11 Can the African human rights system be an effective environmental justice system in Africa?

*Bhavna Mahadew**

1 Introduction

African countries' governments have often expressed concern for the transboundary effects of activities causing global warming. However, the domestic challenge of regulating the activities of companies and private individuals to ensure the environment is protected for the present and future generations continues to remain within the remit of governments and not international organisations. Citizens in countries where economic and political actors have subdued the legal system turn to extraterritorial systems to access environmental justice. Already, cases and factors that necessitated the institution of claims in judicial systems outside Africa have been discussed in this book; this chapter considers the African human rights system a practical option for seeking environmental justice outside Africa.

Environmental justice refers to the fair treatment and meaningful involvement of all people, irrespective of national origin, colour, race, or income, with respect to the creation, implementation, and enforcement of laws, regulations, and policies related to the environment.[1] The notion of fair treatment in environmental justice implies that no individual or group of persons should be disproportionately be subject to the negative environmental impacts and consequences that result from industrial, commercial, and governmental operations and policies.[2] As for the concept of meaningful involvement, this is usually characterised by an opportunity that people should have to participate in activities and

* Law Lecturer, University of Technology, Mauritius bhavna.mahadew@utm.ac.mu

1 United States Environmental Protection Agency 'Learn about environmental justice' (2021) https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (accessed 30 November 2021).

2 A Kaswan 'Environmental justice: Bridging the gap between environmental laws and justice' (1997) 47 *American University Law Review* 221.

undertakings that may affect their environment and health, with their contribution acknowledged and their concerns considered.[3]

According to the environmental justice movement that originated in the United States of America in the 1980s, environmental justice can be broadly seen as an essential component in the struggle to improve and maintain a healthy and clean environment, especially for people who have lived and worked closest to the source of pollution.[4] Environmental justice has also been argued to affirm and recognise the fundamental right to political, economic, cultural and environmental self-determination of all peoples and the right of victims of environmental injustice to receive reparations and compensation for damages. It equally opposes the devastating consequences that the operations of multinational corporations may have on the environment as well as exploitation, repression and occupation by the military of lands and other resources of humanity.[5]

Focusing on environmental justice in Africa, Ssebunya et al have argued that:

> [C]urrent debates and discussions on environmental justice seem to focus more on the West. In a typical African communitarian society, the idea of environmental justice has not been adequately conceptualised. Key scholars in African environmental ethics such as Godfrey Tangwa, Segun Ogungbemi and Murove Munyaradzi have mainly focused their attention on the preservation of nature for both current and future generations, thereby giving less attention to the equitable distribution of environmental resources and environmental burdens in Africa. As such, issues of environmental justice seem to be conspicuously absent from African environmental ethics discourse.[6]

To fill in the above gap, Chemhuru argues that African philosophies such as Ubuntu ethics, relational ethics, ecofeminist ethics, and communitarian ethics are sources from which environmental justice in Africa can be

3 T Abel & M Stephan 'Tools of environmental justice and meaningful involvement' (2008) 10 *Environmental Practice* 152.

4 R Skelton & V Miller 'The environmental justice movement' (2016) https://www.nrdc.org/stories/environmental-justice-movement (accessed 30 November 2021).

5 M Ramirez-Andreotta 'Environmental justice' in M Brusseau et al (eds) *Environmental and pollution science* (2019) 573.

6 M Ssebunya et al 'Environmental justice: Towards an African perspective' (2019) 29 *African Environmental Ethics* 175.

derived.[7] He contends that there exist ways in which African philosophies of existence seek to make everyone participate in environmental planning and policy-making as well as equitably shoulder environmental burdens and reap environmental benefits. He proposes that principles that originate from African philosophies, such as relationships, equality, humaneness, and teleologically oriented existence can contribute to environmental justice in Africa.

While it is clear that the conceptual framework of environmental justice in Africa is still in its developmental stage, there is a pressing need for at least some form of environmental justice to be delivered on the African continent as remedies to victims. As observed above, environmental justice has various premises: economic, financial, scientific, legal, and socio-political. The premise that forms the basis of this chapter is the legal one underpinned by human rights law provided by rules and norms in the African human rights system. The African human rights system refers to the regional system under the aegis of the African Union characterised by specific charters and conventions on human rights and the environment and, more specifically, the human right to the environment. The main argument is that the African human rights system can act as an effective environmental justice system in Africa. It can arguably complement the domestic legislative and judicial framework in African jurisdictions at the domestic level.

This chapter provides an overview of environmental injustice and damage occurring and still existing in Africa. While it is impossible to cover all 55 African states, selected jurisdictions have been chosen with the reasonable assumption that similar environmental injustices and damages are also happening in other African states. The following section focuses on environmental justice in selected jurisdictions from a human rights litigation perspective. This will enable readers to overview court litigation and its effectiveness in domestic countries to enhance and achieve environmental justice. This is followed by another section that presents the arguments on the potential that the African human rights system has for improving environmental justice in Africa before relevant recommendations are made to enhance the efficiency and effectiveness of this system.

