

# Chapter 6: Environmental Law and Policy in the African Union

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## 1 Introduction

The historical foundations of the African Union (AU) originated in the Union of African States, an early confederation that was established in the 1960s. 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>1</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 established. The African Union was launched in Durban on 9 July 2002 by the then South African President, Thabo Mbeki,<sup>2</sup> at the first session of the Assembly of the African Union. The Union's administrative centre is in Addis Ababa, Ethiopia and the working languages are Arabic, English, French, Portuguese, and Swahili. The African Union has 55 member states, representing all countries on the African continent.<sup>3</sup> Geographically, the African Union covers an area of 29,757,900 km<sup>2</sup> and the United Nations Population Division estimated a population total of 1,340,598,000 for 2020.<sup>4</sup> Given the African continent's bounty of natural resources, the protection and conservation of the environment must be an overarching aim within the AU. This is reflected in the African Union's legal framework.

## 2 Structure of the AU

The Assembly is the supreme policy and decision-making organ of the Union, and is composed of heads of state and government or their duly accredited representatives. The Assembly determines common policies. The Executive Council, composed of ministers or authorities designated by the governments of members states, is responsible to the Assembly and coordinates and makes decisions on common policies.

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1 Named after Sirte, in Libya.

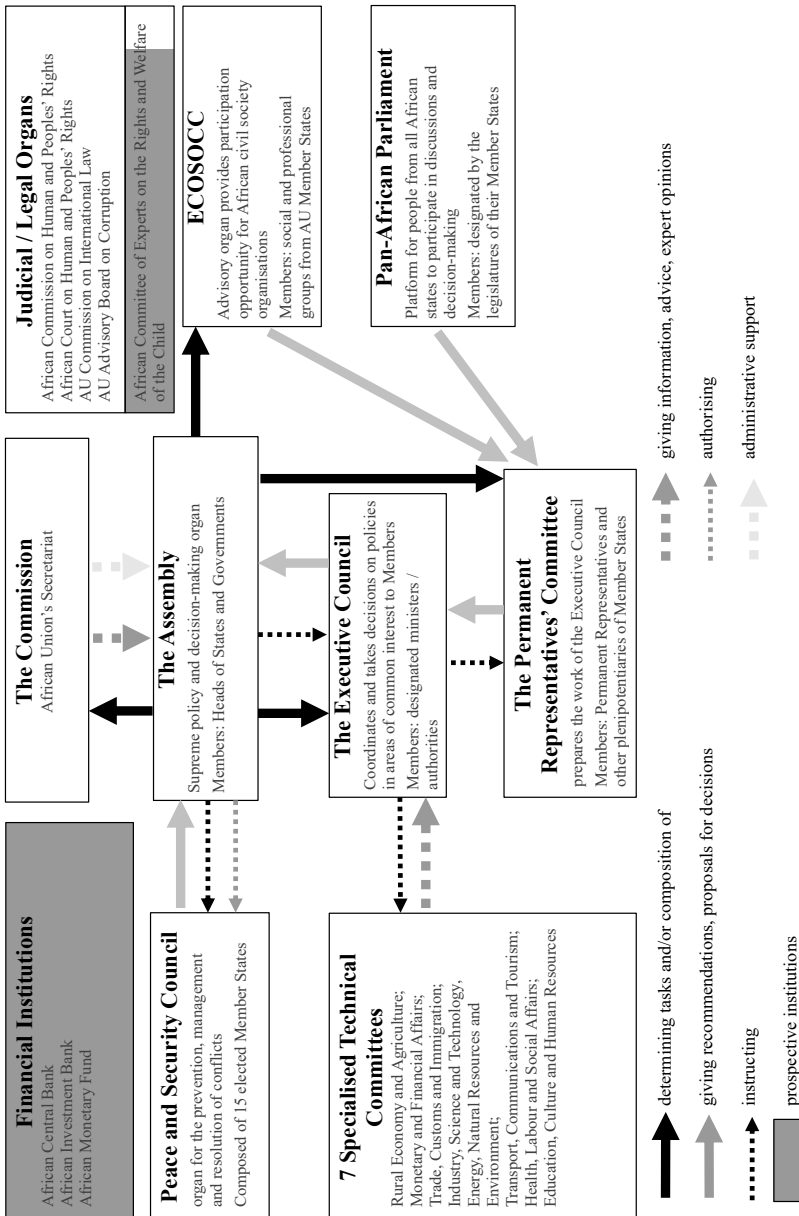
2 Thabo Mbeki was the African Union's first President.

3 See <https://au.int/en/memberstates>, accessed 28 April 2021.

4 See the World Population Prospects of the United Nations Population Division at <https://population.un.org/wpp/Download/Standard/Population/>, accessed 28 April 2021.

