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THE MILLENNIUM DEVELOPMENT GOALS (MDGs) AND NATIONAL AND INTERNATIONAL POLICY REFORM: REALISING THE RIGHT TO A HEALTHY ENVIRONMENT IN AFRICA.

Thesis submitted

by

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In Fulfilment of the Requirements of the Degree of Doctor of Philosophy (PhD) in Law

In the

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ABSTRACT

Africa is a continent characterised by deepening environmental degradation and increasing loss of natural resources. This has had an adverse effect on human health and well-being in the region. Environmental degradation has also made it impossible for average Africans to enjoy the human right to environment guaranteed under the continent-wide African Charter, and the constitutions and laws of most African nations. Several factors are responsible for perpetuating this state of affairs, namely poverty, lack of political will to enforce or adopt environmental regulations, and weak institutional capacity. An opportunity to reverse this trend has been offered by the adoption of the Millennium Development Goals (MDGs) by all United Nations member States in 2000. The MDGs are eight developmental goals with time-bound targets. However, the MDGs are not legally binding despite their global adoption. Despite this inherent legal weakness, the MDGs still have important normative value as they provided a framework for holding governments accountable to their millennium anti-poverty commitments vis-à-vis instituting sound socio-economic reform and strengthening good governance.

This thesis proposes that the role of the MDGs in guiding or stimulating national and international policy reform towards the realisation of the right to environment in Africa is, as *a framework of accountability*, they can be used to promote good governance and socio-economic reform, two ingredients that are essential to creating the enabling environment for implementing the right to environment in Africa. This thesis is therefore an in-depth analysis of this role. The purpose of this analysis is six-fold. First, to provide an overview of the concepts as well as the research methodology used in this study; second, to determine whether there is an established human right to environment in Africa; third, to analyse the extent to which the right has been realised as well as the factors responsible for the non-realisation; fourth, to discuss the relationship between the achievement of the MDGs and realisation of the right in Africa; fifth, to analyse how the MDGs can guide or stimulate policy reform towards the realisation of the right; and sixth, to analyse the major policies adopted for the achievement of the MDGs in Africa to ascertain how they would contribute to the realisation of the right to environment in the region .

DECLARATION

I declare that this thesis is my own, unaided work. I further declare that the thesis has never been submitted for any degree or examination in any university.

Emeka Polycarp Amechi

Sign: …… Dated: 7 October 2009

TO CHUKWUDI CLETUS AMECHI, MY ELDER BROTHER AND MENTOR. WHO DISAPPEARED ON 11 JUNE 2005. WHERE EVER YOU ARE, MAY GOD CONTINUE TO BE WITH YOU.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background

Despite the existence of legal, policy and institutional frameworks adopted to halt or reverse environmental degradation, Africa is still a continent characterised by deepening environmental degradation and increasing loss of natural resources. The findings of the two volumes of *the African Environmental Outlook* show that Africa's natural resources such as fresh water, coastal and marine stocks, and forests are being exploited beyond their viable rates of replacement. In addition, the Reports show that land degradation, water and air pollution as well as natural and human-induced environmental disasters are common in Africa.[1] This is a gloomy picture for a continent where the majority of the inhabitants are rurally-based and depend mostly on their natural environment for their sustenance.[2] Urban Africans are equally affected as they have had to bear the disease burdens and other health hazards associated with pollution and environmental degradation. Thus, it is apparent that environmental degradation usually has adverse effects on human well-being and livelihoods in Africa, by undermining prospects of fighting poverty and achieving economic growth and sustainable development. Environmental degradation has also made it impossible for average Africans to enjoy the right to an environment that is adequate to their health and well-being, or as will be used in this thesis, their right to environment.[3]

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[1] United Nations Environment Programme *African Environmental Outlook: Past, Present and Future Perspectives* (UNEP, 2002) Programme United Nations Environment Programme *African Environmental Outlook 2: Our Environment, Our Wealth* (UNEP, 2006). (Hereinafter AEO 2).

[2] See AEO *ibid*, at 2 (citing International Fund for Agricultural Development (IFAD) *Rural Poverty Report 2001: The Challenge of Ending Rural Poverty* (Oxford University Press, 2001).

[3] As will be apparent from the discussion in this chapter, there has not been an unequivocal recognition of this right at the international level. However, some regional human rights instruments as well as various national constitutions, and human rights and environmental legislation, overtly provide for a substantive right to environment. Most of these provisions used different adjectives in qualifying the right provided. For the purpose of this thesis, the formulation - the right to environment adequate to human health and well-being, or simply, the right to environment - is used. The reason for using this formulation is discussed in page 23-24 of this chapter.

The factors responsible for environmental degradation and non-realisation of this right in Africa are mainly socio-economic and political in nature. Foremost amongst these militating, albeit inter-related factors, is poverty which has been identified by the New Partnership for Africa's Development (NEPAD) as the main cause and consequence of degradation and resource depletion in Africa.[4] Poverty is multidimensional and goes beyond the lack of financial and material resources to include as described by Sen, a lack of capabilities that enable a person to live a life he or she values, encompassing such domains as access to income, health services, education, empowerment, social inclusion and human rights.[5] In essence, poverty is not only about economic disempowerment, but also involves political, social, environmental and cultural disempowerments.[6] It therefore follows that if poverty is the main cause of environmental degradation in Africa (and is also related to other causes of environmental degradation), then policies, programmes and legal provisions (regulations, bylaws, rules etc) designed to protect the environment will be unsuccessful without a significant improvement in the living standards, well-being and livelihoods of the poor.[7]

An opportunity for improving the well-being and livelihoods of the poor in Africa has been offered by the United Nations' adoption of the Millennium Development Goals (MDGs). The MDGs are eight development goals with time-bound and quantified targets geared principally towards poverty reduction and sustainable human

[4] See New Partnership for Africa's Development (NEPAD) *Action Plan of the Environment Initiative of the New Partnership for Africa's development* (June 2003), at para 23. (Hereinafter NEPAD-EAP).
[5] Amartya Sen *Development as Freedom* (Knopf, New York, 1999) 87-98. For similar description of poverty, see United Nations Development Programme (UNDP) *Human Development Report: Human Development to Eradicate Poverty* (UNDP, 1997) 15-16. (Hereinafter HDR 1997). Available at http// hdr.undp.org/ reports/global/1997/en/.
[6] See World Resources Institute, UNDP, UNEP, & World Bank *The Wealth of the Poor - managing Ecosystems to Fight Poverty* (WRI, Washington DC, 2005) at 6, (hereinafter WRI et al); Sonja Vermuelen 'Reconciling Global and Local Priorities for Conservation and Development' in Dilys Roe (ed) *Millennium Development Goals and Conservation: Managing Nature's Wealth for Society's Health* (IIED, 2004) 74, available at http://www.iied.org/Gov/mdgs/documents/9511IIED.pdf; Dilys Roe & Joanna Elliot 'Meeting the MDGs—Is Conservation Necessary' in Roe (ed) *ibid*, at 13; Genevieve Renard Painter *Gender, Millennium Development Goals, and Human Rights in the Context of the 2005 Review Processes* (Gender and Development Network, October 2004) 19, available at http:// www.choike.org/documentos/mdg_women2004.pdf; Focus on Global South *Antipoverty or Anti Poor? The Millennium Development Goals and the Eradication of Extreme Poverty or Hunger* Discussion Paper, Asia Pacific Civil Society Forum, Bangkok, Thailand, 6-8 October 2008 (December 2003) 4-6; available at http://focusweb.org/pdf/MDG-2003.pdf; and Center for Human Right and Global Justice *Human Rights Perspective on the Millennium Development Goals* Conference Report, November 11, 2003 at 18, available at http://www.nyuhr.org/images/NYUCHRGJMDGREPORT2003.pdf. (Hereinafter CHRGJ Conference Report).
[7] See NEPAD-EAP *supra* note 4.

development in developing countries.[8] The formulation of the targets and indicators of the MDGs also shows recognition of the multidimensional nature of poverty. This is reflected in the fact that the MDGs not only aim at increasing income, but also at achieving other non-income goals such as access to healthcare, education, women empowerment, access to clean water and energy, sanitation, and environmental protection.[9] The MDGs also seek to promote good governance and sound socio-economic reform as indispensable to their achievement. This makes the MDGs vital to environmental protection and the realisation of the right to environment in Africa, but only if implemented in a sustainable manner.

This thesis aims to provide a theoretical analysis of the role of the MDGs in guiding or stimulating policy reform, nationally and internationally, in order to realise the right to environment in Africa. The thesis recognises that the MDGs, like other soft norms, are not legally binding on State parties and incapable of imposing any binding legal obligations.[10] However, soft norms do impose moral or political obligations. Being so, only political and moral pressure can be brought to bear on State parties to implement the provisions of these instruments. Such political and moral pressure is exemplified by the argument of Hunter *et al*, that 'a "soft norm" can help to define the standard of good behaviour corresponding to what is nowadays to be expected from a "well-governed state" without being necessarily consecrated as an in force customary norm.'[11] This is similar to the earlier observation of the late Justice Baxter that while these norms do not create legal obligations, '[they] are intended to create pressures and to influence the conduct of States.'[12] Against this background, this thesis seeks to delineate how the MDGs, despite being soft norms, can be used to promote national and international policy reform that will tackle the underlying socio-economic and

[8] The goals are eradicating extreme poverty and hunger; achieving universal primary education; promoting gender equality, reducing child mortality; improving maternal health; combating HIV, Malaria and other diseases; ensuring environmental sustainability; and developing a global partnership for development by 2015.
[9] See Vermuelen *op cit* note 6.
[10] See R.R. Baxter 'International Law in "Her Infinite Variety' (1980) 29 (4) *The International and Comparative Law Quarterly* 549 at 557-563; C. M. Chinkin 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 (4) *The International and Comparative Law Quarterly* 850 at 851-852; Alan E. Boyle 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 (4) *The International and Comparative Law Quarterly* 901 at 901-902; and David Hunter, James Salzman & Durwood Zaelke (eds) *International Environmental Law & Policy* 2ed (Foundation Press, New York, 2002) 349.
[11] *Ibid*, at 357.
[12] *Op cit* note 10 at 559.

political factors militating against the protection of the environment and realisation of the right to environment in Africa.

This thesis argues that the MDGs by representing an unprecedented political consensus on time bound quantified targets, have metamorphosed into an important tool of political mobilisation for the achievement of sustainable development objectives including poverty reduction and realisation of the right to environment. This is based on the premise that as a tool of political mobilisation, the MDGs can be used to hold governments and international institutions accountable to their millennium commitments to eradicate global poverty in the twenty-first century.[13] In essence, the MDGs provide a framework of accountability for national governments, bilateral and multilateral donors, and many other actors that have a role in sustainable development.[14] Meeting these commitments as evident from the Millennium Compact affirmed at the Monterrey Conference,[15] requires member States to create an enabling environment at the national and international levels for the achievement of poverty reduction and sustainable development by instituting sound socio-economic reform and strengthening good governance.[16] This thesis therefore proposes that the role of the MDGs in guiding or stimulating national and international policy reform towards the realisation of the right to environment in Africa is as *a framework of accountability*, they can be used to promote good governance and socio-economic

[13] See Rory Mungoven in CHRGJ Conference Report *op cit* note 6 at 24; Andy Haines & Andrew Cassels 'Can the Millennium development goals be attained?' (2004) 329 *BMJ* 394; Salil Shetty 'The Millennium Campaign: Getting governments to keep their promises' (2005) 48 (1) *Development* 25 at 27; and Eveline Herfkens *The United Nations' MDG Campaign for a Better World & Religious Responses* Speech delivered at the On The Role of American Religious Communities in Achieving the Millennium Development Goals: A Consultation, The Church Center at the United Nations New York, 8 June 2005, at p3, Available at http://www.Millenniumcampaign.org/ atf/cf/D15FF017-0467-419B-823ED6659E0CCD39}/SPEECH_ NY_CHURCH%20CENTRE_08-06-2005.DOC.

[14] Sakiko Fukuda-Parr *The Millennium Development Goals and Human Development* International Symposium, Tokyo, 9 October 2002, at p2; and Sakiko Fukuda-Parr 'Millennium Development Goals: Why They Matter' *Global Governance* Vol. 10, section 4, October 1, 2004, (hereinafter Fukuda-Parr II)

[15] See Monterrey Consensus of the International Conference on Financing for Development, A/CONF.198/11, 22 March 2002, at paras 4 & 6-67, (hereinafter Monterrey Consensus); and United Nations *Report of the International Conference on Financing for Development*, A/CONF.198/11 (New York, 2002) at 38-39, para 30 (1)-(3); 51, para 54(2) & 62-63, para 25 (2)-(3), (hereinafter Monterrey Conference Report). The compact originated initially from the commitment of UN member States under the Millennium Declaration to create an enabling environment which is conducive to development and elimination of poverty. See United Nations General Assembly *Millennium Declaration* A/Res/55/2, September 18, 2000, at paras 12-13. (Hereinafter Millennium Declaration).

[16] See Monterrey Conference Report *ibid*, at 38-39, para 30 (3); 51, para 54(2) & 62-63, para 25 (2); and United Nations General Assembly *Implementation of the United Nations Millennium Declaration: Report of the Secretary-General* A/59/282, August 27, 2004, at paras 42-43.

reform, two ingredients that are essential to creating the enabling environment for implementing the right to environment in Africa.

This study is limited to an enquiry into how the MDGs can guide or stimulate policy reform nationally and internationally towards the realisation of the right to environment in Africa. It recognises that the problem of environmental degradation and hence, non-realisation of this right in Africa is not principally due to lack of regulatory frameworks as these abound at the national, sub-regional and regional levels in Africa.[17] It argues that the non-realisation of the right is due mostly to poverty and other inter-related factors such as lack of political will to adopt or enforce environmental regulations, and weak institutional capacity. It further recognises that just as poverty is multidimensional, that its causes are also varied and range across both national and global issues.[18] These include corruption, bad economic and political governance, climate change, the debt crisis and other adverse impacts of globalisation.[19] Therefore, to combat environmental degradation and enhance realisation of the right to environment, both Africa and the international community must use the opportunity offered by the MDGs to undertake relevant socio-economic reform, and strengthen good governance as an integral element of achieving poverty reduction and overall sustainable development in the region.

1.2 An overview of concepts

1.2.1 Millennium Development Goals (MDGs)

(a) Origin and development

In September 2000 at the United Nations (UN) Millennium Summit,[20] the largest-ever gathering of Heads of State and Government ushered in the new millennium by adopting the Millennium Declaration.[21] The Summit was used as a forum to wrap up the United Nations conferences and resulting commitments of 1990s as well as to

[17] See NEPAD-EAP *supra* note 4 at 25-39; and AEO 2 *op cit* 1 at 21-24, & 264-266.
[18] See Focus on Global South *op cit* note 6 at 4-6.
[19] See Nsongurua J. Udombana 'How Should We Then Live? Globalization and the New Partnership for Africa's Development' (2002) 20 *Boston University Int'l L.J*. 293.
[20] Held from 6-8 September 2000.
[21] *Supra* note 15.

chart a global course of action for the new millennium. The resultant Declaration, which has been described as constituting an unprecedented promise by world leaders to address as a single package, peace, security, development, human rights, and fundamental freedoms,[22] embodied the resolve and commitment of world leaders to create a better world for everyone in the twenty-first century by tackling some of the major challenges facing the world. These include *inter alia* ensuring peace and security; ensuring the right to development for everyone and eradicating poverty; protecting the global environment; promoting human rights, democracy and good governance; as well as meeting the special needs of Africa.[23]

Following on the heels of the Declaration, the United Nations mandated its Secretary-General to prepare a long-term 'roadmap' on strategies for the implementation of the Declaration within the United Nations system.[24] The resultant roadmap was contained in the September 2001 Report of the Secretary-General to the UN General Assembly.[25] The Report, which addresses fully each and every one of the goals and commitments contained in the Declaration, draws on the work of Governments, the entire United Nations system including the Bretton Woods institutions (BWIs) and the World Trade Organisation (WTO), intergovernmental bodies, international organisations, regional organisations, and civil society.[26] The Roadmap itself provides an integrated and comprehensive overview of challenges, as well as outlining potential strategies for action designed to meet the goals and commitments under the Declaration.[27]

The term 'Millennium Development Goals (MDGs)' was first used in the Roadmap document, and refers to the development goals under the Millennium Declaration.[28] The MDGs which were derived principally from Section III of the Millennium Declaration are eight development goals with eighteen time-bound targets geared

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[22] See Kofi Annan, UN Secretary-General in United Nations *Millennium Development Goals Report 2005* (United Nations, New York, 2005) 3.
[23] *Supra* note 15.
[24] See United Nations General Assembly *Follow-up to the Outcome of the Millennium Summit* A/ 55/162, 14 December 2000, at para 18.
[25] See United Nations General Assembly *Road Map Towards the Implementation of the Millennium Declaration: Report of the Secretary-General* A/56/1326, 6 September 2001, at p2. Available at http://www.eclac.cl/povertystatistcs/documentos/a56326i.pdf. (Hereinafter Roadmap document)
[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.*

principally towards poverty reduction and sustainable human development in developing countries. To monitor progress towards the goals and targets, the UN system, the World Bank and International Monetary Fund (IMF), and the Organisation for Economic Co-operation and Development (OECD), under the auspices of the office of the Secretary-General of the United Nations, agreed on 48 quantitative indicators.[29] The MDGs are divided into two components and impose different obligations. The first seven MDGs are directed towards developing countries. These include eradicating extreme poverty and hunger, achieving universal primary education, promoting gender equality and empowering women, reducing child mortality, improving maternal health, combating HIV/AIDS, malaria and other diseases, and ensuring environmental sustainability. The eighth goal, developing a global partnership for development, relates to the obligations of developed countries towards helping developing countries to achieve the targets of MDGs 1-7.[30] Despite the varying obligations, the MDGs are inter-related, and progress towards one goal affects progress towards other goals.[31]

The MDGs are now generally accepted as a blueprint for poverty reduction and overall sustainable development of developing countries in the 21st century.[32] As aptly stated by Attaran '…the MDGs have become important not just within the UN, but also as the zeitgeist of the global development enterprises.'[33] Thus, in addition to being adopted by the United Nations system, the BWIs and WTO, the MDGs have been adopted as a sustainable development agenda by the international community including both developed and developing nations, intergovernmental organisations, and international organisations including non-governmental organisations (NGOs).[34]

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[29] See Annex to the Roadmap document *op cit* note 25.

[30] For a comprehensive discussion of the goals, their targets and indicators, see United Nations Development Group *Indicators for Monitoring the MDGs: Definition, Rationale, Concepts and Sources* (United Nations, New York, 2003). Available at http://devdata.worldbank.org/gmis/mdg/UNDG%20document_final.pdf.

[31] See Women's Environment and Development Organisation (WEDO) *Women's Empowerment, Gender Equality and The Millennium development Goals* A WEDO Information and Action Guide, at p3.

[32] See Kofi Annan *op cit* note 22. See also UN Millennium Project *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (UNDP 2005) 2-4. (Hereinafter UN Millennium Project).

[33] Amir Attaran 'An Immeasurable Crisis? A Criticism of the Millennium Development Goals and Why They Cannot be Measured (2005) 10 *Plos Med* 2.

[34] See United Nations General Assembly *Follow-up on the Outcome of the Millennium Summit* A/Res/56/95, 20 January 2002, at paras 1 &2. See also International Monetary Fund "Development Committees Communiqué' Washington D.C., September 25, 2005.

This is evident in the plethora of international, regional, and national policies that were influenced or inspired by MDGs such as, *inter alia* the Doha Ministerial Declaration,[35] the Monterrey Consensus of the International Conference on Financing for Development,[36] the World Summit on Sustainable Development Plan of Implementation,[37] the New Partnership for Africa's Development,[38] and the G8 African Action Plan.[39] The implication of this global adoption is that it allows development parties to align their work around a common framework, and improves the coherence and effectiveness of all development efforts at the global and national levels.[40]

The MDGs are not novel as they were grained from the resolutions and agreements of the United Nations conferences on development that were held during the 1990s.[41] However, their significance lies in going beyond general statements about what the world hopes to achieve and setting out clear and achievable targets for action. In addition, the MDGs promote a framework in which sustainable human development is now the responsibility of all parties in the international community as evidenced by the various public commitments made by many governments, donors and international organisations towards achieving them.[42] Thus, while developing countries are responsible for their economic, environmental and social governance, MDG 8 constitutes a recognition that they do not have the resources to achieve the goals on their own, and therefore, need significant commitment from developed countries and other relevant organisations.[43] As aptly stated by the United Nations Secretary-General, '[the MDGs] represent a partnership between the developing countries and developed countries determined as the Millennium Declaration states

[35] WT/MIN (01)/DEC/1, November 20, 2001. Adopted at the WTO Ministerial Conference, held on 14 November 2001, in Doha. (Hereinafter Doha Ministerial Declaration).
[36] *Supra* note 15.
[37] A/COPNF.199/20. Adopted at the World Summit on Sustainable Development, held from 26 August - 4 September 2002 at Johannesburg, South Africa. (Hereinafter WSSD PoI).
[38] African Union *New Partnership for Africa's Development* (October 2001). (Hereinafter NEPAD framework document).
[39] G8 *Africa Action Plan* Sommet Kananaski Summit, Canada, June 2002.
[40] See Monterrey Conference Report *op cit* note 15 at 49, para 2.
[41] Such as 1990 Summit on Children, 1992 United Nations Conference on Environment and Development (UNCED), 1993 World Conference on Human Rights, 1995 World Summit for Social Development, and 1995 Fourth World Conference on Women. See Roadmap document *op cit* 25 at 7, para 6.
[42] See Fukuda-Parr *op cit* note 14.
[43] See UN Millennium Project *op cit* note 32.

"to create an environment-at the national and global levels alike - which is conducive to development and the elimination of poverty'[44]

It is apparent from the above discussion that the MDGs, as an innovative sustainable development agenda with emphasis on a developed/developing countries partnership, owe their existence to the Millennium Summit and resulting Declaration. However, the fact that the MDGs are now generally accepted owes much to the following conferences and events coming after the adoption of the Millennium Declaration, which through their resultant declarations not only gave substance to the MDGs, but also helped in establishing them as a global sustainable development paradigm. These include the Doha WTO Ministerial Conference,[45] the International Conference on Financing for Development (Monterrey Conference),[46] and the World Summit for Sustainable Development (WSSD).[47] The latter unequivocally reaffirmed the MDGs as a framework for sustainable development.[48] It also recognised the intricate

[44] See Road Map document *op cit* note 25 at para 2. See also Millennium Declaration *supra* note 15 at para 12.

[45] Held in November 14, 2001. The Conference led to the adoption of the Doha Ministerial Declaration and launching of a Millennium round of global trade talks known as 'Doha Development Agenda' with emphasises on poverty alleviation and meeting the needs of developing countries. It is however doubtful if the launching of the development round was influenced by the MDGs. This is due to the fact that the Declaration, which is the primary negotiating instrument and reflecting a culmination of commitments taken at earlier WTO meetings in the area of development and poverty, makes no reference to the MDGs. However, it is submitted that despite this omission, that the launching of the development agenda was to a certain extent influenced by the MDGs as its overall purpose is in alignment with the MDGs, and therefore, the successful conclusion of the development agenda has the potential of being the most important factor in achieving the MDGs, and hence, a factor in realising the right to environment in Africa. See Susan Sechler & Joe Guinan 'Trade-Plus": Development and the Politics of the Doha Round' at p4; Millennium Campaign *Trade: The Role of the Doha Round in Achieving the MDGs*, available at http://www.Millenniumcampaign.org/UN_HongHong_Leaflet_ Round2[1]-doha.pdf; Jan Vandermoortele, Kamal Malhotra & Joseph Anthony Lim *Is MDG 8 on Track as a Global Deal for Human Development* (United Nations Development Programme, New York, 2003) 3; and Ian Golding, Odin K. Knudsen & Dominique Van der Mensbrugghe *For Whom the Bell Tolls: Incomplete Trade Liberalization and Developing Countries* Paper presented at the International Conference: Agricultural Policy Reform and the WTO: Where are We Heading? Capri Italy, on 23-26 June 2003.

[46] Held in Monterrey, Mexico, from 18-22 March, 2002. It reaffirmed the world's commitment to the Millennium Declaration and its development goals, and advanced new terms for global partnership based on mutual responsibilities between developed and developing countries. It led to the adoption of the Monterrey Consensus that embodies the new partnership for global development, and has been hailed as providing a sound framework for a coherent approach to development. See Monterey Report *op cit* note 15 at 35, para 24(1) & 5, para 54 (1).

[47] Held from 26 August - 4 September 2002. The Summit produced two important documents vis-à-vis the WSSD Plan of Implementation (PoI) *supra* note 37, and the Johannesburg Declaration on Sustainable Development, A/CONF.199/20, 4 September 2002. (Hereinafter Johannesburg Declaration).

[48] See WSSD PoI *supra* note 37. See also Peter Hazlewood, Geeta Kulshrestha & Charles McNeill 'Linking Biodiversity Conservation and Poverty Reduction to Achieve the Millennium Development Goals' in Dilys Roe (ed)) *op cit* note 6 at 143.

linkages between poverty and environmental degradation, and declared that poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base for economic and social development, are overarching objectives of, and essential requirements for sustainable development.[49] In addition, world leaders during the Conference agreed to a number of new targets and commitments to further advance poverty reduction and sustainable development objectives.[50]

(b) Rationale for the adoption of the MDGs

The MDGs arose out of the need to tackle poverty and ensure the sustainable development of the world poorest nations. They concretised the various commitments of the previous decade into a clear set of quantifiable objectives that governments of both developing and developed countries should aim to achieve within a set timeframe.[51] However, prior to the adoption of the MDGs, the international community often through the United Nations has set many development goals since the first Development Decade of the 1960s in the areas of accelerating economic growth and advancing other goals like literacy, schooling, health, survival, water and sanitation.[52] Most of these goals like the 1977 Alma Ata Declaration's healthcare for all by the end of the century, and the 1990 Summit on Children's universal primary education by 2000, failed as the targets were never reached, while goals in the areas of immunisation, eradication of chicken pox and polio, and reduction of diarrhoea among children, were achieved with varying degrees of success.[53]

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[49] *Ibid*, at para 11.
[50] *Ibid*. Many of these targets and commitments complement those already established by the MDGs and linked them to the management of the natural resource base with a view to enhancing integration of the economic, social and environmental pillars of sustainable development. See Committee on Agriculture 'Follow-up to the World Summit on Sustainable development (WSSD)' COAG/2003/INF/2, Seventeenth Session, Rome, 31 March-4 April, 2003.
[51] David Dickson 'How "Scientific" Are the Millennium Development Goals' *One World* Global Policy Forum, September 19, 2005. Available at http://www.globalpolicy.org/socecon/develop/2005/0919scient.htm.
[52] See United Nations Development Programme *Human Development Report2003- Millennium Development Goals: A compact among nations to end human poverty* (New York, Oxford University Press, 2003) 30-31. Available at http://hdr.undp.org/reports/global/2003/pdf/hdr03_complete.pdf. (Hereinafter HDR 2003).
[53] *Ibid*.

An analysis of the factors responsible for the failure or success of prior UN goals shows that such failure or success was determined principally by their follow-up actions. Thus, goals like accelerating economic growth, that require resource mobilisation by the international community for their implementation, usually have a history of failures due to lack of international co-operation, while those that focused on eradicating smallpox and expanding immunisation, usually succeed as the international community led by the World Health Organisation (WHO) and United Nations Children's Fund (UNICEF) supports countries' action.[54] This raises the issue of the necessity for the adoption of the MDGs, which requires resource mobilisation by the international community for their realisation, considering the failure of previous goals requiring international resource mobilisation. However, the MDGs are different from other goals as they set out clear, achievable and quantifiable targets, as well as promote a framework in which sustainable human development is the responsibility of all parties in the international community. They have been widely acclaimed for inspiring new energy for poverty reduction and ensuring sustainable development of the world's poorest people.[55] As stated by Kofi Annan, the former UN Secretary-General:

> 'One of the great achievements of the Millennium Declaration was its success in focusing the world's attention on precise targets which, if achieved by 2015, would mark a real turn of the tide in our struggle against life-destroying poverty…. Since codified and widely endorsed by Member States as the "Millennium Development Goals", these targets form the basis of the great pact of mutual accountability between developed and developing countries, which was sealed at Monterrey two years ago…. They have proved to be an unprecedented catalyst for global action.'[56]

Despite this, the human rights, environment and development advocates and communities have criticised the MDGs. Their criticisms centred not on the need for the adoption of the MDGs, but on the inadequacies relating to most of their targets

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[54] *Ibid*.

[55] *Ibid*. See also Dickson *op cit* note 51; Attaran *op cit* note 33; Kepa Artaraz 'MDGs Mask Injustice and Inequality in Latin America' *1d21* Global Policy Forum, November 2005, available at http://www.globalpolicy.org/socecon/inequal/2005/11mask.htm; and Lorna Gold 'More than Just a Numbers Game? Ensuring that the Millennium development Goals Address Structural Injustice' *Center Focus*, Issue # 168, September 2005, available at http://www.coc.org/pdfs/coc/cf/2005/cf168_200509_more.pdf.

[56] Cited in UN News Centre 'Ahead of September World Summit, Annan Stresses Importance of MDGs' *UN News Service* April 10, 2006. Available at http://www.un.org/apps/news/story.asp?NewsID=15626&Cr=world&Cr1=summit.

and indicators.[57] The human rights community contends that the MDGs *inter alia* are devoid of a human rights dimension, developed top-down without citizens' participation, do not address reproductive and sexual rights, and represent women either as pregnant, mothers, or victims, but not as active agents of development.[58] For the development community, the MDGs are *inter alia* too generous in scope, technical, limited and vague, place a heavy responsibility on developing countries for their achievement, insufficiency of resources for their achievement, distort national priorities, and might be used to justify neo-liberal models of development.[59] The environment conservation community believes the MDGs reduce the importance of the environment to sustainable development as only one of the MDGs addresses environmental conservation, while the targets and indicators for the goal are too narrow, vague and give undue priority to some environmental resources over others.[60]

This thesis does not intend to go into the merits or demerits of the above criticisms as it is not the purpose of this study. Suffice it to say that the criticisms are not entirely without basis. However, the critics fail to take cognisance of the fact that the relevance of the MDGs does not lie in their individual goals, targets and indicators, but in the overall framework they establish.[61] Sustainable human development, as generally agreed, encompasses much more than the MDGs.[62] Therefore, the MDG goals, targets and indicators should not be seen as ends in themselves, but as benchmarks of progress towards the broader goal of poverty eradication and

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[57] For summary of these criticisms, see HDR 2003 *op cit* note 52 at 30; and World March for Women *A Change of Course: The Millennium Development Goals Through the Lens of the Women's Global Charter for Humanity* (Montreal, September 13, 2005) 3-4. Available at http://www.marchemondiale.org/en/docpdf/MDGs_August2005.pdf.

[58] *Ibid*. See also Painter *op cit* note 6 at 18, 22-24; and Statement of the Asia-Pacific Civil Society Forum on the Millennium Development Goals and the Eradication of Extreme Poverty and Hunger, 6-8 October 2003, in Annex three, CHRGJ Conference Report *op cit* note 6 at 31-32.

[59] *Ibid*. See also Painter *op cit* note 6 at 20-22.

[60] See Hazlewood et al op *cit* note 48 at 148-149; and Dilys Roe 'The Millennium Development Goals and natural resource management: reconciling sustainable livelihoods and resource conservation or fuelling a divide?' in David Satterthwaite (ed) *The Millennium Development Goals and Local Processes: Hitting the target or missing the point?* (IIED, 2003) 58-60, 65-66. Available at http://www.undp.org /pei/pdfs/IIED_MDG_Booklet1.pdf.

[61] See Roe *ibid*, at 69.

[62] See United Nations Development Programme *Human Development Report 2005-- International Cooperation at a crossroad: Aid, trade and security in an unequal world* (New York, 2005) 1, available http://hdr.undp.org/reports/global/2005/pdf/HDR05_complete.pdf; and United Nations General Assembly *Implementation of the United Nations Millennium Declaration: Report of the Secretary-General* A/58/323, September 2, 2003, at p9, para 50, available at http://www.un.org/Millenniumgoals/sgreport2003.pdf?OpenElement.

sustainable development.[63] As aptly observed by the UNDP in the *2005 Human Development Report*, 'the goals provide a crucial benchmark for measuring progress towards the creation of a new, more just, less impoverished and less insecure world order.'[64] Similarly, the UN Secretary-General in his Report on the implementation of the Millennium Declaration, *In Larger Freedom: Towards Development, Security and Human Rights for All*,[65] highlights the fact that the MDGs are only part of the picture by stating that '[w]e need to see the Millennium Development Goals as part of an even larger development agenda… they do not in themselves represent a complete development agenda.'[66] He further states that the goals 'do not encompass some of the broader issues covered by the conferences of the 1990s, nor do they address the particular needs of middle-income countries or the questions of growing inequality and the wider dimensions of development and good governance.'[67]

Based on the above, it can be argued that since the MDGs principally constitute crucial benchmarks for monitoring progress towards poverty reduction and sustainable development, that both the MDGs, their targets and indicators can be increased or refined to suit national or regional priorities and conditions,[68] or as proposed by Williamson, can be used as 'benchmark for moving forward on the key [environmental], social and economic issues of our age.'[69] The WSSD, as earlier noted, has already set the tone for the enlargement of the MDG targets to enhance poverty reduction and sustainable development, by adopting a number of additional targets known as 'MDG Plus Targets' in the areas of biodiversity, fishing, marine resources, harmful chemical substances, and sanitation.[70] In addition to the MDG Plus Targets, at the national level, the Mongolian Parliament has passed a resolution adopting a legislative Act on the MDGs that includes a ninth MDG on

[63] See HDR 2003 *op cit* note 53 at 30; and Roger Williamson *The Millennium Development Goals: Ensuring Achievability and Accountability* Wilton Park Paper (December 2005) 8, available at http://www.wiltonpark.org.uk/document/conferences/WP786/pdf/WP786.pdf.
[64] *Op cit* note 62.
[65] A/59/2005, 21 March 2005.
[66] *Ibid*, at para 30.
[67] *Ibid*.
[68] See United Nations Development Group *op cit* note 30 at 1; and Hazlewood et al *op cit* note 48.
[69] *Op* cit note 63.
[70] Indicators for monitoring these targets have not yet been developed. See Hazlewood et al *op cit* note 48 at 150.

fostering democratic governance and strengthening human rights,[71] while Vietnam has enlarged the MDG target on secondary education enrolment to universal enrolment.[72]

Taking cognisance of the acceptance of the MDGs as a sustainable development framework by the international community, and the flexible nature of the MDG goals, targets and indicators, it is submitted that for Africa, a region which is presently experiencing the inter-related problems of rising poverty levels and deepening environmental degradation,[73] the opportunity offered by the MDGs can be used by African leaders and other bodies interested in Africa's development to encourage the conservation of the environment and the realisation of the right to environment, as an integral part of a broader development agenda focused on poverty reduction and sustainable development. This is already evident in NEPAD, which in addition to identifying the protection of the environment as one of its six sectoral priorities, also recognises that the health and good stewardship of the environment is crucial to the achievement of its overall objectives.[74] Similarly, the Millennium Challenge Account (MCA),[75] has recently added environmental concerns focusing on natural resource management and access to land to its selection indicators for eligible developing countries in 2007.[76]

1.2.2 Right to environment

[71] See Patrick Van Weerelt, Senior Human Rights Advisor, UNDP in *Implementing The Millennium Development Goals: Our Human Rights Obligation*, Human Rights & Democracy Conference Report, Ottawa, 8-9 June, 2005 (International Centre for Human Rights and Democratic Developments, 2005) 14.