7 M Chemhuru 'Environmental justice in African philosophy' (2021).

2 An overview of environmental injustice and damages caused to Africans

Western private companies have reportedly contributed to the overexploitation and degradation of environmental resources in Africa. The Great Lake areas of the Democratic Republic of Congo (DRC) bear testimony to this statement. Home to the second-largest rainforest in the world, forests have been severely destroyed by logging companies, contributing to global warming in that area.[8] According to Munnik, diamond mining in the DRC has also resulted in water pollution and deforestation.[9] It has also been reported that private companies entered into concession agreements with the rebel groups when the latter used to control those areas.[10] Toxic dumping by multinational companies and industrialised nations is also a form of environmental injustice for Africa. For instance, Egypt, Nigeria, Equatorial Guinea, Guinea-Bissau, and Benin have been the subject of such practices in the past by American and European companies.[11] Despite the existence of an international legal framework on transboundary movement of wastes, supported by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and the Disposal of 1989 and the Bamako Convention of 1991, any attempt to restrict such movements that cause environmental damage to Africa has not been effective or successful per se.[12]

It is interesting to note that Kelbessa has argued that structural adjustment programmes by the IMF, World Bank, and Western donor countries have negatively impacted the environment in Africa.[13] Many African countries failed to formulate appropriate legislative frameworks to force multinational and private companies to internalise environmental and social costs. Social dislocation and environmental degradation have often been caused by trade liberalisation. Lawrence Summers, a former US Treasury Secretary, World Bank Official, and President of Harvard

8 V Munnik 'Solidarity for environmental justice in Southern Africa' (2007).

9 Munnik (n 8) 10-11.

10 See R de Koning 'Conflict between industrial and artisanal mining in the DRC: Case studies from Katanga, Ituri and Kivu' in S Evers et al (eds) *Africa for sale? Positioning the state, land and society in foreign large-scale land acquisitions in Africa* (2013) 181-202.

11 A Dimah 'Transboundary shipment of hazardous wastes to sub-Saharan Africa: A challenge for the Nigerian foreign policy' (2001) 3 *Journal of Sustainable Development in Africa* 57.

12 F Adeola 'Environmental injustice and human rights abuse: the states, MNCs, and repression of minority groups in the world system' (2001) *Human Ecology Review* 39.

13 W Kelbessa & A Ababa 'In search of an ethical response of environmental impacts of globalisation' (2009) 1 *Caribbean Journal of Philosophy*.

University once suggested in a World Bank Memo that the World Bank should encourage the migration and relocation of the 'dirty industries' to Africa, where the value of human life is negligible or very low.[14] This profoundly illustrates environmental justice or injustice in and towards Africa. It is essential to point out that African governments have also been responsible for considerable environmental injustices in Africa. In association with warlords, the government of Sierra Leone and Angola have exploited their countries' resources in a manner that has caused severe environmental damage to their citizens.[15]

It is today well documented that Africa suffers from significant environmental challenges such as soil erosion, deforestation, desertification, insect infestation, and wetland degradation, to name a few. Indeed, Africa seems to be at the frontline of another related issue: climate change. For instance, the United Nations has stated that the Lake Chad Basin, which covers 8 per cent of the continent and is a source of livelihood for tens of millions of people, has shrunk by 90 per cent since the 1960s because of severe droughts. Referring to this critical issue, Adenike, a young Nigerian lady who participated in the COP 26 Climate Summit in Scotland in November 2021, made the following remark.

> The peace and stability in this region – in the Lake Chad region, the Sahel – depends on when we are able to restore the lake and say that people can get sustainable livelihoods, for them not to be vulnerable to join armed groups of people. And this will likewise improve democracy in the region.[16]

Therefore, it is evident that environmental challenges in Africa are also closely linked with other issues such as violence, terrorism, and a lack of democracy. Deforestation is another major issue that Africans face. According to Greenpeace, the forest cover of Africa, commonly referred to as the lungs of the world, is on a steady decline, with tropical forests of the Congo Basin, Guinean forest of West Africa and coastal forests of East Africa all being systemically eliminated.[17] In Kenya, the Mau Forest

14 L Summers 'The memo' World Bank Office of the Chief Economist (1991) http://www.whirledbank. org/ourwords/summers.html (accessed 1 December 2008).

15 See A Hoogvelt 'Globalization and the postcolonial world: The new political economy of development' (2001).

16 H Ridgwell 'COP26: African youth demand rich nations fulfil promises' *Voice of America* 12 November 2021 https://www.voanews.com/a/cop26-african-youth-demand-rich-nations-fulfil-promises/6311666.html (accessed 30 November 2021).

17 J Igamba 'How widespread deforestation in Africa risks our climate future' *Greenpeace* 6 September 2021 https://www.greenpeace.org/africa/en/blogs/49073/how-widespread-deforestation-in-africa-risks-our-climate-future/ (accessed 30 November 2021).

Complex and the Mount Elgon Forest, two forests that contain several important springs and streams that eventually feed lakes such as Victoria and Turkana, are facing intense pressure from deforestation. Deforestation, in turn, has profound effects. First of all, it is detrimental to human health. When forests are destroyed, animals and insects move to areas populated by humans since their natural habitats have been destroyed. This can be a dangerous situation since these animals can spread pathogens to humans, causing diseases such as zoonotic.[18]

For example, the outbreaks of Ebola in Central and Western Africa have been linked to deforestation.[19] Food insecurity is another significant effect of deforestation. Olagunju has argued that human-induced deforestation causes forest degradation and the fragmentation of food security

> through the loss of biodiversity that is a source of food to man and indirectly through its effect on soil degradation and alteration of the weather elements, which in turn reduce agricultural productivity.[20]

Another devastating effect of deforestation is flooding, of which very often African communities fall victim. Researchers have clearly stated that removing trees from the forests will make rainy seasons have devastating effects such as a floods.[21]

Desertification is another challenge in Africa. It is the process through which fertile lands are lost due to drought, overpopulation, overfarming and climate change. The United Nations has estimated that about 30 million acres of land around the globe are impacted by desertification annually. The most vulnerable stretch of land seriously threatened by desertification is a 3000 miles stretch of land found in the Sahel Region of Africa, an area between the Sahara Desert and the Sudanese Savannah.[22] The desertification process affects 46 per cent of Africa, according to the

18 World Health Organisation 'Zoonoses' (2020) https://www.who.int/news-room/fact-sheets/detail/zoonoses (accessed 30 November 2021).