Together, a Chairperson, the Deputy Chairperson, eight Commissioners and staff members form the Commission. Each Commissioner is responsible for one portfolio (peace and security; political affairs; infrastructure and energy; social affairs; human resources, science and technology; trade and industry; rural economy and agriculture; and economic affairs). The Commission is comparable to a secretariat and plays a central role in the day-to-day management of the AU. The Commission *inter alia* represents the African Union and defends its interests; elaborates draft common positions of the African Union; prepares strategic plans and studies for the consideration of the Executive Council; elaborates, promotes, coordinates and harmonises the programmes and policies of the Union with those of the regional economic communities (RECs); and ensures the mainstreaming of gender in all programmes and activities of the African Union. The Executive Council is assisted by the Permanent Representatives Committee and the following Specialised Technical Committees, which assist the Executive Council in substantive matters: The Committee on Rural Economy and Agricultural Matters; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration Matters; the Committee on Industry, Science and Technology, Energy, Natural Resources and Environment; the Committee on Transport, Communications and Tourism; the Committee on Health, Labour and Social Affairs; and the Committee on Education, Culture and Human Resources. The Pan-African Parliament implements policies, while the Economic, Social and Cultural Council is an advisory organ composed of different social and professional groups of the Member States. The Peace and Security Council makes decisions on prevention, management and resolution of conflicts. The financial institutions of the AU will consist of the African Central Bank, the African Monetary Fund, and the African Investment Bank. The African Court of Justice and Human Rights will ensure compliance with the law as outlined in the following sections.

Figure 1: Structure of the African Union



Source: Table compiled by the author and Cord Lüdemann based on Ouazghari (2007:5) and AU (2020).

### 3 Environmental Issues Within the AU's General Legal Framework

Environmental issues are anchored multifold within the AU's general legal framework. The Constitutive Act of the African Union, which was adopted in Lomé, Togo in 2000, provides in Article 13 that the Executive Council coordinates and takes decisions on policies in areas of common interest to the member states. This includes foreign trade; energy, industry and mineral resources; food, agricultural and animal resources; livestock production and forestry; water resources and irrigation; and the environment and its protection.

The African Economic Community, the African Union's economic institution was established in 1991 by the Abuja Treaty Establishing the African Economic Community. Namibia signed this treaty in 1991. It contains specific provisions regarding environmental protection and the control of hazardous wastes. The Treaty contains broad economic objectives, which touch on the environment, firstly by the general objective of promoting economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and to promote an indigenous and self-sustained development; and secondly, through the specific objective of ensuring the harmonisation and coordination of environmental protection policies, among the States Parties. The Treaty makes provision for several specialised technical committees, including a Committee on Industry, Science and Technology, Natural Resources and Environment. Each of these committees has the mandate to prepare projects and programmes in its sphere of duty, and of ensuring supervision and implementation of these.

Chapter VIII contains provisions with regard to food and agriculture and provides for cooperation among member states in the development of rivers and lake basins, and the development and protection of marine and fisheries resources, and plant and animal protection. States Parties are required to ensure the development within their borders of certain basic industries that are identified as conducive to collective self-reliance and to modernisation, and to ensure proper application of science and technology to a number of sectors that, according to Article 51, include energy and the conservation of the environment. States have the obligation to coordinate and harmonise their policies and programmes in the field of energy and natural resources, and to promote new and renewable forms of energy and, in line with Article 58, to promote a healthy environment, and, to this end, to adopt national, regional and continental policies, strategies and programmes and establish appropriate industries for environmental development and protection. The Treaty requires member states to take appropriate measures to ban the importation and dumping of hazardous wastes in their territories, and to cooperate among themselves in the trans-boundary movement, management and processing of such wastes, where these emanate from a member state.

The African Charter for Human and Peoples' Rights has progressively taken up the issue of environmental protection by explicitly incorporating a human right to

environment, a third generation human right.<sup>5</sup> Article 24 of the African Charter for Human and Peoples' Rights reads, "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development".<sup>6</sup>

#### 4 Specific Environmental Conventions

Table 1: Environmental Conventions under the AU legal Framework

Treaty / Agreement	Treaty / Agreement Particularities			Namibian Participation		
	Date of Adoption	Date Entry into Force	Date of Last Signature / Deposit	Date of Signature	Date of Ratification / Accession	Date Deposited
Phyto-Sanitary Convention for Africa	13.09.1967	06.10.1992	06.10.1992	-	-	-
African Convention on the Conservation of Nature and Natural Resources	15.09.1968	16.06.1969	24.01.2013	-	-	-
Bamako Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa	01.01.1991	22.04.1998	31.05.2013	-	-	-
African Maritime Transport Charter	11.06.1994	-	27.01.2012	13.07.1999	-	-
The African Nuclear-Weapon-Free Zone Treaty (Pelindaba Treaty)	11.04.1996	15.07.2001	27.01.2014	11.04.1996	06.02.2012	01.03.2012
African Convention on the Conservation of Nature and Natural Resources (Revised Version)	01.07.2003	23.07.2016	28.03.2014	09.12.2003	-	-
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa	23.10.2009	06.12.2012	17.03.2015	23.10.2009	-	-
Revised African Maritime Transport Charter	26.07.2010	-	31.01.2014	08.03.2013	-	-

Source: Table compiled by the author based on information from <https://treaties.au.int>, accessed 29 April 2021.

- 5 See Glazewski (2013:-5-2); Ruppel (2008a) and the Chapter on Human Rights and the Environment in this book.
- 6 For a detailed discussion on the right to environment under the African Charter on Human and Peoples' Rights see also Kotzé / Du Plessis (2019) and Mekouar (2001).