[72] See Aisha Ghaus-Pasha *Governance for the Millennium Development Goal: Core Issues and Good Practices* (UNDESA 2006) 18.

[73] See NEPAD-EAP *supra* note 4 at para1.

[74] *Ibid*, at para 34. See also NEPAD framework document *op cit* note 38 at paras 138-142.

[75] Set up by the present Bush Administration to provide substantial new foreign assistance to low income countries beginning in fiscal year 2004. MCA will be devoted to projects in nations that 'govern justly, invest in their people and encourage economic freedom.' See The White House *The Millennium Challenge Account*. Available at http://www.whitehouse.gov/infocus/developing nations/ Millennium.html.

[76] See Steve Radelet, Sarah Rose & Sheila Herrling *Adding Natural Resource Indicators: An Opportunity to Strengthen the MCA Eligibility Process* (Center for Global Development, November 2006) 1.

(a) Origin and development of the right to environment

The right to environment or to an environment that is not harmful to human health and well-being has its origin in the Stockholm Declaration,[77] adopted in the United Nations Conference on Human Environment (UNCHE).[78] The UNCHE was the first global conference to address environmental issues and is regarded as marking a watershed in the internationalisation of environmental protection.[79] It can therefore be argued that the development of this right closely follows developments in the internationalisation of environmental protection. However, the Stockholm Declaration does not proclaim an explicit fundamental right to environment, but rather recognises the link between environmental protection and enjoyment of human rights.[80] The preamble to the Declaration states that '… [b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights-even the right to life itself.' In the same vein, Principle 1 of the Declaration states 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.' This formulation recognises that an environment of a certain quality is a prerequisite for human beings to enjoy their rights to freedom, equality, and adequate conditions of living. It however stops short of proclaiming a direct right to environment.[81]

While the right to environment has its origin in the Stockholm declaration, its current development as an emerging norm of international law is due to its enunciation in international and regional environmental and human rights instruments, declarations of UN Conferences, comments and decisions of international, regional and national human right bodies, and national constitutions and legislation, which arguably shows evidence of

[77] See Stockholm Declaration of the United Nations Conference on Human Environment (UNCHE) U.N Doc. A/CONF.48/ 141 (1972) reprinted in 37 *I.L.M* 1416. (Hereinafter Stockholm Declaration).
[78] Held from 6-12 June 1972 at Stockholm, Sweden.
[79] See Hunter et al *op cit* note 10 at 5 & 1288.
[80] See Dinah Shelton 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stanford JIL* 103 at 112; and Sumudu Atapattu 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergency of a Human Right to a Healthy Environment Under International Law' (2002) 16 *Tulane Environmental LJ* 65 at 74.
[81] See Alexandre Kiss & Dinah Shelton *International Environmental Law* (Transnational Publishers, Inc, 1991) 22.

consistent state practice.[82] Presently, the right has not crystallised into customary norm of international law and there is no binding global environmental or human rights instruments providing for a distinct right to environment. Although the right is expressly recognised in both the Draft Legal Principles for Environmental Protection and Sustainable Development appended to the report of the World Commission on Environment and Development (Bruntland Report),[83] and the Draft Principles on Human Rights and Environment,[84] neither document was adopted by the UN General Assembly. The 1989 Hague Declaration on the Environment overtly recognises the right, but was adopted by representatives of only 24 States, and thus, its application is not universal even though other countries were invited to subscribe to it.[85] UN resolution 45/94 recognises that 'all individuals are entitled to live in an environment adequate for their health and well-being.'[86] However, it has been argued that the Resolution should not be construed as endorsing a fundamental right to environment as it only provided that all individuals are entitled to, rather than have the right to live in an environment adequate for their health and well-being.[87] In any event, the provision is contained in a resolution, which may not create a binding precedent for the recognition of a fundamental right to environment.[88]

Furthermore, the Rio Declaration on Environment and Development,[89] while linking human beings with the environment, does not overtly provide a substantive human right to

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[82] See John Lee 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2002) 25*Columbia J Envtl L* 283 at 305-339; and Laura Horn 'The Implications of the Concept of Common Concern of a Human Kind on a Human Right to a Healthy Environment' (2004) 1 MqJICEL 233 at 236-237.

[83] See Report of the World Commission on Environment and Development *Our Common Future* Annexure 1, principle 1. Annexed to United Nations General Assembly resolution A/42/427, 4 August 1987. Available at http://www.are.admin.ch/imperia/md/content/are/nachhaltigeentwicklung/brundtland_bericht.pdf?PHPSESSID=4b9a471bc01375e502416b8bbdff0f17.

[84] See UN Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment*, Final Report of the Special Rapporteur, UN Doc. E/CN.4/1994/9 (July 1994) 74.

[85] Adopted on 14 March 1989 at The Hague. Available at http://www.nls.ac.in/CEERA/ceerafeb04/html/documents/lib_int_c1s2_hag_230300. htm.

[86] A/RES/45/94, 19 December 1990, para 1. Available at http://www.un.org/documents/ga/res/45/a45r094.htm.

[87] See Atapattu *op cit* note 80 at 77-78.

[88] See John Dugard *International Law: A South African Perspective* 3ed (Juta & Co Ltd, 2005) 34-37.

[89] Adopted at the United Nations Conference on Environment and Development, 3-14 June, 1992, at Rio de Janeiro, Brazil.

environment.[90] It merely states that 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'[91] This formulation cannot therefore be construed to mean that the Declaration recognises a fundamental human right to environment.[92] The Declaration however provides for the procedural environmental rights of all concerned citizens to access to information, participation in environmental decision-making process, and access to judicial and administrative redress and remedy.[93] The most recent environmental instrument, the Johannesburg Declaration on Sustainable Development does not endorse a fundamental human right to environment.[94] It simply commits the participants '...to building a humane, equitable and caring global society, cognizant of the need for human dignity for all',[95] and reaffirms the provisions of the Rio Declaration.[96]

The position with regard to unequivocal recognition of the right to environment is different at the regional and national levels. The African Charter on Human and Peoples' Rights was the first binding instrument to unequivocally endorse a human right to environment.[97] It provides that 'all people shall have the right to a generally satisfactory environment favourable to their development.'[98] The Additional Protocol to the American Convention on Human Rights also endorses a human right to environment.[99] It provides that 'Everyone shall have the right to live in a healthy environment and to have access to

[90] See Annex 1, *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June, 1992. A/CONF.151/26(VOL.1), August 12, 1992. Available at http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm. (Hereinafter Rio Declaration).
[91] *Ibid*, at principle 1.
[92] It has been argued that the Declaration's failure to give explicit emphasis to human rights by endorsing the right to environment is indicative of continuing uncertainty and debate about the proper place of human rights in international environmental law. See Alan Boyle 'The Role of International Human Rights Law in the Protection of the Environment.' In Alan Boyle & Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Oxford University press, 1998) 43.
[93] *Supra* note 90 at principle 10.
[94] *Supra* note 47.
[95] Para 2.
[96] Para 8.
[97] Adopted June 27, 1981, OAU Doc.CAB/LEG/76/3 rev.5, 21 *ILM* 58 (1982), entered into force 21 October 1986. Available at http://www.africaunion.org/official_documents/Treaties_%20 Conventions _%20Protocols/Banjul%20Charter.pdf. (Hereinafter African Charter).
[98] *Ibid*, at art 24.
[99] Adopted at San Salvador, El Salvador, on 17 November 1988, entered into force 16 November 1999. O.A.S Treaty Series No. 69 (1988). Available at http://www.oas.org/juridico/English/Treaties/a52.html (Hereinafter San Salvador Protocol).

basic public services.'[100] The European Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters also recognises the human right to environment.[101] Its preamble states 'that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generation.' However, the Convention mainly embodies procedural environmental rights even though the right to environment is contained in its operative part. These procedural environmental rights have the protection of the right to an adequate environment as their ultimate objective. This is evident in article 1 of the Convention which states that '[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters....'[102]

At the national level, several countries including South Africa have provided for the right to environment in their various constitutions and legislation.[103] These legal provisions are couched either as a fundamental right to environment, and/or as a State obligation to prevent environmental harm.[104] The latter is not couched in human rights terms nor does it provide for a binding right, as such provision is usually found in the constitutional chapter on Fundamental Objectives and Directive Principles of State Policy, which most often is

[100] *Ibid*, at art 11(1). See also art 11(2) that mandates member states to promote the protection, preservation, and improvement of the environment.
[101] Adopted at Aarhus, Denmark, on 25 June 1998. ECE/CEP/43. Available at http://www.unece.org/env/pp/documents/cep43e.pdf. (Hereinafter Aarhus Convention).
[102] *Ibid*.
[103] Some countries like Kenya, Mexico and Indonesia overtly recognised this right in their national legislation only. For a comprehensive list of the national constitutional provisions, see Earth Justice *Human Rights and the Environment*, Issue Paper, Material for the 60th Session of the United Nations Commission on Human Rights, Geneva, 15 March - 23 April 2004. (Earth Justice, 2004) at 61-84. Available at http://www.earthjustice.org/news/documents/4-04/2004UNReports.pdf. (Hereinafter Earth Justice Issue Paper).
[104] For example, see s 20 of the *Constitution of the Federal Republic of Nigeria*, Federal Republic of Nigeria Official Gazette No.27, Vol.86, Lagos-5th May, 1999. This section provides that '[t]he state shall protect and improve the environment and safeguard the water, air, and land, forest and wild life of Nigeria.'

not justiciable.[105] This kind of chapter usually contains objectives and principles deemed to be fundamental in a country's governance, and all organs of government are required to conform to, observe, and apply its provisions in exercising their legislative, executive or judicial powers.[106] The objectives are the goals while the principles are the ways of reaching them.[107] The main purpose of these objectives and principles is to inspire further legislation, rather than conferring enforceable rights.[108] However, recent judicial trends have favoured the enforceability of these objectives and principles provisions as binding rights.[109]

In addition to the above, several international, regional and national human rights bodies have upheld the existence of the right to environment in their resolutions, decisions and comments, as well as taking States and private individuals to task for their violations or anticipated violations of the right. For instance, the United Nations Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights has passed several resolutions affirming the right to environment for everyone,[110] while the UN Committee on the Rights of the Child in its *Concluding Observations on Lithuania,* recommended that Lithuania 'allocate appropriate resources and develop comprehensive policies and programmes to improve the health situation of all children, including measures aiming at a safe and

[105] For example, see s 6 (6) (c) of the Nigerian Constitution *ibid*; art 37, Indian Constitution 1950; *State of Madras v Champpakam Dorairajan* (1950) AIR 226 (SC); and *Okogie (Trustee of Roman Catholic Schools) and others v Attorney-General, Lagos State* (1981) 2 NCLR 337. See also Peter Oluyede *Constitutional Law in Nigeria* 1ed (Evans Brothers (Nig) Publishers Limited, 1992) 174-175.

[106] See Michael Anderson 'Individual Rights to Environmental Protection in India' in Boyle & Anderson (ed) *op cit* note 92 at 213-214; Nigerian Constitution *ibid*, at s 3; and Peter Oluyede *ibid*, at 169 & 174.

[107] Oluyede *ibid*, at 169.

[108] Anderson *op cit* note 106 at 215.

[109] See *Sachidanand Pande v State of West Bengal* (1987) AIR (SC) 1109; *Kinkri Devi v Himachal Pradesh* (1988) AIR 4 (Himachal Pradesh); *The Philippines: Supreme Court Decision in Minor Oposa v Secretary of the Department of Environment and Natural Resources (DENR)* 33 ILM 173 (1994); Prakash *Mani Sharma v Ministers of Council* Writ Nos. 2961 and 2052; *Dr M Farooque v Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 Others* (1997) 49 DLR 1; and *Jonah Gbemre v Shell Petroleum Development Company of Nigeria and 2 Others* Suit No:FHC/B/CS/53/05. Delivered 14 November 2005.

[110] See Earth Justice *op cit* note 103 at 15-17; and Earth Justice *Human Rights and the Environment-Developments*, Issue Paper, Materials for the Fifty-Eight Session of the United Nations Commission on Human Rights, Geneva, March 18-April 26, 2002 (Earth Justice Legal Defense Fund, 2002) 12-13, available at http://www.earthjustice.org/regional/international/2002%20issue%20paper_developments_final.pdf. (Hereinafter Earth Justice Issue Paper II).

healthy environment.'[111] At the regional level, both the Inter-American Commission on Human Rights, the North American Commission on Environmental Cooperation, and the European Courts of Human Rights have adopted decisions recognising their citizens' right to environment.[112] Also, the African Commission on Human and Peoples Rights has held the Nigerian government liable for violating the right to environment with regard to the Ogoni minority group in Nigeria.[113]

In addition to the decisions of these regional bodies, national courts including South African courts have upheld and recognised this right in their decisions.[114] Recently, the Nigeria's Federal High Court for the first time upheld and recognised the existence of this right in Nigeria. The Court declared that the enjoyment of the fundamental rights to life and human dignity '…inevitably includes the right to a clean, poison-free, pollution-free and healthy environment.'[115]

(b) Meaning of the right to environment.

What exactly is the right to environment? The meaning of this concept is vague. This vagueness is due in part to the problem of defining the concept 'environment' which is subject to different interpretations. Does it refer to the 'biosphere'; 'the complex of physical, chemical, and biotic factors that act upon an organism or an ecological community and ultimately determine its form and survival'; or 'the aggregate of social and cultural conditions that influence the life of an individual or

[111] *Concluding Observations on Lithuania*, U.N. CRC, U.N. Doc. CRC/C/15/Add.146 at 36 (2001). Available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.146.En?OpenDocument. See also Earth Justice II *ibid*, at 11.
[112] For the recent decisions, see Earth Justice Issue Paper *op cit* note 103 at 26-33and Earth Justice II *ibid*, at 21-24. See also *Lopez-Ostra v Spain* (1994) ECHR, series A, No. 303C; *Anna Maria Guerra and 39 Others v Italy* (1998) I ECHR, Case 14967/89, delivered 19 February 1998; and *Yanomani v Brazil* Inter-Am C.H.R, 1984-1985 Annual Report 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985).
[113] See *Communication 155/96, the Social and Economic Rights Action Center (SERAC) and another v Nigeria*, Decision of the African Commission on Human and Peoples' Rights. (Interpreting this right under the African Charter). Available at http://www.cesr.org/text%20files%final%20Decision%2000% 20the%Ecosoc%20matter.pdf. (Hereinafter *SERAC* communication).
[114] For an analysis of these decisions, see Dr Jonah Razzaque *Human Rights and the Environment: Development at the National Level, South Asia and Africa* Background Paper No.4, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, January 14-16, 2002, Geneva, pp4-8. Available at http://www.uchchr.ch/environment/bp4.html.
[115] See *Gbemre* case *supra* note 109 at paras 1-2.

community.'?[116] The last definition according to Kiss and Shelton 'is very broad-based and brings urban problems such as traffic congestion, crime, and noise within the field of environmental protection.[117] This definitional dilemma was well articulated by Kiss and Shelton who observed that 'environment'' can signify any point on a continuum between the entire biosphere and the immediate physical surroundings of a person or a group. Moreover, it is neutral in itself: an environment may be good or bad, deteriorated or protected. As a result, in general texts of positive law which speak of the right to environment add qualifications.'[118]

In law, 'environment' can refer to a limited area or it may refer to the entire planet, including the atmosphere and stratosphere.[119] Legal instruments usually adopt the latter approach.[120] For instance, the European Convention on Civil Liability from Activities Dangerous to the Environment defines the concept to include natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which form part of the cultural heritage; and the characteristic aspects of the landscape.[121] The same approach is evident in the definition of environment under the South African National Environmental Management Act (NEMA).[122] According to NEMA, 'environment means the surrounding within which humans exist and that are made up of - the land, water, and atmosphere of the earth; micro-organism, plant and animal life; any part or combination of (i) and (ii) and the interrelationships among and between them; and the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.'[123] Flowing from these legal definitions, the term 'environment' can be understood

[116] Definitions proffered by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and Webster's Dictionary respectively. Quoted in Alexandre Kiss & Dinah Shelton *International Environmental Law* 2ed (Transnational Publishers Inc, 2000) 1-2. (Hereinafter Kiss & Shelton II).
[117] *Ibid*, at 2.
[118] Kiss & Shelton *op cit* note 81 at 22.
[119] See Kiss & Shelton II *op cit* note 116.
[120] *Ibid*. This has been followed by the International Court of Justice (ICJ) which recognises that 'the environment is not an abstraction, but represents the living space, the quality of life, and the very health of human being, including generations unborn.' See *Legality of the Threat or Use of the Nuclear Weapon* (1996) I.C.J. Reports 241-242, para. 29.
[121] See art. 2(10). Adopted at Lugano, June 21, 1993. 32 *ILM* 1228 (1993). (Hereinafter Lugano Convention).
[122] Act 107 of 1998.
[123] *Ibid*, at s 1.

broadly in this thesis to refer to living (biodiversity or ecosystem) and non-living or man-made (landscape, monuments, shrines, etc) components of the natural world, and to the interactions between them and other human activities (such as agriculture, industry, etc) that together support human health and well-being.[124]

The broad legal definitions of the environment make it imperative that rules and policies designed to protect the environment must not only be focused strictly on the conservation of the natural and man-made environment, but also on the promotion of socio-economic factors that impact on the environment and human well-being like poverty alleviation, health, education, gender equality, food, and housing. This is evident in NEMA which stipulates among its National Environmental Management Principles that '[e]nvironmental management must place people and their needs at the forefront of its concern, and must serve their physical, psychological, developmental, cultural and social interests equitably.'[125] This is supported by the recent decision of *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga, and others*,[126] where the South Africa's Constitutional Court states:

> '[o]ne of the key principles of NEMA requires people and their needs to be placed at the forefront of environmental management − batho pele. It requires all developments to be socially, economically and environmentally sustainable. Significantly for the present case, it requires that the social, economic and environmental impact of a proposed development be "considered, assessed and evaluated" and that any decision made "must be appropriate in the light of such consideration and assessment". This is underscored by the requirement that decisions must take into account the interests, needs and values of all interested and affected persons. '[127]

[124] See Kiss & Shelton II *op cit* note 116 at 2; and Department for International Development, United Kingdom (DFID), Directorate General for Development, European Commission (EC), United Nations Development Programme (UNDP), & The World Bank *Linking Poverty Reduction and Environmental Management: Policy Challenges and Opportunities* (The World Bank, July 2002) 9.
[125] See NEMA *supra* note 122 at s 2(2).
[126] Case CCT 67/06, Delivered on 7 June 2007.
[127] *Ibid*, at para 60. See also paras 75 & 77.

In addition to the problem of defining the term 'environment' is the issue of how this right can be formulated or defined.[128] This involves the related issue of the appropriate adjective that can be used to describe or define the right. Resolving this issue is important for understanding which dimensions of the environment are to be protected by the right and what degree of environmental change is permissible.[129] However, there is presently no common denominator for defining the right as several adjectives have been attached to the term 'environment' to describe what is being actually protected. As determined from a survey of existing constitutional and statutory provisions relating to environmental protection, it can refer to a right to healthy, satisfactory, clean, viable, ecologically-balanced, humane, liveable, suitable, sustainable, favourable, intact, harm-free, or contamination-free environment.[130]

This thesis does not intend or purport to discuss the merits or demerits of the constitutional and statutory adjectives used in defining this right. Suffice it to say that countries have the discretion to qualify or define the right according to their level of development.[131] The discretion, as observed by James Nickel,[132] affords poor countries, which may find it difficult to marshal the human, institutional, and financial resources needed to create a meaningful system of environmental protection, the opportunity of attaching less demanding definitions to the notion of an adequate level of environmental safety through their own legislative and judicial processes.[133] For the purpose of this thesis, the formulation - the right to environment adequate to human health and well-being, or simply, the right to environment - is used. This formulation avoids the controversy over the use of the appropriate adjective to qualify the right. In addition, it embodies a common

[128] It has been argued that this definitional dilemma is not alien to the right to environment as it is pervasive in law, especially in human rights law. See Kiss & Shelton *op cit* note 81 at 23.
[129] Michael R Anderson 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle & Anderson (ed) *op cit* note 92, at 10, (hereinafter Anderson II). See also Kiss & Shelton *ibid*, at 23.
[130] *Ibid*. See also art. 24, African Charter *supra* note 97; and s 24, Constitution of the Republic of South Africa Act 108 of 1996.
[131] However, this discretion is not unique to the right to environment. As observed by James Nickel, most human rights contain vague key phrases that give countries discretion to interpret the right in ways that make it less costly to enforce. See James W. Nickel 'The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification' (1993) 18 *Yale JIL* 281 at 295.
[132] *Ibid*.
[133] This assertion is based on the duties generated by this right. Thus, a less demanding definition of environmental adequacy will make the right less expensive to implement. See Nickel, *ibid*.

standard that runs through the whole gamut of the various constitutional and statutory formulations of the right: they are meant to guarantee an environment of such a quality that will be conducive to the health and well-being of their citizens.[134]

The reference to human health may convey the impression that the formulation used in this thesis is purely anthropocentric in nature thereby strengthening the criticism that the right to environment reinforces the assumption that the environment and its resources exist only for human benefit, and have no intrinsic worth in themselves.[135] However, the right promotes not only human health, but also human well-being. The phrase 'human well-being' is wide and not readily determinable, and therefore, can be interpreted to cover all aspects of human's physical, environmental, cultural, social, economic, recreational, spiritual and aesthetic development.[136] Such expansive interpretation can be used to tone down the anthropocentric nature of the right as it is presently hard to distinguish any part of the ecosystem that will not be of any benefit to the well-being of present or future generations, thereby making it impossible to separate human interest from the general protection of the environment.[137] As aptly suggested by Jan Glazewski with regard to a similar term under the South African Constitution, '...the term as used in section 24(a) [of South African Constitution] implies that the environment has not only an instrumental value, in that it secures benefits such as good health, food and tourist-related income, but that in addition, aspects of the environment have an inherent worth and are deserving of conservation for their intrinsic value.'[138]

(c) Nature of the right to environment

[134] See Patrick D. Okonmah 'Right to A Clean Environment: A Case for the People of Oil-Producing Communities in the Nigerian Delta' (1997) 41 *JAL* 43 at 55.
[135] See Boyle *op cit* note 92 at 51; and Anderson II *op cit* note 129 at 14-15.
[136] See AEO 2 *op cit* note 1 at 19; and Jan Glazewski *Environmental Law in South Africa* 2ed (Lexis Nexis Butterworth, Durban, 2005) 77.
[137] However, this approach has its limitations especially regarding pure intrinsic value of the environment including natural ecosystems and species. It is therefore imperative that this approach be used to complement other approaches and mechanisms in the protection of the environment. See Boyle *op cit* note 92 at 51-52; Atapattu *op cit* note 80 at 112-114; and Catherine Redgewell 'Life, The Universe and Everything: A Critique of Anthropocentric Rights' in Boyle & Anderson (ed) *op cit* note 92 at 86-87.
[138] *Ibid*.

A discussion of the nature of the right to environment is important as it will provide further insight into the meaning of the right. It should be noted that the nature of this right is very vague, as it has not been defined at the international level, thereby making it difficult to formulate a universal consensus. This non-definition perhaps may be due to the fact that the right while emerging as a norm of international law has not yet crystallised into such norm. However, as can be deduced from a review of national and international legal provisions and judicial decisions, as well as comments of human right bodies on this right, the nature of the right to environment for the purpose of this thesis can be classified as either substantive or procedural. A substantive right to environment involves the promotion of a certain level of environmental quality.[139] It may mean a right to a decent, healthy, satisfactory, favourable, ecologically-balanced, unpolluted, safe or viable environment depending on the adjective used in defining the right in regional and national constitutional and statutory provisions.[140]

A procedural right to environment on the other hand, includes freedom of environmental association, access to environmental information, public participation in environmental decision-making processes, and access to judicial and administrative redress and remedies.[141] Procedural environmental rights are enabling rights as they make it possible for people to contribute actively to the protection of their environment.[142] For David Hunter *et al*, environmental procedural rights constitute 'environmental due process.'[143] Under international environment law, where as observed earlier that there is no explicit right to environment, what can be implied as environmental rights usually assumes this procedural character as evidenced by Principle 10 of the Rio Declaration.[144] Also in most jurisdictions

[139] Boyle *op cit* note 92 at 48.
[140] See generally the Appendix to Earth Justice *Environmental Rights Report Human Rights and the Environment* Materials for the 61st Session of the United Nations Commission on Human Rights Geneva, 14 March –22 April 2005 (Earth Justice, 2005) 86-108. (Different national formulation of the right). (Hereinafter Earth Justice Report).
[141] For a comprehensive formulation of procedural environmental rights, see Part III, Draft Principles on Human Rights and the Environment *supra* note 81.
[142] Hunter et al *op cit* note 10 at 1312. See also Boyle *op cit* note 92 at 60; and *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA).
[143] *Ibid*.
[144] *Supra* note 90. See generally Boyle *op cit* note 92 at 60-62; Atapattu *op cit* note 80 at 91-94; and Dinah Shelton *Human Rights and Environmental Issues in Multilateral Treaties Adopted Between 1991*

where there is no unequivocal right to environment, existing constitutional procedural rights have been mobilised for environmental protection.[145] Some countries however provide expressly for procedural environmental rights in their environmental legislation.[146]

(d) Scope of the right to environment

Having discussed the meaning and nature of the right to environment, the question therefore is who can enjoy the right? This question raises the issue of whether this right can only be enjoyed by the present generation or does it include future generations? It is submitted that this right can be enjoyed by both the present and future generations.[147] The Stockholm Declaration, from which the right originated, recognises the need to safeguard the environment 'for the benefit of present and future generations through careful planning or management.'[148] Also, an analysis of existing constitutional and statutory provisions shows that such right can be enjoyed by both the present and future generations.[149] For instance, section 24 of the South African Constitution in providing for the right of every one to an environment that is not harmful to their health and well-being, also provides that '[e]veryone has the right...to have the environment protected, for the benefit of present and future generations....'[150]

In addition to these constitutional and statutory provisions, various national judicial decisions have upheld the right of future generations to environment.[151] Such a right was recognised and upheld by the Supreme Court of Philippines in the *Minor Oposa* case.[152]

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and 2001, Background Paper I, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, January 14-16, 2002, Geneva. Available at http://uchchr.ch/environment/bp1.html.

[145] See Anderson II *op cit* note 129 at 4-5; and Carl Bruch, Wole Coker, & Chris Van Arsdale 'Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protection in Africa' (2000) 7 *SAJELP* 21 at 64-74.

[146] For example see NEMA *supra* note 121 at ss 2(4) (f) (k), & 31-33.

[147] See Kiss & Shelton *op cit* note 81 at 22.

[148] *Supra* note 77 at principle 2.

[149] See Appendix to Earth Justice Report *op cit* note 140.

[150] *Supra* note 130.

[151] For these national judicial decisions, see Razzaque *op cit* note 114 at 14-15; and Adriana Fabra & Eva Arnal *Review of Jurisprudence on Human Rights and the Environment in Latin America*, Background Paper No.6, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, January 14-16, 2002, Geneva, at p5, available at http://www.uchchr.ch/environment/bp6.html.

[152] *Supra* note 109 at 187-191.

Also in the Indian case of *People United For Better Living in Calcutta v State of West Bengal*, the court states that '[t]he present day society has a responsibility towards the posterity for their proper growth and development so as to allow the posterity to breathe normally and live in a cleaner environment and have consequent fuller development.'[153] Furthermore, in the Costa Rican case of *Carlos Roberto Mejia Chacon v. Municipalidad de Santa Ana*, the Supreme Court asserted, '...that although man has the right to use the environment for his own development, it has also the obligation to protect it and preserve it so that future generations can use it.'[154] Similarly, in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*,[155] the court held that '[t]he balancing of environmental interests with justifiable social and economic development is to be conceptualised well beyond the present living generation. This must be correct since s 24 requires the environment to be protected for the benefit of present and future generations.'[156] This position was affirmed in *Fuel Retailers Association of SA (Pty) Ltd* case,[157] where the Constitutional Court held:

> '[t]he very idea of sustainability implies continuity. It reflects a concern for social and developmental equity between generations, a concern that must logically be extended to equity within each generation. This concern is reflected in the principles of inter-generational and intra-generational equity which are embodied in both section 24 of the Constitution and the principles of environmental management contained in NEMA.'[158]

However, while future generations are entitled to enjoy this right, by having the environment conserved for their benefit, the responsibility of ensuring such a right for them falls on the State and the present generation (private individuals).[159] This is apparent in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*,[160] where the court held that '[t]he attainment of this objective…confers upon

[153] Quoted in Razzaque *op cit* note 114 at 14.
[154] Para 1, Judgment No. 3705-93, Supreme Court, Constitutional Chamber, July 30, 1993.
[155] 2004 (5) SA 124 (W).
[156] *Ibid*, at 143D.
[157] *Supra* note 125.
[158] *Ibid*, at para 75.
[159] See *Fuel Retailers Association of SA (Pty) Ltd* case *ibid*, at para 102; and *Minor Oposa* case *supra* note 109 at 187.
[160] 2006 (5) SA 512 (T).

the authorities a stewardship, whereby the present generation is constituted as the custodian or trustee of the environment for future generation. …. An owner may not use his or her land in a way which may prejudice the community in which he or he lives because, to a degree, he or she holds it in trust for future generation.'[161] It should be noted that with the exception of the South African constitutional provision which places this duty on both the State and private individuals, most constitutional provisions in other jurisdictions place the duty of ensuring intergenerational equity on the State only.[162] However, it would appear that irrespective of the varying national constitutional and statutory provisions, that private individuals can bring legal actions to enforce the right of the future generations to the full enjoyment of a balanced and healthy environment. As held in the *Minor Oposa* case, '[w]e find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.'[163]

Having established that the right can be enjoyed by both the present and future generations, the next question is whether this right can be enjoyed individually or collectively? This question arises from the fact that the legal definition of the concept 'environment' as stated earlier is very broad, and that environmental problems mostly affect many people and in certain instances may cut across borders.[164] For instance, the environmentally degrading activities of oil companies in Nigeria and their adverse effects on ethnic groups within the Niger Delta region;[165] the asbestos crisis caused by transnational mining companies (TNCs) in South Africa and the adverse effects on the health and well-being of their workers and the

[161] *Ibid*, at 519A-B.
[162] See the constitutions of Andorra, Argentina, Brazilian, Germany, Ghana, Iran, Nigeria, Malawi, and Poland in Appendix to Earth Justice Report *op cit* note 140.
[163] *Op cit* note 109 at 185.
[164] For example, the Chernobyl nuclear disaster that occurred on 26 April 1986. See Greenpeace *Green PEACE Book of the Nuclear Age: The Hidden History* (1990) 280.
[165] See Human Rights Watch *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (January 1999). Available at http://www.hrw.org/reports/1999/nigeria/niew991_05.htm#P500_147118.

inhabitants within their areas of operation;[166] and the 1984 Bhopal gas disaster in India, which claimed many lives as well as poisoning the water and air of the industry's host communities and surrounding areas.[167] In addition to the above, are global environmental problems like ozone depletion, global warming and climate change.

It appears that the right to environment is a collective or group as well as an individual right. It should be noted that it is not in all instances that a group might be affected by an adverse environmental problem. Such environmental problem might be so localised that it may affect only the persons living near to the source of the problem.[168] Even if it were to be argued that the right strictly speaking is a group or collective right, it is ultimately individuals who suffer the adverse effects of environmental degradation. Thus, subscribing to the argument that the right to environment is only a collective right will give rise to the unsatisfactory legal position whereby an individual whose right to environment has been infringed by the State or private individuals, cannot bring an action to enforce such right except if the whole population is involved.

That the right to environment is an individual right is evident from the fact that the predominant domestic constitutional and statutory formulations of the right have been framed with individual in mind.[169] The San Salvador Protocol adopts the same position in its formulation of the right.[170] However, the African Charter formulates the right in terms of the group.[171] The use of the phrase 'all peoples' in the Charter, it has been suggested, refers to the entire population of a State, rather than any particular ethnic group or other

[166] See L. Feris 'The Asbestos Crisis-the Need for Strict Liability for Environmental Damage' (1999) *Acta Juridica* 287 at 289-291.
[167] See New York Times 'A Lethal Cloud Falls on India: An Anguished Community Mourns Its Dead' December 6, 1984, at A1.
[168] See *Powell & Rayner v United Kingdom* 172 Eur. Ct. H.R. (Ser. A) at 5 (1990); and *Lopez Ostra* case *supra* note 112. See also Victor Rodriguez Rescia 'The Right to a healthy environment in the Inter-American System for the Protection of Human Rights: In Search of the implementation of a regional litigation strategy' (Translated by Carla Garcia Zendejas) 6-7. Available at http://www.elaw.org/assets/ word/interamerican.victor.article.2003.eng.doc.
[169] See Appendix to Earth Justice Report *op cit* note 140.
[170] *Supra* note 99.
[171] *Supra* note 97.

group within a State.[172] This has raised the issue of whether the right can be enjoyed by every individual or by the entire population in common.[173] It is submitted that despite the use of this phrase, this right is to be enjoyed by every individual, and thus, any person, ethnic or other group within a State can apply for remedy when it is infringed or threatened.[174]

Having established that the right is an individual as well as a group right, the next question is to whom do the corresponding duties entailed by the right apply? Do these duties apply only to the State or both the State and private individuals? It is submitted that the corresponding duties apply to both the State and private individuals.[175] The obligations imposed by this right on the State, as recently enunciated by the African Commission on Human and Peoples' Rights are namely to respect, protect, promote and fulfil the right.[176] Thus, not only do States have the negative duties of refraining from activities that impair the environment and human health, they are obliged to engage in positive activities that will promote the realisation of the right. As stated by the African Commission on Human and Peoples' Rights in the *SERAC* communication:

> 'The right to a general satisfactory environment…therefore imposes clear obligations upon a government. It 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…. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development [Article 24] already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct

[172] See Richard N Kiwanuka 'The meaning of "people" in the African Charter of Human and Peoples' Right' (1988) 82 *American JIL* 80 at 99-100.
[173] Robin Churchill 'Environmental Rights in Existing Human Rights Treaties' in Boyle & Anderson (ed) *op cit* note 92 at 105-106.
[174] See Emeka Amechi *Environmental Pollution and Human Rights in Nigeria* (unpublished LLM dissertation, University of the Witwatersrand 2004) 27-28; and Lee *op cit* note 82 at 293-297.
[175] See Nickel *op cit* note 131 at 286.
[176] See *SERAC* communication *supra* note 113 at paras 44-47, & 52-54. See also *Velasquez v Honduras* (1988) 4 Inter-AM. Ct. H.R (Ser. C) 155; T. *Damodhar Roa v Municipal Corp of Hyderabad* (1987) AIR 171, at 181; *M.C Mehta v Union of India* (1989) 9 SCC 589; *Minor Oposa's* case *supra* note 109; *Ransome-Kuti v Attorney-General, Federation* (2002) FWLR 1643; *Save the Vaal* case *supra* note 142; and *Minister of Health v Woodcarb (Pty) Ltd v Another* 1996 (3) SA 155 (N).

