

A human rights based approach to climate change adaptation in the AU

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ABSTRACT

It is evident that climate change will not just have detrimental effects on millions of people of the world, but that these impacts will also have a substantial influence on the realisation and recognition of these individuals' human rights. The recognition of a climate-type right or a right to a certain environmental quality is a prerequisite for the fulfilment of international fundamental guaranteed human rights and freedoms. Communities devastated by the impacts of climate change are progressively centring their claims for environmental justice on the basis of the protection of human rights. With at least 147 national constitutions recognising environmental rights and responsibilities, it is clear that human rights law plays a vital role in the fight for environmental justice. The particular language of human rights proposes in theory that human rights surpass any other considerations and that they are by their very nature inalienable, permanent, and fundamental rights. The unambiguous acknowledgement through the international climate change negotiations that the African region is particularly vulnerable to the effect of climate change has created a mandate for the African Union to introduce a climate change-type right. Accordingly, the African Common Position on Climate Change recognised the importance of regional cooperation among member States regarding the development of coordinated law and policy in regions of common interest. The author is of the opinion that a regional approach towards recognising a human right to climate change adaptation is ultimately vital to the advancement of sustainable development in the African region. It is concluded that the African Union response to climate change adaptation should be structured around a coordinated legal response based on the cooperation of African Union member states.

Keywords:

Environmental Law; Climate Change; UNFCCC; Kyoto Protocol; African Union; Human Rights.

OPSOMMING

Dit is duidelik dat klimaatsverandering nie net miljoene mense van die wêreld nadelig gaan beïnvloed nie, maar die impakte sal 'n wesenlike invloed op die verwesenliking en erkenning van menseregte hê. Die erkenning van 'n tipe klimaats reg of 'n verskerde kwaliteit tot 'n gesonde omgewing, is 'n voorvereiste vir die vervulling van internasionale gewaarborgte menseregte en vryhede. Gemeenskappe wat lei aan die hand van klimaatsverandering baseer hul eise vir omgewingsgeregtigheid op die basis van die beskerming van menseregte. Met ten minste 147 nasionale grondwette wat omgewings regte en verantwoordelikhede erken, is dit duidelik dat menseregte 'n wesenlike rol speel in die stryd vir die omgewingsgeregtigheid. Die spesifieke taal van menseregte, stel in teorie, voor dat menseregte die hoogste vorm van erkenning is, en hulle is deur hul aard onvervreembaar en fundamentele regte. Die erkenning deur die internasionale klimaats gemeenskap dat die Afrika streek veral kwesbaar is vir die impakte van klimaatsverandering, het 'n mandaat geskep vir die Africa Unie om 'n klimaatsreg daar te stel. Gevolglik erken die Afrika Gemeenskaplike Posisie op Klimaatsverandering, die belangrikheid van 'n regionale samewerking tussen lidstate oor die ontwikkeling van gekoördineerde wet en beleid, gebaseer op gebiede van gemeenskaplike belang. Die skrywer is van mening dat 'n erkende regionale benadering tot die reg vir klimaatsverandering, is mees geskik in die regional raamwerk van Afrika. Dus is die gevolgtrekking dat die Afrika Unie se reaksie op klimaatsverandering gestruktureer moet word om 'n gekoördineerde wetlike reaksie daar te stel, wat gebaseer is op die samewerking van AU-lidlande.

Sleutelwoorde:

Omgewingsreg; Klimaatsverandering; UNFCCC; Kyoto Protocol; Menseregte.

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LIST OF ABBREVIATIONS

AAU	Assigned Amount Unit
ACHPR	African Commission on Human Rights and Peoples' Rights
AMCEN	African Ministerial Conference on Environment
AJIL	American Journal of International Law
ASIL	American Society of International Law
AR4	Fourth Assessment Report
AR5	Fifth Assessment Report
ARWA	African Region Workshop on Adaptation
AWG-KP	Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol
AWG-LCA	Ad Hoc Working Group on Long-term Cooperative Action
CAHOSCC	Conference of African Heads of State and Government on CC
CDM	Clean Development Mechanism
CER	Certified Emissions Reduction
CESCR	Committee on Economic, Social and Cultural Rights
COP	Conference of the Parties
Environ Polit	Environmental Politics
Ga. J. Int'l & Comp. L	Georgian Journal of International and Comparative Law

GHGs	Greenhouse Gases
Harv. Envtl. L. Rev.	Harvard Environmental Law Review
Hum Rts. Br.	Human Rights Brief
J Hist Intl L	Journal of the History of International Law
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International and Comparative Law Quarterly
IET	International Emissions Trading
IFDD	Institut de la Francophonie pour le Développement Durable
IPCC	Intergovernmental Panel on Climate Change
INC	Intergovernmental Negotiating Committee for a Framework Convention on Climate Change
ISS	Institute for Security Studies
J Environ Law	Journal of Environmental Law
JI	Joint implementation
KP	Kyoto Protocol
LDCs	Least developed countries
LEAD	Law Environment and Development Journal
LJIL	Leiden Journal of International Law

NEPAD	New Partnership for Africa's Development
OECD	Organization for Economic Cooperation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights
SAYIL	South African Yearbook of International Law
SDLP	Sustainable Development Law and Policy
SCUJIL	Santa Clara Journal of International Law
SERAC	Social and Economic Rights Action Centre
SSRN	Social Science Research Network
REC	Regional Economic Communities
Tul. Envtl. L.J.	Tulane Environmental Law Journal
UN	United Nations
UNCED	United Nations Conference on the Environment and Development
UNCHE	United Nations Conference on Human Environment
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UDHR	Universal Declaration on Human Rights
UNITER	United Nations Institute for Training and Research
Vt.J.Envtl.L	Vermont Journal of Environmental Law

Y.B. INT'L ENVTL L. Yearbook of International Environmental Law

YJIL Yale Journal for International Law

1 Introduction

“In an age primarily shaped by people, the so-called Anthropocene,¹ mankind is faced with enormous challenges posed by the effects of climate change,” and in the words of Intergovernmental Panel on Climate Change (IPCC) Chairman, Rajendra Pachauri, no one will be untouched by the impacts of climate change.²

Climate change³ can be described as one of the greatest challenges the 21st century is faced with and as the world encounters disputes relating to competing interests, political tensions, economic recessions and development priorities, the urgency to confront climate change has become even more pressing.⁴ Nevertheless, as climate change has been making headway during recent decades, it has united and forced decision makers to make difficult choices on an international and national level. Moreover, taking into account the number of texts on the subject of the impacts of climate change, it is quite evident⁵ that the impacts⁶ are already undermining the realisation of certain human rights, *inter alia*, civil and political rights as well as

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- 1 The term Anthropocene describes Earth's most recent geologic time period as being human-influenced, or anthropogenic, based on overwhelming global evidence that atmospheric, geologic, hydrologic, biospheric and other earth system processes have now been irrevocably altered by people. In recent years, this has become an environmental buzzword. For more information on the term, see: <http://www.anthropocene.info/>.
 - 2 Ruppel “Interactions of law and co-operative global climate governance” 42. Adelman 2014 *SSRN* 2. Hohmann 2009 *Transnational Law & Contemporary Problems* 296.
 - 3 Article 1 of the UNFCCC defines climate change as: “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”.
 - 4 UNITER 2013 <http://bit.ly/1StDIWn>. UNDP 2007 <http://bit.ly/1ypAQKU>. Rajamani 2010 *J Environ Law* 392.
 - 5 This statement reflects the view of the author and is based primarily on various academic writers and the findings of the most recent IPCC publications. See Chapter Two for specific references made to climate change impacts. Furthermore, the Report prepared and submitted on 1 May 2015 to the COP to the UNFCCC by the Special Rapporteurs for the Climate Vulnerable Forum, titled “The Effects of Climate Change on the Full Enjoyment of Human Rights,” also acknowledges this well-known phenomenon. In paragraph 1 of this Report, the Special Rapporteurs state: “It is now well understood that climate change can and does adversely affect the enjoyment of a broad range of human rights”.
 - 6 The latest IPCC Report, the Fifth Assessment Report (AR5), states that climate change currently contributes to the global burden of disease and premature deaths. Furthermore, that climate change will increase the number of people who will die or suffer from disease and injury caused by heatwaves, floods, storms, fires and droughts. Moreover, the IPCC predicts that by 2020, between 75 million and 250 million people in Africa are projected to be exposed to increased water stress due to climate change. For more information on the risks and impacts climate change poses, see AR5 at: <http://bit.ly/1DeDVUN>; specifically see Topic 2 on page 56 for more information on this.

economic, social and cultural rights.⁷ Human rights hold a certain attractiveness that appeals to society as a whole and it is this appeal that has been used to overcome some world conflicts.⁸ It should accordingly, be no surprise that current climate change talks are dominated by the consideration of human rights, in particular the consideration of the effect of climate change on the realisation of an individual's human rights.⁹ This recognition accorded with the African Union's (AU) efforts to establish a common position during its international climate change negotiations, through which the decision was taken to include articles 22 and 24 in the *African Charter on Human and Peoples' Rights*,¹⁰ signifies the beginning of a human rights agenda for recognising climate change and environmental rights in Africa.

Addressing the issue of climate change demands that action be taken to improve the global regulation of its impacts. These impacts are ultimately inevitable, but society must aim towards making socioecological systems more resilient to them.¹¹ The best response to climate change would include attempts to minimise exposure, reduce sensitivity and build adaptive capacity. This would lead to and complement all climate change strategies, which *inter alia* include mitigation, adaptation, financing and technology.

In the late 1980's climate change emerged as a public policy concern, and since then the concept of mitigation¹² has received the most attention.¹³ Through mitigation, action is taken to reduce and eliminate the causes of climate change, but mitigation alone will not be sufficient to curb greenhouse gasses (GHGs).¹⁴ While mitigation

7 Rajamani 2010 *J Environ Law* 391.

8 Examples would include the First and Second World Wars. These events acted as a reminder that never again should the world allow such violations.

9 Rajamani 2010 *J Environ Law* 391.

10 Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights (Banjul Charter)*, 27 June 1981. (Hereinafter referred to as the "*African Charter*.")

11 Cameron 2010 *Ga. J. Int'l & Comp. L* 688.

12 Mitigation is the reduction of the impact of climate change on humanity, and is primarily focused on controlling the emissions of greenhouse gases.

13 The United Nations Conference on Environment and Development took place in December 1989. UN General Assembly, UN Conference on Environment and Development: resolution / adopted by the General Assembly., 22 December 1989, A/RES/44/228. Rajamani 2010 *J Environ Law* 392. Gerrard and Fischer (eds) *The law of adaptation to climate change* 3.

14 The UNFCCC recognised in its Preamble that human activities have substantially increased the atmospheric concentrations of greenhouse gases (GHGs). Furthermore, it acknowledged that these increases enhance the natural greenhouse effect, and that this will result on average in an

actions are indispensable in curbing GHG emissions and thereby reducing the impacts of climate change, so too is adapting to the effects of climate change. Therefore, while mitigation is fundamental, so is adaptation.

Adaptation is a concept used to describe the changes in behaviour, practices, structures and the ability of human and natural systems to restrain potential damage and adapt to the expected climate change and the effects thereof.¹⁵ Adaptation can be linked to various climate change buzzwords, including *inter alia*, resilience,¹⁶ adaptive capacity¹⁷ and vulnerability.¹⁸

In recent years, international climate change negotiations have been dominated by the following main approaches: firstly, a cost/benefit model that focuses on finding an optimal international climate policy, and secondly inter-state burden sharing.¹⁹ However, this thesis will consider the introduction of a third approach, a human rights approach, which focuses on the individual's needs regarding climate change adaptation. Although a human rights-based approach to climate change is not a new idea within the current climate change debate, the writer will focus on linking the introduction of such an approach with adaptation responsibilities and efforts in the

additional warming of the Earth's surface and atmosphere, and may adversely affect natural ecosystems and humankind. Subsequently, GHGs play a vital role within the climate change regime and the regulation within regime. Article 1 of the UNFCCC defines GHGs as: "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation". Gerrard and Fischer (eds) *The law of adaptation to climate change* 3.

- 15 The UNFCCC text itself does not contain a definition of adaptation. However, the concept is defined on the UNFCCC official website as the "adjustments in ecological, social or economic systems in response to actual or expected climatic stimuli and their effects or impacts." Therefore adaptation differs from mitigation, which intends to prevent or limit the cause of climate change. Adaptation refers to changes in behaviour, practices, structures and the ability of human and natural systems to restrain potential damage. Anon Date Unknown bit.ly/1iso7mj.
- 16 The IPCC's Fourth Assessment Report (AR4). Report Glossary defines resilience, in relation to climate change, as follows: "The ability of a social or ecological system to absorb disturbances while retaining the same basic structure and ways of functioning, the capacity for self-organisation, and the capacity to adapt to stress and change."
- 17 The IPCC's AR4 Report Glossary defines adaptive capacity, in relation to climate change as follows: "The ability of a system to adjust to climate change, including climate variability and extremes, to moderate potential damages, to take advantage of opportunities, or to cope with the consequences." AR4 2007 <http://bit.ly/TrVWJv> 869.
- 18 The IPCC's AR4 Report Glossary defines vulnerability, in relation to climate change as follows: "Vulnerability is the degree to which a system is susceptible to, and unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the character, magnitude, and rate of climate change and variation to which a system is exposed, its sensitivity, and its adaptive capacity."
- 19 Bell 2013 *WIREs* Climate Change 160.

Africa Region. The case brought in front of the Inter-American Commission on Human Rights, known as the Inuit's Petition,²⁰ supports the notion that the AU as a regional organisation is best suited to create and implement a human rights approach to climate change adaptation. In this case the claimants used a similar regional treaty on which to base their claims of human rights violations. A hypothesis is therefore put forward that the inclusion of a human rights-based approach to climate change adaptation would positively contribute to Africa's climate resilience and adaptive capacity.

Attempting to explain the concept of climate change requires a broad understanding of social, economic, development, scientific, political and environmental matters²¹ and because of the "multi-faceted character" of the phenomenon, numerous international laws and institutions addressing climate change refer to the attempts to regulate the response to it as a "regime".²² The aim of Chapter Two of this work is to shed light on the climate change regime within the global legal framework. This chapter will explore and scrutinise the complex network of relevant agreements and mechanisms, focussing on the UNFCCC,²³ the Kyoto Protocol²⁴ and the Aarhus Convention,²⁵ all of which are part of the international "climate change regime". Through this regime a responsibility has been created regarding the establishment of regional workshops with a specific focus on adaptation within the African region.

20 *Petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by the acts and omissions of the United States.* (Hereinafter referred to as the "Inuit's Petition"). A copy of the Inuit's Petition can be found here: http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf.

21 Danish *Sustainable Development Law and Policy* 10.

22 A regime can be defined as: "a persistent and connected set(s) of rules (formal and informal) that prescribe(s) behavioural roles, constrain activity, and shape expectations in a particular issue area." Danish *Sustainable Development Law and Policy* 76.

23 United Nations Framework Convention on Climate Change, 1992. (Referred to hereinafter as "*the Convention*" or "*UNFCCC*".)

24 Kyoto Protocol to the UNFCCC, *UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 1998.* (Referred to hereinafter as "*the Protocol*").