19 J Olivero et al 'Recent loss of closed forests is associated with Ebola virus disease outbreaks' (2017) 7 *Science Report* 14291.

20 T Olagunju 'Impacts of human-induced deforestation, forest degradation and fragmentation on food security' (2001) 8 *New York Science Journal* 10.

21 A Henderson-Sellers et al 'Tropical deforestation: Modeling local to regional scale climate change' (1993) 98 *Journal of Geophysical Research* 7289.

22 The Borgen Project 'The effects of desertification in Africa' https://borgenproject.org/tag/desertification-in-africa/ (accessed 30 November 2021).

Natural Resource Conservation Service of the United States Department of Agriculture.[23]

In addition to the above environmental challenges that Africans face, they are also affected by pollution caused by private individuals or state actors through industrial activities. For example, air pollution was responsible for 1.1 million deaths across the continent caused by household air pollution and ambient air pollution.[24] Climate change is also another critical issue Africans are battling. The African continent is indeed the most vulnerable continent to climate change.[25] According to the Intergovernmental Panel on Climate Change, such a vulnerability is driven by factors such as weak adaptive capacity, high dependence on ecosystem products or goods for livelihoods, and an under-developed agricultural production system.[26]

The above overview makes it clear that Africans' lives are severely affected by environmental challenges. This violates their fundamental rights and freedoms, including civil, political, and socio-economic rights, daily. One can argue that multiple stakeholders may be held responsible for their plight: the government, both central and local; the international community for their inaction, especially regarding climate change; private investors and corporations that are solely focusing on profit. The critical question that arises from this observation is whether there is a form of environmental justice that brings some relief and redress to these victims. Can such a type of justice be obtained at the domestic level? The following section deals with the domestic level and assesses the potential of success for victims to seek justice for environmental injustices suffered.

3 The potential for delivery of environmental justice at the domestic level

Since 2015, more than a thousand cases related to the environment have been filed before courts globally.[27] Despite this global increase, only a few

23 Natural Resources Conservation Service Soils 'Land resources stresses and decertification in Africa' https://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/use/?cid=nrcs142p2_054025 (accessed 30 November 2021).

24 J Ärnlöv et al 'Global burden of 87 risk factors in 204 countries and territories, 1990-2019: A systematic analysis for the Global Burden of Disease Study 2019' (2020) 396 *The Lancet* 1223.

25 African Development Bank Group 'Climate change in Africa' https://www.afdb.org/en/cop25/climate-change-africa (accessed 30 November 2021).

26 O Chidiebere & P Chirwa 'Analysis of rural people's attitude towards the management of tribal forests in South Africa' (2019) 38 *Journal of Sustainable Forestry* 396.

27 Grantham Research Institute on Climate Change and the Environment 'Global

cases have been filed in Africa. For instance, only around ten cases related to climate change have been filed in African jurisdictions. Kotze and Du Plessis have argued that Africans have brought relatively few claims before their domestic courts despite being extremely vulnerable to climate change and its consequences.[28] The main reasons to explain this situation are the weak and functionally non-existent legislative framework for protecting the environment and obstacles such as lack of standing and limited access to financial resources available to claimants.[29]

That said, several cases related to environmental impact assessments (EIAs) have been brought before domestic courts in African countries. The cases of *Save Lamu v National Environmental Management Authority & Amu Power Co Ltd* in Kenya and *Earthlife Africa Johannesburg v Minister of Environmental Affairs* in South Africa are two notable examples dealing with EIAs.[30] In the former case, brought before Kenya's National Environmental Tribunal in November 2016, the issuance of a license by the Kenyan National Environmental Management Authority to a power company enabling the latter to construct a coal-fired power plant in Kenya was challenged by a community-based organisation and individual claimants in Lamu County. The main argument of the claimants was that the Kenyan authority failed to carry out a proper EIA, which contributed to the ill effects on health and biodiversity caused by climate change. The Tribunal set aside the license and adjudicated that the Kenya Authority violated EIA regulations by issuing the license without proper and meaningful public participation. It also ordered the power company to conduct a new EIA study under the EIA regulations recently enacted under the Natural Resources Act 2016, the Climate Change Act 2016, and the Energy Act 2019.

In the case of Earthlife Africa Johannesburg, an environmental NGO filed a claim against the Minister of Environmental Affairs. The Ministry issued a license to companies in view of building a coal-fired power plant in Thabametsi. The claimants argued that the EIA did not adequately address and consider this project's environmental, and notably climate change-related, consequences. The High Court held that these considerations were essential even if the South African National Environmental Management

trends in climate litigation: 2021 snapshot' https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/ (accessed 30 November 2021).