#### 4.1 The African Convention on Conservation of Nature and Natural Resources, 1968

The 1968 African Convention on the Conservation of Nature and Natural Resources (also referred to as the African Nature Convention or the Algiers Convention), and the forerunner to the 2003 Revised Algiers Convention, which is outlined in the next paragraph, is arguably the centrepiece of the AU's environmental texts.

This regional African Convention was originally adopted in Algiers in 1968 under the auspices of the Organisation of African Unity (OAU) and came into force in 1969. As such it was the successor to the 1900 Convention for the Preservation of Wild Animals, Birds and Fish in Africa, which was later superseded by the 1933 Convention Relative to the Preservation of Fauna and Flora in their Natural State (the London Convention). The need for a treaty to address nature conservation had already been expressed in the Arusha Manifesto of 1961.<sup>7</sup> Hence, in 1963, the African Charter for the Protection and the Conservation of Nature was adopted, followed soon after by the Algiers Convention.

The objectives of the 1968 Convention encouraged individual and joint action for the conservation, utilisation and development of soil, water, flora and fauna for the present and future welfare of mankind, from an economic, nutritional, scientific, educational, cultural and aesthetic point of view. To this end, states undertake to adopt the measures necessary to ensure conservation, utilisation and development of soil, water, floral and faunal resources in accordance with scientific principles and with due regard to the best interests of the people (Article II); to take effective measures to conserve and improve the soil and to control erosion and land use (Article IV); and to establish policies to conserve, utilise and develop water resources, prevent pollution and control water use (Article V). Furthermore, the Convention imposes on states the obligation to protect flora and ensure its best utilisation, the management of forests and control of burning, land clearance and overgrazing (Article VI); and to conserve faunal resources and use them wisely, manage populations and habitats, control hunting, capture and fishing, and prohibit the use of poisons, explosives and automatic weapons in hunting (Article VII). States are required to tightly control traffic in trophies, to prevent trade in illegally killed and obtained trophies and to establish and maintain conservation areas (Article X). A list of protected species that enjoy full total protection, and a list of species that may be taken only with authorisation is part of the Convention.

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7 IUCN (2006:4).

## 4.2 The Revised (Algiers) Convention on the Conservation of Nature and Natural Resources, 2003

The Algiers Convention was revised in 2003 (Maputo) to take into account recent developments on the African environment and natural resources scenes, while bringing the Convention to the level and standard of current multilateral environmental agreements.<sup>8</sup> The revised Convention, which was adopted by the African Union in Mozambique in July 2003,<sup>9</sup> was described as “the most modern and comprehensive of all agreements concerning natural resources”.<sup>10</sup>

As of April 2021, 44<sup>11</sup> of the 55 member states have signed the Convention, while only 17 member states<sup>12</sup> have deposited their instrument of ratification.<sup>13</sup> The revised Convention has entered into force on 23 July 2016. Namibia, not being a signatory to the 1968 Convention, signed the revised Convention in December 2003, while no instrument of ratification has been deposited as of yet.

The revised Convention follows a comprehensive and general approach to environmental protection. It defines natural resources, addresses economic and social development goals, and stresses the necessity to work closely together towards the implementation of global and regional instruments supporting the goals of the Rio Declaration and Agenda 21.<sup>14</sup>

The Preamble sets the tone by providing that its “objectives would be better achieved by amending the 1968 Algiers Convention by expanding elements related to sustainable development”. In this vein, Article 4 on fundamental obligation, states:

The Parties shall adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through preventive measures and the application of the precautionary principle, and with due regard to ethical and traditional values as well as scientific knowledge in interest of present and future generations.

The main objective of the Convention is to enhance environmental protection, to foster the conservation and sustainable use of natural resources, and to harmonise and

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8 Decision of the Revised 1968 African Convention (Algiers Convention) on the Conservation of Nature and Natural Resources, Doc. EX/CL/50(III), Assembly/AU/Dec. 9(II).

9 At the second ordinary session of the African Union Assembly held in Maputo, Mozambique in July 2003.

10 Kiss / Shelton (2007:183).

11 The Convention has been signed by Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Cote d'Ivoire, Comoros, the DRC, Congo, Djibouti, Democratic Republic of Congo, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Lesotho, Liberia, Madagascar, Mali, Malawi, Mauritania, Mozambique, Namibia, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, São Tomé and Príncipe, Senegal, Sierra Leone, Somalia, South Africa, Sudan, South Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia and Zimbabwe.

12 i.e. Angola, Benin, Burkina, Faso, Burundi, Chad, Cote d'Ivoir, Comoros, Congo, Gambia, Ghana, Libya, Lesotho, Liberia, Mali, Niger, Rwanda and South Africa.

13 See <https://treaties.au.int>, accessed 28 April 2021.

14 IUCN (2006:5ff.).

coordinate policies in these fields with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes. In realising these objectives, the Parties should be guided by the principles of a right to a satisfactory environment and the right to development – the so-called third-generation human rights.<sup>15</sup> Parties are required to adopt and implement all measures necessary to achieve the objectives of the Convention, in particular through preventive measures and the application of the precautionary principle, and with due regard to ethical and traditional value as well as scientific knowledge in the interest of present and future generations (Article IV).