25 The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted at Aarhus, Denmark on 25 June 1998. (Hereinafter referred to as the "Aarhus Convention".) Find the Aarhus Convention available at: www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

Within this international regime the UNFCCC, the *Copenhagen Accord*²⁶ and the *Cancun Agreements*²⁷ recognise that Africa is particularly vulnerable to the effects of climate change, due to its low adaptive capacity. Chapter Three will focus on a regional theme of climate change and will introduce a human rights-based approach within the AU context, taking into account how the international legal climate change regime is integrated within the African legal framework.

Chapter Four explores the argument that the fulfilment of the right to development and the right to a satisfactory environment as absolute human rights endorses the recognition for adaptation within the international climate change regime. Importantly, international human rights instruments like the *International Covenant on Civil and Political Rights*²⁸ and the *International Covenant on Economic, Social and Cultural Rights*²⁹ emphasise the fact that human rights are mutually interdependent. Through such an acknowledgment, climate-type rights ought to be fundamental, interdependent and internationally recognised as human rights. This chapter draws the inference that in order to achieve the objectives set out under the *AU Constitutive Act*³⁰ and to give full recognition to articles 22 and 24 of Banjul, an independent AU human right to climate change adaption must be created.

In conclusion, Chapter Five recognises that climate change is no longer just an environmental issue, but is a global problem the impacts of which will have a significant influence on the realisation and recognition of individuals' human rights. This chapter also concedes that the recognition of a climate-type right will have far-reaching effects, whether such a human right to climate change adaptation is created as a subordinate right, dependent upon other recognised human rights, or an independent human right. Lastly, this chapter provides recommendations on how the noticeable human right

26 Copenhagen Accord, 2009. (Hereinafter referred to as the "*Copenhagen Accord*".)

27 Cancun Agreements, 2010. (Hereinafter referred to as the "*Cancun Agreements*".)

28 *UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations. G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.*

29 *UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966. G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3.*

30 Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000. (Hereinafter referred to as the "*AU Constitutive Act*".)

deficit existing in particular vulnerable regions would be best addressed through the creation of a human rights-based approach to climate change adaptation, which would be implemented at an institutional level in the AU.

2 Development of the International Climate Change Regime

The modern international climate change regime encompasses a complex network of agreements and mechanisms. This chapter will examine and explore the climate change regime within an international legal framework in an effort to understand the global challenge of climate change and particularly what the AU's response should be towards these challenges. In particular, this chapter will focus on adaptation measures, which are crucial to remedying the impacts of climate change. The international regime itself highlights the urgency of the need for adaptation measures and many developing countries' governments³¹ have given adaptation action a high, if not urgent, priority.³²

A legal framework aspiring to govern the Earth's climate cannot be successful in its development if there is not a concerted effort to address the concerns of international society as a whole.³³ With the creation of the United Nations (UN), came global involvement and participation, through which the international legal climate change regime saw rapid development and ultimately formed part of the international law of the 20th century.³⁴ Subsequently, public awareness increased and was encouraged through the search for ecological and social alternatives for development.³⁵ This led to the first mainstream idea of sustainable development and ultimately, the beginning of the climate change regime as it is known today.

During the early years of development, the climate change regime was influenced by international negotiations and specifically, the notion that climate change posed an array of social, environmental and economic challenges to developed as well as developing nations.³⁶ After the realisation had dawned that climate change would undoubtedly affect both developed and developing nations, a globally combined effort was anticipated. The first joint global action aimed at to dealing with the threat of

31 Examples of developing countries *inter alia* include: Angola, Brazil, China, Gambia, Kenya, Mexico, Philippines, Serbia and South Africa.

32 UNFCCC 2007 <https://unfccc.int/resource/docs/publications/impacts.pdf> 5.

33 Ramakrishna "The UNFCCC, history and evolution of the climate change negotiations" 47.

34 Ruppel "Interactions of law and co-operative global climate governance" 42.

35 Pelling *Adaptation to climate change* 4.

36 Depledge "The global climate change regime" 435.

climate change came in 1988,³⁷ just as the UN General Assembly (UNGA) adopted a unanimous resolution recognising the potential threat of climate change.³⁸ The aforementioned resolution endorsed the establishment of the IPCC,³⁹ a scientific body designed to assess climate change. International society saw the establishment of two global and international instruments, namely: The *UN Framework Convention on Climate Change*, 1992⁴⁰ and the *Kyoto Protocol*.⁴¹ These instruments were seen as global, in the sense that both allowed for and sought global participation in their governance processes.⁴²

This chapter will highlight the key political, social and economic features of the international climate change regime, primarily focusing on the promotion of adaptation through the Convention and its various agreements, accords, conferences, and the Kyoto Protocol.

2.1 Historical and institutional context of the Convention

The international political platform saw climate change emerge into the legal world in 1988, when the UNGA adopted Resolution 43/53 “declaring climate change a common concern for mankind”.⁴³ The fact that scientific conclusions in relation to the causes and potential human impact on the climate could be drawn was enough to motivate for action on an international level.⁴⁴ 20 Years after the UN Conference on the Human Environment (UNCHE) had taken place in Sweden, the UN Conference on

37 See Bondansky 1993 *YJIL* 460-471 for a detailed outline of developments, specifically during 1985-1992, in the climate change regime. For the purposes of this thesis only a brief history is necessary, and the focus will be placed on the adaptive measures within the UNFCCC.

38 Depledge “The global climate change regime” 433.

39 “The IPCC is a scientific body under the auspices of the United Nations. It reviews and assesses the most recent scientific, technical and socio-economic information produced worldwide relevant to the understanding of climate change. It does not conduct any research nor does it monitor climate related data or parameters.” IPCC date unknown <http://www.ipcc.ch/organization/organization.shtml>.

40 United Nations Framework Convention on Climate Change, 1992. (Hereinafter to as “*the Convention*”.)

41 Kyoto Protocol to the UNFCCC, *UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997*; 37 *ILM* 22 1998. (Hereinafter referred to as “*the Kyoto Protocol*” or “*Protocol*” or “*KP*”.)

42 Depledge “The global climate change regime” 435.

43 Resolution 43/53 was proposed by the Government of Malta, which insisted on protection for present and future generations. Yamin and Depledge *The international Climate Change Regime* 22.

44 Soltau *Fairness in International Climate Change Law and Policy* 50.

Environment and Development (UNCED), known as the Earth Summit, was held in Rio de Janeiro.⁴⁵ The focal points of the Earth Summit were the introduction of the principle of sustainable development and the emphasis placed on the need for environmental protection and responsible development.⁴⁶ In 1988, under the World Meteorological Organisation (WMO) and the UN Environment Program (UNEP), the international scientific effort to study climate change was taken up by the IPCC.⁴⁷ The aim was to form an organisation that would bring together the world's best climate scientists to provide policymakers, politicians and citizens with information and important findings on climate change. Discussions and negotiations about the possible drafting of an international convention on climate grew, while the international political response remained supportive of a framework that would deal with climate change specifically. The UNGA, in 1990, established the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC), through Resolution 45/212, which ultimately launched the negotiations on a climate convention. This committee had the mandate to negotiate for a convention containing appropriate commitments and targets for climate change. These commitments had to be gathered in time for signatures at the Earth Summit.⁴⁸ Mostafa Tolba, the then Executive Director of the UNEP, noted that the negotiations of the Convention were driven by financial requirements, technology transfer and economic reforms.⁴⁹ Fundamentally, these three focal points have remained much the same over the past decades, and current climate change talks are driven by concerns about finance, economies and technology.

45 One particular author, Shelton, is of the opinion that Rio+20 was focused only on gaining political support for sustainable development and did little for the fight for a climate-type human right. In the end, the Rio+20 document, *The Future We Want*, included references to the Universal Declaration of Human Rights and made specific reference to particular rights such as the right to development, the right to adequate standard of living, the right to food and the right to water and sanitation. Shelton 1992 *Y.B. INT'L ENVTL L.* 75. Orellana 2015 *SCUJIL* 77.

46 Anon 1997 <http://bit.ly/1mR9cS7>.

47 Soltau *Fairness in International Climate Change Law and Policy* 51.

48 Bodansky 1993 *YJIL* 453.

49 Ramakrishna "The UNFCCC, history and evolution of the climate change negotiations" 51.

2.1.1 Key provisions of the UNFCCC

With the adoption of the UNFCCC-Convention on the 9th of May 1992, it could be said that a global climate change regime had finally been established.⁵⁰ That same year the text of the Convention was adopted and opened for signature at the Earth Summit.⁵¹ The text of the Convention can be summarised under four main themes: introductory provisions, commitments, institutions and final provisions relating to amendments. The key objective of the Convention is “the stabilisation of GHG emissions at a level that would prevent dangerous anthropogenic interference with the climate system” and this stabilisation “should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change.”⁵²

Bodansky⁵³ is of the opinion that the objective of the Convention is not completely comprehensible and clear-cut; it should rather be regarded as a collective commitment and not an obligation.⁵⁴ Although numerous targets to stabilise GHGs have been proposed, these targets cannot be viewed as goals to meet any specific target. Rather, through the implementation of the Convention and subsequent protocols these targets are interpreted as a commitment to strive for and an effort to stabilise GHG emissions.⁵⁵ Nevertheless, considering that more than 140 states, all with different ideologies, were involved in the somewhat short negotiating process, reaching an agreement was an achievement in itself.⁵⁶

The Convention established four principles under article 3: the protection of the climate system for the benefit of present and future generations, the principle of equity, the principle of common but differentiated responsibilities, and the precautionary principle.⁵⁷ Through the insertion of article 2 the Convention strategically linked itself

50 Depledge “The global climate change regime” 435.

51 Soltau *Fairness in International Climate Change Law and Policy* 50.

52 Article 2 of the Convention.

53 Bodansky 1993 *YJIL* 454.

54 Kravchenko, is also of the opinion that the Framework does not contain concrete obligations. Kravchenko 2008 *Vt.J.Env'tl.L* 516.

55 Soltau *Fairness in International Climate Change Law and Policy* 56.

56 Bodansky 1993 *YJIL* 454.

57 Article 2 of the Convention.

to sustainable development. This echoes discussions between the North and South.⁵⁸ Negotiations saw specific developing countries arguing for the inclusion of sustainable development and recognising that development is an inalienable human right.⁵⁹ Africa and more particularly the AU is a leading example of a group of developing nations agreeing that development is a human right. Subsequently the right to development was entrenched in the Banjul Charter, article 22. This right is also linked to the right to a satisfactory environment in article 24.⁶⁰ During discussions the parties acknowledged the fact that the largest share of historical and current global emissions of GHGs had originated in developed countries.⁶¹ This acknowledgment made it evident that the third principle of common but differentiated responsibilities was to receive some valuable attention.⁶² Accordingly, the principle allows differentiation in commitments between Annex I parties⁶³ - developed countries, and non-Annex I parties - the developing countries. Effectively, developed countries adopted targets for stabilisation and reduction while developing countries argued that it would be unfair for them to take on commitments. This matter will be highlighted and elaborated on in the subsequent paragraphs.

The commitments agreed to in article 4, forms the central part and focal-point of the Convention, setting out obligations common to all parties as well as those commitments that are applicable only to Annex I countries. Commitments the Convention can be organised into three categories: general commitments; specific commitments on sources and sinks;⁶⁴ and specific commitments on financial

58 Predominantly the issues between Northern and Southern countries derive from the premise that the Southern countries believe that while the North developed and became industrialised, the South suffered disproportionately. Soltau *Fairness in International Climate Change Law and Policy* 55.

59 Bodansky *YJIL* 1993 504.

60 See Chapter Four of this thesis for a discussion on the right to development.

61 Preamble to the Convention.

62 The principle of common but differentiated responsibilities appears in two other international instruments, the *General Agreement on Tariffs and Trade* and the *UN Convention on the Law of the Sea*.

63 Annex I countries belong to the Organization for Economic Cooperation and Development (OECD), and *inter alia include*: Australia, the European Union, the UK and the USA. For a full list of the Annex I countries, see <http://bit.ly/1NCoCEN>.

64 Article 1 of the UNFCCC defines sinks as: "any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere".

resources and technology transfer.⁶⁵ The commitments under article 4(1) include, *inter alia*, that all parties prepare national inventories of anthropogenic emissions and removals by sinks, and implement programmes containing measures to mitigate and adapt to climate change. Therefore to achieve the commitments made under the Convention all parties must formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources.⁶⁶ Furthermore, parties are expected to promote sustainable development and conservation, and to enhance sinks and reservoirs.⁶⁷

2.1.1.1 UNFCCC and Adaptation

Article 4(1)(b) requires that appropriate regional programmes containing measures to facilitate adequate adaptation to climate change are formulated. Similarly, article 4(1)(e) requests parties to cooperate in preparing for adaptation and to develop appropriate integrated plans, specifically for Africa. Although the Convention places emphasis on both mitigation and adaptation measures, it is clear that when it concerns developing countries, who are particularly vulnerable to the effects of climate change, adaptation is emphasized. These parties must also be assisted by developed countries with meeting the cost of adaptation. Here it is clear that the Convention does not just place a disproportionate burden on those particular vulnerable countries, since it provides them with nominally assured assistance in reaching these adaptation goals, through articles 4(4) and 4(8).

2.1.2 Significant commitments under the Convention

Under article 4(2), Annex I countries commit to adopting national policies to take measures to mitigate climate change by limiting their GHG emissions, and to protect their GHG sinks and reservoirs.⁶⁸ In comparison with non-Annex countries, the commitments from Annex I parties are to return their emissions to 1990 levels by the

65 Article 4 of the Convention.

66 Article 4(1)(b) of the Convention.

67 Soltau *Fairness in International Climate Change Law and Policy* 57.

68 Article 4(2) of the Convention.

year 2000; more stringent and regular reporting obligations; and provisions concerning the granting of assistance.⁶⁹ In accordance with article 4(3) of the Convention, developed nations, excluding those countries undergoing a transition to market economies, shall provide new and additional financial resources to meet the full, agreed costs incurred by developing countries. This commitment also includes funding for the resources needed by developing countries, and technology transfers. The impression is thus that in the absence of such measures it would be unreasonable to expect developing countries to bear their share of the common but differentiated responsibilities.⁷⁰

Article 12, which is closely related to article 4, sets out the different reporting obligations. These reporting obligations specifically reflect the difference between developed and developing countries' commitments. Developing countries are required to submit their first national communication within three years of the Convention's entering into force. This is rather different from the obligations placed on developed country parties, who have six months to submit their communications.⁷¹ Least developed countries (LDCs)⁷² can, however, submit their national communications at their own discretion.⁷³ Reporting and monitoring form a vital component of the Convention, as they do not just comprehensively measure the Convention's progress, but as the foundation of multilateral treaties as well, they facilitate trust among parties.⁷⁴ Compliance and review are not explicitly sanctioned under the Convention, although the Conference of the Parties (COP) has created a process of in-depth reviews of Annex I countries' national communications.⁷⁵ The COP is the supreme body of the Convention and is empowered to make decisions to promote the effective

69 Soltau *Fairness in International Climate Change Law and Policy* 57.

70 Soltau *Fairness in International Climate Change Law and Policy* 57.

71 Article 4(2)(b) of the Convention.

72 The LDCs represent the poorest and weakest segment of the international community. They comprise more than 880 million people (about 12 per cent of world population), but account for less than 2 percent of world's GDP and about 1 percent of global trade in goods. For a detailed description and list of LDCs see the website for the UN Office of the High Representative for LDCs, Landlocked Developing Countries and Small Island Developing States <http://unohrls.org/about-ldcs/>.

