois community,¹⁸⁷ the Mui Coal Project of Kitui,¹⁸⁸ Tullow Oil's projects, and the Kinangop Wind Park Project¹⁸⁹ among others. Given this clear trend, it is clear that members of local communities have taken keen interest in the exploitation of natural resources within their backyards.

In Tullow Oil's case, members of the local community have already held violent demonstrations against its activities at these nascent stages.¹⁹⁰ In fact, given the intricate challenges that oil poses to the local environment, there is reason to believe that contestations by members of the local community against the operations of the MNCs will increase phenomenally once exploitation of these resources commence in earnest.¹⁹¹

One of the ways through which Kenya could effectively deal with these challenges is effective involvement of the local people. Such involvement would create a sense of ownership by the local people to the ongoing and anticipated oil-activities. This chapter proposes recommendations on how Kenya could implement a successful benefit-sharing mechanism based on comparison from the experiences of the petroleum-producing jurisdictions of Nigeria and Norway.

¹⁸⁷ See for instance, *William Yatich Sitetalia & others versus Baringo County Council & another*, Miscellaneous Civil Case No. 183/2002

¹⁸⁸ T Mosoba, 'Sh8.5 billion coal mining project in danger' *Daily Nation* (Nairobi, 21 July 2012). <<http://www.nation.co.ke/news/Sh8-5-bn-coal-mining-project-in-danger/-/1056/1460462/-/13o268f/-/index.html>> accessed on 10 September 2015

¹⁸⁹ A Gitonga, 'Kenya's Sh13b wind power project finally hit the skies in Nyandarua' *Standard Digital* (Nairobi, 16 November 2014). <<http://www.standardmedia.co.ke/business/article/2000141622/kenya-s-sh13b-wind-power-project-finally-hit-the-skies-in-nyandarua>> accessed on 9 September 2015.

¹⁹⁰ See for instance, L Ng'asike, 'We have lost hope in Tullow Oil, Turkana residents say' *Standard Digital* (Nairobi, 2 November 2013). <<http://www.standardmedia.co.ke/article/2000096718/we-have-lost-hope-in-tullow-oil-turkana-residents-say>> accessed on 10 September 2015

¹⁹¹ See for instance, J Schilling *et al*, 'The nexus of oil, conflict, and climate change vulnerability of pastoral communities in Northwest Kenya' (2015) 6 *Earth System Dynamics Discussions* 1163–1200 <<http://www.earth-syst-dynam-discuss.net/6/1163/2015/esdd-6-1163-2015.pdf>> accessed on 10 September 2015

The choice of the two jurisdictions is informed by two reasons. For Nigeria, its inclusion is founded on the fact that being an African country, it has several common economic and developmental similarities with Kenya. However, the way it has handled the issue of benefit-sharing of its oil resources leaves a lot to be desired. The Nigerian experiences must therefore serve to dissuade Kenya against following in the same path. However, unlike Nigeria, Norway offers one of the best examples on how oil-producing countries could implement sustainable benefit-sharing programmes through effective SWFs.

4.2 BENEFIT-SHARING IN A COMPARATIVE CONTEXT: THE CASE STUDIES OF THE FEDERAL REPUBLIC OF NIGERIA AND THE KINGDOM OF NORWAY

4.2.1. THE NIGERIAN EXPERIENCE

4.2.1.1 THE SOCIAL, ECONOMIC AND GEOGRAPHIC STRUCTURE OF NIGERIA

The Federal Republic of Nigeria consists of 36 states together with the Abuja Federal Capital Territory and 774 local governments.¹⁹² It shares land borders with Benin, Chad, Cameroon and Niger.¹⁹³ It also has a coastline along the Atlantic Sea.¹⁹⁴ With a population of about 174 million people, Nigeria is the most populous country on the continent.¹⁹⁵ However, its population is extremely diverse and comprises up to 250 ethnic groups. The country attained its political independence from Britain in 1960 but has since witnessed a lot of political instability. Such incidents of instability include the vicious Biafra War of the late 1960s, the civil war of the oil-producing Delta Region, and up to six coups d'état.¹⁹⁶

¹⁹² H Dyna and N Sothath, *Extractive Industries Revenue Management: A Tale of Six Countries*, Research Report 4 compiled and published by Cambodian Economic Association in cooperation with Cambodians for Resource Revenue Transparency (CRRT), Phnom Penh 2013.

<[http://library.opendevdevelopmentcambodia.net:8080/newgenlibtxt/CatalogueRecords/extractive_industries_revenue_management - a tale of six countries_full_report_english.pdf](http://library.opendevdevelopmentcambodia.net:8080/newgenlibtxt/CatalogueRecords/extractive_industries_revenue_management_-_a_tale_of_six_countries_full_report_english.pdf)> accessed on 11 September 2015

¹⁹³ BBC, 'Nigeria profile – Overview' in *BBC News* (London, 12 June 2015). <<http://www.bbc.com/news/world-africa-13949550>> accessed on 22 September 2015

¹⁹⁴ Ibid

¹⁹⁵ WPR, 'Nigeria Population 2015' in *World Population Review* for 13 September 2015.

<<http://worldpopulationreview.com/countries/nigeria-population/>> accessed on 22 September 2015

¹⁹⁶ PO Bamgboye, 'The Military and Socio-Economic Development in Nigeria (1983 – 1999): A Critical Appraisal' (2014) 5(23) *Mediterranean Journal of Social Sciences* MCSER Publishing, Rome-Italy.

<<http://www.mcser.org/journal/index.php/mjss/article/viewFile/4789/4646>> accessed on 19 September 2015

Nigerian oil was discovered in 1956 but its commercial production began in 1958 through the joint operation between Royal Dutch Shell and British Petroleum.¹⁹⁷ By the end of 2011, it was estimated that Nigeria's proven oil reserves stood at 37.2 billion barrels while its proven natural gas reserves stood at 180 trillion cubic feet.¹⁹⁸ Oil and gas revenue the major economic mainstay of Nigeria's economy it accounts for up to 95% of the foreign exchange earnings, at least 40% of the GDP, and up to 75% of the Federal Government's total revenue earnings.¹⁹⁹ The country's overreliance on oil exports is exacerbated by the extremely low internal consumption of oil which stands only at about 272,000 barrels per day.²⁰⁰

Oil and gas are the most dominant resource within Nigeria's extractives sector. International Energy Statistics' estimates in 2012 revealed that Nigeria held approximately 37 billion barrels of proved crude oil reserves and another 185 trillion cubic feet of natural gas deposits.²⁰¹ With these reserves, Nigeria therefore ranks as the 10th largest oil producing country globally, but second only to Libya in Africa.²⁰² However, in terms of natural gas reserves, the country ranks 7th globally.²⁰³ Due to the political instability that has wracked Libya since 2011, Nigeria has presently taken over as the continent's largest oil-producer with a production volume of up to 2.7 million barrels per day.²⁰⁴

Despite the country's huge onshore oil and gas reserves, the location of its deposits however largely lies within six states in the restive Niger Delta.²⁰⁵ However, the offshore oil and gas lie from wells located in Bight of Bonny, Bight of Benin and Gulf of Guinea.²⁰⁶ Nigeria is one of

¹⁹⁷ A Vaughan, 'Oil in Nigeria: a history of spills, fines and fights for rights' *The Guardian* (Lagos, 4 August 2011). <<http://www.theguardian.com/environment/2011/aug/04/oil-nigeria-spills-fines-fights>> accessed on 10 September 2015

¹⁹⁸ U.S. Energy Information Administration (U.S. EIA), *Nigeria Country Analysis Brief*, for 16 October 2012 as cited by D Otiotio's An overview of The oil and gas industry in Nigeria

¹⁹⁹ See Nigeria's IMF Country Report No. 12/194, *2011 Article IV Consultation Report on Nigeria*, July 2012

²⁰⁰ Dyna and Sothath supra

²⁰¹ US EIA supra

²⁰² Ibid

²⁰³ Ibid

²⁰⁴ See NNPC, *Nigerian Crude Oil Production Hits 2.7 Million Barrels... As NNPC, Benue Pledge to Resuscitate Makurdi Depot*.

<<http://www.nnpcgroup.com/PublicRelations/NNPCinthenews/tabid/92/articleType/ArticleView/articleId/380/Nigerian-Crude-Oil-Production-Hits-27-Million-Barrels-As-NNPC-Benue-Pledge-to-Resuscitate-Makurdi-Depot.aspx>> accessed on 14 September 2015

²⁰⁵ US EIA supra

²⁰⁶ Ibid

the societies with very sharp debates surrounding oil resources. This debate is not only founded in the context of the country's divided society, but also in the uneven geographic distribution of these resources in a manner which corresponds with ethnic, religious and linguistic divides.²⁰⁷

4.2.1.2 THE LEGAL ARCHITECTURE OF NIGERIAN OIL RESOURCES

The primary legal framework for the Nigerian oil and gas resources is founded on the 1999 Constitution.²⁰⁸ Section 44(3) of the Constitution vests both the property in the oil and the control of these resources into the Federal Government. The philosophy behind this decision is that natural resources are every country's common heritage.²⁰⁹ Therefore, their ownership and management need to be vested into the government which would then manage and hold it in trust for its citizens.²¹⁰ This position is further buttressed in legislation through the Nigeria Petroleum Act 1969 which vests the petroleum resources into the Federal Government, and not in the producing states.

Pursuant to section 44(3) of the Constitution, the Federal Government wields absolute power over the oil and gas resources.²¹¹ The Federal Government exercises its power over these resources through three key institutions. These are the President of the Federal Republic, the Ministry of Petroleum Resources and the Nigerian National Petroleum Corporation (NNPC).²¹² The role of the Ministry is to take formal responsibility for policy-making.²¹³ The critical nature of the Ministry's role is demonstrated by the fact that often, the President also doubles up as the Minister for petroleum resources supported by a junior minister for State for Petroleum.²¹⁴ The NNPC is the government's commercial and business agency within the petroleum sector.²¹⁵

²⁰⁷ N Haysom and S Kane, *Negotiating natural resources for peace: Ownership, control and wealth-sharing*, A Briefing Paper by Centre for Humanitarian Dialogue, October 2009.

<http://comparativeconstitutionsproject.org/files/resources_peace.pdf> accessed on 10 September 2015

²⁰⁸ Dyna and Sothath, *supra*

²⁰⁹ RB Bilder, 'International Law and Natural Resources Policies' (1980) 20 *Natural Resources Journal*.

<http://lawschool.unm.edu/nrj/volumes/20/3/02_bilder_international.pdf> accessed on 6 October 2015

²¹⁰ Ibid

²¹¹ Dyna and Sothath, *supra*.

²¹² Ibid

²¹³ Ibid

²¹⁴ Ibid

²¹⁵ Ibid

Section 162 of the Constitution provides on benefit-sharing of the Nigeria's oil resources. Subsection 162(1) establishes a Federation Account into which all revenues and royalties from oil production are paid. The funds paid into this account are then distributed among each level of government and agency in line with a formula determined by the responsible Commission. Subsection 162(2) sets out the formula for sharing the oil resources through the principle of derivation. It obligates the government to allocate 13% of the oil earnings to the derivation states.