> from the State for example, not carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.'[177]

With regard to private individuals, it is doubtful to what extent private individuals are obliged to perform the positive duties entailed by this right.[178] Despite this, private individuals are obliged to respect and protect the right to environment by desisting from acts that are detrimental to the integrity of the environment. Failure to do so will make private individuals liable for breach of the right either at the instance of the government or aggrieved parties.[179] As held in *Gbemre v Shell*, 'The actions of the first and second respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community is a gross violation of their fundamental right to life (including healthy environment) and dignity of human person enshrined in the Constitution.'[180]

(e) Jurisprudential basis of the right to environment

Is a human right to environment necessary? Can a wholesome environment be achieved without ascribing a right to it, particularly as it is argued that the proliferation of rights will result in their devaluation?[181] Is a new right really necessary when existing rights can be reinterpreted to achieve environmental protection? As noted earlier, the emergence of this right follows the internationalisation of environmental protection. However, before the internationalisation of environmental protection, several nations had regulations designed to protect the environment. The Stockholm Convention however gave impetus to the development of environmental regulations at the international, regional

[177] *Ibid*, at para 52.
[178] Most constitutional provisions obliged their citizens to protect, preserve and respect the environment, while the constitutions of both Burundi and Mali obliged their citizens to promote the environment. Their issue therefore is whether private individuals are obliged to promote the environment? It is submitted that while private individuals are encouraged to promote conservation of the environment, that they are not obliged to do so. See Nickel *op cit* note 131 at 292.
[179] See *T. Damodhar Roa* case *supra* note 176 at 181, paras 25-26; *Save the Vaal* case *supra* note 142; and *Woodcarb* case *supra* note 176.
[180] *Supra* note 109 at para 4 (Findings). Note that the first respondent is a private company while the second respondent is a state-owned corporation.
[181] See Phillip Alston 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *American JIL* 607 at 614; and J Donnally 'Third Generation Rights' in C. Brolmann *et al* (eds) *People and Minorities in International Law* (Martinus Nijhoff, 1993) 136.

and national levels especially in developing countries.[182] These international, regional and national environmental regulations when properly implemented or enforced will ensure a wholesome environment adequate for human health and well-being, which is the main objective of the right to environment.

However, these environmental regulations are dependent on the State for their implementation and enforcement. Such dependence has led to environmental regulations and policies being observed in breach by both state entities and private individuals, as governments for a variety of reasons that will be discussed later in this thesis, have failed to implement or enforce the provisions of these regulations. The non-enforcement and implementation of environmental regulations is more frequent in developing countries, leading to the continued degradation of the environment with adverse consequences for the health and well-being of their citizens.[183] This ugly trend therefore necessitates the need for the human right to environment. This right allows citizens not only to enforce environmental regulations against the State and private individuals, but also to compel the State to enforce, adopt, and where necessary, amend environmental regulations.[184] As argued by Nickel, '[the right] can only be justified as a human right if measures weaker than declaring a right to environment will not provide adequate protection against pollution and contamination.'[185]

The opportunity afforded to the citizens to protect their environment by the unequivocal recognition of the right to environment, cannot be fully achieved otherwise by the mobilisation or reinterpretation of existing human rights especially in developing countries.[186] This is because the mobilisation or reinterpretation of existing rights for environmental protection is dependent on a progressive judiciary, as the court is required to make a connection between the alleged human rights

[182] See DFID et al *op cit* note 124 at 10.
[183] See Lee *op cit* note 82 at 289-290; and Joshua P. Eaton 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston Univ. Int'l LJ* 261 at 278- 292.
[184] See *Johann De Kock v Minister of Water Affairs and Forestry and others* Case No. CCT 30/05, at paras 5-6, decided on 26 September 2005; *Fuel Retailers Association of SA (Pty) Ltd* case *supra* note 126; *Gbemre* case *supra* note 109, para 6; *Minor Oposa* case *supra* note 109; *Woodcarb* case *supra* note 176; and *Save the Vaal's* case *supra* note 142. See also Okonmah *op cit* note 134 at 60-61; Anderson II *op cit* note 129 at 22; and Nickel *op cit* note 131 at 282.
[185] *Ibid*, at 291.
[186] See Nickel *ibid*, at 290. (Arguing for a distinct recognition of the right to environment).

violation and the environmental problem in question.[187] This is a qualification which cannot be ascribed to many judicial systems in developing countries especially African countries.[188] In addition, the victim of an actual or potential environmental degradation has to prove that such degradation has violated or will violate one of his/her rights. Failure to establish this link will lead to the failure of the action.[189] These procedural limitations curtail the advantages associated with the mobilisation or reinterpretation of existing human rights for environmental protection. As observed by Anderson, '[a]lthough existing human rights, if mobilised, may offer a great deal to global and local environmental protection, there are good reasons to suspect that they will fall short of meeting desired ends. Established human rights standards approach environmental questions obliquely, and lacking precision, provide clumsy tools for urgent environmental tasks. It may be argued that a comprehensive norm, which relates directly to environmental goods, is required.' [190]

The above procedural limitations necessitate the need for an unequivocal recognition of the right to environment. Such recognition of this right will obviate the need for the claimant to establish injury to his/her health and well-being,[191] and the court will be relieved of the burdensome task of making a connection between the environmental violations and other existing human rights. The claimant only needs to establish that the environmentally degrading activity in question resulted or will result in the creation of environment that is not favourable to his health and well-being. Other procedural advantages associated with this approach include the relaxation of the *locus standi* rule as the victim need not show that he/she has suffered damage over and above others, the promotion of public interest litigation due to the attendant liberalisation of the *locus standi* rule,[192] and circumvention of

[187] See S. Douglas-Scott 'Environmental Rights in the European Union—Participatory Democracy or Democratic Deficit' in Boyle & Anderson (ed) *op cit* note 92 at 111-112.
[188] See O*ronto-Douglas v Shell Petroleum development Corporation and 5 Others* Unreported Suit No. FHC/CS/573/93. Delivered on February 17, 1997. (In this suit, the plaintiff's application to compel the defendants to observe the provisions of the EIA Act was dismissed for lack of *locus standi*).
[189] See Douglas-Scott *op cit* note 187.
[190] *Op cit* note 129 at 8.
[191] See Atapattu *op cit* note 80 at 99 & 111.
[192] See *Wildlife Society of South Africa and others v Minister of Environmental Affairs and Tourism and others* 1996 (3) SA 1095 (Tk).

the burden of proving causation between the environmentally degrading activity and damage to health.[193]

These procedural advantages associated with the right to environment, as well as the problem of non-enforcement or implementation of existing environmental regulations by the State, make the unequivocal recognition of this right necessary. Such recognition will complement and reinforce other human rights, and therefore, will not lead to the proliferation or devaluation of human rights, as existing rights have their shortcomings when used for environmental protection.[194] Also, recognising and enforcing such right will aid the protection of the environment especially in developing countries. As pointed out by Cuomo, 'our world has changed drastically since the Declaration [Universal Declaration of Human Rights, 1948] and the Covenants, and certainly the drafters of these instruments did not foresee the enormity of ecological degradation and the consequent necessity for human rights norms to encompass environmental considerations. Promoting the right to a healthy environment is the most obvious mechanism to fulfil this need.' [195]

1.3 Questions or issues raised by the study

This study is principally concerned with exploring the role that the MDGs can play in guiding or stimulating national and international policy reform towards the realisation of the right to environment in Africa. Such an exploration raises the following questions:

[193] See Atapattu *op cit* note 80 at 99 & 111.
[194] See Kiss & Shelton *op cit* note 81 at 22.
[195] Kerry Cuomo 'Human Rights and the Environment: Common Ground' (1993) 18 *Yale JIL* 227.

a) Whether there is a recognised or established right to environment in Africa. This question raises the issues of the existence of regulatory frameworks establishing the right at the national and regional levels; and the meaning, nature and scope of the right as provided by these frameworks.

b) The extent to which the right has been realised in Africa. This question raises the issues of the state of the environment in Africa as the realisation of the right is dependent on the health of the environment; and the factors responsible for environmental degradation and non-realisation of the right.

c) Whether there is a link between poverty and environmental degradation in Africa. This question raises the issues of the factors causing poverty in Africa, and the link between poverty and other causes of environmental degradation in Africa.

d) Whether there is a link between the achievement of the MDGs and realisation of this right in Africa.

e) Whether the MDGs can be used by African leaders, the international community, and other persons interested in Africa's sustainable development to create the enabling environment that will tackle the underlying causes of environmental degradation and non-realisation of the right in Africa. This question raises the issue of the normative character of the MDGs, and whether the MDGs can be used in guiding or stimulating national and international policy reform towards the realisation of this right in Africa.

f) Whether the MDGs have actually influenced or led to the adoption of policies towards the achievement of sustainable development in Africa, and whether these policies promote socio-economic reform and good governance as essential elements for the achievement of sustainable development objectives including the right to environment in their texts.

1.4 Literature review

This thesis makes use of an interdisciplinary range of materials. The thematic areas of literature to which this study is most closely related are the following:

- The right to environment in Africa – establishing framework, extent of realisation and militating factors in Africa.
- The relationship between the achievement of the MDGs and realisation of the right to environment in Africa
- The normative character of the MDGs and their role in guiding or stimulating policy reform toward realising this right in Africa**.**

(a) Right to environment in Africa – establishing frameworks, extent of realisation and militating factors.

There is some literature on the right to environment in Africa in the form of academic writings, reports of environmental and human rights bodies like the South African Human Rights Commission, Earth Justice, Human Rights Watch, United Nations Environment Programme (UNEP), and African Ministerial Conference on Environment, and news items. The literature will be useful to the discussion in this thesis relating to whether the right has been established in Africa, the meaning and scope of the right as provided under the regional and national laws; the extent of its realisation in Africa and factors responsible for its non-realisation. However, this thesis differs from existing literature by approaching the right to environment as established in Africa, from the perspectives of how it can also contribute to the achievement of poverty reduction and sustainable development.

In addition, this thesis differs on the nature and scope of the right as provided under the African Charter on Human and Peoples' Rights,[196] which is the principal human right instrument in Africa. Such divergence relates to the linkage of the right under the African Charter to development. The linkage has led Anderson to wonder if the Charter 'require[s] that environmental protection and economic development should be balanced off against each other, or rather that the right to a satisfactory environment may only be claimed where it will not infringe the requirements of social and economic development.[197] Echoing similar sentiment, Atapattu argues that the fact that the right is linked to development 'can be interpreted as giving economic

[196] *Supra* note 97.
[197] *Op cit* note 129 at 11.

development preference in the event of a conflict between the two.'[198] This thesis differs by arguing that that such interpretation runs contrary to the intention of the framers of the Charter, and thus, although the right can be balanced against development, it will not necessarily take a back seat if it impacts negatively on development.

Regarding the extent to which the right is realised and the factors responsible for non-realisation in Africa, this thesis agrees with the finding of the two volumes of the African Environment Outlook as well as various national state of the environment (SoE) reports that Africa's environment is heavily degraded.[199] It also agrees with the conclusion of the AEO 2 that the drivers of environmental degradation in Africa vary in nature and scope.[200] However, it adopts a holistic approach in discussing factors responsible for environmental degradation and non-realisation of the right to environment in Africa. This approach is different from the African Environment Outlook 2 which mostly approached the subject from the perspectives of socio-economic factors while neglecting the political factors contributing to environmental Degradation.[201] In addition, the thesis differs from the AEO 2 by expressly not discussing population increase among the socio-economic factors contributing to environmental degradation in Africa.

(b) The theoretical relationship between MDGs and the right to environment in Africa

There is presently no evidence of any literature expressly exploring or analysing the link between the achievement of the MDGs and realisation of the right to environment in Africa. However, there is some literature on the link between the achievement of the MDGs and enhancement of environmental conservation or protection, which arguably is inherent in the right to environment. The literature is unanimous that there

[198] *Op cit* note 80 at 88. See also Boyle *op cit* note 92 at 106; and Morne van der Linde 'African Responses to Environmental Protection' (2002) 35 *CILSA* 99 at 101.
[199] See AEO 2 *op cit* note 1, and AEO 1 *op cit* note 1. For example of a national report, see Department of Environmental Affairs and Tourism (DEAT) *South Africa Environmental Outlook: A Report on the States of the Environment – Executive Summary and Key Findings* (DEAT, Pretoria, 2006) ; and National Environmental Management Authority (NEMA) *State of Environment (SoE) Report for Kenya, 2003* (NEMA, 2003). (Hereinafter Kenya SoE).
[200] *Ibid*, at 2.
[201] *Ibid*, at 4-21.

is a mutual link between the achievement of the MDGs and enhancement of environmental protection. For instance, Roe and Elliot in articulating this link through the biodiversity conservation angle, hold the view that poverty reduction is critical for long term conservation success while biodiversity conservation is crucial in poverty reduction and achieving the MDGs.[202] They argue that biodiversity conservation is not only relevant to the achievement of MDG 7 on environmental sustainability, but also MDG 1-6 in Africa.[203] Recognising that Africa is rich in biodiversity resources, they argue that the conservation of such resources will enable the flourishing of biodiversity-based enterprises, which will be crucial in meeting the estimated seven per cent (7%) annual economic growth needed for the achievement of the MDGs in Africa, provided that the market, production opportunities and appropriate policy frameworks exist.[204]

Chivian also supports the view held by Roe and Elliot and endorses the biodiversity argument.[205] However, Chivian focuses on the specific MDGs which impact on human health,[206] and argues that '[h]uman health is dependent on the biodiversity and the natural function of a healthy ecosystem.'[207] According to Chivian, biodiversity supports human life and promotes health by *inter alia* providing basic ecosystem services; providing medicines from plants, animals and microbes on land, in lakes and rivers, and in the oceans; helping in medical research; and supporting agriculture and marine food web.[208] Chivian also lists some empirical examples of the biodiversity-human health linkages in support of his argument that biodiversity conservation is necessary towards the achievement of the human health-related MDGs.[209]

Similarly, the Millennium Ecosystem Assessment Panel in their report state *inter alia* that changes in ecosystem services influence all components of human well-being

[202] *Op cit* note 6 at 13. For similar arguments, see Dilys Roe & Joanna Elliot 'Poverty reduction and biodiversity conservation: rebuilding the bridges' (April 2004) 38 (2) *Oryx* 137; Hazlewood et al *op cit* note 48 at 144; and Izabella Koziell & Charles I. McNeill 'Building on Hidden Opportunities to Achieve the MDGs: Poverty Reduction Through Conservation and Sustainable Use of Biodiversity' *Equator Initiative* WSSD Opinion Paper (2002).
[203] *Ibid*, at 15.
[204] *Ibid*, at 17.
[205] Eric Chivian 'Beyond Wildlife- Biodiversity and Human Health' in Roe (ed) *op cit* note 6 at 26.
[206] Note that MDG 4-7 concerns human health directly, while MDG 1 & 7 has indirect effects on human health.
[207] *Op cit* note 205.
[208] *Ibid*, at 26-27.
[209] *Ibid*, at 27-33.

including basic material needs for a good life, health, good social relations, security and freedom of choice.[210] The Panel further state that the degradation of ecosystem services poses a significant barrier to the achievement of the MDGs and the MDG targets for 2015.[211]

In addition to the above, some literature has sought to link the MDGs with existing human rights. This is the theme of the Center for Human Rights and Global Justice (CHRGJ) Conference Report.[212] The majority of the CHRGJ panellists recognise the link between the human rights and the MDGs by asserting that human rights are essential in achieving poverty reduction, while poverty reduction is essential in securing human rights.[213] A panellist, Professor Sach states that '[t]he convergence of the two sets of concerns extends beyond the simple definitional overlap. Human rights are instrumentally critical in ensuring empowerment, voice, access to social services, and equality before the law, and are therefore essential in achieving poverty reduction. At the same time, overcoming poverty is absolutely critical in securing civil and political rights, economic and social rights, and human security.… There is a tight link that goes in both directions: human rights support poverty reduction goals and poverty reduction supports the non-economic dimension of human rights.'[214] However, the Report does not expressly discuss the relationship between the MDGs and right to environment as most of the Report's references to human rights are confined to internationally recognised civil, political, and socio-economic rights.

Similarly, the United Nations Development Programme (UNDP) in its 2003 Human Development Report,[215] while focusing principally on socio-economic and cultural rights, as well as recognising the fact that full realisation of such rights requires more

[210] Millennium Ecosystem Assessment *Ecosystem & Human Well-Being: Synthesis* (Island Press, Washington DC, 2005) 50.
[211] *Ibid*, at 61.
[212] *Op* cit note 6. For a similar approach, see Painter *op cit* note 6 at 8-10; Selim Jahan *Human Rights-Based Approach to Poverty Reduction- Analytical Linkages, Practical Work and UNDP*, Paper presented at the High-Level Seminar under Global Partnership for Development on Right to Right to Development, UN Office of the High Commissioner on Human Rights, Geneva, 9-10 February 2004, p 2, available at http://www.undp.org/poverty/docs/HRPR.doc; and Philip Alston *A Human Rights Perspective on the Millennium Development Goals*, Paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development, at paras 50 & 70. Available at http://www.hurilink.org/tools/HRsPerspectives_on_the_MDGs--Alston.pdf.
[213] *Ibid*.
[214] *Ibid*, at 10-11-12; See also Painter *op cit* note 6 at 8-10; and UN Secretary-General MDG Report 2003 *op cit* note 62 at pp13-15.
[215] *Op cit* note 52.

than achieving the MDGs, states that '[a]chieving the goals will advance human rights. Each goal can be directly linked to economic, social and cultural rights enumerated in the Universal Declaration of Human rights (articles 22, 24, 25, 26) and other human right instruments.… The full realisation of [these] rights requires far more than achieving the [MDGs]. But achieving the goals is an important step towards that end.'[216]

This study differs from the above literature by expressly discussing the link between the achievement of the MDGs and realisation of the right to environment in Africa. It proposes that there is a substantively mutual linkage between the achievement of the MDGs and realisation of the right to environment in Africa.

(c) Normative character of the MDGs and their role in guiding or stimulating policy reform towards the realisation to the right to environment.

On the issue of the normative character of the MDGs, Nankani *et al* have suggested that the MDGs 'arguably have the status of international customary law.'[217] Echoing a similar sentiment, Joan Veon, Economist and UN watchdog, observes with respect to the Millennium Summit that this is the first time since 1945 that Heads of State have convened to set a programme of action to reform the UN. Veon therefore argues that because over 152 Heads of State signed the resulting Millennium Declaration, the Declaration and its goals have been 'automatically incorporate[d] into international law.'[218] In addition, Professor Alston in applying a slightly different form of Tomuschat's test to the MDGs,[219] as well as taking cognisance of the fact that

[216] *Ibid*. See also Professor Phillip Alston in CHRGJ Report op *cit* note 6 at 13.
[217] Gobind Nankani, John Page and Lindsay Judge, 'Human Rights and Poverty Reduction Strategies: Moving Towards Convergence?' in Philip Alston and Mary Robinson (eds.), Human Rights and Development: Towards Mutual Reinforcement (Oxford University Press, 2005) 496-497.
[218] Quoted in 'UN Millennium Declaration--"Mandate" for global governance' *Discerning the Times Digest* September 2000. Available at http://www.discerningtoday.org/un_Millennium_declaration.htm. For similar arguments, see Deborah K. Dunn & Gary Chartier 'Pursuing the Millennium Goals at the Grassroots: Selecting Development Projects Serving Rural Women in Sub-Saharan Africa' (2006) 15 UCLA Women's L.J. 71 (arguing that the endorsement of the MDGs by the UN's member states qualify the goals as official commitments that form, at least in broad terms, part of the legal framework of international human rights protections); and Smita Narula 'The Right to Food: Holding Global Actors Accountable Under International Law' (2006) 44 *Columbia Journal of Transnational Law* 691 at 789 (arguing that because of the universal participation of states in the preparation and adoption of the MDGs, the MDGs should be viewed as evidence of customary international law).
[219] Christian Tomuschat sought to depart from applying the traditional criteria in order to evaluate the customary status of human rights norms. Tomuschat argues that '[t]his list of rights and/or forbidden

'[g]overnments of all types have not only committed themselves to such goals, but have insisted on their viability and feasibility if the appropriate policies are put in place', argues that '[o]n the basis of such an analysis it is submitted then that it can plausibly be claimed that at least some of the MDGs reflect norms of customary international law.'[220]

This thesis departs from these arguments by stating that the MDGs have not yet attained the status of customary international law, and therefore, are not binding on State parties. The basis of this assertion is that while the thesis recognises that the behaviour of UN member States in unanimously adopting the MDGs at the Millennium Summit and subsequently reaffirming their commitments to the goals in other international forums, constitutes evidence of state practice,[221] it is doubtful if these commitments have been made with the requisite intention to be legally bound (*opinio juris*). This is because similar arguments with regard to customary status of the entire UDHR (a document having some similarities with the MDGs) and not to a limited range of its component rights, has been contested by many scholars, and also has not been widely endorsed by States.[222] This thesis therefore argues that it is doubtful that States which have traditionally refused to assume binding legal obligation with regard to the socio-economic rights in the UDHR, are willing to accept such obligation with regard to the MDGs which reflects most of these rights.[223] On Professor Alston's argument regarding the customary law status of some of the

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acts and activities', which in his view includes the right to life, the prohibition of torture, the protection of personal freedom, and the prohibition of racial discrimination, 'is not so much based on actual stock-taking of the relevant State practice but rather on deductive reasoning: if human life and physical integrity were not protected, the entire idea of a legal order would collapse.' See Alston *op cit* note 212 at para 38.

[220] *Ibid*, at paras 41-42.

[221] See Restatement (Third) of the Foreign Relations Law of the United States (1987), s 102. (Recognising collective state action as evidence of state practice).

[222] See Alston *op cit* note 212 at para 36; Richard B. Lillich 'The Growing Importance of Customary International Human Rights Law' (1995/1996) 25 *Georgia Journal of International and Comparative Law* 1 at 2-7; Hurst Hannum 'The Status of the Universal Declaration of Human Rights in National and International law' (1996) 25 *Georgia Journal of International and Comparative Law* 287 at 323-333 & 340; and Narula *op cit* note 218 at 780-781, & 793-795. At the other extremes, some States and scholars were unwilling to ascribe legal content to any of the Declaration's provisions per se, as well as some writers that continue to reject the relevance of the Universal Declaration to their own societies, because of the Declaration's purportedly Western bias. See Hannum *ibid*, at 333-334.

[223] For example, the United States have persistently refused to accord the status of fundamental rights to these socio-economic rights, while most developing nations have continued to whittle down the importance of these rights in their constitutional provisions by classifying them as non-justiciable entitlements. See Hannum *ibid*, at 348; and Dejo Olowu 'Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees' (2006) 69 *Saskatchewan L. Rev.* 39.

MDGs (MDGs 1-7), this thesis argues that since developed countries (actively collaborated in elaborating the goals) are not willing to accept a binding legal obligation with regard to MDG 8, it is doubtful that developing countries will agree to assume such obligation with regard to MDGs 1-7.[224] In essence, developing countries may not be willing to open themselves to global legal accountability unless there is a similar commitment on the part of developed countries.

Since the MDGs are contained in a declaration, which is regarded as 'soft' law, this thesis will benefit from the plethora of research on the normative nature of soft law instruments. Olivier states that the contents of soft instruments are usually phrased as policy objectives rather than legal obligations. Olivier further argues that states are not under any legal obligation to implement any specific actions set out by these instruments, and that their obligation lies at a moral or political level.[225] Similarly, Hunter *et al* state that a soft law can be used in defining the standards of good behaviour corresponding to what is nowadays to be expected from a well-governed state without having been necessarily consecrated as an in-force customary norm.[226] In essence, they are confirming Olivier's view that soft law imposes moral or political obligations. Applying this assertion to the facts of this study, this thesis recognises that the MDGs impose only moral and political obligations. However, Fukuda-Parr is of the opinion that the MDGs are more powerful tools than mere UN declarations as not only were the goals unanimously and universally adopted, but they also specify time limits and quantifiable outcomes, by which progress towards their implementation can be objectively measured and monitored. [227] The effect of these Fukuda-Parr argues, is that the MDGs have provided a framework for holding governments accountable to their MDGs obligations at local, national, and international levels. In essence, he is contending that the MDGs constitute a framework of accountability.[228] This thesis adopts this argument, and proposes that

[224] *CF* professor Alston argument that the limited scope of the MDGs when compared to the expansive nature of socio-economic rights in the UDHR, coupled with the fact that the MDGs have been affirmed, reiterated, and restated in ways and forms and with greater frequency and insistence than economic and social rights have ever been, that 'it can plausibly be claimed that at least some of the MDGs reflect norms of customary international law.' *Op cit* note 212 at 22, para 42.
[225] 'Enforcement of International Environmental Law' (2002) 9 *SAJELP* 151 at 156-157.
[226] *Op cit* note 10 at 254-255.
[227] Fukuda-Parr II *op cit* note 14.
[228] *Ibid*.

the normative importance of the MDGs lies in the fact that they constitute a framework for holding governments accountable to their MDG commitments.

On the role of the MDGs in guiding or stimulating policy reform internationally and nationally towards realising the right to environment in Africa, the thesis recognises that there is no direct literature on the topic. However, Mungoven is of the opinion that the utility and instrumentality of the MDGs as a powerful form of accountability and leverage is critical in helping human rights activism.[229] In essence, Mungoven is impliedly recognising the role of the MDGs as a framework of accountability in promoting the realisation of human rights. However, Mungoven did not elaborate on this assertion and whether he is referring to the right to environment is doubtful, as most of the human rights mentioned in the conference deliberations are mostly socio-economic and political rights. This thesis expressly argues that the role of the MDGs in guiding or stimulating policy reform towards realising this right in Africa is that as framework of accountability, they can be used to promote socio-economic reform and good governance, two ingredients that are essential in creating the enabling environment for tackling the political and socio-economic factors militating against the realisation of the right.

1.5 Methodology

This study is concerned primarily with exploring how the MDGs can guide or stimulate national and international policy reform towards the realisation of the right to environment in Africa. The units of analysis and units of observation in this study are the MDGs. Units of analysis refers to the 'WHAT of your study: what object, phenomenon, entity, process, or event you are interested in investigating.[230] The units of analysis in a study are typically also the units of observation.[231] The points of focus are the characteristics, orientations and actions of the objects being studied. [232] The points of focus in this study are therefore the MDG-inspired policies adopted for the achievement of sustainable development in Africa. Since the subjects of analysis in

[229] See Rory Mungoven in CHRGJ Conference Report *op cit* note 6.
[230] Earl Babbie & Johann Mouton *The Practice of Social Research* (Oxford University Press, 2001) 84.
[231] *Ibid*, at 85.
[232] *Ibid*, at 90-92.

this study implicate policy interventions, the study will adopt the unobtrusive or non-reactive research approach. An obtrusive research paradigm involves the researcher not intruding on the object of study.[233] Thus, instead of eliciting information directly from research subjects, unobtrusive research methods do not establish a direct relationship or interaction with the research subjects.[234] An unobtrusive research approach entails the use of unobtrusive method of data collection (found data, captured data, and retrieved data), and unobtrusive method of analysis (content analysis, analysing existing statistics, and historical/comparative analysis).[235]

This study makes use of content analysis methods. Content analysis methods may be applied to virtually any form of communication.[236] It analyses the content of texts or document such as speeches, annual reports, newspapers, letters, laws, policy documents and constitutions.[237] The term 'content' itself refers to words, meaning, pictures, symbols, themes or any message that can be communicated.[238] Content analysis is therefore best suited to the purpose of this study as the thesis needs to analyse laws and legislation to determine if the right to environment has been established; examine existing primary documents to determine if the right has been realised and factors responsible for non-realisation; analyse the Millennium Declaration, other post-MDGs responses such as the WSSP PoI, Monterrey Consensus and conference document, Millennium+5 Summit Outcome, letters and speeches relating to the MDGs, annual reports relating to the MDGs such the UN Secretary-General reports, and global and national MDGs reports, to determine the normative character of the MDGs as well as their role in guiding or stimulating reform; and finally, examine some policies that were inspired or influenced by the MDGs to determine how they can enhance the realisation of the right in Africa.

[233] *Ibid*, at 374. Note that both the quantitative, qualitative and participatory action research paradigms allow the researcher to intrude to some degree on the object of his or her study.
[234] *Ibid*.
[235] Other unobtrusive method of analysis include analysing existing statistics, and historical/comparative analysis. See Babbie & Mouton *ibid*, at 374-404.
[236] *Ibid*, at 383.
[237] *Ibid*. See also J. Mouton *How to Succeed in Your Master's and Doctoral Studies* (Van Schaik, Pretoria, 2001) 155.
[238] Mouton *ibid*.

The mode of reasoning in this study is principally inductive in nature.[239] Induction refers to 'the process by which conclusions are drawn from direct observation of empirical evidence." These conclusions are then fed into the development of theory.'[240] A study using inductive reasoning is not hypothesis-driven, instead theory is generated and built through the analysis of, and interaction with empirical data (facts).[241] The researcher looks for patterns in the data particularly relationship between variables.[242] Generalisations are usually sought from the specific to other, wider contexts as opposed to deductive research strategies.[243] In law, a good example of inductive reasoning is provided by the methodology underpinning the development of the law of contracts. As observed by Samuel, 'Roman law did not develop a general theory of contract; it thought in terms of specific contracts based on particular transactions such as sale, hire, pledge, and stipulation. Each specific contract had its own legal action and it was the empirical nature of the transaction – the sale, hire, deposit and so on – which acted as the *causa* of the contract.'[244] In essence, in order to determine liability, Roman jurists searched within the factual circumstances of the case in order to discover whether or not a remedy would be available and against whom.[245] Applied to this study, since the MDGs *stricto sensu* are not legally binding, an exploration into their role in guiding or stimulating national and international policy reform needs to take into cognisance the circumstances and manner in which the MDGs were adopted, policies inspired or influenced by the MDGs, as well as other post-MDG responses especially subsequent State practice.

However, the fact that the study recognises that the MDG *stricto sensu* are not legally binding implicates elements of deduction, thereby indicating that this study is not totally devoid of deductive reasoning.[246] This is due to the fact that arriving at such a conclusion, involves testing the MDGs against the axiomatic normative proposition that norms or goals contained in a declaration are not legally binding, unless they

[239] See *ibid*, at 156.
[240] Jonathan Grix *The foundations of Research* (Palgrave Macmillan, New York, 2004) 113. Quoting T. Landman *Issues and Methods in Comparative Politics. An Introduction* (Routledge, London & New York, 2000) 226.
[241] *Ibid*.
[242] *Ibid*
[243] *Ibid*. See also Mouton *op cit* note 237 at 156.
[244] G. Samuel *Epistemology and Method in Law* (Aldershot, Ashgate, 2002) 96.
[245] See *ibid*, at 96-104.
[246] For deductive methodology in law, see Samuel *ibid*, at 104-106.

have crystallised into 'hard law' by virtue of incorporation into a treaty or by becoming customary international law.[247] The fact that this study uses inductive reasoning and to certain extent, deductive reasoning should not be regarded as an absurdity as in reality, most research uses both induction and deduction as there is a necessary interplay between ideas and evidence in each research process.[248]

1.6 Research design

A research design is a plan or blueprint of how one intends conducting a research.[249] In determining an appropriate research design, one must focus on the kind of study being planned or results aimed at, research problem or question, and the kind of evidence that is required to address the research question adequately.[250] The research problem or question serves as the principal point of departure in determining the research design.[251] Babbie & Mouton list a typology of research designs based on the nature of questions that a particular piece of research seeks to respond to. They distinguish between empirical and non-empirical questions.[252] Regarding the former, they further distinguished between exploratory, descriptive, causal, evaluative, predictive and historical questions.[253] Resolving an empirical question requires having to 'collect new data about [real world] or …to analyse existing data.'[254]

The principal research questions of this study are as articulated above. They address a 'real-life' problem that is the issue of environmental degradation and non-realisation of the right to environment in Africa, and how the MDGs can help in guiding or stimulating policy reform towards addressing the root causes of the problem. By addressing a real-life problem, these questions are empirical in nature. Specifically, they fall under mostly exploratory questions as they help in exploring the role that the MDGs can play in guiding or stimulating policy reform at the national and

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[247] See *North Sea Continental Shelf Cases* (FRG/Denmark; FRG/Netherlands) (1969) I.C.J. Reports 3 at 44 (Judgment of Feb. 20); and *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.) (Merits) (1986) I.C.J. Reports 14 at 99-100 (Judgment of June 27).
[248] See Grix *op cit* note 240 at 114.
[249] Babbie & Mouton *op cit* note 230 at 74.
[250] *Ibid* at 75.
[251] *Ibid*.
[252] *Ibid.* An empirical question addresses 'a problem in World 1; a "real-life" problem', while non-empirical question is a 'question about "entities" in world 2.' Babbie & Mouton *ibid.*
[253] *Ibid*, at 76-77.
[254] *Ibid*.

international levels towards the realisation of the right to environment in Africa. Resolving an exploratory question usually generates the need for empirical research by either collecting new (primary) data or using existing (secondary) data.[255] The study tackles its research questions by using existing data (secondary empirical data). This can be seen from the fact that the study uses secondary empirical data in analysing the various policy, legal and institutional frameworks establishing this right in Africa; assessing the state of the environment in Africa, as well as analysing factors responsible for environmental degradation and non-realisation of the right in Africa; examining the relationship between the achievement of the MDGs and realisation of the right to environment in Africa; determining the content of the right to environment in Africa; discussing how the MDGs can guide or stimulate policy reform towards realising this right in Africa; and analysing some policies influenced by the MDGs to see how they can enhance poverty reduction and realisation of this right in Africa.

Flowing from the principal questions of this study, the purpose of this thesis is therefore exploratory. An exploratory research is conducted to 'explore a topic, or to provide a basic familiarity with that topic.'[256] It is typical when a researcher examines a new interest or when the subject of study itself is relatively new.[257] It usually lead to 'insight and comprehension rather than the collection of detailed, accurate, and replicable data…[and that] they are essential whenever a researcher is breaking new ground, and…can always yield new insight into a topic for research.'[258] Selltz *et al* emphasise three methods by means of which an exploratory research may be conducted:

(a) A review of the related social science and other pertinent literature;
(b) A survey of people who have practical experience of the problem to be studied; and
(c) An analysis of 'insight-stimulating' examples.[259]

[255] *Ibid*, at 76 & 78.
[256] *Ibid*.
[257] *Ibid*, at 79.
[258] *Ibid*, at 80.
[259] Cited in Babbie and Mouton *ibid*, at 80.

The first and third methods stipulated above are implicated in the method of data generation used in this study vis-à-vis literature review and analysis of existing data like legislation, policies, case laws and existing empirical studies.[260] Literature review and analysis of existing data in turn implicates unobtrusive method of data collection especially retrieved data. The main source of retrieved data used in this study is the internet particularly search engines such Google and its advanced version (Google scholar), and Westlaw.

1.7 Chapter breakdown

Chapter one is a discussion of basic issues such as background information relating to the aim and focus of the study, overview of concepts such as right to environment and MDGs, research questions, literature review, research methodology and design, and justification for the study. Chapter two examines the extent to which the right has been established in Africa by analysing the relevant regional human rights and environment regulatory frameworks and some selected national frameworks. The nature and scope of the right in Africa is also discussed in the process. Such examination is necessary as the MDGs cannot be used to realise a right which is strange to the continent. Chapter three examines the extent to which the right to environment is realised in Africa. This is very necessary as it helps in providing an insight into the role of the MDGs in the realisation of the right environment in Africa. In examining the extent to which the right has been realised in Africa, this thesis assesses the state of Africa's environment and on the basis of such assessment, concludes that environmental degradation has rendered the right illusory to average African. It further examines the factors responsible for environmental degradation and non-realisation of this right in Africa. For the purpose of this study, the thesis discusses such factors under three interrelated factors vis-à-vis poverty, lack of political will, and weak institutional capacity.

