



FORGOTTEN IN THE SCRAMBLE FOR LAMU

***A Position Paper on the LAPPSET Project
In the Case of the Aweer and the Fisherfolk***

Published by

Kenya Human Rights Commission

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Table of Contents

ACRONYMS AND ABBREVIATIONS.....	v
1. ABSTRACT	1
2. ABOUT KENYA HUMAN RIGHTS COMMISSION.....	3
3. PROBLEM STATEMENT.....	4
4. OBJECTIVES	7
4.1. Broad Objective	7
5. METHODOLOGY.....	7
6. GOVERNANCE AND HUMAN RIGHTS FRAMEWORKS FOR THE PROTECTION OF COMMUNITIES AND SOCIETY IN DEVELOPMENT PROGRAMMING.....	8
6.1. The Universal Declaration of Human Rights	8
6.2. The International Covenant on Economic Social and Cultural Rights	8
6.3. The United Nations Declaration on the Rights of Indigenous People (UNDRIPS).....	10
6.4. The United Nations Guiding Principles on Business and Human Rights.....	10
6.5. The African Charter on Human and People’s Rights.....	11
6.6. The OECD Guidelines for Multinational Enterprises.....	12
6.7. Multilateral Development Bank Accountability Mechanisms.....	13
6.8. The United Nations Guiding Principles on Internally Displaced Persons	14
6.9. The AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa	14
6.10. The Constitution of Kenya, 2010	14
6.10.1. Land Rights	15
6.10.2. Clean and Healthy Environment	15
6.10.3. Access to Information and Public Participation	16
6.10.4. Affirmative Action	16
6.10.5. Sustainable Development	16
6.10.6. Rights of Indigenous Persons.....	17
6.10.7. Culture	17
6.11. Kenyan Land legislation	17
6.11.1. The Land Act	17
6.11.2. Land Registration Act.....	17

6.11.3. National Land Commission Act	18
6.12. The Truth, Justice and Reconciliation Commission (TJRC)	18
6.13. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act	18
7 POTENTIAL IMPACT OF THE LAPSSET PROJECT ON HUMAN RIGHTS AND THE ENVIRONMENT.....	20
7.1. The impact of the LAPSSET Project on the Fisherfolk of Lamu	20
7.1.1. Destruction of marine species through pollution and physical processes	20
7.1.2. Blockading of Traditional Fishing Waters.....	21
7.2. The Impact of the LAPSSET Project on the Aweer Community	23
7.2.1. Land deprivation and displacement of people.....	23
7.2.2. Social Marginalisation and Economic Displacement	24
7.2.3. Resource-based conflicts.....	25
7.2.4. Dilution of Cultural identity.....	25
7.2.5. The Rising Cost of Living.....	26
7.3. Impact of the LAPSSET Project on the Environment.....	26
8. RECOMMENDATIONS	28
8.1. Protection of Land Rights	28
8.2. Protection of the Environment.....	28
8.3. Protection of Lamu Cultural Heritage.....	29
8.4. Public Participation and Accountability.....	29
8.5. Protection and promotion of local livelihoods	29
8.6. Government Policy that Advances Sustainable Development.....	30
9. CONCLUSION	32
BIBLIOGRAPHY	33

Acronyms and Abbreviations

ACHPR	African Commission on Human and People’s Rights
AfDB	African Development Bank
BMU	Beach Management Unit
CESCR	Committee on Economic Social and Cultural Rights
CSR	Corporate Social Responsibility
ESIA	Environmental and Social Impact Assessment
ESR	Economic and Social Rights
GDP	Gross Domestic Product
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDB	Islamic Development Bank
IDPs	Internally Displaced Persons
ILO	International Labour Organization
KHRC	Kenya Human Rights Commission
KWS	Kenya Wildlife Service
LAPPSET	Lamu Port South Sudan Ethiopia Transport
MDBs	Multilateral Development Bank
NCPs	National Contact Points
OCR	Office of Claims Resolution
OECD	Organization for Economic Co-operation and Development
TJRC	Truth, Justice and Reconciliation Commission
UNDRIPS	United Nations Declaration on the Rights of Indigenous People
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNGPBHR	United Nations Guiding Principles on Business and Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
WB	World Bank

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1. ABSTRACT

The Kenya Human Rights Commission (KHRC) understands and defines poverty as the inability to access economic and social rights, now recognised in the Constitution of Kenya, 2010, under articles 41, 43, the entire chapter 4 and various other provisions. The KHRC set out on a series of fact finding missions to Lamu spanning from March, 2011 and the most recent being in April, 2014. This was spurred by concerns voiced throughout KHRC's collaboration with various community based organizations in Lamu and had the sole purpose of interrogating the validity of community fears in regard to the proposed Lamu Port South Sudan Ethiopia Transport (LAPSSET) Corridor Project.

Various studies have shown that often the effect of a mega-development project is displacement and that those displaced often end up even more impoverished, disempowered and invisible than they were before the advent of the development project which in theory was intended to uplift from poverty, not leave them worse off. A cursory cost-benefit analysis of the LAPSSET Project reveals that if prevailing concerns over the Project are not addressed, this project – touted as the single largest infrastructural project ever in Africa – will be no different.

The oil in South Sudan and recent oil finds in Northern Kenya are definitely an economic game-changer that Kenya must embrace. The subsequent – if not- predictable, stampede to the arid North has raised a cloud of dust that continues to screen the legitimate concerns of the host community of Lamu. The anticipated prioritization of the oil infrastructure at the expense of other viable livelihood options is characteristic of the age-old "Resource-Curse" that has been the lot of many countries. These concerns find echo in many countries, most notably, Nigeria (oil in the Niger Delta), The Democratic Republic of Congo (minerals), South Sudan and the Sudan (oil), Angola's oil and diamond fields as well as a smattering of Middle East countries. If the current trajectory holds, the disproportionate pre-occupation with the LAPSSET oil infrastructure stands to displace existing and potential livelihood options. The Nigerian experience where agriculture has succumbed to the oil project, with disastrous consequences for food security, remains among the poignant examples.

KHRC's fact-finding missions indicate that the fisher-folk of Lamu will lose their source of subsistence when the Lamu Port is established. They will be physically removed from their traditional fishing waters along the channel. In addition, industrial operations and construction are likely to decimate marine life. Similarly, the Aweer of Milimani, with their agricultural lifestyle will not be able to contend with the more illustrious oil economy. The vulnerability of these two communities is aggravated by poor education standards and low access to factors of production –

- Land and status of land tenure among communities along the LAPSSET Corridor for whom Kenya's Constitution states that land is held in trust by the county government and various departments of national government;
- Access to capital through loans that would facilitate local ownership of resultant enterprises and even companies involved in construction work and that fact that no quota system of local and foreign ownership has so far being tabled for national discussion.
- With regard to labour, there has been little or no public participation on the minimum wage and other labour rights. There has also been little or no public participation in discussions on social and environmental standards and norms that foreign owned enterprises should adhere to while working in Kenya or on grievance redress mechanisms that will apply should communities have any issues to raise on the conduct of the various local and foreign actors involved in setting up LAPSSET Infrastructure.

This position paper therefore seeks to establish international legal and policy framework for best standards and practice in the implementation of the LAPSSET Project. It raises concerns on the Project being administered in a manner that will relegate host communities further into the periphery of poverty and invisibility and offers recommendations on how to urgently mitigate against this adverse yet imminent outcome. KHRC hopes that the recommendations of this position will be applied towards ensuring that the LAPSSET Project results in inclusive growth of the Lamu community and sustainable development. To

this end, this publication offers recommendations on how the various stakeholders may engage towards achieving the state of respect for human rights and environmental justice in implementing colossal development projects. For these reasons the position paper

- a) Recommends that the development of the oil and industrial infrastructure is not executed in a manner that displaces existing and potential livelihoods. It further exhorts government to support host communities towards adapting to new developments without being compelled to abandon old trades. They should, in addition, be enabled to compete effectively in emerging economic activities;
- b) Argues for the protection and promotion of the rights of indigenous communities in light of pressure to modernize and of their continued vulnerabilities;
- c) Argues for a comprehensive Equality and Non-Discrimination policy which also anchors questions of affirmative action, for the benefit of marginalized communities, groups and persons. It, thus, calls for the establishment of equalization models and benefits-sharing standards that seek to rebalance age-old disparities;
- d) Tests the principle of “Public Participation” with regard to the Constitutional thresholds of public involvement in government decision-making as part of the broader end of good governance and accountability. It is suggested that a minimum standard for public engagement in questions that directly affect the well-being of communities be established;
- e) Echoes calls for a well-managed, yet, timely transition into the newly established land tenure systems and structures of accountability as well as the continued regulation of the system thereafter;
- f) Argues for the expansion of grievance redress mechanisms beyond those that are presently utilized by communities, for the resolution of cases of violation of economic, social and cultural Rights by State and corporate entities, alike. It suggests viable avenues of grievance redress, beyond the conventional structures of accountability;
- g) Urges the respect for human rights by the State, corporate entities and citizens alike. As such, it suggests the establishment of, among others, protective legal frameworks and the enforcement of law and policies to protect vulnerable persons and communities from the adverse effects of large scale development projects.

2. ABOUT KENYA HUMAN RIGHTS COMMISSION

The Kenya Human Rights Commission (KHRC) is a non-governmental organization (NGO) which was founded in 1991 and registered in Kenya in 1994 with a mandate to *enhance human rights centred governance at all levels*. The core values of the KHRC include transparency, accountability and fair and equitable distribution of resources which require that power and resources at all governance levels be used and distributed with responsibility, integrity and without discrimination as this is the only way human rights are upheld. KHRC works at the community, national, regional and international level through a rights based approach. It is by working with communities² at their own level, on what is of value to them and enabling them to understand, articulate and claim their rights, that such communities can effectively hold duty bearers accountable.

KHRC acknowledges that poverty is closely related to human rights violations and addressing it requires focus on economic rights and social justice. Under its Economic and Social Rights Programme, the KHRC has been working with various communities towards promoting and protecting their livelihoods, which form the crux of Economic, Social and Cultural rights.

First, the Constitution of Kenya notes the correlation between human rights and development by declaring that, *“the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.”*³ The KHRC recognises the right to development as a fundamental human right giving cognisance to the fact that the right has also been adopted in a number of international legal instruments.⁴ This right has been defined as an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁵

This essentially spells out the fact that each person has a right, not only to participate in, but to benefit from any development projects. This right just like all other fundamental human rights is inalienable and cannot be arbitrarily deprived from a person; it cannot be taken away from a person and neither can it be denied to a person. The right to development emphasises the central place the person takes in development. While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights⁶.

