

# PROTECTION OF ENVIRONMENTAL ASSETS IN URBAN AFRICA: REGIONAL AND SUB-REGIONAL HUMAN RIGHTS AND PRACTICAL ENVIRONMENTAL PROTECTION MECHANISMS

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## ABSTRACT

The rapid urbanisation is exerting increasing pressure on the continent's natural environment which is negatively affecting its sustainability. A rapidly urbanising Africa is vigorously degrading the environmental resources especially those in urban areas. There is also a growing fear that African governments may become locked into 'a grow dirty now, clean up later' development path that may be irreparable, expensive, and wasteful as well as reduce the welfare of especially vulnerable groups. This trajectory has negative connotation on environmental rights and specially the human rights of vulnerable individuals and communities to health, food, water and housing. However, the protection of these environmental assets can upsurge the efficiency and livability of the rapidly urbanising communities, increase tourism opportunities as well as augment resilience to the impacts of global climatic variations. Adopting a doctrinal methodology and the human rights-based approach, this article explores the intersection between human rights and environmental protection in the context of rapid urbanisation on the African continent. This paper further examines whether and to what extent a regional human rights approach to environmental protection can protect environmental assets in the context of urbanization at the national level in Africa. It relies on primary sources and secondary information. The article discusses the nexus between human rights and environment protection in the African context and addresses key issue of human rights and environmental conservation in the context of urbanisation.

**Key words: Environmental Assets, Environmental Protection, Human Rights, Human Rights Law, Urbanisation**

## INTRODUCTION

Africa's cities have grown at an average of 4 per cent annually over the last two decades (Ijjasz-Vasquez and White 2017; Bentil 2017). The rapid urbanisation has enhanced poverty reduction efforts and greatly improved livelihoods on the continent (Africa Growth Initiative 2017). However, this condition is exerting increasing pressure on the continent's natural environment which is negatively affecting its sustainability (Fanan, Dlama, and Oluseyi 2011; Forbes and

Demetriades 2008; Fuwape and Onyekwelu 2010). A recent study by the World Bank contends that a rapidly urbanising Africa is vigorously degrading the environmental resources especially those in urban areas (Ijjasz-Vasquez and White 2017). The protection of these environmental assets can upsurge the efficiency and livability of the rapidly urbanising communities (Schrijver 2016, 1252), increase tourism opportunities as well as augment resilience to the impacts of global climatic variations (Mensah 2014a; 2014b, 1). The exclusive geographies of urbanisation in Africa such as considerably worse per capita incomes, high dependence on biomass fuels, widespread informal settlement with pitiable service levels as well as the exposure of urban communities to environmental catastrophes such as floods is putting pressure on the protection of the natural environment and human rights in Africa (Dubbale, Tsutsumi and Bendewald, 2010, 164; Isunju, Orach, and Kemp 2016, 275; Shikur 2011, 13). This is also eroding the value of environmental assets such as green spaces, forests and water resources that most vulnerable and minority groups depend on for survival and development. There is also a growing fear that ‘African governments may become locked into a “grow dirty now, clean up later” development path that may be irreparable, expensive, and wasteful as well as reduce the welfare of especially vulnerable groups’ (Ijjasz-Vasquez and White 2017). This trajectory has negative connotation on environmental rights and specially the human rights of vulnerable individuals and communities to health, food, water and housing.

Human rights and rights-based approaches are quite fresh add-ons to the environment and development field (Hans-Otto 2000, 734). The concept of development first penetrated the human rights field through the deliberations on the ‘right to development’ (Carmona 2009, 86). The fundamental distinction between a service-based and a rights-based approach to development is shrouded (Uvin 2007, 597). This is because human rights is basically about having a ‘social guarantee’ that is linked to the way the interactions between citizens, states and corporations are structured as well as how these interactions affect the most marginalised and weakest in society. Stated simply, the rights-based approach foremost relates to the link between a state and its citizens (Brown and Heller 2017, 2247). For decades, the development endeavor was isolated from the human-rights system and its implications for development (Uvin 2007, 597). This however began to change in the 1990s when development theorists started seeking to redefine development as being about more than just economic growth, and also including human rights and environmental protection (Uvin 2007, 597). Today, there is widespread acceptance that human rights and environmental protection ought to play a larger role in development. But quite what role and what this might mean for development has remained both vague and contested.

The degradation of natural environmental assets and ecosystems in rapidly urbanising African countries brings real economic, fiscal and social costs such as swelling costs of water production, worsening human health, broken infrastructure, reduced property values as well as loss of recreation and tourism value (White, Turpie and Letley 2017; Ahrends, Burgess, Milledge, Bulling, Fisher, Smart, Clarke, Boniface and Lewis 2010, 14556; Gebre and Van Rooijen 2009; Boadi, Kuitunen, Raheem, and Hanninen, 2005, 465). There is therefore an urgent need to advance rights-based approach to development that promotes environmental sustainability without jeopardizing the human rights of vulnerable populations and communities in Africa. This approach can be more cost-effective and promote environmental conservation. Adopting a doctrinal approach, this article explores the intersection between human rights and environmental

sustainability in the context of rapid urbanisation on the African continent. This paper further examines whether and to what extent a regional human rights approach to environmental protection can safeguard environmental assets in the context of urbanization at the national level in Africa. It relied on primary sources such as international, regional and national environmental and human rights laws and policies as well as secondary information including scholarly works and reports from credible institutions such as the World Bank and jurisprudence of treaty bodies. It engaged international and regional environmental and human rights mechanisms to identify their normative standards to serve as the analytical framework for the analyses. The article is divided into five sections. It begins with a brief introduction. Section two discusses the nexus between human rights and the development of environment protection norms at the international level. Section three examines the rights-based approach to environmental protection in the context of urbanisation in Africa emphasising on African union law and practice. Section four discusses the implications of regional rights-based approach for national policy development on protecting environmental assets in the context of urbanization in Africa. Section five concludes by summarizing key findings and recommendations.