73 Article 12(5) of the Convention.

74 Soltau *Fairness in International Climate Change Law and Policy* 58.

75 Soltau *Fairness in International Climate Change Law and Policy* 58.

implementation of the Convention, including to “exercise such other functions as are required for the achievement of the objective of the Convention”.⁷⁶

During the first COP in Berlin the parties soon realised that additional commitments from blocks were essential, and that they would have to ensure that further commitments were made to endorse the Convention’s outcomes.⁷⁷ The parties reached an agreement and the *Berlin Mandate*⁷⁸ set in motion a process to reinforce the Convention’s commitments in terms of the creation of a protocol or another similar instrument.⁷⁹ Under the Convention’s article 17, protocols may be adopted at any ordinary session of the COPs, and at the third COP in Japan, the Kyoto Protocol was adopted. While the UNFCCC contains the mandate for the mitigation of GHGs, the specific measures needed to achieve the proposed mitigation would be identified through the Kyoto Protocol.⁸⁰

2.2 Kyoto Protocol

The Protocol was adopted in 1997 and entered into force in 2005. It shares the objective of the UNFCCC. In comparison with the UNFCCC, which does not have mandatory obligations and encourages only Annex I (industrial) countries to stabilise GHG emissions, the Protocol goes further, and obliges them to do so.⁸¹ The Protocol includes 28 articles, 2 annexes, 3 decisions adopted at COP 3 and it covers the six main GHGs⁸² as listed in Annex A. Under the Convention’s objective of common but differentiated responsibilities, the Protocol imposes a heavier duty on developed countries. The essential component of the Protocol is the binding quantified emission limitation and reduction commitments, which are established by article 3. Each Annex I country under the Convention is listed in Annex B of the Protocol with specific targets

76 Article 7(2)(m) of the Convention

77 Soltau *Fairness in International Climate Change Law and Policy* 60.

78 The Ad Hoc Group on the Berlin Mandate was created after the Berlin COP, met eight times between 1995-1997, and produced a compilation text for COP-3 in Kyoto. See Breidenich 1998 *ASIL* 317-319 for a detailed discussion on the negotiations surrounding the KP.

79 Soltau *Fairness in International Climate Change Law and Policy* 61.

80 Barnard *Nuclear energy in Africa* 42.

81 Ruppel “Interactions of law and co-operative global climate governance” 45. Kravchenko 2008 *Vt.J.Envtl.L* 518.

82 The six main GHs are: Carbon dioxide (CO₂); Methane (CH₄); Nitrous oxide (N₂O); Hydrofluorocarbons (HFCs); Perfluorocarbons (PFCs) and Sulphur hexafluoride (SF₆).

of reduction. These commitments vary among the different parties and are calculated, with some deviations, with reference to each party's 1990 emission level.⁸³ In particular, if all of the Annex I countries meet their targets to reduce emissions, the overall global reduction will be 5,2 per cent in relation to the 1990 emissions.

2.2.1 Fundamental commitments of the Kyoto Protocol

The Kyoto Protocol contains commitments that relate to all three areas specified by the Berlin Mandate. These areas are binding emission reduction targets for Annex I countries, and a requirement for industrialized countries to implement or further promote suitable policies and measures to meet their targets and provisions that reaffirm and seek to advance the implementation of certain commitments under the UNFCCC.⁸⁴ The Protocol establishes a cumulative target that applies to a multiyear commitment period rather than a single-year fixed target, and each Annex I country must ensure that its total emissions during the commitment period do not exceed its assigned amount.⁸⁵ Article 3(1) states that Annex B parties shall individually or jointly reduce their overall GHG emissions within the first commitment period (2008-2012) by at least 5 per cent below 1990 levels. For Annex B countries to reach these levels, they ought to have adopted differentiated quantified emission limitations or reduction commitments.⁸⁶ This multi-year formulation was devised to give parties greater flexibility in meeting their emission reduction commitments.⁸⁷ For this reason the Protocol created mechanisms, so-called flexibility mechanisms, to provide for the trans-boundary trading of emission allowances and credits arising from emission reductions.⁸⁸

A key feature of the Protocol is the various flexibility mechanisms it creates.⁸⁹ Parties from Annex 1 countries which ratified the Protocol are permitted to make use of one

83 Danish *Sustainable Development Law and Policy* 11.

84 Breidenich 1998 *ASIL* 320.

85 Breidenich 1998 *ASIL* 321.

86 These burden-sharing negotiations and commitments allowed an 8% reduction by the EU, 7% for the USA and specifically a 21% for Germany. Woerdman 2000 *Energy Policy* 29.

87 Breidenich 1998 *ASIL* 321.

88 Soltau *Fairness in International Climate Change Law and Policy* 60.

89 Anon Date Unknown <http://bit.ly/SsXSkw>.

or more of these mechanisms.⁹⁰ Firstly, it establishes three market-based mechanisms for reaching mitigation targets, namely joint implementation (JI),⁹¹ the clean development mechanism (CDM)⁹² and international emissions trading (IET).⁹³ Second, it establishes flexibility in terms of which GHGs is recognised. The Protocol refers only to a reduction of emission of GHGs not controlled by the *Montreal Protocol*,⁹⁴ and does not specifically prescribe these GHGs.⁹⁵ Furthermore, countries with economies in transition are granted flexibility in choosing their baselines. Article 4(6) of the Protocol also allows members of a regional integration organisation to fulfil their obligations jointly. This could potentially mean that the AU, as a regional organisation could jointly implement reduction targets.⁹⁶ These mechanisms are intended to help stimulate green investment and help parties meet their emission targets in a cost-effective way.⁹⁷

2.2.1.1 Joint Implementation

Soltau describes JI as a project-based mechanism whereby reductions in GHG emissions are achieved through projects implemented in an Annex I country by investors from another Annex I country.⁹⁸ The resulting reductions in emissions can then be claimed by the investing country and sold on the market or credited against the investor country's target.⁹⁹ JI is closely connected to CDM, but it is intended to assist only Annex I countries. Annex I countries view JI as a cost-effective way to reduce global emissions, although some developing countries fear that industrialised countries will use JI as a way to avoid taking domestic action to reduce GHG

90 Anon Date Unknown <http://bit.ly/SsXSkw>.

91 Article 6 of KP.

92 Article 12 of KP.

93 Article 17 of KP.

94 *Montreal Protocol on Substances that Deplete the Ozone Layer*, 1987.

95 Article 2(2) of KP.

96 Africa's co-operative efforts to commit to specific reduction targets and climate change strategies are discussed, in detail, in the following Chapter.

97 Barnard *Nuclear energy in Africa* 43.

98 Soltau *Fairness in International Climate Change Law and Policy* 75.

99 Soltau *Fairness in International Climate Change Law and Policy* 75.

emissions.¹⁰⁰ CDM therefore has a much better dual purpose, aiding both Annex I and Non-Annex I countries with meeting their obligations under article 3.

2.2.1.2 Clean Development Mechanism

Like JI, CDM is a project-based mechanism that earns its credits through projects based in developing countries. With regards to CDM, for every certified emissions reduction purchased, an Annex I country increases its GHG allowance. The CDM is created under article 12, whereby Annex I parties may invest in emission reduction projects in non-Annexed countries (typically developing countries) and may apply some portion of the reductions generated by these projects toward meeting their emission targets under article 3.¹⁰¹ In return, a share of the proceeds of these projects will be used to finance adaptation to climate change in particularly vulnerable developing countries, as well as to cover the administrative expenses of the mechanism.¹⁰² The purpose, in accordance with article 12(2), of the CDM is to assist parties, not Annex I parties, in achieving sustainable development and to contribute to the realisation of the objective set by the Convention. The GHG reductions must be real and measureable and according to article 12(5) “each activity shall be certified by operational entities”. Furthermore, CDM project developers must demonstrate that a project’s reduction in GHG emissions goes beyond business as usual, which involves showing that the reductions generated are in addition to that which would have occurred in the project’s absence.¹⁰³ While the Protocol lists the CDM as a mitigation measure for developing regions like Africa, it is not best suited to African needs, especially considering the continent’s extremely high climate change vulnerability.¹⁰⁴

100 Breidenich 1998 *ASIL* 323.

101 Breidenich 1998 *ASIL* 325.

102 Breidenich 1998 *ASIL* 325.

103 Soltau *Fairness in International Climate Change Law and Policy* 80.

104 It would seem unlikely that African countries will invest and set up large institutional infrastructures in order to meet the requirements to qualify for CDM, especially considering the average volume of emissions. Barnard *Nuclear energy in Africa* 43.

2.2.1.3 International Emissions Trading

Annex I countries may engage in IET on the grounds that it will be for the purpose of fulfilling their commitments to the Protocol.¹⁰⁵ The Protocol allows each Annex I country a number of assigned amount units (AAUs), corresponding to its individual emission allowance in Annex B of the Protocol.¹⁰⁶ Through the IET, countries can now trade their AAUs either to gain more or to sell additional AAUs.

2.3 Aarhus Convention

Traditionally, law and policy are created by one of two approaches; a top-down or a bottom-up approach. However, there are also alternative opportunities that present potential avenues, when traditional regimes are unsuccessful and prove ineffective to those individuals who depend on the available remedies. The *Aarhus Convention*¹⁰⁷ is an example of how a legal instrument was formed by combining traditional and modern law-making and enforcement, while involving civil society and state actors.

Conventional top-down approaches are centred on the premise that States adopt formal treaties or formulate binding instruments derived from treaties.¹⁰⁸ Examples within the international climate change regime include the UNFCCC and the Kyoto Protocol, and although these instruments pose various advantages,¹⁰⁹ the noticeable shortcomings simply cannot be ignored. Within the international climate change regime, illustrations of how the top-down approach is proving to be inadequate are quite obvious. Negotiations under the UNFCCC and the Kyoto Protocol have demonstrated that this approach often moves at a sluggish pace and the desired

105 Article 17 of the KP.

106 Soltau *Fairness in International Climate Change Law and Policy* 84.

107 The United Nations Economic Commission for Europe (UNECE) *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* adopted at Aarhus, Denmark on 25 June 1998. (Hereinafter referred to as the “*Aarhus Convention*”.) Find the Aarhus Convention available at: www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

108 Dellinger 2013 *Oregon Review of International Law* 77.

109 Advantages of the top-down approach *inter alia* include the fact that large governments have added technical, financial, human, and other resources at their disposal. Furthermore, they have a larger consortium of expertise available. Dellinger 2013 *Oregon Review of International Law* 78.

results are certainly not reached without political mishaps, which often take a great deal of time to be resolved.¹¹⁰

The somewhat modern bottom-up approach, which is aimed at rectifying some of the disadvantages inherent in the top-down approach, provides additional methods to solve the problems particularly encountered within environmental fields.¹¹¹ Most importantly, what makes this approach relevant is the fact that a diverse range of actors are involved during negotiations, from state actors to governmental representatives, and from private parties to non-governmental organisations. The potential future successor of the Kyoto Protocol provides a good illustration of how different actors are coming together to contribute to the creation of an international climate change document.

The Aarhus Convention is not just an example of how local state actors and civil society came together to create a legal instrument, but it is the first multilateral environmental agreement that centres on the link between States' obligations and their citizens.¹¹² The Convention recognises the right to live in an adequate environment and furthermore acknowledges that to enable individuals to assert this right they must have access to information, be entitled to participate in decision-making, and have access to justice regarding environmental matters.¹¹³ Consequently, the Convention requires its parties to take the necessary legislative, regulatory and other steps to guarantee that its citizens effectively have access to the rights recognised in the Convention.¹¹⁴ Uniquely, the Convention allows members of the general public to communicate with the Compliance Committee in relation to a particular party's compliance with the Convention.¹¹⁵ Although the Aarhus Convention has been ratified

110 Dellinger 2013 *Oregon Review of International Law* 78.

111 Dellinger 2013 *Oregon Review of International Law* 81.

112 The Aarhus Convention is also thought to play a vital role in the recognition of environmental procedural rights. Bobak *The Horizontal Effect of the Right to a Healthy Environment* 45. Dellinger 2013 *Oregon Review of International Law* 87.

113 The recognition of procedural rights ties in with Principle 10 of the Rio Declaration, which recognises that environmental issues are best dealt with when all stakeholders participate, particularly concerned citizens. Preamble of the Aarhus Convention.

114 Article 3 of the Aarhus Convention.

115 Dellinger 2013 *Oregon Review of International Law* 88.

mostly by European Countries,¹¹⁶ it was intended to be a regional treaty and has similarities to the environmental rights recognised in the Banjul Charter.

2.4 Conclusion

It should be recognised that, while developing countries do not have to make big economic sacrifices in an effort to reduce GHG emissions, this does not mean that these countries are experiencing less of an impact.¹¹⁷ The challenge concerning fairness, when it comes to climate change and Africa, is that those countries least responsible for the problem of global climate change are the most vulnerable to climate change impacts.¹¹⁸ The UNFCCC recognises that developed and developing countries have different responses towards climate change and this leads to the common but differentiated responsibilities principle, where the UNFCCC tries to balance/compensate the commitments of developed countries with those of developing countries. Developing nations are required to adapt to climate change by focussing their actions on sustainable development and developed nations are required to address climate change through mitigation measures. Consequently, this leads to a process of adaptation to climate change tailored specifically to the needs of African countries.

The IPCC's AR4 acknowledges that Africa has a low adaptive capacity and is one of the most vulnerable continents when it comes to the effects of climate change.¹¹⁹ Climate change will have a considerable impact on the following sectors and activities in Africa: access to and the demand for water, the agricultural sector, energy, health, the coastal zones, tourism, settlements, infrastructure and ecosystems.¹²⁰ Within the

116 Examples of non-European countries include, *inter alia*, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Ukraine.

117 Gray and Gupta "The United Nations climate change regime and Africa" 69.

118 Madzwamuse *Climate Governance in Africa* 9. Barnard *Nuclear energy in Africa* 43. Scholtz 2011 SAYIL 201.

119 IPCC AR4 available at <http://bit.ly/1v1BbQU> 435. Scholtz 2011 SAYIL 201. Boko *et al Impacts, Adaptation and Vulnerability* 436. Barnard *Nuclear energy in Africa* 43.