As a human right, the right to development enhances accountability by placing implementation responsibilities on individual States, and by requiring effective international cooperation in policies and action for development. The State therefore has an increased responsibility and is held to a higher standard by virtue of this right. There are certain standards that a State must adhere to while undertaking development. The above mentioned provisions are in line with the foundation set by the United Nations Charter in which Member States undertook to “promote social progress and better standards of life in larger freedom.”

The protection of Economic, Social and Cultural Rights is integral to sustainable development. The Constitution of Kenya 2010 (the Constitution) notes that protecting and promoting these rights is primarily but not solely the obligation of the government. The wider civil society and corporate entities are enjoined in this obligation to ensure that development occurs in a manner that is in tandem with the principles outlined in the Rio Declaration on Environment and Development that require that development is met in consideration of present and future generations

² A Community is defined as a social, religious, occupational, or other group sharing common characteristics or interests and perceived or perceiving itself as distinct in some respect from the larger society within which it exists.

³ Constitution of Kenya, Article 19(1)

⁴ 1986 UN Declaration on the Right to Development – UN Resolution 41/128, 1993 Vienna Declaration and Programme of Action and the 1981 African Charter on Human and Peoples’ Rights

⁵ Article 1 of the United Nations Declaration on the Right to Development

⁶ Article 22 of the African Charter on Human and Peoples’ Rights

3. PROBLEM STATEMENT

In the past decade, development, democracy, and human rights have become hegemonic political ideals.⁷ Regimes that do not at least claim to pursue rapid and sustained economic growth (“development”), popular political participation (“democracy”), and respect for the rights of their citizens (“human rights”) place their national and international legitimacy at risk.

There is on the other hand growing evidence of “Development Projects,” rolled out by governments through private-public-partnerships (PPPs) or following State negotiations with local or multi-national companies, usually with the support of various donors that have spawned poverty, widened the gap between the rich and poor and relegated indigenous and host communities to invisibility and enduring injustice. It is not a guarantee that development projects result in economic growth for host communities.

When a large development project begins, the area around the project often sees a sharp boost in economic activity; new roads are built; buildings where the workers reside and work from are erected; smaller businesses set up shop to serve the workers. Such operations are typically presented as the ticket to local prosperity. But the economies that grow around these projects usually suffer from the “company town” syndrome: there is generally little economic activity that is independent of the project. This high degree of dependency has not proven to be a good way to build long-term economic stability. This scenario spawns a question that should be the objective of every development project. *Does this project enhance sustainable development?*

Apart from the sharp spike in the economic activity, there is a marked social effect of the development projects in the areas in which they occur. This has to do with the host communities. It has been noted with concern that in most cases and especially in developing countries that most of the population have no title to the land they live on despite the fact that in some cases the land is ancestral land and has been passed down from past generations. This section of the population is vulnerable to evictions that are done without prior consultation, commensurate compensation or an offer of land elsewhere. Every year since 1990, roughly 10 million people worldwide have been displaced involuntarily by infrastructural development projects⁸.

Unlike those displaced by conflict and natural disasters, those displaced by development projects receive little or no visibility or support because they are neither refugees nor seen as Internally Displaced Persons (IDPs) despite the fact that they are recognized under various legal frameworks as IDPs, because they appear

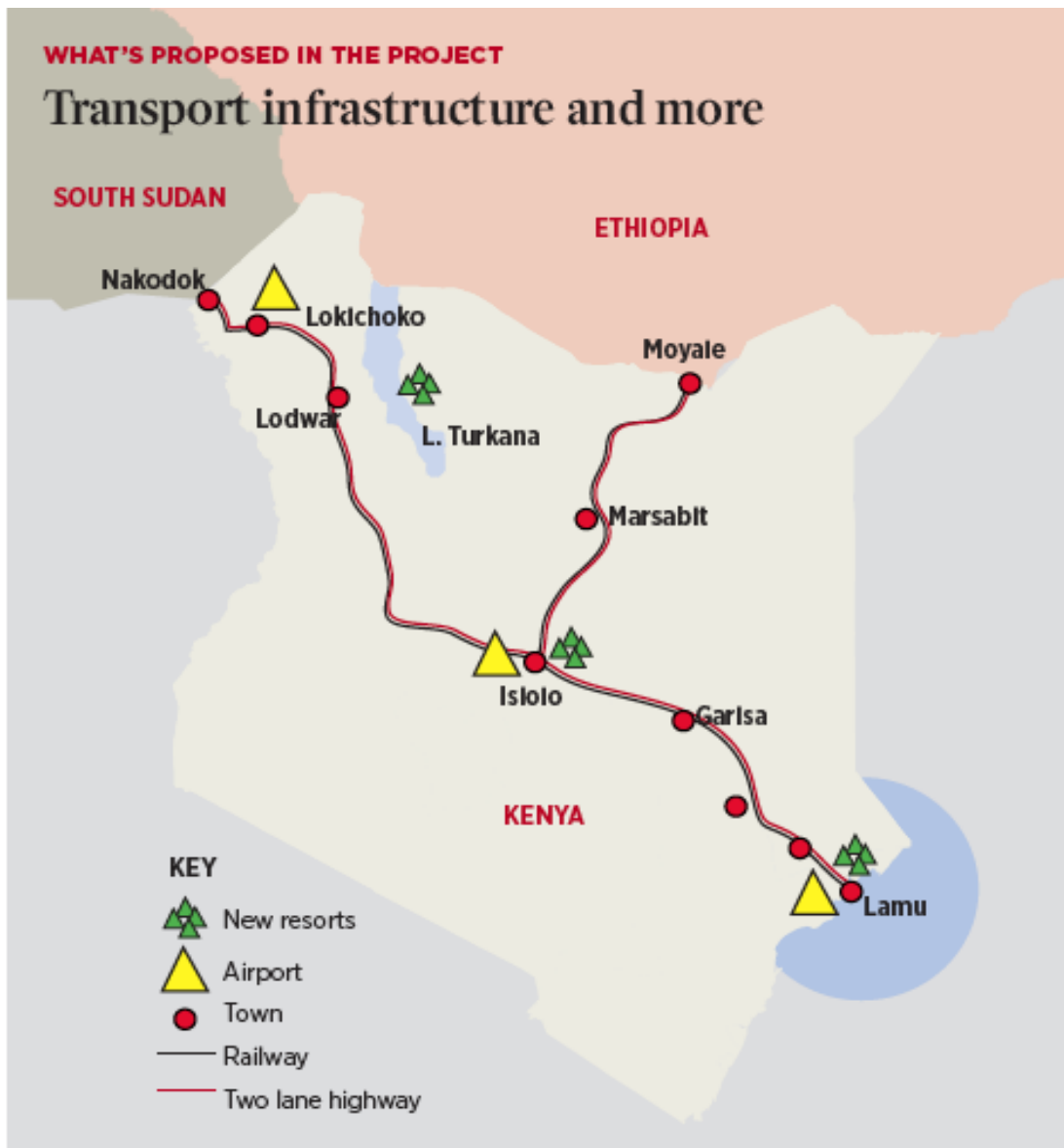
to have moved voluntarily after accepting a compensation and resettlement package. But is the relocation of members of host communities’ initially resident at a site of a mega development project really voluntary?

Further to displacement another challenge posed by development projects to the host community is that there is often an import of skilled labor that is not available within the community and this leads to social and economic marginalization. The host community is pushed further to the periphery of the society. Similarly, the Aweer and the fisher folk may be in a vulnerable position due to the LAPSSET Project.

In March, 2011, the KHRC set out to interrogate the human rights impact of the LAPSSET Project on the host community of Lamu. The infrastructure of the LAPSSET project, which comprises a system of railroads, highways, pipelines, fibre-optic cable and water infrastructure and international airports, links the proposed port with Ethiopia and South Sudan. The project will comprise a seaport in Lamu, an oil refinery at Lamu, a railway line to Juba (for speed passenger shuttles, moving at 160kph and for cargo trains at up to 120kph). To this end, the project involves the construction of a 980km railway line from Lamu, through Isiolo, to Moyale, at the border with Ethiopia, a project which is due for completion in the next four years. In Isiolo, the rail forks into two with the other length of rail running 730 km from Isiolo to Nakodok, at the Kenyan border with South Sudan. This is due for completion within eight years.

⁷ Jack Donnelly, ‘Human Rights, Democracy, and Development’ Human Rights Quarterly Volume 21, Number 3, August 1999

⁸ Michael Cernea, 2000, “Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement.” In M. Cernea and C. McDowell (eds) *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington, DC: World Bank).



The LAPPSET Project. Source: Daily Nation, July 23, 2011

The oil in South Sudan and recent oil finds in Northern Kenya are definitely an economic game-changer that Kenya must embrace. The 2000-km pipeline is expected to transport 700,000 – 1,000,000 barrels per day (bpd) of South Sudan's crude oil once it is complete. The crown in the jewel of the LAPSSET project is, most conspicuously, the planned oil infrastructure from Lamu to Nakodak and to Moyale, via Isiolo. There is no doubt that building a mega-transport corridor that opens up the formerly remote and underdeveloped Northern Kenya is a brilliant initiative that will not only open up northern Kenya but all of Africa to increased trade and place Kenya right at its epicenter.

This position paper is not aimed at casting aspersions on the economic potential of this project. It is not about those who will benefit from LAPSSET. Instead, it is about the intended beneficiaries – the poor and marginalized communities of Lamu, whose interests ideally ought to have inspired this project. This position paper is about raising concerns over the Kenyan government's development agenda which does not embody the principles of sustainable development but appears to advance an economic model that yields significant economic gains, in terms of Gross Domestic Product (GDP), without commensurate income distribution or trickle-down to the majority of citizens, including those closest and indigenously resident along this transport corridor.

The fact-finding mission⁹ was, in part, prompted by the legitimate fears expressed by the Lamu

⁹ The fact finding missions were conducted between October 2011 and April 2012, with a validation forum in April 2013 and a number of

community about potential adverse impacts of the project. It was particularly relevant as illustrated above, government-led “development projects” across the world have, in recent times, also been the genesis of widespread violations of human rights. The fact finding mission, thus, interrogates the trend by the State of advancing a development agenda as part of an economic model that yields significant growth in the Gross Domestic Product (GDP), yet visiting devastating economic, social and environmental consequences upon the common *mwananchi* (ordinary citizen).

The LAPSSSET Project, for its sheer magnitude, prominence and resonance in terms of community development dynamics, is thus representative of similar infrastructural and industrial development projects in Kenya.