## **HUMAN RIGHTS AND THE DEVELOPMENT OF ENVIRONMENTAL PROTECTION NORMS, OBLIGATIONS AND PRACTICE IN THE GLOBAL CONTEXT**

Human rights and environmental rights are traditionally in separate legal regimes but the connection is increasingly recognised. Environmental Protection has been recognised as one of the principles of international law (Boer 2015). As a core element of international law, the Universal Declaration of Human Rights (Universal Declaration) can be considered as the bedrock of international human rights law (Schabas 2013, 37). Although declarations are non-binding, United Nations (UN) declarations with the backing of the UN General Assembly (UNGA) present strong expressions of the principles of international law (Morsink 1999, 146). Undoubtedly, the Universal Declaration has incontestable 'political standing and symbolic significance' (Klaus, McInerney-Lankford and Sage 2005, 10) as a universally-recognised enumeration of fundamental human rights and freedoms (Henkin 1987, 1). Article 25(1) of the Universal Declaration provides that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...' (Universal Declaration 1948, article 25[1]). Though indirectly, this arguably represents the first attempt to make environmental rights a universal appeal due to the close connection between the environment and adequate standard of living particularly its variables such as food and social (ecological) services. The fundamental object of the Universal Declaration culminating into binding international human rights instruments (van Banning 2002, 42) came to fruition when the International Covenant on Civil and Political Rights (ICCPR) [ICCPR 1966,] as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) [ICESCR 1966] were adopted in 1966. However, these instruments are silent on environmental rights essentially because they were adopted before the emergence of environmental protection as a common concern and, as a result; do not mention the environment (de Wet and du Plessis 2010, 345).

Human rights and the environment are inextricably linked particularly in respect to sustainable development (Steiner 2012, 240). For instance, ecosystem services such as food, clean water, medicinal substances, recreation, and protection from natural hazards such as floods and droughts are indispensable to the well-being of all people in all places. Therefore, the protection of environmental assets and the promotion of human rights are increasingly seen as intertwined, complementary, and part of the fundamental pillars of sustainable urbanisation and development. Therefore, the two fields share a core of common interests and objectives indispensable for sustainable development (Boer 2015, 135). Weeramantry contends that ‘the protection of the environment constitutes a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights including the right to health and the right to life itself’ (Hunter, Salzman, Zaelke 2014, 1365). For instance, some of the substantive human rights enshrined in various international and regional instruments include the right to life, to health, to property, to adequate standard of living (food, medicine, clothing, housing and water). In addition, procedural human rights that serve as the vehicle for the delivery of the substantive rights are guaranteed under the substantive international human rights norms. The procedural rights include access to information, access to justice and judicial remedy, due process of the law and fair hearing as well as substantive redress in courts and tribunals with competent jurisdiction (Boer 2015, 135). It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights enshrined in the Universal Declaration and other human rights instruments (Boer 2015, 135). While, therefore, every state and all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment.

At the concluding session of the 1972 Stockholm Conference, the participants adopted the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 16 June 1972) which established a foundation for linking human rights and environmental protection in law. Principle one declared that ‘man has the fundamental right to freedom, equality and adequate conditions of life; in an environment of a quality that permits a life of dignity and well-being’ (Stockholm Declaration 1972, Principle 1). Since the 1972 Stockholm Conference, there have been a plethora of International Environmental Law (IEL) instruments at the global level. In 2015, the Millennium Development Goals (MDGs) was replaced by the Sustainable Development Goals (SDGs) which represents a more comprehensive and ambitious agenda than the MDGs. The SDGs set out 17 major goals with 169 detailed strategic targets associated with the goals. The SDGs were developed within the overall framework of the preparation of the post-2015 development agenda entitled ‘Transforming our world: the 2030 Agenda for Sustainable Development’. The post-2015 development agenda sought to:

build on the Millennium Development Goals and complete what they did not achieve. They seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls. They are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental (UNGA 2015).

In addition, the Agenda reaffirms the principles of the Rio Declaration on Environment and Development especially by recalling the principle of common but differentiated responsibilities. The SDGs can be regarded as another significant milestone on the road to global environmental sustainability. SDG number one states that ‘We are determined to end poverty and hunger, in all

their forms and dimensions, and to ensure that all human beings can fulfil their potential in dignity and equality and in a healthy environment.’ This is clear acknowledgment of the right to a quality environment.

When it comes to IEL, the global juridical order places the subject in a very particular position such that there are no special international environmental courts exercising jurisdiction over the hundreds of multilateral treaties that deal with environmental protection (Voigt and Grant 2015, 131). Meanwhile, these treaties establish non-compliance or review mechanisms and procedures with quasi-judicial features through facilitative approaches, thereby providing transparency, financial and technological assistance and capacity-building rather than sanctions. For instance, the Kyoto Protocol and the Aarhus Convention on Access to Justice in Environmental Matters establish Compliance Committees. However, a large amount of jurisprudence relating to environmental issues now originates from issue-specific judicial bodies including regional human rights courts and human rights treaty bodies (Voigt and Grant 2015, 131). In other words, human rights courts and other quasi-judicial human rights bodies present opportunities that otherwise do not exist for pursuing environmental claims at the international and regional levels. This is due to the increasing recognition of the strong interconnection between human rights and environmental protection especially in the Global South (Voigt and Grant 2015, 131). Therefore, a growing number of current disputes adjudicated in regional human rights courts involve the environmental aspects of human rights claims and, consequently, a growing body of human rights-related jurisprudence is emerging with direct relevance for environmental protection.