28 L Kotzé & A du Plessis 'Putting Africa on the stand' (2019) 50 *Environmental Law* 615.

29 S Adelman et al (eds) *Climate change litigation: Global perspectives* (2021) 274.

30 *Save Lamu et al v National Environmental Management Authority & Amu Power Co Ltd* Tribunal Appeal No Net 196 of 2016; *Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] 2 All SA 519 (GP) (8 March 2017).

Act 1998 does not explicitly contemplate climate change. Citing South Africa's commitments under the Paris Agreement of 2015, the High Court set aside the license.

It should also be highlighted that many rights-based claims have been filed before African courts. For example, the cases of *Gbemre v Shell Petroleum Development Company of Nigeria Ltd*[31] and *Mbabazi v The Attorney General*[32] in Uganda have considered rights-based claims relating to environmental issues. In the former case, Jonah Gbemre from the Iwherekan Community in the Niger Delta filed a lawsuit before the Federal High Court of Nigeria against Shell and the government of Nigeria in July 2005. He argued that Shell was engaged in intense and massive gas flaring activities in the Iwherekan community in furtherance of oil exploration activities, which poisoned and polluted the environment. He further argued that such actions amounted to a violation of their right to life and dignity as enshrined by the Nigerian Federal Constitution. The Court agreed with their arguments and ordered Shell to stop gas flaring activities in the Niger Delta immediately.

In the Mbabazi case, claims were brought against the Ugandan National Environment Management Authority before the High Court of Uganda in September 2021. The claimants argued that the extreme weather conditions and resulting damage and loss of life were linked to the government's inaction regarding climate change. They further added that the Ugandan Constitution confers the role of public trustee of the natural resources and the atmosphere on the government of Uganda, which is obliged to preserve them from degradation for the present and future generations. Since then, the High Court has only ordered a mediation process without ordering any further action.

It should also be noted that South Africa is arguably the African country with the highest number of litigation cases regarding the environment. This may be explained by the vibrant and well-organised civil society organisations involved in strategic litigation on environmental issues and the elaborate constitutional protection that the Constitution of South Africa confers on the environment as a matter of right. In the case of *Minerals Council of South Africa v Minister of Mineral Resources and Energy*,[33] the High Court of South Africa (Gauteng Division, Pretoria) was

31 *Gbemre v Shell Petroleum Development Company of Nigeria Ltd* and *Mbabazi v The Attorney General* (2005) AHRLR 151 (NgHC 2005).

32 *Mbabazi v The Attorney General* High Court Civil Suit 283 of 2012.

33 *Minerals Council of South Africa v Minister of Mineral Resources and Energy* 2022 (1) SA 535 (GP) 20341/19.

called upon to decide whether the 2018 Mining Charter of South Africa was merely a policy or a law and therefore whether provisions containing prescriptive requirements and sanctions for non-compliance were valid. The Court held that the 2018 Mining Charter has to be regarded as a policy, and hence sanctions provided by it for non-compliance are invalid. The same Court, in the matter of *Federation of South African Fly Fisheries v Minister of Environmental Affairs*,[34] emphasised the need for public participation in environmental issues through the following passage from the judgement:

> Public participation in democratic processes is not the exclusive preserve of educated members of society who can read English or the privileged few who have access to the internet. Participative democracy is one of the foundational values of the Constitution, and everyone should be encouraged and enabled to participate.

The issue of public participation was also canvassed in the case of *Groundwork Trust v DG: Water and Sanitation and ACWA Power, Khanyisa Thermal Power Station (RF) Pty Ltd*,[35] whereby the Water Use License was set aside by the Water Tribunal of South Africa for lack of public participation. The Tribunal directed ACWA Power to re-advertise and conduct public involvement properly. It should also be noted that the Tribunal highlighted that climate change was a determining and relevant factor to be considered in Water Use Application Licenses as per Section 27 of the National Water Act 36 of 1998 of South Africa. Another notable case was the *South African Human Rights Commission v Msunduzi Local Municipality*.[36] In this case, the Msunduzi Local Municipality was found by the High Court of South Africa (KwaZulu-Natal Division, Pietermaritzburg) to have infringed the constitutional right to a healthy environment of the inhabitants for its non-compliance with Section 24 of the Constitution of the Republic of South Africa, 1996; Section 20(b) of the National Environmental Management: Waste Act 59 of 2008; Section 31L(4) of the National Environmental Management Act 107 of 1998; Section 28(1) and (3) of the National Environmental Management Act 107 of 1998; Section 19(1) of the National Water Act 36 of 1998; and its obligations in terms of international law regarding the management of the New England Road Landfill site in Pietermaritzburg.

34 *Federation of South African Fly Fisheries v Minister of Environmental Affairs* (62486/2018) [2021] ZAGPPHC 575 (10 September 2021).

35 *Groundwork Trust v DG: Water and Sanitation and ACWA Power, Khanyisa Thermal Power Station (RF) Pty Ltd* WT02/18/ MP 21 July 2020.

36 *South African Human Rights Commission v Msunduzi Local Municipality* 2021 (6) SA 500 (KZP) .