From several interactions¹⁰ with the Lamu community, the KHRC captured the community’s concerns which can be catalogued as below:

- a) There is a lack of adequate preventive and mitigating mechanisms to address the prevailing and potential fall-out with respect to the environmental and ecological well-being of the Lamu ecosystem;
- b) The acquisition of land in Lamu County is dogged by a lack of accountability and transparency, with non-resident speculators and well-connected persons benefitting at the expense of the host community; this is compounded by the fact that Lamu land owners historically do not have title deeds and this would hamper any planned compensation.
- c) The fisher-folk of Lamu and certain indigenous communities stand to lose out on their means of livelihood as well as their cultural development as a result of the physical disruption that the LAPSSSET Project portends. The LAPSSSET Project is likely to affect changes in the lifestyles of the Aweer, Bajuni, Sanye, Orma, Rendille, Samburu, Borana, Wardei, Pokomo, El Molo, Kore, Maasai, Ariaal, Gabbra, Dassanech and Turkana;
- d) The LAPSSSET Project, in part, touted as a scheme to redress economic injustices for marginalized communities along the LAPSSSET Corridor, does not adequately address itself to the relevant local issues relating to economic and social marginalization. In fact, it is feared that the Project may end up smothering long-standing efforts at seeking redress and justice for such groups as the Internally

Displaced Persons (IDPs) from the Bajuni community and others, being among the earliest post-independent Kenya IDPs - and whose plight is yet to be addressed;

- e) There is no known or verifiable covenant between the Government and corporate entities, on the one hand, and the local host community on the other, on the manner of ensuring that the community benefits from the infrastructural and industrial developments arising out of the Project.

This lack of transparency portends grave governance problems as well as the possibility of heightening hostility among the various Lamu stakeholders;

- f) The oil and gas economy is likely to disturb the local equilibrium respecting economic activities and means of livelihood, cultural dispositions, and possibly, knot the historical threads relating to community aspirations, hence destabilizing the host community of Lamu.

follow-up missions with the most recent being April, 2014.

10 These views were collected from several Focus Group Discussions with different segments of the Lamu community and crystallized in a single presentation by the Lamu Community leaders at a consultative workshop in Nairobi, on February 18th and 19th, 2011.

4. OBJECTIVES

4.1. Broad Objective

The broad objective of the position paper is to determine and establish the possible impact of the proposed LAPSSSET Project on the indigenous Aweer and the Fisherfolk communities in Lamu, Kenya.

Specific Objectives

1. To have a better understanding of the expectations and fears of the people of Lamu with respect to the LAPSSSET Project;
2. To ascertain the potential threats, risks and human rights violations affecting the Aweer and fisher folk communities in Lamu and the environmental risks arising out of the LAPSSSET Project and ;
3. To propose mitigating measures aimed at addressing current and imminent human rights violations and adverse impact on environment respecting the LAPSSSET Project.
4. To create awareness on requisite frameworks and best practices in ensuring “Social Justice” in development programming;
5. To recommend and advocate for shift in policy and practice on sustainable development with respect to the LAPSSSET Project.

5. METHODOLOGY

This paper has been informed by a series of fact-finding missions carried out between March 2011 and April 2014. The fact-finding missions enlisted various methods of data collection:

- a) Use of questionnaires on targeted groups;
- b) One-on-one interviews with key informants and on the basis of random sampling, telephone interviews as well as focus group discussions observation;
- c) Literature review which includes an analysis of the various tools and legal frameworks that have a bearing on the proposed project
- d) Validation workshop that was conducted with the various stakeholders in the proposed project including corporate accountability experts, government officials and civil society; and
- e) Pictography.

The respondents were wide-ranging and included: fish industry stakeholders, members of the Aweer community, government official, civil society actors, community based organisations, leaders of faith based organisations, members of Lamu county assembly, teachers, community women leaders and experts. A mix of targeted and random sampling was employed. Reference was made to various applicable international and national legal instruments, the national economic blueprint (The Kenya Vision 2030), international and national standards on governance, human rights and business as well as other relevant, existing publications.

6. GOVERNANCE AND HUMAN RIGHTS FRAMEWORKS FOR THE PROTECTION OF COMMUNITIES AND SOCIETY IN DEVELOPMENT PROGRAMMING

The Constitution of Kenya provides for the justiciability of international legal instruments ratified by Kenya,¹¹ as well as the direct application of general rules of international law.¹² Thus, it recognizes that the obligations of the Kenyan government, relative to its participation through the international community, are enforceable in the local courts. The following instruments provide a framework in which the government, development partners and business enterprises should adhere to in executing the LAPSET Project.

6.1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights is generally agreed to be the foundation of international human rights law. Adopted in 1948, the UDHR has inspired a rich body of legally binding international human rights treaties. It continues to be an inspiration to us all whether in addressing injustices, in times of conflicts, in societies suffering repression, and in our efforts towards achieving universal enjoyment of human rights.¹³

Whereas, on the face of it, the UDHR may be non-binding, its substantive provisions have become binding on all states. There are a number of grounds under which it may be held to be so binding. First, it has been said that the UDHR is an authoritative interpretation to the UN Charter.¹⁴ Secondly, it is now settled that the UDHR is part of customary international law. Lastly, the *jus cogens* character of the UDHR makes it binding upon all States.

In addition, despite the UDHR not being actually enforceable as a legal instrument since, “declarations,” by their nature are not directly applicable judicially; the courts continue to draw jurisprudential inspiration and guidance from its provisions. For instance the International Court of Justice in issuing its ruling on the 1997 case concerning the Gabcíkovo-Nagymaros Project (Hungary and Slovakia), said that, “The protection of the environment is... a vital part of contemporary human rights doctrine, for it’s a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It’s scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration of Human Rights and other human rights instruments.”¹⁵

Crucially, it provides a common standard for nation states. The UDHR has provided both the inspiration and substance to various legal instruments which, today, protect justiciable rights. The UDHR is, thus, seen as a solid commitment by states to adhere to the protection of human rights.

It follows that development projects such as the LAPSET Project ought to be guided by the norms laid down under the UDHR.

6.2. The International Covenant on Economic Social and Cultural Rights

The International Covenant on Economic Social and Cultural Rights (ICESCR) is a multi-lateral treaty adopted by the United Nations General Assembly. Alongside the UDHR and the International Covenant on Civil and Political Rights (ICCPR), they form the international Bill of Rights. The ICESCR charts out a fuller scope of economic, social and cultural rights and provides mechanisms for protecting these rights. The ICESCR is monitored by the UN Committee on Economic, Social and Cultural Rights.

Article 2 introduces the notion of “Progressive Realization” of the rights enshrined under the Covenant and imposes a duty on all parties to:-

11 Article 2(6)

12 Article 2(5)

13 Universal Declaration of Human Rights — A Brief History- <http://circle.org/jsource/universal-declaration-of-human-rights-a-brief-history>

14 Rehman, Javid., International Human Rights Law, Second Edition

15 NGLS Round Up 90, May 2002

“...take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures...”

It, thus, imposes a continuing obligation on States to work towards the realisation of these rights, while at the same time avoiding deliberately regressive measures which would hamper the achievement of that goal.

The Committee on Economic, Social and Cultural Rights interprets the principle¹⁶ as imposing minimum core obligations to provide, at the least, minimum essential levels of each of the rights. If resources are highly constrained, this should include the use of targeted programmes aimed at the vulnerable.

The Courts may intervene to enforce the Doctrine of “Minimum Core Obligations.”¹⁷

To bolster the enforcement of socio-economic rights, the UN General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, on 10th December, 2008. The Optional Protocol is a side-agreement to the Covenant which signifies that the parties to the Protocol recognize the competence of the Committee on Economic Social and Cultural Rights (CESCR) to consider complaints from individuals. The Optional Protocol is in force, having achieved the requisite ten ratifications in February, 2013. While this is a significant step towards protecting economic, social and cultural rights, it is note-worthy that Kenya has not yet ratified the Optional Protocol, to avail citizens of an avenue of direct redress. Among the relevant substantive provisions that the aggrieved communities of Lamu and other persons can rely upon are:

- a) the duty upon States to undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant;¹⁸
- b) the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right;¹⁹
- c) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.²⁰
- d) The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.²¹
- e) The States Parties to the present Covenant recognize the right of everyone to take part in cultural life;²² the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

16 “...Governments, no matter what level of resources are at their disposal, are obligated to make sure that people living under their jurisdiction enjoy at least essential levels of protection of each of their economic, social, and cultural rights. While the ICESCR recognizes the principle of progressive realization of ESCR, this does not mean that states are free to postpone undertaking their duties vis-à-vis ESCR until a later date. Protection from starvation, primary education, emergency healthcare, and basic housing are among the minimum requirements to live a dignified life and it is the duty of governments to ensure these at all times. Even in cases of economic downturn or other emergency, these core requirements must be guaranteed to everyone. States should use all the available resources, including international assistance, to make sure that every individual in their territory enjoys a bare minimum of ESCR.”

17 Also referred to as, the doctrine of ‘Vital Minimum’ or ‘Minimum Level of Existence.’

18 Article 3

19 Article 6(1)

20 Article 6(2)

21 Article 11

22 Article 15

6.3. The United Nations Declaration on the Rights of Indigenous People (UNDRIPS)

The United Nations Declaration on the Rights of Indigenous People (UNDRIPS) is a proclamation of global, minimum standards to be applied in the pursuit of the protection and promotion of the rights of indigenous communities. These rights are present in several binding international legal instruments.

Article 1 of the UNDRIPs recognizes indigenous communities as a part of the wider society by right, and whose human rights are intact. The Declaration goes on to forbid discrimination against indigenous peoples in the exercise of their rights, more so where their indigenous origin or identity is concerned²³

Many societies deem indigenous communities as lagging behind the times. Under intense pressure to conform to the pace of modernity and to mainstream livelihood patterns, they have not been helped by deliberate government positions to disregard their manner and style of livelihood into the new age. *“Like it or not, we are going to build that road through the Indigenous territory”*²⁴ is an example of how some presidents and regional leaders refer to indigenous persons rights and struggles.

The Declaration expressly forbids attempts at forced assimilation of indigenous communities.²⁵ Already, the gazettelement of the forests around the Boni-Dodori Corridor has had the effect of putting a stop to, or reduced the capacity of the Aweer to hunt the game and gather berries, roots and honey in the forests. Their access to traditional shrines and even to the ocean has also been strained or cut out altogether, in certain instances. The continuing acquisition of lands - hitherto used by the Aweer – by private developers has had the effect of consistently barracking the Aweer community into ever-shrinking strips of land.²⁶

Article 8(2) requires States to formulate policies aimed at advancing the economic, social and cultural development of indigenous communities. The UNDRIPs further provides that, *“... Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions...”*²⁷

In addition, the UNDRIPs seek to promote the *“right to practise and revitalize [one’s] cultural traditions and customs.”*²⁸ This right extends to, *“the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.”*

Kenya did not vote in favour of this Declaration. However, since many provisions of the Declaration are found in many treaties that Kenya has actually signed, Kenya is bound by the provisions within the Declaration.