4.2.1.3 MANAGEMENT OF OIL RESOURCES

Natural resource management has two aspects to it.²¹⁶ On the one hand is transparency and accountability, while on the other hand is economic spending.²¹⁷ Economic spending entails the saving versus stabilization function.²¹⁸ Evidence suggests that where resource-rich states fail to address these two crucial aspects, then this portends doom for those states' economic stability. Natural resource revenues injected into the economy usually causes real exchange rate appreciation, loss of efficiency, competitiveness and growth, and ultimately, unviable public and private investment projects.²¹⁹

Nigeria is a clear illustration of how a state's failure to implement the foregoing aspects of natural resource management creates economic distortion. The reasons for Nigeria's failure in this respect are twofold. First, is the country's history of political instability evidenced by multiple *coups d'état*.²²⁰ The military rulers presided over opaque governance system characterized by human rights violations and mega corruption scandals that gave no consideration to transparency and accountability in the management of the oil resources.²²¹

The second factor is the poor spending model which Nigeria has relied upon between 1960 and 2004. During this period, Nigeria applied the big-spending model also known as the balanced

²¹⁶ Ibid

²¹⁷ Ibid

²¹⁸ Ibid

²¹⁹ N Shaxson, *Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit?* Chatham House, a publication of Royal Institute of International Affairs, November 2009.

https://eiti.org/files/NEITI%20Chatham%20house_0.pdf accessed on 19 September 2015.

²²⁰ Ibid

²²¹ Bamgboye, *supra*

budget rule.²²² Under this model, all the oil revenue was considered part of the fiscal revenue and all of it was used in the financing of the public expenditure.²²³ In addition, the oil revenue spending was discretionary as it did not follow any special rule: it simply followed the normal budgetary process.²²⁴ This fiscal regime exposed Nigeria's economy to the vagaries of fluctuations in international oil prices.²²⁵

4.2.1.3.1 REVENUE BENCHMARKING MODEL

In order to cushion the country's economy from the vulnerability of international oil prices, Nigeria abandoned the big-push spending model. To wean the economy from the big-push spending model, Nigeria adopted a two-pronged approach. First, it adopted the policy of the Revenue Benchmarking Model (RBM) in 2004.²²⁶ Secondly, it established the ECA.²²⁷

The RBM model was first implemented through the budget oil price-based rule in 2004.²²⁸ In order to ensure that the economy is protected against the vagaries of the external shocks, this model sought to disconnect government expenditure from the oil revenue.²²⁹ It achieves its purpose by requiring that the annual budgets be based upon pre-determined oil price(s) otherwise known as the benchmark price.²³⁰

4.2.1.3.2 THE EXCESS CRUDE ACCOUNT

Besides the RBM, Nigeria also introduced ECA which was a savings account to enable the country to accumulate its surplus oil revenue so as to cushion the economy against international

²²² M Morgandi, *Extractive Industries Revenues Distribution at the Sub-National Level: The Experience in seven resource-rich countries*, Revenue Watch Institute of June 2008.

<http://www.resourcegovernance.org/sites/default/files/RWISubnatlRevSharing_2008_0.pdf> accessed on 17 September 2015

²²³ Dyna and Sothath supra

²²⁴ Ibid

²²⁵ Ibid

²²⁶ B Adedipe, *The impact of oil on Nigeria's economic policy formulation*, A paper presented at the Conference on "Nigeria: Maximizing Pro-poor Growth: Regenerating the Socio-economic Database" and organized by the Overseas Development Institute in collaboration with the Nigerian Economic Summit Group between 16th and 17th June 2004. <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/events-documents/117.pdf>> accessed on 19 September 2015

²²⁷ Ibid

²²⁸ Dyna and Sothath supra.

²²⁹ Ibid

²³⁰ EIA, 'Benchmarks play an important role in pricing crude oil' in *Today in Energy* published by the US' Energy Information Administration on 28 October 2014. <<http://www.eia.gov/todayinenergy/detail.cfm?id=18571>> accessed on 19 September 2015.

oil price fluctuations and ensure fiscal stability.²³¹ It was intended to serve as a stabilization fund and a buffer to the economy against the volatility of international oil prices.²³² Its operational style was that in case oil prices surged above the benchmark price, then the surplus amounts were channeled into ECA.²³³ Conversely, if the oil prices fell below the benchmark price, then ECA would be withdrawn or outflowed in order to bridge the deficit.²³⁴

4.2.1.3.3 NIGERIAN SOVEREIGN INVESTMENT AUTHORITY (NSIA)

Since 2004 when it introduced both the RBM and ECA, the country has made further improvements to these models. A major hallmark in this direction came with the phasing out of ECA and its eventual replacement with the NSIA in 2012.²³⁵ The merit of NSIA over ECA is that the former introduced the principle of sustainability in both the management and use of the oil resources.²³⁶ Thus, its implementation requires the country to implement mechanisms for sustainability in the use of hydrocarbon revenues. Besides, it is to prepare the country for the ultimate exhaustion of its petroleum reserves.²³⁷

The NSIA is owned by all of Nigeria's three levels of governments in trust for Nigerians.²³⁸ However, each level of government's ownership is restricted to the proportion of their respective percentage share of the revenue allocation formula of the Federation Account.²³⁹ The NSIA has the responsibility to fulfill several key mandates. First, it develops a savings base for the Nigerian people.²⁴⁰ Secondly, it enhances the development of Nigeria's infrastructure.²⁴¹ Thirdly, it provides stabilization to the economy during economic stress.²⁴² Finally, it undertakes any other mandate such as would be incidental to the foregoing three mandates.²⁴³

²³¹ Ibid

²³² Ibid

²³³ Ibid

²³⁴ Ibid

²³⁵ Morgandi supra

²³⁶ Ibid

²³⁷ Dyna and Sothath supra

²³⁸ Ibid

²³⁹ Ibid

²⁴⁰ JSC Ezeani, 'An overview of the Nigerian Sovereign Investment Authority' (2012) *The Sovereign Wealth Fund Initiative* published by the Fletcher School, Tufts University.

<<http://fletcher.tufts.edu/~media/Fletcher/Microsites/swfi/pdfs/2012/NigeriaSWFFinal.pdf>> accessed on 19 September 2015

²⁴¹ Ibid

²⁴² Ibid

²⁴³ Ibid

Each of the foregoing NSIA mandates is aligned to a specific fund. This is because the NSIA is constituted by three mandate-specific funds.²⁴⁴ The first fund is the FGF with the sole mandate of offering diversified portfolio of investments for the benefit of future generations.²⁴⁵ This fund helps to implement the principle of Intergenerational Equity within the purview of the management and use of the country's oil resources.

The second Fund is NIF which offers diverse portfolio of investments that are intended to assist critical Nigerian infrastructural development. The investments targeted are those which seek to attract the support from foreign investments, economic diversification and growth.²⁴⁶ The third fund is the SF which exists as a diversity of investments and can be used to provide supplemental funding to the Nigeria's economy. In addition, the fund also serves as the Budgetary Smoothing Amount so as to stabilize Nigeria's fiscal regime.²⁴⁷

4.2.1.4 BENEFIT-SHARING OF NIGERIA'S PETROLEUM RESOURCES

With regard to benefit-sharing of its oil resources, Nigeria steadfastly pursues the principle of derivation.²⁴⁸ The oil revenue is shared through a pre-determined formula set by the *ad hoc* Commission which entitles each of the petroleum-producing states to 13% of the oil revenue. Nigeria's revenue distribution scheme is as summarized below;

- a) Vertical revenue distribution scheme between Nigeria's three levels of Government i.e. the National (Federal) Government, the States and the Municipalities.²⁴⁹

	Level of Government	Revenue Amount (%)
1.	Central Government	45.83

²⁴⁴ SWFI, *Nigeria Sovereign Investment Authority*, SWFI. <<http://www.swfinstitute.org/swfs/excess-crude-account/>> accessed on 19 September 2015

²⁴⁵ Ibid

²⁴⁶ Ibid

²⁴⁷ Ibid

²⁴⁸ Dyna and Sothath

²⁴⁹ Ibid

2.	All 36 States (by formula)	23.25
3.	All Municipalities (by formula)	17.92
4.	All 9 oil-producing States (by derivation)	13
	Total	100%

b) Horizontal Distribution

	Government	Amount distributed (%)
1.	Central Government	45.83
2.	9 oil-producing States	16.45
3.	Municipalities in oil-producing States	5.81
4.	27 non-producing States	19.80
5.	Municipalities in non-producing States	12.11
6.	Total	100

4.2.1.5 ISSUES AND CHALLENGES ARISING FROM NIGERIA'S PETROLEUM REVENUE DISTRIBUTION SCHEME

Despite the progress noted in its oil revenue management scheme, Nigeria however still faces a number of challenges. Such challenges include contestations about resource ownership and the exclusive rights of the national government towards petroleum resources; effective and progressive petroleum fiscal systems; funding options for joint venture operations and the National Oil Company; authentic indigenous participation in the domestic oil and gas industry; rule of law and institutional empowerment; and continual membership of Nigeria in OPEC.²⁵⁰

²⁵⁰ W Iledare, 'Oil and the Future of Nigeria: Perspectives on Challenges and Strategic Actions for Sustainable Economic Growth and Development' (September 2015) *International Association for Energy Economics* for the Second Quarter 2007. <<file:///C:/Users/Felix/Downloads/Iledare.pdf>> accessed on 19 September 2015

Other challenges include land conflicts, alienation and violence,²⁵¹ perceived inadequate oil-revenue allocation to the oil-producing areas.²⁵²

4.2.1.5.1 AUTHENTIC INDIGENOUS PARTICIPATION

Nigeria has adopted several policies intended to enhance the participation of the local communities into the oil industry. Some of these include the awarding of oil blocks to indigenous firms, and the local content development policies.²⁵³ Despite these policy interventions, the local people's participation in the oil-related remains, at best, unauthentic.²⁵⁴ Even though the country has invested into a lot of human skill and technical expertise among the local population, the policies have nonetheless failed to spur authentic participation by the indigenous population.

This failure has been partially attributed to the fact that the policies in question have not been supported by adequate financial intermediation.²⁵⁵ As a result, what the government has done is to create mere opportunities without a corresponding effectualisation scheme. There is therefore a gap between the policy and reality in the local communities' participation in the oil industry. Effective and authentic participation by the indigenous communities in the management and use of petroleum is critical in managing the tension and possible conflict flare-ups arising from feelings of exclusion by the local communities in the benefit-sharing arrangements. It helps inspire not only confidence, but also a sense of ownership of the process and activities.

The restive nature of the local people within the oil-producing areas could partially be attributable to the failure by both the state and MNCs in implementing a seamless authentic

²⁵¹ JC Ebegbulem, D Ekpe and TO Adejumo, 'Oil Exploration and Poverty in the Niger Delta Region of Nigeria: A Critical Analysis' (2013) 4(3) *International Journal of Business and Social Science*.

<http://ijbssnet.com/journals/Vol_4_No_3_March_2013/30.pdf> accessed on 22 September 2015

²⁵² IO Asume, *Oil and Gas Revenues and Development Challenges for the Niger Delta and Nigeria*. A Paper presented at the Expert Group Meeting on The Use of Non-Renewable Resource Revenues for Sustainable Local Development Organised by the UN Department of Economic and Social Affairs Friday 21 September 2007 UN Headquarters, New York.

