

**PART IV:  
CLIMATE CHANGE POLICY,  
COOPERATION AND PROTECTION  
EFFORTS**



## Climate Change Law and Policy Positions in the African Union and Related Developments in Selected African Countries\*

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### *Abstract*

The African Union (AU) has embarked on new policy pathways to accommodate climate change more effectively in future. These pathways, which are described in this article, are not only deemed to become increasingly relevant in a changing climate, but promise to unfold potential and new opportunities for economic and sustainable development in Africa on regional and sub-regional levels. It is the objective of this article to discuss existing laws and new policy pathways in the AU and related legal developments in selected African countries and, where possible, to assess their potential benefit. While doing so, the article reflects on legal and institutional structures, some relevant cases, contemporary and future challenges, and developmental perspectives pertinent to the issue of climate change and the environment on the African continent.

### *A. Introduction*

Despite Africa's relatively low contribution to the world's total greenhouse gas emissions, it is one of the most vulnerable continents to climate change.<sup>1</sup> Africa emits far less carbon than other continents. Africa's carbon dioxide (CO<sub>2</sub>) emissions per year represent only a small fraction, 3.6%, of global emissions, yet 14% of the population of the world lives here.<sup>2</sup> The African continent accounts for only 3% of world energy consumption, and the average energy consumption of an African inhabitant is six times less

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\* This updated and amended article is based on Ruppel (2012a).

1 Boko et al. (2007).

2 See [http://www.grida.no/graphicslib/detail/emissions-of-carbon-dioxide-in-africa-and-selected-oecd-countries\\_1400](http://www.grida.no/graphicslib/detail/emissions-of-carbon-dioxide-in-africa-and-selected-oecd-countries_1400), last accessed 17 January 2013.

than that recorded for individual inhabitants across the populations of the world. About 600 million people in Africa currently lack access to electricity.<sup>3</sup>

In the same light, Africa is particularly vulnerable as a consequence of a combination of stresses, and especially owing to poverty. The complexity of climate change will require the involvement of a diverse range of institutions.<sup>4</sup> It is expected that climate change will generate varied and significant impacts on national, regional and global economies; and it is also not unlikely that this will result in increased local and international conflict.<sup>5</sup>

Climate change poses an enormous threat to Africa's economic growth (through its harmful effects on natural systems and resources), long-term prosperity, and the survival of its already vulnerable populations. Climate change, variability and associated increased disaster risks are an additional burden to sustainable development in Africa, as well as a threat and impediment to achieving the Millennium Development Goals.<sup>6</sup>

In 2011, the South African city of Durban was in the international lime-light as the host of the global climate negotiations.<sup>7</sup> The goal of these discussions was to advance the implementation of the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, and to make progress on previously agreed action plans (Bali) and agreements (Cancun). The 17th Conference of the Parties (COP 17) to the UNFCCC and the 7th Session of the COP serving as the Meeting of the Parties (MOP 7) to the Kyoto Protocol were, however, especially from an African viewpoint, only partly successful. Not only were China and the United States reluctant to sign binding targets, each waiting for the other to move first, but this reluctance by the two biggest polluters had repercussions for the negotiations as a whole, namely that Canada, Japan and Russia refused to enter into a second commitment period for the Kyoto Protocol owing to the lack of legal restriction on the world's largest polluters.<sup>8</sup> The sense of dampened success applies even more to the outcomes of the 18th Conference of the Parties (COP 18) to the UNFCCC and the 8th Session of the COP serving

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3 See IRENA (2012).

4 Keohane & Victor (2011).

5 Scholtz (2010).

6 AMCEN (2011).

7 See also <http://www.dieburger.com/Suid-Afrika/Nuus/Krisis-raak-net-erg-er-20111129>, last accessed 23 December 2011.

8 Ruppel et al. (2011).

as the Meeting of the Parties (MOP 8) to the Kyoto Protocol held in Doha, Qatar, in 2012, where a number of decisions were adopted (The Doha Climate Gateway).<sup>9</sup> A second commitment period under the Kyoto Protocol has been launched, with the end date being 2020.<sup>10</sup> It has been agreed to work towards a universal climate change agreement covering all countries from 2020. Such agreement is to be adopted by 2015. Countries have furthermore agreed on ways and means to deliver scaled-up climate finance and technology to developing countries and COP18 has also taken note of the first annual report of the Board of the Green Climate Fund to the Conference of the Parties and endorsed the consensus decision of the Board of the Green Climate Fund to select Songdo, Incheon, in the Republic of Korea as the host city of the Green Climate Fund, on the basis of an open and transparent process.<sup>11</sup> Further key elements of the outcome include an agreement to consider loss and damage in developing countries that are particularly vulnerable to the adverse effects of climate change.

At the Doha conference, “Germany, the UK, France, Denmark, Sweden and the EU Commission announced financial pledges for the period up to 2015 totalling approximately \$6 billion. Most developed countries did, however, not make pledges! African countries thus left Doha with little more than they already had.”<sup>12</sup> This means for Africa that climate change continues to prompt significant challenges in future<sup>13</sup> and it is therefore noteworthy that the African Union (AU) and a number of African countries have embarked on new policy pathways to accommodate climate change more effectively.

## *B. The African Union*

The historical foundations of the African Union (AU) originated in the Union of African States, an early confederation that was established in the 1960s.

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9 All decisions adopted by COP 18 and CMP 8 can be accessed at [http://unfccc.int/meetings/doha\\_nov\\_2012/meeting/6815.php#decisions](http://unfccc.int/meetings/doha_nov_2012/meeting/6815.php#decisions), last accessed 16 January 2013.

10 However, some previously participating countries in the Kyoto Protocol have not joined the second period, namely Russia, Canada, New Zealand and Japan.

11 See UNFCCC (2012).

12 See <http://www.un.org/africarenewal/web-features/what-does-‘doha-climate-gateway’-mean-africa>, last accessed 19 January 2013.

13 Ruppel & Van Wyk (2011).

The Organisation of African Unity (OAU) was established on 25 May 1963. On 9 September 1999, the heads of state and governments of the OAU issued the Sirte Declaration,<sup>14</sup> calling for the establishment of an African Union. The Declaration was followed by summits in Lomé in 2000, when the Constitutive Act of the African Union was adopted, and in Lusaka in 2001, when the Plan for the Implementation of the African Union was adopted. During the same period, the initiative for the establishment of the New Partnership for Africa's Development (NEPAD) was also instituted.<sup>15</sup> The AU was launched in Durban on 9 July 2002 by the then South African president, Thabo Mbeki,<sup>16</sup> at the First Session of the Assembly of the AU. The Union's administrative centre is in Addis Ababa, Ethiopia, and its working languages are Arabic, English, French, Portuguese and Swahili. The AU has 54<sup>17</sup> member states, with Morocco being the only African state that is not a member. Geographically, the AU covers an area of 29,757,900 km<sup>2</sup> and, for 2010, the United Nations Population Division estimated a population total of 990,283,000.<sup>18</sup>

Article 3 of the Constitutive Act of the African Union contains the objectives of the AU, which include the promotion of sustainable development, international cooperation and continental integration, as well as the promotion of scientific and technological research to advance the continent's development. In the Protocol relating to the Establishment of the Peace and Security Council (PSC) of the AU, member states committed themselves to various guiding principles (Article 4), including "early responses to contain crisis situations", and the recognition of the "interdependence between socio-economic development and the security of peoples and States". Moreover, in Article 6 of the Constitutive Act, the functions of the PSC are outlined as, among other things, the promotion of peace, security and stability in Africa; early warning and preventive diplomacy; peace-making; humanitarian action; and disaster management. All the aforementioned provisions

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14 Named after Sirte in Libya.

15 Ruppel (2011a: 43).

16 Thabo Mbeki was also the AU's first president.

17 Including South Sudan, which ratified the Constitutive Act of the African Union on 15 August 2011; see [http://www.au.int/en/sites/default/files/Constitutive\\_Act\\_0.pdf](http://www.au.int/en/sites/default/files/Constitutive_Act_0.pdf), last accessed 28 March 2012.