6.4. The United Nations Guiding Principles on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights (UNGPPBHR) are a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. This is the first corporate human rights responsibility initiative to be endorsed by the United Nations Human Rights Council. Nevertheless, the UNGPPBHR do not create international legal obligations for companies that can be enforced and are not accompanied by a redress mechanism that victims of business-related human rights abuses can access for remedy.

Under the UNGPPBHR states and businesses should implement the framework, based on three principles:

23 Article 2, UNDRIPs

24 Amnesty International, “Rights in the Name of Development: Indigenous Peoples Under Threat In the Americas. 2011 page 3

25 Article 8, UNDRIPs

26 Abdirizak Arale Nunow, “The Displacement and Dispossession of the Aweer (Boni) Community: The Kenya Government Dilemma on the New Port of Lamu” paper presented at the International Conference on Global Land Grabbing II October 17-19, 2012

27 Article 5, UNDRIPs

28 Article 11, UNDRIPs

- a) the State duty to protect human rights;
- b) the corporate responsibility to respect human rights; and
- c) access to remedy for victims of business-related abuses.

In implementing the LAPSSET Project, the State's duty includes protecting against human rights abuses by third parties, including business enterprises, through regulation, policymaking, investigation, and enforcement. While the State is not responsible for human rights abuse by private actors, it may be in breach of its international human rights law obligations when it fails to take proper steps to prevent or punish abuses by non-state actors. The UNGPBHR also notes that the State should take additional care in monitoring and preventing human rights abuses by business enterprises owned, controlled, or supported by the State.²⁹

The corporate responsibility to respect human rights indicates that businesses must act with due diligence to avoid infringing on the rights of others and to address negative impacts with which they are involved. Corporate entities involved in the LAPSSET Project ought to undertake their business activities in line with this responsibility.

They are recognized to have the ability to affect virtually all of the internationally recognized rights, hence, the responsibility to uphold and protect human rights. The UNGPBHR encourages companies to conduct due diligence on actual and potential human rights impacts, to create a statement of commitment to respecting rights, and to integrate human rights across relevant internal functions and processes.³⁰

As this Project is rolled out, it is the State's responsibility to provide access to remedy through judicial, administrative, and legislative means. It is also the corporate entity's responsibility to prevent and remediate any infringement of rights to which they contribute. Having effective grievance mechanisms in place is crucial in upholding the first two guiding principles. Beyond judicial processes, the UNGPBHR dictates that non-judicial mechanisms, whether state-based or independent, should be legitimate, accessible, predictable, rights-compatible, equitable, and transparent.³¹ At company level, dialogue is expected between the companies that shall be involved in the Projects and affected groups in Lamu and along the entire Corridor.

Further, the Guiding Principles exhort the State to protect the rights of the people of Lamu, even within the context of government development policies. This is more so the case where government policy seeks to foster the growth and development of businesses, in which case, such a policy must be tempered with sufficient and appropriate safeguards for the protection of all persons who would be adversely affected by the operations of the said businesses. The State is also required to put in place structures for public participation in government decision making, both at national and at local levels with respect to the Project.

6.5. The African Charter on Human and People's Rights

On a regional plane the African Union has since moved to establish the African Charter on Human and People's Rights. This Charter consolidates the key provisions of the afore-mentioned international instruments, besides, establishing an African perspective to the protection of human rights. It places considerable emphasis on socio-economic rights which rights are enforceable through, among other mechanisms, recourse to the interpretative and decisional mandate of the African Commission on Human and People's Rights as well as the African Court on Human and Peoples' Rights.

The provisions of the African Charter have been tested with success, in so far as the developmental rights of indigenous communities are concerned. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003*, an African regional body found the Kenyan government guilty of violating the rights

29 John Ruggie, "United Nations Guiding Principles on Business and Human Rights", March 21, 2011

30 Ibid.

31 U.N. Human Rights Council, "The UN 'Protect, Respect, and Remedy' Framework for Business and Human Rights", September 2010.

to religious practice, to property, to culture, to the free disposition of natural resources, and to development, contrary to the African Charter of the country's indigenous Endorois community, by evicting them from their lands to make way for a wildlife reserve.

The decision, by the African Commission on Human and Peoples' Rights, creates a major legal precedent by recognising, for the first time in Africa, indigenous peoples' rights over traditionally owned land and their right to development. The decision was adopted by the African Commission in May 2009 and approved by the African Union at its January 2010 meeting in Addis Ababa³². Nonetheless, it is worth noting that despite the fact that the Commission issued recommendations in favour of the Endorois community, the government has failed to implement the Commission's recommendations.

The present case respecting the fisher-folk and the Aweer community of Lamu has significant similarities with the Endorois case.

6.6. The OECD Guidelines for Multinational Enterprises

The Organization for Economic Cooperation and Development (OECD) is an intergovernmental organisations consisting of 46³³ countries working at the vanguard of efforts to respond to new global developments. The OECD Guidelines for Multinational Corporations are government-backed recommendations on corporate social responsibility (CSR) addressed by these 46 governments to their multinational enterprises. The range of the Guidelines extends to different issues, including: due diligence in the supply chain; disclosure; human rights; employment and industrial relations; environment; combating bribery; consumer interests; science and technology; competition and taxation.

Thus, investors operating in Kenya but, who originate from any of the 46 States, would be required to comply with the OECD Guidelines. Such multinational corporations may be brought before quasi-judicial panels, the National Contact Points (NCPs), whose purpose is to deliberate over complaints. The NCPs apply the OECD Guidelines to the actions of multinational corporations and render an appropriate decision. The OECD complaints mechanism can bring about change in corporate behaviour, raise public awareness and provide a mechanism for remedying grievances. Two recent cases³⁴ emerging from the NCPs illustrate the growing maturity of this system and suggest the way in which these soft law systems can become effective mechanisms for developing global regulatory cultures of corporate behaviour. The output of the NCPs and interpretive statements, like those of the two cases discussed, will continue to contribute, incrementally, to the institutionalization of transnational systems of multinational regulation, systems that will have legal effect, whether or not this is law classically understood.³⁵ This mechanism could be an option towards holding multinational corporations involved in the LAPSET Project to account over human rights standards, more so because these transnational corporations operate within the territorial domain of a host country which has a weak corporate accountability structure.

32 Landmark decision rules Kenya's removal of indigenous people from ancestral land illegal
4 February 2010

- See more at: <http://www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html#sthash.6im2djRs.dpuf>

33 Position as of October, 2013.

34 *Rights and Accountability in Development (RAID) v Das Air* (21 July 2008) 1 and *Global Witness v Afrimex* (28 August 2008) (2)

35 The OECD Guidelines for Multinational Corporations: Using Soft Law to Operationalize a Transnational System of Corporate Governance, Thursday, March 05, 2009, published on <http://lcbackerblog.blogspot.com/2009/03/oecd-guidelines-for-multinational.html> visited on 9th June 2014.

6.7. Multilateral Development Bank Accountability Mechanisms³⁶

Multi-lateral Development Banks (MDB) are increasingly becoming influential as a tool for leveraging national development, by providing financial and technical support to government projects. To ensure that such projects are sustainable and do not contribute to or aggravate economic, social and environmental conditions, the various MDBs have come up with specific guidelines governing the execution of such development projects. They also establish grievance redress mechanisms that would be utilized by aggrieved persons or communities, more so where grave violations of human rights are alleged.

As such, MDBs are a formal forum for people adversely affected by poorly designed or implemented projects supported by multilateral development banks (MDBs) to file claims to redress their grievances, considering that MDBs have immunity from local jurisdiction.³⁷ Notwithstanding the progressive development as citizen-driven grievance mechanisms, these mechanisms were primarily intended to enhance the institutional development effectiveness, in line with the mandates of their institution.

There has been a shift in development models towards sustainable development and with the right to development formally recognized at the 1992 United Nations Conference on Environment and Development, MDBs, such as the World Bank (followed by other institutions such as AfDB and IDB) began to develop environmental and social policies to improve their development effectiveness by emphasizing the interests of affected communities through policies on involuntary resettlement, environment, and indigenous peoples.³⁸ For example, the first mechanism to be established was the World Bank Inspection Panel after the Sardar Sarovar Projects in India, where more than 100,000 people became subject to involuntary resettlement from the construction of a dam and it was found that the project was ill construed.³⁹

The mechanism procedure involves investigations by a panel of independent external instigators, who give a report that is examined by the Board of Directors of MDBs. Recommendations from civil society can be taken but the ultimate decision remains with the Board. Some mechanisms like AfDB's go beyond investigations to incorporate a problem solving approach driven by claimants.

The MDBs accountability mechanisms are focused on at least one aspect of addressing citizen complaints – investigation or problem-solving, with an emerging trend to set up a permanent panel to carry out investigations instead of drawing on a roster of experts.

There have also been efforts to ensure friendly and easier accessibility of the mechanisms to users by simplifying the language used, and means of receiving information (emails) and allowing confidentiality of claims so that claimants can feel safe. Lastly, there is a growing trend to involve the claimants more in the accountability procedures such as panel visits to the project area and interactions with the claimants during the investigation. In an unusual departure, the AfDB accountability mechanism allows the claimants to comment on the Panel's draft investigation report, and the responses of both claimants and management are posted on the Panel's website when the Board decision is made.

Some people feel that the accessibility could still be improved by piercing the veil and allowing people to sue the MDBs in the domestic courts after unsuccessfully exhausting the process under the accountability mechanism, and the domestic court should deny immunity and exercise jurisdiction over international organizations as long as these lack adequate instruments guaranteeing the right to a court for individuals adversely affected by an organization's actions

36 This discussion is largely guided by: *Multilateral Development Bank Accountability Mechanisms: Developments and Challenges*, Richard E. Bissell and Suresh Nanwani

37 Eisuke Suzuki and Suresh Nanwani, "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks", *Michigan Journal of International Law* 27(1) (2005): 206.

38 Günther Handl, "The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development", 92 *American Journal of International Law* 642 (1998).

39 Richard E. Bissell. 2005. Learning Processes in International Accountability Mechanisms. *The Innovation Journal: The Public Sector Innovation Journal*. Volume 10 (1). p. 2.

or omissions".⁴⁰ In the same breath, the International Court of Justice (ICJ) has opined that international organizations may be responsible for their own conduct under international law⁴¹

There have been proposals to also have Office of Claims Resolution (OCR) which could handle claims through arbitration as opposed to present accountability mechanisms⁴² as there is general immunity of MDBs before national courts and no recourse to national courts will be available unless they waive their immunity or organize some form of dispute settlement mechanism by agreement.

The LAPSSET Project is likely to benefit from funding from one or a number of MDBs. The accountability channels availed through the channels discussed above could lend themselves for use by communities or persons who suffer violations as a result of the Project.