Chapter four discusses the relationship between the achievement of the MDGs and realisation of the right to environment in Africa. This entails discussing the content of

[260] For example, on existing empirical studies on the state of the environment in Africa, see United Nations Environment Programme *African Environment Outlook: Case Studies* (UNEP, Earth Print, 2004); and AEO 2 *op cit* note 1.

the right as well as how the individual goals link and complement the right and vice versa. The motivation behind such discussion is to show that the two concepts are inter-linked and complementary. Thus, African leaders and other bodies interested in Africa's development should use the opportunity presented by the MDGs, to protect the environment and enhance the realisation of the right as an integral part of their broader development agenda focused on poverty reduction and sustainable development.

The main focus in chapter five is how the MDGs can guide or stimulate national and international policy reform aimed at tackling the underlying causes of environmental degradation and non-realisation of the right to environment. This involves discussing the normative character of the MDGs, role of the MDGs as a framework of accountability in guiding and stimulating policy reform, and the meaning of good governance as it relates to the protection of the environment and realisation of the right to environment in Africa. Chapter six is a continuation of chapter five. It analyses the policies influenced by the MDGs to determine how they can contribute to environmental protection and realisation of the right in Africa. Chapter seven concludes the study with recommendations on how African leaders and the international community can use the opportunity presented by the MDGs to enhance environmental protection and realisation of the right to environment in Africa.

1.8 Justification for study

This study is motivated by the need to find a solution to the problem of environmental degradation and attendant non-realisation of the right to environment, an established human right in Africa. It recognises that the problem of environmental degradation in Africa is not lack of regulatory frameworks, but involves wider issues that go beyond Africa's borders. It therefore takes a holistic approach towards tackling the problem of environmental degradation in Africa. In taking this approach, this thesis in essence is advocating that problems of environmental degradation and non-realisation of the right to environment do not *simpliciter* involve issues such as lack of *locus standi*,

lack of access to environmental information, and lack of access to environmental justice. While these issues are relevant, this study proposes that they fall under wider socio-economic and political factors responsible for environmental degradation in Africa such as poverty, weak institutional capacity, and lack of political will to enforce existing or adopt new environmental regulations. An attendant consequence of taking a holistic approach to a legal problem is that any solution proposed must be comprehensive enough to tackle factors causing problem. Hence, the argument in this study that the MDGs provide a framework of accountability which can be used in promoting good governance and socio-economic reform, two ingredients that are essential in creating the enabling environment for tackling the underlying causes of environmental degradation and subsequent non-realisation of the right in Africa.

The topic chosen for this study is thus timely and appropriate insofar as an attempt is made to find a fresh perspective as well as holistic approach to tackling the problem of environmental degradation and non-realisation of the right to environment in Africa. The study recognises poverty as the main cause of environmental degradation in Africa and thus, attempts to link the MDGs which are principally a poverty reduction programme with the promotion of environmental protection. In addition, by promoting the MDGs as a framework that can help in creating the enabling environment for tackling the underlying causes of environmental degradation, this study attempts to use the massive political commitments and consciousness generated by the goals in repositioning environmental protection in the global Agenda. Such repositioning is necessary as development and poverty eradication have more recently taken centre stage in the international arena.[261] Thus, instead of following some writers in bemoaning the supremacy of development and poverty reduction in the world stage,[262] the analysis in this study shows that the momentum and political commitments generated by the MDGs, can be used positively by environmentalists and other persons or bodies interested in Africa's sustainable development. Furthermore, this study contributes to the understanding of the relationship between poverty reduction and the protection environment, by arguing that one cannot be achieved independently of the other, especially in relation to Africa, where most of

[261] See Paolo Galizzi 'From Stockholm to New York, via Rio and Johannesburg: Has the Environment Lost its Way on the Global Agenda? (2006) 29 *Fordham Int'l L.J.* 952.
[262] See Galizzi *ibid*, at 990-1007.

the population are rural-based with attendant high dependence on environmental resources.

This study constitutes an original contribution to knowledge. It is the first formal analysis of the role that the MDGs can play in guiding or stimulating national and international policy reform towards the realisation of the right to environment in Africa. However, this thesis is not the first study to identify the normative importance of the MDGs as there exist two scholarly articles by Fukuda-Parr asserting that the MDGs constitute a framework of accountability.[263] Despite this, this study is still original as it takes the assertion further by analysing the exact nature of this accountability framework, and the obligation it imposes. It is also the first formal study that expressly states that the MDGs, as a framework of accountability, can be used to promote socio-economic reform and good governance. Other areas of originality in the study relates to determining the meaning, nature and scope of the right to environment in Africa; the content of the right; factors responsible for environmental degradation in Africa; and nature of the relationship between the MDGs and the right to environment in Africa. On the latter, it should be noted that while there are some scholarly articles on the link between environmental protection and achievement of the MDGs in Africa, none examine such linkage from the perspective of the right to environment as is done in this study. This is very important, as while it can be argued that the right is inherent in environmental conservation, it cannot be assumed that all environmental conservation efforts inevitably lead to the realisation of the right in Africa.

[263] *Op cit* note 13.

CHAPTER TWO

RIGHT TO ENVIRONMENT IN AFRICA: LEGAL, POLICY AND INSTITUTIONAL FRAMEWORKS

2.1 Introduction

In the introduction to this thesis, it was stated that the aim of this study is to analyse the role of the MDGs in guiding or stimulating policy reform nationally and internationally towards the realisation of the right to environment in Africa. This raises the questions vis-à-vis whether there is an established human right to environment in Africa, and the extent to which the right has been realised in Africa. This chapter tackles the first question. In tackling this question, this thesis also determines whether the 'framing' of the right is connected to achievement of poverty reduction and sustainable development. The term 'establishment' as used in this thesis denotes the extent to which legal, policy, and institutional frameworks for the protection of this right have been adopted at the regional, sub regional and national levels in Africa. Resolving this issue is pertinent due to the fact that the MDGs cannot provide a framework for the realisation of a right that is strange to Africa. This thesis submits that this right is established. This is apparent from the fact that legal, policy and institutional frameworks establishing this right and protecting the environment abound at the regional, sub-regional and national levels.

On the question of whether the framing of the right is connected to the achievement of poverty reduction and sustainable development, resolving the issue is very important because if such connection exists, then efforts geared towards the realisation of the right in Africa can help in the achievement of poverty reduction and sustainable development objectives including the implementation of MDGs. In this regard, it is further submitted that such connection does exist as the legal, policy and institutional frameworks protecting the environment and establishing this right in Africa impliedly, and to a certain extent, expressly recognise the linkage between environmental protection and poverty reduction.[1] This can be seen from the fact that irrespective of

[1] For example, the African Charter on Human and Peoples' Rights links the right to socio-economic development while the African Convention on the Conservation of Nature and Natural Resources

whether these frameworks are environmental or human right instruments, they were enacted or adopted by African countries within the context of poverty reduction and sustainable development.[2] Thus, it can be argued that Africa's attempt to conserve the environment (including the provision of the human right to environment) whether at the regional or national levels, is overtly anthropocentric as African leaders subscribe to the view that environmental conservation must not be inimical to, but should contribute to the overall socio-economic development of human beings. This tone was set very early in the first five preambular paragraphs of the African Convention on the Conservation of Nature and Natural Resources (Algiers Convention),[3] which provides:

> 'FULLY CONSCIOUS that soil, water, flora and faunal resources constitute a capital of vital importance to mankind;
> CONFIRMING, as we accepted upon declaring our adherence to the Charter of the Organisation of African Unity, that we know that it is our duty "to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour";
> FULLY CONSCIOUS of the ever-growing importance of natural resources from an economic, nutritional, scientific, educational, cultural and aesthetic point of view;
> CONSCIOUS of the dangers which threaten some of these irreplaceable assets;
> ACCEPTING that the utilization of the natural resources must aim at satisfying the needs of man according to the carrying capacity of the environment.'[4]

2.2 Historical perspective

However, environmental protection in Africa did not start with the establishment of these formal regulatory frameworks, as the protection of the environment was an

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obligates the contracting parties to ensure conservation, utilisation and development of environmental resources with due regard to the best interest including the socio-economic development of the people. In addition, most of the environmental policy documents at the regional level like the NEPAD environmental Action Plan expressly recognise that the environment must be conserved in such a way that it accelerates poverty reduction and sustainable development.

[2] For example, on the contribution of the African Charter on human and People's Rights to sustainable development in the region, see Fatsah Ouguerouz *African Charter on Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (New York: Kluwer Law International, 2003) 366-370, & 778-799; and U. Oji Umozurike *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, 1997) 127-130.

[3] CAB/LEG/24.1. Available at http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention_Nature%20&%20Natural_Resources.pdf.

[4] *Ibid.*

integral part of the religious, cultural and social life of Africans before their colonisation and subsequent independence. In most rural parts of Africa, practices aimed at the protection of the environment that have stretched back many generations still subsist. These include designation of sacred forests, groves, rivers, and animals, designated market periods and locations, designated bathing and laundry places in streams and rivers and prohibition of defecating or urinating in village amenities like roads, rivers and streams.[5] Infringements of these practices are generally regarded as taboo, and are usually met with strict sanctions like payment of fines, appeasement of the gods through sacrifices and in extreme cases, excommunication.[6]

These pre-colonial conservation practices were based on the traditional African notion of the unity of humanity and nature, and therefore, emphasized conservation and sustainable utilisation of natural resources by man.[7] These practices to a certain extent, account for the pristine condition of the natural environment in Africa before colonization.[8] As observed by Murombezi, '…by the time the "great adventurers'… in the mould of Henry Morton Stanley, or the missionaries in the form of the Moffats and Livingstone arrived in the region, they could report that the region was teeming with wildlife, that the forest were dense and unscathed, and that the landscape was generally pristine.'[9] These practices still exist in varied forms in modern Africa and have been responsible for the wholesome environment that can be found in some rural areas in Africa.[10] In addition, they guarantee that the inhabitants of such villages

[5] In the author's rural town, Ukpor in Nnewi South Local Government Area of Anambra State in Nigeria, the small python and green snakes are regarded as sacred animals dedicated to the gods of the land. In addition, the 'Ubu' river that flows through Ukpor and other neighbouring towns is generally regarded as sacred. The killing of these animals for whatever purpose or fishing in the river is strictly prohibited. See also Achoka Awori 'African Perspective on Environment and Development' *Voice From Africa* UN-NGLS, available at http//www.unngls.org/documents/publicastions.en/voices.africa/number5/vfa5.04.thm#top; and James C. Murombezi *Pre-colonial and colonial conservation practices in southern Africa and their legacy today* (IUCN, February, 2003) 2, available at http://www.iucn.org/themes/ceesp/Publications/TILCEPA/cca-jmurumbed=1.pdf.

[6] See G.O. Anoliefo, O.S. Isikhuemhen & N.R. Ochije 'Environmental Implications of the Erosion of Cultural Taboo Practices in Awka-South Local Government Area of Anambra State, Nigeria: 1. Forest, Trees, and Water Resource Preservation' (2003) 16 *Journal of Agricultural and environmental Ethics* 281 & 289-293. Available at http://www.springerlink.com/content/k3n1712588478382/fulltext.pdf.

[7] Awori *op cit* note 5; and Murombezi *op cit* note 5 at 4.

[8] There is the argument that in the areas of wild life, that because of technological limitations, indigenous hunter-gatherers did not adversely affect the population of big game. See Murombezi *op cit* note 5 at 1.

[9] *Ibid.*

[10] For example, in my village Amihe Ukpor, the 'Onyeukwu' forest, a pristine old growth forest dedicated to the principal deity of the village 'Onyeukwu' is still practically untouched. While the

would enjoy a healthy or wholesome environment. It may be argued that while the express recognition of the right to environment is a recent development, what the right embodies, the right of every African to an environment that is not harmful to their health and well-being, is implicit in these ancient conservation and management practices.

However, the ability of these ancient conservation practices in protecting Africa's natural environment has been weakened by colonisation, independence, and the subsequent massive drive for economic development in Africa.[11] It should be noted that the efficacy of these practices is heavily dependent on the inhabitants of these rural towns and villages existing as a homogenous unit. With colonisation, came the transformation of hitherto rural towns into urban areas. It also brought about migration to urban areas in search of better income. The subsequent independence of African States did not alter this trend. The development of urban areas and the subsequent rural-urban migration contributed to cultural disintegration of both urban and rural areas with adverse consequence for the environment, as their traditions that honour nature and maintain the man/nature balance were gradually eroded.[12] In addition, Christianity, which is closely associated with colonisation, introduced a system of beliefs that questioned the religious basis of these practices and their enforcement institutions as their sustaining system of beliefs, taboos, myths and totems were branded as 'ungodly'.[13]

Furthermore, colonialism led to the establishment of formal administrative structures that took over the administration of Africa's natural resources from the traditional system. However, such administrations were meant principally to serve the interest of foreign merchants and their home governments in the exploitation of Africa's natural

villagers are allowed to collect firewood and other non-timber products from the forest, the felling of timber is strictly prohibited.

[11] See Richard Griggs 'The Cultural Dimensions of Environmental Decision-Making' *Independent Projects Trust (South Africa)*, available at http://www.gdrc.org/decision/edm-culture.html; and Daniel W. Bromley *Environment and Economy: Property Rights and Public Policy* (Blackwell, Oxford, 1991) 106 & 110- 128.

[12] See African Conservancy *The Environmental and Cultural Disintegration of Africa*, available at http://www.africanconservancy.org/about/documents/Problem_1206.pdf; and Anoliefo et al *op cit* note 6 at 282-283 & 285.

[13] See Murombezi *op cit* note 5 at 1.

resources and not in their sustainable use and management.[14] As observed by Boahen '[the] main raison d'etre [of colonialism] was the ruthless exploitation of human and material resources of the African continent to the advantage of the owners and shareholders of expatriate companies and metropolitan governments and their manufacturing and industrial firms.'[15] Thus, the booming trade in wildlife products led to the hunting of Africa's wildlife almost to the brink of extinction to satisfy the western world's exotic taste for ivory, luxury goods and other non-essential psychosocial desires.[16] In addition, Africa's forests were indiscriminately decimated to cater for timber needs of an industrialising Europe, while extractive industries were established for the mining of Africa's precious metals for export to Europe.[17]

The colonial governments did make efforts to arrest the rapid degradation of the environment by promulgating environmental regulations at the regional and national levels. However, these regulations were sectoral as they addressed only specific natural resources valuable to the colonial administrations.[18] Also, they were mostly 'use-oriented' as their specific focus is on the allocation and exploitation of natural resources rather than management.[19] For example, in the area of wildlife conservation, their efforts were limited to the preservation of game stocks that are increasingly being depleted at an alarming rate in order to guarantee continuing access to such species by elite white hunters.[20] For environmental issues other than natural resources conservation, the colonial administrations took a rudimentary approach to such issues by treating them as merely involving environmental sanitation or purely a health problem.[21] Thus, for complex environmental issues like poisonous or hazardous

[14] See John Agbonifo 'The Colonial Origin and Perpetuation of Environmental Pollution in the Postcolonial Nigerian State', at pp4-5. Available at http://lilt.ilstu.edu/critique/fall2002docs/jagbonifo.pdf.
[15] A. A. Boahen *African Perspective on Colonialism* (The Johns Hopkins University Press, Baltimore, 1987). Quoted in Agbonifo *ibid*.
[16] See Awori *op cit* note 5.
[17] *Ibid*.
[18] For example, the 1933 London Convention (Convention Relative to the Preservation of Fauna and Flora in their Natural State) adopted by Africa's colonial masters and which entered into force on 14 January 1936, has as its main objective –the preservation of plants and animal species that are valuable and popular with trophy hunters.
[19] See D. Bondi Ogolla 'Environmental Law in Africa: Status and Trends' (October 1995) *International Business Lawyer*. Cited in International Union for Conservation of Nature (IUCN) *An Introduction to the African Convention on the Conservation of Nature and Natural Resources* IUCN Environmental Policy and Law Paper No. 56 (2004) 1.
[20] See Murombezi *op cit* note 5 at 6-11.
[21] *Cf* E. O. Akanki 'Air Pollution Control Law' in J. A. Omotola (ed.) *Environmental Law in Nigeria Including Compensation* (Faculty of Law, University of Lagos, 1990) 202.

wastes emanating from the activities of transnational companies that pollute the air, water and land, there were little or no legislative efforts by the colonial administration to control them.[22] As observed by Feris with regard to the asbestos crisis in South Africa, '[t]he lack of safety standards in mining operations and neglect of the then government to regulate the industry meant that pollution of the environment inevitably occurred and the exposure to asbestos had dire results on both the workforce and the surrounding communities.'[23]

The 1950s and 1960s marked the granting of independence to the colonised African States. Due to the economic underdevelopment of these States, their most important priority was seen to be economic development.[24] They undertook the realisation of this objective without adequate consideration for the environment as new and heavy industries and industrial complexes were established, and large areas of forest cleared to establish intensive agriculture, industries, markets, as well as houses for the teeming urban population.[25] In addition, in their bid to earn much needed internal and external revenue, concessions were granted to companies for timber logging in rural and sometimes sacred forest, while mining and drilling licences were issued to companies without adequate consideration of the environmental and cultural impacts on the rural communities where usually most of the crude oil and other minerals are situated.[26] As aptly observed by Anago with regard to the environmental consequence of Nigeria's earlier industrialisation drive:

> '[t]hese industrial activities, with their potentials for environmental degradation and pollution were carried out in an uncontrolled manner, leaving a legacy of: [d]eterioration of health quality and generation of health hazards, [d]estruction of flora and fauna, [p]ollution of water resources, [a]ir and noise pollution, [d]estruction of traditional economic infrastructures within

[22] See Agbonifo *op cit* note 14 at 6; L. Feris 'The Asbestos Crisis-the Need for Strict Liability for Environmental Damage' in Robyn Stein (ed) *Lecture Mimeograph: Environmental Law* Part B (University of Witwatersrand, 2004) 859 at 862; and Raewyn Peart & Jessica Wilson 'Environmental Policy-making in the New South Africa' (1998) 5 *SAJELP* 237 at 238.
[23] *Ibid*, at 860.
[24] See Shadrack W. Nasong'o & Wilfred N. Gabsa 'Environmental Policy and Politics of Ecologism in Cameroon and Kenya', at pp 76 & 89. Available at http://www.jsdafrica.com/Jsda/Fallwinter2000/articlespdf/ARCEnvironmental%20Policy%20and%20the%20Politics%20of%20Ecologism.pdf.
[25] *Ibid*, at 76-77. See also Anoliefo et al *op cit* note 6 at 286; and Ifeanyi Anago *Environmental Assessment as a Tool for Sustainable Development: The Nigerian Experience* FIG XXII International Congress, Washington D.C. USA, APRIL 19-26, 2002, pp 2-3. Available at http://www.fig.net/pub/fig_2002/Ts10-3/TS10_3_anago.pdf.
[26] See *ibid*. See also IUCN *op cit* note 19; and Bromley *op cit* note 11 at 128-131.

> communities hosting some of these high powered investments. Policies aimed at integrating development programmes with environmental issues at planning stage were non-existent. Governments focus was maximum exploitation of natural resources for rapid development with scant regard for resource conservation and sustainability.'[27]

This scant regard for the environment was also evident at the regional level as the Charter of the now defunct Organisation of African Unity (OAU) formed by newly independent African States on 25 May 1963, made no express reference to environmental protection.[28] What could be construed as implied references to environmental protection can be seen in the third preambular paragraph of the Charter that speaks of the duty of African leaders to 'harness the natural and human resources of our continent for the total advancement of our peoples in all spheres of human endeavours'[29] and the objective of the OAU to coordinate and intensify their cooperation and efforts to 'achieve a better life for the peoples of Africa.'[30] The OAU sought to change this state of affairs in 1968 by adopting the Algiers Convention,[31] which is the first comprehensive regional environmental convention, in an attempt to address Africa's environmental concerns.[32] The Convention covers a wide range of environmental issues such as soil, water, fauna and flora, protected species, traffic in specimens and trophies, and conservation areas. Most notably, it moved away from the 'use-oriented' colonial notion of nature conservation, and introduced innovative approaches such as promoting the conservation and rational use of natural resources for the benefit of present and future generations, as well as emphasizing the principle of common responsibility for environmental management by African states.[33] However, the adoption of the Convention did not have the anticipated effects of stimulating further environmental developments either at the regional or national

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[27] *Op cit* note 25 at 4. See also Nasong'o & Gabsa *op cit* note 24 at 80-81.

[28] It can be argued African leaders at that point in time did not see environmental protection as meriting their attention in view of their economic backwardness and the fact that most of Africa was still under colonialism.

[29] See the Preamble, Organisation of African Unity (OAU) Charter. Available at http://www.sahistory.org.za/pages/specialprojects/african-union/charter.htm.

[30] *ibid*, at art iii (3). See also Quguerouz *op cit* note 2 at 364.

[31] *Supra* note 3.

[32] This Convention has been described as the 'most comprehensive multilateral treaty for the conservation of nature yet negotiated.' See S. Lyster *International Wildlife Law* (1985) 115. It should be noted that before the Convention, there are other conventions with specific aims like the Convention of the African Migratory Locust Organisation, adopted by 22 African States on 25 May 1962 in Mali and entered into force on 13 April 1963; and the Phyto-Sanitary Convention for Africa, adopted at Kinshasa (Congo DRC) on 13 September 1967, (not yet in force).

[33] See IUCN *op cit* note 19 at 4.

levels in Africa, where most nations until recently, lacked comprehensive environmental regulatory framework.[34]

The late 1980 and 1990s witnessed an increase in environmental consciousness on the part of African leaders, as they became increasingly aware of the actual and potential negative effects of persistent degradation of the environment and natural resources on human health and well-being.[35] Several factors were responsible for this increase in environmental consciousness. These include the 1972 United Nations on the Human Environment (UNCHE) and subsequent 1992 United Nations Conference on Environment and Development (UNCED), that triggered heightened global activity in the area of environmental awareness and management;[36] the menace of toxic waste dumping in Africa evidenced by the dumping of toxic waste in 1988 at Koko, Nigeria, and recently in Cote d'Ivoire in 2006;[37] and with reference to South Africa, the abolition of the apartheid policy and regime that have had adverse environmental consequences.[38] The increase in environmental consciousness among African leaders led to the establishment of legal, institutional and policy frameworks for the protection of the environment at the regional, sub-regional and national levels. It will be instructive to examine these frameworks in details.

2.3 Regional regulatory frameworks

This section discusses the regional regulatory frameworks that establish the right to environment in Africa. The focus will be on the legal, policy and institutional

[34] See Morne van der Linde 'African Responses to Environmental Protection' (2002) 35 *CILSA* 99 at 101; Nasong'o & Gabsa *op cit* note 24 at 86-87; Yemi Osibanjo 'Some Public Law Considerations in Environmental Protection' in Omotola (ed.) *op cit* note 21 at 129; O.A. Bowen 'The Role of Private Citizens in the Enforcement of Environmental Laws' in Omotola *op cit* note 21 at 153; Akanki *op cit* note 21 at 202; and Jennifer A. Storm 'South Africa's New Environmental Policies: Making Green the New Dominant Color' (1997) 9 *Georgetown Int'l Envtl. L. Rev.* 641 at 644.

[35] See van der Linde *ibid*, at 101-102; Nasong'o & Gabsa *op cit* note 24 at 78-80 &90-91; and IUCN *op cit* note 19 at 1-2.

[36] See IUCN *ibid*, at 1; Nasong'o & Gabsa *ibid*, at 87; and Michael Ochieng Odhiambo 'Legal and Institutional Constraints to Public Interest Litigation as a Mechanism for the Enforcement of Environmental Rights and Duties in Kenya' *INECE Conference Proceedings Volume 2*, Fifth International Conference on Environmental Compliance and Enforcement 16-20 November 1998, Monterey, California, USA., 265 at 266, available at http://www.inece.org/5thvol2/odhiambo.pdf.

[37] See van der Linde *op cit* note 34 at 101-102; and K. M. Mowoe 'Quality of Life and Environmental Pollution and Protection' in Omotola (ed) *op cit* note 21 at 181.

[38] See Peart & Wilson *op cit* note 22 at 238-242; and Phia Steyn 'The Lingering Environmental Impact of Repressive Governance: The Environmental Legacy of the Apartheid Era for the New South Africa' (December 2005) 2 (3) *Globalizations* 391 at 392-400.

frameworks adopted or instituted at the regional level for the protection of the right in Africa.

2.3.1 Legal and policy frameworks.[39]

(a) African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights which is the foremost human rights instrument in Africa was adopted by African Heads of States and government during the eighteenth ordinary assembly of the defunct Organisation of African Unity (OAU, now replaced by the African Union (AU) in 27 June 1981, at Nairobi, Kenya.[40] The Charter presently enjoys region-wide ratification. It was adopted to promote and protect human and peoples' rights and freedoms in a continent where human rights violations are the norm.[41] As observed by Ouguergouz, the impetus for the adoption of the Charter 'was a series of events in the continent of Africa itself which lead directly to the decision of African rulers to lay the foundations for regional human rights legislation. The focusing of international public opinion on the, to say the least, singular conduct of some of their colleagues meant that African leaders could no longer remain indifferent as they saw Africa's image in the world being tarnished still further.'[42]

The Charter is innovative and different from existing human rights instruments as it embodies Africa's perception of human rights.[43] The aim of the African experts who drafted the Charter was to create an instrument that would be based on African

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[39] For the policy frameworks, the important document is the Action Plan of the Environment Initiative of the New Partnership for Africa's Development (NEPAD-EAP), which was adopted by the Summit of African Union in July 2003 at Maputo, Mozambique. However, NEPAD-EAP makes no express reference to the right to environment. Its importance lies in the fact that its implementation is vital to the realisation of this right in Africa as it aims at improving environmental conditions in Africa, in order to contribute to the achievement of economic growth and poverty eradication; and to build Africa's capacity to implement regional and international environmental agreements, as well as to effectively address the African environmental challenges within the overall context of the implementation of NEPAD. See New Partnership for Africa's Development (NEPAD) *Action Plan of the Environment Initiative of the New Partnership for Africa's development* (June 2003), at para 38.

[40] OAU Doc.CAB/LEG/76/3 rev.5, 21 *ILM* 58 (1982), entered into force 21 October 1986. (Hereinafter African Charter).

[41] See Ouguergouz *op cit* note 2 at 37

[42] *Ibid.*

[43] *Ibid*, at 41-42. See also Rachel Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 10.

traditional philosophy and responsiveness to the real needs of Africa.[44] The most important of such needs was identified as poverty reduction and achievement of socio-economic development in the region.[45] To achieve this purpose, the Charter provides for extensive civil and political rights, as well as socio-economic and cultural rights. These rights are essential to the achievement of poverty reduction objectives including the MDGs, and promotion of human dignity as they ensure empowerment, voice, access to social services, and equality before the law.[46] Most importantly, the Charter recognises that an individual can only enjoy his dignity if he enjoys not only his civil and political rights, also his socio-economic and cultural rights, and therefore, places both sets of rights on the same pedestal by treating them as indivisible, interlinked and mutually reinforcing.[47] Such mutual reinforcements create 'synergies that contribute to poor people securing their rights, enhancing their human capabilities and escaping from poverty.'[48] The Charter also incorporates peoples' rights or the so-called 'rights of solidarity' as well as the concept of duties of the individual.[49] With respect to the right to environment, the Charter is the first binding albeit regional instrument to expressly embody this right as outlined below.

[44] This is reflected in the fourth and fifth preambular paragraphs of the Charter which provide that '[r]eaffirming the pledge they solemnly made in Article 2 of the said [OAU] Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa….'; and '[t]aking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights.' The tone for this underlying philosophy was laid down by the late President Leopold Senghor in his opening address to the meeting of the African experts held in Dakar, Senegal, from 28 November to 8 December 1979. In his address, he urged the experts to 'use their imagination and draw inspiration from African traditions, keeping in mind the values of civilisation and the real needs of Africa'. See Speech by His Excellence Leopold Sedar Senghor, President of the Republic of Senegal, OAU Doc. CAB/LEG/67/5.

[45] See Senghor's opening address *ibid.* See also the observation of the discussion leader in *Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa*, Dar es Salaam, United Republic of Tanzania, 23 October- 5 November 1973, UN Doc. ST/TAO/HR/48, at p.22, para iii.

[46] See United Nations Development Programme (UNDP) *Human Development Report: Human Rights and Human Development* (UNDP, 2000) 74-77, (hereinafter HDR 2000); and Professor Jeffery Sach in Center for Human Rights and Global Justice *Human Right Perspective on the Millennium Development Goals: Conference Report* (New York: NYU School of Law, 2003) 10-11. Available at http://www.nyuhr.org/images/NYUCHRGJMDGREPORT2003.pdf, (hereinafter CHRGJ Conference Report).

[47] See para 7, preamble to the African Charter *supra* note 40. See also Ouguergouz *op cit* note 2 at 13-14; and Umozurike *op cit* note 2 at 41-42.

[48] HDR 2000 *op cit* note 45 at 73. (Hereinafter HDR 2000).

[49] See Ouguerouz *ibid*, at 57-58; and Murray *op cit* note 42.

(i) Right to a generally satisfactory environment (Article 24)

Article 24 of the Charter provides that 'All peoples shall have the right to a general satisfactory environment favourable to their development.' The inclusion of this novel right in the Charter is an acknowledgement by its framers of the importance of the right to environment to Africa's socio-economic development as well as the realisation of other human rights in Africa. This can be seen from the fact that the right aims to promote an environment of such quality that is favourable *to the development of African people*. As observed by Ouguergouz:

> 'For a great many African peoples, these various aspects of the problem of the natural environment are of vital importance. For them as others, a "general satisfactory environment favourable to the development" also means a quality environment: in other words, relatively unpolluted air and water, the protection of the flora and fauna which are particularly important as they sometimes form an integral part of the traditional way – food and medicine for example – of certain African people.'[50]

However, the right as contained in the Charter is vague and ambiguous with regard to its meaning and scope.[51] This vagueness can be seen from the fact that the Charter did not give any clear indication of the meaning of the terms 'satisfactory' and 'environment' used in framing the right. Nevertheless, it can be argued that the term 'environment' refer to both the natural environment comprising living (biodiversity or ecosystem), and non-living or man-made components of the natural world, as the Charter envisages *a general satisfactory environment favourable* to the development of African people.[52] Using such expansive interpretation enables not only persons whose access to streams, rivers, land and clean air has been impeded by environmental degradation but also those whose enjoyment or access to their homes and other buildings, as well as shrines, sacred groves and other cultural monuments, to rely on the provisions of section 24 of the African Charter for appropriate relief.[53]

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[50] *Op cit* note 2 at 364.

[51] It has been argued that such ambiguity is symptomatic of the vague and laconic way in which much of the Charter is drafted. See Robin Churchill 'Environmental Rights in Existing Human Rights Treaties' in Alan Boyle & Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Oxford University press, 1998) 90 at 106. See also van der Linde op *cit* note 34 at 106.

[52] Other meaning of the term 'environment' includes setting, situation, background and location. See chapter one of this thesis at pp20-22; and Ouguergouz *op cit* note 2 at 361.

[53] It appears that courts in South Africa subscribe to an expansive interpretation of the term 'environment', and thus, are willing to uphold this right where it can be proved that the non-natural

As aptly suggested by Jan Glazewski with regard to the interpretation of the term 'environment' under section 24 of the South African Constitution,[54] 'the term [should] be broadly interpreted to include not only our relationship with natural resources but also our cultural heritage as well as the urban environment.'[55]

In addition, the term 'satisfactory' is ambiguous as it can refer to clean, adequate, acceptable, reasonable, suitable, fitting, pollution-free, healthy or pleasing when qualifying the right to environment as used in the Charter. The ambiguity of these qualifying terms may make the interpretation of the right by the court, environmentalist and human rights scholars difficult.[56] On the other hand, as argued by van der Linde, '…it could possibly assist positively in that it allows for a wide and more flexible interpretation.'[57] The effect of this ambiguity is that the meaning of the term 'satisfactory' is now a matter of subjective value judgement.[58] Flowing from the above, it is submitted that the best way out of this definitional muddle is for the courts, environmentalist and human rights scholars in each specific context to adopt such meaning of the term 'satisfactory' that will as much as possible give effect to the intention of the Charter's framers, that is, guaranteeing for average Africans, the right to an environment of such a nature that will ensure their overall economic, social and cultural development.[59]

Such interpretation will make it possible to widen the scope of the right to cover any instance of environmental degradation that is inimical to socio-economic development of African citizens and not be limited only to pollution, dumping of toxic wastes and

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aspects of the environment are affected by pollution and other environmental degradation. See *Minister of Public Works and others v Kyalami Ridge Environmental Association and another* 2001 (3) SA 1151 at 1178 C-J, (the Constitutional Court held that the Respondents (Kyalami residents) have not shown as a probability that the action of the government in establishing a camp for displaced people at the premises of the Leeuwkop prison will have a significant effect on the environment); and *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd and others* 2004 (2) SA 393 at 411J-413D, (although the allegation that the 1st respondent's polluting activities have adverse effects *inter alia* on the materials in the premises of the first defendant was not proved).

[54] See Constitution of the Republic of South Africa Act, 1996.

[55] Jan Glazewski *Environmental Law in South Africa* 2ed (Lexis Nexis Butterworth, Durban, 2005) 76.

[56] See Churchill *op cit* note 51 at 106; and van der Morne *op cit* note 34 at 106.

[57] *Ibid.* See also Morne van der Linde & Lirette Louw 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the *SERAC* Communication' (2003) 3 *African HRLJ* 167 at 174.

[58] Alan Boyle 'The Role of International Human Rights Law in the Protection of the Environment.' In Boyle & Anderson (eds) *op cit* note 51 at 50.

