Sustainable Development and the African Union Legal Order

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Abstract

Sustainable development has been at the centre of discourse in the African Union (AU) and its Member States in recent times. Over time, the AU has developed mechanisms on sustainable development including conventions and different policies and programmes. This chapter critically analyses these mechanisms and their possible implications on the development of sustainable development norms in Africa. This chapter argues that the various AU treaties on the environment and initiatives on sustainable development are an integral part of the emergent AU legal order on the continent. This chapter discusses the utility of the African Charter on Human and People's Right and Agenda 2063 as integral aspects of sustainable development under the AU and hence contributing to the emergent AU legal order. This chapter focuses on the contribution of the African Charter and Agenda 2063 to the development of sustainable development norms under the AU's framework.

Keywords: AU Law, Sustainable Development, SDGs, Regional Courts, African Charter, African Commission, African Court

Introduction

Sustainable development has been at the centre of discourse in the African Union (AU) and its Member States in recent times. This is especially relevant in the light of international initiatives in relation to the Sustainable Development Goals (SDGs) and initiatives developed under the auspices of the AU (for example, Agenda 2063). This chapter critically analyses the emergent AU legal order through a sustainable development lens. This chapter focuses on the AU

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instruments and initiatives promoting sustainable development and how these initiatives are also contributing to the emergent AU Law. Hence, the question this chapter seeks to answer is whether the AU sustainable development mechanisms are an integral part of the emergent AU legal order.

The chapter is divided into five sections. This first section of the chapter provides a brief discussion of AU Law and its relationship with sustainable development norms on the continent. The second section of the chapter focuses on the evolution of sustainable development in the international sphere. The third section focuses on some AU initiatives on sustainable development on the continent. Arguably, these AU sustainable development initiatives have led to the development of standards/norms/laws at the continental level which is part of the emergent AU legal order. The fourth section makes some recommendations, and the fifth section is the conclusion. This chapter contends that the AU mechanisms on sustainable development are an essential part of the emergent AU legal order. This chapter also concludes that AU mechanisms on sustainable development will contribute to the development of common standards/norms/laws at the continental level which enhances the emergent continental AU legal order.

1. African Union Law and Sustainable Development

Due to the different institutions, norms and frameworks developed under the AU, some scholars have argued that the concept of "African Union Law" is emerging or evolving.[1] AU law has been defined 'as the bodies of treaties, resolutions and decisions that have direct and indirect application to the member States of the Union'.[2] The concept of an AU law or AU legal order can be traced especially to the creation of the African Union.[3] The AU in contradistinction to its predecessor – the Organisation of African Union (OAU) is said to have kick-started a new continental legal order in Africa with its unique strengths and characteristics.[4] Unlike, the OAU, the AU was created via a Constitutive Act of the AU. Furthermore, it has been argued that the Constitutive Act created a continental social contract and a constitutional tool.[5] Hence, Addaney et al argue that this development suggests that

[1] Olufemi Amao, *African Union Law: The Emergence of a Sui Generis Legal Order* (Routledge 2018); Michèle Olivier, 'The Role of African Union Law in integrating Africa' (2015) 22(5) SAJIA 513
[2] Amao, *ibid* 22.
[3] Amao 'African Union'
[4] ibid
[5] ibid

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Africa currently has the foundation or basis for a continent-wide legal order.[6] However, the concept of AU law is not yet a generally recognised term in law and practice.[7] A major criticism of AU law points to the fact that the AU law lacks the depth and complexity seen in the European Union (EU) law.[8]

Notwithstanding the criticism against and apparent weaknesses of the AU law or AU legal order, this section posits that AU law is indeed emerging. Magliveras and Naldi suggest that AU law is an important development in the scholarship on the AU and that it should be extensively studied by AU researchers or scholars.[9] Fortunately, there have been recent publications that have based their analysis on the concept of AU law.[10] For example, Addaney and Jegede's edited collection focuses on human rights and environment and relies on AU law as its analytical framework.[11]

The concept of AU law engages with the AU's capacity for norm creation through its institutions and decisions and raises the questions whether it paves the way for an emerging continental legal system with supranational qualities. Also, arguably sustainable development can form part of that body of norms. AU law is more than treaties adopted by AU but refers to capacity of the AU and its institutions to enforce decisions/norms as matter of law/soft law. However, the remit of the AU legal order is still limited especially in respect to the enforcement of sub-regional and regional judiciaries in Africa.[12]

The creation of the AU has led to a 'new era of regional cooperation, which elevated sustainable development to a primary objective of the AU'.[13] In essence, the AU's normative framework encompasses sustainable development.[14] One of the aims of the AU is to promote or enhance sustainable development at the economic, social and cultural levels including the integration

[6] Michael Addaney and Ademola Jegede (eds) *Human Rights and the Environment under African Union Law* (Palgrave Macmillan, 2020)
[7] Generally, see Konstantinos Magliveras and Gino Naldi, *The African Union*. (Kluwer 2018) 87
[8] Magliveras and Naldi ibid
[9] Magliveras and Naldi *African Union* 87. Also, Amao (n 1) *African Union Law* 17 suggests that the development of AU law has been 'largely gone unnoticed or is under-explored within the academic discourse.'
[10] For example, see Addaney and Jegede *Human Rights and Environment* (n 6); Rui Garrido, 'African Regional Jurisdiction: How African Union is Creating an Innovative Regional Jurisdiction for international Crimes' 4 (1) *Portuguese Law Review*, *4*(1). 113; Namira Negm and Guy-Fleury Ntwari, 'African Union Legal Drafting: Process, Mechanisms and Challenges' (2019) 8 IJLDLR 85
[11] Addaney and Jegede (n 6) *Human Rights and Environment*
[12] Magliveras and Naldi (n 7) *African Union* 87
[13] Werner Scholtz and Jonathan Verschuuren, 'Introduction' in Werner Scholtz, and Jonathan Verschuuren (eds), *Regional environmental law: Transregional Comparative Lessons in pursuit of Sustainable Development* (Edward Elgar Publishing, 2015) 5
[14] Scholtz and Verschuuren *ibid*

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of African economies, and cooperation in all aspects of human activity to improve the living standards of Africans.[15] This is embedded in Article 3(j) of the Constitutive Act. Hence, the Constitutive Act provides a good foundation for the development of laws or norms on sustainable development in Africa.

Furthermore, some AU environmental law conventions and recent mechanisms (including Agenda 2063 and AUDA-NEPAD) promote sustainable development in their provisions. Examples of AU environmental law conventions promoting sustainable development include the Revised African Convention on the Conservation of Nature and Natural Resources (2017), the African Charter on Human and Peoples' Rights[16] and the Bamako Convention on the Ban and the Import into Africa and Control of Transboundary Movement and Management of Hazardous Waste within Africa.[17] For example, the African Charter has substantive provisions (for example, article 24) that have been interpreted as promoting sustainable development on the continent. Also, the Revised African Convention on the Conservation of Nature and Natural Resources provides for a plethora of environmental principles including the right to satisfactory environment enshrined in article III of the Convention.[18] A key objective of the Revised Convention (2003) is the promotion of sustainable development in environmental issues in Africa as demonstrated by article II.[19] This is also reflected in the 2017 version. These conventions encompass diverse normative standards, which according to Maluwa form an integral part of the corpus of the evolving rules of international law in these spheres.[20] These conventions are expected to be respected and implemented in AU member states that have signed and ratified them. For example, the African Charter has had a significant but modest impact in many African states.[21] Few countries (for example, Nigeria) have domesticated the Charter, and it has been enforced in several countries in Africa.[22] Also, the African Charter has