The provisions of the Convention address the following areas:<sup>16</sup> Land and soil (Article VI), water (Article VII), vegetation cover (Article Viii), species and genetic diversity (Article IX), protected species (Article X), trade in specimens and products thereof (Article XI), conservation areas (Article XII), process and activities affecting the environment and natural resources (Article XIII), sustainable development and natural resources (Article XIV), military and hostile activities (Article XV), procedural rights (Article XVI), traditional rights of local communities and indigenous knowledge (Article XVII), research (Article XVIII), development and transfer of technology (Article XIX), capacity building, education and training (Article XX), national authorities (Article XXI), cooperation (Article XXII), compliance (Article XXIII), liability (Article XXIV), and exceptions (Article XXV).

The Conference of the Parties and the Secretariat are established by Articles XXVI and XXVII respectively. Article XXXIV relates to the relationship with the 1968 Algiers Convention and provides that for Parties that are bound by the revised Convention, only this Convention is to apply. The relationship between parties to the original Convention and parties to this Convention is to be governed by the provisions of the original Convention (Article XXXIV).

It has to be noted that unlike its predecessor, the 2003 Convention excludes reservations, which reflects the necessity for the parties to apply common solutions to common problems. If the parties had the right to make reservations, differing obligations would jeopardise the attainment of the Convention's objectives.<sup>17</sup>

Disputes regarding the interpretation and application of the Convention are primarily subject to alternative dispute resolution otherwise the African Court of Justice has jurisdiction. Included as part of the 2003 Convention are three Annexes: on the Definition of Threatened Species, on Conservation Areas, and on Prohibited Means of Taking.

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15 IUCN (2006:6).

16 For a discussion on each of these areas see IUCN (2006:8ff.).

17 IUCN (2006:7).



#### 4.3 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa

The Convention was adopted in Bamako, Mali on 30 January 1991 and entered into force on 22 April 1998. As of April 2021, it had 35 signatories, of which 28 had ratified the Convention. As of April 2021, Namibia had not become a party to this Convention.

The Convention creates a framework of obligations to strictly regulate the transboundary movement of hazardous wastes to and within Africa. The Bamako Convention in Article 3 categorises hazardous wastes and enumerates general obligations of state parties in respect of the enforcement of a ban on hazardous waste import, and on the dumping of hazardous wastes at sea and internal waters in respect of waste generation, and the adoption of precautionary measures. States are furthermore required to establish monitoring and regulatory authorities to report and act on transboundary movement of hazardous wastes. A Secretariat to serve a Conference of the Parties is established. A list of categories of wastes which are hazardous waste and a list of hazardous characteristics are annexed to the Bamako Convention as well as annexes on disposal operations; information to be provided on notification; information to be provided on the movement document; and on arbitration.

#### 4.4 The Maritime Transport Charters

Considering the importance of cooperation among African countries in the maritime transport sector and in order to find appropriate solutions to the problems impeding the development this sector, the Charter was adopted in 1994. Namibia has signed the Charter in 1999, which has not come into force as of yet. In 2010, the Revised African Maritime Transport Charter has been adopted. This Charter has so far been signed by 23 and ratified by 10 member states. Namibia has signed the Charter in 2013. Ratification by 15 states is required for the Charter to come into force. The revised African Maritime Transport Charter, in contrast to its predecessor, puts a strong emphasis on the protection of the marine environment. The Charter recognises the interdependence between economic development and a sustainable policy for the protection and preservation of the marine environment. One of the objectives of the Charter is to develop and promote mutual assistance and cooperation between states parties in the area of maritime safety, security and protection of the marine environment. Article 28 provides that parties are to seek intensify their efforts to ensure the protection and preservation of the marine environment and to promote measures aimed at preventing and combating pollution incidents arising from marine transport. Furthermore, parties “commit themselves to the creation of a sustainable compensation regime to cover

marine incidents of pollution of the sea that are not covered by existing international compensation regimes.”

#### 4.5 The African Nuclear Free Zone Treaty (Treaty of Pelindaba)

The Treaty, to which Namibia became a signatory in April 1996, entered into force in August 2009. Namibia’s instrument of ratification has been deposited in March 2012. The Treaty establishes the African nuclear-weapon-free zone, thereby achieving, *inter alia*, the promotion of regional cooperation for the development and practical application of nuclear energy for peaceful purposes in the interest of sustainable social and economic development of the African continent and keeping Africa free of environmental pollution by radioactive wastes and other radioactive matter.

Each party has the obligation to renounce nuclear explosive devices, prohibit in its territory the stationing of any nuclear explosive device, and prohibit testing of nuclear explosive devices. Any capability for the manufacture of nuclear explosive devices has to be declared and parties undertake to dismantle and destroy any nuclear explosive device, destroy facilities for the manufacture of nuclear explosive devices or where possible to convert them to peaceful uses. Furthermore, the measures contained in the Bamako Convention on the Ban of the Import into Africa and Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa have to be implemented according to Article 7 in so far as it is relevant to radioactive waste and not to take any action to assist or encourage the dumping of radioactive wastes and other radioactive matter anywhere within the African nuclear-weapon-free zone. The use of nuclear science and technology for economic and social development is to be promoted, including cooperation under the African Regional Cooperation Agreement for Research, Training and Development Related to Nuclear Science and Technology. Each party undertakes not to take, or assist, or encourage any action aimed at an armed attack by conventional or other means against nuclear installations in the African nuclear weapon-free zone. The Treaty of Pelindaba establishes the African Commission on Nuclear Energy for the purpose of ensuring compliance with their undertakings under the Treaty. Annual reports have to be submitted by the parties to the Commission and a Conference of the Parties is to be convened.