In addition, a great deal of studies has been carried out relating to the right to environment by the United Nations Special Rapporteur on the Right to Environment, Professor John Knox who was appointed in 2011 (Office of the High Commissioner on Human Rights 2017). Knox (2013) in his first report, contends that ‘it is now beyond argument that human rights law includes obligations relating to the environment’, and that taken together, the treaties and documents included in the report ‘provide strong evidence of converging trends among these human rights bodies towards uniformity and certainty in the application of human rights law to environmental issues. He therefore strongly encouraged ‘States to accept these statements as evidence of actual or emerging international law.’ When he was the UN Independent Expert on the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Knox (2012) observed that ‘environmental degradation can and does adversely affect the enjoyment of a broad range of human rights’. He asserted that contemporary environmental challenges such as

‘climate change, desertification, mining activities, industrial air and water pollution, large-scale oil development, improper disposal of toxic wastes, exposure to harmful chemicals or to radiation and the improper use of pesticides among other developments and activities can pose threats to the right to life, to the highest attainable standard of physical and mental health, to an adequate standard of living, to the right to food and to the right to respect for family life and other human rights. Certain groups may even be particularly vulnerable to environmental threats. The rights of children, for example, can be particularly affected by environmental degradation.’

Land degradation is associated with poor regulation of the use of agricultural pesticides and fertilizers, land and water contamination by the release of toxic chemicals from industrial sites, diminution of the fertility of agricultural land through the loss of its productive capacity (UNCCD 1994). A combination of these poses threats to food security and results in serious effects on human health. For instance, the United Nations Special Rapporteur on the Right to

Food has indicated that the total number of people suffering from hunger has increased to about 854 million worldwide. It is estimated that half of these people live in degraded lands and depend for their survival on these lands that are inherently poor and becoming less fertile due to recurring droughts resulting from climate change and unsustainable land use (Ziegler 2008, 7).

Notably, some 20 per cent of the world's land is considered degraded. The implication is that land degradation (UNCCD 1994, article 1) which affects most regions of the world could result in many legitimate human rights issues. Sub-Sahara Africa is identified as one of the hotspots of land degradation, particularly in the south of the Sahara desert itself (UNCCD Secretariat 2012). The preamble to the United Nations Convention to Combat Desertification (UNCCD) particularly mentions the relationship between desertification, sustainable development and the associated social problems of poverty, food security as well as other issues emanating from demographic dynamics. Therefore, as rightly observed by the Independent Expert, the rights of children and other vulnerable groups can be affected by environmental degradation. For example, the Convention on the Rights of the Child (CRC) provides that environmental pollution poses 'dangers and risks' to access by children of nutritious foods and clean drinking water (CRC 1989, 3). It is generally recognised that environmental hazards are often barriers to the realization of children's rights to health and to other rights. Also, indigenous peoples can be uniquely vulnerable to environmental degradation because of their close relationship with their lands, nature and with natural resources (Voigt and Grant 2015, 131). Therefore, activities associated with rapid urbanisation and expansion as well as extractive industries in particular can generate effects that often violate the rights of indigenous peoples' including *inter alia* the rights to life, health, property, and culture.

Most obviously, and in contrast to the rest of international environmental law, a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the environment in general. Boyle (2015: 202) contends that it may serve to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution or degradation affecting health and private life. Furthermore, a human rights-based approach to environmental protection helps to promote the rule of law by making governments directly accountable for their failure to regulate and control environmental nuisances such as those caused by private corporations as well as for facilitating access to justice and enforcing environmental laws and judicial decisions (Boyle 2015: 202). The expansion of economic and social rights to cover elements of the public interest in environmental protection has breathed new life to the notion that there is, or should be, in some form, a right to a safe and decent environment (Francioni 2010: 41). The growing environmental caseload of human rights courts and treaty bodies further indicates the importance of environmental protection in mainstream human rights law. However, it is self-evident that the environmental dimensions of rights found in the substantive human rights treaties are not direct and therefore any reference to such is just 'greening' them. This implies a 'greening' of existing human rights law rather than the addition of new rights to existing treaties (Boyle 2015: 202). The greening of human rights law is therefore not only a European phenomenon but rather extends across the African Charter. For instance, Judge Higgins (2006) and the ICJ (2010) have drawn attention to the way human rights courts 'work consciously to coordinate their approaches'. The main focus of the case law has thus been the rights to life, private life, health, water, and property.