[15]Generally, see Constitutive Act of the African Union, adopted July 11, 2000, OAU Doc. CAB/LEG/23.15 (entered into force May 26, 2001) (hereafter, 'AU Constitutive Act) for the aims and objectives of the AU.
[16] African Charter of Human and Peoples' Rights OAU CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 entered into force Oct. 21, 1986.
[17] Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes (1991) 30 ILM 773 (1991)
[18] Bolanle Erinosho, 'The Revised African Convention on the Conservation of Nature and Natural Resources: Prospects for a Comprehensive Treaty for the Management of Africa's Natural Resources' 21(3) (2013) *African Journal of International and Comparative Law* 378.
[19] Eghosa Ekhator, 'Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?'20 (1) (2018) *International Community Law Review* 30
[20] Tiyanjana Maluwa, 'International law-making in post-colonial Africa: the role of the Organization of African Unity' 49(1) (2002) *Netherlands International Law Review* 81
[21] Generally, see Obiora Okafor, *The African Human Rights System and International Institutions* (Cambridge University Press 2007).
[22] Victor Ayeni, 'The Impact of the African Charter and Women's Protocol in Nigeria' in Centre for Human Rights, The impact of the African Charter and Women's Protocol in selected African States (PULP 2016)

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been extensively cited by domestic courts in Africa thereby impacting positively on national laws.[23] By virtue of the various AU environmental conventions, at the continental level in Africa, environmental rights, and protection (including sustainable development) are recognized as specific treaty norms or standards and this coheres with other rights and corresponding commitments or obligations.[24] Hence, the main crux of the argument in this chapter is that AU environmental conventions or treaties and regional courts (including sub-regional courts) are key to the evolution of sustainable development norms in the AU legal order.

Furthermore, this chapter focuses on the African Charter and Agenda 2063.[25] The next part of the chapter discusses the evolution of the sustainable development paradigm in the international sphere.

2 Evolution of Sustainable Development in the International Sphere

Sustainable development has been a recurring theme in the international sphere in different mutations. The Brundtland Commission also known as the World Commission on Environment and Development (WCED) defined sustainable development as 'the development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[26] The Stockholm Declaration in 1972 embodies a set of principles to guide the people in the protection and preservation of their environment.[27] Hence, this Declaration 'formed the foundation of modern international environmental law and shaped its direction.'[28] The definition by WCED has become the most commonly accepted definition.[29] Furthermore,

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[23] Generally, see Ayeni *ibid*

[24] Lilian Chenwi, 'The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System' in John Knonx and Ramin Pejan (eds) *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 59

[25] This chapter will not discuss AU resolutions on environment and the Agreement for the establishment of the African Continental Free Trade Area (AfCFTA)

[26] WCED (1987) 3. Generally, see Ifeoma Owosuyi, 'The pursuit of Sustainable Development through Cultural Law and Governance Frameworks: A South African perspective' 18 (5) (2015) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 2011

[27] Report of the UN Conference on the Human Environment UN Doc A/Conf48/14 (1987); Stockholm Declaration of the United Nations Conference on the Human Environment (1972) (hereafter Stockholm Declaration). Also cited in Owosuyi ibid 2012.

[28] Sumudu Atapattu, 'From Our Common Future to Sustainable Development Goals: Evolution of Sustainable Development under International Law' 36 (2019) Wis Int'l LJ 215, 218

[29] Generally, see Peter Oniemola and Oyinkan Tasie, 'Engendering Constitutional Realization of Sustainable Development in Nigeria' 13 (1) *Law and Development Review* 159 for the various criticisms of the definition of sustainable development by the Brundtland Commission.

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the publication of "Our Common Future" by the WCED in 1987 popularised the sustainable development paradigm and 'researches into the concept in a holistic manner.'[30] This definition is said to promote sustainable development as an environmental concept.[31]

There have been recent UN conferences on sustainable development which includes Johannesburg in 2002 and the Rio +20 Conference in 2012.[32] In 2012, countries attending the Rio +20 Conference, engaged in the process that would lead to the development of the SDGs to replace the Millennium Development Goals (MDGs) which were due to expire in 2015.[33] The sustainable development paradigm is now fully embedded within the United Nations system with the development of the SDGs in 2015.[34]

Rich countries (the Global North) are the major recipients of the accruing benefits arising from the international economic activity and whilst the developing countries (the Global South) are the major victims of its negative environmental consequences.[35] The overarching view in academic literature on global governance norms is that developing countries (the Global South) do not play major roles in the development of global mechanisms or initiatives.[36] Arguably, this is no longer the case with the development of the SDGs and other recent international mechanisms. For example, the Global South (including Africa and other developing countries) played integral roles in the development of the SDGs framework.[37] Fukuda-Parr and Bhumika asserts that scholars and stakeholders from the Global South were some of the significant contributors to ideas and concepts that eventually culminated in the emergence and development of the SDGs in 2015.[38] For example, Paula Caballero of the Delegation of Colombia proposed the idea of establishing the SDGs in the preparatory process for Rio + 20.[39] Hence, Caballero's (Colombia's) contribution to the development of the SDGs exemplifies the role of the Global South in the creation of recent global mechanisms.

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[30] Rhuks Ako, 'Challenges to Sustainable Development in the Niger Delta (Nigeria)' in Samuel Ibaba (ed), *Niger Delta: Constraints and Pathways to Development* (Cambridge Scholars, 2012) 9

[31] Owosuyi (n 26) 2012

[32] Regina Scheyvens et al 'The Private Sector and the SDGs: The need to move beyond 'business as usual' 24 (6) (2016) *Sustainable Development* 371, 372.

[33] Scheyvens et al *ibid*

[34] Oniemola and Tasie (n 29)

[35] Carmen Gonzalez and Sumudu Atapattu 'International environmental law, environmental justice, and the Global South' 26 (2016) *Transnat'l L. & Contemp. Probs.* 229.

[36] Generally, see Sakiko Fukuda-Parr and Bhumika Muchhala 'The Southern origins of sustainable development goals: Ideas, actors, aspirations'126 (2020) *World Development* 104706.

[37] Generally, see Fukuda-Parr and Muchhala *ibid*

[38] Fukuda-Parr and Bhumika *ibid*

[39] Fukuda-Parr and Bhumika (n 36); Paula Caballero, 'The SDGs: changing how development is understood' 10 (2019) *Global Policy* 38

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Furthermore, Africa played noteworthy roles in the development of the SDGs.[40] African states and representatives were actively involved in the negotiation process of the development of the SDGs.[41] In 2013, a high-level committee of heads of states and government of African states produced the Common African Position (CAP) on the Post-2015 Development Agenda.[42] The CAP was adopted by the member states of the AU at the January 2014 AU Summit in Addis Abba.[43] In January 2015, the AU set up a group of African negotiators to help promote the interests of Africa during the negotiations of the SDGs.[44] The CAP on 'the post-2015 development agenda provides an agreed set of specific African priorities, many of which are mirrored by the SDGs and fully aligned with AU Agenda 2063.'[45] The AU is an important stakeholder in the SDGs and the post-2015 international development agenda.

The next section focuses on sustainable development under the AU.