Concerning environmental legislation, a vast majority of African States have adopted framework environmental legislation, even if the level of sophistication of the framework may vary from one country to another.[37] These countries have also noticed an effort to establish apex institutions and align functional and sectoral agencies with environmental considerations. It is also noteworthy that they struggle with limited human and institutional capacity to strengthen the legislative and institutional arrangements to boost their efficiency. The following passage by Okidi is relevant to this viewpoint:

> A decisive lesson is obtainable from the pilot project on Environmental Law and Institutions in Africa that has been implemented systematically in seven African countries from 1995 to 2001, and with funding from The Dutch Government. Through the methodology operationalising the concept of capacity building and broadly based public participation, the African project countries have demonstrated a commitment to developing and implementing environmental law. Built on national motivation and drive, the project has confirmed that African countries need opportunities, information and resources to support human and institutional capacity building. With these forms of support, development and implementation of environmental law in Africa will doubtlessly match their aspiration commonplace in conference diplomacy.[38]

A keenness to participate meaningfully in the development and implementation of matters such as climate change, protection of the ozone layer, biodiversity, and biotechnology has also been noted among public officials in African states.[39] In addition, the general interest in procedural rights in environmental protection and justice in the broader quest for democratic governance has also been noted.[40] As early as 2001, western industrialists were surprised to see how an effort was being made to use judicial mechanisms to address environmental degradations and ills, as evidenced by the Titanium case in Kenya by the name of *Rodgers Muema Nzioka v Tiomin Kenya Ltd in the High Court of Kenya at Mombasa*.[41] In this case, slogans such as 'environmental protection and enforcement

37 C Okidi 'Foreword' in B Chapter & K Gray (eds) *International environmental law and policy in Africa* (2003).

38 As above.

39 J Carmin et al 'Urban climate adaptation in the global south: planning in an emerging policy domain' (2012) 32 *Journal Of Planning Education and Research* 18-32.

40 C Schall 'Public interest litigation concerning environmental matters before human rights courts: A promising future concept?' (2008) 20 *Journal of Environmental Law* 417.

41 *Rodgers Muema Nzioka v Tiomin Kenya Ltd in the High Court of Kenya at Mombasa* Civil case 97 of 2001.

will hamper development' usually employed by industrialists, were set aside. Other cases cited previously in this chapter from Uganda and South Africa echo the same observation. Okidi generally concluded that:

> With increased awareness, information and resources, a critical mass of environmental experts may be built in each African country, and their cooperation with civil society organisations will lead to effective environmental management in Africa.[42]

While the number of cases filed in African courts may be less compared to legal suits on environmental matters in other regions of the world, the interest and acceptance of such a possibility are evident. However, the pace at which the field of environmental justice moves forward in Africa is arguably slow and insufficient, given the irreversible effects that environmental degradation is causing Africans. Several factors contribute to this slow pace. First, the legislative and judicial framework may be inadequate, despite being existent, to confer protection to the environment and justice to victims. The issue is often the implementation of judicial decisions that are given in favour of victims, which are ineffective or simply ignored. Second, environmental tension and stress in Africa are usually between powerful parties, such as politically connected industrialists, business people and corporations; and poor, helpless and indigenous peoples. The winner seems to be evident in such strained relationships. Third, from a macroeconomic perspective, African governments seem to be entangled in the struggle between economic development and environmental protection. In several cases, it appears that economic growth, no matter in what form, quickly takes precedence over allegedly costly or 'anti-business' ideas of environmental protection. Fourth, factors such as lack of political will, finance, and technology may also be reasons for the slow pace of environmental justice in African states.

Therefore, in light of the above observation and the fact that environmental justice at the domestic level may be falling short of achieving its ambitious objectives, the pertinent interrogation is the support that the African human rights system may provide. Can explicitly recognising the human right to a healthy environment make a difference? Can treaties and conventions created at the African Union level fill in essential gaps arguably left by African jurisdictions? The following section assesses the African human rights system's potential to support environmental justice in Africa.

42 Okidi (n 37).

4 Interplay of the African human rights system with the environmental justice

The African Charter on Human and Peoples' Rights spearheads the African human rights system on human and peoples' rights (hereafter referred to as the African Charter). It is heralded as the first international human rights law instrument to explicitly provide for and recognise the human right to a generally satisfactory environment.[43] Okoth-Ogendo also made the following pertinent observation on the African Charter:

> The African Charter generally does not contain rights that are novel, but the rights and duties contained in this instrument are of 'peculiar relevance to Africa' and that it is a regional mechanism for the management of international obligations imposed by fundamental rights.[44]

Indeed, Article 24 states that 'all peoples shall have the right to a satisfactory general environment favourable to their development'. The environment of people seems to be given much importance in this article, similar to what several African institutions would do. For example, the New Partnership for Africa's Development (NEPAD) recognises that a healthy and productive environment is a prerequisite for Africa's development, that the range of issues necessary to nurture the environment is vast and complex, and that a systematic combination of initiatives is essential to developing a coherent environmental programme.[45] It also recognised eight themes that require priority intervention. These are combating desertification, wetland conservation, invasive alien species control, coastal management, global warming, cross-border conservation areas, environmental governance and financing. The Southern African Development Community's (SADC) Revised Treaty of 1992 also aims at achieving sustainable utilisation of natural resources and adequate protection of the environment (Article 1(g)), while the African Development Bank developed a policy on the environment in 2004.

Du Plessis argues that although Article 24 is regarded as an environmental right, its scope *stretches in a typical anthropocentric style far*

43 M Van der Linde & L Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication: Recent developments' (2003) 3 *African Human Rights Law Journal* 167 at 170-173.

44 H Okoth-Ogendo 'Human and peoples' rights: What point is Africa trying to make?' in R Cohen et al (eds) *Human rights and governance in Africa* (1993) 75-76.