6.8. The United Nations Guiding Principles on Internally Displaced Persons

Internally displaced persons (IDPs) according to the UN Guiding Principles on IDPs are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, development programmes and who have not crossed an internationally recognized State border. Therefore any persons that shall be displaced by the LAPSSET Project shall be deemed as IDPs under this framework and provisions thereunder with respect to their protection shall apply to them.

6.9. The AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa

The AU Convention for the Protection and Assistance of IDPs in Africa requires State Parties undertake to respect and ensure respect for the Convention by refraining from, prohibiting and preventing arbitrary displacement of populations. In addition, States are obliged to prevent political, social, cultural and economic exclusion and marginalisation that are likely to cause displacement of populations by virtue of their social identity, religion or political opinion.⁴³ This requires the State to execute the LAPSSET Project by taking positive steps to implement the provisions of this Convention for the benefit of the host communities.

6.10. The Constitution of Kenya, 2010

In a bold departure from the past experience, the Constitution of Kenya, 2010, specifically, guarantees economic and social Rights.⁴⁴ This provision specifically guarantees the protection of aspects that contribute to the livelihoods of people. In addition, Article 26 of the Constitution protects the right to life. The right to life also covers various elements associated with livelihoods. Indeed, the Kenyan courts are increasingly finding that the denial of certain factors of livelihood amount to the denial of the right to life under Kenyan law:

"...We can say that when the people of Kenya included an elaborate Bill of Rights that specifically provides for the right to water and sanitation. The people of Kenya did not intend that these...be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the provisions...should have substantive bite. In short, the people of Kenya intended that the provisions...will be enforced and implemented.

40 Gerhard Thallinger, "Piercing jurisdictional immunity: The possible role of domestic courts in enhancing World Bank accountability" Vienna Online Journal on International Constitutional Law (Vol. 1, 2008), p. 35.

41 Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62.

42 Enrique R. Carrasco and Alison K. Guernsey, "The World Bank's Inspection Panel Promoting True Accountability through Arbitration" (forthcoming 41:3 Cornell Int'l L. J. 2008)

43 Article 3 of the AU Convention for the Protection and Assistance of IDPS

44 Article 43

They desired these collective commitments to ensure good governance in the Republic will be put into practice...”⁴⁵

6.10.1. Land Rights

For the first time, there is an acknowledgement that community land should vest in and be held by communities. These communities may be identified on the basis of ethnicity, culture or similar community interests.⁴⁶ The definition of community land is fairly comprehensive. It offers protection to communities who dwell on ancestral lands and lands traditionally occupied by hunter-gatherer communities,⁴⁷ among others. USAID and Kenya’s Ministry of Lands, Housing and Urban Development developed the Community Land Rights Recognition (CLRR) Model, which will secure the rights of the local Boni and Bajuni communities who have occupied customarily-held land for over one thousand years and have been considered ‘squatters’ without legal standing to advance their social and economic aspirations.⁴⁸ In addition, Lamu and the neighboring areas have been prime targets for irregular, illegal, and extra-legal acquisition from speculators targeting the proposed Lamu Port Project area. Developed based on provisions in Kenya’s Constitution as well as the 2009 National Land Policy, the CLRR’s main goal is to provide a mechanism for the registration of community rights and interests to land in a systematic, transparent and cost-effective manner.

As a system of land tenure in Kenya, ‘Community Land’ is a new category introduced in the Constitution.

This category strengthens the various provisions in the National Land Policy regarding the recognition of all modes of tenure, including customary and community land ownership. Almost all previous statutes on land were geared towards individualization of land with few provisions for recognizing communal rights and interests to land.

6.10.2. Clean and Healthy Environment

The right to a clean and healthy environment capable of sustaining life is enshrined under Article 42 of the Constitution bolstered by the Environmental Management and Coordination Act. The latter prescribes, in detail, the responsibilities towards guaranteeing a clean and healthy environment. It establishes the National Environmental Management Authority (NEMA) to

oversee and advise on this mandate. The role of NEMA includes providing environmental licences ahead of projects which stand to impact upon the environment and providing resolutions to issues raised during the Environmental and Social Impact Assessment (ESIA) process. The ESIA report does not sufficiently provide information for considering alternatives in design and implementation of the project as well as mitigation measures that will negatively impact the environment.

In addition, Article 69 of the Constitution requires the government to ensure sustainable exploitation, utilisation and management of the environment and natural resources and ensure the equitable sharing of accruing benefits. In implementing the LAPSSET Project, the government must ensure that it encourages public participation in the protection of the environment and protects genetic resources and biological diversity.

⁴⁵ *Trusted Society of Human Rights Alliance vs The Attorney General Minister for Justice National Cohesion & Constitutional Affairs Director of Public Prosecutions HC PETITION NO 229 OF 2012 (NRB)*

⁴⁶ Article 63(1)

⁴⁷ Article 63(d)(2)

⁴⁸ Abdirizak Arale Nunow, *The Displacement and Dispossession of the Aweer (Boni) Community: The Kenya Government dilemma on the new Port of Lamu*, October 2012, at 9

6.10.3. Access to Information and Public Participation

The freedom of access to information⁴⁹ requires that the people have access to information held by the State and by other persons, where such information is required for the exercise or protection of any right or fundamental freedom. It has been found that the government has not adequately disseminated information regarding the proposed LAPSET developments to the host community of Lamu.

The Constitution, further, enshrines the doctrine of “Public Participation” which is contingent upon access to information and a practical level of consultation and contribution to government decision making and accountability. Following the decision of constitutional court in *Kenya Small Scale Farmers Forum and 6 others v Republic of Kenya and 2 Others*,⁵⁰ it is now settled that even in formulating and implementing government policy, government should allow for an open process that takes cognizance of the interests and vulnerabilities of stakeholders. Good governance ideals further demand minimum procedural safeguards for government projects, including impact assessments. These processes not only introduce checks to advance accountability; they also promote robust debate to foster sound government policy and decisions.

6.10.4. Affirmative Action

The Constitution is also emphatic about the importance of Affirmative Action in redressing past and contemporary inequalities in society. Affirmative Action refers to policies that take factors including “race, color, religion, sex, or national origin”⁵¹ into consideration in order to benefit an underrepresented group “in areas of employment, education, and business”.⁵² This concept has since been widened to allow for preferential protection for various categories vulnerable groups. States may, thus, adopt Affirmative Action measures in order to combat contemporary and historical incidents of discrimination.

The Constitution directs the State to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination,⁵³ where there is genuine need.⁵⁴ It has long been established that various groups and communities, including minority groups have over the years been victims of economic marginalization and other aspects of discrimination, hence deserving of affirmative action as a means of restoring the said groups to the fore-front of the national economic, social and cultural development.

6.10.5. Sustainable Development

The Constitution introduces the concept of Sustainable Development.⁵⁵ Sustainable development connotes a triple bottom-line approach to planning, formulating, executing and evaluating projects, in order to yield economic, social and environmental development. Thus, the government must ensure that its policies and projects do not apportion undue preponderance on economic gains, at the expense of social and environmental impact on citizens.

49 Article 35, the Constitution of Kenya

50 Petition Number 1174 of 2007; (2013) eKLR – www.kenyalaw.org accessed on 5th June 2014

51 Executive Order 11246—Equal employment opportunity”. The Federal Register. Archived from the original on 30 March 2010. Retrieved 5/2/2010.

52 “Affirmative Action”. Stanford University. Retrieved 4/6/2012.

53 Article 27(6)

54 Article 27(7)

55 Article 10(2)(d)

6.10.6. Rights of Indigenous Persons

Kenya declined to adopt the UNDRIPs and to ratify ILO Convention 169. The Constitution of Kenya, 2010, however, recognizes “Indigenous Peoples” within the bracket of marginalization. The Constitution provides for the recognition, protection and safeguarding of the rights of marginalized communities in the social, political and economic life of Kenya.⁵⁶ The Constitution brings hunter-gatherer communities, pastoralists and minority fisher-communities, among others, under the ambit of Indigenous Communities. Among the indigenous communities identifiable along the LAPSSET Corridor are the Aweer, Samburu, Bajuni, Sanye, Borana, Rendile, Turkana, Orma and the Somali.

6.10.7. Culture

Conscious not to alienate or discriminate against any segments of society, the Constitution declares that there shall not be any state religion,⁵⁷ thus complementing the kindred “freedom of conscience, religion, belief and opinion.”⁵⁸ The Constitution is categorical about the centrality of culture being among the normative foundations of the nation.⁵⁹ It further and expressly, demands that the State promotes the development and use of, among others, indigenous languages.⁶⁰ The State is obliged to take measures to promote all forms of national and cultural expression through a multiplicity of media.

6.11. Kenyan Land legislation ⁶¹

6.11.1. The Land Act

The Land Act provides a new legislative structure for land governance and rights in Kenya. It spells out the functions of the different players in the administration of land: National Land Commission (NLC); the Cabinet Secretary; the Chief Registrar of Lands; and Parliament. The Land Act addresses the manner of compulsory acquisition, including safeguards for interested parties in that eventuality. The NLC is charged with implementing programs on behalf of the national and county governments, and establishing a settlement fund for providing access to land for squatters and displaced persons. However, it must be noted that the Act does not prescribe a transitional calendar, a matter that could pose challenges in implementation.

6.11.2. Land Registration Act

For the first time in Kenya, the system of title registration has been unified under the Land Registration Act. The Act establishes a community lands registry, in anticipation of a more comprehensive future community land legislation. To address potential transitional difficulties, the Act prohibits registration of or any dealing in community lands prior to enactment of such legislation.

As with the Land Act, the Land Registration Act lacks clarity in regard to transition and savings provisions, which may result in initial confusion about how to register rights and transactions.

56 Article 56

57 Article 8, Ibid

58 Article 32, Ibid

59 Article 11, Ibid

60 Article 7(3)(b)

61 The discussion below draws heavily from studies by the Kenya Secure Project, citation; Analysis of Kenya’s Land Act, Land Registration Act and National Land Commission Act 2012, Kenya Secure Project, June 2012.

6.11.3. National Land Commission Act

The National Land Commission Act establishes the NLC. The NLC's functions include:

- the management authority over public lands;
- advising the national government on a comprehensive program for land title registration;
- initiating claims for historic injustices;
- encouraging the application of alternative and traditional dispute resolution mechanisms;
- managing and administering all unregistered trust land and unregistered community land on behalf of the county government;
- developing and maintaining an effective land information management system at national and county levels; and
- monitoring and oversight over land use planning.