3 Sustainable Development Mechanisms as a Source of AU Law

The AU actively promotes sustainable development as part of its legal architecture. This is exemplified in article 3(j) of the Constitutive Act of the AU and hence one of the major aims of the AU is the promotion of sustainable development on the continent. From an AU law perspective, this chapter argues that sustainable development is an aspirational goal that can be achieved by the development of norms by the AU and its institutions (for example, regional and sub-regional courts). This is notwithstanding the view that 'there are only a few concrete principles or binding rules that are explicitly aimed at sustainable development within the AU legal system'.[46] This chapter argues that AU has developed a plethora of measures, policies, programmes, and conventions promoting sustainable development on the continent. Furthermore, by virtue of the various AU environmental treaties at the continental level in Africa, environmental rights, and protection (including sustainable development) are

[40] Kole Shettima, 'Achieving the Sustainable Development Goals in Africa: call for a paradigm shift' 20 (3) (2016) *African journal of reproductive health* 19-21.
[41] Shettima *ibid* 19
[42] Sarah Lawan, 'An African take on the Sustainable Development Goals' (October 2015) <https://www.brookings.edu/blog/africa-in-focus/2015/10/13/an-african-take-on-the-sustainable-development-goals/ > accessed 21 July 2020
[43] Lawan *ibid*
[44] Office of the Special Adviser on Africa (OSAA) 'The 2020 Agenda for Sustainable Development <https://www.un.org/en/africa/osaa/peace/sdgs.shtml> accessed 21 July 2020
[45] Muhammed Ladan, 'Achieving Sustainable Development Goals Through Effective Domestic Laws and Policies on Environment and Climate Change'48 (1) (2018) *Environmental Policy and Law* 42, 59,
[46] Jonathan Verschuuren, 'The growing significance of the principle of Sustainable Development as a Legal Norm' in Douglas Fisher (ed) *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar Publishing, 2016)

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recognized as specific treaty norms or standards in tandem with the normative harmony with other allied rights and corresponding commitments or obligations.[47] Hence, the main crux of the argument in this chapter is that AU environmental conventions or treaties are at the centre of the sustainable development norms in the AU legal order.

This section adopts the Brundtland Commission's definition of sustainable development which is 'the development that meets the needs of the present without compromising the ability of future generations to meet their own needs.' This section focuses on the contribution of the African Charter and Agenda 2063 to the development of sustainable development norms under the AU's framework. Furthermore, this section adopts the framework developed by Verschuuren on whether the sustainable development is a legal norm in international law.[48] Verschuuren states that the following should be considered:

- a description of the emergence of sustainable development in soft law instruments
- a description of the references to sustainable development in legally binding international instruments as in multilateral conventions
- a description of the references to sustainable development in decisions by courts and tribunals
- an analysis of these instruments and decisions whose aim is to determine the status of sustainable development as a legal norm.[49]

Hence, an application of the framework enunciated by Verschuuren to sustainable development norms under the AU system corroborates the notion that sustainable development is an important aspect of the emergent AU legal order. Arguably, this framework on the legal status of sustainable development (developed by Verschuuren) can be the basis for identifying sustainable development norms under the AU legal order. Furthermore, according to Amao, the AU legal order is based on 'several sources of law'.[50] Soft law is one of the sources of AU legal order.[51] Similar to the development of sustainable development in the international sphere which can also be traced to international soft law mechanisms (such as the Stockholm Declaration, the Brundtland Report 1987, the Rio Declaration 1992 and Rio+20: 2012 amongst

[47] Chenwi (n 24) 59.
[48] Verschuuren (n 46); also see Jorge Viñuales, 'Sustainable Development', in Lavanya Rajamani and Jacqueline Peel (eds.) *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2nd edn. 2019), forthcoming who also states that sustainable development is norm of international law.
[49] Verschuuren (n 46)
[50] Amao (n 1) 25; Namira Negm and Guy-Fleury Ntwari (n 10)
[51] Amao (n 1) 37-38 defines soft law under AU system as 'instruments that are non-binding but have quasi-legal character. Such instruments are useful in areas in which regulation is desirable but agreements are difficult to reach.'

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others), the AU also has soft law instruments (Agenda 2063 and NEPAD amongst others) promoting sustainable development on the continent.

The next section focuses on Agenda 2063 as an example of a soft law mechanism on sustainable development under the AU legal order.

3.1 Soft Law and AU Legal Order

The AU in May 2013 developed an initiative called the Agenda 2063.[52] Agenda 2063 is said to be 'Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future.'[53] Agenda 2063 encompasses the AU's (African) Aspirations for the future, and it also showcases key Flagship Programmes which are expected to enhance the economic growth and development of Africa and lead to the accelerated transformation of the continent.[54] Furthermore, under Agenda 2063, certain crucial activities are expected to be undertaken in its '10 year Implementation Plans which will ensure that Agenda 2063 delivers both quantitative and qualitative Transformational Outcomes for Africa's people.'[55]

A plethora of stakeholders including civil society groups, women, children, private sector, think-tanks, Africans in the diaspora, and the regional economic communities (RECs) were involved and consulted during the development of the Agenda 2063.[56] Thus, unlike development of the MDGs which had little or no input from Africans, the Agenda 2063 involved consultation with African people thereby enhancing the legitimacy of the measure.[57]

The AU has developed norms on regional integration, peace, security, governance, and development amongst others.[58] Arguably, the Agenda 2063 is a mechanism that could lead to norm creation, for example by establishing norm creating institutions. Agenda 2063 was adopted by the AU Assembly in 2015 and it is the latest initiative that attempts to provide a

[52] Agenda 2063 website < https://au.int/agenda2063/overview > accessed 25 March 2020
[53] Agenda 2063 website *ibid*
[54] See the Agenda 2063 flagship projects website <https://au.int/en/agenda2063/flagship-projects > accessed 21 July 2020.
[55] Agenda 2063 website < https://au.int/agenda2063/overview > accessed 21 July 2020.
[56] Generally, see Michael Addaney, 'The African Union's Agenda 2063: Education and Its Realization' in Azubuike Onuora-Oguno, Wahab Egbewole and Thomas Kleven (eds) *Education Law, Strategic Policy and Sustainable Development in Africa* (Palgrave Macmillan, 2018).
[57] Oluwaseun Tella, 'Agenda 2063 and Its Implications for Africa's Soft Power' '49 (7) *Journal of Black Studies* 714, 716
[58] Tim Murithi, 'Briefing: The African Union at Ten: An Appraisal' 111(445) (2012) *African Affairs* 662,663

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supranational direction in African integration.[59] This section briefly highlights the roles of two of the AU organs that are essential to the implementation of the Agenda 2063 - the African Union Commission (AUC) and the Pan-African Parliament (PAP).[60] A major objective of the AUC in this regard is to seek technical and financial support from strategic partners and member states.[61] Thus, according to Fagbayibo, this puts the AUC 'in the driving seat of the implementation matrix' of Agenda 2063.[62] Furthermore, the PAP is expected to provide legislative rules to civil society and sub-regional parliaments on implementation of the Agenda 2063 as a strategy for development.[63] Currently, both AUC and PAP suffer from institutional deficits and until they are reformed, the Agenda 2063 will not be successful and this will impact negatively on the bourgeoning supranational ambition of the AU. Hence, Fagbayibo avers that Agenda 2063 will not be successful until the AUC and PAP are garnished with the requisite powers of enforcement to ensure its effective implementation.[64]

The implementation of Agenda 2063 requires different actions by countries concomitant to their various levels of development, priorities and resources.[65] Also, State Parties and the AU and other relevant stakeholders play invaluable roles in the implementation process of the Agenda 2063.[66] However, the proposed plan of action under Agenda 2063 has been criticised because it 'does not include steps for working with those member states that may need assistance.'[67] Notwithstanding the weaknesses of Agenda 2063, it constitutes one of the building blocks of the emergent AU legal order on sustainable development. Hence, Agenda 2063 is also tailored towards enhancing the sustainable development norms in Africa.[68]

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[59] Babatunde Fagbayibo, 'Nkrumahism, Agenda 2063, and the role of intergovernmental institutions in fast-tracking continental unity' 53 (4) *Journal of Asian and African Studies* 629, 630

[60] Other AU organs that play a role in the implementation, monitoring and evaluation of Agenda 2063 include NEPAD Planning and Coordinating Agency (NPCA) and Economic, Social and Cultural Council (ECOSOCC) amongst others. Generally, see African Union Commission (2015a) Agenda 2063: Popular Version Available at: https://au.int/Agenda2063/popular_version