The Treaty has four Annexes, including a Map of the African-nuclear free zone; and Annexes on Safeguards of the International Atomic Energy Agency and on the African Commission on Nuclear Energy; and an Annex on the complaints procedure and settlement of disputes.

#### 4.6 The Phyto-Sanitary Convention for Africa

The Phyto-Sanitary Convention for Africa was adopted in Kinshasa, DRC, on 13 September 1967. The Convention does not contain any provision relating to its entry into force. However, as of April 2021, 12 member states have deposited their instruments of ratification. The aim of this Convention is to control and eliminate plant diseases in Africa and prevent the introduction of new diseases. To this end, parties undertake to control import of plants and to take measures of quarantine, certification or inspection in respect of living organisms, plants, plant material, seeds, soil, compost and packing material. Namibia is not a party to this Convention.

#### 4.7 The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (hereafter the Kampala Convention) was adopted on 23 October 2009 in Kampala. So far, the Kampala Convention has 40 signatories. 31 countries have so far ratified the Kampala Convention and it has entered into force on 6 December 2012. Namibia signed the Convention in 2009, however, ratification is still pending. The Convention is the first regional legal instrument in the world containing legal obligations for states with regard to the protection and assistance of internally displaced persons. It applies to displacement caused by a wide range of causes including conflict and human rights violations but also to natural or man-made disasters<sup>18</sup> and has thus an environmental component. Member states commit themselves to establish early warning systems and adopt disaster preparedness and management measures to prevent displacement caused by natural disaster. The Convention provides standards for the protection of internally displaced people from arbitrary displacement, protection of internally displaced people while they are displaced and durable solutions to their displacement.

### 5 Agenda 2063

At the 50th anniversary of the African Union in 2013, Agenda 2063 was issued as a vision within a 50-year period from 2013 to 2063. Agenda 2063 is conceptualised as Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future. It is the continent's strategic framework that aims to deliver on its goal for inclusive growth and sustainable development. The genesis of Agenda 2063 was

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18 See also Kälin / Haeni Dale (2008).

the realisation by African leaders that there was a need to reposition Africa to becoming a dominant player in the global arena and draft Africa's agenda to prioritise inclusive social and economic development, continental and regional integration, democratic governance and peace and security. Agenda 2063 thus formulates Africa's aspirations for the future and identifies key flagship programmes which can boost Africa's economic growth and development and lead to the rapid transformation of the continent.

With a view to environmental issues, aspiration 1 within Agenda 2063 is of particular relevance as it envisages a prosperous Africa based on inclusive growth and sustainable development. Here, Agenda 2063 explicitly mentions environmentally sustainable climate and resilient economies and communities as one of the goals. The objective is to put in place measures to sustainably manage the continent's rich biodiversity, forests, land and waters and using mainly adaptive measures to address climate change risks.

## 6 The African Union's Judicial, Human Rights and Legal Organs and Bodies and the Consideration of Environmental Rights

Environmental agreements under the umbrella of the AU each have their own provision on how disputes are to be settled. Alternative dispute resolution plays an important role in this regard as it is the favourable mechanism, as e.g. provided for in the African Convention for Nature Conservation. The judicial system in the AU has been subject to continuous development and several amendments in recent years.<sup>19</sup>

### 6.1 The African Court on Human and Peoples' Rights and the African Court of Justice to become the African Court of Justice and Human Rights

In 1998, the African Court on Human and Peoples' Rights (AfCHPR) has been 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, United Republic of Tanzania and has received cases since June 2008.

In 2003, the African Court of Justice as ultimate organ of jurisdiction in the African Union was established by the Protocol of the Court of Justice of the African Union, which entered 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 African Union

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19 For more details on the creation of judicial structures in the AU see Franceschi (2014:141ff.) and AU (2020).

Summit of Heads of State and Government in Sharm El Sheikh, Arab Republic of Egypt provides for the 1998 and the 2003 Protocols to be replaced and the African Court on Human and Peoples' Rights and the Court of Justice of the African Union to 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 eight<sup>20</sup> states and ratification by 15 states 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 *inter alia* relate to the interpretation and application of the AU Constitutive Act or the interpretation, application or validity of Union Treaties, as well as human rights violations.

In June 2014, a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights has been adopted to extend the jurisdiction of the African Court of Justice and Human Rights to cover individual criminal liability for serious crimes committed in violation of international law – making the African Court the first regional court with criminal jurisdiction over genocide, war crimes and crimes against humanity once the Protocol comes into operation upon ratification of 15 member states (the Protocol has not been ratified by any of the member states as of April 2021). At the same time, the Protocol gives immunity to sitting Heads of State and Government, and to other senior officials based on their function, before the African Court, which has been subject to criticism as no other international tribunal that provides individual criminal liability for serious crimes allows such immunity.<sup>21</sup>

## 6.2 The African Commission on Human and Peoples' Rights

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 favourable to their development" (Article 24). Article 24 of the African Charter establishes a binding human-rights-based approach to environmental protection, linking the right to environment to the right to

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20 As of 29 April 2021, the Protocol has been ratified by Angola, Benin, Burkina Faso, Congo, Gambia, Libya, Liberia and Mali.