18 Africa's entire population was estimated to be 1,022,234,000. As Morocco is not a member of the AU, its population – estimated at 31,951,000 – has to be deducted. Data collected from [http://esa.un.org/unpd/wpp/unpp/panel\\_population.htm](http://esa.un.org/unpd/wpp/unpp/panel_population.htm), last accessed 28 March 2012.

give a clear mandate to address climate change as a matter of priority within the AU.

### *C. The New Partnership for Africa's Development (NEPAD)*

NEPAD was adopted in 2001 in Lusaka, Zambia, by heads of state and government of the OAU in 2001. NEPAD was ratified by the AU in 2002. Partnership and cooperation between Africa and the developed world are envisaged by this development initiative aimed at the economic and social revival of Africa. NEPAD is —<sup>19</sup>

... a pledge by African leaders, based on a common vision and a firm and shared conviction, that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development, and at the same time to participate actively in the world economy and body politic. The Programme is anchored on the determination of Africans to extricate themselves and the continent from the malaise of underdevelopment and exclusion in a globalising world.

NEPAD has emphasised Africa's important role in respect of the critical issue of environmental protection. Of the six main thematic areas on which NEPAD focuses, two are of particular relevance here —<sup>20</sup>

- Agriculture and food security, and
- Climate change and natural resource management.

NEPAD's Climate Change and Natural Resource Management Programme focuses on three key areas: environment, water and energy. The Programme aims to assist countries to integrate climate change responses with their national development processes. The Programme also aims to strengthen skills in adaptation, mitigation, technology and finance in order to combat environmental change. In order to achieve these aims, an Action Plan for the Environment Initiative was released in 2003, paving the way for the first decade of the 21st century.<sup>21</sup>

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19 See NEPAD's founding document, available at <http://www.dfa.gov.za/au.nepad/nepad.pdf>, last accessed 12 February 2012.

20 Further thematic areas within the NEPAD framework are Regional Integration and Infrastructure; Human Development; Economic and Corporate Governance; and Crosscutting Issues (Gender and Capacity Management).

21 Available at <http://www.nepad.org/system/files/Environment%20Action%20Plan.pdf>, last accessed 12 February 2012.

D. *The AU's Judicial System and Consideration of Environmental Rights*

In 1998, the African Court on Human and Peoples' Rights (AfCHPR) was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which came into force in 2004. The AfCHPR is situated in Arusha, in the United Republic of Tanzania, and has received cases since June 2008.

In 2003, the African Court of Justice – as the ultimate organ of jurisdiction in the AU – was established by the Protocol of the Court of Justice of the African Union, which came into force in February 2009. However, the Protocol on the Statute of the African Court of Justice and Human Rights adopted in 2008 during the AU Summit of Heads of State and Government in Sharm El Sheikh in the Arab Republic of Egypt provides that the 1998 and 2003 Protocols be replaced, and that the AfCHPR and the AU's Court of Justice be merged into a single court to become what is now known as the African Court of Justice and Human Rights. However, the 2008 Protocol on the merger of the courts has so far only been ratified by five<sup>22</sup> member states, but ratification by a minimum of 15 is required for the Protocol to come into force. Once operational, the merged court will have two sections: a General Affairs Section, and a Human Rights Section, both composed of eight Judges. The court will have jurisdiction over all disputes and applications referred to it which, among other things, relate to the interpretation and application of the AU Constitutive Act or the interpretation, application and validity of Union Treaties, as well as human rights violations.

The African Commission on Human and Peoples' Rights (hereafter *African Commission*) is a quasi-judicial body established by the 1981 African (Banjul) Charter on Human and Peoples' Rights (hereafter *African Charter*) and is responsible for monitoring compliance with the African Charter. The African Charter is a human rights treaty that already proclaims environmental rights in broadly qualitative terms. It protects the right of peoples both to the “best attainable state of physical and mental health” (Article 16) and to a “general satisfactory environment favorable to their development” (Article 24). Article 24 of the African Charter further establishes

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22 As of 01 March 2013, the Protocol was ratified by Benin, Burkina Faso, Congo, Libya, and Mali. See <http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf>, last accessed 07 April 2013.



a binding human-rights-based approach to environmental protection, linking the right to environment to the right to development.<sup>23</sup>

In the *Endorois* case,<sup>24</sup> the African Commission concluded that several Articles of the African Charter had been violated in the course of the dispossession of the land of Kenya's indigenous Endorois through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Kenyan Government. Among the Endorois' rights found to be violated were their right to culture (Article 17 (1) and (2)) and their right to the free disposition of natural resources (Article 21), as they were unable to access the vital resources in the Lake Bogoria region after their eviction from the game reserve. Moreover, the African Commission held that the Endorois' right to development (Article 22) had been violated, as the respondent state had failed adequately to involve the Endorois in the development process.<sup>25</sup> The decision of the African Commission in the *Endorois* case<sup>26</sup> was influenced by provisions of Convention No. 169 of the International Labour Organisation on Indigenous and Tribal Peoples in Independent Countries.<sup>27</sup> Among other things, the Convention –<sup>28</sup>

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23 Van der Linde & Louw (2003).

24 Communication 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, available at [http://www.achpr.org/english/Decison\\_Communication/Kenya/Comm.%20276-03.pdf](http://www.achpr.org/english/Decison_Communication/Kenya/Comm.%20276-03.pdf), last accessed 12 February 2012.

25 The Commission's recommendation was to recognise the Endorois' rights of ownership and to restore their ancestral land; to ensure that the Endorois community had unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle; to pay adequate compensation to the community for all the loss they had suffered; to pay royalties to the Endorois from existing economic activities and ensure that they benefited from employment possibilities within the Reserve; to grant registration to the Endorois Welfare Committee; and to engage in dialogue with the complainants for the effective implementation of these aforementioned recommendations and to report on their implementation.

26 Communication 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, available at [http://www.achpr.org/english/Decison\\_Communication/Kenya/Comm.%20276-03.pdf](http://www.achpr.org/english/Decison_Communication/Kenya/Comm.%20276-03.pdf), last accessed 28 March 2012.

27 The Convention came into force on 5 September 1991 and is available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>, last accessed 12 February 2012.

28 It should be noted that of the 22 states that have ratified ILO Convention No. 169, as of February 2012, only one – the Central African Republic – is from the African continent.

- provides criteria for describing the peoples it aims to protect
- makes provision regarding the principle of non-discrimination
- calls for special measures to be adopted to safeguard the persons, institutions, property, labour, cultures and environment of indigenous and tribal peoples
- recognises cultural and other specificities of indigenous and tribal peoples, and
- requires that, on all issues that affect them, indigenous and tribal peoples are consulted and that these peoples are able to engage in free, prior and informed participation in policy and development processes.

In the *Ogoni* case, the African Commission held, among other things, that Article 24 of the African Charter imposed an obligation on the state to take reasonable measures to “prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.”<sup>29</sup>

The *Ogoni* case led to a landmark decision with regard to the effective protection of economic, social and cultural rights in Africa, particularly the protection of the right of peoples to a satisfactory environment.<sup>30</sup> Article 24 of the African Charter should be viewed together with the Bamako Convention and the first OAU treaty on the environment, namely the Convention on the Conservation of Nature and Natural Resources, which predates the African Charter. The Revised African Convention on the Conservation of Nature and Natural Resources was adopted by the Second Ordinary Session of the AU Assembly of Heads of State and Government in Maputo, Mozambique, in July 2003. However, the latter Convention has not yet come into force.

The recognition in the African Charter of a right to a satisfactory environment and the progressive jurisprudence by the African Commission take up the issue of environmental protection from a human rights perspective, and underline the linkage between climate change and human rights in a modern, holistic approach to one of today’s burning issues.<sup>31</sup> The impacts of climate change on human rights have been explicitly recognised by the

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29 Communication 155/96, *The Social and Economic Rights Action Center (SERAC) & the Center for Economic and Social Rights (CESR) v Nigeria*, available at [http://www.achpr.org/english/\\_info/decision\\_article\\_24.html](http://www.achpr.org/english/_info/decision_article_24.html), last accessed 28 March 2012.