## **RIGHTS-BASED APPROACH TO ENVIRONMENTAL PROTECTION IN THE CONTEXT OF URBANIZATION IN AFRICA: AFRICAN UNION LAW AND PRACTICE**

The African Charter on Human and Peoples' Rights (the African Charter) is one of the few international human rights instruments that unequivocally recognises and guarantees the human right to a satisfactory environment. Article 24 of the African Charter provides that 'all peoples shall have the right to a general satisfactory environment favourable to their development' (African Charter 1981). The Protocol to the African Charter relating to the Rights of Women in Africa (the Maputo Protocol) also provides that 'women shall have the right to live in a healthy and sustainable environment.' These provisions are reiterated in the 2003 Revised African Convention on the Conservation of Nature and Natural Resources (Revised African Convention). In article 3 concerning the Principles, the Revised African Convention provides that 'in taking action to achieve the objectives of this Convention and implement its provisions, the Parties shall be guided by the following '...the right of all peoples to a satisfactory environment favourable to their development'. These rights and guarantees have also constituted the object of a complaint in terms of the individual complaints procedure<sup>1</sup> before the African Commission (Viljoen 2004, 420; Ouguergouz 2003, 485). Thus, as argued, the links between the environment and human rights have been recognised by regional courts and tribunals in Africa.

The African Court and Commission remain the most important regional monitoring bodies in relation to the rights guaranteed in the African Charter. Decisions by the Court are binding while the binding nature of the Commission's decisions is disputed because there are some scholars who argue that the decisions are binding because they emanate from an obligation in the African Charter which is binding on states (Waichira and Ayinla 2006, 465; Naldi 2002, 1; Murray 1997, 412; Viljoen and Louw 2004 1; Viljoen 2012, 339). For instance, while Naldi argues that decisions of the African Commission are not binding but are of persuasive effect akin to the views of the UN Human Rights Committee (Naldi 2002, 10), Viljoen and Louw (2004, 18) on the other hand, contend that "subsequent 'ratification' (or 'adoption') of the AU Assembly" of the Commission's decisions in terms of article 59 of the African Charter converts the decisions of the Commission into legally binding decisions of the AU Assembly. Regardless of which of these views one finds more persuasive, states have a duty to comply with their obligations under the African Charter in good faith (Vienna Convention on the Law of Treaties 1969, article 26) including interpretation of the African Charter by the Commission through its decisions (Viljoen 2012, 339). Binding or non-binding, the track record of states giving effect to the decisions of both the Commission and the Court remains mixed. The African Court and particularly the African Commission, through its dual mandate of protection and promotion present an opportunity for the advancement of human rights and development standards for the region to support the achievement of the African Union's Agenda 2063 as well as the Sustainable Development Goals (Boer 2015, 135). This is because human rights conventions and MEAs set standards for development goals to ensure that specific groups such as indigenous peoples, women, children and persons with disabilities are included in the development planning process and implementation. Given the challenge of inadequate financial and human resource in the region, an effective regional human rights tribunal will supplement services where national human rights mechanisms are nonexistent and hold up those that are emerging. Therefore, the African Court/Commission on Human and Peoples' Rights are the most sustainable and practical approach to assisting the member states of the AU in meeting their international and regional

human rights obligations including the rights-based development objectives contained within the Sustainable Development Goals and the AU Agenda 2063.

The significant role played by non-governmental organizations (NGOs) in promoting the implementation of international human rights regimes and systems is increasingly recognised (Boer 2015, 135). Burdekin (2011, 18) contends that ‘any regional or sub-regional human rights mechanism that wants to be effective and credible must also develop a modus operandi for working in co-operation with national institutions and civil society.’ This is because international NGOs have been working strongly with international human rights bodies under the aegis of the UN and other institutions to promote, monitor and push forward the protection of human rights across the world. For example, in its 2013 World Report, Human Rights Watch, an NGO that began in 1978, sets out a range of environmental and human rights issues affecting countries around the world. It emphasised that:

Unfortunately, in practice, governments and international agencies do not often enough analyse environmental issues through the prism of human rights or address them together in laws or institutions. But they should, and they should do so without fear that doing so will compromise efforts to achieve sustainability and environmental protection. Indeed, rather than undermine these important goals, a human rights perspective brings an important and complementary principle to the fore – namely that governments must be accountable for their actions. And it provides advocacy tools for those affected by environmental degradation to carve out space to be heard, meaningfully participate in public debate on environmental problems, and where necessary, use independent courts to achieve accountability and redress (Kippenberg and Cohen 2013, 41).

There are also many NGOs in Africa that while primarily focused on the environment recognize that human rights issues are very close to many of their concerns. While most of them do not have an explicit human rights and environment brief, they deal with a wide range of development matters which raise human rights concerns in relation to exploitation of natural resources and the environment.

Although environmental legislation is continuing to develop in the African continent, and the field of human rights is gaining more focus, there continue to be many instances of environmental degradation and associated violations of basic human rights caused by unsustainable development practices (Collier and Venables 2015, 413; Collier 2015, 169). These are aggravated by the higher population growth rate and rapid urbanisation in many African countries which are placing greater pressures on the land, water, biodiversity and other natural resources of the region (Turok 2016, 30; Cartwright 2015). The African Commission being the foremost human rights institution of the African Union with supervisory jurisdiction to oversee the implementation of the African Charter within member states plays an important role in ensuring the realisation of the right to environment in Africa. The African Commission contributes to the protection and promotion of environmental rights through its promotional and protective mandates as envisaged in the African Charter. Over the past three decades, the African Commission has executed these mandates through country promotional visits, the drafting of general comments, guidelines and resolutions, and the settlement of disputes relating to the right to environment through the individual complaints mechanism.