[61] African Union Commission (2013) African Union Agenda 2063: A shared strategic framework for inclusive growth and sustainable development: Background note. Available at: https://www.au.int/web/sites/default/files/newsevents/workingdocuments/29732-wd-27_08_agenda_2063_background_note_en_0.pdf

[62] Fagbayibo (n 59) 630

[63] African Union Commission (2015b) Agenda 2063: The Africa We Want: A shared strategic framework for inclusive growth and sustainable development: First ten-year implementation plan 2014–2023. Available at: https://www.tralac.org/documents/resources/african-union/1135-agenda-2063-first-ten-year-implementation-plan-2014-2023/file.html Also see Fagbayibo (n 59) 630

[64] Fagbayibo (n 59) 631

[65] Kaitlyn DeGhetto et al 'The African Union's Agenda 2063: Aspirations, Challenges, and Opportunities for Management Research' 2 91) (2016) *Africa Journal of Management* 93

[66] Generally, see Kariuki Muigua, 'Africa's Agenda 2063: What is in it for Kenya?' (2019)

[67] DeGhetto et al (n 65) 99

[68] Generally, see Muigua (n 66)

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3.2 AU Instruments and Sustainable Development: the impact of the African Charter on Human and Peoples' Rights

The AU has got a plethora of treaties and conventions promoting sustainable development in their provisions.[69] However, this section focuses on the African Charter.

The African Charter is 'often heralded as the first international law instrument to have expressly recognised a generally satisfactory environmental as a human right.'[70] Article 24 of the African Charter states that: 'All peoples shall have the right to a generally satisfactory environment favourable to their development.' This right reaffirms the expectation that the AU and its institutions or mechanisms (such as African Charter and Agenda 2063 amongst others) will promote sustainable development and protect the environment on the continent.[71] Arguably, due to the expansive wordings of Article 24, the African Charter is said to have fashioned-out a balance between the environmental and other relevant factors essential for development such as social, cultural and economic considerations.[72] When discussing the relevance of the African Charter to the promotion of sustainable development on the continent, Article 24 should be read in tandem with Article 22 (right to development).[73] It is contended that the attainment of sustainable development (which is one of the key objectives of the AU) provides a route or framework in reconciling the tension between rights to environment and development in the African Charter.[74] Scholtz argues that sustainable development 'serves as conceptual and normative bridge between Article 22 and Article 24, and the rights contained therein need to be interpreted as being components of this overarching concept.'[75]

Arguably, the sustainable development concept under the African Charter is unable to resolve the trade-offs between environment and economic concerns in many African countries.[76] Notwithstanding that the language of article 24 enshrines a normative link between the

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[69] Generally, see Ekhator (n 19). Furthermore, Maluwa (n 20) contends that the African Convention on the Conservation of Nature and Natural Resources (1968) was the first international mechanism that expressly recognised the principles of sustainable development.

[70] Anel du Plessis, 'The Balance of Sustainability Interests from the Perspective of the African Charter on Human and Peoples' Rights' in Michael Faure and Willemien du Plessis (eds*) The balancing of Interests in Environmental Law in Africa* (PULP 2011) 36

[71] Du Plessis *ibid*

[72] Du Plessis (n 70).

[73] Werner Scholtz, 'Human Rights and the Environment in the African Union Context' in Werner Scholtz and Jonathan Verschuuren (eds) Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development (Edward Elgar 2015).

[74] Scholtz (n 73)

[75] Scholtz (n 73) 118

[76] Scholtz (n 73); Chenwi (n 24)

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environment and development, it is somewhat imprecise or vague.[77] Hence, it has been contended that it is difficult to determine the meaning of the words 'satisfactory' and 'favourable to their environment' as enshrined in Article 24 of the African Charter.[78] In *SERAC*, it was held that while a state may be permitted to engage in industrial pursuits for socio-economic development, it has to weigh this with protection and promotion of the rights of its peoples.[79] However, Chenwi argues that a major criticism of the SERAC case is that the decision did not adequately clarify the link or relationship between right to a satisfactory environment and development.[80] Notwithstanding some of these criticisms, Article 24 of the African Charter has had positive influence on the right to environment jurisprudence in Africa and beyond.

The next section discusses the role of the African Commission on Human and Peoples' Rights (African Commission) and African Court on Human and Peoples' Rights in the promotion of sustainable development norms in Africa.

3.3 The roles of Courts and Tribunals in promoting sustainable development under the AU Legal order

The concept of sustainable development has become widespread in international law and this has led to the rise of courts (including domestic, regional, and sub-regional courts) in developed and developing countries referring or alluding to sustainable development in their judgments or decisions.[81] The judiciary plays an indispensable role in the interpretation of sustainable development norms.[82] Hence, the courts or judiciary helps to clarify the legal status of the concept of sustainable development.[83]

The first explicit judicial elucidation by any international law tribunal on the concept of sustainable development was by the International Court of Justice (ICJ), in the case concerning

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[77] Chenwi (n 24)
[78] Mulesa Lumina, 'The Right to a Clean, Safe and Healthy Environment under the African Human Rights System' in Michael Addaney and Jegede (n 6) 36.
[79] Generally, see Lumina *ibid*
[80] Chenwi (n 24)
[81] Generally, see Verschuuren (n 46)
[82] Onyeka Osuji and Paul Abba, 'Domestic adjudicative institutions, developing institutions, developing countries and sustainable development: Linkages and Limitations' in Onyeka Osuji et al (eds.) *Corporate Social Responsibility in Developing and Emerging Markets Institutions, Actors and Sustainable Development* (Cambridge University Press 2019) 49-84, 50.
[83] Verschuuren (n 46)

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the Gabčíkovo-Nagymaros Project.[84] The ICJ stated that the 'need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.'[85] The Court of Justice of the European Union (CJEU) arguably possesses the most advanced case law on the standards of environmental law at the regional law.[86] However, sub-regional and regional courts in Africa function in distinctive legal and political environments from their European counterparts.[87] Hence, Daly suggests that the 'insights provided by scholarship on Europe will have limited relevance to regions outside Europe.'[88]

The judicial organs of the AU have also examined the concept of sustainable development and similar notions in some of their decisions or judgements. This section focuses on the African Commission of Human and Peoples' Rights and the African Court on Human and Peoples' Rights. The African regional human rights system, is said to consist of three treaty institutions or bodies (or supervisory mechanisms) that 'may make findings or take decisions in respect of African Union (AU) member states.'[89] The AU institutions are the African Commission, the African Court on Human Rights Court and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee).[90]

The African Commission 'is primarily responsible for monitoring the implementation of the African Charter and the Protocol on the Rights of Women in Africa.'[91] The findings or decisions of the African Commission are referred to as recommendations.[92] There have been debates on whether African Commission's decisions are binding or not.[93] Viljoen suggests that recommendations are final and binding if they are contained in the Activity Reports of the

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[84] Viñuales (n 48)
[85] Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, ICJ Reports 1997, p. 7, para. 140. Also cited in Viñuales (n 48) 8
[86] Verschuuren (n 44) 292
[87] James Gathii, 'Introduction' in James Gathii (ed) *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change* (Oxford University Press, 2020)
[88] Tom Daly, 'The Alchemists: Courts as Democracy-Builders in Contemporary Thought' (2017) 6 GlobCon 101, 123
[89] Frans Viljoen, 'The African Human Rights System and Domestic Enforcement' in Malcom Langford et al (eds) *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge: Cambridge University Press, 2017) 352
[90] Generally, see Frans *Viljoen International Human Rights Law in Africa*, (2nd edn. Oxford, Oxford University Press 2012)
[91] Manisuli Ssenyonjo (ed), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers 2012) 18. See article 45 of the African Charter.
[92] Frans Viljoen and Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' 101 (2007) Am J Int'l L 1, 2
[93] Rachel Murray and Debra Long, *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press, 2015) 50; Amao (n 1) 39