30 Ruppel (2011b).

31 Ruppel (2010a).

African Commission: in its AU Resolution 153, the African Commission calls on the Assembly of Heads of State and Government to ensure that –<sup>32</sup>

human rights standards safeguards, such as the principle of free, prior and informed consent, be included into any adopted legal text on climate change as preventive measures against forced relocation, unfair dispossession of properties, loss of livelihoods and similar human rights violations;

and “to take all necessary measures to ensure that the African Commission on Human and Peoples’ Rights is included in the African Union’s negotiating team on climate change”. In the same communication, the African Commission resolves to carry out a study on the impact of climate change on human rights in Africa.<sup>33</sup>

### *E. AU Climate Change Policy and Related Developments*

Many African governments have made progress in addressing climate change and related issues. The AU itself has succeeded in presenting a more cohesive African position on climate change. Although gaps may remain, it was clearly reflected during COP 17 in Durban that Africa maintained a common position in spite of pressure from developed countries. In fact, the African Group “spoke with one voice”, according to Seyni Nafo, spokesperson for the African Group and lead negotiator on Mitigation.<sup>34</sup> It has since become apparent, however, that divergent priorities among African countries threaten the potential of the AU to influence international climate politics.<sup>35</sup>

At its 46th Ordinary Session, held in Banjul, The Gambia, from 11 to 25 November 2009, the African Commission urged –<sup>36</sup>

... the Assembly of Heads of State and Government of the African Union to ensure that human rights standards safeguards, such as the principle of free, prior and informed consent, be included into any adopted legal text on climate

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32 AfCHPR/Res. 153 (XLV09).

33 See [http://www.achpr.org/english/resolutions/resolution153\\_en.htm](http://www.achpr.org/english/resolutions/resolution153_en.htm), last accessed 14 February 2012.

34 See [http://www.dailytrust.com.ng/index.php?option=com\\_content&view=article&id=149432:africa-maintains-common-position-in-durban&catid=10:environment&Itemid=11](http://www.dailytrust.com.ng/index.php?option=com_content&view=article&id=149432:africa-maintains-common-position-in-durban&catid=10:environment&Itemid=11), last accessed 20 February 2012.

35 Hoste (2010).

36 See [http://www.achpr.org/english/resolutions/resolution153\\_en.htm](http://www.achpr.org/english/resolutions/resolution153_en.htm), last accessed 14 February 2012.

change as preventive measures against forced relocation, unfair dispossession of properties, loss of livelihoods and similar human rights violations.

### *I. Climate Change Induced Displacement*

One legal instrument which explicitly deals with the potential impacts of climate change is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (hereafter *Kampala Convention*),<sup>37</sup> which was adopted in Kampala on 23 October 2009. It is the first regional legal instrument in the world to contain legal obligations for states with regard to the protection and assistance of internally displaced persons (IDPs).<sup>38</sup> So far, the Kampala Convention has 39 signatories, and 17 countries<sup>39</sup> have ratified it. The Convention entered into force on 6 December 2012.<sup>40</sup> Article 1(k) of the Kampala Convention defines IDPs as follows:

[P]ersons 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, and who have not crossed an internationally recognized State border.

The Kampala Convention explicitly recognises climate change as one of the possible reasons for internal displacement: Article 5 states that “States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change.”

However, the Kampala Convention applies to all situations of internal displacement regardless of its causes (Article 15), which makes sense:

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37 Text available at [http://www.au.int/en/sites/default/files/AFRICAN\\_UNION\\_CONVENTION\\_FOR\\_THE\\_PROTECTION\\_AND\\_ASSISTANCE\\_OF\\_INTERNALLY\\_DISPLACED\\_PERSONS\\_IN\\_AFRICA\\_\(KAMPALA\\_CONVENTION\).pdf](http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA_(KAMPALA_CONVENTION).pdf), last accessed 30 January 2012.

38 See Kidane (2011).

39 As of 07 April 2013, the following 17 member states had ratified the Convention: Benin, Burkina Faso, Central African Republic, Chad, Gabon, Gambia, Guinea-Bissau, Lesotho, Mali, Nigeria, Niger, Rwanda, Sierra Leone, Swaziland, Togo, Uganda and Zambia, see <http://www.au.int/en/sites/default/files/Convention%20on%20IDPs%20-%20displaced....pdf>, last accessed 07 April 2013.

40 Ratification of 15 member states was required for the Convention to come into force.

drivers of migration in general are not mono-causal, but are influenced by multiple factors.

Several obligations are imposed on states parties by the Kampala Convention. For example, the Convention addresses the need to prevent displacement from happening, e.g. by establishing early warning systems and adopting disaster preparedness and management measures to prevent displacement caused by natural disaster. The Convention also requires States Parties to, among other things, protect people against displacement resulting from conflict and violence, discriminatory policies, or human rights violations. Neither should displacement be used as a method of warfare, nor as collective punishment. Forced evacuations should only take place for reasons of health and safety, and, once people have been displaced, the Kampala Convention provides that they are to be protected and assisted (Article 4). According to Article 5, States Parties are obliged to assess the needs and vulnerabilities of displaced persons, as well as those of the host communities, and to provide adequate assistance, if need be with assistance from relevant local and international agencies. One objective of the Kampala Convention is to provide for durable solutions with respect to IDPs, who retain the right to make a free and informed choice on whether to return, integrate or relocate elsewhere in the country (Article 11). Furthermore, States Parties are responsible for establishing an effective legal framework to provide just and fair compensation, and other forms of reparations for damage incurred as a result of displacement (Article 12).

In light of the aforementioned, it is also worthwhile noting that various sub-regional organisations, that is Regional Economic Communities (RECs), have “at the insistence of the AU” established certain mechanisms.<sup>41</sup> At the seventh ordinary session of the AU’s Assembly of Heads of State and Government in Banjul, The Gambia, in July 2006, the AU officially recognised eight such communities.<sup>42</sup> Alphabetically listed, these are as follows:<sup>43</sup>

- The Arab Maghreb Union (AMU)
- The Community of Sahel-Saharan States (CEN-SAD)

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41 See Eze (2012:516).

42 See the decision relating to the recognition of RECs, Assembly/AU/Dec.112 (VII) Doc. EX.CL/278 (IX), text in French, available at [http://www.africa-union.org/Official\\_documents/Assemblee%20fr/ASS06b.pdf](http://www.africa-union.org/Official_documents/Assemblee%20fr/ASS06b.pdf), last accessed 22 December 2012.

43 Ruppel (2009a:276).

- The Common Market for Eastern and Southern Africa (COMESA)
- The East African Community (EAC)
- The Economic Community of Central African States (ECCAS)
- The Economic Community of West African States (ECOWAS)
- The Intergovernmental Authority on Development (IGAD), and
- The Southern African Development Community (SADC).