[59] See *ibid*, at 50-51.

wastes generally.[60] This is reflected in the decision of the African Commission on Human and Peoples' Rights (African Commission) in *Social and Economic Rights Action Center (SERAC) and another v Federal Republic of Nigeria*,[61] where without expressly clarifying the meaning of the term 'satisfactory', the Commission's view of the meaning of the right to a satisfactory environment can be gleaned to include *inter alia* an environment free from pollution and ecological degradation, and environment of such quality that can secure an ecologically sustainable development and use of natural resources.[62]

Furthermore, the Charter linked the right to a satisfactory environment to the issue of development. The Charter did not define the meaning of the term 'development'. Despite this omission, it appears that the Charter envisages socio-economic development. This is arguably based on the premise that the drafters of the Charter by linking the right to development, envisage that African citizens should not only be able to live in a undegraded and pollution-free environment, but also, be able to access to the resources provided by their environment in order to develop to their full potential.[63] In essence, the right to a general satisfactory environment under the African Charter is a composite right, and thus, measures taken to protect the environment in terms of this right must also promote socio-economic development.[64] This argument is consistent with the principle of sustainable development as well as the philosophy underlying the adoption of the entire Charter, which is to address the

[60] See Churchill *op cit* note 51 at 106.
[61] Communication 155/96, Decision of the African Commission on Human and Peoples' Rights. (Interpreting this right under the African Charter). Available at http://www.cesr.org/text%20files%final %20Decision%2000%20the%Ecosoc%20matter.pdf. (Hereinafter *SERAC* communication).
[62] This is gleaned from paragraph 52 of *SERAC* communication *ibid*, where the Commission states the obligations imposed by the right on the State as follows: 'It 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.
[63] See Ouguergouz *op cit* note 2 at 364. See also *Better Environment, Better Tourism: Building the Age of Hope in South Africa*, An Address by the Deputy Minister of Environmental Affairs and Tourism, the Honourable Rejoice Mabudafhasi to the National Council of Provinces (NCOP) on 8 June 2006. Available at http://www.environment.gov.za//newsmedia/speeches/2006jun8/08062006_2.doc. (Admitting that unless communities living in and around protected areas derive tangible benefits from natural resources, that the government will be failing to discharge its responsibilities to its people).
[64] See *SERAC* communication *supra* note 61 at para 52. For similar national decision, see *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2006 (5) SA 512 at 518E-I; *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga, and others* Case CCT 67/06, delivered on 7 June 2007, at para 45; and *Department of Agriculture: MEC Conservation and Environment and another v HTF Developers (Pty) Limited*, Case CCT 07/32, delivered 6 December 2007, at para 24. (Hereinafter HTF Developer case II).

real needs of Africa, of which economic under-development was identified as the most important.[65] Such philosophy is evident in a more recent declaration of the 13th Conference of Non-Aligned Countries (most African countries are members) stating:

> 'Sustainable development, therefore, must be considered in the wider context of sustained economic growth. States have the sovereign right to exploit their resources in accordance with their own environmental and development policies. [less industrialised countries] cannot forego growth and transformation in the name of conservation of natural resources or for the sake of preserving an unaltered natural habitat. Actions taken to protect the environment by diverting resources from development might in the long run prove to be self-defeating, since they might reduce development thereby limiting the magnitude of resources ultimately available for improving the human environment.'[66]

The link to socio-economic development makes the promotion of the right relevant to the achievement of poverty reduction and sustainable development objectives including the MDGs in Africa. As observed by the Constitutional Court of South Africa in *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga, and others*, dealing with a similar provision in the South African Constitution, '[s]ustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.'[67] However, the link with development has led Anderson to wonder if the Charter 'require[s] that environmental protection and economic development should be balanced off against each other, or rather that the right to a satisfactory environment may only be claimed where it will not infringe the requirements of social and economic development.[68] Expressing similar sentiment, Atapattu argues that the fact that the right is linked to development 'can be interpreted as giving economic development preference in the event of a conflict between the two.'[69]

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[65] See FN 44 & 45.
[66] Held in 2000. Quoted in Ouguergouz *op cit* note 2 at 369.
[67] *Supra* note 64.
[68] Michael R Anderson 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle & Michael Anderson (eds) *op cit* note 51 at 11.
[69] Sumudu Atapattu 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law' (2002) 16 *Tulane Environmental LJ* 65 at 88. See also van der Linde & Louw *op cit* note 57 at 176.

This thesis disagrees with the argument that this right may only be claimed where it will not infringe the requirements of socio-economic development or that where there is a conflict between the right and socio-economic development that the latter will prevail. The basis of this assertion is that the argument is too general and fails to take account of the people, persons or group of person whose right to environment is infringed or will be infringed by socio-economic development projects. It cannot be presumed that development projects that are beneficial to a country will also benefit their host communities. A prime example is the current plight of the communities of the Niger Delta region of Nigeria that host the major oil companies operating in Nigeria. Presently, the oil industry accounts for over 77 per cent of the federal government's revenue.[70] The crucial question therefore is whose socio-economic development will be enhanced by environmentally degrading activities thereby causing them to forego claiming the right to environment?

Admittedly, the community whose environment has been degraded may accept or ignore such degradation if it promotes activities crucial to their socio-economic development like the establishment of amenities such schools, hospitals, roads, as well as employment opportunities. For such community, claiming the right to environment might be counterproductive, as it will affect their development, which may in turn affect their ability to conserve and manage their environment in the face of rising poverty level. However, such acceptance is contextual and not absolute as it is dependent on the level of the degrading entity's social and environmental responsibilities to their host communities and the type of degradation involved. It cannot be assumed that a community that is enjoying social amenities and employment opportunities provided by a company will turn a blind eye to environmentally degrading activities that pollute their streams, rivers and creeks; destroy their shrines and other monuments; and degrade their ancestral forests and farmlands.[71] The basis of this assertion is that the socio-economic development of

[70] See Hon. John Udeh 'Petroleum Revenue Management: the Nigerian Perspective' *Workshop on Petroleum Revenue Management*, (Oil, Gas, Mining and Chemical Department of the WBG and ESMAP) Washington D.C., October 23-24, 2002, at p2. Available at http://www.esrthinsittute. columbia.edu/igsd/STP/Oil%20revenue%20managem,ent?General%20oil%20documents/Nigeria/Nigeria%20petroluem%revenue%management%20Udepaper.pdf.

[71] It should be noted that the unrests and agitations in the volatile Niger Delta region of Nigeria is still continuing, despite claims by oil companies and the statutory Niger Delta Development Commission (NDDC) of undertaking projects aimed at the socio-economic development of the region.

such community will not be sustainable in the long-term and such negative attitude towards their environment might come to haunt them especially when the entity ceases operation in their community. By that time, the natural resource base that sustains their development will have been heavily degraded.[72]

On the other hand, a community may be the host to an industry that is crucial to the revenue generation base of a country. Such revenues are essential for the socio-economic development of the nation. However, the activities of the industry may result in heavy degradation of the host community environment. The Niger Delta region of Nigeria once again provides a perfect example of this scenario. As earlier noted, the bulk of the Nigerian government revenue is provided by the oil industry. Such revenue has been driving the socio-economic development of Nigeria for the past 40 years.[73] However, the environmentally degrading activities of the industry especially oil pollutions are now threatening the environment as well as the overall socio-economic development of their host communities.[74] Does it then mean that the communities will not be able to claim the right to environment as it might heavily impact or cause a cessation of the activities of the oil industry thereby adversely affecting the revenue base of the State, and which in turn will affect the State's ability to undertake activities having socio-economic benefits?

The above arguments would seem to imply that the inhabitants of the region might not claim this right against the oil industry and the State considering the adverse effect that it will have on the revenue of the government and subsequent socio-economic development of the country. This means that persons or communities must endure the violations of their right to environment in order to promote the economic development

[72] A perfect example is Oloibiri in Bayelsa State, Nigeria. The town is renowned for having the foremost oil field in Nigeria as it was where a consortium headed led by Shell first struck oil in commercial quantity in 1957. Presently, this premier oil field has been abandoned by Shell since the early 1980s while for the town and its inhabitants, they have become a reference case of neglect or total abandonment and unfair treatment. See Ogbia Professional 'In the Beginning- How Oil Exploration Began in Ogbia' Tuesday, February 14, 2006. Available at http://www.ogbiaprofessionals.org/Special %Reports.htm.

[73] See Patrick Okonmah 'Right to A Clean Environment: A Case for the People of Oil-Producing Communities in the Nigerian Delta' (1997) 41 *JAL* 43.

[74] See Human Right Watch *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities (*1999), available at http://www.hrw.org/reports/1999/nigeria/niew991_05.htm#P500_147118; and BBC News 'Oil: Nigeria's Blessing and Curse' June 8, 2000, available at http://news.bbc.co.uk/hi/english/world/africa/newsid782000/782925.htm.

of their country. This is clearly not the intention of the framers of the Charter.[75] It is therefore submitted that persons, communities or group of persons adversely affected by environmental degradation can claim this right against the responsible industry or organ of government, irrespective of the negative results of such actions on government's revenue and subsequent economic development of the country.[76] This assertion recognises that although the right can be balanced against development, it will not necessarily take a back seat if it impacts negatively on development.[77] Thus, while States have the right to exploit their natural resources by themselves or through private individuals, it must not be done in a manner that will prejudice the right of their citizens to a healthy environment.[78]

Finally, the Charter identified 'people' as the beneficiary of the right. The Charter did not define the meaning of the term 'people'.[79] However, it has rightly been suggested that the use of the phrase 'all peoples' in the Charter, refers to the entire population of a State party, rather than any particular ethnic group or other group within a State.[80] This suggestion is more cogent with regard to the environment. This is because traditionally, the sustainable use, conservation and management of the environment and its resources has always been a collective endeavours involving all persons in a particular community, and therefore, the use of the phrase 'all peoples' in the formulation of the right to environment is an embodiment of this African traditional philosophy.[81] However, the fact that the entire population of a State can enjoy this right has made Churchill wonder whether '...no complaint can be made that a state is violating article 24 unless the population as a whole is

[75] Subscribing to contrary argument will lead to a violation of articles 2 and 3 of the Charter recognising equality of all African citizens.
[76] See *Jonah Gbemre v Shell Petroleum Development Company of Nigeria and 2 Others* Suit No: FHC/B/CS/53/05. Delivered 14 November 2005, where the Nigerian Federal High Court (Benin division) did not hesitate in ordering a cessation of the flaring of gas in the course of oil production activities of the 1st and 2nd respondents. For similar Indian decision, see *MC Mehta v Union of India and Others* (1987) 4 SCC 463, where the Supreme Court did not hesitate in ordering the closure of polluting factories despite the fact that it will lead to unemployment and loss of revenues.
[77] See *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Limited and another* 2006 (5) SA 483 (SCA). (Upheld the decision of the MEC not to grant the respondent an authorisation to build a petrol station on environmental grounds).
[78] See *SERAC* communication *supra* note 61 at para 54.
[79] It seems that the drafters made a 'deliberate choice not to define certain concepts, such as that of "peoples", in order to avoid becoming bogged down in a complicated discussion.' Ouguergouz *op cit* note 2 at 205. (Citing the report of the Rapporteur).
[80] See Richard N. Kiwanuka 'The meaning of "people" in the African Charter of Human and Peoples' Right' (1988) 82 *American JIL* 80 at 99-100; and Ouguergouz *op cit* note 2 at 206, 210-211.
[81] This is consistent with paragraph 4 of the preamble to the Charter.

enjoying a less than satisfactory environment, rather than a particular segment of the population? Or that no complaint can be made by an individual or group of individuals, but only by the population as a whole?'[82]

It is submitted that despite the use of the phrase 'all peoples' in the Charter, this right is intended to be enjoyed by every individual, and thus, any person, ethnic or other groups within a State can apply for appropriate remedy when it is infringed or threatened.[83] As argued in chapter one of this thesis, subscribing to the argument that this right is intended to be enjoyed only collectively by the entire population of a State will give rise to the unsavoury conclusion that an individual whose right to environment has been infringed by the State or private individuals cannot bring action to enforce such right, except if a group of citizens' segment of the population or the whole population is involved.[84]

(ii) Obligations imposed by the right

The Charter obligates the State parties to '…recognise the rights, duties and freedoms enshrined in [the] charter and to 'undertake to adopt legislative or other measures to give effect to them.'[85] This provision is mandatory, and thus, with regard to legislative measures, parties are obliged to incorporate the Charter into their municipal systems.[86] The reference to 'adopt other measures' in the provision can be understood to mean the adoption of institutional and policy measures for the realisation of the

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[82] *Op cit* note 51 at 106.

[83] See Emeka Amechi *Environmental Pollution and Human Rights in Nigeria* (unpublished LLM dissertation, University of the Witwatersrand 2004) 27-28; and John Lee 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2002) 25*Columbia J Envtl L* 283 at 293-297.

[84] At p 29.

[85] Art 1.

[86] This obligation applies irrespective of whether a country practices either 'monism' where international agreements are automatically integrated into their municipal system and normally have the same standing as municipal laws, or 'dualism' whereby such agreements need to be formally incorporated into the municipal legal order through the enactment of a special law. See Ouguergouz *op cit* note 2 at 51-52; Umozurike *op cit* note 2 at 110; and Nsongurua J. Udombana 'Between Promise and Performance: Revisiting States' Obligations Under the African Human Rights Charter' (2004) 40 *Stanford JIL* 105 at 124-126. See also *Amnesty International v Zambia* Communication No. 212/98, Twelfth Annual Report of the Commission-1998/99, at paras 59-60, & 62; *Legal Resources Foundation v Zambia* Communication No. 211/98, paras 59-60; and *Purohit v Gambia* Communication No. 241/2001, para 43.

rights and freedoms enshrined under the Charter.[87] With regard to policy measures, it can be argued that since the Charter aims *inter alia* to reduce poverty and promote socio-economic development in Africa, policy measures adopted by African countries aimed at implementing internationally agreed sustainable development and poverty reduction objectives such as the MDGs could fall within the category of 'other measures' envisaged in the Charter.[88] It should be noted that the MDGs correspond to most of the socio-economic rights guaranteed under the African Charter, and thus, the achievements of the goals in Africa will enhance the realisation of these rights in the region.[89] Regarding the protection of the environment in Africa, this entails a positive duty on State parties not only to recognise the right to environment, but also to adopt appropriate environmental and environmentally-friendly regulations and policies,[90] as well as institutional machinery that will give effect to the right.

In addition, the Charter obligates State parties 'to guarantee the independence of the courts and to 'allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the …Charter.'[91] This provision according to Udombana 'envisions establishment, funding, and protection of the courts, which traditionally has been a bastion of the individual's rights against the abuse of state power.'[92] The guarantee of the independence of the court is very important from both human rights and environmental point of view, as it will enable the courts to pronounce without fear or favour on the actions of the State or private individuals that constitutes or may constitute a violation of the right to environment. As aptly stated in the Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global

[87] Institutional measures most often are in the form of establishment of human rights commissions and public protector. See Umozurike *op cit* note 2 at 110-113 (showing the different institutional measures established in Nigeria and Togo).
[88] The linkage between the MDGs and human rights will be discussed in a later chapter of this thesis.
[89] For this linkage, see Office of the United Nations High Commissioner for Human Rights *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (United Nations, 2002) 18-40. Available at http://www.ohchr.org/english/issues/docs/guidelinesfinal-poverty.doc. (Hereinafter OHCH R Draft Guidelines). Note also that the MDGs also have a link albeit indirect with most of the civil and political rights guaranteed under the Charter.
[90] Environmentally-friendly regulations and policies would include regulations and policies aimed at achieving sustainable development and poverty reduction in the regions. These would include policies aimed at achieving the MDGs.
[91] Art 26.
[92] *Op cit* note 86. See also *Civil liberties Organisation (In re Nigerian Bar Association) v Nigeria*, Communication No. 101/93, 1994-1995, Afr. Ann. Act. Rep., Annex VI, para 14.

Judges Symposium held in Johannesburg, South Africa on 18-20 August 2002,[93] '…an independent Judiciary and judicial process is vital for the same implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and the enforcement of, international and national environmental law.'[94]

Furthermore, the Charter obligates the State parties to 'undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the …Charter.'[95] Flowing from the earlier argument in this chapter, it can also be argued that the States are required to provide information on their national constitutions and other legislative measures, as well as institutional and policy measures giving effect to the rights guaranteed under the Charter. This may in view of the complementarity of the Charter rights and the MDGs, include information on policies implementing the MDGs. It should be noted that this obligation is vital as the regularity and quality of country reports not only provides an important mechanism and opportunity for African governments to engage in a process of continuous dialogue with the African Commission, but also, 'enables the States to constantly check the whole government machinery as [they] force[] the relevant government institutions from all departments and ministries to evaluate [policies], legal regulations, procedures, and practices, vis-à-vis the provisions guaranteed in the Charter.'[96]

[93] Available at http://www.unep.org/dpdl/symposium/Principles.htm. (Hereinafter the Johannesburg principles).
[94] *Ibid*.
[95] Art 62.
[96] Para 1(2) *State Reporting Procedure: Information Sheet No. 4*. Available at http://www.achpr.org. See also para 16, Grand Bay Declaration and Plan of Action. Adopted at The First OAU Ministerial Conference on Human Rights, Held from 12 to 16 April, 1999 in Grand Bay, Mauritius. Available at http://www.achpr.org/english/declarations/declaration_grand_bay_en.html.

The obligations imposed on the State parties by the Charter were further elaborated by the African Commission in the *SERAC* communication.[97] The Commission noted that all human rights generates at least four levels of overlapping duties for their State parties vis-à-vis to respect, protect, promote, and fulfil these rights, and held that '[a]s a human rights instruments, the African Charter is not alien to these concepts….'[98] The obligation to respect 'entails that the State must refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.'[99] This obligation is paramount and non-derogable, and attaches to a State even during emergency situations. This means that a civil war as in the case of Chad 'cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.'[100] Any failure to ensure respect for human rights constitutes a violation of the Charter, and in considering whether or not a State has breached this obligation, it is immaterial that the State or its agents are not the perpetrators of the human rights violations.[101] The duty to respect also extends to socio-economic rights guaranteed under the Charter. As enunciated by the African Commission, 'the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.'[102]

It is apparent from the above that State parties cannot be allowed to violate the right to a general satisfactory environment or any other environment-friendly rights guaranteed in the Charter under any guise including for the purpose of socio-economic development.[103] Thus, in promoting new socio-economic development that may disrupt the environment, States must respect the extent to which existing socio-

[97] *Supra* note 61.
[98] *Ibid*, at para 44.
[99] *Ibid*, at para 45.
[100] See *Nationale des Droits de l'Homme et des Libertes v Chad*, Communication No. 74/92, 1995-1996, Afr. Ann. Rep. Annex VII, at para 21.
[101] See *Avocats Sans Frontieres ex rel. Gaetan Bwampamye v Burundi* Communication No. 231/99, 2000-2001, Afr. Ann. Act. Rep., Annex V.
[102] See *SERAC* communication *supra* note 61 at para 45.
[103] *Ibid*, at para 54.

economic arrangements are dependent on a non-disrupted environment. As held by the African Commission in the *SERAC* communication:

> The right to enjoy the best attainable state of physical and mental health…and the right to a general satisfactory environment favourable to development…already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.'[104]

The obligation to respect further obliges the States to remove any State-sponsored or approved impediments that prevent individuals from enjoying the Charter guaranteed rights.[105] As held by the African Commission in *Constitutional Rights Project v Nigeria*,[106] 'to foreclose any avenue of appeal to "competent national organs" in criminal cases bearing such penalties clearly violates Article 7.1 of the African Charter, and increases the risk that severe violations may go unredressed.'[107] With regard to the right to environment, these would involve inter alia permitting independent scientific monitoring of threatened environments, removing impediments to access to environmental information, facilitating the participation of people to be affected by developmental projects in the environmental decision-making process concerning such projects, and guaranteeing access to judicial or administrative remedy for those whose environment might be impaired by such projects.[108]

The obligation to protect obliges the State to protect right-holders against other subjects by legislation and provision of effective remedy.[109] This entails a positive duty on the part of the State 'to take measures to protect beneficiaries of the protected rights against political, economic and social interferences.'[110] It would appear that the interferences to be protected against are not only that of the State, but also that of

[104] *Ibid*, at para 52. See also paras 61 (right to housing), and 65 (right to food).
[105] Udombana *op cit* note 86 at 132.
[106] Communication No. 60/91, 1994-1995, Afr. Ann. Act. Rep., Annex VI.
[107] *Ibid*, at para 11.
[108] See *SERAC* Communication *supra* note 61 at para 53.
[109] *Ibid*, at para 46.
[110] *Ibid*.

private individuals. Thus, States are bound to prevent private individuals from committing human rights violations within its jurisdiction.[111] This will include multinational companies and other private entities involved in environmentally degrading activities that devastate the environment of their host communities with adverse consequences for their health and well-being.[112] The protection envisaged by the African Commission will generally entail 'the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms.'[113] The rationale for this positive obligation according to Udombana is that 'human rights [including the right to environment] are better protected where appropriate laws and administrative policies are supported by equally appropriate governmental machinery – courts, police, and penal institutions—as well as a system of health, social, and educational services.'[114]

Allied to the above is the obligation to promote the enjoyment of the human rights guaranteed in the Charter. This promotional obligation requires the State to 'make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.'[115] This positive obligation is not only about the establishment of human rights commissions, but also involves educating citizens of their rights and underlying obligations. This is very important as ignorance has been identified by the African Commission as the main obstacle to respect for human and peoples' rights in Africa.[116] This is very important with regard to the right to environment, as not many Africans are aware of the existence of the right as most attention were focused on conventional rights like civil and political rights and socio-economic rights.[117] The States are in a better position to fulfil this obligation as they largely own or control the means of their

[111] See *Nationale des Droits de l'Homme et des Libertes v Chad supra* note 100 at para 22.
[112] See *SERAC* Communication *supra* note 61 at para 57 & 58; and *Minister of Health v Woodcarb (Pty) Ltd v another* 1996 (3) SA 155 (N) at 164, paras E-G.
[113] *Ibid*, at para 46. See also *WoodCarb* case *ibid*, at 161-162, para I-A.
[114] *Op cit* note 86 at 133.
[115] *SERAC* communication *supra* note 61 at para 46.
[116] *Recommendations on Modalities for Promoting Human and Peoples' Rights*, in Recommendations and Resolutions Adopted by the African Commission on Human and Peoples' Rights 1998-2002 (2002) 13.
[117] This perhaps explains the fact that despite the massive degradation of the environment in Africa, only a single case has come before the African Commission.

internal communication. Thus, without such a positive obligation, 'the state might be unwilling to undertake the substantial investment involved in informing a largely illiterate population of human rights guarantees and obligations entailed therein.'[118]

Finally, the States are required to fulfil the rights and freedoms under the Charter. This obligation, which is closely intertwined with the promotional obligation, is a positive expectation on the part of the State to 'move its machinery towards the actual realisation of the rights.'[119] The duty as interpreted by the African Commission is very broad, and encompasses the facilitation and provision of resources and services necessary for the realisation of human rights guaranteed under the Charter.[120] Specifically on the duty of the States to fulfil the right to environment, the African Commission held that States are required 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.'[121] Such 'reasonable and other measures' can be interpreted to include measures aimed at tackling poverty, which has been identified by the New Partnership for Africa's Development (NEPAD) as the main cause and consequence of environmental degradation in Africa.[122] By implication, measures adopted by African nations to achieve the MDGs could come under 'reasonable and other measures' required to fulfil this right.

(b) The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.

This Convention was adopted on 30 January 1991 and entered into force on 22 April 1998.[123] It was adopted under the auspices of the defunct OAU as an alternative to the Basel Convention on the Control of Transboundary Movement of Hazardous Waste

[118] Udombana *op cit* note 85 at 134.
[119] *SERAC* Communication *supra* note 60 at para 47.
[120] Udombana *op cit* note 85 at 136.
[121] *Ibid*, at para 52.
[122] See NEPAD-EAP *supra* note 39 at para 23.
[123] 30 *ILM* 775 (1991).

and their Disposal.[124] It should be noted that in the build-up to the Basel Convention, OAU member States were concerned about the issue of toxic colonialism whereby foreign companies will exploit their countries as cheap disposal sites for toxic wastes.[125] This concern was not misplaced as during the same period, an unscrupulous Italian businessman dumped five shipload of hazardous waste in the small coastal town of Koko, Nigeria, while there were reports of similar dumping in Djibouti, Equatorial Guinea and Sierra Leone.[126] In addition, there were also reports of some African countries entering into dubious agreements with unscrupulous western companies for the dumping of toxic wastes in their territories.[127] The Basel Convention by regulating, rather than prohibiting trade in hazardous wastes, was felt by the OAU member States as not stringent enough to assuage their concerns.[128] Thus, by signing the Bamako Convention, OAU member States with the exception of South Africa, which was then not a member, seek to ban the import of all hazardous waste into Africa, as well as the imposition of stricter standards on transboundary movement.[129]

The purpose of the Convention is principally to protect the region from the growing threat to human health and the environment posed by the increased generation and the complexity of hazardous wastes. It also helped in establishing the right to environment in Africa as it signifies the intentions of the defunct OAU member States to ensure the protection of this right, along with other human rights guaranteed under the African Charter, from the adverse effects of toxic waste pollution. This is apparent from the preamble to the Convention which states that the parties to the Convention

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[124] 28 I.L.M. 649 (1987).

[125] David Hunter, James Salzman & Durwood Zaelke (eds) *International Environmental Law & Policy* 2ed (Foundation Press, New York, 2002) at 852.

[126] See United Nations Commission on Human Rights (UNCHR) *Economic, Social and Cultural Rights: Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights* Report Submitted by the Special Rapporteur on toxic waste, Mrs. Fatma-Zohra Ouhachi-Vesely, E/CN.4/2001/55, 19 January 2001, at p12, para 18. See also Tunde Akingbade 'Nigeria under Toxic Waste Threat…As Devil's Trinity Hits West Africa Again' *Sunday Sun* Friday, 13 October 2006, at pp 1-2 &4. Available at http://www.sunnewsonline.com/webpages/features/spectator/2006/sept/24/spectator-2; and James Brooke 'Waste Dumpers Turning to West Africa' *The New York Times*, 17 July 1988. Available at http://query.nytimes.com/gst/fullpage.html?res=940DE4D9163DF934A25754C0A96E948260&sec=&spon=&pagewanted=print.

[127] *Ibid*.

[128] See John Ovink 'Transboundary Movement of Hazardous Waste, the Basel and Bamako Conventions: Do Third World Countries Have a Choice?' (1995) 13 *Dick. J. Int'l of Law* 281 at 285.

[129] However, the Convention complements the Basel Convention as the later makes provision for regional and stricter treaties. See Art 11 (1) Basel Convention *supra* note 124.

were 'mindful of the growing threat to health and the environment posed by the increased generation and the complexity of hazardous wastes'[130] and '[a]ware of the risk of damage to human health and the environment caused by transboundary movements of hazardous wastes.'[131] The preamble also recalled '…relevant Chapters of the Charter of the Organisation of African Unity (OAU) on environmental protection, the African Charter on Human and Peoples' Rights, Chapter IX of the Lagos Plan of Action and other Recommendations adopted by the Organisation of African Unity on the environment.'[132]

In addition, the Convention has a vital link to poverty reduction and sustainable overall development in Africa. It should be noted that while this intention may not be readily discernible as there is no mention of poverty reduction or sustainable development in the preamble or in the body of the Convention, it can be argued that such intention is implicit in the determination of the parties to '…protect, by strict control, the human health of the African population and the environment against the adverse effects which may result from the generation of hazardous wastes.'[133] This is based on the premise that by aiming to protect the environment and human health from hazardous waste pollution, the Convention will help in tackling poverty (which has been identified as the main consequences of environmental degradation), as well as preventing diseases that causes or exacerbates poverty.[134] This will enhance the achievement of sustainable development programmes including the MDGs in Africa, as people will be able to enjoy their basic rights to life, health, adequate food and housing, education, satisfactory environment, and traditional livelihood and culture.[135] As observed by Madava, '[h]azardous wastes are potential pollutants of the human and biophysical environment. Waste pollution can cause death as well as rashes, lung and other cancers... Dumping toxic wastes in developing countries where poverty is high is

[130] Para 1.
[131] Para 3.
[132] Para 5.
[133] Para 16.
[134] For example, the MA estimates that Africa's GDP could have been $100 billion larger in 2000 if malaria which is responsible for 11 per cent of Africa's disease burden had been eliminated 35 years ago. See Millennium Ecosystem Assessment *Ecosystem & Human Well-Being: Synthesis* (Island Press, Washington DC, 2005) 61. (Hereinafter MA General Synthesis).
[135] It is estimated that about 5.2 million people die each year from waste-related diseases in developing countries. See Gary D. Meyers, Glen McLeod, and Melanie A. Anbarci 'An international waste convention: measures for achieving sustainable development' (2006) 24 (6) *Waste Management and Research* 505.

a major drawback in the struggle to catch-up with the developed world.[136] This is exemplified by the Ivorien toxic waste incident, where Ms. Safiatou Ba-N'daw, Deputy Director of the Office of the Prime Minister of Cote d'Ivoire and coordinator of the national plan to combat toxic waste, in describing the state of affairs in her country after the incident stated:

> 'It resulted in 10 deaths, 69 people hospitalized and 100,000 medical consultations. People had been displaced; schools in affected areas were closed; water sources were contaminated; the city's household waste treatment centre was closed for two months; there was contamination of the food chain; industries had been closed and hundreds of workers were laid off; fishing activities, vegetable and small livestock farming had been halted.'[137]

(c) Revised African Convention on the Conservation of Nature and Natural Resources

The revised Convention was adopted on 11 July 2003 and is not yet in force. The Convention when in force will replace the original Algiers Convention for those African states that have ratified it.[138] The Convention was borne out of the need to update and strengthen the Algiers Convention, in order to bring it in line with the latest developments and thinking in international environmental law and sustainable development as well as the latest scientific and technological developments in the environmental field.[139] This revision became necessary as the Algiers Convention was adopted before the hosting of the first global environmental conference held in

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[136] Tinashe Madava 'Illicit dumping of toxic wastes breach of human rights' (2001) 28 (88) *Review of African Political Economy* 288 at 288. See also Ariana Balestrieri 'Illegal Toxic Trading: The Exchange of a Deadly "Good' (Spring 2006) *Brown Policy Review* 1 at 2-3. Available at http://www.brown.edu/Students/Roosevelt/wp-content/uploads/balestrieri-done.pdf.

[137] See Anne Daniel 'Hazardous Substances and waste, other than nuclear' Available at http://www.jus.uio.no/forskning/grupper/intrel/YBIEL/Reports2Check/0603Transboundary%20Movement%20of%20Haz%20Waste.doc.

[138] For those that have not ratified it, and are parties to the Algiers Convention, they are only bound by the provisions of the Algiers Convention. The provision of the original Convention will also govern their relationship with parties to the revised Convention. See art XXXIV, Revised African Convention on the Conservation of Nature and Natural Resources. Available at http://www.africa-union.org/root/au/Documents/Treaties/Text/nature%20and%20natural%20recesource.pdf. (Hereinafter Revised Nature Convention).

[139] See *Decision on of the Revised 1968 African Convention (Algiers Convention) on the Conservation of Nature and Natural Resources* Doc. EX/CL/50(III), Assembly/AU/Dec.9 (II). See also IUCN *op cit* note 19 at 5; and afrol News 'Africa to enhance nature conservation' 18 July 2003. Available at http://www.afrol.com/articles/10361.

Stockholm in 1972,[140] which catalysed decades of rapid development of environmental thought and treaty law subsequent to the adoption of the Convention.[141] The end product of this revision is a comprehensive regional convention on natural resources, environment and development, and which has aptly been described as a 'road map'[142] for the management of Africa's natural resources. The Convention when in force shall apply to all areas which are within the limits of national jurisdiction of any Party; and to the activities carried out under the jurisdiction or control of any Party within the area of its national jurisdiction or beyond the limits of its national jurisdiction.[143]

The Convention is vital to the promotion of sustainable development and realisation of the right to environment in Africa. This is due to the fact that Convention reveals a strong commitment to the realisation of this right and the achievement of poverty reduction and sustainable development in the region.[144] This apparent from the Convention's preamble under which the Heads of States and Government of the AU acknowledge that the Africa's natural environment and its resources 'are an irreplaceable part of the African heritage and constitute a capital of vital importance to the continent and mankind as a whole', as well as 'the ever-growing importance of natural resources from economic, social, cultural and environmental points of view.'[145] The member States also re-affirmed the right of States to sustainable use of their natural resources in order to satisfy human needs including the reduction of poverty, and recalled the African Charter.[146] Such commitment to poverty reduction, sustainable development and realisation of this right in Africa is also from the objectives of the Convention, which are to enhance environmental protection, foster the conservation and sustainable use of natural resources, and to harmonise and coordinate policies in these fields with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.[147]

[140] Note that the adoption of the Convention coincided with the decision of the UN General Assembly to convene the United Nations Conference on Human Environment.
[141] See IUCN *op cit* note 19 at 4-5.
[142] afrol News *op cit* note 139.
[143] Art I.
[144] See IUCN *op cit* note 19 at 3.
[145] See paras 2 & 4, Preamble to the Convention. These provisions are similar to paras 2 & 4 of the original Algier Convention.
[146] Paras 6 & 8 respectively.
[147] Art II.

In achieving these objectives as well as implementing the provisions of the Convention, the parties shall be guided *inter alia* by the principle of 'the right of all peoples to satisfactory environment favourable to their development.'[148] This provision is very important to the establishment of the right to environment in Africa as it constitutes an unequivocal recognition by AU member States of its normative existence. In addition to the guiding principles, the parties are required to 'adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through preventive measures and the application of the precautionary principle, and with due regard to ethical and traditional values as well as scientific knowledge in the interest of present and future generations.'[149] This provision is not only mandatory, but also recognises some of the principles shaping international environmental law such as the preventive and precautionary principles as well as the principles of inter- and intra-generational equity. It is instructive to note that the Convention did not prescribe any particular measures to be adopted by the parties provided that any measure so adopted must be necessary to achieve the Convention's objectives. Thus, it can be argued that environmentally-friendly MDG policy measures that are not contrary to, but promote the objectives of the Convention, will fall under the measures envisaged by the Convention.

(d) Other legal instruments

In addition to the regional legal instruments discussed above, other instruments exist which are essential to the establishment of the right to environment as well as sustainable development in Africa. These include the African Charter on the Rights and Welfare of the Child, which was adopted in 1990,[150] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which was adopted in July 2003.[151] The Charter is principally concerned with the

[148] Art III (1).
[149] Art IV.
[150] OAU Doc. CAB/LEG/24.9/49 (1990). (Entered into force November 29, 1999). (Hereinafter African Children Charter).
[151] Not yet in force. Available athttp://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf. The Protocol is principally concerned with the protection, promotion and realisation of women's rights in Africa, and has proven to be a much-needed improvement on the way in which the African Charter addressed the position of women in

rights and welfare of the African child. From an environmental perspective, the Charter does not provide for an express right to environment for the African Child. However, the Charter recognises the importance of a healthy or pollution-free environment in securing the rights and welfare of the African child. This is apparent in the fifth preambular paragraph of the Charter.[152] In addition, the Charter provides for some children's rights that are essential to securing the protection of the environment. These include the right to non-discrimination,[153] right to life,[154] rights to freedom of expression and association,[155] rights to privacy and family,[156] rights to education and cultural life,[157] and right to health.[158]

These rights enjoy a kind of mutual relationship with the right to environment or environmental protection. Thus, not only are they essential to environmental protection, but also protecting the environment will also help in securing their realisation.[159] This linkage has been recognised in the Charter. For instance, with regard to the right of the African child to enjoy the best attainable state of physical, mental and spiritual health, the Charter mandates its States parties to pursue its full implementation and in particular to take measures *inter alia* 'to reduce infant and child mortality rate',[160] 'to ensure the provision of adequate nutrition and safe drinking water',[161] and 'to ensure that all sectors of the society… are informed and supported in the use of basic knowledge of child health and nutrition, … hygiene and environmental sanitation and the prevention of domestic and other accidents.'[162]

Africa.[151] It applies the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the 1995 Beijing Platform for Action (BPfA) in an African context. See Roselynn Musa 'Women, Equality and the African Human Rights System' *Craig Eisele on Africa Development Project*, 13 November 2007. Available at http://craigeisele.wordpress.com/2007/12/01/women-equality-and-the-african-human-rights-system/.

[152] 'NOTING WITH CONCERN that the situation of most African Children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger….'

[153] Art 3.

[154] Art 5 (1).

[155] Arts 7 & 8.

[156] Arts 10 & 18.

[157] Arts 11 & 12.

[158] Art 14.

[159] See generally Hunter et al *op cit* note 125 at 1292-1317; Atapattu op *cit* note 69 at 89-104; and Churchill *op cit* note 51 at 90-104; and Dinah Shelton 'Human Rights, Environmental Protection, and the Right to Environment' (1991) 28 *Stanford JIL* 103.

[160] Art 14 (2) (a).

[161] Art 14 (2) (c).

[162] Art 14 (2) (h).