120 Scholtz 2011 SAYIL 201. IPCC AR4 2007 <http://bit.ly/TrVWJv> 444-451.

international climate change regime the non-binding¹²¹ *Copenhagen Accord*¹²² acknowledges Africa's vulnerability to the effects of climate change and calls for enhanced action and international cooperation to implement adaptation actions and to support resilience activities within those regions that are particularly vulnerable.¹²³ As a result, the *Cancun Agreements*¹²⁴ also recognised that Africa is most vulnerable to climate change impacts.¹²⁵ Closely related to the Cancun Agreements and the Copenhagen Accord is Decision 1/CP.10 drafted at COP10 in Buenos Aires, 2004. During COP10 the UNFCCC secretariat was requested to arrange three regional workshops to facilitate the exchange of information and assist countries in identifying specific adaptation needs and concerns.¹²⁶ Subsequently, in 2006 the African Regional Workshop on Adaptation (ARWA) was held in Ghana, which focused on emphasising African concerns related to climate change, while specific needs and concerns related to adaptation under the UNFCCC were identified.¹²⁷

The above mentioned international instruments set out the mandate discussed in Chapter Three, in the sense that they create a responsibility regarding regional workshops while specifically referring to climate change within the African region with the focus on adaptation activities. In the next chapter Africa's specific vulnerability towards climate change will be discussed and reference will be made to important African climate change instruments.

121 COP15 did not adopt the accord. Instead the Copenhagen Accord was drafted and noticed by the COP by way of decision 2/CP.15, available at <http://bit.ly/1kltvyE>. Scholtz 2011 *SAYIL* 201. UNFCCC Date Unknown <http://bit.ly/1mj9YbM>.

122 Copenhagen Accord, 2009. (Hereafter referred to as Copenhagen Accord.)

123 Copenhagen Accord paragraph 3.

124 Cancun Agreements, 2010.

125 Paragraph 95 of Decision 1/CP.16, *The Cancun Agreements: Outcome of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention*, available at <http://bit.ly/1pJyhkq>. (Hereinafter referred to as "*Cancun Agreements*".)

126 Paragraph 4 and 5 of Decision 1/CP.10. Barnard *Nuclear energy in Africa* 45.

127 IISD 26 September 2006 <http://bit.ly/1mnZpnR> 1. Barnard *Nuclear energy in Africa* 45.

3 The international climate change regime and the AU

It is evident that climate change poses a global threat and that although the impact will be universal, the effects will not be proportionately distributed across the world.¹²⁸ The IPCC has stressed that Africa is one of the regions that are most vulnerable to the effects of climate change.¹²⁹ This is also recognised by the non-binding¹³⁰ Copenhagen Accord and the Cancun Agreements.¹³¹ Article 3(2) of the UNFCCC recognises that certain countries have specific needs and special circumstances, especially those who are particularly vulnerable to the effects of climate change. Africa is particularly vulnerable to the effects of climate change due to its low adaptive capacity.¹³² Therefore, the UNFCCC has placed a somewhat “heavier” duty on developed nations to assist developing countries in realising their adaptation investments.

The AU¹³³ was formed as an instrument to work towards the realisation of Africa’s quest for unity, and the Member States set out to formulate various positions that would lead them in their efforts to unite the continent. An examination of the various environmental agreements and policies under the AU suggests that the *African Charter*¹³⁴ is considered as the foundation and the introduction to all African rights. As a human rights treaty it guarantees civil and political, economic, social and cultural

128 Scholtz 2011 SAYIL 201.

129 Boko *et al Impacts, Adaptation and Vulnerability* 436. Scholtz 2011 SAYIL 201. Ruppel and Ruppel-Schlichting *Environmental Law and Policy in Namibia* 283. UNEP 2006 <http://bit.ly/1CSSL3k>. UNFCCC *Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries* 18.

130 Due to objections by a group of states (led by Sudan, Venezuela and Bolivia), COP15 was unable to adopt the accord. Instead the COP took “note” of it. Scholtz 2011 SAYIL 201.

131 Least developed countries and Small Island Developing States have also been recognised as countries which are particularly vulnerable to the effects of climate change.

132 The IPCC’s AR4 Report Glossary defines adaptive capacity in relation to climate change as follows: “the ability of a system to adjust to climate change, including climate variability and extremes, to moderate potential damages, to take advantage of opportunities, or to cope with the consequences.” AR4 2007 <http://bit.ly/TrVWJv> 869.

133 For a brief background on how the AU was formed, refer to: <http://www.au.int/en/about/nutshell>.

134 Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights (Banjul Charter)*, 27 June 1981. (Hereafter referred to as the African Charter.)

rights, and furthermore encompasses environmental rights in broad terms through the inclusion of articles 22 and 24.¹³⁵

Article 22:

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 24:

All peoples shall have the right to a general satisfactory environment favourable to their development.

The inclusion of Article 24 in the African Charter means that the right to a satisfactory environment is included in an international binding human rights instrument.¹³⁶ This right is furthermore connected with and seen as a link between a human-rights based approach and environmental protection; it is in effect linking the right to a satisfactory environment to the right to development.¹³⁷ This realisation goes further, to associate this right with a recognised human right. As formulated in the African Charter, the right itself is vague and ambiguous. The Charter gives no clear indication as to what the right would entail or how it should be interpreted or applied. However, the SERAC¹³⁸ decision, given by the African Commission on Human Rights and Peoples' Rights,¹³⁹ reaffirmed the right's existence and at least some authentication to the particular subject matter was contributed.¹⁴⁰ Commonly, environmental rights, specifically the right to a satisfactory environment, have been categorised as "third generation rights" or solidarity rights, which implies that individuals and the general public can benefit

135 The AU was the first regional system that recognised the right to a satisfactory environment, and it was also the first to provide meaning and content to the right. Van der Linde and Louw *AHRLJ* 170. Ruppel and Ruppel-Schlichting *Environmental Law and Policy in Namibia* 55.

136 Ruppel and Ruppel-Schlichting *Environmental Law and Policy in Namibia* 55.

137 Before the inclusion of the right to a satisfactory environment was included in the African Charter it was found only in non-binding international soft-law. Origins of this right can also be found in the *African Convention on the Conservation of Nature and Natural Resources* of 1968. Van der Linde and Louw *AHRLJ* 173. Ruppel and Ruppel-Schlichting *Environmental Law and Policy in Namibia* 55.

138 ACHPR, *Communication No 155/96: The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, 30th session (13–27 October 2001). This case will be discussed in more detail in Chapter 4.4.

139 Hereinafter referred to as "African Commission" or "ACHPR".

140 Van der Linde and Louw *AHRLJ* 174.

from this right.¹⁴¹ In addition, the right conveys the characteristics of both civil and political rights and socio-economic rights in that government's failure to act would impair individuals from enjoying the right to a satisfactory environment.¹⁴² Governments must increasingly realise and fulfil their obligations under the right to a satisfactory environment. The scope and application of a human rights approach in relation to a satisfactory environment will be discussed further, in Chapter Four.

This chapter will focus on the theme of climate change and its developmental impacts on an African regional level, and will aim to explain how the international legal climate change regime is integrated within the African legal framework. The decisions under the UNFCCC, the Kyoto Protocol, Decision 1/CP.10¹⁴³ and ARWA emphasise the significance of a regional approach to policy making, regardless of the subject-matter being regulated. Consequently, by coordinating regional policies focused on the promotion of sustainable development via the realisation of human rights, international objectives within normative frameworks could and should be integrated within the African Continent.

3.1 African common position on climate change

The impact climate change is threatening to have on the African continent has been foreseen. It is clear that climate change poses a threat to the African environment but also to peace and security on the African continent. It has the potential to intensify the on-going conflict over natural resources.¹⁴⁴ These potential conflicts could be influenced by Africa's inability to adapt to the effects of climate change, since there are several constraints hampering Africa's adaptive capacity. Notorious African constraints include, *inter alia*, poor governance and underdevelopment.¹⁴⁵ A

141 Glazewski *Environmental law in South Africa* 17. Kidd *Environmental Law: A South African Perspective* 34. Van der Linde and Louw *AHRLJ* 174.

142 Ankumah *The African Commissions on Human and Peoples' Rights: Practices and Procurers* 168. Van der Linde and Louw *AHRLJ* 175.

143 During COP10 the UNFCCC secretariat was requested to arrange three regional workshops to facilitate the exchange of information and assist countries in identifying specific adaptation needs and concerns.

144 Scholtz 2010 *AHRLJ* 3.

145 Urquhart "Governing the Ungovernable" 310. Scholtz 2010 *AHRLJ* 3. Barnard *Nuclear energy in Africa* 46.

region and a country's adaptive capacity are influenced by negotiations, policies, legal frameworks, strategies and topic-specific diplomacies. A lack of suitable legislative frameworks could potentially hamper efforts towards the implementation of adaptation activities, while at the same time increasing the region's vulnerability. The well-being of communities which are dependent on natural resources for their livelihoods and survival would particularly be under threat when they are confronted with the need to adapt to climate change, especially in the absence of proper institutional and legislative support.¹⁴⁶

In an effort to create legislative support and to provide access to international assistance for African States suffering under climate change, the AU has facilitated a common African regional position on climate change. Effectively, this would allow African States to increase their adaptive capacity through international negotiations and indirectly strengthen Africa's negotiation position.¹⁴⁷ There is no doubt that the international community wasn't aware that Africa is, and will be, greatly influenced by the effects of climate change. Therefore Africa as an entity needed the international community to invest and assist in developing policies, institutions, strategies and plans to address the threats climate change is posing. This common position aims at facilitating the development of resilience strategies for the most vulnerable groups of African society. Collectively, Africa had more to gain during international negotiations if it stood united and articulated its position together.¹⁴⁸ The objectives of the *Constitutive Act of the African Union*¹⁴⁹ encompass *inter alia* the following: to accelerate political and socio-economic integration, to promote peace and security, to promote African positions, good governance, human and peoples' rights, and sustainable development and co-operation in all fields of human activity in order to raise the living standards of the African peoples.¹⁵⁰ These principles make the AU the

146 Madzwamuse Climate Governance in Africa 10.

147 Barnard *Nuclear energy in Africa* 46. Scholtz 2010 *AHRLJ* 4.

148 Regional integration could help strengthen Africa's negotiating position. Furthermore, Africa is the largest negotiating block, as it represents 25 per cent of the parties to the UNFCCC. A regional effort would not just facilitate a stronger negotiating position, but would make all parties aware of the existence of a united region with a united cause. Scholtz 2010 *AHRLJ* 7.

149 Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000. (Hereinafter referred to as the "*AU Constitutive Act*".)

150 Article 3 (c), (d), (f), (g), (h), (j), (k).

most appropriate organisation to facilitate the common African position on climate change.¹⁵¹

Post 2007 the African group was focused on a post-2012 framework that would include their interests as a negotiating block during future international climate change talks. It was therefore convenient to use the Bali Action Plan,¹⁵² which was already considered as a road map and guideline, to create this position. The common position embodies the pillars of the Bali Action Plan, in that it is supportive of a “climate regime” that will not just be an all-encompassing shared vision¹⁵³ for cooperative action, but that will be inclusive, fair and effective.¹⁵⁴ Furthermore, the common position looks at establishing country-driven Adaptation Action Programmes which will provide support *inter alia* for financial, technological and capacity building.¹⁵⁵ The African common position is also quite resolute on the fact that developed States have quantified emission reduction commitments coupled with mitigation commitments, while developing States have only mitigation commitments, which are a slightly lesser stringent obligation.¹⁵⁶

3.1.1 *The road towards a common position*

In efforts to gain recognition on an international level, the African Heads of State and Government adopted the New Partnership for Africa's Development (NEPAD) at the

151 Article 3(d) of the AU Constitutive Act recognises that the AU is best suited to promote and defend African common positions on issues of interest to the continent and its people. The issue of climate change is a problem that affects each member state and a common position would unite and strengthen the negotiation tactics of the whole African continent. Tadesse 2010 *ISS* 9. Scholtz 2010 *AHRLJ* 10.

152 The COP13 of the UNFCCC and the COP/MOP3 were held in Bali in 2007, where negotiations delivered a road map, which includes the Bali Action Plan, on how to reach a post-2012 agreement before the first commitment period (2008-2012) lapses. For a full discussion on the Bali Action Plan, see Rajamani 2008 *International and Comparative Law Quarterly* 909-939.

153 Paragraph 1.

154 One of the main objectives that was reached during the Bali negotiations, was a “shared vision for long-term cooperative action,” which particularly incorporates the principle of common but differentiated responsibilities. Sub-paragraph (a) of the first operative clause of the Bali Action Plan incorporates this shared vision. Rajamani 2008 *International and Comparative Law Quarterly* 918. Van Bassewitz “International Climate Change Policy and Legislation” 320. Scholtz 2010 *AHRLJ* 13.

155 Scholtz 2010 *AHRLJ* 14.

156 Paragraph 3.1. This also exemplifies the fact that Africa valued the principle of common but differentiated responsibilities quite highly.

37th ordinary session of the AU in the form of a declaration.¹⁵⁷ While staying focused on Africa's development objectives, NEPAD received recognition on an international level,¹⁵⁸ despite its addressing concerns regarding climate change, on an African level.

Considering that a common position would progressively influence Africa's negotiating position within international climate change dialogues, the AU Assembly, in the 8th ordinary session, instructed Regional Economical Communities (RECs) to incorporate climate change in their respective development programmes.¹⁵⁹ In early 2009 the Assembly approved the Algiers Declaration on climate change, at the 12th ordinary session.¹⁶⁰ The Assembly also decided that the Algiers Declaration would serve as the common position of African states during international climate change negotiations.¹⁶¹ Most importantly, the decision also incorporated an affirmation that Africa must be represented by one delegation only, which should be empowered to negotiate on behalf of all AU Member States. The Assembly mandated the African Commission to take the lead with preparations on Africa's common position and to put together a committee which would represent the African continent at negotiations.¹⁶² Prior to the

157 Assembly of the AU, 37th ordinary session, 9-11 July 2001, Lusaka, Zambia. Available at: http://www.au2002.gov.za/docs/summit_council/ahg.pdf.

158 In November 2002, the United Nations General Assembly passed a declaration (A/RES/57/2) and a resolution on NEPAD (A/RES/57/7), affirming the UN system's support for the implementation of NEPAD and recommending that the international community use NEPAD as its framework to support development in Africa. The Secretary General also established the Office of the Special Advisor on Africa to coordinate the UN's support of Africa, to guide reporting on Africa, and to coordinate global advocacy in support of NEPAD. IISD date unknown <http://bit.ly/1liFgux>.

159 Assembly of the AU, 8th ordinary session, 29-30 January 2007, Addis Ababa, Ethiopia, Assembly/AU Dec 134/(VIII) Decision on Climate Change and Development in Africa Doc Assembly/AU/12/(VIII). Available at: <http://bit.ly/1RMV7HP>.

160 Assembly of the AU, 12th ordinary session, 1-3 February 2009, Addis Ababa, Ethiopia, Assembly/AU Dec 236/XII Decision on the African Common Position on Climate Change Doc Assembly/AU/8 (XII) Add 6. Available at: <http://bit.ly/1Ox3cet>.