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African Commission and are approved by the OAU/AU Assembly or Executive Council.[94] As highlighted earlier, the African Charter is lauded for the indivisibility and justiciability of all generations of human rights (including civil and political, and socio-economic rights among others) enshrined in its provisions. The African Commission in its jurisprudence has expounded on a range of human rights including socio-economic rights, women's rights, group rights, indigenous rights, and individual rights amongst others.[95]

Sustainable development appears not to be a major part of the case law that emerges from the regional human rights tribunals or instruments such as the European Court of Human Rights and CJEU.[96] Peeters and Eliantonio argue that in 'the few cases in which the CJEU has considered sustainable development show that this concept may only serve as a point of general reference, but does not have a direct impact on the outcome of a case.'[97] Arguably, this is not the position in Africa and Latin America.[98] Hence, in the *SERAC* case,[99] which concerned the environmental degradation occasioned by the activities of multinational corporations and governmental inertia in Ogoniland in Nigeria, the African Commission held that Article 24 of the African Charter (which promotes right to satisfactory and healthy environment) enjoins African states 'to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.'[100] The African Commission also held that the Nigerian Government and its agencies were in violation of the African Charter. The African Commission further held that the Nigerian state had violated a plethora of rights including rights to life (Article 4), non-discrimination, property (Article 14), health (Article 16), family life (Article 18), the right of people to freely dispose of their wealth and resources (Article 21) and clean and general satisfactory environment (Article 24) as provided in the African Charter. In *SERAC*, the African Commission deepened the applicability of Article 24 and arguably this has not

[94] Viljoen (n 89) 339; generally, see, Chairman Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' 18 (1) (2018) *African Human Rights Law Journal* 27.
[95] Generally, see Ssenyonjo (n 91)
[96] Verschuuren (n 46)
[97] Marjan Peeters and Mariolina Eliantonio, 'On Regulatory Power, Compliance, and the Role of the Court of Justice in EU Environmental Law' in Marjan Peeters and Mariolina Eliantonio (eds) *Research Handbook on EU Environmental Law* (Edward Elgar Publishing, 2020) 494
[98] Verschuuren (n 46). The Inter-American human rights system is renowned for its innovative decisions in different areas such as right to environment, socio-economic rights, indigenous rights, and sustainable development amongst others.
[99] Social and Economic Rights Action Centre & Centre for Economic and Social Rights v. Nigeria (SERAC Case) 3 Communication No. 155/96(2001).
[100] *SERAC Case* para. 52 *ibid*

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‘only enhanced existing jurisprudence on the fulfilment of environmental rights, but also provided concrete guidelines for state parties on the meaning that can be afforded to environmental rights generally.’[101] These guidelines developed in SERAC are said to be obligatory rather than voluntary.[102] Also, the SERAC decision confirms the justiciability and enforceability of environmental rights on the continent.[103] Hence, African countries should endeavour to legislate and provide for environmental rights/protection in their countries. Furthermore, these environmental laws or legislation should be enforced and realisable in practice.[104] Also, some African states have explicitly incorporated environmental rights provisions in their constitutions[105] and this ‘places the environment within its proper legal framework and shows a commitment to sustainable development’ in Africa.[106] Examples of countries that have made the right to environment justiciable in Africa include Kenya, South Africa, Zimbabwe and Uganda.[107] For example, article 42 of Constitution of Kenya (2010) expressly provides for right to a healthy and clean environment.[108] The overarching scholarly view is that this constitutional provision has impacted positively on environmental rights and environmental justice (including sustainable development) issues in Kenya.[109]

Notwithstanding that the recommendations or rulings by the African commission are non-binding on States[110], this section argues that the jurisprudence arising from the SERAC case supports the view that there is an emergent AU Law on the continent and SERAC adds to the existing blocks of regional sustainable development norms (for example, Agenda 2063 amongst others) at the continental level.[111] Furthermore, judicial decisions from sub-regional

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[101] Du Plessis (n 70) 43
[102] Du Plessis *ibid*
[103] Du Plessis *ibid*; generally, see Chenwi (n 24)
[104] Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019); Joe Oloka-Onyango ‘Have Economic, Social and Cultural Rights (ESCRs) Come of Age?’ (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3617295> accessed 21 July 2020
[105] Murray (n 104)
[106] Tumai Murombo, ‘The Utility of Environmental Rights to Sustainable development in Zimbabwe: A Contribution to the Constitutional Reform Debate’ 11(1) (2011) *African Human Rights Law Journal* 120, 125.
[107] Oloka-Onyango (n 104)
[108] Caiphas Soyapi ‘Environmental protection in Kenya’s environment and land court." *Journal of Environmental Law* 31.1 (2019): 151-161.
[109] Muigua, Kariuki, ‘The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal’ (2019).
[110] Olivier (n 1) 522
[111] This theme is thoroughly explored in the section on the impacts of SERAC case in Nigeria and other African states. Generally, see Amao (n 1) 40 wherein he states that ‘… the Commission’s jurisprudence has been a key building block in shaping the AU legal order, especially in human rights sphere and in the development of key underlying principles of the AU legal order.’

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and regional tribunals or judiciaries are one of the sources of AU Law according to Amao's interpretation.[112] The *SERAC* case from the African Commission exemplifies this assertion.[113]

Due to the weaknesses and criticisms of the African Commission, an African Court on Human and Peoples' Rights was created in 2007.[114] An overarching weakness of the African Commission is said to be the non-binding nature of its findings or decisions. On the other hand, the judgments of the African Court are binding and it has jurisdiction over the African Charter, the African Women's Protocol and the African Charter on the Rights and Welfare of the Child (African Children's Charter), including other international human rights convention or treaties ratified by the affected states.[115] Currently, 30 AU States have ratified the African Court and only nine of them permit individual applications and Nigeria is yet to ratify the Protocol.[116] Also, by virtue of article 34(6) of the Protocol to the African Court, the jurisdiction is optional, and states may decide whether to recognize the direct access to the court.[117] This has led to a restriction of direct access to the court and hence some states now proceed to the African court via the African Commission.

Furthermore, under the African Court on Human and Peoples' Rights, individuals do not have direct access to the court. Member States make declarations recognising the jurisdiction of the court and thereby allowing direct access to individuals in such countries. However, the African Court may receive complaints or applications from the African Commission, state parties to the protocol and African intergovernmental organisations.[118] In addition, non-governmental organisations (NGOs) with observer status before the African Commission and individuals from countries which have made declaration recognising the jurisdiction of the court can also file or institute cases directly before the court.