The Protocol on the Rights of African Women while containing some conventional and other human rights that are essential to environmental protection in Africa expressly provides that '[w]omen shall have the right to live in a healthy and sustainable environment.'[163] This environmental provision is mandatory and different from the environmental provision in the African Charter, as it is not linked or made subject to socio-economic development. Thus, State parties cannot hide under the guise of socio-economic development in violating or not promoting the right of their women to environment. Furthermore, while article 24 of the African Charter did not place any precise obligations on States parties,[164] the Protocol expressly mandates its State parties to take appropriate measures towards the realisation of the women's right to environment by *inter alia* ensuring greater participation of women in the planning, management and preservation of their environment; protecting and enabling the development of women's indigenous knowledge system; regulating the management, processing, storage and disposal of domestic wastes; and ensuring that proper standards are followed for the storage, transportation and disposal of toxic wastes.[165]

In addition to these human rights instrument, the treaties establishing regional and sub-regional bodies are also essential to the realisation of the right to environment in Africa as they usually embody the determination of their State parties to promote and protect the human rights guaranteed in the African Charter and other regional human rights instruments.[166] Foremost among these instruments is the Constitutive Act that established the African Union (AU).[167] The Act in its preamble reinstates the determination of its State parties to promote and protect human and people's rights,[168]

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[163] Art 18.
[164] Thus making it imperative for the African Commission to stipulate the obligations at the earliest opportunity in the *SERAC* Communication.
[165] *Supra* note 151, at art 18(2) (a) (c) – (e) respectively.
[166] For the subregional treaties, see the Treaty Establishing the Southern Africa Development Co-operation, arts 4 (c) & 5 (1) (g) respectively; The Common Market for Eastern and Southern Africa (COMESA) Treaty, Art 6 (e) & (f) – (g); and The Treaty of the Economic Community of West African States, art 4 (g) & (h) - (i). These references to human rights can be interpreted to mean the human rights guaranteed in the African Charter and other regional human rights instrument. Thus, it can be argued that these regional and sub-regional bodies recognised the right to environment among other human rights in Africa.
[167] CAB/LEG/23.15 Adopted July 11, 2000 and in force May 2001. Available at http://www.africa-union.org. (Hereinafter AU Act).
[168] See para. 9.

while it has respect for human rights as one of its guiding principles.[169] In addition, the Act listed as one of its objectives, the promotion and protection of human and people's rights in accordance with the African Charter and other relevant human rights instruments.[170] Further objectives of the Act that are essential to the right to environment and sustainable development include the promotion of democratic principles and institutions, popular participation and good governance,[171] and the promotion of sustainable development at the economic, social and cultural levels.[172]

2.3.2 Institutional framework

(a) African Commission on Human and Peoples' Rights

A quasi-judicial organ established pursuant to article 30 of the African Charter to promote and protect the human and peoples rights guaranteed under the Charter. The Commission was officially inaugurated on 2 November 1987 in Addis Ababa, Ethiopia, after its members had been elected in July of the same year by the then OAU 23rd Assembly of Heads of State and Government, and has its headquarters in Banjul, the Gambia.[173] The functions of the Commission are enumerated under article 45 of the African Charter and include the promotion of human and peoples rights; protection of human and peoples rights; interpretation of the provisions of the Charter; and any other task assigned to it by the OAU (now AU) Assembly. The main objective of the promotional function is the sensitisation of the population and dissemination of information on human and peoples' rights in Africa.[174] To achieve the objective, the Commission is mandated to undertake information and research activities such as the collection of document, studies and researches on African problems in the field of human and peoples' rights; organise seminars, symposia and conferences, and disseminate information; and encourage national and local

[169] Art 4(m).
[170] Art 3(h).
[171] Art 3(g).
[172] Art 3(j). See also Art 3 (g) & (h), the African Economic Community (AEC) Treaty. Available at http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oau/treaties/AEC_Treaty_1991.pdf.
[173] See African Commission on Human and Peoples Rights (ACHPR) OAU-*OUA Information Sheet No 1: Establishment* (ACHPR Secretariat) 4. Available at http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.1.doc.
[174] *Ibid*, 9.

institutions concerned with human and peoples' rights, and should the need arises, give its views or make recommendations to governments.[175]

Other promotional functions include consultative activities with regard to the formulation and laying down of principles and rules aimed at solving legal problems relating to human and peoples' rights as well as fundamental problems upon which African governments may base their legislation.[176] The African Commission is also required to co-operate with other African and international institutions concerned with the promotion and protection of human and peoples rights.[177] Considering the similarities between most of the Charter's rights and MDGs, this could include co-operation with human rights organisations as well as organisations concerned with the promotion and realisation of the objectives of the MDGs.[178] In addition, the Commission are required to consider the periodic reports of States on the legislative or other measures adopted to give effect to the rights and freedoms recognised and guaranteed in the African Charter.[179]

The protective function requires the Commission to take measure to ensure that the citizens enjoy the rights contained in the Charter. This entails ensuring that States do not violate these rights, and if they do, that the victims are reinstated in their rights.[180] Activities under the protection function consist mainly of the consideration of communications relating to alleged human rights violations. The communication procedure is a complaint system through which an individual, NGO or group of individuals who feel that their right or those of others have been or are being violated,

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[175] See Art 45(1) (a), African Charter *supra* note 40. It should be noted that the Commission has undertaken many activities in these areas. This includes establishing in collaboration with NGOs and inter-governmental organisations, a documentation centre used for human rights studies and research. It has also organised several seminars, symposia and conferences aimed at promoting human and peoples' rights within the continent. See ACHPR Information Sheet 1 *ibid*, at 5.

[176] Art 45 (1) (b).

[177] Art 45(1).

[178] It would appear that such contact has already been made as the Commission has an established relationship with the United Nations Economic Commission for Africa, UNESCO, and the European Union. See Ouguergouz *op cit* note 2 at 525-527.

[179] The Charter strictly speaking did not entrust this task to the Commission as article 62 only requires the parties to submit every two years, a report on the legislative or other measures taken to give effect to the rights and freedom guaranteed under the Charter, and does not expressly state for whom the report is intended or what action will be taken on it. However, the then OAU Assembly of Heads of State and Government at its 24th ordinary session expressly decided to entrust consideration of these reports to the Commission. See Ouguergouz *op cit* note 2 at 527. This is also a perfect example of the fourth function of the Commission as stipulated under the Charter.

[180] See ACHPR Information Sheet 1 *op cit* note 173 at 6.

can petition (complain) to the Commission about these violations.[181] It can also be used by a State party to the Charter which reasonably believes that another State party has violated any of the provisions in the Charter.[182] However, a communication can only be brought against a State entity which is a party to the Charter,[183] and must meet the criteria set out in article 56 of the African Charter before it will be formally accepted for consideration.[184] Where there is a violation, the Commission will make recommendations to the State and the AU Assembly on what the State should do including how to remedy the victim.[185] Other protective functions include fact-finding missions on the territory of State parties to investigate allegations of massive and serious human right violation; adoption of resolutions on the human rights situation in the territory of African states irrespective of whether they are parties or not;[186] and considers periodic reports submitted by State parties in conformity with article 62 of the Charter.[187]

The interpretative function requires the Commission to interpret the provisions of the Charter at the request of a States party, an AU body or an African organisation recognised by the AU. Such interpretation can be made at the initiatives of the above parties or during the consideration of a communication. The latter has been used by the Commission in interpreting the nature of undertaking by parties under article 1 of the Charter, the violations of rights under the Charter, and the content of the Charter's socio-economic rights including the right to environment.[188] It should be noted that where the interpretation is initiated by an organisation, it must be an African body and must further be recognised by the AU. Some NGOs have already sought and obtained through draft resolutions, the interpretation of some provisions of the Charter.[189] Such mechanism has enabled the Commission to adopt numerous resolutions that gave

[181] *Ibid*.
[182] *Ibid*.
[183] Arts 47 & 49, & 55(2) respectively.
[184] ACHPR Information Sheet 1 *op cit* note 173 at 6.
[185] *Ibid*.
[186] This function implicates both the promotional and protective functions. See Ouguergouz *op cit* note 2 at 542-550.
[187] ACHPR Information Sheet 1 *op cit* note 173 at 6.
[188] For example, see *SERAC* communication *supra* note 61. See also Ouguergouz *op cit* note 2 at 563-564.
[189] ACHPR Information Sheet 1 *op cit* note 173 at 7.

clarity and broader interpretation to some of the ambiguous provisions in the Charter.[190]

From an environmental perspective, the protective mandate of the Commission has been raised by virtue of the complaints in the *SERAC* communication alleging violations of *inter alia* article 24 of the African Charter.[191] In its decision, the Commission found the Nigerian government in violation of various human rights guaranteed under the African Charter including the right to a general satisfactory environment.[192] By virtue of this decision, the Commission helped in establishing the right to environment in Africa by re-affirming the existence and justiciability of the right.[193] In addition, the decision helped in establishing jurisprudence relating to the substantive content of the right under the African Charter vis-à-vis the prevention of pollution and ecological degradation, promotion of conservation, and securing an ecologically sustainable development and use of natural resources.[194] The latter expressly linked the right to the achievement of poverty reduction and sustainable development.

Furthermore, the Commission gave clarity to the contentious issue of whether the right can only be claimed where it will not infringe the requirements of socio-economic development, by holding that while States have the right to exploit their natural resources by themselves or through private individuals, it must not be done in a manner that will prejudice the right of their citizens to environment.[195] In essence, although the right can be balanced against development, it will not necessarily take a back seat if it impacts negatively on economic development.[196] The Commission also indicated its willingness to apply any of the diverse rights contained in the African Charter irrespective of whether they are collective, environmental or socio-economic rights, by declaring that there is no right in the African Charter that cannot be made effective.[197]

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[190] *Ibid*. For some of the resolutions, see Ouguergouz *op cit* note 2 at 565-566.
[191] *Supra* note 61 at paras 1-10.
[192] *Ibid*, at paras 50-69.
[193] *Ibid*, at paras 51-53.
[194] *Ibid*, at para 52. See generally van der Linde & Louw *op cit* note 57 at 169-179.
[195] *Ibid*, at paras 54 & 69.
[196] van der Linde & Louw *op cit* note 57 at 179.
[197] See *SERAC* communication *supra* note 61 at para 68.

(b) African Court on Human and Peoples' Rights (ACHPR).

A judicial body established pursuant to article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[198] It came into existence on 25 January 2005 with the ratification by fifteen members States of the establishing Protocol and is located in Arusha, Tanzania. The Court held its first meeting on 2-5 July 2006.[199] The Court complements and reinforces the protective mandate conferred on the Commission by the African Charter.[200] Its jurisdiction extends 'to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.'[201] In addition, the Court is tasked with giving advisory opinion on any matter relating to the Charter and other relevant human rights instruments, at the request of any AU member State, AU and any of its organs, or any AU recognised African organisation. This is however subject to the proviso that the subject matter of the opinion is not related to any matter being examined by the Commission.[202] The Court and the African Court of Justice (ACJ),[203] have now been merged into a single new court known as the African Court of Justice and Human Rights.[204] It appears that until the coming into force of the ACJHR Protocol, the ACHPR will continue to function separately from the ACJ.[205]

The ACHPR is required to adjudicate cases submitted to it by the African Commission, State parties, and African intergovernmental organizations.[206] In addition, the court may entitle non-governmental organizations (NGOs) with observer

[198] Adopted on 10 June 1998. Entered in force on 25 January 2004. (Hereinafter ACHPR Protocol).
[199] See Answers.com *African Court of Human and Peoples' Rights* Available at http://www.answers.com/topic/african-court-on-human-and-peoples-rights.
[200] Art 2.
[201] Art 3(1).
[202] Art 4.
[203] Established pursuant to Art 2, the Protocol of the Court of Justice of the African Union. Adopted on 11 July 2003. (Hereinafter ACJHR Protocol)
[204] See Art 3, Protocol on the Statute of the African Court of Justice And Human Rights. Adopted in July 2008 and not yet in force. Available at http://www.africaunion.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf.
[205] This can be implied from the provisions of articles 5 and 7 of the Protocol, *ibid.*
[206] Art 5(1), ACHPR Protocol *supra* note 198.

status before the Commission and individuals to institute cases directly before it.[207] The Court may consider cases brought before it or transfer them to the Commission.[208] In considering such cases, it shall apply the provisions of the African Charter and any other relevant human rights instruments ratified by the State concerned.[209] Where the court finds that there has been a violation, it shall make appropriate order to remedy it including the payment of fair compensation or reparation.[210] The Court shall deliver its judgment within 90 days of having completed its deliberation and such judgment decided by majority shall be final and not subject to an appeal.[211] The parties to the case shall be notified of the judgment and it shall be transmitted to the member States of the AU and Commission.[212] The Executive Council shall be notified of the judgment and shall monitor its execution on behalf of the Assembly.[213] The judgment will be binding as States parties to the Protocol have undertaken to comply with the judgment in any case to which they were parties within the time stipulated by the Court and to guarantee its execution.[214]

The Court has not received any case including matters relating to environmental protection as it is not yet fully operational. However, it appears from the scope of its mandate that the court when fully operational will be important to the protection of the right to environment in Africa. Thus, it can be argued that like the Commission in *SERAC* communication, it will uphold the existence of the right when the opportunity arises, but unlike the Commission, its decisions including orders for remediation, compensation and reparation in cases of environmental degradation will be binding on the State party concerned. However, the fact that individuals and NGOs whom as evident from the experiences of the Commission are the main sources from which cases will originate, can only bring cases before the court when the State party concerned has made a declaration accepting the competence of the court, is a major drawback on the effectiveness of the Court in providing remedies to victims of

[207] Art 5 (2) & (3). However, this is subject to the allegedly violating state making a declaration accepting the competence of the Court in receiving such cases. See art 34(6).
[208] Art 6(3).
[209] Art 7.
[210] Art 27(1). See also art 27 (2) allowing the court to adopt necessary provisional measures in cases of extreme gravity and urgency to avoid irreparable harm to persons.
[211] Art 28.
[212] Art 29(1).
[213] Art 29(2).
[214] Art 30.

environmental abuse and other human rights violations.[215] This requirement equally applies to the new African Court of Justice and Human Rights.[216]

2.4 National Regulatory Frameworks

The argument that the right to environment has been established will not be complete without a discussion of the regulatory frameworks establishing the right at the national level. This is very necessary as enjoyment of the right like other human rights is at this level. Thus, if the right is established at the regional level and without any corresponding framework for their protection and realisation at the national levels, it cannot be said in actual fact that the right is established in Africa. In this discussion, it should be noted at the onset that the African Charter has been ratified or acceded to by all African countries. In addition, every nation in Africa has adopted a plethora of environmental regulations, while most nations have incorporated the right to environment in their constitutions or legislation, as well as providing institutional mechanisms for their realisation.[217] Thus, it can be argued that this right has been established in the national level in Africa.

However, the degree to which this right is established at the national level varies. This is as a result of how parties incorporated the right in their legislation in discharge of their obligation under article 1 of the African Charter. An analysis of such legislative incorporation shows that African countries have incorporated the right in their various constitutions, or in their environmental and human rights legislation.[218] With regard to the former, Bruch *et al* in their comprehensive analysis of constitutional environmental protection in Africa identified two major constitutional manifestations of this right vis-à-vis as an express fundamental right to environment or as a State

[215] As at July 2006, only Burkina Faso among the 21 States parties has filed this declaration. See *Information Note on the First Meeting of the African Court on Human and Peoples' Rights*. Available at http://www.africaunion.org/root/au/conferences/past/2006/july/summit/doc/cadhp/background_document_on_the_african_court.doc.

[216] See art 30 (f), Statute of the African Court of Justice and Human Rights, Annexed to the ACJHR Protocol *supra* note 203.

[217] These legislative measures are in conformity with article 1 of the African Charter *supra* note 40.

[218] African countries that have incorporated the right in their constitution include Algeria, Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Congo Brazzaville, Democratic Republic of Congo (interim constitution), Equatorial Guinea, Eritrea, Ethiopia, Ghana, Madagascar, Malawi, Mali, Mozambique, Namibia, Niger, Nigeria, Sao Tome & Principe, Seychelles, South Africa, Sudan (interim constitutions),Tanzania, Togo, Uganda, and Zambia. Countries that included the right in their municipal environmental legislation include Uganda.

duty to protect the environment.[219] This is an important distinction as the mode of the manifestation of environmental protection in national constitutions affects not only the degree to which the right is established, but also its enjoyment as it determines the extent to which citizens can enforce such right against the governments and private parties.[220] Thus, where it is provided as fundamental right, aggrieved citizens can bring actions before the court compelling their government to take reasonable measures to give effect to the right.[221] On the contrary, where the right is provided as a State duty to protect the environment, which is usually a non-justiciable Directive Principles of State Policy, the doctrine of *locus standi* has been used to deny judicial access to litigants.[222] This usually leads to a situation where the adoption and enforcement of the enabling legal, policy and institutional frameworks is at the whim of the State.

Thus, in discussing the establishment of the right to environment at the national level in Africa, this thesis differs from Bruch *et al* by analysing the national regulatory frameworks through the lens of the different methods of legislative incorporation in Africa vis-à-vis constitutions, and environmental and human rights legislation. Three African countries exemplify these different methods of legislative incorporation namely:

2.4.1 Regulatory frameworks of the Republic of South Africa

[219] Carl Bruch, Wole Coker, & Chris Van Arsdale 'Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protection in Africa' (2000) 7 *SAJELP* 21 at 35-36.
[220] See Bruch et al *ibid*, at 27-39; Jan Glazewski 'Environmental Justice and the New South African Democratic Legal Order' *Acta Juridica* 1; Joshua P. Eaton 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston Univ. Int'l LJ* 261; Earth Justice *Issue Paper: Human Rights and the Environment – Case Studies* Additional Materials for the Fifty-Eight Session of the United Nations Commission on Human Rights, Geneva, March 18-April 26, 2002 (Earth Justice Legal Defense Fund, 2002) 1; and Human Rights Watch *The Price of Oil: Corporate Responsibility and Human Right Violations in Nigeria's Oil Producing Communities* (1999). Available at http://www.hrw.org.
[221] For example, see *Johann De Kock v Minister of Water Affairs and Forestry and others* Case No. CCT 30/05, at paras 5-6. Decided on 26 September 2005. In this case, the South African Constitutional Court while refusing the application for direct access, upheld the right of the defendant to bring action compelling the defendants to implement and enforce environmental pollution regulations.
[222] For example, see *Oronto-Douglas v Shell Petroleum Development Company Ltd and 5 others* Unreported Suit No. FHC/CS/573/93. Delivered on Feb. 17, 1997. (The Nigerian Federal High Court denied access to the plaintiff on the ground of lack of standing).

(a) Legal and policy frameworks.[223]

(i) Constitution of the Republic of South Africa.[224]

The South African Constitution has been hailed as one of the 'most admirable constitution[s] in the history of the world.'[225] This may not be unconnected to the fact that the Constitution provides for a comprehensive Bill of Rights, which is generally seen as one of the most progressive in the world.[226] The Bill of Rights contains all categories of human rights seen in most international human right instruments including the African Charter on Human Peoples Rights. From an environmental perspective, section 24 of the Constitution provides for an express right to environment.[227] By virtue of this provision, this right constitutes an integral component of the justiciable fundamental rights guaranteed under the Bill of Rights. The importance of this inclusion was highlighted in the decision of the Supreme Court of Appeal in *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and others,*[228] where the Court held that '[o]ur Constitution by including environmental rights as fundamental justiciable human rights, by necessary implication requires that environmental considerations be

[223] Foremost among the policy documents is the 1996 White Paper on Environmental Management Policy for South Africa, an overarching framework policy document that sets out the vision, principles, strategic goals and objectives, and regulatory approaches that the government will use for environmental management in order to achieve sustainable development in South Africa. Others include the 1996 White Paper on Tourism Development and Promotion; the White Paper on Conservation and Sustainable Use of Biological Diversity; 1997 Marine Fisheries White Paper; the 2000; the White Paper on Sustainable Coastal Development; the 1998 White Paper on Sustainable Forest Development in South Africa; and the various sectoral White Papers adopted with the framework of the National Policy on Environment such as White Paper on Integrated Pollution and Waste Management for South Africa.

[224] *Supra* note 54.

[225] Cass R. Sunstein *Designing Democracy: What Constitutions Do* (2001) 261. Quoted in Heinz Klug 'Five Years on: How Relevant is the Constitution of the New South Africa?' (2002) 26 *Vermont L. Rev*. 805.

[226] See Klug *ibid*, at 806; and John Cantius Mubangizi 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 *African Journal of Legal Studies* 1 at 2-3.

[227] 'Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable and other measures that –
    (i) prevent pollution and ecological degradation;
    (ii) promote conservation; and
    (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

[228] 1999 (2) SA 709 (SCA).

accorded appropriate recognition and respect in the administrative process in our country.'[229]

The right as provided under the Constitution is made up of two components. Firstly, section 24(a), which is couched like a first generation right, guarantees the fundamental right of everyone to an environment that is not harmful to his or her health and well-being.[230] Like other first generation rights that are usually negative in character, this right requires the State to desist from undertaking or allowing environmentally degrading activities that may render its enjoyment illusory (vertical application).[231] However, in view of the nature of this right, the obligation to desist from environmentally degrading activities also extends to private persons whether natural or juristic (horizontal application).[232] Thus, a victim of environmental degradation can invoke the right not only against the State, but also against private persons responsible for such degradation when his health and well-being is affected.[233]

The reference to human health and well-being makes section 24 (a) to appear purely anthropocentric in nature. However, this does not mean that the section cannot be applied to the general protection of the environment in South Africa irrespective of the fact that human health is not directly involved.[234] This is based on the fact that the subsection elevates the guaranteed right beyond human health to 'human well-being.' The phrase 'human well-being' as earlier argued in chapter one of this thesis is wide and not readily determinable, and therefore, can be interpreted to cover all aspects of man's physical, cultural, social, economic, recreational, spiritual and aesthetic development.[235] Subscribing to this approach as further argued would to a large extent mitigate the anthropocentric criticisms of the right, as it is presently difficult to see any part of the ecosystem that will not be of any benefit to present or future generations, thereby

[229] *Ibid*, at 719, para 20.
[230] See Glazewski *op cit* note 55 at 75; Glazewski II op *cit* note 220 at 6; and *HTF Developers* case *supra* note 64 at 518E, para 17.
[231] See *ibid*, at 70 & 74.
[232] See *ibid*, at 74-75. See also s 8(2).
[233] See *Woodcarb* case *supra* note 112 at 163.
[234] See Glazewski II op *cit* note 220 at 7-8.
[235] At p23.

making it impossible to separate human interest from that of the environment.[236] Thus, the fact that human interest cannot be readily determinable from that of the environment is enough to encourage the utilisation of the environment and its resources in a morally responsible, considered and ethical manner in South Africa.[237]

On the other hand, section 24 (b) has the character of second-generation rights.[238] It imposes programmatic and positive obligations on the State to protect the environment by preventing pollution and ecological degradation, promoting conservation, and securing ecologically sustainable development.[239] The State is required to discharge this obligation by adopting reasonable legislative and other measures. The reference to 'other measures' may include policies implementing the MDGs in South Africa provided they can contribute to the attainment of the above environmental objectives. It should be noted that any measure adopted by the State to protect the environment can only be regarded as reasonable when it is capable of facilitating the realisation of the right.[240] In addition, such measures must seek to protect the environment not only for the benefit of the present generation, but must take the interest of the future generation into cognisance.[241] As held by the High Court in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*, '[t]he balancing of environmental interests with justifiable social and economic development is to be conceptualised well beyond the present living generation. This must be correct since s 24 requires the environment to be protected for the benefit of "*present and future generations*."[242] This is supported by the decision in the *Fuel Retailers Association* case, where the Constitutional Court states:

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[236] *Ibid*.
[237] See Glazewski *op cit* note 55 at 77.
[238] Second generation or socio-economic rights tend to be positive in character as they oblige the State to secure and provide social and economic amenities and services. See Glazewski *Ibid*, at 70 & 78; and Mubangizi *op cit* note 226 at 5.
[239] *HTF Developers* case *supra* note 64 at 517I-J.
[240] See *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* 2004 (5) SA 124 at 142F (W); *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 at para 42 (CC); and *Minister of Health and others v Treatment Action Campaign and others No. 2* 2002 (5) SA 721at 740F, para 38.
[241] See *BP Southern Africa* case *ibid*, at 143D; and *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga, and others* 2007 (2) SA 163 at 168C-D, paras 14-17 (SCA), (hereinafter Fuel Retailers Association II); and *Fuel Retailers Association* case *supra* note 64 at paras 45, 55-62, & 70-83.
[242] *Ibid*, at 143D.

> '[t]he very idea of sustainability implies continuity. It reflects a concern for social and developmental equity between generations, a concern that must logically be extended to equity within each generation. This concern is reflected in the principles of inter-generational and intra-generational equity which are embodied in both section 24 of the Constitution and the principles of environmental management contained in NEMA.'[243]

In addition, the environmental protection measures envisaged under the right must promote justifiable socio-economic development. This requirement makes the right as provided under section 24 of the South African constitution, to be composite in nature as it includes *inter alia* 'social, economic and cultural considerations in order to ultimately result in a balanced environment.'[244] In essence, the environmental protection measures envisaged by the right must promote sustainable development by enhancing and not hindering the achievement of poverty reduction and socio-economic objectives including the MDGs in South Africa.[245] This reflects the view expressed in this chapter that Africa's notion of environmental conservation is one that supports rather than being inimical to their socio-economic development. The obligation to promote justifiable socio-economic development was recently noted by the Constitutional Court in the *Fuel Retailers Association* case when it held:

> 'The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b) (iii) which provides that the environment will be protected by securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development". Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.[246]

[243] *Supra* note 63 at 75. See also para 102.
[244] See *BP Southern Africa case supra* note 238 at 144H-145A. See also *HTF Developers* case II *supra note* 63 at para 24.
[245] See *ibid*, at 151 D-G; and *HTF Developers* case *supra note* 63 at 518E-H.
[246] *Supra* note 63 at 45.

Section 24(b) is justiciable despite the fact that it has the character of a socio-economic right, and therefore, more in the nature of a directive principle,[247] which traditionally is regarded as non-justiciable by most countries.[248] This is because both civil and political rights and socio-economic rights are of the same fundamental status in the Constitution, and thus, socio-economic rights are also justiciable in South Africa.[249] The effect of this justiciability is that any one affected by the State's action or inaction in adopting legislative and other measures with regard to the prevention of pollution and ecological degradation, promotion of environmental conservation, and securing ecologically sustainable development and use of natural resources, or promotion of justifiable socio-economic development, can now petition the court for appropriate relief in form of either review or other administrative law measures.[250] It is not a bar to action that the petitioner is not motivated principally by the desire to protect the environment, but by overriding socio-economic considerations.[251] As stated by Sachs J. in his dissenting opinion in the *Fuel Retailers Association* case:

> 'It is ironic that the first appeal in this Court to invoke the majestic protection provided for the environment in the Bill of Rights comes not from concerned ecologists but from an organised section of an industry frequently lambasted both for establishing world-wide reliance on non-renewable energy sources and for spawning pollution. So be it. The doors of the Court are open to all, and there is nothing illegitimate or inappropriate in the Fuel Retailers Association of Southern Africa seeking to rely on legal provisions that may promote its interests.'[252]

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[247] See Glazewski II *op cit* note 220 at 6. But see Michael Kidd 'Environmental Justice – A South African Perspective' (1999) *Acta Juridica* 142 at 154. (Arguing that the right is not justiciable).

[248] For example, s 6 (6) (c) of the Nigeria Constitution which provides for the non-justiciability of the provisions of Chapter II of the Constitution (Fundamental Objectives and Directive Principles of State Policy). See *Constitution of the Federal Republic of Nigeria 1999*, Federal Republic of Nigeria Official Gazette, No.27, Lagos-5th May, 1999, Vol. 86, GN No.66, Chapter II. (Hereinafter the Nigerian constitution). Available at http://www.nigeria-law.org. See generally See Dejo Olowu 'Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees' (2006) 69 *Saskatchewan L. Rev.* 39.

[249] See *In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 at 1289-1290 (CC), para 20; *Grootboom* case *supra* note 240; and *Treatment Action Campaign* case *supra* note 240.

[250] See *BP Southern Africa* case *supra* note 240; *HTF Developers* case *supra* note 64; *Kyalami Ridge Environmental Association* case *supra* note 53; *Fuel Retailers Association* case *supra* note 64 at paras 60-62, 71-80 & 89-92; *Turnstone Trading CC v Director General Environmental Management, Department of Agriculture, Conservation & Development*, Case no 3104/04 (T), 11 March 2005, (unreported), at paras 17-19; and *Sasol Oil* case *supra* note 77 at para 15.

[251] *Fuel Retailers Association* case *supra* note 64 at paras 100-101. But see *Fuel Retailers Association* case II *supra* note 241 at para 13. (Finding that the applicant's opposition to the application for authorisation was motivated by the desire to stifle competition which was 'thinly disguised as a desire to protect the environment').

[252] *Ibid*, at para 109.

The right to environment as provided under section 24 of the Constitution is to be enjoyed by everyone. The term 'everyone' can be interpreted to refer to both natural and juristic persons. This is because section 8(4) of the Constitution guarantees the latter class of persons to be entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person.[253] In addition, any one who alleges that any of the provisions of section 24 has been infringed or threatened can approach the court for appropriate relief including a declaration of right.[254] These include anyone acting in their own interest;[255] any one acting on behalf of another person who cannot act in their own name;[256] any one acting as a member of, or in the interest of, a group or class of person;[257] anyone acting in the public interest;[258] and an association acting in the interest of its members. [259] The inclusion of the last three classes of persons has greatly enhanced public interest litigation in South Africa by liberalising the *locus standi* rule. This liberalisation enhances the conservation of the environment, and hence, the achievement of sustainable development in South Africa as it enables individual litigants or non-governmental organizations (NGOs) concerned with the conservation or protection of the environment to approach the court for appropriate relief without having to prove personal interest.[260]

In addition to the right to environment, the Constitution provides for other substantive and procedural rights that can be used for the protection of the environmental.[261]

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[253] See All The Best Trading CC t/a Parkville Motors, and Others v S.N. Nayagar Property Development and Construction CC and others 2005 (3) SA 396 at 400 H-J & 401A (T). (This decision indicates when appropriately and directly in issue, a juristic body right to a health environment will be upheld).
[254] S 38.
[255] S 38(a).
[256] S 38(b).
[257] S 38(c).
[258] S 38(d).
[259] S 38(e). See *Kyalami Ridge Environmental Association* case *supra* note 53.
[260] See Glazewski *op cit* note 55 at 73; and Tobias P. van Reenen 'Locus Standi in South African Environmental Law: A Reappraisal in International and Comparative Perspective' (1995) 2 *SAJELP* 121 at 142-149. See also *Woodcarb* case *supra* note 112 at 159-162; and *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism and others* 1996 (3) SA 1095, at 1104I-J (TK).
[261] These include substantive rights like the rights to equality, human dignity, life, property, housing, healthcare, food, water and social security, education, and cultural, religious and linguistic communities; and procedural rights include the rights to freedom of expression and association, access

Unlike the position in India, these substantive rights may not be of relevance in environmental litigation in South Africa due to the inclusion of a justiciable environmental clause in the constitutional Bill of Rights.[262] In contrast, the procedural rights have been invoked extensively in environmental litigation in South Africa despite the existence of a justiciable environmental clause in the constitutional Bill of Rights.[263] The reason for this being that these procedural rights are generally regarded as an integral part of the substantive environmental right created under section 24 of the South African Constitution, and therefore, essential to the realisation of the objectives of that section.[264] Thus, when applied in an environmental context, these rights could be interpreted to mean rights to freedom of environmental expression and association,[265] access to environmental information,[266] public participation in environmental decision-making process,[267] and in instances of actual or potential environmental harm, access to administrative/or judicial justice.[268]

(ii) National Environmental Management Act (NEMA).[269]

The Act seeks to establish an integrated management framework for all sectors of the environment in South Africa. This is apparent from its long title which indicates that the Act aims *inter alia* to provide for co-operative environmental governance by establishing principles, procedures and institutions to that effect, and to provide for certain aspects of the administration and enforcement of other environmental management laws. NEMA was enacted to give effect to the provisions of section 24

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to information, just administrative action including public participation in administrative decision-making process, and access to courts. See ss 9, 10, 11, 16, 18, 25, 26, 27, 29, 32, 33, & 34.

[262] See Glazewski *op cit* note 55 at 101.

[263] For example, see *Petro Props (Pty) Ltd v Barlow and another* 2006 (5) SA 160 (W), where the Court upheld the respondents' freedom of expression. From an environmental perspective, this decision recognises the important role of both the rights to freedom of expression and association to the protection of the environment in South Africa.

[264] See Boyle *op cit* note 58 at 60-63; Hunter et al *op cit* note 125 at 1312; Atapattu op *cit* note 69 at 90; and *Save the Vaal Environment* case *supra* note 228 at 7181/J-719D/E.

[265] See *Petro Props* case *supra* note 263.

[266] See *Trustee, Biowatch Trust v Registrar: Genetic Resources and others* 2005 4 SA 111 (T); and *Van Huysteen NO and other v Minister of Environmental Affairs and Tourism and others* 1995 (9) BCLR 1191 (C).

[267] See *Save the Vaal Environment* case *supra* note 228; and *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and another* 2005 (3) SA 156 (C).

[268] See *ibid*. See also *Earthlife Africa* case *ibid*; *Kyalami Ridge Environmental Association* case *supra* note 53; and *Hichange Investments* case *supra note* 53.