161 Gupta *The history of global climate governance* 163. Scholtz 2010 *AHRLJ* 10.

162 Leary "Reports on International Organisations and Bodies" 798. Jarso 2011 *SDLP* 38.

13th ordinary session, which was to be held later that year, the African Ministerial Conference on the Environment (AMCEN)¹⁶³ took place.¹⁶⁴

The AMCEN session held in Nairobi marks a turning point in the road to the African common position on climate change. Africa and specifically the AU have been criticised for not articulating their common position on climate change clearly enough.¹⁶⁵ It is evident that the AU needed a robust common position on climate change and Africa's adaptive capacity depended on the creation of a united front concerning climate change issues.¹⁶⁶ Nonetheless, AMCEN revealed two important responses from Africa related to the threat of climate change: African states wanted some sort of compensation to be paid to them, and a comprehensive framework was to be developed for African climate change programmes.¹⁶⁷ Through the adoption of the Nairobi Declaration,¹⁶⁸ AMCEN ultimately created a platform for the African Continent to make their united case for support at the climate change conference in Copenhagen.¹⁶⁹ The Nairobi Declaration¹⁷⁰ was similarly based on the pillars of the

163 AMCEN was established in December 1985 following a conference of African ministers of environment held in Cairo, Egypt. Its mandate is to provide support 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. UNEP date unknown <http://bit.ly/1HTAJuL>.

164 Pallangyo and Scholtz "Africa and Climate change" 53. Leary "Reports on International Organisations and Bodies" 798.

165 Mumma has expressed the opinion that Africa has subsequently failed to demonstrate a unique African position on climate change. However, other authors such as Scholtz state that a possible reason is the fact that African countries were grouped with the G77 block during negotiations. This meant that poor and underdeveloped states in Africa were grouped with industrial states like China and India. The outcome was that Africa's voice was slightly muted during the negotiations. Mumma 2000 *Journal of Environmental Law and Policy* 181. Scholtz 2010 *AHRLJ* 6.

166 Pallangyo and Scholtz "Africa and Climate change" 54.

167 African leaders have over the years pushed for the "polluter pays" principle, which would see developed countries which contributed to the bulk of the historical GHG emissions having to accept binding reduction targets. Leary "Reports on International Organisations and Bodies" 798. Scholtz 2010 *AHRLJ* 11.

168 The "comprehensive framework of African climate change programmes" is in line with article 4(1)(b) of the UNFCCC and the aim of AMCEN to integrate adaptation measures into national and regional development plans and policies. Doing so would enhance environmental security. The Nairobi Declaration was adopted at the third special session of AMCEN held in Nairobi on 29 May 2009. *Nairobi Declaration on the African Process for Combating Climate Change*, 2009. Available at: <http://bit.ly/1RQYU79>. (Hereinafter referred to as "*Nairobi Declaration*".)

169 IISD 29 May 2009 <http://bit.ly/1LDw4lv>.

170 The Nairobi Declaration identified two ways forward for combating climate change: creating a common position on climate change that could be utilised during international negotiations, and adopting a comprehensive framework that would develop African climate change programmes. Pallangyo and Scholtz "Africa and Climate Change" 53.

Bali Action Plan,¹⁷¹ and it served as the updated Algiers Declaration and assisted African negotiators in the climate change talks.¹⁷²

The African Commission has also recognised the impacts of climate change on human rights. At a meeting of the 46th Ordinary Session¹⁷³ of the AU, it called upon the Assembly of Heads of State and Government to take all necessary measures to ensure that the African Commission is included in the AU's negotiating team on climate change.¹⁷⁴ The African Commission furthermore decided to carry out a study of the impact of climate change on human rights in Africa. It was ultimately COP15¹⁷⁵ that presented the AU with an opportunity to communicate a common position on climate change.¹⁷⁶ The Conference of African Heads of State and Government on climate change (CAHOSCC) was established at the 13th ordinary session¹⁷⁷ CAHOSCC was to be Africa's driving force during international climate change negotiations at the UNFCCC summit.

While international negotiations have been centred on the creation of a new climate change instrument, the African group is still focused on its initial common position, which has taken into account the key priorities for Africa.¹⁷⁸ Subsequently AU Member States have maintained the common position during UNFCCC negotiations; but despite having this common ground, historical differences have kept African States

171 The Bali Action Plan was developed during negotiations at COP13 in Bali, 2007. The Action Plan focused on adaptation, mitigations, financing and technology transfer. These were also what the needs of AU Member States were. They had reached consensus on what Africa's priorities were concerning climate change. For more information on the road to COP13, refer to: http://unfccc.int/key_steps/bali_road_map/items/6072.php.

172 Jarso 2011 *SDLP* 39. Scholtz 2010 *AHRLJ* 13.

173 African Commission's 46th Ordinary Session held from 11 to 25 November 2009 in Banjul, The Gambia.

174 ACHPR/Res153(XLVI)09: Resolution on climate change and human rights and the need to study its impact in Africa. Available at: http://old.achpr.org/english/resolutions/resolution153_en.htm. Ruppel and Ruppel-Schlichting *Environmental Law and Policy in Namibia* 267.

175 COP15 of the United Nations Framework Convention on Climate Change took place 7-18 December 2009. Scholtz 2010 *AHRLJ* 3.

176 Scholtz 2010 *AHRLJ* 3.

177 Assembly of the AU, 13th ordinary session, 1-3 July, Sirte, Libya Assembly/AU/Dec 257(XIII) Rev 1 Decision on the African Common Position on Climate Change including the Modalities of the Representation of Africa to the World Summit on Climate Change. Available at: <http://bit.ly/1RT6Pkd>.

178 Key priorities include: sustainable development, poverty reduction and the attainment of the Millennium Development Goals. Pallangyo and Scholtz "Africa and Climate change" 55.

staying united and it would seem that it has been too difficult to maintain a common position as a regional negotiating block.¹⁷⁹ However, maintaining consensus during COP negotiations could ensure that more attention is paid to African interests.¹⁸⁰ Africa did, nonetheless, receive attention during the COP15 and 16 negotiations and Africa's vulnerability was recognised under both the Copenhagen Accord and the Cancun Agreements. These two agreements create a favourable context for the further development of a common African position at international climate change negotiations.¹⁸¹

3.2 Copenhagen Accord and Cancun Agreements

Since the Kyoto Protocol entered into force in 2005, negotiators have been fixated on the agreement that will pave the way forward after the Kyoto Protocol has reached the end of its commitment period. The Copenhagen Conference had been intended as the deadline to resolve all the issues concerning the post-2012 climate agreement.¹⁸² However, despite the fact that the Copenhagen Conference was well attended, only a political agreement was reached and no legally binding agreement emanated from the negotiations. This lack of an agreement would preoccupy negotiators preparing for the next climate change Conference, since the legal nature of the post-2012 agreement would need to be agreed upon. The stage was set for negotiations in Cancun, and although expectations weren't very high, some positive progress was made during the conference.

3.2.1 Copenhagen Accord

179 African consensus was disrupted during COP15 when Ethiopian Prime Minister Meles Zenawi unilaterally departed from the common position and submitted a Joint Appeal of France and Ethiopia, representing Africa, for an ambitious Copenhagen Accord. Pallangyo and Scholtz "Africa and Climate change" 56. Gray and Gupta "The United Nations climate change regime and Africa" 76.

180 Pallangyo and Scholtz "Africa and Climate change" 56.

181 Pallangyo and Scholtz "Africa and Climate change" 57.

182 This Conference was also the largest environmental meeting in history, with more than 100 Heads of State and 40 000 delegates registered to attend, and it was thought that the delegates would agree on a way forward after the KP. Bodansky 2010 *AJIL* 1.

Expectations¹⁸³ for COP15 were high, as there was a feeling that the Copenhagen Conference represented a deadline to shed light on the remaining issues on the post-2012 climate regime.¹⁸⁴ Despite the excitement that accompanied COP15, the Conference didn't meet expectations. It produced a political agreement designed to serve as the basis for further and future negotiations instead of a final product, as had been envisaged by the Bali Action Plan.¹⁸⁵ The lack of a concrete legal agreement¹⁸⁶ suggests that the African common position will continue to be a vital component of future COP negotiations.

Ultimately COP15 yielded only an Accord of which the conference took note. This was as a result of the objections raised by a group led by Sudan, Venezuela and Bolivia. The Accord is non-binding.¹⁸⁷ At least the Accord recognises Africa's vulnerability, since it denotes in paragraph 3 that:

Adaptation to the adverse effects of climate change and the potential impacts of response measures is a challenge faced by all countries. Enhanced action and international cooperation on adaptation is urgently required to ensure the implementation of the Convention by enabling and supporting the implementation of adaptation actions aimed at reducing vulnerability and building resilience in developing countries, especially in those that are particularly vulnerable, especially least developed countries, small island developing States and Africa. We agree that developed countries shall provide adequate, predictable and sustainable financial resources, technology and capacity-building to support the implementation of adaptation action in developing countries.

In a somewhat less than forceful manner Africa pursued its negotiating interests when African Nations led a protest against developed States' efforts to put an end to the Kyoto Protocol.¹⁸⁸ These efforts were hampered by the Ethiopian Prime Minister, a

183 COP15 was meant to finalise two years of extensive negotiations that had been launched with the Bali Action Plan and Roadmap. Van Bassewitz "International Climate Change Policy and Legislation" 322.

184 This chapter will refer to the issues relevant to the current discussion. For a detailed discussion on the outcomes of COP15, see Bodansky D "The Copenhagen Climate Change Conference – A Post-Mortem" 2010 *AJIL* 1-11.

185 Scholtz 2010 *AHRLJ* 22.

186 It was expected that COP15 would produce a legally binding climate change agreement that would replace the KP after 2012.

187 Bodansky 2010 *AJIL* 1. Scholtz 2011 *SAYIL* 201.

188 Africa has consistently favoured an agreement with emissions reduction targets. Scholtz 2011 *AHRLJ* 22.

fellow co-ordinator of CAHOSCC, who departed from the African common position.¹⁸⁹ Nonetheless, the fact that Africa was characterised as particularly vulnerable in this context had definite consequences within the international climate change negotiations.

The backbone of all climate change negotiations, the UNFCCC, acknowledges the special circumstances that surround particularly vulnerable states, and the African negotiating group used this acknowledgement as the driving force behind its interests. Article 3(2) of the UNFCCC includes and recognises the principle that special needs and specific circumstances exist for those countries which are particularly vulnerable to the adverse effects of climate change.¹⁹⁰ Furthermore, article 4 of the UNFCCC declares that vulnerable States should get special consideration when the commitments of all parties are considered.¹⁹¹ Africa's common position refers to a \$67 billion per annum commitment from developed countries for adaptation support and a \$200 billion commitment for mitigation. However, developed States committed to new and additional funding only "approaching" \$30 billion for the period 2010-2012, with an allocation balanced between adaptation and mitigation.¹⁹² A further \$100 billion collective goal commitment was made, but this commitment was linked to the performance of "meaningful mitigation actions and transparency on

189 The actions of Prime Minister Meles Zenawi and the subsequent reaction thereto are thought to have led to the downfall of the common negotiation strategy of the African group. Scholtz 2010 *AHRLJ* 23.

190 Article 3(2): "The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration". This principle is also in line with Principle 6 of the Rio Declaration, which states that: "the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority". Article 1 defines the adverse effects of climate change as: "changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare".

191 Article 4(4) states: "The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects". Article 4(8), also gives special recognition to particular vulnerable developing countries, it states that: "In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures".

192 Paragraph 3 of the Copenhagen Accord.

implementation”.¹⁹³ Although the AU Assembly endorsed the Copenhagen Accord and urged Member States to make individual submissions to the UNFCCC Secretariat, overall it would seem that not all of Africa’s interests, as represented by the common position, were addressed.¹⁹⁴

3.2.2 Cancun Agreements

After the Copenhagen negotiations it was clear that the UNFCCC negotiation structure had a flaw which was the prime cause for the approximate failure of the negotiations in Copenhagen. It was evident that there was a dire need for a more effective and inclusive decision-making process within the negotiation framework.¹⁹⁵ With expectations running low, there wasn’t much hope that the next COP would produce a legally binding document. COP16¹⁹⁶ was scheduled to take place in Cancun, Mexico and it was anticipated that parties would assert their intention on the elements of a new legal framework. However, the Cancun Agreements¹⁹⁷ stunned¹⁹⁸ many when the objective of a temperature increase below 2° Celsius was accepted.¹⁹⁹

193 Paragraph 8 of the Copenhagen Accord.

194 Scholtz 2010 *AHRLJ* 24.

195 Van Bassewitz “International Climate Change Policy and Legislation” 327. A good example of why the UNFCCC’s negotiation framework is thought to be inadequate is the situation where Bolivia’s official objection to the adoption of the Cancun Agreements was only noted. The COP16 chairperson was of the view that Bolivia did not have the right to object to the Agreements which all the other parties had agreed to, and said: “Consensus requires that everyone is given the right to be heard and have their views given due consideration, and Bolivia has been given this opportunity. Consensus does not mean that one country has the right to veto, and can prevent 193 others from moving forward after years of negotiations on something that our societies and future generations expect”. For a full discussion on this procedural topic, see Rajamani 2011 *ICLQ* chapter 4.

196 This chapter will refer to the issues relevant to the current discussion. For a detailed discussion on the outcomes of COP16, see Dickason *Climate Change Regime after the Copenhagen Accord* chapter 4.1.

197 The Agreements consist of two formal COP decisions, 1/CP.16 and 1/CMP.6. The Agreements therefor include the outcomes of two working groups, the AWG-LCA and the AWG-KP. Dickason *Climate Change Regime after the Copenhagen Accord* 31.

198 Some authors are of the opinion that the Cancun outcomes were still quite inconclusive and undecided. See De Vit and Gagnon-Lebrun 2010 *IFDD* 1.

199 Decision 1/CP.16 paragraph 2. Parties agreed to have the 2° Celsius objective included in an official UN document, which, at this stage, hasn’t been a reality. Furthermore, the Agreement includes a clause to have this objective periodically reviewed, with the option to have it decreased to 1.5° Celsius. This objective was only taken note of during the Copenhagen Negotiations. Van Bassewitz “International Climate Change Policy and Legislation” 327.

There was also some successful efforts noted from the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA) under the UNFCCC. The AWG-LCA was tasked to negotiate a post-2012 agenda. Through their efforts to create this agenda, merely a handful of countries argued the importance of a human rights approach.²⁰⁰ Overall, the positive initiatives that emerged from these Agreements included *inter alia* enhanced support, including financial support for adaptation in particularly to vulnerable States, the establishment of the Green Climate Fund, and an improved technology transfer mechanism.

3.3 Conclusion

The explicit recognition that Africa is particularly vulnerable to the effects of climate change, interpreted together with articles 3(2), 4(8) and (9) of the UNFCCC, constitutes a “guiding framework” for further negotiations for African States.²⁰¹ The African continent will be given focused priority during Climate Change negotiations, which will provide the CAHOSCC with an advantageous position to pursue support for adaptation during future international climate change talks. This will in turn promote environmental security.²⁰² This should give Africa enough motivation to further develop a common position that would promote the taking of adaptation measures on the Continent. However, Africa’s common position needs to be refined, and future negotiators should advocate for an agreement that will benefit the African group. This will be possible only if the CAHOSCC relationship is strengthened;²⁰³ if AMCEN is properly implemented;²⁰⁴ if regional NGO’s, communities and research groups receive

200 These countries include Argentina, Bolivia and Chile.

201 Yamin and Depledge *The international Climate Change Regime* 227. Scholtz 2011 *SAYIL* 207.

202 This is also the case with LCDs and Small Island Developing States, who also have a special position in climate change negotiations. Scholtz 2011 *SAYIL* 207. Scholtz 2010 *AHRLJ* 4.