By virtue of article 30 of the Protocol, decisions of the African Court are binding, and States are expected to comply with these decisions. Furthermore, because the African

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[112] Generally, see Amao (n 1).
[113] SERAC case was extensively analysed in section 3.3 and 3.4 of this chapter.
[114] Generally, Oloka-Onyago (n 104); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, July 10, 1998, in force January 25, 2004, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) ("African Court Protocol"), cited in Chenwi (n 24) 62
[115] Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; Viljoen (n 89) 354
[116] African Court of Human and Peoples' Rights website 'Welcome to the African Court' < https://www.african-court.org/en/ > assessed 21 July 2020
[117] Adamantia Rachovitsa, 'On New 'Judicial Animals': The Curious Case of an African Court with Material Jurisdiction of a Global Scope' 19 (2) (2019) *Human Rights Law Review* 255
[118] 'African Court in Brief', African Court on Human and Peoples' Rights < http://www.african-court.org/en/index.php/about-the-court/brief-history > assessed 21 July 2020

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Court has started 'issuing strong merits judgments,'[119] Abebe has ambitiously argued that the African court has been effectively acting as a 'constitutional court for Africa.'[120] Arguably, this will lead to hostile reaction from African countries as exemplified by the political backlash from the governments of Tanzania and Rwanda on unfavourable judgements of the African court against them.[121]

There has been a plethora of cases that have been decided by the African Court.[122] However, according to Chenwi, there has been only one case on alleged violations of the African Charter provisions on environmental protection in the African Court and this was the *Ogiek* case.[123] The case was originally brought before the African Commission, but due to the extensive violations of human rights and non-compliance with the Provisional Measures issued by the African Commission to Kenya, the Commission referred the case to the African Court.[124] The *Ogiek* case is said to be the African Court's first significant decision on indigenous peoples' rights.[125] This case involved the Ogiek Community, an indigenous community of the Mau forest in Kenya. The Kenyan government made order to evict the Ogiek community from the Mau forest (which is their ancestral land). The Kenyan government contended that the eviction was essential for the environmental sustainability or conservation of the area. The African Court held that the Kenyan government had violated seven articles of the African Charter—1, 2, 8, 14, 17(2) and (3), 21 and 22 of the African Charter and Ogiek community is an indigenous community.[126] In the *Ogiek* case, the African Court 'made indirect reference to the protection

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[119] Daly *The Alchemists* (n 88) 103

[120] Adem Abebe, 'Taming regressive constitutional amendments: The African Court as a continental (super) Constitutional Court' 17 (1) (2019) *International Journal of Constitutional Law* 89. Also, Bado argued that in some respects, the ECOWAS Court of Justice resembles a constitutional court. Kangnikoé Bado, *The Court of Justice of the Economic Community of West African States as a Constitutional Court* (Nomos Verlagsgesellschaft mbH & Co. KG, 2019)

[121] Tom Daly, 'As Karlsruhe and Luxembourg Feud, are Jo'burg and Arusha growing closer?' (July 2020) I-CONNECT Blog - http://www.iconnectblog.com/2020/07/as-karlsruhe-and-luxembourg-feud-are-joburg-and-arusha-growing-closer/ In 2020, Benin and Cote d'Ivoire withdrew their declarations allowing NGOs and individuals to petition the African Court.

[122] African Court cases and judgments https://www.african-court.org/en/index.php/cases

[123] *African Commission on Human and Peoples' Rights v. Kenya*, Application 006/2012, Judgment (African Court of Human and Peoples' Rights, 2017) (Ogiek case or ACHPR v. Kenya (Judgment)). Also cited in Chenwi (24) 64

[124] Chenwi (n 24) 78

[125] Furthermore, the African Commission have provided extensive analysis of people's rights (including indigenous rights) in Southern *Cameroon*, *Darfur*, and *Endorois* cases. Generally, see Tiyanjana Maluwa, 'Reassessing Aspects of the Contribution of African States to the Development of International Law Through African Regional Multilateral Treaties' 41(2) (2020) *Michigan Journal of International Law* 327, 364-368

[126] Ogiek case (n 123)

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of environmental rights.'[127] The *Ogiek* case, even though it mainly focused on indigenous rights, also highlighted the utility of environmental conservation.[128] The African Court held that contrary to the view by the Kenyan government (that the eviction of the Ogiek people was necessary to maintain the environment), the action of the Kenyan government was neither proportionate or necessary to justify its eviction of the people from their land.[129] The Ogiek people have sentimental attachment to their lands and the environmental degradation was exacerbated by the actions and activities of the Kenyan government and its agents such as the 'encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions.'[130]

Furthermore, the African Court has also been buffeted by resistance from some states refusing to enforce its judgments.[131] African states and governments should endeavour to respect and implement decisions of regional and sub-regional courts on the continent. This is particularly important, because the African Court is the only functioning judicial organ of the AU.

3.4 Impact of judicial decisions and treaties on the evolution of sustainable developments norms in Africa

This section focuses on the impacts of the decisions of regional and domestic courts on sustainable development in different parts of Africa. The overarching academic view on the impact of African Commission and African Court jurisprudence on domestic courts and national law is that very few domestic courts in Africa refer to them.[132] Furthermore, notwithstanding that Nigeria has incorporated the African Charter into domestic law, Nigerian courts are yet to explicitly refer to case law of regional courts in Africa.[133] However, in a recent judgment of the Nigerian Supreme Court in *Centre for Oil Pollution Watch v NNPC*, the court expressly relied on the provisions of Article 24 of the African Charter, section 33 (1) of the Nigerian Constitution and section 17 (4) of the Oil Pipelines Act to hold that the right to

[127] Funmi Abioye, 'Advancing Human Rights through Environmental Rule of Law in Africa' in Addaney and Jegede (n 6) 97. Generally, see Lucy Claridge, 'Litigation as a Tool for Community Empowerment: The Case of Kenya's Ogiek' 11 (2018) *Erasmus L. Rev.* 57
[128] Abioye *ibid*
[129] Ogiek case (n 123) para. 130
[130] Ogiek case (n 123) para. 130
[131] Generally, see Tom Gerald Daly and Micha Wiebusch. "The African Court on Human and Peoples' Rights: mapping resistance against a young court' 14 (2) (2018) *International Journal of Law in Context* 294.
[132] Generally, see Olubayo Oluduro, *Oil exploitation and human rights violations in Nigeria's oil producing communities* (Intersentia, 2014) 454
[133] Generally, see Oluduro ibid

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environment can be justiciable in Nigeria and hence, these instruments recognised the fundamental rights of Nigerians to a clean and healthy environment.[134]

Arguably, things are changing and some domestic courts in Africa have expressly referred to the case law from the African Commission and African Court. Dinokopila avers that domestic courts that have referred to the African Commission in their jurisprudence includes courts in South Africa, Ghana, Zimbabwe, Gambia and Kenya.[135] For example, some municipal courts have relied on the African Charter and African Commission's decisions or case law to find breaches of human rights.[136] For example, in 2015, the High Court of Kenya in *Eric Gatari* case relied on provisions (Article 10) of the African Charter and African Commission case law on freedom of association to protect the rights of sexual minorities in Kenya.[137] Furthermore, the Supreme Court of Zimbabwe *in Kachingwe and Others v Minister of Home Affairs and Commissioner of Police* suggested that the decisions of the African Commission were of persuasive authority in the country.[138]

Scholars argue that the impact of the African Charter has been modest but significant on the continent.[139] For example, the Charter has been extensively relied on in Nigeria and South Africa to ventilate the rights of litigants in a plethora of cases.[140] Arguably, a major limitation or barrier to the enforcement of the African Charter is the way international law/ratified treaties are received or implemented in Member States. This is exemplified by the so-called 'dualist and monist' divide. In dualist countries, treaties are not applied domestically unless incorporated via municipal legislation. On the other hand, in monist countries, international law applies directly. However, the dualist-monist dichotomy has been argued to be inappropriate to analyse the reception of international law by African countries.[141] The

[134] *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* [2019] 5 NWLR 518. The implications of this case will be further explored in later part of this section.
[135] Bonolo Dinokopila 'The Impact of Regional and Sub-regional Courts and Tribunals on Constitutional Adjudication in Africa' in Charles Fombad (ed) *Constitutional Adjudication in Africa* (Oxford University Press, 2017) 232
[136] Manisuli Ssenyonjo, 'Responding to human rights violations in Africa: Assessing the role of the African Commission and Court on Human and Peoples' Rights (1987–2018)' 7 (1) *International Human Rights Law Review* 1, 18-19. The influence or impact of the African Charter, African Commission and African Court will be in focus in a later section of this chapter.
[137] *Eric Gitari v Non-governmental Organisation Coordination Board and 4 Others*, Petition 440 of 2013, [2015] eKLR (High Court of Kenya at Nairobi, 24 April 2015). Cited in Ssenyonjo *ibid* 19.
[138] Dinokopila (n 135) 233
[139] Okafor (n 21); Ayeni (n 22)
[140] Ayeni (n 22). Generally, see Philip Oamen, 'Realisation of the Right to Health in Nigeria: The Prospects of a Dialogic Approach' (August 13, 2020). Available at SSRN: https://ssrn.com/abstract=3673480
[141] Michelle Barnard, 'Legal reception in the AU against the backdrop of the monist/dualist dichotomy' 48 (1) (2015) *Comparative and International Law Journal of Southern Africa* 144