[269] No. 107 of 1998.

of the South African Constitution.[270] This makes the Act vital in the establishment of the right to environment in South Africa. This is apparent in the preamble which recognises the right of everyone to 'an environment that is not harmful to his or her 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.'[271] The preamble also recognises the duty of the State to 'respect, protect, promote and fulfil the social, economic and environmental rights of everyone.'[272]

In giving effect to the provisions of section 24 of the Constitution, NEMA provides for a set of fundamental principles known as the National Environmental Management (NEMA) Principles.[273] These NEMA principles which include the principle that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably,[274] are to apply throughout the Republic to the actions of all organs of state that may significantly affect the environment. In addition, they shall apply 'alongside all other appropriate and relevant considerations including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination.' This provision obligates decision-makers when applying the principles to consider not only ecological factors, but also socio-economic factors particularly the basic needs of previously disadvantaged persons or communities.[275] This will by implication includes the need to achieve socio-economic objectives such as the MDGs in South Africa. Furthermore, the principles are to serve as guidelines by reference to which any organ of state must

[270] See *HTF Developers* case II *supra* note 64 at paras 24 & 62; *Sasol Oil* case *supra* note 77; and *Fuel Retailers Association* case *supra* note 64 at para 59.
[271] *Supra* note 269 at paras 1 & 5.
[272] *Ibid*, at para 2.
[273] See Chapter 1. The obligatory nature of the principles was affirmed by the Constitutional Court in *Fuel Retailers Association* case *supra* note 64 at paras 71-97. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490. (Interpreted similar principles under section 2 of the Marine Living Resources Act of 1998).
[274] S 2(2).
[275] Glazewski op *cit* note 55 at 138. See also *Fuel Retailers Association* case *supra* note 64 at paras 61-62; *BP Southern Africa* case *supra* note 240 at 140E-151H; *Sasol Oil* case *supra* note 77 at para 15.

exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;[276] and guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.[277]

Other provisions of NEMA that are relevant to the establishment of this right include the general duty imposed on every person that causes, has caused or may cause significant pollution or degradation of the environment to take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or in the event that the pollution or degradation cannot reasonably be avoided or stopped, to minimise or rectify it;[278] rights of employees to abstain from or refuse the performance of environmentally hazardous work;[279] the right of every person to access environmental information held by the State and organs of state, and protection of any person who disclosed environmental information from civil or criminal liability, dismissal, discipline, prejudice or harassment on account of such disclosure.[280] The Act also liberalises the *locus standi* rule in environmental litigation;[281] and provides for the recovery of environmental damages in criminal proceedings.[282]

(iii) Other legislation

Other legislation that have helped in establishing the right to environment in South Africa are the specific environmental legislations emanating from NEMA which is a framework Act. These Acts like NEMA recognise the right as provided under section 24 of the Constitution. These include the Air Quality Act that regulates air pollution in South Africa;[283] the Biodiversity Act,[284] and the Protected Areas Act.[285] In addition, there are other environmental legislations whose legal value lies in the fact

[276] S 2 (1) (c).
[277] S 2(1) (e).
[278] S 28.
[279] S 29.
[280] S 31.
[281] Part III of Chapter 7. Compare with s 38 of the South African Constitution *supra* note 54.
[282] The court can also order forfeiture, see s 34D.
[283] National Environmental Management: Air Quality Act No. 39 of 2004.
[284] National Environmental Management: Biodiversity Act No. 10 of 2004.
[285] National Environmental Management Act: Protected Areas Act No. 57 of 2003.

that they are vital to the protection of the environment, and thus, fall under the legislative measures contemplated under section 24(b) of the Constitution.[286] These include the Environmental Conservation Act, which was promulgated in 1989 and aims *inter alia* to provide for the effective protection, and controlled utilisation of the environment;[287] and the Marine Living Resources Act (MLRA), which aims at the sustainable utilisation and exploitation of marine living resources as well as the conservation of the resources for present and future generations.[288] The National Water Act adopted in 1998 is also relevant.[289] Specifically section 19 of the Act which is in many respects similar to section 28 of NEMA, deals with the prevention of pollution arising from activities performed on land or any situation which exists on land which causes has caused or is likely to case pollution of water resources.[290]

(b) Institutional Framework

(i) The judiciary (courts)

The judiciary as presently constituted is provided under Chapter 8 of the South African Constitution.[291] The Constitution vests the courts with the judicial authority of

[286] See *Fuel Retailers Association* case *supra* note 64 at para 40; and *Sasol Oil* case *supra* note 77 at para 15.
[287] See the Long Title to Act No. 73 of 1989. Presently, NEMA has repealed most of the provisions of the Act (s 50 of NEMA). Despite that, some of the provisions of the Act are still relevant to the protection of the environment in South Africa particularly in the area of prevention of environmental pollution or degradation (part IV & s 31A.). However, the continuing relevance of the Act to environmental protection will soon be further diminished, as the proposed Waste Management Bill when promulgated will automatically repeal the provisions of Part IV of the Act. See s 84 & schedule 1, National Environmental Management: Waste Management Bill (19 December 2006).
[288] No. 18 of 1998.
[289] Act No.36 0f 1998. It should be noted that this Act is not strictly speaking an environmental legislation as it is principally concerned with the equitable allocation of water for beneficial use as well as its redistribution. Despite this, the Act is vital to environmental protection as it recognises that such utilisation must be sustainable. In addition, it acknowledges the need to protect the quality of water resources through *inter alia* protecting aquatic and associated ecosystems and their diversity; and reducing and preventing pollution and degradation of water resources. Legal instruments like this can best be described as environmentally related legislation. NEMA requires that the interpretation, administration and implementation of such legislation must be guided by its principles. See s 2 (1) (e). Other legislation that will fall within this category include the Minerals and Petroleum Resources Development Act No. 28 of 2002 (MPRDA), National Nuclear Regulator Act No. 47 of 1999, Gas Act No. 48 of 2001, National Forest Act No. 84 of 1998, and Water Services Act No. 108 of 1997.
[290] See *Minister of Water Affairs and Forestry v Stilfontein Gold Mining CO Ltd and others* 2006 (5) SA 333 at 345D-G, paras 14.14 – 14.16 (W).
[291] *Supra* note 54.

the Republic.[292] The courts consist of the Constitutional Court, Supreme Court of Appeal, the High Courts, Magistrates' Courts, and any court established or recognised in terms of an Act of Parliament.[293] The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.[294] In addition, no person or organ of state is allowed to interfere with the functioning of the courts.[295] Any order or decision issued by a court binds all persons to whom and organs of state to which it applies.[296] The constitutional duty imposed on the courts to uphold the Constitution and the law has made the courts vital in protecting the right to environment in South Africa. As stated by the Constitutional Court in the *Fuel Retailers Association* case, '[t]he role of the courts [in upholding the Constitution and the law] is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development.'[297] It further states the readiness of the courts to protect this right by holding that '[w]hen the need arises to intervene in order to protect the environment, they [court] should not hesitate to do so.'[298]

The Courts indeed have intervened in many instances to stop or declare null and void, the actions of both private persons and public bodies that are contrary to the provisions of section 24 of the Constitution. This is evident in the *Woodcarb* case, which was the first reported case which referred to the right albeit under the Interim Constitution.[299] The Court in finding that the respondent had been operating the burning process without the necessary certificate, held that 'the generation of smoke in these circumstances, in the teeth of the law as it were, is an infringement of the rights of the respondent neighbours to 'an environment which is not detrimental to their health and well-being', enshrined in the Interim Constitution.'[300] In other instances of intervention, the courts have upheld the justiciability of the right thereby

[292] S 165(1).
[293] S 166. For the functions and powers of the various courts, see ss 167-170 respectively.
[294] S 165(2).
[295] S 165(3).
[296] S 165(5).
[297] *Supra* note 64 at para 102.
[298] *Ibid*, at para 104.
[299] Glazewski II *op cit* note 220 at 9.
[300] *Supra* note 112 at 164E-F.

confirming it as one of the fundamental rights under the Constitution.[301] In addition, the courts have clarify the substantive content of the right as provided under the Constitution vis-à-vis the prevention of pollution and environmental degradation; the promotion of conservation; and the securing of ecologically sustainable development and use of naturally resources while promoting justifiable economic and social development.[302] With regard to promoting justifiable socio-economic development, the courts not only acknowledge the composite nature of the right,[303] but also expressed their determination to balance the conflict that may arise between the right and the requirements of socio-economic development.[304]

(ii) Other institutions

The South African Human Rights Commission established under the Constitution and charged with promoting respect for human rights; promoting the protection, development and attainment of human rights; and monitoring and assessing the observance of human rights in the republic.[305] In addition, the Commission is required to monitor annually the conduct of organs of state by requiring them to provide information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment.[306] For the organs of state, such information will invariably include their various policies implementing the MDGs. Other institutions include those whose value lie in the fact that they fall under the institutional measures contemplated under section 24(b) of the Constitution. These include the Department of Environmental affairs and Tourism (DEAT), which is the primary department charged with the protection of the environment in South Africa; the Department of Water Affairs and Forestry (DWAF); and the Department of Minerals and Energy.[307]

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[301] See *Save the Vaal Environment* case *supra* note 228; and *Fuel Retailers Association* case *supra* note 64 at para 40.
[302] See *HTF Developers* case *supra* note 64 at 518F-G.
[303] See *BP Southern Africa* case *supra* note 240 at 144H-145A; *Fuel Retailers Association* case *supra* note 64 at paras 44-45; and *HTF Developers* II case *supra note* 64 at paras 24 & 62.
[304] *HTF Developers* II case *supra* note 64 at 28.
[305] *Supra* note 54 at s 184 (1). See also the Human Rights Commission Act No. 54 of 1994.
[306] S 184(3).
[307] See generally, South African Human Rights Commission (SAHRC) *The Right to a Healthy Environment*, 5th Economic and Social Rights Report Series 2002/2003 Financial Year (21 June 2004) 8-40. Available at http://www.sahrc.org.za/old_website/5th_esr_environment.pdf.

2.4.2 Regulatory frameworks of the Federal Republic of Nigeria

(a) Legal and policy frameworks.[308]

(i) The Constitution of the Federal Republic of Nigeria 1999.[309]

The Nigerian Constitution does not provide for an express right to environment among its fundamental rights. However, it provides for substantive rights like the rights to life, dignity of human person, private and family life, equality, and property that are essential to the protection of the environment and realisation of the right to environment in Nigeria.[310] The importance of these rights to environmental protection in Nigeria was affirmed in the *Gbemre* case, where the Federal High Court held that that the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's community was a gross violation of their constitutionally guaranteed rights to life (including healthy environment) and dignity of human person.[311] In addition to these substantive rights, the Constitution provides procedural rights that can also be mobilised for environmental protection. These include the rights to fair hearing, freedom of expression and the press, and peaceful assembly and association.[312]

The Constitution also provides among its Fundamental Objectives and Directives Principles of State Policy, that '[t]he State shall protect and improve the environment

[308] Prominent among the policy documents are the revised National Policy on the Environment which was initially adopted in 1989 and which aims to *inter alia,* secure for all Nigerians a quality of environment adequate for their health and well-being, conserve and use the natural resources for the benefits of present and future generations, restore, maintain and enhance the ecosystem and ecological processes essential for preservation of biodiversity, and raise public awareness and promoting understanding of the essential linkages between environment and development; and the National Agenda 21 that was published in 1999 and now incorporated in the VISION 2010 Report. This touches on the various cross-sectoral areas of environmental concerns and maps out strategies on to address them.
[309] *Supra* note 248.
[310] On the link between environmental degradation and non-achievement of these rights in Nigeria, see Amechi *op cit* note 83 at 21-33.
[311] *Supra* note 76 at paras 3-4.
[312] See ss 36, 39 & 40 respectively.

and safeguard the water, air and land, forest and wildlife of Nigeria.'[313] This provision places a mandatory duty on the State to direct its policies towards achieving the above environmental objective.[314] However, it does not place any corresponding legal right on the citizens to enforce such provision or any other provisions of the Chapter in the event of non-compliance by the State. The reason for this state of affairs is because of section 6 (6) (c) of the Constitution which provides that '[t]he judicial powers vested in [the courts]…shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objective and Directive Principles of State Policy set out in Chapter II of this Constitution.'

The above stipulation was judicially interpreted in *Okogie (Trustees of Roman Catholic Schools) and other v Attorney-General, Lagos State*,[315] which is based on equivalent provision of the erstwhile 1979 Nigerian constitution. The case dealt with the constitutional issues of the Plaintiffs' fundamental right under section 32(2) of the 1979 Constitution to own, establish and operate private primary and secondary schools for the purpose of imparting ideas and information, and the constitutional obligation of the Lagos State government to ensure equal and adequate educational activities at all levels under section 18(1), Chapter II of the 1979 Constitution.[316] On reference to the Court of Appeal, the Court while considering the constitutional status of the said Chapter stated:

> 'While section 13 of the Constitution makes it a duty and responsibility of the judiciary among other organs of government, to conform to and apply the provisions of Chapter II, section 6 (6) (c) of the same Constitution makes it clear that that no court has jurisdiction to pronounce on any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. It is clear therefore that section 13 has not made Chapter II of the Constitution justiciable. I am of the opinion that the obligation of the judiciary to observe the provisions of Chapter II is limited to interpreting the general provisions of

[313] S 20. These Fundamental Objectives and Directive Principles are essentially a set of guidelines designed to secure the 'national' targets of social well-being, social justice, political stability, and economic growth in accordance with the espoused vision of the Preamble to the Constitution. See Olowu *op cit* note 248 at 56.
[314] See s 13.
[315] (1981) 2 NCLR 337.
[316] In pursuit of this objective, the State government purported via a circular letter dated 26 March 1980 to abolish the operation of private schools in the State. See *ibid*.

> Constitution or any other statute in such a way that the provisions of the Chapter are observed, but this is subject to the express provisions of the Constitution.[317]

The reasoning in the above decision was affirmed in the later case of *Adewole v Jakande*.[318] The effect of these decisions is that the provisions of Chapter II of the Nigerian Constitution are now regarded as mere declarations or 'cosmetic constitutional provisions'[319] while their constitutional weight lies at the moral level.[320] Indeed in the *Okogie* case, Justice Mamman Nasir, President of the Court of Appeal (as he then was) expressed the view that the arbiter for any breach of the provisions of Chapter II is the legislature or the electorate.[321] However, the *Okogie* case suggests that the provisions of the Chapter can be made justiciable by appropriate implementation legislation provided the fundamental rights of any citizen or any other expressed constitutional provision are not infringed.[322] This has been reaffirmed by the Nigerian Supreme Court in *Attorney-General, Ondo State v Attorney-General, Federal Republic of Nigeria*,[323] involving the constitutional validity of the Corrupt Practices and Other Related Offences Act No. 5 of 2000 and its Independent Corrupt Practices and Other Related Offences Commission (ICPC). Both the Act and ICPC were established to enforce observance of the Directive Principle set out in section 15(5) of the Constitution.[324] The Court held that '[a]s to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy, s. 6 (6) (c)... says so. While they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of State organs if they acted in clear disregard of them ... the Directive Principles can be made justiciable by legislation.'[325]

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[317] *Ibid*.
[318] (1981) 1 N.C.L.R. 152.
[319] Olowu *op cit* note 248 at 58-59.
[320] Peter Oluyede *Constitutional Law in Nigeria* 1ed. (Evans Press) 174.
[321] *Supra* note 315.
[322] *Ibid*.
[323] (2002) 9 Sup. Ct. Monthly 1 (Nig. Sup. Ct.) [Ondo State].
[324] In holding that the Act and the commission were constitutional and valid, the apex court referred extensively to the Fundamental Principles in Chapter II of the Nigerian Constitution. As stated by the Court, 'it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy.... The ICPC was established to enforce the observance of the Directive Principle set out in s. 15(5) of Chapter II which provides that "The State shall abolish all corrupt practices and abuse of power.'
[325] *Supra* note 323. This position tallies with the almost uniform position of the state courts in the United States that general constitutional environmental provisions are ineffective save with the aid of

The Nigerian judicial attitude to the Directive Principles is influenced by the initial position of the Indian Supreme Court with regard to the justiciability of article 48A of the Indian Constitution, which is similar to section 20 of the Nigerian Constitution.[326] The Court's decisions in the 1950s established that article 48A and other provisions of Part IV of the Indian Constitution relating to the Directive Principle, are not justiciable as a result of article 37 which provides that the Directive principles ' shall not be enforceable by any court.'[327] Presently, the judicial position has changed in India starting with the decision of the Supreme Court in *Minerva Mills v Union of India*,[328] which elevated the constitutional status of the Directive Principles. It is from the philosophy underlying the elevated status of the Directives Principles, that the Supreme Court began interpreting fundamental rights under Part III in the light of the provisions of Part IV.[329] In the area of environmental protection, the Court has recognised the right of every Indian to live in a healthy or pollution-free environment by utilising the environmental provisions of Part IV to flesh out the constitutional right to life.[330] As observed by Dam and Tewary:

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additional legislative enactment (see Pollard III 'A Promise Unfulfiled: Environmental Provisions in State Constitutions and the Self-Execution Question' (1986) 5 *Va. J. Natural Resources Law*. Cited in Francois Du Bois 'Social Justice and the Judicial Enforcement of Environmental Rights and Duties' in Boyle & Anderson (ed) *op cit* note 51 at 154). This judicial attitude flowed from the doctrine of 'self-execution'. This doctrine requires a provision to constitute 'a sufficient rule by means of which the right which [it] grants may be enjoyed and protected…without the aid of a legislative enactment' before it will be judicially enforced. (See *State ex rel. City of Fulton v Smith* 194 S.W. 2d 302, 304 (Mo. 1946). Thus, since only provisions couched in prohibitory language are regarded as satisfying this test, the mandatory language of environmental prohibitions in US state constitutions has disqualified them from being regarded as self-executing (see Du Bois *ibid*, at 155 citing Fernandez 'State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?' (1993) 17 *Harvard ELR* 333 at 361-365). It should be noted that section 20 of the Nigerian Constitution is also couched in a mandatory language.

[326] See *Okogie* case *supra* note 315.

[327] See *State of Madras v Champakam Dorairajan* (1951) AIR (SC) 226 at 252; and *Mohd Nanif Qureshi v State of Bihar* (1958) AIR (SC) 731.

[328] (1980) AIR (SC) 1789.

[329] Shubhankar Dam & Vivek Tewary 'Polluting Environment, Polluting Constitution: Is a "Polluted" Constitution Worse than a Polluted Environment?' (2005) 17 (3) *Journal of Environmental Law* 383 at 386. See also Michael R. Anderson 'Individual Rights to Environmental Protection in India' in Boyle & Anderson (eds) *op cit* note 51 at 214; and *Francis Coralie Mullin v Union Territory of India* (1981) AIR (SC) 746 at 752-753 (interpreting the right to life).

[330] See Dam & Tewary *ibid*; and Anderson *ibid*, at 215-216. For the judicial decisions, see *Subash Kumar v State of Bihar*, AIR 1991 SC, 1991 (1) SCC 598; *L.K. Koolwal v Rajasthan* (1988) AIR 2 (High Court of Rajasthan); *Charan Lal Sahu v Union of India* (1990) AIR (SC) 1480; T. *Damodhar Roa v Municipal Corp of Hyderabad* (1987) AIR 171 at 181; and *M.C. Mehta v Kamal Nath* (2000) 6 SCC 213.

> 'In recognising the right to a clean environment, the Court drew inspiration from article 48-A enjoining upon the state a duty to protect the environment and a similar fundamental duty of every citizen under article 51A of the Constitution. This recognition of the right to a clean environment and, consequently the right to a clean air and water was a culmination of the series of judgements that recognised the duty of the state and individuals to protect and preserve the environment.'[331]

The Nigerian constitution does not contain a provision similar to article 51A of the Indian Constitution. Despite this, the Indian judicial decisions constitute persuasive precedents for Nigerian courts. Thus, when confronted with a similar situation, the courts are urged to re-interpret the fundamental rights in the Constitution especially the rights to life, dignity of human persons, private and family life, and property in the light of the provision of section 20, in order to uphold the constitutional right of every Nigerian to live in an environment adequate to their health and well-being.[332] The importance of such recognition is that it will enhance the ability of a person to obtain legal redress against the State and private individuals, when his/her environment is threatened by the action of the State or private individuals. This will deter future polluting conducts and conserve the environment, thereby enhancing the achievement of poverty reduction and sustainable development in Nigeria as most Nigerian are dependent on the environment for their sustenance.[333]

However, the Indian approach when applied to Nigerian context has some drawbacks. These include the victim having to prove a violation of his right to life by showing that the degradation or pollution in question is of such significant proportion as to adversely affect or threaten his/her enjoyment of this right.[334] Failure to prove this linkage will be prejudicial to the victim's suit.[335] In addition, a person can only approach the court for remedy, if he/she alleges that any of the fundamental rights guaranteed under the Nigerian constitution has been, is being, or is likely to be

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[331] *Ibid*.
[332] See Nasir JCA (as he then was) *Okogie* case *supra* note 315. Note that some of these rights such as rights to private and family life and property under article 8 of the European Convention and article 1 of Protocol 1 respectively now form the basis of environmental protection in Europe. See Churchill *op cit* note 51 at 91-95.
[333] See Federal Environmental Protection Agency (FEPA) *National Policy on Environment: Revised Edition* (The Presidency, Abuja, 1999) 2.
[334] S. Douglas-Scott 'Environmental Rights in the European Union—Participatory Democracy or Democratic Deficit' in Boyle & Anderson (ed) *op cit* note 51 at 111-112.
[335] *Ibid.*

contravened in relation to him,[336] thereby effectively precluding public interest litigation.[337] In addition to the above, a drawback unique to Nigeria is that since Chapter II of the Nigerian Constitution does not contain a provision similar to article 51A of the Indian Constitution, it will be difficult to extend the constitutional duty of protecting the environment directly to private individuals. This perhaps explains why *Gbemre* case which is the only judicial decision on the right to environment in Nigeria made no mention of section 20 of the Constitution. [338]

(ii) African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[339]

The Act domesticates the provisions of the African Charter in Nigeria.[340] Thus, by virtue of this Act, article 24 of the African Charter providing for the right to environment as well as other provisions of the African Charter has become part and parcel of Nigerian law.[341] This Act now forms part of existing Nigerian legislation recognised under the Constitution and has such effect until modified by the appropriate authority.[342] Since the Act domesticates the African Charter in Nigeria, the discussion in the earlier part of this chapter with regard to the provisions of the African Charter applies. However, the domestication of this charter in Nigeria extends the corresponding obligations not only to the State (government of Nigeria), but also to private individuals in Nigeria.[343] Thus, any person who felt that any of the rights provided by the Act including the right to environment, in relation to him is infringed or threatened by conducts of the State or private individuals can bring an action in any

[336] *Supra* note 248 at s 46(1).
[337] See *Oronto-Douglas* case *supra* note 222. (Application to compel the defendants to comply with the provisions of the EIA Act struck out on the ground that he has no legal standing to prosecute the action).
[338] *Supra* note 248.
[339] Enacted in 1983. See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Vol. 1, LFN 2004. (Hereinafter African Charter Ratification Act).
[340] S 1.
[341] See Nigerian Constitution *supra* note 248 at s 12(1). See also *Abacha v Fawehinmi* (2000) FWLR 585G-P; 586A-C; & 653G.
[342] See Nigerian Constitution *ibid* at s 315; and *Abacha* case *ibid*, at 596C-E. 'Appropriate authority' according to the Supreme Court in *Attorney-General, Abia State and 35 others v Attorney-General, Federation*, is the President of the Federal Republic of Nigeria. (2003) 4 NWLR (Part 809) 124 at 175D-H.
[343] See *Gbemre* case *supra* note 76 at para 6. (The Court held that a government legislation that allows the 1st and 2nd Respondents to continue flaring gas is a violation *inter alia* of articles 4, 16 and 24 of the Act).

of the several Nigerian high courts depending on the circumstances of the case for appropriate relief.[344] Bringing such action under the Act has many procedural advantages such as decreasing the over reliance on the onerous tort rules, thereby easily allowing access to judicial remedy for victims of actual or potential environmental degradation. Other procedural advantages include removing the necessity to prove that the degradation affected a victim's health or well-being except that it has created an unhealthy environment for him to live in; and permitting a victim to proceed against the polluter by way of either a Writ or any other permissible procedure including the Fundamental Rights (Enforcement Procedure) Rules 1979.[345]

However, the provisions of article 24 and other relevant provisions of the Act are subject to the provisions of the Nigerian Constitution and any other subsequent law repealing or modifying it.[346] The effect of this is that in the event of any conflict between the provisions of the Act and that of the Nigerian Constitution particularly its fundamental human rights provisions, the latter prevails.[347] While it may be argued that the provisions of both the Act and the Fundamental Rights Chapter of the Nigerian Constitution complement each other,[348] the possibility of such conflict arising still exists especially with regard to the provision of article 24 of the Act providing for the right to environment, and that sections 43 and 44 of the Nigerian Constitution providing for the right to property. Thus, in the event of such conflict ever arising, the provision of the latter sections prevails.

(iii) Federal Environmental Protection Agency (FEPA) Act.[349]

FEPA Act is the principal environmental legislation in Nigeria. However, the Act was enacted in response to the Koko toxic waste incident,[350] and not necessarily by the need to fulfil the State's obligation under the African Charter Ratification Act. It was

[344] See *Abacha* case *supra* note 341 at 590E-H & 591A; and *Ogugu v the State* (1994) 9 NWLR (Part 366) 1.
[345] See *Ibid.*
[346] *Ibid*, at 586F-G.
[347] See s 1(3), Nigerian Constitution *supra* note 248. See also *Ransome-Kuti v Attorney-General, Federation* (2001) FWLR 1677F; and *Akulega v B.S.C.S.C* (2002) FWLR 288E-F.
[348] See *Abacha* case *supra* note 341 at 586D.
[349] Cap F10 *LFN* 2004. Amended in 1992 by virtue of the Federal Environmental Protection Agency (Amendment) Decree No. 59 of 1992, and further amended by the Federal Environment Protection Agency (Amendment) Decree No. 14 of 1999.
[350] See Bowen *op cit* note 34 at 152.

designed to provide a comprehensive and coordinated legal and institutional framework for the protection of the environment in Nigeria.[351] Thus, the Act in addition to establishing the Federal Environmental protection Agency (FEPA, now Federal Ministry of Environment), provides for the establishment of national environmental standards such as federal water quality standards for inter-states waters of Nigeria, and effluent limitations;[352] air quality standards including recommendations and programmes for the protection of the ozone layer;[353] and noise abatement programmes and emission standards.[354] The Act also prohibits 'the discharge in such quantities of any hazardous substance into the air or upon the land and waters of Nigeria or at the joining shorelines…except where such discharge is permitted or authorised under any law in force in law.'[355]

The Act did not recognise or provide for the right to environment. However section 29(1) impliedly provides for the right of private persons to sue the Ministry when the latter's act, neglect or default in the execution of any law including environmental legislation, public duties or authority, infringes or threatens their right to environment or other legal rights.[356] This is a very important provision as it potentially enables private persons to bring an action before an appropriate court, to compel the Ministry to enforce the provisions of the Act, or any other environmental law in Nigeria against those involved in environmental degradation. This will include determining the

[351] See Akanki *op cit* note 21 at 202.
[352] Ss 15 & 16. Note that the regulation of inter-states waters falls under the exclusive legislative jurisdiction of the Federal government. See s 4 (2) & (3), & para 64, Part 1, 2nd Schedule, Nigerian Constitution *supra* note 246.
[353] Ss 17 & 18.
[354] S 19. See also s 37. Note that FME has adopted regulations establishing several of these environmental standards. These regulations include the National Guidelines and Standards for Environmental Pollution Control in Nigeria 1991; National Effluent Limitation Regulation S.1.8 of 1991; the Pollution Abatement in Industries and Facilities Generating Waste Regulations S.1.9 of 1991; the Management of Solid and Hazardous Waste Regulations S.1.15 of 1991; National guidelines on waste disposal through underground injection 1999; National guidelines in spilled oil finger printing 1999; National guidelines on registration of environment friendly products 1999; National guidelines and standards for water quality in Nigeria 1999, National guidelines on Environmental Audit 1999; and National guidelines on Environmental Management Systems 1999.
[355] S 20(1). Note that waters of Nigeria is defined under the Act to mean all waters resources of whatever form where the resources 'are inter-state, or in the Federal Capital Territory, territorial waters, exclusive economic zone or in any other area under the jurisdiction of the Federal Government.' The effect of this is that this provision does not cover intra-state rivers, creeks and stream as their regulation falls under the jurisdiction of states governments.
[356] 'No suit against the Agency, a member of the Agency or any employee of the Agency for any act done in pursuance or execution of any law, or of any public duties, or in respect of any alleged neglect or default in the execution of such law, duties or authority, shall lie or be instituted in any court unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of damage or injury within twelve months next after the ceasing thereof.'

amount of compensation to be paid to the victims of environmental degradations by those responsible.[357] The only limitation is that recourse to this provision is only available to persons who as required by the existing rule of *locus standi* in Nigeria can show that they are 'person aggrieved', that is persons whose legal rights are infringed or threatened by the Ministry's act, neglect or default in the execution of any environmental law, duties or authority.[358] This will effectively preclude enforcement by non-governmental organisation and other interested citizens.[359] As aptly argued by Bowen:

> 'To the extent that section 29 merely implies but does not specifically grant a general right to sue to individuals, it does not provide a reliable basis for citizens enforcement. In the absence of a specific grant of general standing, the

[357] See *Mobil Producing Nigeria Unlimited v Lagos State Environmental Protection Agency* (2001) 8 NWLR. (Pt 715) 489 CA. This case arose from the oil spill at Mobil's Idoho Qua Iboe oil terminal which devastated the coastal areas of Akwa Ibom State, Nigeria. Strong wind carried the oil slick as far as the shores of other farther Nigerian coastal states of Rivers, Bayelsa, Ondo, and Lagos States. The case has not been finally decided as the Supreme Court as had to remit it back to the Federal High Court for retrial. Thus, a rare opportunity for a definitive and final pronouncement on this right was missed. See (2003) FWLR (Pt 137) 1029 SC. (For decision of the Supreme Court remitted the matter back to the Federal High Court for retrial).

[358] This is known as the 'civil rights' test. Bello JSC (as he then was) laid down this test in *Adesanya v President of Nigeria*, when he stated that 'standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or in danger of being violated or adversely affected by the act complained of.' The test reflects his view that s 6 (6) (b) of the then 1979 (now 1999) Nigerian Constitution laid down a standing requirement. See (1981) All NLR 1 at 39. This construction was accepted by Nigerian Courts and later affirmed by the Supreme Court as laying down a constitutional rule of standing applicable in all cases. See *Inyangukwo v Akpan* (1985) 6 NCLR 770; *Attorney-General of Kaduna State v Hassan* (1985) 2 NWLR 483; *Irene Thomas and others v Reverend Olufosoye* (1986) 1 NWLR 669, and *Adediran and another v Interland Transport Limited* (1992) 9 NWLR (Part 214) 155. For a criticism of this position, see Tunde I. Ogowewo 'Wrecking the Law: How Article III of the Constitution of the United States led to the Discovery of a Law of Standing to Sue in Nigeria' (2000) 26 *Brooklyn JIL* 527. This position appears to have changed with the decision in *Owodunni v Registered Trustees of Celestial Church of Christ and others* (2000) 10 NWLR (Pt. 675) 315, where the Supreme Court-per Ogundare JSC (as he then was)- in reviewing *Adesanya* case unanimously held that the majority of the court were not in favour of Bello's interpretation of s 6 (6) (b) of the Constitution, and that 'It will therefore not be correct to say that this Court decided in Adesanya case that the sub-section prescribes the locus standi of a person wanting to invoke the judicial powers of the Court… the Adesanya case which is in the realm of public law seems to lay down that to invoke the judicial powers of the Court, a litigant must show sufficient interest or threat to of the injury he will suffer' This view received the unanimous agreement of the remaining justices. However, it appears that the decision is only favourable to action in private law as Ogundare JSC further held in the same case that s 6 (6) (b) was relevant to locus standi in public law by stating that 'I think there is some wisdom in the views expressed by his Lordship Ademola JCA [as he then was in *Bolaji v Bamgbose* (1986) 4 NWLR 632]. The Judgement in the Adesanya case seen to support him. The term "civil rights and obligation" applies more in the sphere of public law.' The effect of this pronouncement being that in public law, *Owodunni* did not differ from *Adesanya*, and thus, the 'civil rights' test still applies. See Akpo Mudiaga Odje 'Locus Standi: Threat to Anti-Corruption Crusade and Good Governance in Nigeria (1) & (2)' The *Vanguard* January 13 & 20, 2006. Available at http//www.vanguardngr.com/articles/2002/features/lwa/law413012006.html and http://www.vanguard ngr.com/articles/2002/features/law/law620012006.html.

[359] See Ogowewo ibid, at 542-543.

> courts may fall back on the conflicting and inconsistent rules of standing in "public-interest" cases. A person is required to show some personal grievance as basis for instituting an action, or standing may depend on the nature of the remedy sought.'[360]

The effect of this rule of standing in public interest litigation in the area of environmental protection was felt in *Oronto-Douglas v Shell Petroleum Development Company Ltd and 5 others*,[361] where the plaintiff, an environmental activist sought to compel the respondents to comply with provisions of the EIA Act.[362] The suit was struck out on the grounds *inter alia* that the plaintiff has no legal standing to prosecute the action. As stated by the trial judge, Belgore, CJ (as he then was), '…the claim is baseless, the plaintiff shows no prima facie evidence that his right was affected nor any direct injury caused to him. Furthermore, since there was no personal right of the plaintiff infringed nor has he shown any injury suffered if he suffered anything at all more than the generality of the people.'[363]

(b) Institutional framework

(i) The judiciary (Courts)

The judiciary as presently constituted in Nigeria is established under Chapter VII of the Nigerian Constitution.[364] It is composed of the federal courts consisting of the Supreme Court, Court of Appeal, Federal High Court, High Court of the Federal Territory, and Sharia Court of Appeal and Customary Court of Appeal of the Federal Territory; and state courts consisting of High Court, Sharia Court of Appeal and Customary Court of Appeal.[365] In addition to these, are such other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the

[360] *Op cit* note 34 at 163.
[361] *Supra* note 222.
[362]The Respondents includes oil companies, Attorney-General of the Federation and FEPA. However, the claim against the agency was discontinued. Thus, it is doubtful if the plaintiff brought the action pursuant to section 29 of the FEPA Act. However, the decision would still have been the same even if the suit were brought under that section.
[363] *Supra* note 222. On appeal, this decision was set on appeal and remitted back to the Federal High Court for retrial. However, it did not change the rule of standing in public interest litigation as the Court of Appeal decision was based on the technical ground that it is erroneous to conclude that the appellant has no standing without looking at the statement of claim or in the absence of any evidence. See (1999) 2 NWLR 466.
[364] *Supra* note 248.
[365] For various powers and functions, see ss 233, 239, 251, 257, 262, 267, 272, 277, & 282 respectively.

National Assembly or a House of Assembly may make laws.[366] The judicial powers of the federation are vested in the courts.[367] Such powers extend to all inherent powers and sanctions of a court of law, and to 'all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceeding relating thereto, for the determination of any question as to the civil rights and obligations of that person.'[368] From an environmental perspective, the latter was judicially interpreted in *Adediran and another v Interland Transport Limited*,[369] where the Supreme Court held that by virtue of section 6 (6) (b) of the 1979 Constitution of Nigeria (now 1999 Constitution), a private person can commence an action in public nuisance without the consent of the Attorney-General and without joining him as a party. The liberalisation of this rule has greatly enhanced the right of victims of environmental degradation in seeking judicial remedy in Nigeria.[370]

The judicial powers does not extend to 'any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objective and Directive Principles of State Policy set out in Chapter II of this Constitution.'[371] This provision has been judicially interpreted to deny court access to any one interested in enforcing the provisions of Chapter II of the Constitution, including section 20 providing for the duty of the State to protect and improve the environment as evidenced in the *Oronto-Douglas* case.[372] The failure by Nigerian Courts in following the Indian precedents with regard to the justiciability of a Directive Principle dealt a big blow with regard to the establishment of a constitutional right to environment in Nigeria. This does not mean that Nigerian courts have not upheld the right to environment as evidenced by the *Gbemre* case, which was based on the fundamental rights to life and dignity of human person as well as the right to a general satisfactory environment under the African Charter Ratification Act.[373] However, the *Gbemre* case did not establish a jurisprudence on a constitutional right to environment as it is a judgement of a High Court which does

[366] S6 (5) (j)-(i).
[367] S 6(1)-(3) & (5).
[368] S 6 (6) (a)-(b).
[369] *Supra* note 358.
[370] However, the plaintiff still has to show that he is affected by the public nuisance just like the rest of the public. See *Adediran* case *ibid*, at 180.
[371] S 6 (6) (c).
[372] *Supra* note 222. See also *Okogie* case *supra* note 315; and *Adewole* case *supra* note 318.
[373] *Supra* note 75.

not bind other high courts that deal with constitutional matters. In fact, in a similar case against four oil conglomerates in Nigeria, a judge of the Federal High Court (Port Harcourt Division) in September 2006, declined to follow the decision in the *Gbemre* case, and dismissed the action.[374] Neither does it liberalise the *locus standi* rule, which is still one of the greatest obstacle in public interest litigation generally and in environmental cases specifically.

(ii) Other institutions

The National Human Rights Commission was established *inter alia* to deal with all matters relating to the protection and promotion of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria, African Charter on Human and Peoples' Rights, and all international treaties on human rights to which Nigeria is a signatory.[375] This will include the right to a satisfactory environment under article 24 of the African Charter Ratification Act.[376] Most importantly, the Commission which serves as the mechanism for the enhancement of all human rights in Nigeria recognises some of the socio-economic provisions under Chapter II of the Constitution as human rights although they are not justiciable rights.[377] To that end, the Commission has made a strong case for their upgrading into fundamental rights to the Joint National Assembly and Presidential Committee on the Review of the 1999 Constitution.[378] In addition, the Commission has identified environmental protection as one of its fifteen (15) main thematic areas of focus.[379] Other relevant institutions include the Federal Ministry of Environment, which was established to coordinate various environmental efforts of the government as well as to tackle environmental degradation issues.