6.12. The Truth, Justice and Reconciliation Commission (TJRC)

Kenya's past governments during the colonial and post-independent eras have committed massive human rights violations and economic crimes. These violations have entrenched impunity as a way of life in Kenya. As a key cog in the Agenda 4 Reforms, the implementation of Truth Justice and Reconciliation Commission recommendations remains important in the quest for closure over past misdeeds and to heal society in order to facilitate national progress. The TJRC recommendations are aimed at rectifying historical injustices that have, hitherto, not been addressed appropriately and comprehensively. Among some of the issues that the TJRC Report addresses are the economic marginalization of various communities and economic crimes, which have historically affected the livelihoods of many Kenyans. Of particular concern to the people of Lamu is the land question, which continues to rip apart the socio-economic fabric of this nation.

The TJRC has been a forum where a number of pertinent livelihood concerns have been raised: land-based injustices; economic crimes; economic marginalization; gross violation of human rights; and, gender-based violations, among others. Despite the timelines outlined in the TJRC report that was released in May, 2013, none of the recommendations has been implemented to date, except for the erection of a monument by the Kenya National Commission on Human Rights (KNCHR) in memory of the Wagalla Massacre of the 1980s.

6.13 The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act

This definition within the Kenyan context includes amongst others persons internally displaced by development projects including those forcibly evicted, who remain without proper relocation and sustainable re-integration.⁶² Although the colonial government initiated displacements to pave way for the so called "White Highlands", it is the post-independent regimes which have perfected this phenomenon by not failing to resolve historical injustices and exposing the population to most of the above causal factors with impunity.

It is the primary duty of every government to ensure effective protection of any persons that may be displaced by the LAPSSET Project. This is based on the States' international obligations to protect, fulfill and respect rights for all. *Protection* is defined as all the activities aimed at obtaining full respect for the rights of the individual with the letter and spirit of the relevant bodies of law-namely human rights, humanitarian and refugee law. The main outcome of protection to IDPs is *durable solutions*.

62 Section 6 of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act

Achieving durable solutions means putting ensuring that IDPs no longer have any specific assistance and protection needs that are directly linked to their displacement and can enjoy human rights without discrimination on account of their displacement. A durable solution to internal displacement can be achieved through one of the three modalities (without any hierarchy depending on the context): sustainable *return* the place of origin; sustainable *reintegration/local resettlement* in the area where IDPs have taken refuge; or sustainable *settlement* (relocation) elsewhere in the country.⁶³

Generally, durable solutions should enable IDPs to enjoy without discrimination the following rights:

- Long-term safety, security and freedom of movement;
- An adequate standard of living, including at minimum access to adequate food, water, housing, health care and basic education;
- Access to employment and livelihoods;
- Access to effective mechanisms that restore housing, land and property or provide them with compensation;
- Access to and replacement of personal and other documentation;
- Voluntary re-unification with family members separated during displacement;
- Participation in public affairs at all levels on an equal basis with the resident population;
- Effective remedies for displacement-oriented violations, including access to justice, reparations and the causes about reparations.

The LAPSSET Project poses a potential threat of displacement to the host communities if the framework on protection and provision of durable solutions is not effectively implemented.

63 Davis Malombe, "Lopsided Priorities in the Protection of Kenyan IDP's"

7. POTENTIAL IMPACT OF THE LAPSET PROJECT ON HUMAN RIGHTS AND THE ENVIRONMENT

The Government expects the project to have an impact upon the livelihoods of 166 million people in Kenya, Ethiopia and the new state of South Sudan, as well as other East African countries.⁶⁴ In addition, the tumultuous co-existence between Sudan and South Sudan makes the LAPSET Project convenient to Kenya-South Sudan relations. Currently, South Sudan exports its oil through a 1,600 km pipeline that connects its oil-fields to the Red Sea at Port Sudan. Through LAPSET, South Sudan will be able to deal in oil without having to contend with the frosty political relationship with her northern neighbour.

Likewise, with the intervening discovery of economically viable oil deposits in Lokichar, in Turkana, -along the LAPSET corridor - the proposed refinery and oil-based infrastructure will certainly lend itself to

refining oil mined from Turkana. At least one oil company has suggested that the Lamu Basin has a potential of generating up to 3.7 billion barrels of oil.⁶⁵

In sum, it is easy to see the significance of the oil industry development to the LAPSET Project. It is therefore the main driving point for the LAPSET Corridor Project.

According to the Government of Kenya, the LAPSET Project is expected to transform regional economies through trade, integration and interconnectivity.⁶⁶ In addition, the series of KHRC fact finding missions in Lamu indicates that the people of Lamu are hopeful that the LAPSET Project will bring with it good tides including job creation, infrastructural development, increased levels of trade and commerce, improved medical facilities, intermarriage, improved flow of transport and increased revenue collection.⁶⁷ However an interrogation into aspects of the scheme reveals a high potential for adverse impacts on the host community of Lamu, including grave violations of human rights.

In addition, the series of KHRC's fact finding missions revealed a lack of awareness of the existing frameworks on sustainable development by key stakeholders as well as the host community and a failure by the government to domesticate, harmonize, enact and implement some of these frameworks.

7.1. The impact of the LAPSET Project on the

7.1.1. Destruction of marine species through pollution and physical processes

Industrial activity is bound to introduce pollutants that are unfavourable to the survival of the most vital species of algae that fish eat, hence, interfering with the growth and development of fish leading to a reduction in fish for economic activity. Spillage and dumping of industrial chemicals and refuse will contribute to the introduction or engineering of dangerous marine species.⁶⁸ It is very likely that such toxic substances will be introduced into the marine environment, hence, contributing to the loss of rare sea creatures, including the endangered Dugong, turtles and several fish species.⁶⁹

It is projected that dredging activities near Manda Bay will decimate fish breeding sites and mangrove forests through either excavation or through silting caused by dredging activities, hence, limiting the capacity of regeneration of fish along the channel. Similarly, the introduction of large sea vessels will have the effect of interrupting the fisheries ecosystem, hence leading to loss of fish through migration or outright decimation while introducing shark specie into the channels of the Archipelago. Logging activities and the clearing of mangroves in preparation

64 Study for LAPSET Corridor FS & Lamu Port, MP & DD JPC & BAC/GKA JV

65 Projections from Pancontinental, an Australian oil and gas prospecting company commissioned to prospect for oil has said, quoted in David Mugwe, The East African posted Wednesday, February 27 2013 at 10:32 , <http://www.theeastafrican.co.ke/news/Lamu-Basin>

66 The Kenya Vision 2030, Ibid.

67 These views were collected from Lamu community based and faith based organisations, Lamu women leaders, members of the Lamu county Assembly and teachers from Lamu on 31st March to 6th April, 2014.

68 Professor Abdalla Bujra, BA in African Studies, PhD in Sociology. He is an eminent academic on the global scene. These are positions he has taken at experts and community forums deliberating over the Lamu Port.

69 Ibid.

for construction of the industrial hub shall interfere with fish breeding sites and disturbing the balance of the marine ecosystem.



Destruction of mangrove to pave way for the Lamu Port site

7.1.2. Blockading of Traditional Fishing Waters

The building and operations of the port will require the cessation of traditional fishing practices in some of the fisheries most heavily used by Lamu fisher folk. Traditional fishing waters will be closed off to a significant number of artisanal fisher-persons who presently depend upon the waters of the channel for their livelihood. Fishermen - mostly artisanal – will be forced to abandon their trade when they are forced out of the safer and more sheltered fishing waters of Lamu. In this event, they would struggle to cope with the new and more onerous demands of fishing the high seas. For instance, the simple fishing machinery and equipment would struggle to cope with the rigours of deep-sea fishing. Bigger and more powerful boats with fish storage facilities would be required for excursions into the deep sea. However, the prohibitive costs involved in the acquisition of the said machinery would lock out the majority of the Lamu fisher-folk.⁷⁰ The government has not been forthcoming about any plans towards cushioning the fisher-folk from the economic and social fallout that will result from this development. Fisher-folk have sought to be compensated for the impending loss of traditional fishing easements, without success.

⁷⁰ Focus Group Discussion at the Department of Fisheries, Lamu



Fisher folk on an expedition. This fishing channel will be closed off by operations of the Lamu Port forcing most fishermen to abandon their trade.

The prevailing assumption is that industrialization will attract such infrastructural development as to catalyze local job creation. However the capacity of the Lamu fisher-folk to adapt to the beckoning industrial economy is slim due to poor access to education and skills development, over the years. For now, the government blueprint is implicitly premised on the large-scale conversion of local fisher-folk – mainly, unskilled labourers - to power the anticipated “industrial revolution.” However, this is inadequate. The people of Lamu have expressed their desire to participate fully at the fore-front of local development, far from being accorded a bit-time role as unskilled labourers.

In addition, the government has not been categorical about practical plans to prepare the local labour force to anticipate and adjust accordingly. There is no known road map on equipping local labourers with vocational and higher technical skills for the purpose of ensuring that the scheme yields jobs that are both qualitatively and quantitatively adequate.



The above diagram shows Manda channel which will be closed to fishermen to give way to the operations of the port.

7.2. The Impact of the LAPSSET Project on the Aweer Community

7.2.1. Land deprivation and displacement of people

The KHRC fact finding missions reveal that the government has not put in place a comprehensive and coherent strategy towards ensuring that the Aweer and other indigenous groups are not deprived of their integrity as a people. There is scant political will towards ensuring that communal land is secured, with most land in Milimani, Mangai, Bargoni, Kiangwe and Basuba, still unregistered, hence denying them adequate legal protection for the land. The Aweer have traditionally owned land communally, with rules of use and access, well stipulated. Whereas, the Witu and Boni forests in which they live are not gazetted, these lands have practically remained “Government land,” with the consequence that the Aweer are bereft of ownership, tenure rights or formal usage agreements.⁷¹ The Aweer have to contend with constant threats of eviction by perennial claimants upon the land: the KWS; and private developers, mainly, ranchers who have been granted rights over parts of the land, even, illegal loggers. The construction of the Port has put considerable pressure on land ownership and use, with speculators acquiring land, some, through illegal, irregular or coercive means at the expense of the Aweer community. Many people allege loss of land under dubious circumstances or undue intimidation by government officials and private developers.

Incidents of displacement of members of the Aweer community have been reported in Lamu.⁷² The Aweer are being forced to abandon their traditional cultural lifestyle and to assimilate into the “mainstream” society through forcible removal from traditional lands and territory to make way for the LAPSSET infrastructure. They are losing their shrines to land-grabbers and a government policy that is not keen on tempering its wildlife policy with the historical and developmental needs of local communities.

Development-induced Displacement and Resettlement (DIDR)⁷³ is not unique to Lamu. DIDR or forced migration in the name of development is a common thread as countries carry out

⁷¹ Forest Dependence in Kenya: A Case Study of Hunter-Gatherer Communities in Kenya, Kenya Land Alliance, November 2009 at p. 23

⁷² Focus Group Discussion in Bargoni and Milimani in 2011 and reports of Lamu stakeholders’ workshops in 2011 and 2012.