45 J Akokpari 'Policing and preventing human right abuses in Africa: The OAU, the AU & the NEPAD Peer Review' 2004 32 *International Journal of Legal Information* 461.

beyond the eco-centric type of environmental concerns.[46] The following passage from his work is relevant here:

> People have the right to a 'general satisfactory environment', a phrase which, when read with the caveat that the environment should be favourable to peoples' development, implies at a minimum that equilibrium should exist between peoples' natural environment and other factors necessary for development, including economic, social and cultural factors. Article 24 should be read in conjunction with Article 26, which states that: 'States Parties to the present Charter ... shall allow the establishment and improvement of appropriate national institutions entrusted with promoting and protecting the rights and freedoms guaranteed by the present Charter.[47]

From the above reading, it is clear that state authorities shoulder the positive duty to create and maintain a living environment conducive to the development of present and future generations of Africans. In addition, such a duty is not limited to merely the protection of natural resources but extends to issues related to a generally satisfactory environment, such as well-being, livelihood, and health. Article 24 can be safely considered as conferring significant protection against any act that would affect, degrade, deplete, and diminish the environment Africans live in because of its wide frame of reference. As a result, Article 24 should serve as a guideline for how constitutional environmental rights in domestic states should be interpreted to benefit communities and peoples in Africa. It translates into an enforceable positive duty that all African governments must fulfil. Further, the burden imposed on states to create an environment that is appropriate and conducive to the development of Africans is supported by other provisions of the African Charter, such as the right to enjoy the best attainable state of physical and mental health (Article 16), the right to economic, social and cultural development (Article 22), and the duty of the individual to preserve and strengthen positive African cultural values in its relations with other members of society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society (Article 29).

While environmental issues in Africa take various forms concerning various parties, developmental projects, either private or state-driven, can be considered an essential source of environmental problems in multiple ways. In light of this, the African Commission on Human and Peoples'

46 A du Plessis 'The balancing of sustainability interests from the perspective of the African Charter on Human and Peoples' Rights' in M Faure et al (eds) *The balancing of interests in environmental law in Africa* (2012) 38.

47 As above.

Rights (hereafter referred to as the African Commission), established by the African Charter itself as a quasi-judicial body mandated to receive complaints on human rights violations and issue recommendations to state parties, adjudicated the strong case of *Social and Economic Rights Action Centre v Nigeria* in 2001 (the SERAC case).[48] This case has been referred to by Shelton as *the first complete exposition of a human rights approach to environmental protection*.[49]

According to the communication, Nigeria's military government has been directly involved in oil production through the Nigerian National Petroleum Company (NNPC), which is the majority shareholder in a partnership with Shell Petroleum Development Corporation (SPDC). These operations, it is claimed, have led to environmental degradation and health issues among the Ogoni people as a result of environmental contamination. The oil consortium allegedly violated applicable international environmental standards by exploiting oil deposits in Ogoniland with little regard for the local residents' health or environment and by discharging toxic wastes into the local environment and rivers. Additionally, the consortium neglected and/or disregarded the maintenance of its facilities, which led to multiple avoidable spills in close proximity to settlements. Skin infections, digestive and respiratory disorders, an elevated risk of cancer, neurological and reproductive issues, and other major short- and long-term health effects have been caused by the ensuing poisoning of water, soil, and the air. By giving the oil firms access to the state's legal and military resources, the Nigerian government has encouraged and made these abuses easier. According to the communication, neither safety requirements that are accepted practice in the industry nor government oversight of oil company activities have been implemented. Communities in Ogoni have not received information from the government regarding the risks posed by oil operations. Communities in Ogoni have not been involved in making choices that would affect how Ogoniland develops.

Despite the clear health and environmental crises in Ogoniland, the government has not mandated that oil corporations or its own agencies undertake fundamental health and environmental impact evaluations involving hazardous procedures and materials related to oil production. Even entry into Ogoniland for such research by scientists and environmental organisations has been prohibited by the government. Additionally, the government disregarded Ogoni communities' worries

48 *Social and Economic Rights Action Centre v Nigeria* Communication 155/96 (27 May 2002).

49 D Shelton et al *Yearbook of international environmental law* (2002) 202.

about oil development and responded to protests with severe violence, including the execution of Ogoni chiefs. In addition, under the pretence of removing leaders and supporters of the Movement for the Survival of the Ogoni People, Nigerian security personnel raided, burned down, and destroyed many Ogoni communities and residences (MOSOP). Armed with armoured tanks and other cutting-edge weapons, the combined forces of the police, army, air force, and navy have participated in some of the attacks. In other cases, unidentified gunmen have carried out the attacks, which are typically at night.

According to the letter, the Nigerian government has threatened and allegedly destroyed Ogoni food sources using a number of tactics. The government became involved in the reckless oil development that contaminated a large portion of the soil and water used for Ogoni farming and fishing. Nigerian security personnel have slaughtered farm animals and destroyed crops during their assaults on villages. Many Ogoni communities are unable to return to their farms and livestock because the security forces have instilled a climate of fear and insecurity. Some Ogoni communities are suffering from malnutrition and starvation as a result of the destruction of farmlands, rivers, crops, and animals.