21 See HRW (2014); Du Plessis (2012).

development.<sup>22</sup> Some cases that have been brought to the Commission have dealt with alleged violations of Article 24.

In the *Endorois* case,<sup>23</sup> the African Commission concluded that several Articles of the African Charter have been violated in the course of the dispossession of their land 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 Government of Kenya. Among the rights found to have been violated was the Endorois' right to culture (Article 17 (1) and (2)) and their right to free disposition of natural resources (Article 21) as they were unable to access the vital resources in the Lake Bogoria region since their eviction from the Game Reserve. Moreover, the African Commission held that their right to development (Article 22) had been violated, as the Respondent State's failed to adequately involve the Endorois in the development process.<sup>24</sup> The decision of the African Commission in the *Endorois* case,<sup>25</sup> was influenced by provisions of Convention No. 169 of the International Labour Organisation (ILO) on Indigenous and Tribal Peoples in Independent Countries.<sup>26</sup> The Convention *inter alia* provides criteria for describing the peoples it aims to protect; entails provisions 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.<sup>27</sup>

In the *Ogoni* case, the African Commission held, *inter alia*, 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

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22 Van der Linde / Louw (2003).

23 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council/Kenya* Communication 276/03 ACHPR available at <https://www.achpr.org/sessions/descions?id=193>, accessed 29 April 2021.

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

25 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication 276/03 ACHPR available at <https://www.achpr.org/sessions/descions?id=193>, accessed 29 April 2021

26 The Convention came into force on 5 September 1991 and is available at <http://www.ilo.org/ilo-lex/cgi-lex/convde.pl?C169>, accessed 28 April 2021.

27 It should be noted that of the 23 states that have ratified ILO Convention No. 169, as of April 2021 only one, namely the Central African Republic, is from the African continent.

ecologically sustainable development and use of natural resources”.<sup>28</sup> The *Ogoni* case is considered to be 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.

Another case decided by the African Commission on Article 24 was the *Cabinda* case,<sup>29</sup> in which the complainants argued that the unequal share of petroleum exploitation, the exploitation of the natural resources in the Cabinda region (formerly known as Portuguese Congo) by the Angolan government and the alleged economic and social marginalisation of the Cabinda people amounted to violations of Article 24 among others. The complainant claims that the people of Cabinda are not allowed to have any say in the grant of licences and concessions over their resources and that the people of Cabinda have been suffering disease and intense poverty since the Government of Angola took over Cabinda’s natural resources such as offshore oil, onshore mineral and oil resources. It was argued that the operations of oil companies took place in conditions that harm human health and the environment because the Respondent had failed to enforce compliance with environmental rules and that no compensation is paid in the event of damage to the environment. The Complainant therefore argued that the Respondent had violated the right of the people of Cabinda to a satisfactory environment as guaranteed in Article 24 of the African Charter.

The African Commission found no violation of Article 24 of the African Charter as apart from the fact that the complainant “did not adduce any evidence in support of the general allegation that the right to a satisfactory environment has been violated by the Respondent State, the Complainant has not disputed or challenged the claims of the Respondent State.”

The recognition of a right to a satisfactory environment by the African Charter and some progressive jurisprudence by the African Commission emphasise the importance of environmental protection from a human rights perspective and lead the way to a linkage between climate change and human rights, in a modern holistic approach to one of the most burning issues of today.<sup>30</sup>

The impacts of climate change on human rights have been explicitly recognised by the African Commission. In its AU Resolution 153, the African Commission called on the Assembly of Heads of State and Government to take all necessary measures to ensure that the African Commission is included in the African Union’s negotiating

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28 *The Social and Economic Rights Action Center (SERAC) & the Center for Economic and Social Rights (CESR) v Nigeria*.

29 *Front for the Liberation of the State of Cabinda v Republic of Angola* Communication 328/06 (2013) ACHPR (54th Ordinary Session), available at <https://www.achpr.org/sessions/descriptions?id=247>, accessed 29 April 2021.

30 Ruppel / Ruppel-Schlichting (2017).

team on climate change.<sup>31</sup> In the same communication it decided to carry out a study on the impact of climate change on human rights in Africa.

### 6.3 The AU Commission on International Law

The AU Commission on International Law (AUCIL) was founded in 2009 by the Assembly as per Article 5(2) of the AU Constitutive Act and acts independently as an advisory organ. The AUCIL usually meets twice a year and consist of eleven members experts in international law, who are nationals of different member states and who serve in their personal capacities. In Article 4, the Statute of the AUCIL sets forth the objectives of the AUCIL which include:

- a. to undertake activities relating to codification and progressive development of international law in the African continent with particular attention to the laws of the Union as embodied in the treaties of the Union, in the decisions of the policy organs of the Union and in African customary international law arising from the practice of Member States;
- b. to propose draft framework agreements, model regulations, formulations and analyses of emerging trends in States' practice to facilitate the codification and progressive development of international law;
- c. to assist in the revision of existing treaties, assist in the identification of areas in which new treaties are required and prepare drafts thereof;
- d. to conduct studies on legal matters of interest to the Union and its Member States;
- e. to encourage the teaching, study, publication and dissemination of literature on international law in particular the laws of the Union with a view to promoting acceptance of and respect for the principles of international law, the peaceful resolution of conflicts, respect for the Union and recourse to its Organs, when necessary.