All AU member states are affiliated to one or more of these RECs, as tabulated below:

**Table 1: State members of RECs officially recognised by the AU<sup>44</sup>**

AMU	CEN-SAD	COMESA	EAC	ECCAS	ECOWAS	IGAD	SADC
Algeria	Benin	Burundi	Burundi	Angola	Benin	Djibouti	Angola
Libya	Burkina Faso	Comoros	Kenya	Burundi	Burkina Faso	Ethiopia	Botswana
Mauritania	Central African Republic	DRC	Rwanda	Cameroon	Cameroon	Kenya	DRC
Morocco	Egypt	Djibouti	Tanzania	Central African Republic	Cape Verde	Somalia	Lesotho
Tunisia	Eritrea	Egypt	Uganda	Chad	Cote d'Ivoire	Sudan	Madagascar
	Chad	Ethiopia		Chad	d'Ivoire	Uganda	Malawi
	Comoros	Kenya		Congo	Gambia		Mauritius
	Cote d'Ivoire	Libya		DRC	Ghana		Mozambique
	Djibouti	Madagascar		Gabon	Guinea		Namibia
	Egypt	Malawi		Guinea	Guinea-Bissau		Seychelles
	Eritrea	Mauritius		São Tomé and Príncipe	Liberia		South Africa
	Gambia	Rwanda			Mali		Swaziland
	Ghana	Seychelles			Niger		Tanzania
	Guinea-Bissau	Sudan			Nigeria		Zambia
	Kenya	Swaziland			Senegal		Zimbabwe
	Liberia	Uganda			Sierra Leone		
	Libya	Zambia			Togo		
	Mali	Zimbabwe					
	Mauritania						
	Morocco						
	Niger						
	Nigeria						
	São Tomé and Príncipe						
	Senegal						
	Sierra Leone						
	Somalia						
	Sudan						
	Togo						
	Tunisia						

44 Ruppel (2009a:278).

At first glance it appears that the promotion and protection of displaced persons is not within the RECs' focal range. However, it will still have to be seen how effective these mechanisms actually are. Regional integration, which is the primary engine of RECs, certainly has the potential to provide –<sup>45</sup>

... an opportunity to enhance political stability by establishing regional organisations which play an increasing role in defusing conflicts within and between countries and in promoting human rights. In terms of climate change related matters, such organisations are of the utmost relevance, especially when it comes to climate change related disaster management and environmentally induced migration.

## II. Climate Change and Vulnerable Groups

The African Commission in 2009 urged –<sup>46</sup>

... the Assembly of Heads of State and Government to ensure that special measure of protection for vulnerable groups such as children, women, the elderly, indigenous communities and victims of natural disasters and conflicts are included in any international agreement or instruments on climate change.

This call is very much in line with Article 3 of the International Covenant on Economic, Social and Cultural Rights,<sup>47</sup> the Convention on the Elimination of All Forms of Discrimination against Women, and the latter's Optional Protocol.<sup>48</sup> The vulnerability of women to climate change and natural disasters is more severe than for other groups for a number of reasons. Women are usually at higher risk of being placed in unsafe, overcrowded shelters owing to a lack of assets such as savings, property or land. In the context of droughts, floods and other disasters that require mobility, cultural constraints on women's movements may hinder their timely escape, access to shelter, or access to health care. These effects are exacerbated when women avoid using shelters out of fear of domestic and sexual violence, and become even less mobile as primary family caregivers. Poor women and

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45 See Ruppel & Ruppel-Schlichting (2012:41).

46 See [http://www.achpr.org/english/resolutions/resolution153\\_en.htm](http://www.achpr.org/english/resolutions/resolution153_en.htm), last accessed 14 February 2012.

47 Article 3 encourages States Parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights as set forth by the Covenant.

48 See Ruppel (2008); Ruppel (2010b).

those in countries with greater gender inequality appear to be most at risk.<sup>49</sup>

The impact of climate change on the realisation of child rights<sup>50</sup> as a whole obviously also includes multiple effects on basic rights such as water, food and health, especially in African countries that are vulnerable to temperature and precipitation change. Children are vulnerable to climate change – and policy makers need to adhere to the Convention on the Rights of the Child that requires national governments to ensure that children’s specific needs are given due consideration in adaptation and mitigation policy.<sup>51</sup>

It is worth noting that Cancun Decision 1/CP.16 also recognises indigenous peoples as a vulnerable group, alongside women, children and other vulnerable groups. In Africa, indigenous peoples are vulnerable to the actual and potential detrimental impacts of climate change. In line with the Declaration on the Rights of Indigenous Peoples, which was adopted by the United Nations General Assembly in 2007,<sup>52</sup> indigenous peoples should be free from discrimination of any kind – including that in the context of climate change.

### *III. Climate Change, Peace and Collective Security*

The AU has a clear mandate regarding the maintenance of peace and security in Africa. Yet, Africa remains a continent blighted by conflict, where “millions of human beings remain at the mercy of civil wars, insurgencies, state repression and state collapse”.<sup>53</sup> But these are not the only challenges. Climate change overlays these ravages, intensifying existing problems as a magnifying glass would. Although climate change is, in the first instance, an environmental issue, it is also political, with “far-reaching economic, societal and political ramifications”<sup>54</sup>, which cannot be neglected.

In fact, framing climate change as more of a security issue in Africa could serve to enhance existing policy response mechanisms. In 2011, the United

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49 UN Womenwatch (2009).

50 See Ruppel (2009b).

51 UNICEF (2009).

52 Resolution 61/295.

53 Report of the International Commission on Intervention and State Sovereignty (2011).

54 See Scott (2012:220).



Nations Security Council expressed concern that the possible adverse effects of climate change could, in the long run, intensify certain existing threats to international peace and security and that the loss of territory in some states could have possible security implications.<sup>55</sup>

The Constitutive Act of the African Union, which was adopted in July 2000,<sup>56</sup> stipulates the Union's right of intervention in a member state in cases of "grave circumstances", i.e. crimes against humanity, war crimes and genocide. This raises the question of how such grave circumstances relate to climate change? Notwithstanding the controversy around this question, Achim Steiner, when addressing the UN Security Council in the 2011 Debate on Climate Change and Security, clearly stated the following:<sup>57</sup>

Climate change as a threat multiplier: The scale and pace of climate change acts as a multiplier which could result in simultaneous and unprecedented impacts on where we can settle, grow food, maintain our built-up infrastructure, or rely on functioning ecosystems. Managing the potential disruption, displacement and adaptation to phenomena such as sea-level rise or extreme weather events, represents a profound challenge to sustainable development at the local, national and international level – both in economic and geopolitical terms. ...In 2010, over 90 per cent of disaster displacement within countries was caused by climate-related hazards, primarily floods and storms. Climate scenarios expect such weather events to increase and or intensify as a result of accelerating climate change. (...) Competition over scarce water and land, exacerbated by regional changes in climate, are already a key factor in local-level conflicts in Darfur, the Central African Republic, northern Kenya, and Chad, for example – when livelihoods are threatened by declining natural resources, people either innovate, flee or can be brought into conflict.

The aforementioned statements clearly pinpoint climate change as a potential source of conflict, and a potential threat to national and international peace and human security. One cornerstone of the United Nations Charter paradigm is the notion of collective security which is perhaps the first and most obvious manifestation of the principle of solidarity in the post-World

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55 Security Council Meeting SC/10332 document available at <http://www.un.org/News/Press/docs/2011/sc10332.doc.htm>, last accessed 18 February 2013.

56 Constitutive Act of the African Union, 11 July 2000.

57 Address by UN Under-Secretary-General and UNEP Executive Director Achim Steiner at UN Security Council Debate on the impact of climate change on maintaining international peace and security, 20 July 2011, available at <http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=2646&ArticleID=8817&l=en>, last accessed 18 February 2013.

War II era.<sup>58</sup> In fact, it forms the political and legal foundation for the collective security system established by the UN Charter. A still controversial manifestation of the notion of solidarity in international law is the emerging doctrine of the responsibility to protect. This concept was developed by the International Commission on Intervention and State Sovereignty in September 2000, after UN Secretary-General Kofi Annan emphasised the grave failure of the international community to handle gross and systematic violations of human rights such as those perpetrated in Rwanda and others.<sup>59</sup> The aforementioned concept has gained growing attention in the context of the notion of global solidarity and collective security as it aims at addressing legal and political dilemmas for intervention to stop or prevent human suffering and crimes against humanity.<sup>60</sup>

The Peace and Security Council (PSC) of the African Union in its recent report<sup>61</sup> documented its activities and the state of peace and security in Africa pursuant to Article 7(q) of the Protocol Relating to the Establishment of the PSC of the AU. It provides an overview of the state of peace and security on the continent from July 2012 to January 2013. During this reporting period, the PSC considered the crisis and conflict situations in the following states: Central African Republic, Sudan, Democratic Republic of Congo, Guinea Bissau, Mali and Somalia, as well as the situation between Sudan and South Sudan. During the reporting period, the PSC considered several thematic issues relating to the promotion of peace, security and stability in Africa, such the following:<sup>62</sup>

- Capacity-building for effective response to humanitarian assistance and disasters in Africa
- Challenges related to peace and security in Africa from the perspective of delivering humanitarian assistance in situations of crisis and conflict
- The need to mainstream gender in all development, peace and security efforts on the continent, and

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58 See Koroma (2012).