The African Commission reflected on *what is generally expected of governments under the Charter and, more specifically, the rights themselves* (paragraph 43). Du Plessis accurately synthesises the African Commission's views as follows:

> It was held by Commissioner Dankwa that states have the duty to respect, protect, promote, and fulfil civil and political as well as socio-economic rights. It was expressly found that these obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter was said to be 'not alien' to these concepts. With regard to the fulfilment of rights and freedoms the ACHPR held that there is a positive expectation on the part of the state to 'move its machinery towards the actual realisation of the rights. This positive expectation is, according to the ACHPR, also very much intertwined with states' duty to promote rights and freedoms and could be fulfilled by means of the direct provision for basic socio-economic needs. The ACHPR importantly remarked further that 'depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands concerted action from the state.' Governments are, in other words, expected to undertake scrupulous and

> tangible endeavours to ensure that they provide for peoples' socio-economic needs and rights.[50]

The African Commission observed that Article 16 (on the right to health) and Article 24 recognise the importance and need for a clean and safe environment which is also intrinsically linked to other socio- economic rights.[51] It further stated that the right to the environment is protected under the African Charter and imposes clear positive and negative obligations and duties upon governments. In the words of the African Commission, *it requires the state to take reasonable and other measures to prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources*.[52] The African Commission made it clear that governments should desist from menacing the environment and health of their citizens.[53]

Referring especially to the positive obligations that Article 24 imposes on states, it was highlighted by the quasi-judicial body that governments are under a duty to allow for independent scientific monitoring of threatened environments, conduct environmental and social impacts studies before any industrial development with the findings publicised, inform communities of the risks and hazards to which they are exposed through the developmental activities, and provide for meaningful opportunities for people to participate in decision-making processes. It also remarked that the African Charter and all the rights contained therein must be made effective, and states are expected to meet the minimum expectations of the African Charter.[54]

Environmental issues vary from one African country to the other. As such, it may be essential to have some flexibility for governments to find concrete and sustainable ways to protect the environment in Africa and the right to the environment of Africans. It has been argued that the manner in which the African Commission has formulated the duties that states have in relation to the right to a generally satisfactory environment (as described above) provides for this much-needed flexibility.[55] Also, sometimes African jurisdictions with a newly created legislative framework

50 Du Plessis (n 46) 41.

51 *SERAC* para 51.

52 *SERAC* para 52.

53 As above.

54 *SERAC* para 68.

55 M Nmehielle 'The African human rights system: Some strategies, for reforming its economic, social and cultural norms' (2009) www.bepress.com/morris_mbondenyi/6 156 (accessed 30 November 2021).

on the environment may not have the experience on effectively implement concepts such as EIA, public participation and monitoring. This decision of the African Commission acts as essential guidelines and, interestingly, one that is more of an obligatory nature rather than a voluntary one, as typically 'guidelines' would be considered.[56] In essence, the SERAC case has come to confirm that environmental rights in Africa are fully enforceable and justiciable under the African Charter. The African Commission has and will continue to adopt a progressive and broad approach to deciding environmental cases for the benefit of all Africans.

It is apporopiate to mention that the SERAC case has not been spared from its share of criticism especially from the academic world. Ekhator has argued that the positive implications that the SERAC case ought to have in Nigeria have arguably been dampened by the lack of a normative and institutional framework at the level of the African Union regulating the activities of multinational companies.[57] Bello and Smis also argue that 20 years after the decision, the Ogoni people are still demanding their basic rights which exposes the implementation gap of the decision as well as a critical lack of monitoring mechanisms for compliance with the Commission's recommendations.[58] In highlighting its shortcomings, Nwobike argues that the Commission's weaknesses include its inability to address the right to development, its silence over the need to hold multinational corporations accountable for violations of human rights, and its institutional inadequacy in upholding its rulings.[59]

In addition to the African Charter, other conventions emphasise the environment and its protection. For instance, the African Convention on the Conservation of Nature and Natural Resources, revised by the African Union in 2003, provides that African states recognise the duty *to harness our continent's natural and human resources for the total advancement of our peoples in spheres of human endeavour.*[60] This convention advocates for balancing all necessary factors for improvement or development. This includes the protection of natural resources and the environment in

56 Van der Linde & Louw (n 43) 183.

57 See E Ekhator 'Regulating the activities of multinational corporations in Nigeria: A case for the African Union?' 2018 20 *International Community Law Review* 30.

58 S Smis & O Bello '*Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*: Two decades on – Questioning the continued implementation gap' (2021) 5 *African Human Rights Yearbook* 454.

59 C Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*' 2005 (2) *African Journal of Legal Studies* 129.

60 See the Preamble of the Convention.

general. The Preamble also references the states' obligations to protect and conserve their environment and natural resources and sustainably use them to satisfy human needs according to the environment's carrying capacity. In furtherance of the above, Article 3 of the Convention provides that states must *ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner*.

The African Charter on Democracy, Elections and Governance 2007 also makes specific reference to the environment in its Article 42, which provides that s*tate parties shall implement policies and strategies to protect the environment to achieve sustainable development for the benefit of present and future generations*. In addition, Article 9 of the Charter provides that *state parties undertake to design and implement social and economic policies and programmes that promote sustainable development and human security.* It can be argued that sustainable development and human security can be achieved by, *inter alia,* adequate protection of the environment and an encompassing and meaningful concept of environmental justice.

A look at the general legal framework of the African Union itself will also show that the environment has an important place within this regional organisation. Indeed, Article 13 of the Constitutive Act of the African Union provides that the Executive Council coordinates and takes decisions on policies in the common interest of the member states, including the environment. The 1991 Abuja Treaty Establishing the African Economic Community also contains specific provisions regarding protecting the environment and the control of hazardous wastes.