⁷³ This is the forcing of communities and individuals out of their homes, often also their homelands, for the purposes of economic development. It is a subset of forced migration.

development projects. The people that face such migration are often helpless, suppressed by the power and laws of nations. Inadequate or the altogether absence of rehabilitation policies for migrants means that they are often compensated only monetarily - without proper mechanisms for addressing their grievances or political support to improve their livelihoods. The position of those who are not uprooted from their native lands but whose livelihoods are displaced is somewhat similar.

Case Study: The Cameroon-Chad Oil Pipeline

The Project involved the construction of a 1070km pipeline to transport crude oil from three fields in south western Chad to a floating facility 11 km off the Cameroon coast. The Chad- Cameroon pipeline inauguration day was declared by the Civil Societies as a day of *national mourning*⁷⁴ due to the adverse social and environmental impacts of the project. A complaint was filed by scores of farmers and communities from Cameroon citing that no compensation has been received as earlier promised for the adverse effects.⁷⁵

Displacement was a major social impact experienced in both countries. However, the Bagyeli 'pygmies' were the most affected following forced resettlement, migration of the animals they hunted, destruction of the land and contamination of their ground water. The pipeline is located a few meters below Chad's most fertile agricultural land. The area is Chad's only breadbasket and feeds most of the country.⁷⁶ The displacement has had adverse effects on agricultural production since most of the population has not found alternative land to continue with their agricultural activities.

In addition a dump site where toxic substances such as asbestos, scrap metal and discarded iron were dumped was opened up in a village north of the pipeline route by the company responsible posing grave danger to the residents. Oil spills were also experienced especially in Lake Chad thus exposing residents to various health problems such as diarrhea

7.2.2. Social Marginalisation and Economic Displacement

Long standing historical marginalization of the Aweer makes them vulnerable to competition in the jobs and economic market that industrialization, occasioned by the LAPSET Corridor Project, might bring forth. The Aweer have extremely high illiteracy levels, significantly few schools, and poor infrastructure and social amenities. They would, thus, fare ill in the face of competition in the jobs market, more so where skilled labour is concerned. The factors of production militate against the Aweer: the transport infrastructure is dilapidated and connectivity to electric energy is trace, all factors of which would send the cost of production soaring. In the event that they are forcibly torn off their traditional forms of livelihood and culture, the change-over would, clearly, be troubled and torturous.

Economic Displacement is the loss of income streams or means of livelihood resulting from, among others, obstructed access to resources.⁷⁷ These resources include land, water, or forest - resulting from the construction or operation of a project or its associated facilities. It can manifest as a permanent or temporary phenomenon. The loss of arable land or land for housing, acquired for the permanent placement of project infrastructure, for instance, is a permanent manifestation. On the other hand, damage to crops in the course of construction or intermittent activities could visit temporary or permanent loss.

74 A Humanitarian Disaster in the Making Along the Chad-Cameroon Oil Pipeline -- Who's Watching? AlterNet By Brendan Schwartz, Valery Nodem

75 OMBUDSMAN ASSESSMENT REPORT Regarding Community and Civil Society concerns in relation to the Chad-Cameroon Petroleum Development and Pipeline Project (#11125) in Chad October 2012

76 ibid

77 The 'Handbook for Preparing a Resettlement Action Plan' (IFC 2002), authored by the International Finance Corporation (IFC)



A woman from the Aweer Community. Most women from the community lack any source of livelihood.

7.2.3. Resource-based conflicts

Competition for natural resources is a major catalyst for conflicts in Kenya. Hunter-gatherer communities are typically victims of the Resource Curse, at this level. Egged on by population pressure, as is the added problem in Lamu, different groupings are brought to square off on account of resources. It is expected that the population of Lamu will rise significantly as a result of the LAPSSET Corridor Project. Invariably, the additional population will diffuse into the Lamu mainland, where the Aweer community live. This will compound the problem relating to the struggle for scarce resources, if not addressed, in timeous fashion.

Unfortunately, discriminative policies and practices by successive governments of issuing title deeds to individuals as gifts or on the basis of tribalism, at the expense of the Aweer community stand to further catalyze the conflicts.⁷⁸ The exercise continues to be marked by a lack of accountability and consultation. Consequently, the process has proceeded, oblivious or in utter disregard for unique political, historical and cultural context within which the Lamu communities have lived.

7.2.4. Dilution of Cultural identity

The Aweer speak a distinct language, though they have, over time been partially assimilated into the dominant Islamic culture in Lamu County. Without a proactive government policy to protect indigenous and minority communities, these communities are tending towards extinction. Dominant tribes and groupings easily dilute their cultural norms, ethnic identity and language. Among the indicators of the identity crisis are:⁷⁹ Change in livelihood system and, the gradual loss of language and assimilation or acculturation into the dominant neighbouring cultures. It has

⁷⁸ Memorandum on Historical Land Injustices in Lamu presented by Save Lamu to the Truth Justice and Reconciliation Commission on 9th January 2012.

⁷⁹ Forest Dependence in Kenya: A Case Study of Hunter-Gatherer Communities in Kenya, Kenya Land Alliance, November 2009 at p. 23

been observed that historical marginalization and discrimination of hunter-gatherers in Kenya is spurred both by an unresponsive government policy, just as much as cultural perceptions by neighbouring – often dominant – communities.⁸⁰ In Lamu, for instance, the Aweer have been known to go by two names: “Aweer,” being the preferred name by the community itself, while the more dominant Bajuni tribe has historically tagged them as the “Boni,” referring to their movement from place to place. The last title is derogatory. It is illustrative that even within the marginalized Lamu County, the Aweer are further marginalized, economically, socially, even, politically. The Aweer of Bargoni observed that, in the political sphere, they are regarded by politicians as insignificant, owing to their small numbers. Consequently, their aspirations are not prioritized within the local political context. On its part, the lack of a responsive government policy in many respects has led to the continued violation of the Aweer community.⁸¹

7.2.5. The Rising Cost of Living

The hallmark of the Resource Curse is an unhealthy over-dependence on a commodity to the extent of holding a local or national economy hostage. The “Dutch Disease” is a symptom of the Resource Curse. The Dutch Disease is a phenomenon that was witnessed in the Netherlands in respect of the discovery of large pockets of natural gas. It progresses as follows:⁸²

- a) a nation finds ample natural resource reserves;
- b) economic focus begins to target this high-income industry;
- c) skilled workers from other sectors transfer to the resource sector;
- d) higher wages make the national currency less competitive;
- e) other industries, especially the manufacturing and agricultural sector, begin to suffer.

Additional revenues from the natural resources put pressure on demand for domestic goods and services in a way that consequently raises the value of the local currency - real exchange rate appreciation - and makes tradable goods uncompetitive. This, in turn, stifles other sectors of the economy. Oil rents are not always synonymous with economic or social development. It has been observed that:

“High oil revenues raise exchange rates, promote an adverse balance of payments on the cost of imported goods when prices fall, boost wages for skilled labor – ultimately pricing them out of the international market - and reduce the incentive to risk investment in non-oil sectors. In short, it kills the competitiveness of all non-oil sectors, squeezing out vital sectors like agriculture and manufacturing, leaving oil as the only functioning revenue source. Just one example includes Gabon, which since initiating the export of oil has seen its agriculture sector collapse; it is now entirely dependent on imported food.”⁸³

7.3. Impact of the LAPSSET Project on the Environment

The LAPSSET Corridor Project, when complete, is likely to lead to large scale defacement and pollution of the environment. The oil sector is responsible for among the most devastating incidences of pollution. Oil spills make up about 12% of the oil that enters the ocean.⁸⁴ Oil spills are a localised problem but can be catastrophic to local marine wildlife such as fish, birds and sea otters. Oil pollution is also a direct health concern to humans. Most oil producing economies have a particularly special regard for oil because of the colossal economic returns associated

80 Ibid at p.29

81 Policies relating to land, water, wildlife and environmental management, among others.

82 Ibid.

83 UNCTAD, 2007

84 <http://www.water-pollution.org.uk> visited on 15th March 2014.

with oil. Many of these countries have walked blindly into the so called “Resource Curse.” This is the paradoxical situation in which countries with an abundance of non-renewable resources experience stagnant growth, economic contraction, even.⁸⁵

Case study: The OGONI Pipeline

The Nigerian delta has some of the best agricultural land in Africa, as well as vast oil resources. The Ogoni people have lived there for over 500 years. Prior to the discovery of oil in the 1950s, agriculture was the mainstay of the economy, with agricultural produce exported to the more industrialized regions of the world. By 1971 there had been a shift from agriculture to petroleum production, such that between 1973 and 1981 the value of agricultural exports fell from more than USD 1.5 billion to about USD 0.3 billion⁸⁶. Several oil companies, including Shell, set up operations in the 1950s and since then, the land, water, and air have been polluted to such a great extent that the Ogoni people’s *livelihood is threatened*.

In the proceeding thirty years, USD 30 billion in oil was drawn from Ogoniland. The central government received a portion of the profits, however *none of the money ever reached the people* of Ogoni⁸⁷. The people of Ogoni never received any monetary benefit from the mining activities carried out in the area. While Ogoniland was rich in fertile soil at the mouth of the Niger River and rested on one of the largest oil reserves in the world, the Ogoni people lived in abject poverty for the 30 years of Shell’s drilling. They had no electricity, no sewer system, and no water filtration.

In a report done by the United Nations Environment Program (UNEP) as well as other reports presented by various scholars it is shown that as a result of a strong societal uprising by the Ogoni, the drilling came to a halt in 1993. Unfortunately, as late as 2011, the effects of the drilling continued to deteriorate the environment, social and economic well-being of the Ogoni people. The consumption of their land by oil drilling operations and the resulting pollution has forced many Ogoni off of their land. As a result of the forced removal, *over 100,000 Ogoni have sought refuge in the neighbouring country* of Benin⁸⁸. The UNEP Environmental Impact Assessment reports contaminated rivers and wells that contained a means for livelihood for the fishermen as well as sources for drinking water for the community.

The deterioration of Ogoniland has been attributed to the fact that no environmental impact assessment was done at the beginning of the project ⁸⁹ further to the fact that the government had no policy or legislative framework that governed the manner in which the multi-national carried out their business on extracting oil⁹⁰.

85 www.investopedia.com

86 World Bank (1982). World Development Report 1982, Volume 1. ISBN 0-19-503224-1. Available at <http://go.worldbank.org/16BEWURYEO>

87 The Curse of Oil in Ogoniland < http://www.umich.edu/~snre492/cases_03_04/Ogoni/Ogoni_case_study.htm> accessed on 10th June 2014

88 Ibid.

89 Legborsi Saro Pyagbara, The Adverse Impacts of Oil Pollution on the Environment and Wellbeing of a Local Indigenous Community: The Experience of the Ogoni People of Nigeria, August 2007.