Notably, article 24 of the African Charter which guarantees peoples the ‘right to a general satisfactory environment favourable to their development’ is quite vague as it does not elaborate on the scope and content of the right measures that states must adopt to realize this right. The African Commission has over the years tried to elaborate on the exact scope and content of the



right to satisfactory environment in this regard. This section highlights, in a chronological manner, the African Commission's conception of the means and scope of the right to satisfactory environment. The African Commission's first attempt at elaborating on the scope and meaning of the right to satisfactory environment dates back to 1989 when it adopted its Guidelines for National Periodic Reports (African Commission 1989). The Commission herein elaborated that states were required to 'establish a system to monitor effective disposal of waste in order to prevent pollution' and 'to prohibit and penalise disposal of waste on the African soil by any company' (African Commission 1989). Consequently, states are required to indicate in their initial state reports, the 'legislation and other measures' adopted in preventing the dumping of toxic waste from industrialized countries in Africa and 'scientific and efficient methods utilised for effective disposal of locally produced wastes' (African Commission 1989). In subsequent periodic reports, states are also required to report on and the 'continuation of development to curb wastes and removal of pollution on land, in water and in the air' (African Commission 1989).

Apart from the African Commission's elaboration on the reporting requirements on the right to satisfactory environment under article 24, the Commission also elaborated that in terms of the right to health under article 16 of the African Charter, states must indicate in their initial report, 'measures taken to protect and improve all aspects of environmental and industrial hygiene, to prevent air, land and water pollution, to overcome the adverse effects of urban development and industrialization...' (African Commission 1989). Additionally, in terms of the right to enjoy the benefits of scientific progress, which the Commission considers to be an integral part of the right to take part in cultural life, states are required to report on the 'measures taken to ensure the application of scientific progress for the benefit of everyone, including measures to promote a healthy and pure environment' (African Commission 1989).

The most notable intervention of the African Commission with regards to environmental rights is its decision in the (Social and Economic Rights Action Centre & Another v Nigeria [SERAC case] which was decided in 2001. The facts giving rise to the case emanates from the exploration of oil in the lands of the Ogoni people by a consortium between the Nigerian National Petroleum Company (NNPC) and Shell Petroleum Development Corporation (SPDC). The applicants alleged that the operations of the consortium had led to environmental degradation and health problems as a result of contamination of the lands of the Ogoni people. These included the disposal of oil waste into the environment and local waterways and numerous oil spillages near villages resulting from the failure of the consortium to maintain facilities. These had resulted in the pollution of land, air and water bodies of the Ogoni people leading to infections and other health problems. The applicants also alleged that the government of Nigeria had failed to monitor the operations of the oil companies and had not required them to adhere to relevant safety standards. Additionally, the government had refused to give the Ogoni communities the relevant information on the dangers neither created by the activities of the oil companies nor consulted them on the impacts of these activities.

The African Commission held that the right to satisfactory environment 'requires the state 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' (SERAC case 2001, para 52). This right and the right to health require states to refrain

from any acts that ‘directly threaten the health and environment of their citizens’ or tolerating any act that has the same or similar effect (SERAC case 2001, para 52). This according to the Commission is the state’s obligation to respect the right to satisfactory environment (SERAC case 2001, para 52). In addition to this, the state has the obligation to order or at least permit ‘independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities (SERAC case 2001, para 52). This can be likened to the positive obligation to protect and fulfill the right to satisfactory environment.

On these terms the Commission concluded that even though the government of Nigeria has the right to produce oil for the socio-economic benefits of Nigerians, this must be done in accordance with the relevant safeguards elaborated above to ensure that the rights of host communities are protected (SERAC case 2001, para 54). The Commission therefore found the Nigerian government in violation of the right to satisfactory environment of the Ogoni people and among others requested that environmental and social impact assessment be conducted prior to the commencement of future oil explorations. The Nigerian government was also requested to provide information on health and environmental risks to affected communities and allow meaningful participation of the affected communities in decision-making (SERAC case 2001, para 71). Van der Linde and Louw contend that the obligations elaborated by the African Commission contain both procedural and substantive aspects (van der Linde and Louw 2003, 167). Procedural aspects include the ‘right to access environmental information or information relating to a possible adverse impact on the natural environment’ and the opportunity to seek redress for the violation of one’s environmental rights. Substantive aspects on the other hand, relates to the obligation of the governments to prevent pollution and ecological degradation and to ‘promote conservation and sustainable development’ (van der Linde and Louw 2003, 167; Amkumah 1996, 186). These obligations, they further contend, reflect the values of international environmental law such as the ‘preventative principle and duty of care principle’ (van der Linde and Louw 2003, 167; Amkumah 1996, 186; Kidd 2011).

Some of these obligations have been reiterated in subsequent soft law instruments adopted by the African Commission.<sup>2</sup> The Commission throughout these various attempts has always recognized the interdependence and invisibility of the right to satisfactory environment with other rights, particularly the right to health. Important for the increasingly urbanizing continent, it is important that the African Commission recognizes that the right to satisfactory environment envisages measures aimed at countering the effects of urbanization. Again, the African Commission recognizes that the right to satisfactory environment entails both negative and positive aspects. The negative aspect requiring states to refrain from polluting the environment or condoning its pollution by third parties while the positive aspects require the state to manage and/or conserve the environment in a manner that is conducive for development. States are also required to provide relevant information about environmental risks to affected communities and involve them in decision-making processes relating to the management of the environment. Where any of these obligations is violated, affected persons or communities must be afforded the consequent procedural right of access to appropriate redress.