5 Factors impeding the effectiveness of the African human rights systems

The correct political will is required for the African Charter to be domesticated in African states so that citizens can benefit from the right to a generally satisfactory environment in the African Charter. Most African states would typically refrain from domesticating the African Charter, allowing for a direct application of all the rights in the African Charter that can be used in a typical environmental complaint filed before domestic courts. African judiciaries, especially those of the commonwealth countries, find their hands tied and unable to interpret provisions such as those of the African Charter, which, otherwise, would have made a huge and significant difference in environmental justice. It is noted that the South African Constitutional Court is among the few African judicial bodies that have drawn inspiration from the SERAC case in relation to

the application and interpretation of the African Charter.[61] The inability of African judiciaries to apply undomesticated provisions is accurately captured by the Law Lords in England in the case of *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* as follows:

> It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law ... Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English Law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the Court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations.[62]

Another critical issue to be taken into account, given enhancing environmental justice in Africa through the African human rights system, is access to the African Court on Human and Peoples' Rights (the African Court) as the judicial body responsible for the interpretation of the African Charter and more specifically Article 24 on the right to a generally satisfactory environment. A declaration under Article 34(6) of the Protocol establishing the African Court has to be submitted by African states so that their citizens can have direct access to the Court to submit cases regarding environmental degradation and injustices.[63] The very low number of submissions to that declaration by African states implies that a vast majority of African citizens and victims of environmental injustices, do not have direct access to the African Court.[64]

Implementation of recommendations by the African Commission or decisions by the African Court in relation to environmental cases (in cases where victims do get access to them) can also play a decisive role in environmental justice in Africa. It has been argued that little attention has been paid to the decisions given by the African Commission and African Court, which has hampered the enforcement of the decisions of these

61 See *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* Case CCT 20/04 13 May 2005.

62 *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* (1990) 2 AC 418.

63 R Eno 'The jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223.

64 D Juma 'Access to the African Court on Human and Peoples' Rights: A case of the poacher turned gamekeeper' (2007) 4 *Essex Human Rights Review* 1.

bodies.[65] Concerning the recommendations of the African Commission, many African states' behaviour towards them suggests that they do not consider these recommendations as being legally binding.[66] This is certainly a drawback in the quest for environmental justice in Africa. This is because, while the African Court requires the submission of the declaration under Article 34(6) of the Court's Protocol, as discussed above, access for African citizens who are also victims of environmental injustices does not require such declarations and, therefore, any permission per se from the state of nationality to submit complaints to the African Commission. However, suppose the decision of this quasi-judicial body is not considered binding and therefore put aside by African governments. In that case, this will undoubtedly undermine the whole African human rights system, inclusive of the enforceability and justiciability of the right to the environment in Africa.

In addition, the conventions and treaties under the aegis of the African Union, as mentioned in the previous section, should also be appropriately domesticated in African countries. They must become genuine guiding principles for the legislative bodies of Africa when they create domestic laws on the protection of the environment in Africa. The judiciary must also use them as a source of legal interpretation of domestic laws, even if it is based on persuasiveness. This also applies to the instruments from the Regional Economic Communities (RECs) in Africa, which also have a crucial role in environmental justice in Africa.

Lack of knowledge on the existence and potential of the right to a generally satisfactory environment and other relevant rights in the African Charter can also be a factor that impedes environmental justice in Africa.[67] Indeed, citizens of African states who are victims of environmental issues may not be aware of the possibility of submitting cases to the African Commission or the African Court. They may rely solely on domestic courts that often do not have the mandate to adjudicate such matters, or simply there are simply no laws allowing for environmental litigation in their countries.

65 R Murray et al 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150.

66 R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 349.

67 C Heyns & M Killander 'The african regional human rights system' (2006) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356505 (accessed 30 November 2021).

6 Concluding remarks

It should be kept in mind that the domestic states and their judicial and legislative frameworks are the best placed to cure environmental injustices and enhance environmental justice in Africa. Environmental justice in Africa can be subjective, with various states having different specificities and characteristics. Therefore, the states and their mechanisms can best respond to the challenges and pressure that the African environment is feeling. That being said, a supra-national architecture such as the African Union, with its human rights system in particular, indubitably has a significant role to play in ensuring more effective environmental justice in Africa. As discussed above, through the right to a generally satisfactory environment, various socio-economic rights enshrined by the African Charter and the notion of duties for both states and individuals, the foundational basis for achieving greater environmental justice is certainly well in place. However, there are still several fine-tuning to be conducted.

The African Charter must be domesticated in all African states. In addition to this, access to the African Court must be made possible and hassle-free by submitting the declaration under Article 34(6) by all African states. This, however, will still not be sufficient without the respect and enforcement of the decisions of the African Commission and the African Court. Therefore, the proper political will must be applied by all governments to ensure that they are respected and implemented for the benefit of their citizens. Equally important is the necessity for African citizens to know their environmental rights and the various avenues available under the African system of human rights to enforce them, especially when the domestic judicial systems are ineffective for various reasons mentioned previously in this chapter. It is known to all that Africa is bearing the brunt of climate change the most, despite being the least polluting continent globally. While developed nations have more control over certain matters, African governments should at least legitimately expect their citizens to utilize the African human rights system and other environmental conventions.

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