203 The CAHOSCC is the head of the negotiating team for the African group. They pursue Africa’s interest during international climate change negotiations. This negotiating team should serve as the regional negotiating force and ultimately this regionalism” will make provision for environmental security.

204 AMCEN endorsed various African framework for climate change programmes. These programmes should receive the necessary attention and should be properly implemented in the various sub-regions.

the necessary attention;²⁰⁵ and if the important relationships between climate change and human rights are acknowledged.²⁰⁶

The negotiations, as described above, form the backdrop for Chapter Four. The African common position created a mandate that adaptation measures on the African Continent must receive priority, and this requires the adoption of an approach that takes full cognisance of the right to a satisfactory environment, as conveyed in the Banjul Charter.

In the following chapter, the scope and application of a human rights approach in relation to a satisfactory environment will be discussed. Furthermore, reference will be made to the approach that is needed to fulfil the adaptation obligations established under the international climate change regime.

205 These community and research groups provide much needed insights on how frameworks will effectively be implemented in Africa.

206 Articles 16(1), 22 and 24 of the Banjul Charter are recognised human rights, and they create the basis for a duty and obligation for African States to address climate change through the recognition of human rights protection. Ultimately the African common position needs to contribute to the advancement of human rights on the African continent. Scholtz 2010 *AHRLJ* 22.

4 A human rights based approach

African States have always advocated an African solution to African problems, and through their efforts to establish a common position during international climate change negotiations it was clear that Africa advocates for an approach that realises African needs. The inclusion of articles 22 and 24 in the Banjul Charter²⁰⁷ set the stage for recognising a human rights agenda for environmental rights within the international climate change regime. The argument is made that the development and implementation of adaptation measures originates from the right to a satisfactory environment, as included in the Banjul Charter. Ultimately all of these environmental rights are interlinked by their common recognition of the importance of environmental justice, and essentially they endorse the need for adaptation within the climate change regime.²⁰⁸ This recognition is in turn used as the mandate to introduce a human rights approach that aims specifically to provide individuals with a remedy they can utilise in an attempt to rectify all the injustices caused by the impacts of climate change.

Within the African context, the right to development and the right to a satisfactory environment are recognised inalienable human rights. It is furthermore acknowledged that all people are entitled to social, economic, cultural and political development within an environment that is favourable to their well-being.²⁰⁹ On an international level, the interconnectedness between human rights and environmental protection has been recognised and even emphasised.²¹⁰ The OHCHR²¹¹ is an example of how the “importance of applying a human rights approach” is recognised in the effort to

207 The AU was the first regional system that recognised the right to a satisfactory environment. It was also the first to provide meaning and content to the right. The African Heads of State adopted the African Charter, in 27 June 1981. Van der Linde and Louw AHRLJ 170. Amechi 2009 *LEAD* 60.

208 Barnard *Nuclear energy in Africa* 90.

209 Article 22 and 24 of the Banjul Charter. Barnard *Nuclear energy in Africa* 90.

210 Chapter 4.1 will consider international recognition for human rights and environmental protection. Specifically, the OHCHR recognised the linkages between human rights and environmental protection at the Expert Seminar on Human Rights and the Environment in 2002. The World Summit on Sustainable Development, held in Johannesburg 2002, also discussed these linkages. Also, notably, the UN Human Rights Council published a resolution which explicitly emphasized that the threats climate change poses have implications for the realization of human rights.

211 Office of the High Commissioner for Human Rights, 10th Sess., U.N. Doc. A/HRC/RES/10/4 25 March 2009.

“strengthen international and national policymaking in the area of climate change”.²¹² However, the reality is that these rights are not explicitly recognised within the international framework of human rights, which include economic, social and cultural rights along with civil and political rights.

This chapter will consider the context of various human rights instruments and international acknowledgements, such as the Cancun Agreements, which indirectly recognise a human rights approach to climate change adaptation through the inclusion of paragraph 8, which states: “that Parties should, in all climate change related actions, fully respect human rights”.²¹³ Furthermore, this chapter will examine what a human rights based approach is, what it entails and how it could be utilised within the AU. It is in this respect that the link is made between the recognition of the right to development and a satisfactory environment through a human rights approach for climate change adaptation, within an African context. Overall this chapter aims to add to the current debate about human rights and climate change, and argues that the inclusion of a human rights-based approach for climate change adaptation would positively contribute to Africa’s climate resilience, vulnerability and adaptability.

4.1 International human rights

When one thinks about the point in time at which the international community as a whole decided that human rights should unequivocally be acknowledged and upheld, the end of the Second World War comes to mind. It was the *Universal Declaration on Human Rights* (UDHR) which sought to heal the wounds caused by the blatant “disregard and contempt for human rights that had resulted in barbarous acts which... outraged the conscience of mankind”.²¹⁴ It is believed that the UNHR’s greatest

212 Although the term “human rights approach” is used only on the OHCHR official website, Resolution 10/4 states: “that human rights obligations and commitments have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes”.

213 Decision 1/CP.16, Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011 paragraph 8. Morgera “A Human Rights-Based Approach to Tackling Climate Change” 360.

214 Preamble of the *Universal Declaration of Human Rights*, G.A. Res. 217A U.N. GAOR, 3d Sess., U.N. Doc A/810 (Dec. 10, 1948). Cameron 2010 *Ga. J. Int'l & Comp L* 692. Woodcock 2006 *J Hist Intl L* 246.

success is the fact that it included and recognised a combination of economic, social and cultural rights.²¹⁵ It was through the inclusion of articles 22 and 25 that it was agreed that a upholding a “person’s dignity and [the] free development of a person’s personality” are indispensable to the existence of a global moral order. The Vienna Convention, however, went further and created a duty that “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.²¹⁶ The term “universal human rights” was fully grasped through the statement that: “all human rights are universal, indivisible and interdependent and interrelated”.²¹⁷ It was then that society acknowledged the importance to civilisation of realising all human rights to the fullest extent, and so recognised the right to development.²¹⁸

Internationally, human rights are enshrined²¹⁹ in the *International Covenant on Civil and Political Rights* (ICCPR)²²⁰ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).²²¹ The rights envisaged by these two international instruments, namely economic, social and cultural rights, and civil and political rights are seen as groups of rights that are mutually interdependent.²²²

215 Tadeq 2010 AHRLJ 328.

216 *Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., 22d plen. mtg., part I, 5, U.N. Doc. A/CONF.157/24 (1993), reprinted in 32 I.L.M 1661 (1993).* (Hereinafter referred to as “*Vienna Convention*”.)

217 Human rights are distinguished from other rights because they adhere to four basic principles, namely that they are viewed as being universal, inalienable, indivisible and interdependent. The concept of universality means that everyone is entitled to these rights simply by virtue of being human. Inalienable means that human rights can neither be given away nor can they be taken away from the rights holder. Indivisible and interdependent means that all rights are co-equal in importance and can be achieved only collectively. This final component relates to the development discourse, which stresses that development is a process, often involving complex choices between competing urgent priorities. Cameron 2011 *Social Development Working Papers 2*.

218 Tadeq 2010 AHRLJ 328.

219 It could be said that nine core human rights treaties were signed after the Second World War, between 1965 and 2006, , but this chapter will consider only those that are most relevant to the current topic.

220 G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

221 G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3.

222 The *Declaration on Social Progress and Development*, is one example of where an international instrument recognised the interdependence of the ICCPR and ICESCR. Declaration on Social Progress and Development, adopted 11 Dec. 1969, G.A. Res. 2542 (XXIV), U.N. GAOR 24th Sess., Supp. No. 30, at 49, U.N. Doc. A/7630 (1969). Barnard *Nuclear energy in Africa* 101.

The right to life is recognised by the ICCPR and implies the inherent right of all people to enjoy their natural wealth and resources. It could be argued that this right can be interpreted to recognise specific climate acts, which contribute to the loss of life.²²³ The Human Rights Committee²²⁴ has also acknowledged this argument and specifically noted that the right to life cannot be interpreted in a restrictive manner and declared that the existence of the right imposes a duty upon States to make positive contributions to the realisation of this right.²²⁵ Moreover, Special Rapporteur Fatma Zohra Ksentini made a suggestion to the Human Rights Committee to have the general comment on the right to life include environmental concerns.²²⁶ Ultimately such recognition would contribute to the argument to have a recognised climate-type human right.

Jurisdictional limitations play a role in how rights are recognised. It could therefore be said that the most promising treaty to use as a motivation for the inclusion of a climate-type right is the ICESCR. The ICESCR has no jurisdictional limit and physically requires parties “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights”.²²⁷ The steps required to fulfil this duty are in accord with the various duties incorporated in the UNFCCC, the Kyoto Protocol, the Copenhagen Accord, the Cancun Agreements and the Banjul Charter combined.

223 Specific climate acts could include weather events that increase the risk of fatalities in countries which are particularly vulnerable to the effects of climate change. Rajamani 2010 *J Environ Law* 393.

224 The Human Rights Committee is the body of independent experts that monitor the implementation of the ICCPR by its State parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented.

225 The Committee also noted that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing the arbitrary loss of life. Human Rights Committee, Covenant on Civil and Political Rights General Comment No. 6, The Right to Life’ (1982) 30/04/82. See; <http://bit.ly/1xuKDC3>, for the complete text on General Comment No.6.

226 Ksentini, also suggested that the general comment should be developed to define the linkages that exist between civil and political rights and the environment. Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Special Rapporteur, Human Rights and the Environment, Final Report, U.N. Doc. E/CN.4/Sub.2/1994/9 July 6, 1994. Kravchenko 2008 *Vt.J.Envntl.L* 526.

227 Article 2 of ICESCR. Knox “Diagonal Environmental Rights” 158.

The Committee on Economic, Social and Cultural Rights (CESCR), the body responsible for overseeing the ICESCR, used the particular language expressed in the Covenant to confirm that parties have extraterritorial obligations relating to several rights with environmental associations, which would *inter alia* include the rights to health, water, and food.²²⁸ Most importantly the CESCR, in its interpretation of the rights to water and health, has expressly asserted that parties should ensure international and regional agreements do not adversely affect the realisation of human rights.²²⁹ By not recognising a right to climate change adaptation, it could be argued that the AU would not be fully compliant with the obligations imposed by the ICESCR.

The Human Rights Committee similarly made a General Comment regarding the ICESCR and the right to the highest attainable standard of health. Here, the Committee acknowledged the indispensability and inclusiveness of this particular right and the fact that it has an influence on the enjoyment of all other rights.²³⁰ The right to health under article 12 of the ICESCR, which includes a right to the highest attainable standard of physical and mental health, can be used to provide motivation for a climate-type right.²³¹

It is central to the hypotheses in this paper to link the detrimental impacts of climate change to the non-realisation of a variety of explicit human rights, as such a link will serve to prove that climate change is obstructing the full realisation of recognised human rights. Through such a link it could be established that a climate right should be recognised, since there is an obvious void within the international human rights regulatory regime that warrants its establishment.

228 Gonzalez 2015 *Santa Clara Journal of International Law* 178. Knox “Diagonal Environmental Rights” 158.

229 General Comment 14 paragraph 39. General Comment 15 paragraph 35.

230 The inclusiveness of the right to health encompasses *inter alia* “timely and appropriate health care, access to safe and potable water, adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health-related education and information”. Human Rights Committee, “Covenant on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health” (2000) E/C 12/2000/4. See; <http://www.refworld.org/docid/4538838d0.html>, for the complete text on General Comment 14.

231 The right to health is also recognised under article 25(1) of the UDHR.

4.1.1 Environmental Rights

The treaties included in the international climate change regime are silent on the point of explicit human rights references. Neither the UNFCCC nor the Kyoto Protocol makes mention of official human rights considerations.²³² The preamble to the *Stockholm Declaration on the Human Environment*²³³ of 1972 recognised the environmental “movement” and expressly the relationship of environmental protection and human rights, which took form during the late 20th Century.²³⁴ Through this Declaration it became evident that the realisation of a certain degree of environmental quality is a necessity for the fulfilment of internationally recognised rights and freedoms.²³⁵ Typically, the right to a satisfactory environment and general environmental rights are characterised as third generation rights and hold properties that incorporate civil and political rights along with socio-economic rights.²³⁶ Today it could be said that around 100 constitutions throughout the world either recognise or guarantee a right to a clean and healthy environment, impose a duty on the state to prevent environmental harm, or identify the protection of natural resources as a national goal; yet there is no explicit recognition.²³⁷

The UN High Commissioner on Human Rights (OHCHR) and the Executive Director of the UNEP convened a colloquium with experts in 2002 to discuss the connection between human rights and the environment.²³⁸ It was acknowledged during this seminar that human rights and environmental protection are inevitably linked.²³⁹ In 2008 a Resolution was reached whereby the UNHRC instructed the OHCHR to

232 Bell 2013 *WIREs Climate Change* 160. Cameron 2011 *Social Development Working Papers* 2.

233 United Nations Conference on the Human Environment, Stockholm, Sweden, June 5-16, 1972, Report of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev.1, 3 (Nov. 1973).

234 Atapattu 2002 *Tul. Envtl. L.J.* 68. Caney 2008 *Environ Polit* 537.

235 Principle 1 of the Stockholm Declaration also recognizes the “fundamental right” to live in “an environment of a quality that permits a life of dignity and well-being”. Bell 2013 *WIREs Climate Change* 163. Shelton 2015 *SCUJIL* 12.

236 Van der Linde and Louw *AHRLJ* 174-175.

237 Examples include South Africa, Argentina, Azerbaijan, Angola and Brazil. Shelton 2015 *SCUJIL* 17.

238 The Expert Seminar on Human Rights and the Environment was convened in 2002. See the Report of the Joint OHCHR-UNEP Meeting of Experts on Human Rights and the Environment, available at: <http://bit.ly/1k6AiYR>.

239 Point 16 of the Report of the Joint OHCHR-UNEP Meeting of Experts on Human Rights and the Environment.

conduct a detailed a study on the relationship between climate change and human rights.²⁴⁰ Through Resolution 7/23 the Council expressed its concern about the threat that climate change is posing, and this created a mandate to start investigating internationally the relationship between climate change and human rights.²⁴¹ Suggestively, the Human Rights Council has emphasized the significance of a human rights approach and the usefulness such an approach would have.²⁴² This was again acknowledged by the Council in April 2015, when it reiterated that “a safe, clean, healthy and sustainable environment is indispensable to the full enjoyment of human rights”.²⁴³

Moreover, the OHCHR Human Rights Approach Framework states that a human rights approach can be used to guide policies of climate change mitigation and adaption. In this Framework specific mention is made of those who are already vulnerable to the effects and impacts of climate change, and that “a human rights-based approach to climate change” could be particularly advantageous when trying to counter the impacts of climate change. Under the UNFCCC, developing countries have been identified as being vulnerable to the effects of climate change, and Africa is singled out as the continent most vulnerable to these effects, based on its lack of adaptive capacity.²⁴⁴ Accordingly, the OHCHR has indirectly identified a mandate for the creation of a human rights-based approach to climate change in Africa. This mandate has recently been emphasized by a Report submitted to UNFCCC COP, which recognises the effects that climate change has on the full enjoyment of human rights.²⁴⁵

240 Office of the High Commissioner for Human Rights, U.N. Human Rights Council, 7th Sess., U.N. Doc. A/HRC/7/L.21/Rev. Mar. 26, 2008. (Hereinafter referred to as “Resolution 7/23”) See; <http://bit.ly/1P2mCcY>.