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overarching view is that in Africa, civil law countries are monist and common law countries are dualist in nature. However, this does not always reflect the reality or practice in some of these countries. For example, even though Kenya is a 'dualist' country, it has recently amended its constitution to make ratified treaties directly applicable without the need for parliamentary domestication.[142] Furthermore, in monist states such as Côte d'Ivoire, the African Charter and ratified international instruments or treaties are said to have a higher status than its constitution and in Ethiopia, international human rights treaties including the African Charter 'have a status higher than ordinary legislation, and are equal in status to the Constitutions.'[143] Despite the criticisms of the monist-dualist dichotomy in Africa, once a dualist state incorporates or transforms a treaty into domestic law, it is free are free to assign which ever status it would give to it. The monist/ dualist issues remain relevant because dualist states need a 2-step process: ratify and incorporate, whilst in monist states only one step needed: once ratified it applies automatically – but may still be subject to the national constitution.[144]

Notwithstanding these advances by the African Charter on the continent, some parts of Africa are still mired in gross violations of human rights. Hence, African countries should not just sign and ratify (and in some instances, domesticate) the African Charter, they should endeavour to respect and enforce it. Otherwise, the African Charter will remain a paper tiger.

Notwithstanding that Nigerian courts are yet to expressly cite African Commission and African Court in their judgments, the African Charter has had a significant influence on Nigerian courts and laws.[145] For example, in a recent Supreme Court decision in Nigeria, some of the Justices in *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* explicitly referred to sections 20 and 30 of the Nigerian Constitution, 17 (4) Oil Pipelines Act and Article 24 of the African Charter to hold that the right to a clean and healthy environment can be

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[142] Ayeni (n 22). Also, in Nigeria (which is also a 'dualist' country) by virtue of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010, an amendment of the Nigerian Constitution which now makes International Labour Conventions (ILO) Conventions directly applicable in the National Industrial Court of Nigeria. Hence, section 254 (c) (2) of the Nigerian Constitution now provides that 'Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.' Generally, see Flora Alohan Onomrerhinor, 'A re-examination of the requirement of domestication of treaties in Nigeria', 7 (2016) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 17-25
[143] Ayeni (n 22) 14
[144] Generally, see Michèle Olivier, *International law in South African Municipal Law: Human rights procedure, policy and practice* (PhD Dissertation, 2002).
[145] Ayeni (n 22); Okafor (n 21)

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recognised under the Nigerian law.[146] This case has liberalised *locus standi* of NGOs in environmental matters in Nigeria thereby improving access to environmental justice and promoting sustainable development for litigants, victims, and communities in Nigeria.[147] This is the first time that the Nigerian Supreme court has stated that right to the environment can be justiciable in Nigeria. This judgment creates a binding judicial precedent in Nigeria and all other (lower) courts in the country are expected to follow it. Under Nigerian law, socio-economic rights are neither justiciable nor enforceable (unlike civil and political rights). This is exemplified by section 20 of the Nigerian Constitution, which seeks to promote and protect the environment in chapter II of the Constitution and therefore neither justiciable nor enforceable.[148] Hence, the decision in the *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* has made right to environment (a socio-economic right) justiciable in Nigeria. However, it should be noted that these comments by the Supreme Courts Justices on right to environment were made *obiter* and right to environment was not an issue directly before the court. On the other hand, this decision can serve as a launchpad to further develop the evolving jurisprudence around economic and social rights (ESR) in Nigeria.

The Supreme Court in the *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* further stated that the being a domesticated treaty, the African Charter is part of Nigerian law and as long as Nigeria remains a signatory to the African Charter and other relevant international treaties on the environment, the Nigerian courts would continue to protect and vindicate the human rights entrenched in such international mechanisms.[149] A major criticism of the decision is that the court did not refer to the SERAC case or case law of the African Commission or Africa Court. Arguably, reference or reliance on the SERAC case and the jurisprudence of regional courts (including sub-regional judiciaries) would have added more nuance or clarity to the right to environment analysis in the judgment. Notwithstanding, the criticism of the judgement in *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation*, this case evidences the extent and the positive impact of the African Charter on domestic law in sustainable development in Nigeria. Even though the Supreme Court Justices in the *Oil Pollution Watch* case did not expressly refer to the *SERAC* decision,

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[146] *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* [2019] 5 NWLR 518, 587, 597-598

[147] Also, see Ayodele Babalola, 'The Right to a Clean Environment in Nigeria: A Fundamental Right' 26 (2020) *Hastings Envt'l LJ* 3

[148] Eghosa Ekhator, 'Improving access to environmental justice under the African Charter on human and peoples' rights: the roles of NGOs in Nigeria' 22 (1) *African Journal of International and Comparative Law* 63, 70

[149] *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* [2019] 5 NWLR 518, 598

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one of the Justices (Justice Nweze) in a public lecture given in 2017, explicitly mentioned reliance on the *SERAC* case as one of the strategies of extending environmental rights in Nigeria.[150] Justice Nweze delivered the leading judgment in the *Oil Pollution* case. Arguably, the *SERAC* case was a persuasive influence on Justice Nweze, notwithstanding that he (and the other Justices) did not expressly refer to the *SERAC* case and other relevant caselaw from sub-regional and regional courts in the judgment in *Oil Pollution* case.[151] Also, Justice Nweze in his public lecture advises the National Assembly in Nigeria 'to rise to the occasion and constitutionalise socio-economic rights as other African countries have done. This is the only way of eradicating poverty and illiteracy; confronting diseases and mitigating hunger and hardship in the land etc'.[152]

Many domestic courts in Africa are yet to cite the jurisprudence of the African Court.[153] For example, the South African Constitutional Court is one of the most international law-friendly courts in Africa.[154] However, the Constitutional Court cited the jurisprudence of the African court for the first time in June 2020.[155] Thus, Dinokopila argues that there is little evidence of the use of the African Court by domestic courts in Africa.[156] This is arguably due to the fact that the African Court (in comparison with the African Commission) is a recent development. A major problem is the lack of information on the number of domestic courts that have cited the jurisprudence of the African Court. Fortunately, the ACtHPR Monitor has begun a project to map out the influence of the African Court on domestic courts in Africa.[157]

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[150] Justice Chima Centus Nweze, 'Constitutional Adjudication for Democratic Consolidation in Nigeria: The Role of The Supreme Court' 16th Justice Idigbe Memorial Lecture, which held at the University of Benin (UNIBEN, 2017) 34.

[151] However, Justice Chima Centus Nweze has written extensively on the justiciability of environmental rights in Nigeria. Generally, see Chima Nweze, 'Justiciability or judicialization: circumventing Armageddon through the enforcement of socio-economic rights' 15(1) (2007) *African Yearbook of International Law Online/Annuaire Africain de droit international Online* 107.

[152] Nweze (n 150) 35

[153] Tom Daly, 'Kindred strangers: why has the Constitutional Court of South Africa never cited the African Court on Human and Peoples' Rights?: the limited influence of African moral theory & law on the Constitution' 9 (1) (2019) *Constitutional Court Review* 387

[154] Dire Tladi, 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' 16 (2) (2016) *African Human Rights Law Journal* 310, 311.