One of the ways in which to measure the impact of the regional standard setting exercise is the extent to which States incorporate such standards and norms as laid down in these instruments and decisions into their domestic laws and policies on human rights and environmental protection. For instance, globally, over 140 countries have incorporated some form of recognition of environmental rights in their national constitutions in recent years, mainly in developing countries (Boer 2015, 135). One example is the 1996 Constitution of South Africa, which in section 24 provides that, ‘everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development’ (Government of South Africa 1996 Constitution, Section 24).

Nevertheless, the status of international instruments such as the African Charter and the Revised African Convention in national jurisdictions depends in the first place on whether a State is monist or dualist. Whereas in the former instance, once a treaty is ratified, it automatically becomes part of the law of the country, most States in Africa are dualist, which means that the treaty first has to be incorporated into domestic law before it can be enforced at the national level. Nigeria is one of the dualist countries which have adopted legislation in order to incorporate the African Charter, through the 1983 African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act (Ayeni 2016, 183). Constitutionally monist countries in which the African Charter forms part of the domestic law include Burkina Faso, Cameroon, Cote d’Ivoire and Kenya; although in practice they have proven to be more dualist than monist (Ayeni 2016, 183). The incorporation of the African Charter into the law of Nigeria has had positive impacts also in the domestic jurisprudence. For instance, in the *Gbemre v Shell* (2005), while the Court did not find a violation of the right to environment in this claim brought against Shell for the practice of gas flaring, the Court did find a violation of the right to life and dignity, relying in this regard on the Nigerian Constitution and the African Charter (Ekhatior 2015, 253). In monist countries, the Revised African Convention would also become part of the national law upon ratification, although to date not many States have ratified this Convention. There is thus much need for popularization of this instrument at the national level in order to increase ratification and promote domestication. The Revised African Convention also does not have an implementing body, as is the case with the African Charter, and thus there is much less opportunity for its implementation and enforcement.

Apart from incorporation into law, there are also other ways in which States can respond to international norm-setting, for example through the establishment of a regulatory body. The Federal Ministry of Environment was set up in Nigeria in the time when the SERAC case was pending before the African Commission, and was ‘established to address environmental and environment related issues prevalent in Nigeria, and as a matter of priority, in the Niger Delta area including the Ogoni land’ (SERAC Case 2001). This step, along with other steps taken by the Nigerian Government, including the enactment into law of the Niger Delta Development Commission (NDDC) in order to address environmental and social problems in the Niger Delta, and the inauguration of a Judicial Commission of Inquiry to investigate the issues of human rights violations, were communicated to the Commission by the State during its 28<sup>th</sup> Ordinary Session in October/November 2000. Furthermore, the NDDC, through the Ministry of the Niger

Delta and in conformity with its mandate, since 2002 started addressing issues of health in the Niger Delta including through the building of health centres and by providing health personnel, and providing clear progress in terms of development.

However, in many cases it may be difficult to determine the extent to which developments at the domestic level can be causally linked to processes at the international level. In this regard, for example, in 2016 the Nigerian government, together with the United Nations and oil companies operating in the region, officially launched a project to clean up Ogoniland, one of the key recommendations by the African Commission in the SERAC case, but it is not clear to which extent the SERAC case causally contributed to this development, as compared, for example, to work done by the United Nations Environmental Programme which included reporting on investigations done on ground and providing funding towards the project. Other recommendations made by the Commission in the SERAC case, such as ‘conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations’ and ‘ensuring adequate compensation to victims of the human rights violations’ were never substantively acted upon by the Nigerian Government. Unfortunately, the Report of the Rivers State Truth and Reconciliation Commission has to date not been made public (Institute for International and Comparative Law in Africa 2016).

In addition to the continental human rights frameworks and institutions that operate under the auspices of the African Union, various regional economic communities (RECs) have human rights frameworks and courts that enforce these frameworks. The most developed of these RECs are the Economic Community of West African States (ECOWAS), East African Community (EAC) and the Southern African Development Community. All these three RECs have judicial institutions that perform functions related to the protection of human rights. In particular, the ECOWAS Community Court of Justice (ECCJ) and the East African Court of Justice (EACJ) have taken active roles in the protection of human rights (Alter, Helfer and McAllister 2013, 737; Ebobrah 2007, 307; Possi 2015, 192). The most important environmental human rights cases decided by these Courts are the *SERAP v Nigeria* (2012) and *African Network for Animal Welfare v Tanzania* (2014) respectively, which are briefly discussed below.

The *SERAP* case arose from the same factual background as the *SERAC* case involving the destructive effects of oil extraction in the Niger Delta (Ogoni lands) (Grant 2015, 379). Just like the *SERAC* case, the applicant alleged the violation of several rights including the right to health and healthy environment (*SERAP v Nigeria* 2012, para 14). The applicant alleged that although the Nigerian government’s regulation required the swift and effect clean up of oil spills, this was never done in time and adequately which increased the impacts on human rights and the environment (*SERAP v Nigeria* 2012, para 15). The applicant further submitted that the government has an obligation to monitor and investigate possible health impacts of gas flaring, provide the community with information on the risks of such activities and take the concerns of the communities into consideration (*SERAP v Nigeria* 2012, para 17), failing which it was in violation of the right to satisfactory environment guaranteed in article 24 of the African Charter. The ECCJ held that the duty imposed by article 24 of the African Charter is ‘both an obligation of attitude and an obligation of result’, which requires states to maintain the quality of the environment to enhance sustainable development (*SERAP v Nigeria* 2012, paras 100-101). This requires not only the adoption

of legislative, administrative and other measures but also ‘it must ensure that vigilance and diligence are being applied and observed towards attaining concrete results’ (SERAP v Nigeria 2012, para 101).