90 United Nations Environment Program, Environmental Assessment of Ogoniland, 2011

8. RECOMMENDATIONS

In line with the noted trends of displacement in other countries and the potential human rights threats to host communities and the fears expressed by the Aweer and fisher folk communities, KHRC recommends the following measures to ensure that the LAPSSET Project is implemented in a sustainable manner.

8.1. Protection of Land Rights

- a) The Eviction and Resettlement Guidelines Bill, 2012, should be enacted expeditiously to provide for protection and redress against unlawful and inhuman eviction;
- b) The Community Land Bill should be enacted expeditiously to provide the legal framework for the use, transfer and management of community land in line with the Constitution;
- c) In the interregnum, the NLC and the government should impose a moratorium on dealings in land while it puts in place adequate mechanisms for the protection of communally held or used land, ahead of a speedy and comprehensive transition into the new land tenure systems;
- d) The government should conduct a forensic audit of land ownership and use in Lamu to ascertain the legality of allocation of land and to establish the veracity and credibility of claims of land grabbing and of loss of community land and provide compensation or restitution where necessary;
- e) The government should put in place an elaborate plan to implement the provisions of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act
- f) Where there is the possibility of relocation of indigenous communities from their ancestral lands, such a course of action should be preceded by consultations, whereupon, free, prior and informed consent should be procured as prescribed under the UNDRIPS. Fair compensation should be paid out to them and an option to return, where appropriate, reserved.

8.2. Protection of the Environment

Pursuant to Article 42(a) of the Constitution the following measures should be put in place for protection of the environment:

- a) The government should commission a comprehensive environmental and social impact assessment that takes cognizance of the human rights and developmental consequences of all aspects of the LAPSSET project on the local community and the environment. This assessment should be implemented in advance of any far-reaching construction or project implementation, in a participatory and transparent manner as required under Article 69(1) (d) of the Constitution. Mitigating measures that are recommended by the report should, subsequently, be put in place with clear responsibilities and timelines given to the appropriate state agencies;
- b) The NEMA should put in place adequate structures for monitoring and redressing environmental degradation and for holding violators to account.
- c) On the basis of Article 69(2) of the Constitution, a rapid oil spill response mechanism should be put in place by oil companies and the government which must be committed to mitigating and responding to communities in distress due to oil spills.
- d) An insurance fund against oil pollution be established by the government and the oil companies. In this fund, all the socio-economic costs resulting from oil pollution, can be charged and insured against.

8.3. Protection of Lamu Cultural Heritage

- a) The government should enact and enforce legislation on culture, in line with Article 11(3) of the Constitution and the UNESCO Convention, for safeguarding intangible cultural heritage and for promoting broad cultural rights;
- b) The government – through the National Museums of Kenya - should establish an appropriate framework on the basis of Article 11 (2) (a) of the Constitution for protecting and promoting and preserving Lamu’s cultural heritage, including the Old Town of Lamu and promote the free practice of the cultures and languages of host communities, including the Aweer;
- c) National laws and policies which hamper the free observance of local cultures and customs should be repealed in order to promote progressive traditional institutional frameworks as contribute to social order.

8.4. Public Participation and Accountability

- a) The government should commence focused and constructive dialogue with communities along the LAPSET Corridor to inform the nature and manner of leveraging development projects for the benefit of the host community. Dialogue committees should be established in a manner that is representative of local views and proceeds upon informed and constructive dialogue in a manner that advances free, prior and informed consent, where appropriate, by the communities, ideally in accordance to standards set out in international law and frameworks. The fisher-folk of Lamu should be engaged in constructive dialogue through acceptable professional structures, including the Beach Management Units.
- b) A multi-stakeholder approach to benefit sharing should be put in place involving the triad of government, companies and host communities. The multi-stakeholder mechanism should address issues of biodiversity conservation and regeneration.
- c) The government should ensure access to information about the LAPSET Corridor Project by local communities, including through sensitization, to enable them to understand and participate in the regional and national development discourse;

8.5. Protection and promotion of local livelihoods

- a) Both national government and county governments should put in place mechanisms to support existing cottage industries and alternative livelihood options for the Aweer community and Lamu fisher-folk, including through: the provision of agricultural extension services as well as allowing access to forests to enable local agriculturalist and gathering communities to produce competitively; and the establishment of facilitative infrastructure (such as fish cooling plants; canning factories; good roads; access to electricity; communication) and amenities (such as hospitals; schools and libraries).
- b) The government and non-state actors should develop the technical capacities and boost the financial capabilities of fisher-persons to adjust to more stringent fishing methods in the event that they are forced to relocate from the more sheltered fishing zones to the open sea.
- c) The government should ensure the protection of national fishing zones by gazetting or to protect fisheries resources from decimation by indiscriminate industrial and shipping activities and allowing local fisher-persons access to habitual marine easements for the purpose of fishing. In addition, the government should facilitate the return community boat landing sites that have been privatized;
- d) Oil revenues from the LAPSET Corridor Project should be applied towards increasing agricultural productivity, safeguarding the environment, reclaiming the cultural heritage of Lamu and addressing past injustices that handicap the participation of the host community in a new-look economic dispensation.

8.6. Government Policy that Advances Sustainable Development

- a) The government should leverage the discovery of oil and future production of oil as a catalyst for the benefit of the people as envisaged under Article 69(1)(h) of the Constitution by ensuring oil revenues should be used, in part, to develop local livelihoods for optimal production. In Lamu, rather than displace the fisheries sector, oil revenues should be employed towards exploiting the presently under-utilized fishing zones up to 200 NM into Kenya's territorial waters.
- b) The Lamu host community, companies and the government should, through dialogue, agree to a workable benefits-sharing model in respect of the benefits and proceeds of the LAPSET Corridor industrial and transport infrastructure, including through:
 - A community fund with regular payment into a community based fund for the benefit of local residents
 - Employment quotas for the local community;
 - Offering ownership shares in the project to the local community through a part ownership scheme;
 - capacity building programmes to enable the community to tap into the economic benefits of the proposed port;
 - Production sharing agreements with corporate entities, and through the national tax policy and laws.
- c) The government should comply with its obligations as per the Protect, Respect and Redress framework under the UNGP in order to ensure sustainable development. In this regard, it should establish a supportive legal and regulatory framework for the protection of human rights. It should, thus:
 - i. Develop a National Action Plan (NAP) to implement the UNGP;
 - ii. Support the call for a binding international treaty on business and human rights to hold corporations liable for human rights violations;
 - iii. Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Op-ICESCR) to afford citizens the opportunity to canvass grievances relating to violation of socio-economic rights, directly with the Committee on Economic Social and Cultural Rights (CESCR);
 - iv. Ratify the International Labour Organization (ILO) Convention Number 169;
 - v. Enact a comprehensive legislation on Equality and Non-discrimination;
 - vi. Formulate an affirmative action framework to ensure that sustainable development aid reaches the most marginalized members of society and to catalyze efforts at equalizing long-standing marginalization; and,
 - vii. Implement the recommendations of the TJRC Report.
- d) Corporations involved in the project should fulfill their responsibility to respect human rights by putting in place policies and processes⁹¹ on human rights and exercise due diligence by assessing, preventing, and mitigating their impact on human rights and the environment, and by facilitating viable remedies, if abuses occur.⁹²
- e) International and regional financial institutions, multi-lateral development banks and development partners involved in the LAPSET Project should establish and enforce viable grievance redress mechanisms that are legitimate, accessible, predictable, rights compatible, equitable and transparent⁹³ to protect, promote and remedy the violations of human rights;

91 Guiding Principle 15 of the UNGP

92 Guiding Principle 17 of the UNGP

93 United Nations Human Rights Office of the Commissioner, "Guiding Principles on Business and Human Rights: Implementing the United

- f) The government should require all companies and development partners involved in the LAPPSET Project to provide all the necessary social infrastructures before the commencement of the Project so that their operations will not impact negatively on the immediate local population.
- g) The government should enact laws that impose stricter penalties on multinational corporations that do not comply with the framework on environmental conservation including forfeiture of their license to carry on the said activities;
- h) all laws should be amended to reflect the inclusion and participation of the host communities in the activities contributing to their development.

9. CONCLUSION

This position paper posits that there are potential violations of human rights, in respect of the nature and manner of execution of the LAPSSET Project. In rolling out the LAPSSET Project, the Government has failed to observe best practices and standards in good governance. There has been little, if any transparency and accountability in the manner in which the Project has been advanced. Indeed, it appears that the government economic development policy is, in this regard, failing to contextualize and address the livelihood concerns of host communities.

Community voices are effectively muzzled. The legal framework in Kenya is reasonably well developed for the purpose of offering first-line protection to victims and potential victims of development induced injustices. Whereas the Constitution firmly stipulates these protections, there is scope for further elaboration of these safeguards through sound and conclusive legislations and policies, in line with international best practices and standards.

The Constitution of Kenya recognizes the responsibility of government in facilitating economic and social⁹⁴ as well as cultural⁹⁵ and environmental⁹⁶ development, in a manner that advances the ends of sustainable development. It recognizes that popular participation and approbation of governance is crucial to achieving sustainable development. In formulating and implementing policy, government must consider the public interest to yield policies that progressively fulfil the human rights of all people, more so the vulnerable. Paul Goldsmith⁹⁷ contends that the LAPSSET Project is;

"...a gravy train being pushed to benefit politicians, wealthy individuals, land grabbers, and a cartel of foreign investors... (The)LAPPSET (Corridor Project) is clearly meant to grant contracts to private firms, create structures to ferry oil from South Sudan and nothing else. It's not about developing the remote north Kenya, it's not about a change of policy. ... (The) high cost of LAPSSET, estimated at \$29.24 billion in April 2013, represents a major financial burden to the country and a major investment risk. Furthermore, concerns over delays and reports that South Sudan was looking for an alternative port to export her oil will mean that Kenya is putting up a port that may be idle and incapable of recovering costs..."

The discovery of oil deposits provides Kenya with the opportunity to escalate economic, social and environmental development, through access to energy and increased oil revenues. Facilitative infrastructural development should, as such, be laid in a manner that that optimizes all round benefit to local and global stakeholderships. For sustainability, the benefits of such a discovery must be well distributed to facilitate poverty reduction. As Kenya prepares to be embraced into the league of global oil producers, this discourse can only be ignored at the country's collective peril. Government economic policy must be informed by tenets that advance sustainable development, including human rights concerns.

94 Article 43

95 Article 44

96 Article 42

97 Ali Noor writing in Pambazuka News, e-newsletter - Development or fraud? Another coastal paradise to die for big oil. See <http://www.pambazuka.org/en/category/features/90644> accessed on 6th January 2014.

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