[155] The Constitutional Court in *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* (CCT110/19) [2020] ZACC 11 (11 June 2020) made explicit reference to the decision of the African Court in *Mtikila v. Tanzania*. Generally, see Daly blog post (n 119)

[156] Dinokopila (n 135) 236

[157] The ACtHPR Monitor is an independent website dedicated to the African Court on Human and Peoples' Rights < http://www.acthprmonitor.org/ > accessed 21 July 2020

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3.5 Impacts of SERAC Case in Nigeria and other parts of Africa

The African Commission in the SERAC case made five orders or recommendations that the Nigerian government should adhere to.[158] One of the orders was a directive that the Nigerian government 'stop all attacks on Ogoni communities' and to permit 'citizens and independent investigators free access to the territory'. During the *SERAC* case, the Nigerian government accepted that it had exacerbated the environmental problems in the Niger Delta. The government posited via a *note verbale* delivered to the African Commission that 'there is no denying the fact that a lot of atrocities were and are still being committed by oil companies in Ogoni Land and indeed in the Niger Delta area.'[159] The Nigerian government further averred that it had initiated remedial mechanisms to alleviate the suffering of the Ogoni people. These include the creation of the Federal Ministry of Environment, Niger Delta Development Commission (NDDC) and a Judicial Commission of Inquiry to investigate the issues of human rights violations amongst other measures to ameliorate the impacts of the activities of the oil MNCs on the Niger Delta and the environment.[160] The Nigerian government in recent years has established more interventionist agencies such as the Ministry of Niger Delta Affairs, the National Environmental Standards and Regulations Enforcement Agency (NESREA) and National Oil Spill Detection and Response Agency (NOSDRA) amongst others and measures (for example, the Amnesty programme for repentant militants) to ameliorate the suffering in the Niger Delta. However, some of these measures cannot be directly traced to the SERAC decision and all the orders or recommendations in the SERAC case are yet to be fully implemented in Nigeria.[161] The general consensus in academic literature is that the aforementioned governmental initiatives have been ineffectual.[162] The United Nations Environment Programme (UNEP) environmental assessment on Ogoniland was conducted at the behest of the Nigerian government[163] and two different Nigerian Presidents (Goodluck

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[158] SERAC Case; Viljoen (n 89) 371
[159] *SERAC* Case para. 42
[160] SERAC Case para 30
[161] Viljoen (n 89)
[162] Generally, see Nelson Ojukwu-Ogba, 'Legislating Development in Nigeria's Oil-Producing Region: The N.D.D.C. Act Seven Years On' 17 (1) (2009) *African Journal of International and Comparative Law* 136
[163] UNEP Assessment of Ogoniland Report (2011) <https://www.unenvironment.org/explore-topics/disasters-conflicts/where-we-work/nigeria/environmental-assessment-ogoniland-report> accessed 21 July 2020.

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Jonathan and Mohammadu Buhari) have tried to implement the UNEP report and unfortunately, progress has been very slow.[164]

Following the SERAC decision, there appears to be some direct engagement by the African Commission to ascertain whether the Nigerian government did fully comply with the decision.[165] For example, the African Commission Concluding Observations in 2008, advised the Nigerian government to establish an 'effective monitoring mechanism for the implementation of decisions of regional and domestic bodies on violations of the rights in the Niger Delta.'[166] However, it is unsure, if the Nigerian government did actually get back to the African Commission on whether it explicitly implemented the SERAC decision.[167] Notwithstanding, the criticisms of the implementation of the SERAC decision in Nigeria, it has positively impacted on sustainable development and environmental protection in the country because the Nigerian government actually created governmental agencies as a direct response to the SERAC case (as highlighted in the *note verbal*e).

Furthermore, some domestic courts in Africa have directly referred to the SERAC case in their jurisprudence. For example, the South African Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* referred to the African Commission's decision in SERAC.[168]

Arguably, the Constitutive Act of the AU does not explicitly promote sustainable development as a norm under the AU legal order. However, the position of this section is that an application of Verschuuren's framework on sustainable development as legal norm in international law evidences the notion that the various AU treaties on environment and regional courts have engaged in norm creation on sustainable development in Africa. Thus, sustainable development is a norm which is implicit in the Constitutive Act. The contention of this chapter is that notwithstanding that domestic and regional (including sub-regional courts) have not expressly referred to AU law in its jurisprudence, there is evidence that the case-law on sustainable development in domestic, regional, and sub-regional courts can form part of the body of norms

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[164]Amnesty International 'Nigeria: No Clean-Up, No Justice: An Evaluation of the implementation of UNEP's Environmental Assessment of Ogoniland, Nine Years On' (June 2020) https://www.amnesty.org/en/documents/afr44/2514/2020/en/
[165] Viljoen (n 89) 375
[166] Concluding Observations and Recommendations on the Third Periodic Report of the Federal Republic of Nigeria, 10– 24 November 2008, para 40 https://www.achpr.org/sessions/concludingobservation?id=77
[167] Viljoen (n 89)
[168] Dinokopila (n 135) 230

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under the emergent AU law. It is suggested that this also contributes to the emergent continental legal system with supranational qualities.

4 Recommendations

Contracting states to treaties cannot rely on its domestic laws as reasons or justification for not performing its expected obligations under such treaties. This is exemplified in article 27 of the Vienna Convention on the Law of Treaties which states that a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' Hence, state parties to AU treaties or conventions should endeavour to respect and fulfil the obligations arising from such treaties.

The AU should harmonise the various AU environmental law treaties to expressly promote sustainable development on the continent.[169] A major advantage of harmonising the AU instruments promoting sustainable development is that will help to clarify the extent of sustainable development norms in the AU legal order.[170] It is understood that institutional barriers such as state sovereignty and the reluctance of some AU Members to respect and implement AU decisions might negatively impact on harmonisation of sustainable development norms in Africa.

The AU Constitutive Act should be amended to expressly provide for sustainable development as a legal norm or in the alternative, an explicit sustainable development treaty should be adopted by AU. Here, allusions can be made to the EU, under which sustainable development became a legal norm through a gradual process.[171] Hence, new AU institutions (or existing institutions such as the Pan-African Parliament and AUC) should be mandated to ensure the full implementation of sustainable development norms throughout the continent. This will ensure consistency amongst African states in this sphere. Furthermore, African states should endeavour to respect and implement the decisions of the African Commission, African Court, and relevant domestic courts decisions on sustainable development on the continent.

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[169] Okechukwu Aholu 'Greening AU Environmental Law: How can Harmonisation help?' (2019)
[170] Aholu *ibid*, in respect of AU environmental law states that one of the advantages of harmonising AU treaties on environment is that it will help 'clarify the depth of environmental policy within the AU.'
[171] Generally, see Gyula Bándi, 'Principles of EU Environmental Law Including (the Objective of) Sustainable Development' in Marjan Peeters and Mariolina Eliantonio (eds) *Research Handbook on EU Environmental Law* (Edward Elgar Publishing, 2020)

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5 Conclusion

This chapter has focused on the African Charter and Agenda 2063 as AU mechanisms promoting sustainable development on the continent. There have been divergent arguments whether sustainable development is a legal norm in international law. This chapter relying on Verschuuren's framework on the status of sustainable development in international law, posits that arguably sustainable development is a legal norm in the AU legal order. This is exemplified by the impacts of the African Charter and decisions of regional courts in domestic laws and legislation in Africa. This chapter contends that the AU mechanisms on sustainable development are an essential part of the emergent AU legal order. Furthermore, AU mechanisms on sustainable development will contribute to the development of common standards/norms/laws at the continental level which enhances the emergent continental AU legal order.

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