241 Preamble of Resolution 7/23: “climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights”. Article 1 of Resolution 7/23 requests the OHCHR to conduct a detailed analytical study of the relationship between climate change and human rights.

242 In 2010 the OHCHR published a document, they labeled a framework titled: “Applying A Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures”. (Hereinafter referred to as “*OHCHR Human Rights Approach Framework*”) See: <http://hrbportal.org/wp-content/files/InfoNoteHRBA1.pdf>.

243 Aquilar *et al* <http://www.thecvf.org/wp-content/uploads/2015/05/humanrightsSRHRE.pdf>.

244 See Chapter Three, for a discussion on Africa’s vulnerability and adaptive capacity.

245 Several Special Rapporteurs for the Climate Vulnerable Forum submitted a report, titled “The Effects of Climate Change on the Full Enjoyment of Human Rights,” on 1 May 2015 to the COP to the UNFCCC. Find the Report at; <http://bit.ly/1Wpn9Jk>.

Drawing a connexion between this mandate and other human rights instruments, the Vienna Declaration and the *Declaration on the Right to Development*,²⁴⁶ which share a collective recognition for the connection between human rights and the environment, set the scene. This scene links the right to a general satisfactory environment, as recognised by Banjul, with the right to development, as recognised in the Declaration on the Right to Development.²⁴⁷

It could be argued that the right to development was created to rectify the divide between the rights recognised in the ICCPR and those rights acknowledged by the ICESCR.²⁴⁸ It was ultimately developing countries²⁴⁹ who fought for its recognition internationally, and in December 1986 the Declaration on the Right to Development²⁵⁰ was adopted by the General Assembly. This Declaration recognises, in article 1, that:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The Declaration goes further and defines the right to development in a broader and very distinctive way, as opposed to the conventional way in which it is primarily interpreted, which is purely as a growth in gross domestic product. In the Preamble the Declaration describes the right to development is defined as follows:

Development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population

246 *Declaration on the Right to Development, adopted 4 Dec. 1986, G.A. Res. 41/128, GAOR, 97th Plenary Meeting.*

247 Article 24 of Banjul: "All peoples shall have the right to a general satisfactory environment favorable to their development".

248 Barnard *Nuclear energy in Africa* 108. Gromilova 2014 *Utrecht Law Review* 87.

249 Collectively, developing countries fought for the establishment of an international order that would favour and understand their special needs. This ultimately led to the adoption of the *UN Declaration on the Establishment of a New International Economic Order; GA Res 3201(S-VI) UN GAOR 6th special session Agenda Item 6, 2229th plen mgt at UN Doc A/RES/3201(S-VI) (1974)*. Tadeo 2010 *AHRLJ* 325.

250 In November 1979 the UN General Assembly passed a resolution recognising the right to development as a human right. Subsequently, the General Assembly proclaimed and adopted the Declaration on the Right to Development by a vote of 146 to one, with eight abstentions. The adoption of the Declaration showed an overwhelming support for the recognition of the right to development as a human right. The single dissenting vote from the United States and the eight abstentions came from developed countries, showing the negative attitude of these countries towards the idea of a right to development. For more on this Declaration, refer to: Tadeo 2010 *AHRLJ* 325-330.

and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.²⁵¹

Accordingly, the development process is designed to incorporate the full realisation of all human rights, including all political, civil and economic, social and cultural rights. The right to development, as envisaged by the Declaration, was reaffirmed by the Vienna Convention in 1993 as “a universal and inalienable right and an integral part of fundamental human rights”.²⁵² The right to development fits in with the third-generation rights group, otherwise known for the right to a healthy environment and the right to peace.²⁵³ Although it has been acknowledged that principles of the right to development have been incorporated in international treaties, it should be noted that the right has particular features. Tadeq²⁵⁴ describes these features as “unique characteristics” that make the right to development a separate and independent right.

A particularly good example of where the right to development has been envisaged as an independent, indivisible and enforceable human right is its inclusion in the Banjul Charter. The right finds recognition in only one international legally binding human rights document, in article 22 of the Banjul Charter.²⁵⁵ The UNFCCC also indirectly acknowledges the vast role that development plays within the international climate change regime, but it cannot be said that the Convention specifically endorses the right.²⁵⁶

251 Tadeq has a particular good definition of the right to development, based on what is described in the Declaration: “the right to development refers to a process of development that leads to the fulfilment of all human rights through a rights-based approach that takes account of international human rights standards, participation, non-discrimination, accountability, transparency and equity in decision making and sharing the benefits of the process. Both the process of development and its objectives are, thus, important components of the right to development.” Tadeq 2010 *AHRLJ* 330.

252 This recognition, by the Vienna Convention, was especially important, since some countries (the USA was the only objection against the adoption) had reservations about recognising the right to development as a human right. Article 10 of the Vienna Declaration.

253 The right to a satisfactory environment is also characterised as a third-generation right.

254 Tadeq 2010 *AHRLJ* 327.

255 The Banjul (African) Charter incorporated the right to development as a human right before the Declaration on the Right to Development was adopted. Boyle 2007 *Fordham Environmental Law Review* 3. Tadeq 2010 *AHRLJ* 330. Shelton 2015 *SCUJIL* 18.

256 The UNFCCC Preamble and article 2 refer to the utilization of resources within development policies and economic development. The Preamble states: “... States have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.

4.2 Connecting international and regional human rights law

A significant case which sheds light on the regional function with regard to the fulfilment of human rights is the Inuit's Petition to the Inter-American Commission on Human Rights (IACHR).²⁵⁷ This case is particularly important as an indication of why the AU is best suited to creating and implementing a human rights approach to climate change adaptation. The case was brought in front of the IACHR by the Inuit and the Small Island States, who claimed that the impacts of climate change directly violated their fundamental human rights. Their claim was based on the premise that the various acts and omissions of the United States caused the violation of various human rights, including the rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and the inviolability of the home.²⁵⁸

The Inuit's claim was based on the fact that their human rights were protected under several international human rights instruments, including the *American Declaration of the Rights and Duties of Man*.²⁵⁹ Although the Inuit's Petition didn't particularly yield the astronomically lucrative outcomes the applicants sought, it did shed light on the possibility of a climate change human rights approach.²⁶⁰ Moreover, the IACHR considered the relationship between climate change and human rights, which led to a "Hearing of a General Nature"²⁶¹ on the topic of human rights and global warming.²⁶²

257 *Petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by the acts and omissions of the United States*. (Hereinafter referred to as the "Inuit's Petition"). Find the Inuit's Petition here: http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf.

258 Watt-Cloutier *et al* 2005 http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf 5.

259 *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). (Hereinafter referred to as "*American Declaration*".) Find the American Declaration here: <https://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>.

260 The IACHR refused to consider the Petition on the basis that the information that was provided didn't enable them to determine whether the alleged facts would tend to characterise a violation of human rights protected under the American declaration. Rajamani 2010 *J Environ Law* 399. Hohmann 2009 *Transnational Law & Contemporary Problems* 298.

261 The Hearing was held on 1 March 2007 and the Chair of the Inuit Circumpolar Conference was invited to give statements.

262 Press Release No 8/07, Inter-American Commission on Human Rights, IACHR Announces Webcast of Public Hearings of the 127th Regular Period of Sessions, 26 February 2007. See the Press Release available at: <http://www.cidh.org/Comunicados/English/2007/8.07eng.htm>.

It could be argued that had the Inuit Peoples established a direct link between the human rights violations and the rights protected under the American Declaration, they would have stood a better chance of succeeding with their claims. There are two other particularly important cases which also directly relate to claims made regarding human rights violations based on a regional organisational treaty. In the SERAC²⁶³ and Endorios²⁶⁴ communications it was found that two AU countries had violated their citizen's human rights, which were explicitly recognised by the Banjul Charter.²⁶⁵

The Banjul Charter directly recognises the interdependence of human rights in its Preamble, stating;

It is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

The AU recognises that as a regional organisation it has a duty towards the protection and promotion of all human rights and freedoms in Africa.²⁶⁶

The right to development, as envisaged as an internationally recognised human right, embraces all civil, political, social, economic and cultural rights, and recognises that the evolution of one human right creates advancement in the realisation of another.²⁶⁷ As recognised within the context of the Banjul Charter, this right incorporates social, cultural and economic development and combines these with the enjoyment of the common heritage of mankind.²⁶⁸

263 Decision of the African Commission on Human and People's Rights, Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria*, ACHPR/COMM/A004/1 (27 May 2002). (Hereinafter referred to as the "SERAC" case.)

264 Decision of the African Commission on Human and People's Rights, Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorios Welfare Council v Kenya* (17 February 2010). (Hereinafter referred to as "Endorios" case.)

265 These cases will be discussed in more detail in the next paragraph.

266 Preamble to the Banjul Charter.

267 Barnard *Nuclear energy in Africa* 109.

268 Article 22 of the Banjul Charter. Barnard *Nuclear energy in Africa* 109.

4.3 Nexus between human rights and climate change

The topic of human rights and climate change has seen a great deal of debate within international negotiations, especially during the past few years.²⁶⁹ During these negotiations the delegation from the Maldives and other small island states advocated for a human rights approach to climate change, or at least some recognition that climate change is having an impact on human rights.²⁷⁰ Ultimately this led to an investigation and two resolutions formed by the UNHRC, recognising that human rights commitments can “strengthen international and national policy making”.²⁷¹ Furthermore, through the AWG-LCA negotiations a small number of countries have expressly argued for the inclusion of a human rights approach.²⁷²

The link between climate change impacts and human rights has already been emphasised by the OHCHR on numerous occasions, and particularly during the OHCHR address at the 2007 COP,²⁷³ when the deputy high commissioner stated the following:

There are many predictions that global warming could result in hundreds of millions of people suffering from hunger, malnutrition, water shortages, floods, droughts, heat stress, diseases triggered by extreme weather events, loss of livelihoods and permanent displacement. These human consequences are already visible and real in many corners of the world. Indeed, climate change poses a direct threat to a wide range of universally recognized human rights, such as the rights to life, food, adequate housing or water.

The idea that climate change is having a direct effect on the realisation of some of the most basic human rights leads to the suggestion that a human rights approach would direct attention to the individual victims who suffer at the hand of climate change.²⁷⁴

269 Cameron 2011 *Social Development Working Papers* 1. Bell 2013 *WIREs Climate Change* 161.

270 Bell 2013 *WIREs Climate Change* 160.

271 Human Rights Council, ‘Human rights and Climate Change’ (25 March 2009) Resolution 10/4. Bell 2013 *WIREs Climate Change* 160. Rajamani 2010 *J Environ Law* 400.

272 Countries that have argued for the inclusion of a human rights approach with regards to climate change include *inter alia* Argentina, Bolivia and Chile. Rajamani 2010 *J Environ Law* 400.

273 Address by Ms. Kyung-wha Kang, Deputy High Commissioner for Human Rights, Conference of the Parties to the United Nations Framework Convention on Climate Change and its Kyoto Protocol, 3-14 December 2007, Bali, Indonesia. For the full address, see: <http://bit.ly/1NEzOoz>.

274 Caney is of the view that climate change “clearly jeopardizes several fundamental rights”. Some of these threats include *inter alia* widespread malnutrition, people’s ability to support themselves, and a right and interest in health. Caney 2008 *Environ Polit* 538.

Before an argument can be made for the creation of a human rights approach to climate change, consideration will have to be given to the question whether such an approach could be justified morally. A legal human right encompasses legal burdens and obligations which are dependent upon “legislative, judicial and executive bodies that maintain and interpret the laws in question”.²⁷⁵ When considering the roots and foundation of human rights and the ethical demands that were made by society as a whole after the Second World War,²⁷⁶ it is evident that some aspects of moral human rights are now also widely accepted. Moral human rights are independent of governmental bodies, yet these rights afford the governmental bodies with legitimacy, should they have the capacity to create and enforce moral obligations that must be complied with.²⁷⁷ Accordingly, moral human rights would allow for a critical review of existing international law, and therefore its legitimacy is based on natural law.²⁷⁸ Whereas, legal human rights derive their validity from the sources of international laws and treaties.²⁷⁹

Accordingly, it is clear that “two related branches” of human rights exist: first a moral or ethical branch, and secondly a juridical or legal branch.²⁸⁰ Based on the typical characteristics of human rights, it cannot be assumed that a human right can be created or invoked, just because of the ethical demand being made by certain members of society, no matter how intense this ethical demand might be.²⁸¹ The

275 Bell 2013 *WIREs Climate Change* 161. Pogge 2005 *LJIL* 718. Rajamani 2010 *J Environ Law* 413.

276 Accordingly, owing to the events that took place, the lessons of the Second World War have been engraved in the thoughts of all citizens of the world. The resolution of the Second World War and the acceptance of the Universal Declaration of Human Rights could also be said to be a turning point in the modern practice of international human rights.

277 Furthermore, take note that moral human rights are justified by their moral argument and they are not dependent upon the existence of international law. Pogge 2005 *LJIL* 718. Bell 2013 *WIREs Climate Change* 161.

278 Woodcock 2006 *J Hist Intl L* 245.

279 Rajamani 2010 *J Environ Law* 413.

280 Cameron 2011 *Social Development Working Papers* 1. Rajamani 2010 *J Environ Law* 412.

281 Primarily, human rights can be seen as ethical demands made by society. Therefore, although human rights often motivate the creation of legislation, this is more of a reflection of that demand meeting a certain internationally acknowledged threshold, than a “constitutive characteristic” of that particular ethical demand, being made. The key to the significance of the ethical demand which is being made relates to the importance of the freedoms that form the basis for the demand. These ethical demands can thus generate reasons for action that supports their inclusion and recognition. For example, the Universal Declaration of Human Rights, which is not legally binding, can be thought to be merely a compilation of ethical demands or articulations, rather than legal statements. Morris *Human Rights and Social Theory* 142. Sen 2004 *Philosophy and Public Affairs* 320.

reason for this is that human rights require and are dependent upon the existence of certain legal frameworks; and it would be difficult to demand the inclusion of a human right just on the basis of an ethical demand.²⁸² It is necessary to remember that before these demands can become recognised human rights, “human rights law requires identifiable violations, identifiable harms attributable to violations, and for remedies to be provided by the government to individuals within its territory and jurisdiction”.²⁸³

4.3.1 Justification for climate-type human rights

In an effort to determine if the demand for the inclusion of a climate change human right meets the criteria of an acceptable and recognised international human right, the following questions have to be considered: do climate change impacts undermine the realisation of rights, are climate change policies possibly weakening the realisation of rights, and would a human rights approach develop opportunities for improved climate change resilience?²⁸⁴

Various writers have argued that anthropogenic climate change threatens basic human rights and ultimately plays a considerable role in the realisation of fundamental, recognised human rights.²⁸⁵ Furthermore, it is apparent that there is a general acceptance of environmental rights on a national, regional and international level.²⁸⁶ Although the recognition of environmental rights can be found in numerous international soft laws, treaties and various national constitutions, few recognise a direct human right likened to the environment. In particular, the African Commission²⁸⁷

282 Cameron 2011 *Social Development Working Papers* 1.

283 Sen 2004 *Philosophy and Public Affairs* 320. Cameron 2011 *Social Development Working Papers* 2.

284 Cameron 2010 *Ga. J. Int'l & Comp L* 676.

285 Writers who share this view include *inter alia* Rajamani, Bell and Caney. The UNHRC notably also shares this view, as demonstrated throughout this paragraph.