Further, these concrete measures must aim at preventing the occurrence of damage or ensuring accountability for such damage and effectively repairing environmental damage that occurs (SERAP v Nigeria 2012, para 105). The ECCJ held that even though the Nigerian government had passed legislation and set up institutions relating to environmental governances, the failure to effectively enforce the laws amounted to a failure to take action to prevent damage to the environment and that the failure to hold offenders of environmental rights to account was in violation of article 24 of the African Charter. Consequently, the court found a violation of article 24 and ordered Nigeria to ‘take all effective measures... to ensure restoration of the environment of the Niger Delta’ from oil spills by Shell and other companies, to take all effective measures to prevent the occurrence of damage to the environment’ and to take all measures to hold the perpetrators accountable (SERAP v Nigeria 2012). This case thus, confirmed the African Commission’s decision in the *SERAC* case on the obligations of states to ensure that the refrain from polluting the environment or condoning its pollution, provide affected communities with relevant information and ensure their participation in decision making and ensure that violators of environmental human rights are held to account. This judgment in all probability also contributed to placing pressure on the government to initiate the ongoing measures taken to restore the environment discussed above. The case also highlights the importance of managing the environment in manner that enhances sustainable development.

The *ANAW* case concerned the decision of the government of Tanzania to construct a road across the Serengeti National Park. The applicant argued that the construction of the road would negatively impact on animal behaviour and the quality of life of the people living within the vicinity. The EACJ held that the proposed road construction would violate provisions of the East African Treaty that requires member states to promote the sustainable utilisation of natural resources using measure that effectively protect the environment, co-operate to conserve, protect and enhance the quality of the environment (African Network for Animal Welfare v Tanzania 2014, paras 59-74). Even though these cases do not directly relate to urbanisation and its impacts on environmental human rights, important lessons can be learnt from the decisions. The most important lesson that these cases highlight is that states have an obligation not to only refrain from polluting the environment but also to manage the environment in such a manner that enhances sustainable development. These processes must include access to information by affected communities, consultation with these communities and provision of redress where violations occur.

The African Court on Human and Peoples’ Rights has not yet dealt with the right to environment, but has pronounced itself to the related right to development, in this regard, the May 2017 decision of the in the *Ogiek* case, while not finding a violation of the right to a satisfactory environment, addressed important issues related to the right to development. However, when the case was first brought to the Court by the Commission in 2012, there had been a request for provisional measures, following an eviction notice of 30 days issued in 2009. The provisional measures issued in 2013 ordered Kenya to ‘immediately reinstate the restrictions it had imposed on land transactions in the Mau forest complex and refrain from any act or thing that would or might irreparably prejudice the main application before the Court’. The judgment in reporting on this simply states that the Respondent reported on the measures it had taken to comply with the Order for Provisional Measures, but does not give any detail as to what these steps were, and the Complainants thereafter notified the Court that in their view there had been

non-compliance with the Provisional Measures (African Commission on Human and Peoples' Rights v Kenya 2017, paras 17, 21).

In its decision on the Merits, the Court ordered the State to take all appropriate measures within a reasonable timeframe to remedy all the violations established'. However, the African Court deferred its final decision on reparations to a later date following provision of further submissions by the Parties to this effect. The initial prayers submitted as part of the Merits submissions of the Applicant include restitution of the ancestral land, compensation for damages suffered and an apology for the violations. Although, this determination do not directly involve protecting landscapes, habitats, endangered species or other aspects of nature in themselves; the claims concerning violations of rights protected under relevant human rights treaties contributes to environmental conservation since it is a common knowledge that indigenous peoples possess traditional knowledge and practices that enhances environmental sustainability in Africa (Jegade 2016). This is also recognition of the importance of the environment to whole communities and the intimate correlation between the environment and a wide range of human rights. Therefore, it can be argued that human rights can be used as effective tools for protecting the common resources and supportive systems on which other rights depend as well as for contesting the processes that fuel environmental degradation.

On 10 November 2017 a Task Force on the Implementation of the decision of the African Court was officially gazetted, however, the community and their representatives have raised concerns about the lack of consultation with the Ogiek in the setting up of the Task Force and the absence of Ogiek representation on the Task Force (Minority Rights 2017). The Ogiek case is, however, not the first decision by the regional human rights system against Kenya on the right to development. The 2009 decision of the African Commission in the Endorois case also related to development and the rights of an indigenous people/community. In this case the recommendations of the African Commission included 1) the recognition of ownership rights by the Endorois and the restitution of their ancestral lands, 2) ensuring unrestricted access of the Endorois to the Lake Bogoria for religious and cultural rites, as well as grazing of cattle, 3) payment of adequate compensation for the loss suffered, amongst others. This interpretation considered current developments in international human rights law such as the ILO Convention No 169 relating to Indigenous and Tribal Peoples in Independent Countries which recognises the close relationship between the environment and a wide range of human rights. However, despite various requests for implementation by the African Commission, including a hearing on implementation and the passing of a resolution, during the first five years after the decision no concrete steps were taken by the State. Finally in September 2014, the State established a Task Force dedicated specifically to address implementation of the Endorois ruling (Government of Kenya 2014). A memorandum of understanding was also signed by the Endorois with the Kenya Wildlife Service and others which 'recognises Lake Bogoria as Endorois ancestral land and requires Endorois inclusion in land management' Minority Rights Group (2015). From the foregoing, there have been some positive impacts at the national level as a result of the regional norm-setting relating human rights and environmental protection. However, much remains to be done to ensure that decisions of the Commission and the Court receive better compliance from States and that the norms are more effectively incorporated into national legislation.