59 Report of the Secretary-General on the Work of the Organization, document A/54/1, at 48, 31 August 1999.

60 See Koroma (2012).

61 Assembly of the African Union, 20<sup>th</sup> Ordinary Session, 27–28 January 2013, Addis Ababa, Ethiopia, Assembly/AU/3(XX), available at <http://www.peaceau.org/uploads/assemblyau-3-xx-e.pdf>, last accessed 05 April 2013.

62 (ibid.).

- The importance of international and transitional justice in the promotion of peace and security in Africa.

The PSC in its report furthermore –<sup>63</sup>

- reiterated the commitment of the AU to the fight against impunity, and stressed the importance of international and transitional justice in the promotion of peace and security in Africa, and the need, in the context of the search for solutions to crises and conflicts and in view of the fragility of the peace and reconciliation processes on the continent, to ensure that they are mutually reinforcing; and
- underscored the fact that the primary responsibility for the protection of human rights rests with Member States;
- emphasized the need for a close working relationship with the African Commission on Human and Peoples' Rights, as well as with the African Court on Human and Peoples' Rights.

Under Article 52 of the UN Charter, regional organisations may undertake actions aimed at the maintenance of international peace and security. Article 53(I) of the UN Charter specifically provides that such regional organisations may undertake enforcement measures, provided that they have the authorisation of the UN Security Council. As mentioned earlier, Article 4(h) of the Constitutive Act of the African Union provides for such intervention in the event of grave circumstances and it also gives the Assembly of the African Union the authority to decide over it. Moreover, Article 13(3)(c) of the African Union Peace and Security Protocol provides a mandate to the African Standby Force to intervene in the activities of a member state, when grave circumstances demand such intervention, in accordance with Article 4(h) of the Constitutive Act of the African Union.<sup>64</sup>

Most obviously the responsibility to protect concept strongly revolves around the dilemma between state sovereignty and intervention for humanity. In light of this, current discussions focus on the duty of the international community and the territorial state in cases of natural disasters, which raises the question whether the doctrine of the responsibility to protect can actually be extended to the international law relating to disaster relief and in particular to cases of grave circumstances, such as severe human suffering during times of natural disasters.

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63 (ibid.).

64 See Kabau (2012).

Unfortunately, international law and politics thus far still seem to attach great significance to whether human suffering is the result of a natural disaster or of an (international) armed conflict.<sup>65</sup> However, when responding to the question whether the doctrine of the responsibility to protect should be extended to international law relating to disaster relief, one should argue in the interest of the African people. Once again, consider the words of Achim Steiner:<sup>66</sup>

There is no reason why the international community cannot avoid escalating conflicts, tensions and insecurity related to a changing climate if a deliberate, focused and collective response can be catalyzed that tackles the root causes, scale, potential volatility and velocity of the challenges emerging. In bringing forward a response that enhances global security and cooperation on the climate challenge, the world can perhaps also better manage risk from numerous other challenges and in doing so diminish tensions between nations and lay the foundations and possibilities of a more sustainable and equitable peace.

#### *F. The African Ministerial Conference on the Environment*

The African Ministerial Conference on the Environment (AMCEN), which has so far played a prominent role in the African response to climate change,<sup>67</sup> has a strong regional and sub-regional focus. Thus, AMCEN builds on the potential for regional economic communities (RECs) to integrate adaptation measures into regional policies and socio-economic development.<sup>68</sup> AMCEN is a permanent forum where African ministers of the environment discuss mainly matters of relevance to the environment on the continent. The forum was established in Egypt in 1985, the year in which the Cairo Programme for African Co-operation has been adopted. AMCEN has convened every second year since then. In 2010, at its Thirteenth Session, AMCEN adopted the Bamako Declaration on the Environment for Sustain-

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65 See Thielbörger & Liburd (2012).

66 Address by UN Under-Secretary-General and UNEP Executive Director Achim Steiner at the UN Security Council Debate on the impact of climate change on maintaining international peace and security, 20 July 2011, available at <http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=2646&ArticleID=8817&l=en>, last accessed 19 February 2013.

67 2009 Nairobi Declaration on the African Process for Combating Climate Change, UNEP/12/9.

68 Scholtz (2010).

able Development as its contribution towards providing political guidance and leadership on environmental management to Africa. AMCEN was established to –

- provide advocacy for environmental protection in Africa
- ensure that basic human needs are met adequately and in a sustainable manner
- ensure that social and economic development is realised at all levels, and
- ensure that agricultural activities and practices meet the food security needs of the region.

The adequate response to these challenges needs to be aligned with national and regional strategies for development, poverty alleviation, economic growth, and the enhancement of human well-being, while increasing resilience to the physical impacts of climate change. Several bodies have identified opportunities and challenges in the transition to a green economy, with links to the achievement of the United Nations Millennium Development Goals, climate change, and sustainable development. These bodies include the Meeting of African Heads of State and Government at the Seventeenth Session of the AU Summit held in Malabo, Equatorial Guinea, in July 2011; AMCEN's Fourth Special Session held in Bamako, Mali, in September 2011; and, most recently, the Seventh Session of the Committee on Food Security and Sustainable Development, as well as the Africa Regional Preparatory Conference on Sustainable Development (Rio+20) held in Addis Ababa, Ethiopia, in October 2011. In recognition of AMCEN's mandate, which includes guidance in respect of key issues related to multilateral environmental agreements, African governments asked AMCEN to facilitate the provision of information to countries that would assist them with translating available climate science and current international climate policies in their effort to move towards their practical implementation in the context of sustainable development. To this end, AMCEN prepared a guide book with information on climate change matters including science, governance, technological, financial and capacity-building needs, as well as opportunities for effective action that would lead towards sustainable development.<sup>69</sup>

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69 See ACMEN (2011).

### G. *The African Climate Policy Centre*

The African Climate Policy Centre (ACPC) was established in 2010 as an integral part of the Climate for Development in Africa Programme, which is a joint initiative of the African Union Commission, the United Nations Economic Commission for Africa, and the African Development Bank.

The ACPC has been established to develop into a hub for a demand-led knowledge base on climate change in Africa to address the impact of climate change by assisting member states to elevate climate change into mainstream deliberations in their development strategies and programmes. To this end, the ACPC hosted the inaugural Climate Change and Development in Africa (CCDA) Conference between 17 and 19 October 2011 at the United Nations Conference Centre in Addis Ababa, Ethiopia. The theme for the conference was “Development First: Addressing Climate Change in Africa”, which reflected the need for integrating development and climate policies, and emphasised the importance of African ownership of policy formulation and decision-making processes. The inaugural conference built directly on the African Development Forum VII, and many other forums, initiatives, activities, and outcomes of initiatives, including AMCEN; the Conference of African Heads of State and Government on Climate Change; the UNFCCC and related instruments; the UN Secretary-General’s High-level Advisory Group on Climate Change Financing; the Global Climate Observation System and its sub-regional climate programme; and the Africa-EU Climate Change Partnership. The CCDA Conference helped to position the Climate for Development in Africa Programme within this ever-broadening knowledge and institutional terrain, and ascertained how best it could facilitate the interaction between policy, research and practice. The overall objective of the Conference was to establish a forum for dialogue, enhance awareness-raising, and mobilise effective commitment and action by bringing together policy makers, academicians and practising stakeholders, with the aim of effectively mainstreaming climate change concerns into development policies, strategies, programmes and practices in Africa. The CCDA also aimed at strengthening Africa’s position and participation in international climate change negotiations with a view to ensuring the continent’s concerns and priorities are adequately reflected in a post-2012 international climate change regime.<sup>70</sup>

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70 See <http://www.uneca.org/acpc/ccda/ccda1/index.htm>, last accessed 13 January 2013.