<http://www.un.org/esa/sustdev/sdissues/institutional_arrangements/egm2007/presentations/isaacOsuoka.pdf> accessed on 22 September 2015

²⁵³ Ibid

²⁵⁴ Ibid

²⁵⁵ JO Agwara, *Resource Curse in Nigeria: Perception and Challenges*, published by the International Policy Fellowship Program Open Society Institute in December 2007. <<https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=challenges%20to%20the%20nigerian%20oil%20resources%20and%20economy>> accessed on 19 September 2015

participation by the local communities into the industry for so long. The responsible state institutions and the MNCs have only succeeded in creating a policy of exclusion in the oil industry so much so that the oil-producing areas remain least-developed with the people wallowing in abject poverty. The local people therefore feel no sense of inclusion, responsibility and ownership of the oil-related activities. This is the basis for the incessant protests, insurgency, conflicts and sabotage of activities of the MNCs in the oil-producing regions.²⁵⁶

4.2.1.5.2 OWNERSHIP AND CONTROL OF OIL RESOURCES

Section 44(3) of the 1999 Nigerian Civilian Constitution vests oil resources in the Federal Government. The exclusive ownership of oil resources by the Federal Government is responsible for numerous challenges facing the oil industry. First, it has fueled rampant corruption and economic wastage which have characterized the oil industry.²⁵⁷ Secondly, it has promoted inefficiency in block allocation mechanisms, and limited transparency.²⁵⁸ Finally, it has undermined meaningful attempts and strategies aimed towards indigenization of the industry.²⁵⁹

Lack of indigenization of the industry has, in turn, sabotaged development of the local economy within the oil-producing areas.²⁶⁰ This is because the centralisation of the petroleum royalties greatly reduces, to insignificant levels, possible impacts of the petroleum taxation policies developed among the communities.²⁶¹ Thus, in the realm of benefit-sharing discourse, the underdevelopment in the petroleum oil-producing areas has largely been attributed to Federal Government's exclusive ownership and control of petroleum resources. This scenario persists notwithstanding the fact that the oil-producing states are entitled to 13% of Nigeria's total oil revenue, over and above the rest of the states.

²⁵⁶ C Obi, 'Nigeria's Niger Delta: Understanding the Complex Drivers of Violent Oil-related Conflict' (2009) 34(2) in *Africa Development* pp. 103–128. Published by Council for the Development of Social Science Research in Africa (CODESRIA), 2009. <<http://www.ajol.info/index.php/ad/article/viewFile/57373/45753>> accessed on 17 October 2015.

²⁵⁷ *Ibid* supra

²⁵⁸ *Ibid*

²⁵⁹ NC Ozigbo, 'Technological Capacity Building in the Nigeria's Oil and Gas Industry'. Proceedings of the 19th Annual International Information Management Association held between 13 and 15 October 2008 in San Diego, California.

²⁶⁰ *Ibid*

²⁶¹ *Ibid*

4.2.1.5.3 CORRUPTION AND DEVELOPMENT DISPARITIES

The Niger Delta is Nigeria's economic heartbeat owing to the fact that it produces most of the oil resources which form the country's economic mainstay. Despite its key role in Nigeria's economic matrix, the region however suffers acute underdevelopment which has been the result of years of social and economic marginalisation.²⁶² Whereas this underdevelopment is partially attributable to the years of military misrule, it is also the common view that rampant corruption in the public sector has also contributed significantly towards this reality.²⁶³

Systemic corruption is said to have become a subculture among most of the regional public office holders, hence undermining the push towards implementation of effective development policies.²⁶⁴ So rampant is corruption that the vice is said to have become deeply embedded in the regional political economy to the extent that it forms a central point of discussion in Nigeria's development discourse.²⁶⁵ For Nigeria to arrest this downward trend in its development programme(s), it needs to invest in effective watchdog institutions.²⁶⁶ Such measures shall help to guard against economic pilferage, especially those targeting the billions of Naira flowing into the economy.

4.2.1.5.4 DEFICIENCIES IN INSTITUTIONAL AND HUMAN CAPACITY

Nigeria lacks adequate technically-qualified and skilled manpower to service its oil and gas industry.²⁶⁷ Therefore the MNCs have flooded the industry with expatriates.²⁶⁸ This has led to the alienation of the local Nigerians in the exploitation of the country's oil resources.²⁶⁹ This has stymied adequate capacity development and technological transfer.²⁷⁰ Therefore, even though

²⁶² D Babalola, 'The Underdevelopment of Nigeria's Niger Delta Region: Who is to Blame?' (2014) 7(3) *Journal of Sustainable Development*. Published by Canadian Center of Science and Education.

<<http://www.ccsenet.org/journal/index.php/jsd/article/viewFile/36094/20743>> accessed on 23 September 2015

²⁶³ Ibid

²⁶⁴ Ibid

²⁶⁵ U Mohammed, 'Corruption in Nigeria: A Challenge to Sustainable Development in The Fourth Republic' (2013) 9(4) *European Scientific Journal* February

²⁶⁶ MAO Aluko, 'The institutionalization of corruption and its impact on political culture and behaviour in Nigeria' (2002) 11(3) *Nordic Journal of African Studies* pp. 393-402. <http://www.njas.helsinki.fi/pdf-files/vol11num3/aluko_02.pdf> accessed on 17 October 2015

²⁶⁷ DE Agbibo and B Maiangwa, 'Corruption in the Underdevelopment of the Niger Delta in Nigeria' (2012) 5(8) in *The Journal of Pan African Studies*. <<http://www.jpanafrican.com/docs/vol5no8/5.8Corruption.pdf>> accessed on 22 September 2015

²⁶⁸ Ibid

²⁶⁹ Ibid

²⁷⁰ Ibid

Nigeria has recently invested in human capacity development over the years, the level of development in this regard remains unreasonably low so much so that indigenization of the industry remains a painfully slow exercise.²⁷¹ The challenge of the lack of adequate human capacity development in the oil industry has sometimes been described as the “knowing-doing” gap.²⁷²

Besides human capital challenges, Nigeria also experiences deficiencies in its institutional capacity.²⁷³ Despite the fact that the country has engaged in oil production for close to 60 years, its institutional capacity remains relatively weakly developed. This is partially attributable to the country’s previously unstable political regime necessitated by the incessant military coups as well as outright corruption.²⁷⁴ Institutional capacity challenges in Nigeria’s oil industry is best illustrated by the fact that key institutions such as NSIA, are in their nascent stages of development. Consequently, capacity building and development in the sector have not matched the demand.

Aside from the NSIA, another petroleum-related institution which experiences deficiency in capacity is the Department of Petroleum Resources. The DPR has never been able to attain the autonomy and independence which it needs in order to be able to effectively discharge its statutorily defined mandate.²⁷⁵ This handicap exists notwithstanding the fact that its statutory mandate is clearly defined and is not in dispute. The institutional capacity challenges of the DPR undermine Nigeria’s ability to harness its technical expertise within the oil industry.

4.2.1.5.5 POVERTY

The oil-producing areas have over the years witnessed social and economic marginalisation which is manifested through abject poverty.²⁷⁶ The poverty levels in the oil-producing Niger

²⁷¹ LN Chete, JO Adeoti, FM Adeyinka and O Ogundele, ‘Industrial development and growth in Nigeria: Lessons and challenges’ *Nigerian Institute of Social and Economic Research (NISER), Ibadan.*

<http://www.brookings.edu/~media/Research/Files/Papers/2014/11/learning-to-compete/L2C_WP8_Chete-et-al.pdf?la=en> accessed on 22 September 2015

²⁷² J Balouga, ‘Nigerian Local Content: Challenges and Prospects’ (2012) (3rd Quarter) *International Association for Energy Economics.*

²⁷³ Ibid

²⁷⁴ Agbiboa *et al* supra

²⁷⁵ Agwara supra

²⁷⁶ Asume, supra

Delta caused general feeling of social-economic disenfranchisement that spawned into a full-fledged insurgency in the region.²⁷⁷ The violence only dissipated in 2009 when President Jonathan's government granted amnesty to the insurgents.²⁷⁸ Whereas the guns have gone silent, tension however remains high and both the relevant state institutions and MNCs have not made tangible social and economic investments within the region in order address the root causes of the violence.

4.2.1.5.6 LAND CONFLICTS

Section 44(3) of the 1999 Civilian Constitution together with the Land Use Act vest the control and ownership of all land and mineral resources in the State.²⁷⁹ Such legal ownership and control of land and mineral resources often give the Federal Government the right to expropriate and avail communal lands and forests for petroleum-related activities without reference to the affected communities.²⁸⁰ This has caused social dislocation and communal violence, especially within the oil-producing regions.²⁸¹

The intermittent violence and insurgency in the Niger Delta Region could be attributed to two factors. First, is the act of government expropriation of communal lands as this leads to scarcity of productive land for agricultural activities.²⁸² This, in turn, leads to little agricultural output and food hence making food items to become very expensive. Secondly, the various stages of the oil activity including the exploration, drilling and transportation often lead to environmental degradation and corresponding unmitigated destruction on the livelihoods of the local population.²⁸³ The land and environmental dilemma in the Niger Delta Region has been described thus;

²⁷⁷ C Newsom, 'Conflict in the Niger Delta: More Than a Local Affair' (Special Report 271, US Institute for Peace June 2011). <http://www.usip.org/sites/default/files/Conflict_Niger_Delta.pdf> accessed on 22 September 2015

²⁷⁸ Ibid

²⁷⁹ Asume, supra

²⁸⁰ Ibid

²⁸¹ Ibid

²⁸² Ibid

²⁸³ HA Saliu, S Luqman and AA Abdullahi, 'Environmental Degradation, Rising Poverty and Conflict: Towards an Explanation of the Niger-Delta Crisis' (2007) 9(4) *Journal of Sustainable Development in Africa*. <<http://www.unilorin.edu.ng/publications/JSDA.pdf>> accessed on 6 October 2015

Forests and mangroves are cleared, community farmlands are destroyed, and wetlands, creeks and community fishponds are polluted, while the air and rainwater is contaminated with dangerous gasses flared indiscriminately by oil and gas producing companies.²⁸⁴

4.2.2 THE NORWEGIAN EXPERIENCE

Norway is one of the world's few success stories regarding the management and use of oil and gas resources. Very importantly, it has put into place key institutional measures to ensure its economy is not adversely affected by massive fiscal inflows from the oil and gas revenue. The Norwegian experience would therefore offer Kenya certain positive insights with respect to the mechanisms that Kenya needs to implement in its oil and gas resources management.

4.2.2.1 NORWAY'S SOCIAL, ECONOMIC AND GEOGRAPHIC STRUCTURE

Norway, together with Denmark, Finland, Iceland, Sweden, and the autonomous regions of Åland Islands, Faroe Islands, and Greenland, constitute the Nordic Region.²⁸⁵ The Kingdom has a population of 5.1 million people, a stable economy consisting of 2.2% annual growth rate, a GDP per capita of 100,178 and a GDP of US\$ 517 billion.²⁸⁶ Given the structure and size of its economy, Norway is one of Europe's biggest economies.²⁸⁷

4.2.2.2 LEGAL ARCHITECTURE OF NORWAY'S OIL RESOURCES

The present legal structure of Norway's oil sector consists of various laws which act in concert. These include the Petroleum Act (Act No. 72 of 29 November 1996) pertaining to petroleum activities; Petroleum Regulations as laid down by Royal Decree of 27 June 1997; the Technical Regulations and the Safety (HSE) Regulations.

The historical development of Norway's legal structure for oil resources has been painstaking. The first legislation was Royal Decree of 9 April 1965. The second legislation was the Royal Decree of 8 December 1972. The third was the Act of 22 March 1985 pertaining to petroleum

²⁸⁴ Asume, *supra*

²⁸⁵ M Hoydal, 'History of the Nordic Region from the Viking Times to the Present' in *Norden*.

<<http://www.norden.org/en/fakta-om-norden-1/history-of-the-nordic-region>> accessed on 6 October 2015

²⁸⁶ Focus Economics, *Norway Economic Outlook*, Focus Economics for 1 September 2015. <<http://www.focus-economics.com/countries/norway>> accessed on 25 September 2015

²⁸⁷ *Ibid*

activities. This was then followed by the present principal legislation in the sector, i.e. Petroleum Act of 1996, i.e. Act No. 72 pertaining to petroleum activities.²⁸⁸

In addition to the above, the other legal interventions came in through the Petroleum Regulations of 27 June 1997, the European Union Licensing Directive which came into effect for Norway as from 1 September 1995, the Directive 97/11 and 2001/42/EC on impact assessments of 1999, New Chapter 11 regarding Petro of 2001, the New Chapter 9 in the Petroleum Regulations – EU gas market directive of 2003 and, finally, the New Chapter 2a in the Petroleum Regulations – SEA directive of 2005.