286 The Ksentini Report, commissioned by the UN Sub Commission on Prevention of Discrimination and Protection of Minorities, records this universal acceptance. See the Draft Principles on Human Rights and the Environment, E/CN.4/Sub.2/1994/9, Annex I (1994), which can be found at: <https://www1.umn.edu/humanrts/instree/1994-dec.htm>.

287 The European Court of Human Rights has also recognised the fact that environmental violations lead to human rights violations, even in the absence of a recognized environmental human right. The European Court held in the Lopez Ostra case (*Lopez Ostra v Spain* (1994) 20 EHRR 277) that significant environmental pollution may affect the well-being of individuals. For a comprehensive discussion on this case, see: P Sands “Human Rights, Environment and the Lopez Ostra Case: Context and Consequences” 1996 *EHRLR* 597-618.

has used the violation of a recognised right to find Nigeria in violation of the right to life, health, food, property and the right to a healthy environment.²⁸⁸ The African Commission similarly found that Kenya violated the rights to freedom of religion, property, health, culture, religion, natural resources, and intriguingly the right to development.²⁸⁹

In the SERAC case it was alleged that Nigeria had violated, amongst others, the right to a satisfactory environment.²⁹⁰ The African Commission held that this right in particular had been violated,²⁹¹ and the Commission went further to establish that such a right imposes certain duties upon governments, which include the obligation:²⁹²

To take reasonable measures to prevent pollution and ecological degradation; promote conservation and ensure ecological sustainable development and the use of natural resources; permit independent scientific monitoring of threatened environments; undertake environmental and social impact assessments prior to industrial development; provide access to information communities involved; and grant those affected an opportunity to be heard and participate in the development process.

The African Commission considered such duties in terms of procedural aspects and substantive aspects in such a manner as to highlight the socio-economic characteristics of environment-related rights.²⁹³ Moreover, the African Commission went so far as to “read into” Nigeria’s obligations some rights not expressly guaranteed

288 Decision of the African Commission on Human and People’s Rights, Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria*, ACHPR/COMM/A004/1 (27 May 2002). (Hereinafter referred to as the “SERAC” case.)

289 Decision of the African Commission on Human and People’s Rights, Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (17 February 2010). (Hereinafter referred to as the “Endorios” case.)

290 Other rights violations include the right to life, the right to health, the right to a healthy environment, the right to property, the right to housing and food, and the protection of the family.

291 This right was directly linked to the right to development, but the ultimate decision that the right to development had indeed been violated was never included in the African Commission’s final decision, and other rights violations were emphasized instead. ACHPR, Communication NO 155/96: *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in Decisions 2002–2007, IHRDA, Banjul 2008, 277–293], paragraph 52. Barnard *Nuclear energy in Africa* 120. Gonzalez 2015 *Santa Clara Journal of International Law* 184. Chirwa 2002 *Hum Rts. Br.* 16.

292 SERAC case, paragraphs 52 and 53.

293 Van der Linde and Louw *AHRLJ* 179.

in the Banjul Charter, which reflects the Commission's creative approach in dealing with this case.²⁹⁴

In the Endorois case, the Commission considered a broad interpretation of legislation and particularly deliberated on the interdependency of all the rights for which a claim had been made, in connection with the right to development and the protection of such a right. During this case it was argued that the various collective rights to religious practice and culture, property, free disposition of natural resources, and development were being violated.²⁹⁵ The Kenyan government defended themselves against the arguments raised against them and stated that not just had these communities received financial compensation but they continued to draw benefit from the development. However, the court held that the eviction and restriction of access to Lake Bogoria undertaken by the Kenyan government had led to the explicit violation of the right to development and various other rights too.²⁹⁶

Taking into account these cases and interpreting existing international human rights treaties provides for the argument that a climate change right focused on adaptation can be realised through existing AU human rights. This would imply that the climate change right would to some extent be a subordinate right, recognised and derived through the interpretation of other rights.²⁹⁷ The rights as contained in articles 22 and 24, the right to development and to a generally satisfactory environment favourable to a person's development, of the Banjul Charter, would be the existing rights from which the right to climate change adaptation would be derived.

294 Barnard *Nuclear energy in Africa* 120. For a full discussion on the abovementioned cases, see: Van der Linde M and Louw L "Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication" *AHRLJ* 167-187.

295 ACHPR, "Case 276/2003: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council versus Kenya*", February 2010, 1.

296 For a full discussion on the abovementioned cases, see: Lynch G "Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois" 2011 *African Affairs* 21-22.

297 Bluemel and Barnard make the same argument with regards to the rights to water and energy. Bluemel used the rights contained in the ICESCR, namely the rights to adequate housing, food and a standard of living to establish that the right to water is encompassed through the recognition of these rights. Bluemel 2004 *Ecology Law Quarterly* 969-971. Barnard *Nuclear energy in Africa* 122.

This human right to climate change adaptation can be characterised as a right through which other rights are recognised, such as the rights to life, health, development and a satisfactory environment. This would imply that the right is seen as a subordinate right and is recognised through primary human rights found in international human rights agreements. However, it could also be considered as a secondary right the achievement of which is dependent upon achieving the primary economic and socio-cultural rights recognised directly by an agreement, such as the ICESCR. This approach seems more appropriate, since it would allow complainants to rely on existing human rights without having to convince governments to adopt additional institutional frameworks.²⁹⁸ Taking this approach, however, would have its limitations in that human rights law is unsuitable to protect ideals where the rights are not expressly recognised. But then again, if one takes full account of the method²⁹⁹ by which the African Commission interpreted the duties envisaged by the Banjul Charter, it is quite possible to argue that it is not necessary for the human right on which the claim is based to be directly recognised. Lastly and preferably, it might be possible to have the right recognised as an independent human right, but once again, if the SERAC method is followed, independence is not necessarily warranted.

In order to create a theoretical basis for proposal that a climate change right regarding adaptation should be accepted as an AU human right, the General Comment 15 made by the CESCR and the SERAC and Endorios decisions could be applied.³⁰⁰ Although the General Comment 15³⁰¹ refers to the right to water, the value of this Comment lies in the fact that the CESCR connects this right to various other international human, economic, social and cultural instruments. Ultimately, the Comment recognises the right to water as an independent human right through the statement that it is a

298 Knox "Diagonal Environmental Rights" 153.

299 The rights which were found to have been violated were not expressly recognised in the Banjul Charter, but the Commission, during their decision, "read into" some rights, which included rights to food, hunting, etc. This broadminded interpretation in the SERAC communication expanded the scope and range of the rights to which States are bound by Banjul.

300 The same foundation and argument is used by Barnard to derive an AU human right to energy, in Barnard *Nuclear energy in Africa* 122.

301 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11. See the General Comment at: <http://www.refworld.org/docid/4538838d11.html>.

“prerequisite for the realisation of other human rights”.³⁰² This allows that a violation of a human right may be recognised without requiring that such a right be explicitly or directly recognised in a human rights instrument.

4.4 Conclusion

A human rights-based approach to climate change can be described as an approach which provides a conceptual framework for climate change policies, a framework which is normatively based on international human rights standards, and which is practically directed to promoting and protecting human rights.³⁰³ Consequently, the emphasis in this approach is placed on encouraging a contribution towards sustainable policy responses. Accordingly, it is seen as a more forward looking approach than that in current human rights law, which focuses on rectifying previous wrongs.³⁰⁴

The inference is drawn that in order to achieve the objectives set out under the AU Constitutive Act³⁰⁵ and to give full recognition to articles 22 and 24 of Banjul, an independent AU human right to climate change adaption must be created. Consequently, the full realisation of article 24, a right to a generally satisfactory environment favourable to one’s development, is dependent on the creation and fulfilment of a human right to climate change adaption. African States are obliged under their commitment and support for various international climate change instruments to identify and explore the human rights that might be placed at risk by climate impacts, and to take pre-emptive action in that regard.³⁰⁶ Most importantly,

302 Paragraph 1 of General Comment 15.

303 Gromilova 2014 *Utrecht Law Review* 91.

304 Limon describes this approach as encouraging the evolution of and providing a qualitative contribution to robust, effective, and sustainable policy responses at both the national and international levels, across mitigation and adaptation. Limon 2009 *Harv. Env’tl. L. Rev.* 458. Gromilova 2014 *Utrecht Law Review* 91.

305 The objectives of the AU Constitutive Act, article 3 (c), (d), (f), (g), (h), (j), (k), encompass *inter alia* the following: to accelerate political and socio-economic integration, to promote peace and security, to promote African positions, good governance, human and peoples’ rights, sustainable development, and co-operation in all fields of human activity to raise the living standards of African peoples.

306 The UNFCCC, in its preamble, states that parties must, within their common but differentiated responsibilities and respective capabilities and their social and economic conditions, participate in an effective and appropriate international response to climate change. The UN Charter and the Universal Declaration of Human Rights also places a duty on states to cooperate and to prevent

developing States are required by the UNFCCC to develop in a sustainable manner and to address climate change effects through adaptation.³⁰⁷ Ultimately, the creation of a human rights-based approach to climate change adaptation would encourage the fulfilment and recognition of the Banjul rights, would ensure the protection of human dignity, and would encourage the African Continent to be more adaptive to the impacts of climate change.

the violation of human rights, and this duty includes, taking effective action in the fight against climate change.
307 Articles 3(4) and 4(1).

5 Conclusion and Recommendations

In an age that has faced simultaneous environmental destruction and environmental protection it could be said that the greatest tragedy is that society has not forced governments to change their wary ways and take account of those warnings science has been issuing. It is clear not only that climate change will have detrimental effects on millions of citizens of the world, but also that these impacts will have a substantial influence on the realisation and recognition of these individuals' human rights. The recognition of a climate-type right to an assured environmental quality is a prerequisite for the fulfilment of international fundamental guaranteed human rights and freedoms.³⁰⁸

Communities devastated by the impacts of climate change are progressively basing their claims for environmental justice on the demand for the protection of human rights. With at least 147 national constitutions recognising environmental rights and responsibilities, it is clear that human rights law plays a vital role in the fight for environmental justice.³⁰⁹ The particular language of human rights proposes in theory that human rights surpass any other considerations, and that they are by their very nature inalienable, permanent, and fundamental. In brief, a human rights-based approach could be described as "viewing certain human rights as essential precursors to achieving environmental protection".³¹⁰ Consequently, whether a human right to climate change adaptation is created as a subordinate right dependent upon other recognised human rights or an independent human right, the recognition of such a right would have far-reaching effects.

The Human Rights Council, has consistently recognised that the realisation of human rights depends on a healthy environment. Further, the explicit recognition of a human right to climate change adaptation would provide individuals with a remedy and this

308 *United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, Report of the United Nations Conference on the Human Environment, U.N. Doc.A/Conf.48/14/Rev.1, 3 (Nov. 1973).*

309 Gonzalez 2015 *Santa Clara Journal of International Law* 157.

310 Morgera "A Human Rights-Based Approach to Tackling Climate Change" 360.

would enable national and international organisations, courts and institutions to progressively prepare for the impacts of climate change.

The unambiguous acknowledgement through the international climate change negotiations that the Africa region is particularly vulnerable to the effect of climate change has created a mandate for the AU to introduce a climate change-type human right. Under the UNFCCC³¹¹ the AU is urged to consider, as a matter of urgency, adaptation or response measures that realise their commitments in relation to the climate change regime. In particular, under the UNFCCC's negotiations the urgency for Africa to develop adaptation tools that will enhance its adaptive capacity, resilience and vulnerability toward the impacts of climate change has explicitly been signalled.

This thesis has put forward the hypothesis that a human rights-based approach to climate change adaptation is the only approach, within an African context, that would explicitly give realisation to the linkages between development and the right to a general satisfactory environment. In summation, the following statements and recommendations should be seen to embody and integrate the author's conclusions regarding the hypothesis.

With the publication of the CESCR's General Comment 15, a theoretical basis for the creation for a human rights approach materialised, making it possible for individuals to perhaps ground their claims of human rights violations in relation to climate change on this theoretical possibility. Consequently the African Commission used and applied this theoretical basis during its interpretation of the socio-economic rights recognised by the ICESCR and the Banjul Charter, in the SERAC and Endorios communications.

In General Comment 15 the CESCR interpreted the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health as recognised in articles 11 and 12 of the ICESCR as implicitly including other rights. The presence of the word "including" in article 11 was interpreted as meaning that the list of rights contained in the ICESCR was not exhaustive, and other rights compatible with articles 11 and 12 could therefore simply be read in. The point

311 Particularly articles 3(4), 4(1)(d)(e) and 4(8).

of this lies in the fact that the CESCR approach maintains that the realisation of existing human rights is dependent, in certain cases, upon the formulation and successive realisation of other inherent rights. The author of this paper has used this interpretation to suggest the possibility of “reading in” a right to climate change adaptation at an AU level, asserting that the AU human rights formally recognised by Banjul should not be considered as an exhaustive list. The reading in of implicit rights is essential to the realisation of those AU human rights which are already formally recognised by Banjul, and this reading in is often merited. A climate right can therefore be derived from existing human rights, and it will therefore be justified through the existence of the right or rights it is connected with.

The author therefore recommends that the interpretation of the CESCR as applied by the ACHPR in reaching its decisions in the above-mentioned cases should be followed in justifying a right to climate change adaptation. In this regard, the right to development and the right to a generally satisfactory environment favourable to development, contained in articles 22 and 24 of the Banjul Charter, should be interpreted so as to include an implicit right to climate change adaptation. The realisation of the rights contained in articles 22 and 24 should be interpreted as being dependent upon the realisation of the right to climate change adaptation. It is concluded that a right to climate change adaptation, derived from existing AU human rights, should be considered to be an independent, recognised AU human right. The fulfilment of these rights would assist in the protection and promotion of human dignity and furthermore serve to promote sustainable development on the African continent.

The African Common Position on Climate Change recognised the importance of regional cooperation among member States regarding the development of coordinated law and policy on matters of common interest. The author is accordingly of the opinion that a regional approach towards recognising a right to climate change adaptation would be appropriate to the African framework. It is concluded that the AU’s response to climate change adaptation should be structured around a coordinated legal response based on the cooperation of all AU member states.

The author concludes that the right to climate change adaptation, the right to development, and the right to a satisfactory environment could be recognised by way

of a coordinated regional climate change adaptation legal framework. It would be very difficult for African communities to adapt to climate change variability without proper institutional and legislative support.³¹² The creation of a coordinated regional approach to climate change adaptation is ultimately vital to the advancement of sustainable development in the African region.

312 Madzwamuse *Climate Governance in Africa* 10.

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