All the aforementioned developments are laudable, and should be seen as being in the overall interest of the AU. These developments, although not always clearly concerted, reflect that the AU and its subsidiary bodies have acknowledged that climate change and its impacts constitute a pressing policy priority.

#### *H. National Climate-change-related Legal Developments*

In light of the aforementioned AU policy pathways and related developments, accommodating national constitutional and legislative stipulations as well as climate change policy developments is critical because these are the linchpin between global, continental and domestic action. When countries enact policies responsive to climate change, it is more likely than not that investment will follow, which in turn can open opportunities for development and political space for international cooperation. Interaction around policy responses at national and international level generates incremental, structural and transformational change. As there is no universal solution to environmental climate change, coordination, participation and cooperation are critical for jointly achieving internationally agreed-upon goals and targets, while also addressing national capacity deficits.<sup>71</sup>

#### *I. The Democratic Republic of Congo*<sup>72</sup>

Noteworthy legal developments in environmental protection in the Democratic Republic of Congo (DRC) commenced with the adoption of a new constitution on 18 February 2006.<sup>73</sup> During the 45 years preceding its 2006

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71 See [http://www.unep.org/geo/pdfs/GEO5\\_SPM\\_English.pdf](http://www.unep.org/geo/pdfs/GEO5_SPM_English.pdf), last accessed 19 January 2013.

72 Based on Ruppel & Bwiza (2013).

73 The adoption of a new constitution was a result of the overthrow of president Mobutu's power in 1996 by the opposition coalesced in the *Alliance des Forces Democratiques pour la Liberation du Congo-Zaire*. After a political impasse that lasted from 1997 to 2003, and the adoption of a government of national unity that ruled the country between 2003 and 2006, the DRC adopted a new constitution, which was followed by presidential elections.

Constitution, the DRC introduced eight previous constitutions.<sup>74</sup> The 2006 Constitution introduced clear environmental rights and obligations as follows:

- Right to clean drinking water (Article 48)
- Right to a healthy environment and the duty to protect the environment (Article 53)
- Obligation of the State to protect the environment and to ensure health of populations (Article 54), and
- Obligatory control of domestic and international toxic waste resulting from economic activities (Article 55).

Article 123 of the Constitution provides for laws to be made concerning, among others, the protection of the environment and tourism. To protect, among others, the environment, natural sites and landscapes, Article 203 allows for cooperative governance by central government and the provincial administrations. The DRC alone accounts for one-fifth of Africa's total forest area and as rainforests play a key role in the Earth's carbon cycle,<sup>75</sup> it is seen to be particularly important to preserve these forests in the fight against climate change.<sup>76</sup> Besides many other International Environmental Agreements, the DRC is a party to the UNFCCC (since 1995) and the Kyoto Protocol (since 2005). A National Climate Change Adaptation Plan (NAPA) was adopted in 2006, in order to develop a concrete priority action programme to guide the DRC's adaptation to climate change.<sup>77</sup> The NAPA is intended to provide the DRC with a framework to guide the coordination and implementation of climate change adaptation initiatives in the country, using a participative approach. The need to build synergies with other environmental programmes, such as the Biodiversity Action Plan is emphasised. A national plan to combat desertification was finalised in 2012.<sup>78</sup>

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74 Loi fondamentale du 19 juin 1960, Constitution du 1er août 1964, Constitution du 24 juin 1967, Loi constitutionnelle du 15 août 1974, Acte constitutionnel harmonisé du 2 avril 1993, Acte Constitutionnel de la transition du 9 avril 1994, Décret-loi constitutionnel du 27 mai 1997 et Constitution de la Transition du 3 avril 2003.

75 Food and Agricultural Organization of the United Nations (2011).

76 UNEP (2008).

77 Government of the Democratic Republic of Congo (2006).

78 See <http://www.riddac.org/content/view/174/>, last accessed 15 November 2012.



Various national environmental laws also relevant to the field of climate change have been enacted during the past years.<sup>79</sup>

## II. Ethiopia<sup>80</sup>

The Constitution of the Federal Democratic Republic of Ethiopia in Article 44 provides that –

1. [a]ll persons have the right to a clean and healthy environment.
2. [a]ll persons who have been displaced or whose livelihoods have been adversely affected as a result of State programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance.

Moreover, the Constitution stipulates the Environmental Objectives in Article 92 that –

1. Government shall endeavour to ensure that all Ethiopians live in a clean and healthy environment.
2. The design and implementation of programmes and projects of development shall not damage or destroy the environment.
3. People have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly.
4. Government and citizens shall have the duty to protect the environment.

Ethiopia is a non-Annex I member to the UNFCCC and the Kyoto Protocol, which it ratified in 2005. It has taken an active role in the recent climate negotiations and in the fight against deforestation in developing countries – mainly the poor and vulnerable ones. Ethiopia's 1995 Constitution includes the principle of environmental rights, including the right to a clean and healthy environment and the principle of government responsibility to en-

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79 That is, law no 11/009 of 09 July 2011 on fundamental principles of environmental protection in the DRC on fundamental principles of environmental protection in the DRC; the Forest Code no 011/2002 of 29 August 2002, which sets out the law applicable to the conservation, exploitation and development of forestry resources; the Mining Code law no 007/2002 of 11 July 2002, which specifies the need for environmental impact assessments to be conducted for certain activities, such as prior feasibility studies of environmental, social and economic impact of projects, mitigation and rehabilitation plans, and environmental management plans for specific projects.

80 Based largely on GLOBE International (2013:134–141).

sure this right. In 2011, the Ethiopian Government finalised the Climate Resilient Green Economy<sup>81</sup> – the first of its kind in Africa. The strategy seeks to achieve ambitious economic development goals in a sustainable way by building a climate-resilient green economy

Ethiopia's NAPA<sup>82</sup> was finalised in June 2007 by the Ministry of Water Resources and the Meteorological Service. The NAPA identifies high-priority adaptation projects, for example, promoting drought and crop insurance programmes; strengthening or enhancing drought and flood early warning systems; conserving and using wisely selected wetlands to promote the adaptation capacity of the rural community for climate shocks; enhancing the Community Based Carbon Sequestration Project in the Rift Valley System; establishing a national research and development (R&D) centre for climate change; strengthening the malaria containment programme; and promoting farm and homestead forestry and agroforestry practices in arid, semiarid and dry sub-humid parts of Ethiopia. The NAPA was updated and replaced in 2010 by the Ethiopian Programme of Adaptation to Climate Change, which is tasked to identify climate-change-related risks and oversee institutions in charge of mitigating these risks.

### III. Kenya<sup>83</sup>

The 2010 Kenyan Constitution<sup>84</sup> provides a modern framework for environmental rights. In its preamble it states that the people of Kenya are respectful of the environment, “which is our heritage, and determined to sustain it for the benefit of future generations”. In the section on rights and fundamental freedoms, the Constitution in Article 42 recognises that everyone has a “right to a clean and healthy environment”, which includes the right –

- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
- (b) to have obligations relating to the environment fulfilled under Article 70.

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81 Federal Democratic Republic of Ethiopia (2011).