4.2.2.3 MANAGEMENT AND CONSERVATION OF NORWAY'S OIL RESOURCES

Since the 1960s when Norway commenced its oil-production activities, it adopted a sound oil conservation policy.²⁸⁹ One such measure is the staggered-approach in the extraction of the oil resources.²⁹⁰ Under this approach, the government grants only a few licenses for extraction at a given time.²⁹¹ The approach helps to ensure that every acreage licensed and awarded for petroleum activities is explored efficiently in a manner that guarantees the realization of full potential of the resources within an efficient financial framework.²⁹² Consequently, it maximises the lifetime of the licensed oil fields.²⁹³

The steady stream of petroleum production volumes that Norway has achieved notwithstanding the fact that its oil reserves are much lower than other states has been attributed to this prudent approach of management.²⁹⁴ This approach is all the more necessary against the backdrop of the fact that oil resources are non-renewable and as such, exploitation needs to be done in a manner that ensures available resources are maximally extracted.

²⁸⁸ H Keilen, 'Norwegian Petroleum Technology: A success story', published by the Norwegian Academy of Technological Sciences (NTVA) in co-operation with Offshore Media Group and INTSOK, 2005. <https://www.sintef.no/globalassets/upload/petroleumsforskning/dokumenter/forskningsboken_en.pdf> accessed on 24 September 2015

²⁸⁹ CRED, 'What Canada and Alberta could learn from Norway', *CRED* 2013. <<http://credbc.ca/norways-oil-gas-policy/>> accessed on 25 September 2015

²⁹⁰ CRED, *supra*

²⁹¹ *Ibid*

²⁹² *Ibid*

²⁹³ *Ibid*

²⁹⁴ *Ibid*

This approach has turned out to be a long-term management and planning strategy which is paying off handsomely in a manner that far outstrips the benefits that the country would have received had the exploitation been done haphazardly. Due to this arrangement, Norway has consistently over the years produced a steady volume of over one million barrels per day.²⁹⁵ Norway has therefore been able to make their limited oil resources available to several generations of its citizens in a manner that clearly implements the principle of Inter-generational Equity.

4.2.2.4 BENEFIT-SHARING OF NORWAY'S OIL RESOURCES

Unlike Kenya, Norway's economy is fully developed. As a result, Norway's considerations for benefit-sharing do not readily map into those for a developing country. For instance, unlike a developing country where policy developers have to deal with the question of how much more resources would a resource-producing area be entitled to over and above the rest of the non-resource producing area, the same is not the case with a developed country.

The justification for the higher resource allocations for the resource-producing areas is generally out of the need to empower such regions for the opportunity cost of having foregone the use of their own lands in favour of the greater national good. However, given Norway's well-heeled economy, the type of benefit-sharing policies that it pursues for its oil resources become a little different.

4.2.2.4.1 GOVERNMENT PENSION FUND GLOBAL

The Government Pension Fund Global (GPF) is Norway's SWF.²⁹⁶ Governments resort to SWFs as SPVs for investment of assets within private financial markets.²⁹⁷ The SWFs are not just considered as implicit acceptance by states of the power of finance, they also illustrate

²⁹⁵ See the website for the Norwegian Petroleum Directorate at <http://www.npd.no/en/news/Production-figures/> accessed on 25 September 2015

²⁹⁶ AHB Monk, *Sovereignty in the Era of Global Capitalism: The Rise of Sovereign Wealth Funds and the Power of Finance*. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1587327 accessed on 25 September 2015

²⁹⁷ World Bank Group, 'Sovereign Wealth Funds and Long-Term Development Finance: Risks and Opportunities', *World Bank Group*, 2014. file:///C:/Users/Felix/Downloads/WBG_Sovereign_Wealth_Funds_and_Long_Term_Development_Finance_Risks_and_Opportunities.pdf accessed on 7 October 2015

attempts by the state to leverage finance and filter the transformative forces of global capitalism.²⁹⁸

The GPF is Norway's SWF into which all surplus revenue from the oil resources is kept.²⁹⁹ Until January 2006, the Fund had been known as the Petroleum Fund of Norway.³⁰⁰ It is the largest SWF globally with the value of the Fund established in October 2014 to be in excess of USD 850 billion.³⁰¹ It has a strong institutional arrangement in its management system and this has instilled prudent management of the oil resource revenue inflows into the economy.³⁰²

The Fund was established in 1990 when Norway's oil and gas production began to rise sharply.³⁰³ It was however intended for the purposes of making long-term investments which would have countered effects of possible decline in production or income from the oil revenue.³⁰⁴ Through this, the Fund was to buffer Norway's economy against the disruptive effects of fluctuations in international oil prices, especially after the 1986 oil crash. The 1986 oil crash caused a deep nosedive in international oil prices to oil prices of the early 1970s.³⁰⁵

The surplus deposited into the GPF is generated from several sources which include 28% on income companies, 50% oil and gas tax levied on agreements, 67% of proceeds of government share in Statoil, and from a share of the 20% stake that Norway holds in all oil companies operating in the country.³⁰⁶ The Fund has divested its global investments and is now estimated to

²⁹⁸ Ibid

²⁹⁹ Sovereign Wealth Fund Institute, 'Norway Government Pension Global' *SWFI*.

<<http://www.swfinstitute.org/swfs/norway-government-pension-fund-global/>> accessed on 17 October 2015

³⁰⁰ Ibid

³⁰¹ M Skancke, E Dimson, M Hoel, M Kettis, G Nystuen and L Starks, *Fossil-Fuel Investments in the Norwegian Government Pension Fund Global: Addressing Climate issues through Exclusion and Active Ownership*. A Report by the Expert Group Appointed by the Norwegian Ministry of Finance.

<https://www.regjeringen.no/contentassets/d1d5b995b88e4b3281b4cc027b80f64b/expertgroup_report.pdf>

accessed on 17 October 2015

³⁰² S Al Fathi, 'Norway's Petroleum Fund is a success story' in *Gulf News Energy* for 14 July 2013.

<<http://gulfnews.com/business/sectors/energy/norway-s-petroleum-fund-is-a-success-story-1.1208975>> accessed on 17 October 2015

³⁰³ Ibid

³⁰⁴ Ibid

³⁰⁵ D Gately, 'Lessons from the 1986 Oil Price Collapse' in *Brookings Papers on Economic Activity* 2: 1986.

<http://www.brookings.edu/~media/Projects/BPEA/1986-2/1986b_bpea_gately_adelman_griffin.PDF> accessed on 17 October 2015

³⁰⁶ Al Fathi supra

hold 1% of the global equity markets but 1.78% of the European stocks.³⁰⁷ Up to 2009, the Fund had invested 40% of its value into stock markets but this value was increased to 60%.³⁰⁸ Of the remaining value, 5% is invested in real estate while the rest is invested in bonds.³⁰⁹ In order to minimise risks, all the Fund's investments are diversified in close to 8,000 companies globally with the Fund not being permitted to hold more than 10% of any single company's shares.³¹⁰

4.2.2.5 INSTITUTIONAL STRUCTURE IN THE NORWEGIAN OIL INDUSTRY

4.2.2.5.1 MINISTRY OF PETROLEUM AND ENERGY (MPE)

The Ministry of Petroleum and Energy deals with policy matters especially with respect to environmental issues.³¹¹ EC Directive 2001/42/EC also tasks the ministry with the responsibility of opening up the NCS for petroleum activities. Due to the significant impacts that petroleum activities have on such ecosystems, the Ministry plays the role of overseeing the impact assessments. This is intended to determine the impacts and mainstream mitigation measures.³¹²

During oil production, the Ministry deals with licensing through award of oil production licences. In addition, EC Directives 85/337 and 97/11/EC gives the Ministry the responsibility for issuance of approval plans for the development and operation. Such approvals are predicated upon satisfactory social impact assessment reports undertaken.

The Ministry also plays a role in dealing with facility installation and decommissioning. For instance, after reviewing environmental impact assessments, the Ministry then approves plans for the installation and operation of facilities such as pipelines. Similarly, pursuant to submission of environmental impact assessment, the Ministry also reviews and approves decommissioning plans.

³⁰⁷ Ibid

³⁰⁸ Ibid

³⁰⁹ Ibid

³¹⁰ Ibid

³¹¹ P Heum, 'Local Content Development-experiences from oil and gas activities in Norway' published by *Institute of Research in Economics and Business Administration in Bergen* in February 2008 and funded by NORAD.

<http://brage.bibsys.no/xmlui/bitstream/handle/11250/166156/1/A02_08.pdf> accessed on 3 October 2015

³¹² Ibid

4.2.2.5.2 NORWEGIAN PETROLEUM DIRECTORATE

The Directorate has the mandate to deal with technical control, regulatory and advisory functions.³¹³ Its management consists of a Board of Directors which is appointed by the Ministry of Petroleum.³¹⁴ The Directorate is administratively answerable to the Ministry which is responsible for overall policy in the industry.

The primary objective of the NPD is to create the greatest possible values for the Norwegian society from the oil and gas activities through “prudent resource management based on safety, emergency preparedness and safeguarding of the external environment”.³¹⁵ In order to attend to the foregoing objective, the NPD is required to play four critical functions. First, it serves as the advisor to the Ministry through its professional integrity and interdisciplinary expertise.³¹⁶ Secondly, it has the responsibility for data from NCS to inform decisions on oil-related activities. Thirdly, in cooperation with other authorities, it is required to ensure comprehensive follow-up of petroleum activities.³¹⁷ Finally, the NPD is the driving force for realization of Norway’s resource potential.³¹⁸

4.2.2.5.3 STATOIL

Statoil was established in 1972 as a wholly state-owned oil corporation but was later privatized and listed in June 2001 in both Oslo and New York.³¹⁹ The Corporation’s primary function is the marketing and sale of the SDFI petroleum.³²⁰ The resources from such sale go directly to the government’s coffers.³²¹ Its operations are conducted on similar terms and conditions like any other commercial institutions in the NCS.³²² The SDFI is the vehicle through which Norway holds direct participating interests in licensing and petroleum facilities on the country’s

³¹³ Ibid

³¹⁴ Ibid

³¹⁵ See the website of Norwegian Petroleum Directorate at <<http://www.npd.no/en/About-us/>> accessed on 17 October 2015

³¹⁶ Ibid

³¹⁷ Ibid

³¹⁸ Ibid

³¹⁹ M Thurber, D Hults, and PRP Heller, ‘The Limits of Institutional Design in Oil Sector Governance: Exporting the “Norwegian Model”’ (ISA Annual Convention 2010 New Orleans, 18 February 2010). A Programme on Energy and Sustainable Development.