## **THE IMPLICATIONS OF REGIONAL RIGHTS-BASED APPROACH FOR NATIONAL POLICY DEVELOPMENT ON PROTECTING ENVIRONMENTAL ASSETS IN THE CONTEXT OF URBANIZATION IN AFRICA**

Having up to this point given an overview of the sources and development of processes for the protection of the human right to environment and environmental assets on the African continent, this section addresses the key issue of human rights and environmental conservation in the context of urbanization. As posited in the introduction above, it is clear that there is a role for human rights law in the protection of environmental assets in rapidly urbanising contexts in the Global South, since the protection of such assets are often correlated to the violation of human rights, not least the right to a satisfactory environment. However, this is not an issue which the regional human rights system has ever been called upon to address directly. The case law discussed above of the African Court and the African Commission in relation to the environment and development has thus far only been within the context of indigenous peoples, who, by their very characterization do not live in urbanized areas. Thus there is no direct application of these cases to the urban context. However, some of the principles derived from these cases could have a positive impact on the protection of environmental assets in the cities.

The first principle as the case law set out above clearly does is the extent to which environmental well-being is a prerequisite for human wellbeing. To that extent, this is something which could be relied on also in urban settings, where people often do not have access to clean water, recreational green spaces as well as being exposed to illness caused by pollution. A second principle is the close connection which exists between sustainable development and environmental protection, thus indicating that development should not come at the cost of the environment or vice versa, but that it is possible for the two to coexist through sustainable use. For example in the Ogiek case, the Court noted that the protection of the water catchment area does not have to mean that the Ogiek cannot continue to use the land in a sustainable manner, for instance through bee-keeping activities and use of plants for medicinal purposes. This is in stark contrast to the unsustainable extractive industries which had been granted licenses to exploit the land following the removal of the Ogiek. A third principle which arises from the regional standard-setting is the ‘polluter pays principle’ which stipulates that the person causing the damage should be held responsible by the state for this violation. While it is an easy exercise to allocate responsibility for restoration of the environment in cases such as that in Ogoniland where it is clear that certain companies were responsible for the oil spills and other degradation, this ‘polluter pays’ principle poses an interesting problem in an urban context, where the pollution and degradation is often caused not by a single culprit, but results from the unregulated increase of population and expansion of informal settlements characteristic of rapid urbanisation in Africa. This is thus a matter which is yet to be clarified at the regional level.

Despite these positive developments in regional standards which go a long way to addressing issues related to all environmental assets including those in urban areas, there are some areas in which the problems of environmental degradation faced in cities differs from rural areas and has thus not been addressed by the developing standards. For example, while in rural areas which are more sparsely populated it may be possible to use biomass fuels like wood in a sustainable manner, the sheer numbers of people in particularly informal settlements on the fringes of modern African cities means that high dependence on biomass fuels could result in rapid deforestation, soil erosion, flooding and air pollution. This is a scenario which has not yet been

addressed by the existing jurisprudence and standards. Other environmental/human rights concerns which only or to a much larger extent find application in urban areas include recreational green spaces and access to (affordable, healthy) food.

## **CONCLUSION**

This article recognises the intimate connection between protecting human rights and securing the environment upon which humans depend not only for their physical existence but for their economic, social and cultural prosperity. It observed that there is little doubt that progress has been made in the development of closer links between human rights and the environment in the African Union. Indeed the African Charter was the first human rights instrument to expressly recognise the right to satisfactory environment as a human right (der Linde and Louw 2003, 170; de Wet and du Plesis 2010, 345). Despite the express guarantee of the right to satisfactory environment under the African Charter, the African Commission and the African Court have been generally underutilized in the protection of environmental rights. However, the overall situation remains patchy in comparison with a number of the world's other regions, especially Europe and Latin America. While the discussion on the realisation of a substantive environmental right at global level is becoming more sophisticated and broader ranging, that discussion is only just beginning in the Africa. Although the African Charter and the Revised African Convention include a clear provision on the right to a safe, clean, and sustainable environment, environmental rights violations continue to remain unaddressed at both regional and national levels in member states. Nevertheless, the jurisprudence of the African Court/Commission is being developed as a valuable source for the further development of the rights-based approach to environmental protection. This experience will be particularly valuable in the era of rapid urbanisation on the continent and likely to see an increase in the use of regional human rights provisions and more effective implementation of environmental legislation. As noted in the introduction, the convergence of human rights law and environmental law is an undoubtedly budding experience, as human rights instruments and institutions continue to be engrafted in. However, without more coordinated and conscious efforts on the part of regional institutions and national governments, and closer integration will continue to depend on the initiatives of courageous litigants, increased acceptance of cases by the courts and tribunals, innovative arguments by advocates, and the determination of non-governmental organizations to achieve significant and meaningful change in Africa.

## **DISCLOSURE STATEMENT**

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<sup>1</sup> The individual complaints procedure resulted from art 55 of the African Charter in conjunction with chapter XVII of the Rules of Procedures of the African Commission, 10 June 1995 [http://www.achpr.org/english/\\_info/rules\\_en.html](http://www.achpr.org/english/_info/rules_en.html) (accessed 13 July 2010).

<sup>2</sup> See The State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines) (2012); and The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2012).