To this end, the AUCIL identifies and develops legal instruments which have not yet been regulated by international law in the African continent and is active in the process of codification. Drafts for legal texts are prepared by the AUCIL and circulated to member states for their comments after having submitted the drafts together with a commentary to the Assembly through the Executive Council. The AUCIL considers comments and observations by the member states and may subsequently recommend that the Assembly, through the Executive Council takes no action, takes note of the report, adopts the report, or recommends the draft to member states with a view to the conclusion of a convention (Articles 5 and 6 of the AUCIL Statute).

One of the AUCIL's tasks is to encourage the teaching, study and dissemination of international law and African Union law. It does so by cooperating with universities, institutions and other educational and research centres as well as with bar associations and other associations of lawyers. Furthermore, the AUCIL holds an annual Forum on International Law and African Union Law as a discussion platform for matters relating

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31 ACHPR/Res. 153 (XLV09).



to international law and the African Union law to raise awareness on the necessity of accelerating regional integration among others.<sup>32</sup>

## 7 Selected Institutions and Initiatives Particularly Relevant for Environmental Protection

### 7.1 The African Ministerial Conference on the Environment (AMCEN)

The African Ministerial Conference on the Environment (AMCEN) has a strong regional and sub-regional focus. AMCEN thus builds on the potential that Regional Economic Communities (RECs) have to integrate adaptation measures into regional policies and socio-economic development.<sup>33</sup> AMCEN is a permanent forum where African ministers of the environment discuss matters of relevance to the environment of the continent. It was established in 1985 when African ministers met in Egypt and adopted the Cairo Programme for African cooperation. The Conference is convened every second year. In the 2010 Bamako Declaration on the Environment for Sustainable Development, at the thirteenth session of the African Ministerial Conference on the Environment, the Conference's contribution in providing political guidance and leadership on environmental management to Africa since its creation in 1985 in Cairo was appreciated. AMCEN was established to provide advocacy for environmental protection in Africa; to ensure that basic human needs are met adequately and in a sustainable manner; to ensure that social and economic development is realised at all levels; and to 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.

The most recent meeting of the African Ministerial Conference on the Environment was held in Durban in November 2019. Major outcomes of this conference include the decision on taking action for the sustainability of environmental and natural resources in Africa, the decision on climate change and the Durban Declaration on taking action for environmental sustainability and prosperity in Africa. Interestingly, the texts of the

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32 Topics of recent annual Forums on International Law and African Union Law included: Constitutional democracy, rule of law and the fight against corruption (2019); Agenda 2063 Goals of Commodity Markets and new legal partnerships for exploitation and exploration of natural resources (2018); Legal and socio economic consequences of immigration, refugees and internally displaced persons in Africa (2017); The role of Africa in developing international law (2016); The challenges of ratification and implementation of treaties in Africa (2015); Codification of international law at the regional level in Africa (2014); Law of regional integration in Africa (2013).

33 Scholtz (2010).

outcomes reflect that within the AU, the most pressing issues around environmental concerns are being considered as high priority topics. The decision on taking action for the sustainability of environmental and natural resources in Africa for example touches on topics such as the blue economy; the concept of circular economy, aimed at comprehensively addressing plastic pollution; the conservation of biodiversity; the implementation of land degradation neutrality transformative projects and the promotion of action to combat desertification and drought. The outcomes, however, also reflect that it is time for action and that more emphasis needs to be put on taking necessary action to accelerate the implementation of past and future decisions of the Conference. The decisions emphasise that more cooperation and assistance is needed to put the decisions into practice. The sustainable flow of financial resources to support implementation measures is stressed by the decision makers. The decision on climate change urges “developed country Parties to continue fulfilling their commitments under the Framework Convention on Climate Change” and stresses that the Paris Agreement aims to enhance ambition, in both action and support, with clear linkage and balance between the actions envisaged to be taken by African countries and the level of support provided and developed country Parties are urged to provide climate finance.

## 7.2 Relevant Departments within the AU Commission

Several departments within the AU Commission, the African Union’s Secretariat, play an important role when it comes to issues related to environmental protection. The most relevant one is probably the Department of Rural Economy and Agriculture and the Department of Infrastructure and Energy.

One of the objectives for establishing the Department of Rural Economy and Agriculture was to promote sustainable development and sound environmental and natural resources management while ensuring food and nutrition security. Located within the Department of Rural Economy and Agriculture are the Division of Agriculture and Food Security and the Division of Environment, Climate Change, Water and Land Management and the Division of Rural Economy. The Department of Rural Economy and Agriculture has developed various important policy documents pertaining to environmental protection such as the 2020 Framework for Irrigation Development and Agricultural Water Management in Africa, the 2019 Sanitary and Phytosanitary (SPS) Policy Framework for Africa, the 2019 Continental Strategy for Geographical Indications in Africa 2018-2023, and the 2018 AU Wildlife Strategy.