<http://fsi.stanford.edu/sites/default/files/Thurber_Hults_and_Heller_ISA2010_paper_14Feb10.pdf> accessed on 7 October 2015

³²⁰ Ibid

³²¹ Ibid

³²² Ibid

continental shelf.³²³ Its assets are wholly owned by Petoro AS, a corporation which is itself wholly owned by the state.³²⁴

4.2.2.6 NORWAY'S POSITIVES

Kenya can draw a lot of positives from Norway on how the country manages its oil sector. Some of these include;

4.2.2.6.1 STRONG REGULATORY FRAMEWORK

The legal regulatory framework for Norwegian oil and gas resources is governed by the Petroleum Act, Act No. 72 of 29 November 1996 relating to petroleum activities.³²⁵ This is further supported by the Petroleum Regulations (Regulation No. 653 of 27 June 1997).³²⁶ These laws define all the processes relating to the award of licences for exploration, production and transportation of oil resources. These laws control all phases of petroleum activities including award of exploration licenses, acquisition of seismic data and exploration drilling, plans for development and operation, and plans for field cessation.³²⁷

The Act vests Norway's petroleum resources into the State. Therefore, the State has responsibility for the grant of approvals and permits necessary for all petroleum activities.³²⁸ Besides, the state also deals with policy development and implementation in the sector. To achieve this, the state ensures that impact assessments are conducted as condition precedent for the implementation of all phases of petroleum activities.³²⁹ The requirement for impact assessment derives from chapter 3 of the Petroleum Act and chapter 2a of the Petroleum Regulations.

³²³ OB Moe, 'The Norwegian Model: Evolution, performance and benefits', *Norwegian Ministry of Petroleum and Energy*. <http://sener.gob.mx/Experiencia_Noruega_Materia_Petrolera/res/2congreso/The_Norwegian_Model-%20Evolution_performance_and_benefits.pdf> accessed on 7 October 2015

³²⁴ Ibid

³²⁵ Y Tormodsgard, *Facts 2014: The Norwegian Petroleum Sector*, published by Ministry of Petroleum and Energy, 2014. <http://www.npd.no/Global/Engelsk/3-Publications/Facts/Facts2014/Facts_2014_netto.pdf> accessed 25 September 2015

³²⁶ Ibid

³²⁷ Ibid

³²⁸ Ibid

³²⁹ Ibid

Apart from local legislation, regulation of Norwegian oil activities is also subject to certain regime of international law. For instance, even though the disposal or decommissioning of oil facilities is governed by chapter 5 of the Act and chapter 6 of the Regulations, those provisions of the local law are also complemented by the OSPAR Convention.³³⁰ In addition, since Norway's oil activities occur on its Continental Shelf, such activities are therefore also regulated by the provisions of the 1982 UNCLOS.

However, despite the complexity and challenging regulatory nature of the oil industry, Norway has navigated across the challenges successfully.³³¹ In fact, Norway stands out as one of the few success stories in the management and regulation of the oil industry.³³² The fact that Norway has kept environmental challenges like pollution to very minimum levels, and deal effectively with incidents arising therefrom, can only be attributed to effective legal regulation of the sector. This is a positive value which every upcoming oil state should emulate.

4.2.2.6.2 INSTITUTIONAL AUTONOMY

The regulation of the extractives sector such as oil involves the activities of multiple institutions. One of the key Norwegian institutions involved in the industry is Parliament (Stortinget). Other institutions include the Ministries of Petroleum and Energy, Environment, Labour, Fisheries and Coastal Affairs, and Finance. The ministries deal with policy making, overseeing implementation, as well as legal enforcement. In addition, other relevant institutions include the Climate and Pollution Agency, Norwegian Petroleum Directorate, the Norwegian Petroleum Safety Authority, Norwegian Coastal Administration, the Petroleum Tax Office and the Government Pension Fund Global.³³³

³³⁰ Ibid

³³¹ H Ryggvik, 'The Norwegian Oil Experience: A toolbox for managing resources', (Centre for Technology, Innovation and Culture (TIK Centre), 2010). <<http://www.sv.uio.no/tik/forskning/publikasjoner/tik-artikkelserie/Ryggvik.pdf>> accessed on 25 September 2015

³³² CRED, supra

³³³ MC Thurber, DR Hults, and PRP Heller, 'Exporting the "Norwegian Model": The effect of administrative design on oil sector performance' in *Energy Policy*, 2011. <http://iis-db.stanford.edu/pubs/23264/Thurber_Hults_Heller_Norwegian_Model_Energy_Policy_2011.pdf> accessed 25 September 2015

Usually, every oil industry has conflicting interests from powerful industry players such as the MNCs and international lobbyists.³³⁴ Regulation of the sector therefore meets strong opposition and resistance from vested interest groups. Institutional independence and autonomy is not just significant but critical in this sector's regulation. The effectiveness of the institutions in discharge of their mandate is to be viewed in light of the independence and or autonomy of the institutions. Norwegian institutions involved in the oil industry have done a commendable job in acting independently but with synergy in order to deliver upon their respective mandates.

4.2.2.6.3 EFFECTIVE PUBLIC PARTICIPATION

Norway has implemented a strong framework to ensure effective public participation in the entire decision-making stratum of the oil and gas industry. This has been achieved through the mainstreaming of the requirement of public participation within the public consultation fora. This is achieved by requiring that at every point of action, one form of impact assessment is undertaken. Such assessment could be environmental and/or social impact assessment, depending on the circumstances of each case.

For example, before the government opens any new areas for petroleum activities on the NCS, the Ministry of Petroleum and Energy undertakes a three months' public participation exercise for an impact assessment.³³⁵ The duration of three months is considered reasonably long enough to examine the extent to which human activities would be impacted upon by such grants. Similarly, before the government awards new production licences, there is a six-week' window period for public consultation concerning the possible impacts of such licenses.³³⁶

In addition, another instance of public consultation is just before approval of plans for installations and operation of facilities such as pipelines.³³⁷ This exercise lasts for three months and during that period, the Ministry undertakes an impact assessment. Similarly, before disposal,

³³⁴ S Bromley, J Busby, N Duquet, LN Moro, P Utting and K Ives, 'The International Politics of Oil' (2006) 2(1) *St Anthony's International Review*. <http://users.ox.ac.uk/~stair/2_1/betts&eagleton-pierce&roemer-mahler.pdf> accessed on 25 September 2015

³³⁵ Moe supra

³³⁶ Ibid

³³⁷ Ibid

the government undertakes a 6-week public consultation exercise.³³⁸ Aside from offering citizens the opportunity to make their input, public participation also offers opportunities for governments to give their citizens the chance to own their public decisions and processes in a manner that diminishes possible public hostilities towards such projects.

4.2.2.6.4 MAINSTREAMING ENVIRONMENTAL ISSUES WITHIN OIL INDUSTRY OPERATIONS

Norway's oil and gas production activities are conducted in the offshore.³³⁹ One form of pressure on Norway's environment arises from high exposure of its environment to air and coastal pollution owing to emissions from other neighbouring countries.³⁴⁰ In addition, a more pressing environmental concern arises from the country's offshore oil and gas production, fishing, transport and its ever swelling demand for electricity.³⁴¹

These challenges are exacerbated by the need to strike the delicate balance between optimisation of its economic benefits from its rich natural resource base *vis-à-vis* its environmental and social value systems. This dilemma presents a number of environmental challenges to Norway. These include issues on biodiversity, eutrophication and oil pollution, waste and recycling, climate change, outdoor recreation, cultural heritage, hazardous chemicals, international co-operation, and environmental protection in polar areas.³⁴²

In order to deal with these challenges within the background of offshore oil drilling, Norway has successfully put in place various environmental conservation and management interventions. One such measure is the implementation of a seamless institutional structure that operates in a coordinated manner by enhancing operational synergy for better environmental management and conservation.³⁴³ Among the key institutions that play a role in environmental management and

³³⁸ Ibid

³³⁹ Ibid

³⁴⁰ P McLoughlin and M Geller (ed), 'Norway, Russia on collision course over Arctic oil drilling' in *Platts* (27 May 2015). <<http://www.platts.com/latest-news/oil/london/norway-russia-on-collision-course-over-arctic-26102429>> accessed on 24 September 2015.

³⁴¹ OECD, 'Environmental Performance Review: Norway', (OECD, Paris 2001). <<http://www.oecd.org/env/country-reviews/47689483.pdf>> accessed on 24 September 2015

³⁴² Ibid

³⁴³ Moe supra

conservation include the Ministries of Petroleum and Energy, Environment, Labour, Fisheries and Coastal Affairs, Transport and Communication, and that of Finance.

The Ministry of Labour and Social Affairs has the responsibility of regulating the working environment and safety at work.³⁴⁴ Despite the high risk nature of the working environment in the oil industry, Norway has however implemented safety measures. Such success is attributable to the effectiveness of this Ministry in discharging its mandate. The Ministry of Finance has undertaken the responsibility of petroleum taxation, as well as the administration of the Government Pension Fund Global.³⁴⁵ The Ministry of Transport and Communication is mandated to handle oil spill preparedness.

Oil spillages pose adverse environmental consequences and the fact that they have been handled efficiently with minimal environmental damage is testimony to the Ministry's effectiveness in discharging this mandate. The Ministry of Climate and Environment is responsible for safeguarding the external environment.³⁴⁶ In concert with the other Ministries, this Ministry has over the years played a coordinating role in handling the environmental impacts that the activities in the oil and gas sector. It appears that the ministries have adopted an integrated approach in discharging their mandates in a manner that has ensured that the often overlapping sectoral mandates and issues are addressed holistically.

In addition to the ministries, there are departments that also play key roles within the area of environmental conservation and management. These include Norwegian Petroleum Directorate, Climate and Pollution Agency, Petroleum Safety Authority, Norwegian Coastal Administration and the Petroleum Tax Office.³⁴⁷ These institutions have been able to execute their mandate very

³⁴⁴ Tormodsgard supra

³⁴⁵ Ibid

³⁴⁶ Ibid

³⁴⁷ S Jadhav, 'Petroleum Resource Management: The role of institutional frameworks and fiscal regimes in value creation-A Comparative Analysis for Norway and Nigeria' (Masters Thesis, NHH - Norges Handelshøyskole and HEC Paris Bergen/ Paris, Spring 2014).

<<http://brage.bibsys.no/xmlui/bitstream/handle/11250/223637/masterthesis167.PDF?sequence=1>>. Accessed on 24 September 2015

effectively because they have been strengthened through adequate funding and functional autonomy in a manner that enhances professionalism.³⁴⁸

Apart from the institutional interventions, Norway has also undertaken other measures which have contributed towards ensuring effectiveness in environmental conservation and management. These include the close international cooperation through bilateral and multilateral arrangements. Such arrangements include the UN, the EU, the WTO, and the Russia-Norway Action Plan on the Elimination of Pollution in the Arctic, among others.³⁴⁹ Such international cooperation are critical platforms through which states lay strategies for dealing with international challenges such as environmental pollution among others.

Other environmental conservation and management mechanisms that Norway has implemented include policies on sustainable development within the area of environmental management conservation. Such policies include the integration of social concerns into environmental policies, integration of environmental concerns in economic and sectoral policies, sectoral integration on clean energy requirements, among others. In this respect, Norway has adopted a holistic approach in its environmental management and conservation matters.

4.2.2.6.5 TRANSPARENCY IN THE OIL INDUSTRY ACTIVITIES

Norway has endeavoured to infuse transparency in all activities touching on and relating to the oil industry.³⁵⁰ In this regard, it has opened itself up to the scrutiny of both local and international civil society groups.³⁵¹ One international civil society group that has worked closely with Norway's oil industry is the Extractive Industries Transparency Initiative (EITI). EITI is an international initiative whose purpose is to reinforce sound management principles through the disclosure and verification of revenue flows to the state from the extractives sector in mineral-resource countries.³⁵²

³⁴⁸ Ibid

³⁴⁹ OECD supra

³⁵⁰ Tormodsgard, supra

³⁵¹ Ibid

³⁵² See EITI website at

Norway has put into place a transparent system for its oil and gas sector that ensures its citizens are kept abreast with the revenue flows in its extractives industry.³⁵³ Such transparency has inspired confidence among the citizens with regard to how the government applies funds from the extractives industry. Nothing is most illustrative of this reality than the fact that Norway was the first OECD country to have implemented EITI having been admitted into this forum in March 2011.³⁵⁴ Until 2014, only 24 countries had implemented EITI.³⁵⁵ To implement EITI, Norway has established a stakeholder group with participation from authorities, companies and the general population.³⁵⁶

EITI membership requires the infusion of certain principles of governance. It requires transparency and accountability and effective public participation. For effective public participation among the citizenry, it is imperative that there be a higher level of general public awareness on issues of public governance. This therefore requires that the state invests in civic education among its citizenry so that the general population becomes informed.