82 Available at <http://unfccc.int/resource/docs/napa/eth01.pdf>, last accessed 06 April 2013.

83 Based largely on GLOBE International (2013:269–277).

84 See Glinz (2011:60–80).

Under Chapter 5 (Land and Environment) of the Constitution, the enforcement of environmental rights is regulated in Article 70(1), where it states that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Kenya signed the UNFCCC in 1992, ratifying it in 1994, along with the Kyoto Protocol in 2005. Kenya (a non-Annex I country) has placed great importance on issues of climate change, for example its 2008 Draft National Environment Policy, which recognises that climate change involves many ministries, gives climate change a higher profile at a national level to help address climate-related issues in respect of the relevant ministries.<sup>85</sup>

Kenya has developed a Climate Change Authority Act that is making progress through parliament and is likely to be voted into law in early 2013. In November 2012 a public validation process paved the way for government to approve a land launch in early 2013 of a complementary Climate Change Action Plan that defines clear measures on adaptation and mitigation, including nationally appropriate mitigation actions, a low carbon development strategy, knowledge management and capacity development, financing mechanisms and the creation of an institutional structure to ensure effective coordination. Developed by the Kenyan Government, through the Ministry of Environment and Mineral Resources, and in conjunction with donor partners, the Action Plan provides a platform for the implementation of the 2010 National Climate Change Response Strategy. When it is passed, the Action Plan could qualify to be considered Kenya's flagship legislation on climate change. Another process under way is the formulation of the National Environment Policy, also expected to be adopted soon. The Climate Change Authority Bill was introduced in the National Assembly in 2012. In addition to establishing a Climate Change authority, the Bill sets out to provide for the development of strategies to address the effects of climate change, as well as to forge a framework for mitigation of and adaptation to climate.

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85 See Kameri-Mbote & Odote (2012:296–318).

#### IV. Namibia<sup>86</sup>

The 1990 Namibian Constitution, many international treaties, as well as a multitude of statutory enactments and policies provide for a wide field of environmental protection in Namibia. Over the past years a bundle of new environmental legislation has been passed, and it thus becomes evident that environmental concern has gained momentum. The Namibian environmental policy framework<sup>87</sup> determines the guiding objectives and the strategies to be used to strengthen the respect for environmental values, taking into account the existing social, cultural and economic situation. The foundation for the Namibian environmental policy framework is Article 95 (1) of the Namibian Constitution of 1990. It stipulates that the state shall actively promote and maintain the welfare of the people by adopting policies which include the “maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis ...”.

It is worthwhile mentioning that the Namibian Constitution explicitly incorporates international law and makes it part of the law of the land. *Ab initio*, public international law is part of the law of Namibia. No transformation or subsequent legislative act is needed. A treaty will become binding upon Namibia in terms of Article 144 of the Constitution if the relevant international and constitutional requirements have been met.<sup>88</sup> Namibia ratified the UNFCCC in 1995 and became legally obliged to adopt and implement policies and measures designed to mitigate the effects of climate change and to adapt to such changes. Namibia acceded to the Kyoto Protocol in 2003. Namibia’s Initial National Communication to the Conference of Parties of the UNFCCC was submitted in 2002 in accordance with decisions taken at various COPs to the UNFCCC. The Ministry of Environment and Tourism (MET) through the Directorate of Environmental Affairs (DEA) is responsible for overseeing the coordination of climate change issues in Namibia.<sup>89</sup>

Vision 2030, the various National Development Plans, various sector policies and Cabinet directives are in place. Moreover, Namibia in 2008 drew up a draft national climate change strategy and action plan – which was

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86 Based largely on Ruppel & Ruppel-Schlichting (2013).

87 (*ibid.*).

88 See with further references Ruppel (2010a).

89 Mapaire (2013).

introduced in 2009.<sup>90</sup> In June 2011 Namibia's prime minister, Nahas Angula, indicated that a national policy on climate change for Namibia should be placed within the global framework of political, developmental, and technological interests.<sup>91</sup> The then Namibian minister of Environment and Tourism made the following significant statement: "While climate change has the potential to side-rail development processes, the key is to prepare sufficiently and effectively and to use the threats and opportunities of climate change to lay the basis for sustainability and prosperity".<sup>92</sup>

### *V. Rwanda*<sup>93</sup>

Article 49 (I) of the 2003 Rwandan Constitution stipulates that every citizen is entitled to a healthy and satisfying environment. This provision obliges the government to commit itself to ensuring that citizens live in a safe and clean environment. To achieve this obligation, reforestation and terracing are emphasised on hilly areas to prevent soil erosion, while marshlands and low-land vegetation are protected. Article 49 (II) provides that every person has a duty to protect, safeguard and promote the environment, and places the State under the obligation to protect the environment. Article 49 (III) stipulates that the law shall determine the modalities for protecting, safeguarding and promoting the environment.

Rwanda has ratified almost all international instruments related to the protection of the environment. The government provides orientation through the national policy on environment and the national policy on water and sanitation. The Rwanda Environment Management Authority takes the lead in regulating, safeguarding and promoting safe-and-clean environment protection programmes. Rwanda ratified the UNFCCC and the Kyoto Protocol in 1998. In 2005 Rwanda submitted its initial report to the UNFCCC, and in June 2012 its second communication, including a stand-alone mitigation strategy, the Carbon Policy and an updated emissions inventory. The Constitution of 2003 is Rwanda's supreme law. In 2011 the Government pub-

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90 See Mfuno et al. (2009).

91 See <http://www.namibian.com.na/news-articles/national/full-story/archive/2011/june/article/policy-on-climate-change-needs-review-pm/>, last accessed 18 February 2013.

92 Nandi-Ndaitwah (2011).

93 Based largely on GLOBE International (2013:365–371).

lished the National Climate Change and Low Carbon Development Strategy. The Action Plan for the Ministry of Natural Resources July 2011 – June 2012 sets specific targets for reducing climate change vulnerability. In May 2012, a law establishing a national fund for climate change financing, FONERWA, was passed, and is expected to contribute to Rwanda's existing financing gap. In 2009 a Climate Change and International Obligations Unit was established to coordinate carbon market activities. Rwanda's climate change efforts are supported by various international donors. In 2010, the Government of Rwanda, the Government of Japan, the United Nations Development Programme and the United Nations Environment Programme (UNEP) launched two climate change adaptation programmes, one focusing on reducing vulnerability to climate change by establishing early warning and disaster preparedness systems and support for integrated watershed management in flood-prone areas. The other focuses on building an integrated comprehensive national adaptation approach in Rwanda.

## VI. South Africa<sup>94</sup>

Section 24 of the 1996 South African Constitution states, among others, that everyone has the right –

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The Constitution also provides the framework for the administration of environmental laws. It designates the environment as a matter of concurrent national and provincial responsibility. Environmental law is contained in a multitude of statutes and regulations.<sup>95</sup>

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94 Based on GLOBE International (2013:373–379).

95 Relevant to the context of climate change are, *inter alia*, the following statutes: National Environmental Management Act, 1998 (Act 107 of 1998); National Water Act, 1998 (Act 36 of 1998); Marine Living Resources Act, 1998 (Act 18 of 1998); Disaster Management Act, 2002 (Act 57 of 2002); National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004); National Environmental Management:

South Africa signed the UNFCCC in 1993 and ratified it in 1997. It acceded to the Kyoto Protocol in July 2002. Within the Sub-Directorate for Global Climate Change of the Department of Environmental Affairs lies the responsibility to ensure that South Africa complies with its obligations under the UNFCCC. In 2011 South Africa's Second National Communication under the United Nations Framework Convention on Climate Change was published.<sup>96</sup> South Africa has largely dealt with climate change through policies, strategies and regulations. Through these measures South Africa is showing its commitment to tackling climate change, particularly in developing market-based mitigation mechanisms and promoting renewable energy and energy efficiency.

The 2004 National Climate Change Response Strategy represented the first direct recognition of the need for action on climate change. Two years later, the Cabinet commissioned the Long Term Mitigation Scenario study in an attempt to produce sound scientific analysis from which the Government could derive a long-term climate policy. The study produced a series of policy recommendations. In July 2008, the Vision, Strategic Direction and Framework for Climate Policy were announced. The current flagship policy in South Africa is the National Climate Change Response Policy, approved by Cabinet in October 2011. This policy's White Paper presents the South African Government's vision for an effective climate change response and the long-term, just transition to a climate resilient and lower carbon economy and society. It reflects a strategic approach referred to as "climate change resilient development", addressing both adaptation and mitigation. The White Paper accepts the conclusions of the Intergovernmental Panel on Climate Change (IPCC); regards climate change as one of the greatest threats to sustainable development; reaffirms its commitment towards the UNFCCC and the Kyoto Protocol, and undertakes to develop a comprehensive national response plan of which the White Paper is an integral part.