The Department of Infrastructure and Energy is composed of three divisions, namely the Energy Division, the Information Society Division and the Transport and Tourism Division. The mission of the Department of Infrastructure and Energy “is to enhance regional and continental efforts for accelerating integrated infrastructure

development and the effective sustainable deployment of energy resources.”<sup>34</sup> Ensuring environmental sustainability is an essential component within the the Department’s framework of initiatives aimed at increasing energy access to the African people and improving livelihoods.

Other departments within the AU that can be involved with issues pertaining to environmental protection include the Departments of Political Affairs; Human Resources, Science and Technology; Trade and Industry; and Peace and Security.

### 7.3 The Peace and Security Council (PSC)

Article 3 of the AU Constitutive Act contains the objectives of the AU, including, among other things, the promotion of sustainable development, international cooperation, continental integration, and the promotion of scientific and technological research to advance development of the continent. In the Protocol relating to the Establishment of the Peace and Security Council (PSC) of the African Union, member states committed themselves to various guiding principles (Article 4), including early responses to contain crises situations, the recognition of the interdependence between socio-economic development and the security of peoples and states. Moreover, in Article 6 of the AU Constitutive Act, the functions of the PSC are outlined as, among others, the promotion of peace, security and stability in Africa; early warning and preventive diplomacy; peace-making; humanitarian action and disaster management. All of the aforementioned provisions provide a clear mandate for addressing environmental problems, especially when it comes to natural or man-made disasters.

### 7.4 The African Union Development Agency and the New Partnership for Africa’s Development (AUDA-NEPAD)

The New Partnership for Africa’s Development (NEPAD) was adopted in 2001 in Lusaka, Zambia by African Heads of State and the Government of the OAU in 2001 and was ratified by the AU in 2002. South Africa is a founding member-country of NEPAD. Its overall aim is to promote partnership and cooperation between Africa and the developed world and it envisages the economic and social revival of Africa. Its founding document states:<sup>35</sup>

This New Partnership for Africa’s Development is 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

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34 AU (2020a:106).

35 NEPAD founding document available at <http://www.dirco.gov.za/au.nepad/nepad.pdf>, accessed 1 May 2021.

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 includes an environmental component, in that:<sup>36</sup>

It has been recognised that a healthy and productive environment is a prerequisite for the New Partnership for Africa's Development, that the range of issues necessary to nurture this environmental base is vast and complex, and that a systematic combination of initiatives is necessary to develop a coherent environmental programme.

NEPAD recognises that the region's environmental base must be nurtured, while promoting the sustainable use of its natural resources. To this end, the environmental initiative targets eight sub-themes for priority intervention, namely combating desertification, wetland conservation, invasive alien species control, coastal management, global warming, cross-border conservation areas, environmental governance, and financing.

In 2003, NEPAD released the Action Plan of the Environment Initiative.<sup>37</sup> The Environment Action Plan for the first decade of the 21<sup>st</sup> Century is underpinned by the notion of sustainable development in that it takes account of economic growth, income distribution, poverty eradication, social equity and better governance. With the overall objective "to complement the relevant African processes, including the work programme of the revitalized AMCEN, with a view to improving environmental conditions in Africa in order to contribute to the achievement of economic growth and poverty eradication."<sup>38</sup>

In order to integrate NEPAD into the AU framework, a decision was taken in 2018 to transform the NEPAD Planning and Coordination Agency into the African Union Development Agency-NEPAD (AUDA-NEPAD). The mission of AUDA-NEPAD has been defined as to<sup>39</sup>

foster the development of the continent through effective and integrated planning, coordination, and implementation of Agenda 2063 with Member States, Regional Economic Communities and pan-African institutions by leveraging partnerships and technical cooperation.

One of the broad thematic areas through which AUDA-NEPAD implements its mandate to coordinate and execute priority regional and continental projects to promote regional integration towards the accelerated realisation of Agenda 2063 is the area of environmental sustainability. Interventions under this focus area have the main focus on five core performance areas: Climate change; sustainable natural resources and extractive industries management; disaster risks and recovery management; ecotourism; and environment and social impact assessment and governance. Recent interventions within the area of environmental sustainability are manifold and include biosafety

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36 Preamble to Chapter 8 of the NEPAD documentation, titled The Environmental Initiative; see generally Van der Linde (2002).

37 NEPAD (2003).

38 NEPAD (2003:33).

39 AUDA-NEPAD (2020a).

regulatory mechanisms; the deployment of photovoltaic solar systems to increase access to water and sanitation and climate smart agriculture technologies; and sustainable energy projects. Furthermore, AUDA-NEPAD has integrated climate change mitigation, adaptation and risk management practices into several programmes that promote rural transformation and a risk management framework for climate and other hazards was established, which will contribute towards an enhanced collaboration with the Green Climate Fund.<sup>40</sup> Sustainable energy, climate resilience, as well as environment and natural resources management have been identified as one of AUDA-NEPAD's strategic priorities to deliver on its strategic objectives.<sup>41</sup>

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<sup>40</sup> Ibid:43.

<sup>41</sup> AUDA-NEPAD (2020b:5).