4.2.2.6.6 EFFECTIVE AND A HARMONISED REGIONAL TAXATION REGIME

The institution of the Petroleum Tax Office is an establishment in the Ministry of Finance. A significant way through which the Department has internalized the externalities of the oil and gas sector, such as pollution, is through the administration of the environmental taxes. Environmental taxes are taxes whose tax base is a physical unit, or a proxy of it, of something with proven, specific negative impact upon the environment.³⁵⁷ According to the Norwegian law, all taxes on energy and transport are considered environmentally-related taxes.³⁵⁸

Among the gases that are targeted by these taxes include carbon dioxide and nitrogen oxides.³⁵⁹ Apart from the gases, all petroleum activities are also subjected to emission permit requirements

³⁵³ Tormodsgard supra

³⁵⁴ Ibid

³⁵⁵ See EITI

³⁵⁶ Tormodsgard, supra

³⁵⁷ Eli Marie Naess and Tone Smith, 'Environmentally related taxes in Norway: Totals and Divided by Industry' (Statistics Norway/Division for Environmental Statistics, 2009)

³⁵⁸ Ibid

³⁵⁹ Ibid

of environmental taxes.³⁶⁰ The emission permit requirements are implemented through the requirement that the licensees purchase permits for each tonne of carbon dioxide that it emits within the NCS.³⁶¹ These environmental taxes were introduced to reduce carbon dioxide gas emissions into the atmosphere, hence ensure reduction of GHG emissions into the atmosphere.

The implementation of the environmental tax regime in Norway has therefore made significant steps towards addressing pollution concerns that come with petroleum activities. Norway's success story in implementing the environmental tax has been boosted further by the fact that environmental taxes are a common feature of the other Scandinavian countries as well.³⁶² Thus, the regional cooperation and near harmonised European environmental laws, have contributed towards advancing environmental cause by reducing carbon emissions together with other GHGs.

4.3 CONCLUSIONS AND RECOMMENDATIONS FOR THE KENYAN CASE

Benefit-sharing of natural resources is all about fiscal planning. Therefore, its successful implementation requires that the relevant state creates adequate structures for good governance. Good governance in the extractives industry is predicated upon two broad requirements. First, it requires that the development of long-term planning from the outset.³⁶³ Secondly, the country needs to implement fiscal transparency in all matters relating to the extractives in question.³⁶⁴

However, the specifics of what each country needs to put into place in order for its citizens to experience equitability in the benefits from the natural resources will depend on various factors. Some of these factors could be general while others are unique to the circumstances of the implementing country. For instance, for Kenya to develop its benefit-sharing policy for the Turkana oil resources, some of the considerations that it needs to take into consideration include

³⁶⁰ Sirini Withana, Patrick ten Brink, Andrea Illes, Silvia Nanni and Emma Watkins, 'Environmental Tax Reform in Europe: Opportunities for the future', (Institute for Environmental Policy, 30 May 2014).
<[file:///D:/LLM%20Materials/First%20Semester/Research%20Methodology/Chapters/Chapter%203/ETR in Europe - Final report of IEEP study - 30 May 2014.pdf](file:///D:/LLM%20Materials/First%20Semester/Research%20Methodology/Chapters/Chapter%203/ETR_in_Europe_-_Final_report_of_IEEP_study_-_30_May_2014.pdf)> accessed on 28 September 2015

³⁶¹ Naess and Smith supra

³⁶² Michal Ptak, 'Environmentally motivated energy taxes in Scandinavian countries' (2010) 10(3) *Economic and Environmental Studies* Vol. 10, No. 3 (15/2010), pp. 255-269.
<http://www.ees.uni.opole.pl/content/03_10/ees_10_3_fulltext_01.pdf> accessed on 28 September 2015

³⁶³ Dyna and Sothath supra

³⁶⁴ Ibid

the level of development of the Turkana region relative to the rest of the country, general security matters of the region, land-tenure system of the Turkana community, among others.

4.3.1 CONCLUSION

It is clear from the discussion herein that Kenya still lacks what it takes in order to implement an effective benefit-sharing structure that would adequately answer to the social, economic and political construct of the Turkana area. While it is admitted that Kenya already has certain basic structures in place, it is however evident from the discussion that a lot more still needs to be done. Among the challenges in this regard include;

4.3.1.1 INADEQUATE LEGAL FRAMEWORK

Kenya has not enacted substantive legislation on benefit-sharing. Parliament has published the Natural Resources (Benefit-sharing) Bill 2014 and the Petroleum (Exploration, Development and Production) Bill 2015. These Bills of Parliament, if passed, shall provide a sound framework on the administration of benefit-sharing programmes within Kenya. It could be argued that the lack of a legal framework to regulate benefit-sharing is the reason why benefit-sharing programmes have been administered haphazardly.

For most Kenyans, benefit-sharing has been couched within the framework of CSR. This view however poses three inherent flaws. First, it presupposes that the responsibility for implementation of benefit-sharing is exclusively placed upon the corporations involved in the exploitation of the natural resources. Whereas it is conceded that CSR activities play significant roles in enhancing engagement between the corporations and the local people, this study argues that corporations cannot be exclusively be responsible for the implementation of adequate benefit-sharing programmes. State institutions have to be at the forefront in the administration and implementation of benefit-sharing programmes.

The second flaw of the view of benefit-sharing through CSR is that because CSR programmes are not obligatory, it turns out that most companies engage in it through tokenism. This view is informed by the concern that the returns that the corporations give back to the society through CSR programmes are too little as compared to the profits that they post. In Kenya, for instance,

most CSR programmes undertaken by the corporations involve construction of classrooms for neighbouring schools, construction of a few water spots, among others.

Admittedly, these are important investments for the local people. However, this approach makes us lose sight of the bigger picture on benefit-sharing. Most of the programmes undertaken through CSR programmes are, in fact, social-welfare activities which ought to be undertaken by the state. To a great extent, therefore, CSR activities tend to be gap-fillers for state failure, rather than being benefit-sharing programmes in the strict sense.

Thirdly, CSR programmes are not regulated and are also largely uncoordinated. As a result, most corporations end up undertaking similar programmes. Programmes overlap results in “over-investment” in certain projects. This therefore results in underutilization of such projects by the target local communities. Consequently, the same defeats the very intention of benefit-sharing.

4.3.1.2 DISPARATE AND WEAK IMPLEMENTING STRUCTURES

Kenya’s regulatory framework for upstream petroleum activities is quite weak and is therefore not suited to deal with the challenges that relate not only to the upstream activities, but also benefit-sharing of the oil resources. In addition, an aspect of benefit-sharing of oil resources requires the establishment of strong implementation institutions which have the capacity and the ability to effectively coordinate the oil-related activities in a manner that ensures they discharge their mandates successfully.

However, Kenya’s institutional framework is not best-placed to engage in sustainable oil-related activities. At present, Kenya’s existing institutions include the Training Fund established under section 11 of the Petroleum (Exploration and Production) Act, NOCK, PIEA, the Ministry of Energy and Petroleum, the National Treasury and Parliament. Each of these institutions would have some role to play in the implementation of any benefit-sharing programme. However, presently, the nature of their operations is quite disparate in a manner that does not inspire synergy.

4.3.2 RECOMMENDATIONS ON OVERCOMING THE CHALLENGES

4.3.2.1 CHOOSING A SPENDING MODEL BASED ON KENYA'S LEVEL OF ECONOMIC DEVELOPMENT

Natural resource-based revenue inflows into the economy pose two main challenges to the country. First, fluctuation of the commodity's price requires that the country's medium-term expenditure be formulated by making conservative assumptions regarding future price and related revenues.³⁶⁵ Secondly, extractives are exhaustible resources yet their benefits need to be shared by both the present and future generations. This is in line with the requirement that states implement principles of intra-generational and intergenerational Equity.³⁶⁶ This therefore requires that every country with revenue inflows from extractives develop a policy for saving and investment which clearly spells out a draw-down policy for the maximization of the benefits.³⁶⁷

The practice by most states has been the creation of a stock of human and physical capital or even foreign assets.³⁶⁸ However, it is to be appreciated that the pressure for a country's development ought not to blind policymakers to the reality that rapid fiscal expansion, such as is usually the case with financing inflows from oil resources, has inherent risks that could threaten the economy. This is because higher uncontrolled public expenditure results in a buildup of pressure on the prices of non-tradable goods.³⁶⁹ Consequently, it leads to the impairment of non-oil private sector competitiveness and the Dutch Disease phenomenon.³⁷⁰

The response that states have adopted to these challenges are usually varied. However, the common point for oil-producing states has been to devise spending-saving models depending on their state of economic and political development.³⁷¹ The most common spending-saving models include the following;

³⁶⁵ Dyna and Sothath supra

³⁶⁶ Daniel Yaw Opong and William Boateng, 'Intergenerational Versus Intragenerational Equities and the Development of Resource-Rich But Poor Countries: The Case of Ghana' (2014) 28 *Journal of Law, Policy and Globalization*.

³⁶⁷ Dyna and Sothath

³⁶⁸ Ibid

³⁶⁹ Ibid

³⁷⁰ Ibid

³⁷¹ Morgandi supra

	Model	Definition	Benefit and Risk	Note
1.	Big-Push Spending Model e.g. Vietnamese Approach	All the current Revenues	The model accelerates growth but faces macroeconomic instability and Dutch Disease Risks	The model is not recommended for weak-institution countries
2.	Bird-in-Hand Model e.g. the Norwegian Approach	The Model offers real returns on current assets	It offers the state a prudent and simple saving plan, while denying the state faster growth opportunity	It is however not recommended for Least Developing Countries that still need to invest in their social and economic infrastructure
3.	Sustainable Income Model such as the Timor Leste Approach	This Model offers a state real returns on the sum of current assets and future revenues	Its main advantage is that it helps in avoiding the boom-bust cycle. However, it faces uncertainty in future because of challenges of revenue estimation	
4.	Revenue Benchmarking Model as practiced by Trinidad and Tobago, and Ghana	The model offers a fixed/variable share of average of revenues known as the Moving Average	It is credited with stability in the state's savings but requires a clear benchmarking and long-term development objectives	

NB: the table is adapted from Dyna and Sothath, supra, at page 7

In the benefit-sharing discourse, the saving-spending model is relevant to the extent that it determines how much of the revenue from the oil resources would flow into the economy. This would in turn determine how much of that revenue inflow is available for sharing with the oil-producing region. Further, it may have a bearing in determining which principle of benefit-sharing a country may adopt. Whether the state adopts the principle of Need or Derivation has significant impacts on the extent to which the country would adopt its benefit-sharing programmes.