The Taxation Law Amendment Bill of 2009 amends the 1962 Income Tax Act to include, among other things, income tax incentives for participation in Clean Development Mechanism projects as well as for energy efficiency savings. The Clean Development Mechanism projects are run by a desig-

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Protected Areas Act, 2003 (Act 57 of 2003); National Environmental Management: Waste Management Act 2008; and National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004).

96 See Glazweski & Collier (2012:319–348).

nated national authority established under the Department of Energy, and they are governed by regulations published under the National Environmental Management Act of 1998. During the 2012–2013 budget discussions in February 2012, the minister of Finance introduced a proposed carbon tax on annual emissions for all sectors, including electricity, petroleum, iron, steel and aluminium.

### *I. Developments and Gaps*

The aforementioned passages reflect that much is already been done in Africa: the rolling out of AU policy pathways and related legal processes, the accommodation of national constitutional and legislative frameworks, and the development of climate change policy are all in progress and are also critical for the continent. Resolution (A/RES/67/1) was recently adopted by the UN General Assembly on the Rule of Law – which underlines the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development and for maintaining peace and security. In this light it is also essential to further the discussions on

- the linkage between climate change, sustainable development and the rule of law
- the mutually supportive relationship between the adherence to the rule of law and the respect for all human rights, including those related to the environment
- access to justice in environmental matters and new and emerging principles, such as the non-regression in environmental law; and
- the importance of country systems and other developments at the national level to improve the effectiveness of environmental and climate change law.

Many African governments have progressed in addressing climate change and related issues. The AU has also succeeded in presenting an increasingly cohesive African position on climate change. However, significant gaps remain.<sup>97</sup>

At the regional level, effectively managing consensus and divergence remains challenging. Divergent priorities among African countries threaten

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97 This passage is based on Ruppel & Speranza (2011:199–202).



the potential of the AU to wield influence in international climate politics. The AU thus needs to address divergence factors in lieu of conducting international negotiations.

At the national and sub-regional levels, various policy gaps exist, a major one being the sluggishness in bringing climate change into the mainstream planning of all development sectors. In many African countries, a climate policy is non-existent or still in the making. Development and climate policy run parallel and integrated development-climate policy framework is non-existent, making it difficult to stop the rebranding of Official Development Assistance (ODA) as climate response. Very few sectoral policies consider climate change, and need reviewing to close this gap.<sup>98</sup>

Moreover, African governments should make provisions for integrating climate change responses into national budgetary allocations. Economic planners often lack guidelines on mainstreaming climate change adaptation at the national level. As with other policy spheres, climate-proofing development through integrating climate change in all policy spheres has its costs and trade-offs. Considering the chronic understaffing and underfunding of certain government activities, climate change will bring more work and governments should improve staff skills and provide more resources to address the add-on challenges of climate change. Many operational limitations hinder implementation. These include dysfunctional organisational arrangements causing conflicting and overlapping mandates, overburdening reporting requirements of various international agreements and conventions, and inability to retain skilled staff.

Lastly, designing policies for dealing with climate change offers an opportunity to address the dichotomy between parallel regulatory systems, i.e. the customary and the state laws, e.g. in access to land, the aspects of the management, use of and control over natural resources, and benefit-sharing. However, issues remain on how to develop a national framework for compensating natural resource users for providing environmental services and how to proceed with a low-carbon development, renewable energy schemes and the role of green transformation in these processes.<sup>99</sup>

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98 (ibid.).

99 (ibid.).

## J. Conclusion

Although it is primarily the responsibility of developed countries to reduce their greenhouse gas emissions first, in line with the principle of common but differentiated responsibility, developing countries also need to make specific policy commitments. What became very clear during the past few years is that we live in a world that is very different from the context in which the Kyoto Protocol was established. Compared with the mid-1990s, the debates are now taking place in a much-changed world. This applies to Africa, but even more notably to China and other developing countries that have gained more political clout – and greater impact on the world’s climate. More effective action is still needed.<sup>100</sup>

For Africa climate change is becoming an increasingly threatening reality, but one which is often too narrowly perceived in economic and sectoral policies, meaning that the severe negative consequences on the people are still largely being neglected.<sup>101</sup>

According to IPCC findings –<sup>102</sup>

Africa is one of the most vulnerable continents to climate change and climate variability, a situation aggravated by the interaction of ‘multiple stresses’, occurring at various levels, and low adaptive capacity. . . . Africa’s major economic sectors are vulnerable to current climate sensitivity, with huge economic impacts, and this vulnerability is exacerbated by existing developmental challenges such as endemic poverty, complex governance and institutional dimensions; limited access to capital, including markets, infrastructure and technology; ecosystem degradation; and complex disasters and conflicts. These in turn have contributed to Africa’s weak adaptive capacity, increasing the continent’s vulnerability to projected climate change.

In response thereto the AU has introduced initiatives aiming to ensure that poor and marginalised communities in Africa, i.e. women, children and indigenous peoples, do not suffer a disproportionate burden associated with climate change. The same applies to various African countries where significant climate-change-policy-related (legal) developments reflect political will towards addressing climate change.<sup>103</sup>

The AU has been decisive on action. Populations whose rights are poorly protected are likely to be less well-equipped to understand or prepare for

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100 See Ruppel et al. (2011).

101 Susswein (2003:297).

102 Boko et al. (2007:435).

103 Ruppel & Speranza (2011:199–202).

climate change; they would be less able to enforce their rights or lobby them effectively; and are, thus, more likely to be unable to adapt to the anticipated changes in their environmental and economic situation. What remains essential is that Africa is very clear on the fact that the majority of its people are vulnerable, i.e. subjected to displacement, landlessness, joblessness, homelessness, marginalisation, food insecurity, increased morbidity, loss of access to common property resources, and social disarticulation. These people are particularly vulnerable to extreme events, on the basis of a wide range of social vulnerability characteristics.<sup>104</sup> This needs to be brought more sharply to the attention of the global community in order to develop more international solidarity in terms of a global corporate social responsibility to protect those populations that need it most. In the same light it is hoped that in future we can come up with more global and consolidated approaches when it comes to water, climate, energy, economy, security and development policy. In the interest of Africa and its people this – without doubt – requires still more international cooperation, regional integration and local implementation.<sup>105</sup> In fact, a new global “social contract refers to the necessity of humankind taking collective responsibility for the avoidance of dangerous climate change...to the planet”.<sup>106</sup>

Moreover, addressing climate change adequately also requires substantial investment in new technologies, processes and services. Therefore a favourable investment climate is pivotal – and adequate framework conditions for more inclusive climate investment, leveraging private sector resources, and seizing opportunities for innovation will be needed. In light of this, Africa now needs to strengthen its long-term vision of working together on the African continent, with global partners; and, in adapting to climate change, it needs to promote climate investment, sustainable economic development and green economic growth.

A major problem unfortunately prevails: The World Corruption Report 2011<sup>107</sup> states that corruption was a risk in addressing climate change, since a risk of corruption always exists where “huge amounts of money flow through new and untested financial markets and mechanisms”. This may be particularly true for recent, current and future financial flows related to climate change finance, technology and capacity-building meant to support

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104 IPCC (2012).

105 See Ruppel (2012b) for further references.

106 WBGU (2011:8).

107 Transparency International (2011).

developing countries according to the principle of equity. Corruption eventually puts at risk the rights of those most vulnerable to the negative effects of climate change. The reasons for the high risk of corruption with regard to climate finance are rooted in the level of complexity, uncertainty and novelty that surrounds many climate issues. A multitude of regulatory grey zones and loopholes exist that are at risk of being exploited to satisfy corrupt interests. In order to ensure that the investments by the public and private sectors are properly and equitably managed, a system of good climate governance<sup>108</sup> with participatory, accountable, transparent, inclusive and responsive policy development and decisions, and respect for the rule of law, is essential.

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108 *Climate governance* can be understood as the processes that currently exist at the international, national, corporate and local levels to address the causes and effects of climate change. See Transparency International (2011:3).

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