4.3.2.2 DEVELOP CAPACITY THROUGH LOCAL CONTENT DEVELOPMENT

Local Content is the added value brought to either the host nation as a whole, or its regional and/or local areas through oil and gas activities.³⁷² It represents the quantity of the composite value which is added to or created in a host state through utilization of the host state's resources and services in the petroleum industry, hence leading to the development of indigenous capability without compromising quality, health, safety and environmental standards.³⁷³

The underpinning philosophy of local content development is founded on the host state's desire for the expansion of its own local entrepreneurship base, as well as the domestication of its assets in order to maximise its own strategic developmental goals.³⁷⁴ The measurable indicators of Local Content reflect through workforce development, employment of members of the local communities, trainings for the members of the local people, investment in supplier development, developing local supplies and services, as well as procurement of local supplies and services.³⁷⁵ The long and short of local content development is that it entails capacity building and development for the oil-producing country.

In the context of the Turkana oil, implementation of the local content development requirements should be undertaken at two levels. First, would be the requirement for capacity building among the Kenyan people generally. This would require that the government puts into place legal

³⁷² IPIECA, 'Local Content Strategy: A guidance document for the oil and gas industry' (IPIECA, The Global Oil and Gas Industry Association for Environmental and Social Issues, 2011).
<<http://www.engineersagainstopoverty.org/documentdownload.axd?documentresourceid=28>> accessed on 1 October 2015

³⁷³ Definition adapted from the Nigerian Oil and Gas Development Law of 2010

³⁷⁴ Balouga supra

³⁷⁵ Ibid

requirement to obligate companies to build capacity among Kenyans in the oil industry through technology transfer and in other available ways. In addition, it would require that the government invests adequately in education and training on oil sector so as to build the capacity of Kenyans with the aim of benefiting the local population from the oil resources in a much more direct manner away aside the fiscal inflows.

Secondly, and more importantly to this study, is local content development among members of the local Turkana community. In the context of this study, benefit-sharing has been viewed within the narrow scope of benefits accruing to the immediate local communities from the oil resources. Therefore, an effective local content development scheme ought to encapsulate a programme for building the capacity of members of the local communities.

Capacity building for members of the Turkana Community would entail several requirements. Among others, it would require that the government invests heavily into the area's infrastructural development on transport and communication so as to bring the marginalised area to be at par with the rest of the country. Secondly, it would require that the government invests into social welfare programmes within the area. This would ensure that the Turkana people would access quality training institutions as well as scholarship opportunities. This shall enable them to compete fairly with people from the rest of the country in order to access training and employment opportunities within the oil industry.

The Norwegian experience on the mainstreaming of local content development policy requirements into the oil and gas sector would be most ideal to the Kenyan situation as compared to the Nigerian case. This is because Norway's policy has been to favour and encourage Norwegian-based, not necessarily Norwegian-owned inputs.³⁷⁶ This policy is founded on the understanding that oil and gas industry is knowledge-intensive. Therefore oil-producing companies are obliged to maintain significant presence in Norway since that is the arena where the intellectual capital is needed and located.³⁷⁷

³⁷⁶ Rahman Khanani, 'The Nordic Model of Industrial Development: A study of Norway's Oil Industry' (RSM). <<http://rsmi.no/wp-content/uploads/2015/06/A-study-of-Norway%C2%B4s-Oil-Industry.pdf>> accessed on 3 October 2015

³⁷⁷ Ibid

The presence of the oil firms in Norway, together with the country's policy on local content development, have facilitated greater Foreign Direct Investments (FDIs) in the country's oil and gas industry.³⁷⁸ This has, in turn enhanced the capacity of the Norwegian people and institutions involved in the industry. A significant approach that Norway has adopted in implementing its local content development policy is its mainstreaming into the country's institutions. This is demonstrated through the activities of Statoil which is mandated to contribute to local development through local supplier mapping and development and local industry incubators.³⁷⁹

Unlike Norway, Nigeria's local content development policy is disparate and not properly coordinated. Consequently, the capacity of both the Nigerian people and institutions remains largely untapped. This reality caused the marginalisation of most Nigerian people and institutions from mainstream oil industry activities. This is explained as part of the reason(s) as to why there is prevalent tension and conflict between the local communities in the Niger Delta and the Multinational Oil Corporations engaged in oil activities.³⁸⁰

In the Turkana region's case, the area is hugely marginalised when viewed through the lens of social, economic and development priorities.³⁸¹ The region is therefore largely cut off from Kenya's core investment and development priorities. In order to arrest the situation, it shall require that both the oil corporations join hands with the Government to prioritise investments in the area. This would ensure that members of the local community shall be able to tap into the available employment and investment opportunities.

³⁷⁸ Olivia Leskinen, Paul Klouman Bekken, Haja Razafinjatovo and Manuel García, 'Norway's oil and gas cluster: A story of achieving success through Supplier Development' (Harvard Business School, May 2012). <<http://www.isc.hbs.edu/resources/courses/moc-course-at-harvard/Documents/pdf/student-projects/120503%20MOC%20Norway%20final.pdf>> accessed on 5 October 2015

³⁷⁹ Heum, *supra*

³⁸⁰ JC Ebegbulem, D Ekpe, TO Adejumo, 'Oil Exploration and Poverty in the Niger Delta Region of Nigeria: A Critical Analysis' (2013) 4(3) *International Journal of Business and Social Science*

³⁸¹ See KIPPRA, Kenya Economic Report 2013: Creating an Enabling Environment for Stimulating Investment for Competitive and Sustainable Counties, *Kenya Institute for Public Policy Research and Analysis*

The necessity of local content development lies on the basis that it enhances a feeling of inclusivity and participatory ownership of the natural resource activities among the citizens.³⁸² As a result, it becomes a critical way by which the investor-local community tension and clashes could be curtailed. If the relevant stakeholders implement an effective local content development policy, then there would be peaceful co-existence between the local community and the private investors. The failure to put into place such programmes often leads to catastrophic consequences since the local communities often claim marginalisation.

It is noteworthy that Kenya seems to be making some progress towards dealing with the issue of local content development in the anticipated oil industry. This is illustrated by the publication of two proposed but related legal instruments. These are the Petroleum (Exploration, Development and Production) Bill 2015 and the Petroleum Exploration, Development and Production (Local Content) Regulations 2014. These proposed legal instruments are intended to deal with the gap that presently exists on local content development.

4.3.2.3 INVESTING IN RESEARCH DEVELOPMENT

All aspects of petroleum activities including exploration, exploitation and processing, are technology-intensive.³⁸³ It is therefore imperative for every state engaging into oil production to invest adequately in research and development.³⁸⁴ One way through which research and development could be achieved is through government collaboration with universities. Such collaboration would require universities to offer courses in oil and gas for Kenyan students. Alternatively, it could also be realised through partnership programmes between the government and stakeholders in the oil industry who would avail industry-specific scholarship opportunities on both training and research on oil and gas.

³⁸² M Levette and AE Chandler, 'Maximising Development of Local Content across Industry Sectors in Emerging Markets-How Private-Sector Self-Interest can Help US Development Policy', (CSIS Project on US Leadership in Development, May 2012). <http://csis.org/files/publication/120517_Levett_LocalContentDevel_web.pdf> accessed on 1 October 2015

³⁸³ K Glass, 'Shale Gas and Oil Terminology Explained: Technology, Inputs & Operations' in *Environmental and Energy Study Institute*. <http://www.eesi.org/files/fracking_technology_120111.pdf> accessed on 2 October 2015

³⁸⁴ IBM, Meeting the challenges of today's oil and gas exploration and production industry: Leveraging innovative technology to improve production and lower costs' (IBM Global Services, 2004). <<http://www-935.ibm.com/services/us/gbs/bus/pdf/g510-3882-meeting-challenges-oil-gas-exploration.pdf>> accessed on 3 October 2015

In this regard, Tullow Oil is already offering scholarships to Kenyan students to foreign universities in a bid to build the capacity base for Kenyans within the oil and gas industry.³⁸⁵ In addition, it could also involve the building of capacity of existing specialist oil and gas training institutions to enable them engage in industry-specific research activities. Among the institutions which could benefit in this regard include PIEA which offers specialised training in the oil and gas sector.³⁸⁶ Other relevant institutions that ought to benefit include NEMA and EACC.

For Kenya to attain sustainable levels of research and development, its investments in research and development must not be piecemeal. It shall require that Kenya develops concrete policy and legal frameworks that encourage holistic approach in implementation of research activities.³⁸⁷

In addition, successful implementation of research and development programmes requires that the programmes be coordinated through an established institution with requisite capacity. For example, best practice from Norway indicates that Statoil is one of the institutions at the forefront in the implementation of research and development. Thus, Statoil is mandated to spearhead higher education and research in the oil and gas sector, as well as workforce development.³⁸⁸

4.3.2.4 ESTABLISHMENT OF A NATURAL RESOURCE FUND

Effective benefit-sharing programmes ought to ensure that the resources benefit both the present and future generations. Such resource management strategy has three significant benefits. First, it enables the oil-producing state to implement both the environmental principles of Intergenerational Equity, as well as Intra-generational Equity. This management policy ensures that every member of the present generation strives to hold environmental resources in trust for the future generation.

³⁸⁵ See the website for Tullow Group Scholarship Scheme at <<http://www.tullowgroupscholarshipscheme.org/>> accessed on 3 October 2015

³⁸⁶ For more information on PIEA, see its website at <www.petroleum.co.ke/> accessed on 3 October 2015

³⁸⁷ Per Heum, 'Local Content Development-experiences from oil and gas activities in Norway' (Institute of Research in Economics and Business Administration in Bergen, February 2008). Funded by NORAD.

<http://brage.bibsys.no/xmlui/bitstream/handle/11250/166156/1/A02_08.pdf> accessed on 3 October 2015

³⁸⁸

Secondly, oil-production activities pose various challenges to land. Among the challenges include the environmental pollution from the oil seepage and spillage, land dereliction from failure to implement land reclamation programmes, and reduction in agricultural output owing to the Dutch Disease syndrome, among others.³⁸⁹ Owing to these challenges, it is therefore necessary that the host state implements adequate safeguards to ensure that the oil resource does not only benefit the present generation, but also the future generation.

There is justification for the drive to provide for future generations because of opportunity cost to their land and environmental resources. The oil activities being undertaken by the present generation shall have long-term adverse effects upon the land. Consequently, members of the future generation shall not be able to put their land into optimal use. Therefore, in order to help the future generation to mitigate the effects on their land and environmental resources by the present generation, it is only fair that adequate provisions be made for them from the benefits earned from the resources being exploited today.

Thirdly, Natural Resource Funds help oil-producing states to regulate the amount of fiscal inflows into their economies.³⁹⁰ In instances where an oil-producing state fails to implement a Natural Resource Fund to mop up excess cash inflows in its economy, there is bound to be the Big-Push Spending Model. Such a model encourages high cash inflows into the economy. This then makes the rest of the economy vulnerable to such negative experiences like the Dutch Disease, as well as the vagaries of fluctuations in international oil prices.³⁹¹

This big-push model presents fiscal challenges as witnessed by Nigeria prior to 2004 when it introduced the ECA which was later succeeded by the Nigerian Sovereign Investment Authority.³⁹² The vulnerability of the Nigerian oil-relying economy could only be contrasted to the stability of the Norwegian economy. The latter economy, has witnessed long span stability despite the fact that oil resources form a significant component in its fiscal inflows. The

³⁸⁹ C Obidegwu, 'Post-Conflict Peace-Building in Africa: The Challenges of Socio-Economic Recovery and Development' (2004) *African Region Working Paper Series*. <<http://www.worldbank.org/afr/wps/wp73.pdf>> accessed on 3 October 2015

³⁹⁰ Dyna and Sothath supra

³⁹¹ Morgandi supra

³⁹² Dyna and Sothath supra

contradiction is substantially attributable to the different management strategies adopted by the two countries.³⁹³

Nigeria introduced the institution of fiscal stabilizing Sovereign Fund long after oil resources became part of its economic structure, whereas Norway introduced the Government Pension Fund Global much earlier in 1990. The Sovereign Funds are fiscal policy tools which underpin long-term considerations in the phasing out of petroleum revenues into a host state's economy.³⁹⁴ They serve as economic buffers that ensure the oil-producing state's economy is not susceptible to fluctuations in the international oil prices, as well as the Dutch disease syndrome, among others.

As Kenya prepares to begin its oil exploitation in Turkana, it is imperative that the country learns from the comparative experiences of both Nigeria and Norway. On the one hand, Nigeria's negative experiences, owing to its inability to establish a Sovereign Fund for close to 50 years after commencement in oil production, should dissuade Kenya from taking that economically risky route. Kenya should therefore emulate Norway's institutional stability by establishing the Sovereign Fund soonest possible and avoid ensnaring its small economy with risks inherent in the Big-Push Spending Model.

It is however noteworthy that the published Petroleum (Exploration, Development and Production) Bill 2015, and the National Sovereign Wealth Fund Bill 2014 propose to introduce one form of SWF. However, the jury is still out there on whether the proposed laws shall address the issues of concern or not.

However, section 95 of the Petroleum Bill seems to encourage the big-push spending model because it only requires the Government to save a minimum of 5% of the revenues that it receives from oil resources. If enacted in the present state, then the Fund shall not, in this study's view, be the ideal institution to compare with Norway's Government Pension Fund Global. The

³⁹³ See R Torvik, 'Why do some resource-abundant countries succeed while others do not?' (2009) 25(2) *Oxford Review of Economic Policy*, pp.241–256. <<http://www.svt.ntnu.no/iso/ragnar.torvik/OXREP.pdf>> accessed on 3 October 2015

³⁹⁴ See the website for Government Pension Fund Global (GPF) at <<https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/government-pension-fund-global-gpfg/id697027/>>

Act would therefore not be able to mop up cash inflows that would negatively affect the country's economic stability. Besides, the minimum 5% savings value that the Bill stipulates, shall not constitute an adequate share of Kenya's oil resources by the future generations as envisaged by the Principle of Intergenerational Equity.

4.3.2.5 BUILD INSTITUTIONAL CAPACITY

All forms of oil-related activities, as well as the oil-based resource management and distribution mechanisms are implemented through structured institutions. Some of these institutions undertake policymaking e.g. ministries, while others deal with lawmaking e.g. Parliament, while others are administrative in nature e.g. the Sovereign Fund. For successful implementation of all oil-related activities, management and distribution of the oil-based resources, the state has the obligation to create, nurture and build capacity of its institutions to ensure that they are able to discharge their respective mandates adequately.

The corollary to the foregoing is that if the country fails to build capacity for its institutions, then it is bound to experience challenges in the implementation of all its oil-related activities as well as management and distribution of the resources therefrom. The experiences of both Nigeria and Norway can be contrasted here. The political turmoil and instability in Nigeria had the effect of undermining Nigeria's institutional capacity for oil activities.³⁹⁵ The military regimes performed poorly in governance issues, with corruption being the hallmark of their administration.³⁹⁶

These realities jolted Nigeria's ability to plan, establish and nurture key institutions required to implement petroleum-related activities, plans and programmes in a coherent, orderly and sustainable way. It could be posited that the challenges in Nigeria's public governance system were responsible in delaying the country's establishment of the Natural Resources Fund. This is because it took the intervention of the democratically elected government of General Olusegun Obasanjo to establish the first rudimentary structures of a Sovereign Fund, the ECA in 2004.³⁹⁷

³⁹⁵ Agbiboa and Maiangwa supra

³⁹⁶ Ibid

³⁹⁷ Dyna and Sothath supra

This institution was later to be perfected to the Nigerian Sovereign Investment Authority (NSIA) by President Goodluck Jonathan in 2012.³⁹⁸

Due to the challenges of institutional capacity, Nigeria's oil activities, operations, management and distribution have previously tended to be politicized, mismanaged, and pervaded by corruption.³⁹⁹ The oil revenue therefore ended up lining up the pockets of a few individuals instead of the same being used to improve the general welfare of all Nigerians.⁴⁰⁰

Unlike Nigeria, Norway has strived to instill order in the oil industry. The Kingdom has put into place impeccable institutions to deal with all its oil-related activities ranging from licensing for exploration to exploitation and resource management and distribution. The Kingdom's Sovereign Fund remains one of the case studies of best-run sovereign funds globally. It could be posited that the exclusive institutionalization of the oil activities has cushioned the lucrative industry against the vested interests from the political class.

Therefore, if Kenya seeks to create stability in its upcoming oil industry, it has to plan, create and nurture strong institutions to govern the sector. Institutional capacity building would be of two aspects. First, capacity building for already existing specialist institutions shall entail the strengthening of their capacity to deliver on their mandates. For instance, the Government shall need to enhance the funding and human resource capacity for institutions such as the NOCK, and PIEA to enable them undertake their respective mandates much more effectively.

This is, for instance, the approach that Norway has taken by establishing and building the capacity of Statoil. Statoil is mandated to deal with local content development through investment, procurement and capacity building. The development of Norway's oil industry and

³⁹⁸ Ibid

³⁹⁹ Newsom supra

⁴⁰⁰ Kamaldeen Ibraheem Nageri, Gunu Umar and Falilat Ajoke Abdul, 'Corruption and economic development: evidence from Nigeria' (2013) 3(2) *Kuwait Chapter of Arabian Journal of Business and Management Review*. <http://www.arabianjbm.com/pdfs/KD_VOL_3_2/4.pdf> accessed on 3 October 2015

stability is partially attributable to the country's investment in a stable institutional framework for the oil and gas industry.⁴⁰¹

Secondly, newly created institutions shall need to be nurtured and enabled to discharge their envisaged mandates. Such institutions include the proposed SWF under the Petroleum (Exploration, Development and Production) Bill 2015. In order to build the capacity of these institutions to enable them deliver on their mandates, the country shall not only have to provide adequate budgetary allocations for their operational activities, but they shall also need to be managed professionally. Professionalism in the running of these institutions shall require that the institutions are shielded against political interference as well as the influence of corruption.

4.3.2.6 OPERATIONALISE ARTICLE 63 OF THE CONSTITUTION

Members of the Turkana community practices Communal Land Tenure system. The legislative framework for communal land tenure is the Community Land Act, which has however not been enacted. This legislation shall define and distil the local people's proprietary rights to the said lands. It should have therefore been imperative that before the state authorised oil activities within Turkana, the country needed to have enacted the Community Land Act in the manner specified under Article 63(5) as read together with the Fifth Schedule of the Constitution. In the absence of such legislation, then the lands shall be expropriated without the benefit of a legal framework within which the local people's right to the protection of their property could be pursued.

As of now, the National Assembly has already published the Community Land Bill, 2015. However, the Bill is yet to be enacted because Parliament extended the deadline for its passage to August 2016.⁴⁰² While the country delays in enacting this legislation, the local people of Turkana continue to lose proprietary interests in their land without recourse. In addition, the legislation is necessary to help clarify what appears to be overlapping and clashing mandates of

⁴⁰¹ Mark C Thurber, David R Hults, Patrick RP Heller, 'Exporting the "Norwegian Model": The effect of administrative design on oil sector performance' (2011) *Energy Policy*. <http://iis-db.stanford.edu/pubs/23264/Thurber_Hults_Heller_Norwegian_Model_Energy_Policy_2011.pdf> accessed on 5 October 2015

⁴⁰² MJ Okandi, 'Deadline for passing crucial bills extended to August 2016' *NTV* for 25 August 2015. <<http://ntv.nation.co.ke/news/politics/-/2725580/2846362/-/b9cdxmz/-/index.html>> accessed on 7 October 2015

the National and County Governments out of the interplay of Article 62(1) (f) and 63(3) of the Constitution.

4.3.2.7 SECURE THE WILD NORTH

The Turkana County Region, together with much of Kenya's north are often described as "wild". The region is highly volatile with persistent insecurity caused by inter-ethnic conflict among the Turkana-Samburu, Turkana-Pokot, Pokot Samburu, Turkana-Inyangatom, Turkana-Toposa and Turkana-Merille.⁴⁰³ Sustainable oil activities and operations involve a lot of FDIs through MNCs. As a result, it is imperative for the production areas to be peaceful so as to inspire confidence in both the local private investors, as well as foreign investors.

Failure to secure oil-producing areas would lead to either frequent disruptions in oil production and transportation, vandalism and destruction of key oil infrastructure, among other negative impacts. Such insecurity leads to higher costs of production of the oil and, in turn, little inflows and benefits to the country from the oil resources. Such costs would invariably be visited upon the local communities whose entitlement to the oil resources would be substantially whittled down. As a result, benefit-sharing programs would either be non-existent, or they would be so strained due to reduced resources so much so that their impact would, at best, be negligible.

Therefore, for Kenya to implement an efficient benefit-sharing programme for the Turkana people, the government must address the intractable conflicts and insecurity at the North holistically and sustainably. This would involve opening up the Turkana region through social, cultural and economic development initiatives, mopping up illegal weapons and disarming the local and neighbouring communities, engaging in cross-border intelligence sharing with the neighbouring countries whose militia constantly wreak havoc in Kenya's North, international security co-operation between Kenya and Ethiopia, Uganda and South Sudan. The conflict and insecurity are both localized, as well as international. Hence any systematic attempts to address it need to be holistic and coordinated among the regional states, the regional bodies such as the EAC, IGAD and even internationally through the AU and UN.

⁴⁰³ Ruto Pkalya, Mohamud Adan, Isabella Masinde, and Martin Karimi (ed), in *Conflicts in Northern Kenya: A Focus on the Internally Displaced Conflict Victims in Northern Kenya* (ITDG-EA, DTP Martin Karimi, 2003). <https://practicalaction.org/docs/region_east_africa/conflict_in_northern_kenya.pdf> accessed on 5 October, 2014

4.3.2.8 SURVEY AND DEMARCATO OUR INTERNATIONAL BORDERS

The insecurity to the North of Kenya has both local and international dimensions. The local dimension arises from the fact that the local communities have similar cultural practices and economic activities. These include nomadic pastoralism and cattle rustling. Conflicts among these communities arise over limited water resources and pasture, as well as cattle rustling activities. This is true of the Pokot, Turkana, and Samburu. The conflict between these communities is localized.

There is however an international dimension to the conflict. This arises from the fact that communities which reside across Kenya's borders but next to Turkana have similar cultural and economic practices like the Turkana. These communities include the Karamojong of Uganda, Toposa and Nyangatom of South Sudan, and Merille of Ethiopia. Members of these communities usually conduct cross-border incursions into and out of these neighbouring countries. These cross-border incursions have far reaching effects on the region's security.

In order to secure the North, Kenya needs to address both the local and international dimensions to the conflicts. For the international dimension, Kenya must liaise with its neighbours in order to survey and demarcate our international borders. Such demarcation would strengthen Kenya's ability to police her borders effectively and engage with the security threats from across the borders pre-emptively. This would be a complete departure from Kenya's current security policy where our security along the borders is handled reactively. The survey and demarcation shall also enable Kenya settle the question of the Ilemi Triangle with finality in a manner that will enable it, South Sudan and Ethiopia to delineate their rights within the contested area.

The exercise of surveying our international borders has two critical requirements. First, is international co-operation and political goodwill from both our neighbours as well as international organisations like the UN, AU, IGAD and EAC. Secondly, the exercise also requires a lot of financial investments. Kenya shall therefore be required to work closely with its development partners such as the World Bank Group, African Development Bank, the EU as well as other bilateral forums in order to raise the money to finance these programmes.

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