2.4.3 Regulatory frameworks of the Republic of Kenya

[374] See Peter Roderick, Co-Director, Climate Justice Programme *Climate change in the courts: Summary of cases*, Wild Law Conference, September 2007, at p6. Available at http://www.climatelaw.org.
[375] See National Human Rights Commission Act of 1995, at s5.
[376] *Supra* note 337.
[377] See National Human Rights Commission (NHRC) *About the National Human Rights Commission*, available at http://www.nigeriarights.gov.ng/about.html.
[378] *Ibid*.
[379] *Ibid*.

(a) Legal and policy frameworks.[380]

(i) Constitution of the Republic of Kenya

The Constitution does not provide for the right to environment among its fundamental rights and freedoms of the individual nor does it contain any express environmental provision. However the Constitution provides for substantive and procedural rights that are vital to the protection of the environment and realisation of the right to environment in Kenya.[381] With regard to these rights, the Indian judiciary has already established a fairly large amount of jurisprudence on their reformulation or interpretation for environmental protection. For example, the Supreme Court of India has interpreted the constitutional right to life to encompass the right to a clean and healthy environment.[382] The Court pointed out that the right to life does not mean the right to any kind of life,[383] and thus, did not hesitate in forbidding all environmentally degrading activities of both the State and private individuals that disturb the ecological balance,[384] affect human health,[385] or pollute the environment.[386] As a common law country, such decisions constitute persuasive precedent, and thus, the Kenyan courts should take cognisance of them when adjudicating cases involving the protection of the environment.

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[380] The policy documents include 1994 *National Environment Action Plan* (NEAP) that was adopted as a strategy for sustainable development in Kenya; the *Economic Recovery Strategy (ERS) for Wealth and Employment Creation (2003-2007)* that guides the overall process of policy formulation and implementation in Kenya and which recognises the need to achieve broad macro and sectoral objectives without compromising the environment; the *9th National Development Plan (2002-2008)* that recognises the need to fully integrate environmental concerns in development planning at all levels of decision-making as well as valuing the contribution of the environment to the national economy; the *Kenya Forestry Master Plan, and Forest Policy*; the *Sessional Paper No. 6 on Environment and Development*; The *Kenya Vision 2030* envisions a globally competitive and prosperous nation with a high quality of life by 2030; and the various Strategic Plans that set out the strategies that both the Ministry of Environment and Natural Resources (MENR) and the National Environmental Management Authority (NEMA) will pursue within the stipulated plan period in order to achieve its mandate of contributing to overall national goal of sustainable development.

[381] See chapter V, the Constitution of the Republic of Kenya (Revised Edition) 1998. Available at http: //www.bunge.go.ke/downloads/constitution.pdf. (Hereinafter Kenyan constitution).

[382] Anderson *op cit* note 329 at 214; and Bruch et al *op cit* note 219 at 55-58.

[383] See *Kumar* case *supra* note 330.

[384] See *Damodhar Roa* case *supra* note 330.

[385] See *Koolwal* case *supra* note at 330.

[386] See *Kumar* case *supra* note 330; *Vellore Citizens Welfare Union v Union of India* (1996) AIR (SC) 2715; and *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212.

Presently, Kenya does not have any judicial decision incorporating this expansive interpretation of the right to life. However, it has been argued that the right as provided under the Kenyan constitution also encompasses the right to environment as the right to life can only be meaningful in Kenya if enjoyed within a favourable natural environment.[387] This thesis agrees with the above argument and it is hoped that the Kenyan judiciary when confronted with the issue, can look to judicial decisions in other common law countries as a precedent for upholding the environmental components of the right. However, it is doubtful if such an opportunity will ever arise as the Environmental Management and Co-ordination Act (EMCA),[388] provides not only for an express right to environment but also important procedural guarantees for the enforcement of the right against degraders and polluters.

(ii) Environmental Management and Coordination Act (EMCA)

EMCA is a framework legislation that was adopted in 1999 and entered into force on 14 January 2000.[389] It was adopted against the backdrop of a deteriorating state of Kenya's environment, as well as increasing social and economic inequality and their negative impact on the environment.[390] It therefore provides for the establishment of an appropriate legal and institutional framework for the management of the environment in Kenya.[391] It further recognises the need for improved legal and administrative co-ordination of the diverse sectoral initiatives in order to improve national capacity for the management of the environment.[392] This recognition is very important as the Act seeks to avoid the fragmented and diffuse environmental

[387] See G.M. Wanukoya & F.D.P. Situma (eds) *Environmental Management in Kenya: A Guide to the Environmental management and Coordination Act* (Centre for Research and Education, Environmental Law, 2000). Cited in Dr Patricia Kameri-Mbote *Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention* IERLC Working Paper 1 (2005) 2. Available at www.ielrc.org/content/w0501.pdf.
[388] No. 8 of 1999.
[389] Several regulations have been enacted pursuant to the Act. These include the Environmental (Impact Assessment and Audit) Regulation, Legal Notice No. 108 of 2003, Environmental Management and Coordination (Fossil Fuel Emission Control) regulation, 2006, and National Environmental Tribunal Procedure Rules, Legal No. 191 of 2003.
[390] Hon. Stephen Kalonzo Musyoka 'Foreword' in National Environmental Management Agency (NEMA) *Strategic Plan (2005-2010)* (NEMA, June 2005) 1.
[391] Preamble to the Act, at para 1.
[392] *Ibid*, at para 2.

management system which existed prior to its adoption.[393] In addition, the Act accepts that the environment constitutes the foundation not only of Kenya's economy, but also its social, cultural and spiritual advancement.[394] This is an express recognition of the importance of environment to the achievement of sustainable development objectives including the MDGs in Kenya.

Most importantly for the discussion in this chapter, EMCA provides a set of general principles that will guide its interpretation and application. Foremost among them is the right of every person in Kenya to a clean and healthy environment.[395] However, the Act did not identify the beneficiaries of the right as it did not provide for the definition of the term 'person', leading to confusion as to whether the term refers only to natural persons or both natural and legal persons.[396] Despite this non-definition, the term can be construed as referring both to natural and legal persons. The basis of this assertion is that a similar term under the fundamental rights provision of the Kenyan constitution has been judicially interpreted to cover both natural and legal persons.[397] This was illustrated by the case of *Sha Vershi Devshi and Company Ltd v The Transport Licensing Board*,[398] where the applicant company was refused renewal of a licence under the policy of Africanisation. It appealed to the High Court claiming breach of its fundamental rights. The Court while holding that the constitutional references to 'person' covered both natural and legal persons observed:

> '…a company is a "person" within the meaning of Chapter V [of Kenyan constitution] and would be entitled to all the rights and freedoms given to a "person" which it is capable of enjoying. …. If a right or freedom is given to a "person" and is, from its nature, capable of being enjoyed by a "corporation" then a "corporation" can claim it, although it is included in the list of "rights and freedoms of the individual". The word "individual" like the word "person", does where the context so requires, includes a corporation.'[399]

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[393] The fragmented system was due to the existence of a multiplicity of sectoral laws and implementation institutions resulted in Kenya. See Nasong'o & Gabsa *op cit* note 24 at 86-87; and Odhiambo *op cit* note 36.
[394] Preamble to the Act, at para 3.
[395] S 3(1).
[396] This confusion is not peculiar to the EMCA as it also occurred with regard to fundamental rights guaranteed under the Kenyan constitution especially when used to address environmental issues. See Kameri-Mbote *op cit* note 387 at 2.
[397] *Ibid*.
[398] (1971) EALR 289. Cited In Mbote *ibid*.
[399] *Ibid*, at 298.

It is therefore apparent from the above that there is no legal basis for precluding legal persons from enjoying the right to environment under the EMCA. This is further supported by section 3(1) of the Act providing that the entitlement to a clean and healthy environment includes access by any person in Kenya to the various public elements or segments of the environment for recreational, education, health, spiritual and cultural purposes.[400]

The right carries a correlative duty. Hence, every person in Kenya 'has the duty to safeguard and enhance the environment.'[401] The effect of this provision is that the protection of the environment is not a task reserved for the State alone, but also includes the participation of all persons including juristic persons.[402] However, the Act is not specific on what this duty generally entails. It is submitted that despite the omission, this duty is similar to those enunciated by the African Commission in *SERAC* communication.[403] Thus, every person in Kenya is required to prevent pollution and ecological degradation,[404] and promote conservation,[405] as well as ecologically sustainable development.

In discharging this duty, any aggrieved person can without prejudice to any other action that is legally available, apply to the High Court for redress, and the Court is obliged to make appropriate order to remedy or address the situation.[406] This right of action subsists irrespective of the fact that the applicant is unable to show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury.[407] This provision is innovative as it eliminates most of the limitations inherent in the traditional *locus standi* rule, which previously has been a major impediment to

[400] See *Rodger Muema Nzioka and 2 others v Tiomin Kenya limited*, Civil case No.97 of 2001, High Court of Kenya, Mombassa, at 10, para 2. Available at http://www.elaw.org/assets/pdf/kenya.tiomin.case.pdf.
[401] S 3(1) EMCA *supra* note 388.
[402] See *Park View Shopping Arcade Ltd v Charles M. Kangethe and 2 others* (2004) eKLR at 21. Available at www.kenyalaw.org.
[403] *Supra* note 61 at para 52.
[404] See *Peter Kinuthia Mwaniki and others v Peter Njuguna Gicheha and others* Civil Case 313 of 2000. Cited as (2006) eKLR.
[405] The decision in *Park View* case implies that citizens can bring action to protect the environment within the ambit of the law. *Supra* note 402 at 21-22.
[406] S 3 (3).
[407] S 3 (4). See *Sylvia C. Endere versus Karen Roses Ltd* HCCC (Nakuru) No. 298 of 2005. Reported on [2006] eKLR; and *Samson Lereya and 800 others v The Attorney General and 2 Others* HCCC No. 115 of 2006. Reported in [2006] eKLR.

public interest litigations in Kenya.[408] This is however subject to the proviso that the action is not frivolous, vexatious, or amounts to an abuse of the court process.[409]

In exercising its jurisdiction, the Court shall guided by the principles of sustainable development. These includes the principle of public participation in the development of environmental management policies, plans and processes; the principle of international co-operation in the management of shared environmental resources; principle of intra-generational and intergenerational equity; the polluter-pays principle; and precautionary principle.[410] In addition, they are to take cognisance of the cultural and social principles traditionally applied by any community in Kenya for the management of the environment and natural resources, except if they are irrelevant or repugnant to justice and morality or inconsistent with any written law.[411] This is important for the achievement of poverty reduction and sustainable development objectives (including the MDGs) in such a community as most of these cultural and social principles which the court are bound to respect, aim at the conservation and sustainable use of these resources, as explained in the beginning of this chapter.

However, the right as provided under the EMCA is not on the same fundamental level with rights guaranteed under the Kenyan Constitution. This makes the right subject to the provisions of the Constitution especially that of Chapter V. Thus, in the event of conflicts between the right and any of the rights guaranteed under the Kenyan Constitution, the latter prevails, subject however to the limitations provided under the Constitution.[412] In addition, the right is susceptible to limitation or modification by subsequent legislation.[413] This was implied in the High Court decision in *Park View*

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[408] See *Nzioka* case *supra* note 400. But see *Wangari Mathai v the Kenya Times Media Trust* Civil Case No. 5403 0f 1989, High Court of Kenya; and *Law Society of Kenya v Commissioner of Land and others*, Civil Case No. 464 of 2000, High Court of Kenya.

[409] See *Subash Kumar* case *supra* note 330, where the Indian Supreme Court in interpreting a similar version in the article 32 of the Indian constitution, held that such standing to sue is limited to persons 'genuinely interested in the protection of society on behalf the community. Public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge or enmity.'

[410] S 3 (5).

[411] *Ibid*.

[412] See *Park View* case *supra* note 402 at 21-22. See also *Abhilash Textile v Rajkot Municipal Corporation* (1988) AIR 57 (Gujurat). (The High Court linked the reasonable restriction clause in article 9(6) of the Indian Constitution to the fundamental duty under article 51-A to protect and improve the natural environment).

[413] *Cf Nzioka* case *supra* note 400 at 11-13.

Shopping Arcade Ltd v Charles M. Kangethe and 2 others,[414] where the defendants/respondents purported to justify their trespass on the basis of section 3 of the EMCA as the disputed land is located on an ecologically fragile area. It was contended on behalf of the Defendants/Respondents *inter alia* that while the activities of the Plaintiff/Applicant (the owner) is bound to imperil the land which is a river-bed, the current activities of the Defendants/Respondents through the propagation of flowers and seedling will lead to its conservation. The Court in rejecting the above argument held:

> 'On the basis of that provision [section 3 of the EMCA), if nothing else is taken into account, the Defendants/Respondents in this case could very well contend that by denying the Plaintiff/Applicant access to his own land [that] they are protecting the environment. But I have already discounted the validity of such argument…. I should add that, although "every person" has been empowered by section 3(1) of the Act to aforesaid to "Safeguard and enhance the environment", this must be subject to the State's policy and management directions. This is essential for the efficacious and well-ordered environmental management and for compliance with the governing law, the relevant ministerial regulations, and authoritative provisions of the Constitution. Once this principle is observed, then it will be readily seen that the claims now being made by the Defendants/Respondents must be subject to the Constitution. The claims of the Defendants cannot be upheld if they run counter to the express provisions of the Constitution.' [415]

These limitations can be avoided by the provision of an express right to environment in the Constitution. Such provision will elevate the right to the status of other fundamental rights in the Constitution and accord it with the same importance, thereby overriding lesser legal obligations.[416] In addition, such constitutional provision will be an acknowledgement of the 'vital character of the environment as basic condition of life, indispensable to the promotion of human dignity and welfare, and to the fulfilment of other human rights.'[417] The importance of having a constitutional right to environment has been recognised in Kenya as a case was made during the May 2003-March 2004 Constitutional Review Process for the proposed

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[414] *Supra* note 402.
[415] *Ibid*, at 18.
[416] See Atapattu op *cit* note 69 at 91; Anderson *op cit* note 329 at 222; and Boyle op *cit* note 58 at 49.
[417] *Ibid*. See also Anne N. Angwenyi *Environmental Legislation and Domestication of International Environmental Law in Kenya*, Paper presented at the Sesei Programme Sub-Regional Legal Workshop held in Nairobi, 13th -17th December 2004 (NEMA Kenya, 2004). Available at http://www.nema.go.ke/envilegilation.asp#.

constitution to address environmental concerns by incorporating *inter alia* this right.[418] This resulted in the draft of the proposed constitution having extensive provisions on the management of land, environment and natural resources including an express right to environment and free information about the environment,[419] as well as access to court.[420] However, the proposed constitution was not passed into law as it was rejected in a national referendum conducted in November 2005.[421]

(b) Institutional framework

(i) The judiciary (courts)

The judiciary as presently constituted is provided under Chapter IV of the Constitution. It consists of the High Court, Court of Appeal, and other courts as may be established by parliament and which must be subordinate to the High Court.[422] The High Court which is a superior court of record 'shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.'[423] This will include adjudicating on the actual or potential infringement of the right to environment as provided under the EMCA.[424] The High Court has on a number of occasions upheld the right of Kenyans to a healthy environment.[425] In addition, with the exception of the *Law Society of Kenya* case,[426] the High Court has upheld the right of the public to bring public interest litigation in order to protect the environment without the litigant

[418] See Angwenyi *ibid*.
[419] See art 67 (a) & (c), the Draft Constitution of Kenya. Adopted by the National Constitutional Conference on 15 March 2004.
[420] *Ibid*, at art 72.
[421] The reason for the rejection centred mostly on the wide powers given to the President under the draft constitution. See afrol News 'Kenya votes on new constitution' 21 November 2005, available at http://www.afrol.com/artilces/17343; and afrol News 'Kibaki defeated in Kenya referendum' 22 November, 2005, available at http://www.afrol.com/articles/17362.
[422] For the powers and functions of the courts, see ss 60(1), 64(1), & 65(1).
[423] S 60(1).
[424] *Supra* note 388 at s 3.
[425] See generally Maurice Odhiambo Makoloo, Benson Owuor Ochieng' & Collins Odote Oloo *Public Interest Environmental Litigation in Kenya: Prospects and Challenges*, Ecogovernance Series NO. 4 (An Institute for Law and Environmental Governance (ILEG), Nairobi, February 2007) 32-39.
[426] *Supra* note 408.

having to prove personal interest in the subject matter of the litigation.[427] It should be noted that while the basis of these decision is the provisions of section 3 of EMCA, generally it appears that the Kenyan judiciary is now taking a liberalised attitude towards the *Locus standi* rule.[428]

(ii) Other institutions

The Kenya National Commission on Human Rights is an autonomous body created by Act No. 9 of 2002 and charged with the protection, promotion and enhancement of all human rights in Kenya.[429] The National Environmental Tribunal established under EMCA is charged with adjudicating disputes of a technical nature on the administration of the Act as well as appeals against the administrative decision taken by the authority and other organs responsible for enforcement of the Act or regulations and standards made under it.[430] This will invariably involve where such decision does not protect or promote the realisation of the right to environment under the EMCA. Other relevant institutions include the National Environmental Management Authority (NEMA) established under section 7 of the EMCA, and charged with exercising general supervision and co-ordination over all matters relating to the environment, and to be the principal instrument of the Government charged with the implementation of all policies relating to the environment.[431]

2.5 Conclusion

This chapter shows that the right to environment has been established in Africa as there exists various legal, policy and institutional frameworks at the regional and national levels providing, recognising or giving effect to the right. Section 24 of the African Charter arguably provided the impetus for the establishment of this right. It is

[427] See *Nzioka* case *supra* note 400; Mwaniki case supra note 404; *Endere* case *supra* note 407; and *Lereya* case *supra* note 407.
[428] See *Kenya Bankers Association & Others versus Minister for Finance & Another* No.4, (2002) 1 KLR at 61; and *Paul Nderitu Ndungu and 2 Others v. Pashito Holdings Limited and another*, HCCC No. 3063 of 1996 Reported in *The Economic Review*, 5-11 May 1997.
[429] See the Kenya National Commission on Human Rights Act No. 9 of 2002, s 16.
[430] S 125.
[431] S 9(1).

also apparent that the right as established in Africa is framed in such a way that it is linked to both poverty reduction and sustainable development. In addition, the African Charter imposes a positive duty on States parties not only to recognise the right to environment but also to adopt appropriate environmental regulations and policies as well as institutional machinery for its realisation. States parties through the African Union and sub-regional bodies have discharged this obligation at the regional and sub-regional levels by adopting the various legal, policy and institutional frameworks discussed above. Similar actions were also taken at the national level albeit at varying legislative levels. Despite these national differences, it is apparent that African nations have individually undertaken to recognise the right to environment and to give effect to it.

The next chapter of this thesis will therefore discuss the extent that the right to environment has been realised in Africa.

CHAPTER THREE

BEYOND THE FRAMEWORKS: TO WHAT EXTENT HAS THE RIGHT TO ENVIRONMENT BEEN REALISED IN AFRICA?

'We are all aware of the problems and challenges facing our continent today. Almost 15 years after the establishment of AMCEN and, indeed, eight years after the Earth Summit… our region is still bedevilled by many problems. We are still contending with land degradation and natural, as well as man-made disasters. Our forests and forest resources are being indiscriminately exploited and depleted, our coastal and marine resources are being degraded, and we still have enormous problems with water supply and availability, qualitatively and quantitatively…. These difficulties are further aggravated by broader environmental problems of planet Earth, such as ozone layer depletion and climate change, which continue to threaten the survival of mankind. In addition, Africa has unfortunately been an easy dumping ground for toxic and hazardous wastes and obsolete chemicals and technologies…'

(Chief Olusegun Obasanjo, President of the Federal Republic of Nigeria [as he then was]. Quoted in United Nations Environment Programme *African Environmental Outlook: Past, Present and Future Perspectives* at 321)

3.1 Introduction

The discussion in the preceding chapter showed that the right to environment is not alien to Africa, as there are legal, policy and institutional frameworks at the regional and national levels providing, recognising or giving effect to the right. This leads to the issue of whether the right to environment has been realised in Africa and the extent of its realisation. Resolving this issue is important, as it will help in providing an insight into the role of the MDGs in the realisation of the right to environment in Africa. It should be noted that if the existence of these regulatory frameworks has led to the realisation of the right to environment for average Africans, then there is no need for the MDGs as far as environmental goods are concerned as there is no lacunae for the goals to correct or fill. If on the contrary, the right is still a mirage despite the existence of these frameworks, then there is a lacunae and hence a role for the MDGs in the realisation of this right in Africa. This chapter therefore examines the extent to which the right has been realised in Africa by assessing the state of the environment in Africa. If the state of the environment is not satisfactory to human development, it discusses the factors responsible for environmental degradation in the region.

3.2 Assessment

An assessment of the extent to which the right to environment has been realised in Africa will involve an analysis of the state or condition of the environment in Africa. This is due to the fact that the right is intrinsically linked to the health of the environment. Thus, where the environment is degraded, such degradation most often infringes or threatens the enjoyment of the right. In analysing the state of the environment in Africa, this thesis adopts the findings of the African Environmental Outlook (AEO).[1] The two volumes of the AEO, which incorporate the inputs of scientists and other experts from national and sub-regional environmental institutions,[2] constitute the most comprehensive, integrated and authoritative assessment of the state of the environment in Africa.[3] The AEO reporting process itself has been endorsed by the African Ministerial Conference on the Environment (AMCEN) as a 'valuable monitoring and reporting tool for sustainable environmental management and to provide a framework for national, sub-regional and regional integrated environmental assessment and reporting in Africa.'[4]

These Reports show that despite the existence of legal, policy and institutional frameworks adopted to halt or reverse environmental degradation in Africa, that the environment is heavily degraded and that the degradation is still continuing with adverse consequences for prospects of achieving sustainable development in Africa.[5] The Reports while concluding that Africa's contribution to global greenhouse gas (GHG) emissions is negligible, find that environmentally degrading activities such as deforestation, inappropriate coastal development, and poor land management throughout Africa contribute to the worsening of possible impacts of climate change

[1] Compiled by the United Nations Environment Programme (UNEP) for the African Ministerial Conference on the Environment. The first volume of the Report was published in July 2002, while the second volume was published in June 2006.

[2] See United Nations Environment Programme *African Environmental Outlook 2: Our Environment, Our Wealth* (UNEP, 2006) XXV. (Hereinafter AEO 2).

[3] See United Nations Environment Programme *African Environmental Outlook: Past, Present and Future Perspectives* (UNEP, 2002) 31, (hereinafter AEO I). See also 'The State of Africa's Environment Chronicled in Ground-Breaking Report: Hard Facts Tough Choices' *UNEP News Release 2002/50* 4 July 2002. Available at http://www.unep.org.

[4] AEO 2 *op cit* note 2 at XXIV – XXV.

[5] See UNEP News Release *op cit* note 3; and also Achim Steiner 'Speaking Notes of the UNEP's Executive Director on the Launch of the African Environmental Outlook 2' 27 June 2006. Available at http://www.unep.org. For an assessment of specific environmental degradation in Africa, see United Nations Environment Programme *African Environment Outlook: Case Studies* (UNEP, Earth Print, 2004).

such as drought, desertification, flooding, and rise in sea level.[6] They also find that outdoor air pollution is fast emerging as an issue in most African countries especially in the urbanised and industrialised areas.[7] Indoor air pollution as a result of burning of fuelwood and other unhealthy sources of fuel is also increasing with adverse consequences on human health and well-being.[8]

Furthermore, the Reports find that Africa's biological resources are declining rapidly due to habitat loss, over-harvesting of selected species, the spread of invasive alien species, and illegal activities such as the poaching of endangered species for the bush meat or exotic pets' trade.[9] They also find that Africa's marine and coastal resources are under pressure from land-based and sea-based sources of pollution.[10] These include pollution from oil transportation that threatens the eastern and southern African coast and islands, and oil drilling and processing activities that have had adverse effects on the northern, western and central African coast.[11] Africa's marine and coastal resources are also under threat from over-harvesting of its resources, as well as from domestic, industrial and agricultural effluents.[12]

Forests and woodlands in Africa did not fare better as the Reports find that Africa has the fastest rate of deforestation in the world as a result of competing land uses, rising demand for fuel wood and charcoal, illegal and poorly regulated timber extraction, and conflicts.[13] In addition, the Reports find that almost all African countries are experiencing problems of water quality due to the pollution of Africa's freshwater resources.[14] The pollution is caused mostly by the discharge of large quantities of untreated industrial and domestic wastewater into the watercourses and coastal waters of Africa.[15] Finally, the Reports find that land and its resources in Africa are being

[6] AEO I *op cit* note 3 at 222. See also AEO 2 *op cit* note 2 at 58 – 59.
[7] *Ibid*. See also AEO 2 *ibid* at 60.
[8] *Ibid*. See also AEO 2 i*bid*. It has been argued that charcoal production and consumption emits more GHGs than the industry and transports sectors combined in Kenya. This not only contributes to global warning but also to acute respiratory infections especially in children under the age of 5. See AEO 2 *ibid*, at 65.
[9] *Ibid*, at 223. See also AEO 2 *ibid*, at 237 –238.
[10] *Ibid* at 224. See also AEO 2 *ibid*, at 160 – 161.
[11] *Ibid*. See also AEO 2 *ibid*, at 175 & 185.
[12] *Ibid*. See also AEO 2 *ibid*, at 166, 175 & 185.
[13] *Ibid*, at 225. See also AEO 2 *ibid*, at 202.
[14] *Ibid*, at 226. See also AEO 2 *ibid*, at 125 – 126.
[15] *Ibid*. See also AEO 2 *ibid*, at 134, 136, 141, & 146; and Japan International Cooperation Agency JICA) *Country Profile on Environment: Nigeria* (November 1999) 19. Available at http://www.jica

degraded as a result of increasing use of inorganic chemicals, invasive alien species, increased monoculture, conflicts, desertification, mining and oil extraction activities, and poor management practices.[16]

The findings of the Reports are supported by the various national state of environment (SoE) reports prepared either prior to, between, or after the Reports.[17] These reports were unanimous in their conclusions that the Africa's environment is in a poor state albeit at the national level. For example, the 2006 national SoE report released by the Department of Environmental Affairs and Tourism (DEAT) in South Africa concludes that the condition of South Africa's environment is deteriorating.[18] According to the Report, this deterioration is evidenced by increasing pollution and declining air quality that harm people's health; unsustainable exploitation of natural resources, declining water quality and aquatic ecosystems; continuing land degradation; and the overexploitation and collapse of commercial and recreational fish species.[19] Similarly, the 2003 Kenya SoE report shows a deteriorating environment as a result of increasing land degradation; dwindling forest and wildlife; degradation of water resources and general aquatic environment; and increased air pollution.[20]

It is apparent from the findings of these regional and national SoE reports that the environment in Africa is heavily degraded. Such degradation more often than not affects the enjoyment of most of the human rights including the right to environment

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.go.jp/english/Global/env/profiles/eggnai.pdf. (Showing that no municipal sewage plant operates in Nigeria which is Africa's most populous nation. This leads to the discharge of such waste into its water bodies).

[16] *Ibid*, at 227. See also AEO 2 *ibid*, at 91 – 95.

[17] For example, see JICA *op cit* note 15 at 11-27; and National Environmental Management Authority (NEMA) *State of Environment (SoE) Report for Kenya, 2003* (NEMA, 2003). (Hereinafter Kenya SoE).

[18] See Department of Environmental Affairs and Tourism (DEAT) *South Africa Environmental Outlook: A Report on the States of the Environment – Executive Summary and Key Findings* (DEAT, Pretoria, 2006) 2.

[19] *Ibid*, at 23-33 & 38-39. It should be noted that the findings of this SoE is not new as the news media are full of reports of environmental degradation in South Africa. For example, see Elise Templehoff 'Study warns of radioactive foods' *Beeld/News24.com* July 31, 2007. (Reporting the existence of contaminated food items polluted by overflow from sludge dams).

[20] *Op cit* note 17 at 9-14. See also Lucy Emerton, Francis Karanja & Sam Gichere *Environment, Poverty & Economic Growth in Kenya: What are the Links, and Why do They Matter?* Policy Brief No. 2 (IUCN, December 2001) 1-4. Available at http//www.borderdiversity.org/dcforum/User_Files/Policy_brief_No_2_Kenya.pdf. (Painting similar picture of massive environmental degradation in Kenya).

guaranteed under the African Charter on Human and Peoples Rights,[21] as well as the various national constitutions and laws.[22] Flowing from this, it is submitted that environmental degradation has made it impossible for average African citizens, to enjoy the right to environment as well as other relevant human rights guaranteed under the African Charter and national constitutions in Africa. The next section of this chapter discusses the factors that are responsible for environmental degradation and hence, non-realisation of the right to environment in Africa

3.3 Factors Responsible for Environmental Degradation in Africa

The degraded state of Africa's environment has been attributable to mostly non-natural or man-made incidents such as *inter alia* climate change, invasive alien species, over-harvesting, deforestation, charcoal production and consumption, pollution, hazardous and untreated wastes, and land cover change.[23] The Millennium Ecosystem Assessment (MA) describes these incidents as direct drivers of environmental deterioration.[24] It should be noted that with the exception of climate change that has been attributed to anthropogenic GHG emissions by industrialised countries,[25] most of these environmentally devastating incidents are caused or exacerbated by human and industrial activities within Africa. The emergence or occurrence of these incidents or direct drivers is in turn influenced by human acts or omissions that are mostly socio-economic and political in nature.[26] For the purpose of this thesis, these socio-economic and political issues will be discussed under three

[21] OAU Doc.CAB/LEG/76/3 rev.5, 21 *ILM* 58 (1982), entered into force October 21, 1986. Available at http://www.africaunion.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf. (Hereinafter African Charter).

[22] See the discussions in chapter two of this thesis. See also Emeka Amechi *Environmental Pollution and Human Rights in Nigeria* (unpublished LLM dissertation, University of the Witwatersrand 2004); and *Social and Economic Rights Action Center (SERAC) and another v Federal Republic of Nigeria* Communication 155/96, Decision of the African Commission on Human and Peoples' Rights, paras 61 & 67. Available at http://www.cesr.org/text%20files%final%20Decision%2000%20the%Eco soc%20matter.pdf. (Hereinafter *SERAC* communication).

[23] See AEO I *op cit* note 3 at chapter 2; AEO 2 *op cit* note 2 at chapter 2; and Kenya SoE *op cit* note 17 at 9-16.

[24] Millennium Ecosystem Assessment *Ecosystem & Human Well-Being: Synthesis* (Island Press, Washington DC, 2005) 67-70, (hereinafter MA General Synthesis); and Millennium Project *Environment and Human Well-Being: A Practical Strategy*. Summary Version of the Report of the Task Force on Environmental Sustainability (Earth Institute, New York, 2005) 5-6.

[25] Africa's contribution to global GHG emission is negligible. See AEO 2 *op cit* note 2 at 59.

[26] See also Johan Hattingh & Robin Attfield 'Ecological Sustainability in a Developing Country such as South Africa: A Philosophical and Ethical Inquiry' (Summer 2002) 6 (2) *The International Journal of Human Rights* 65 at 86-87.

major interlinked factors namely poverty, lack of political will, and weak institutional capacity.[27]

3.3.1 Poverty

The NEPAD Environmental Action Plan (NEPAD-EAP) has identified poverty as the main cause and consequence of man-made environmental degradation and resource depletion in Africa.[28] Poverty as previously argued in chapter one of this thesis is multidimensional,[29] and therefore, goes beyond lack of income to include as proposed by the United Nations Development programme (UNDP) 'the denial of opportunities and choices most basic to human development - to lead a long, healthy, creative life and to enjoy a decent standard of living, freedom, dignity, self-esteem and the respect of others.'[30] Environmental degradation and poverty are inextricably intertwined.[31] The consequence of this linkage is a vicious cycle in which poverty causes the degradation of the environment, and such degradation in turn perpetuates more poverty.[32] As aptly observed by Fabra '…poverty and environmental degradation are often bound together in a mutually reinforcing vicious cycle, and thus human rights abuses related to poverty can be both cause and effects of environmental problems.'[33] Several factors are responsible for causing or exacerbating poverty and by implication environmental degradation in Africa. These include corruption, low literacy, lack of

[27] Note that these socio-economic and political issues may also overlap among the factors. The MA has referred to these factors and issues as indirect drivers. See MA General Synthesis *op cit* note 24 at 64-66.

[28] See New Partnership for Africa's Development (NEPAD) *Action Plan of the Environment Initiative of the New Partnership for Africa's development* (June 2003), at para 23. (Hereinafter NEPAD-EAP).

[29] At p2. For a comprehensive treatment of the nature, dimension and manifestation of poverty, see Focus on Global South *Antipoverty or Anti Poor? The Millennium Development Goals and the Eradication of Extreme Poverty or Hunger* (December 2003) 4-6. Available at http://focusweb.org/pdf/MDG-2003.pdf.

[30] *Human Development Report: Human Development to Eradicate Poverty* (UNDP, 1997) 5. Available at http/hdr.undp.org/reports/global/1997/en/. For similar definition, see para 3, United Nations Statement of Commitment of the Administrative Committee on Coordination of Action to Eradicate Poverty, UN Doc. E/1998/73.

[31] See NEPAD-EAP *supra* note 28 at para 1.

[32] *Ibid*, at para 3. See MA General Synthesis *op cit* note 24, at 62.

[33] Adriana Fabra 'The Intersection of Human Rights and Environmental Issues: A Review of Institutional development at International Level' Background Paper 3 *Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment*, January 14-16, 2002, Geneva, available at http://uchchr.ch/environment/bp3.pdf.

access to information and public participation, lack of access to legal remedy or justice, armed conflict, and HIV/AIDS.

(a) Corruption

Corruption is endemic in Africa.[34] This is evident from the result of the *2007 Transparency International Corruption Perception Index* (CPI), which focuses on corruption in the public sector.[35] The CPI shows that out of the 52 African countries surveyed, 2 scored above 5.0, 5 scored above 4.0, 9 scored above 3.0, while the rest scored below 3.0.[36] A score of between 3 and 5 shows that the African countries falling within the bracket are facing a serious challenge regarding corruption, while for those African countries that fall below 3 out of 10, such score is a sign of 'rampant' corruption.[37] The widespread corruption in Africa is costing the region nearly $150 billion a year.[38] This translates to about twenty-five percent of Africa's collective national income;[39] up to $30 billion in aid to African countries that has ended up in foreign bank accounts thereby making the region 'the graveyard of development aid';[40] loss of approximately 50 percent of tax revenue;[41] and percentage of household income spent on bribes.[42]

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[34] See Transparency International *Report on the Transparency International Global Corruption Barometer 2007* (Policy and Research Department, 2007) 3-4; 'Corruption still a problem in Africa, says UN' *The Cape Times* 14 March, 2006, at p7; Ray Faure 'Survey shows signs of "rampant corruption" in Africa' *Mail & Guardian* 18 October 2005, available at http://www.mg.co.za/article. aspx?area=/breaking_news_business/.; Noel Mwakugu 'Kenya re-invents corruption' *BBC News* 23 February 2004, available at http://news.bbc.co.uk/o/pr/fr/2/hi/Africa/350 6433.stm; Nosike Ogbuenyi & Deji Elumonye 'EFCC Recovers N100bn Assets from Ex-Govs' *THISDAY* 12 June 2007, available at http://www.thisdayonline.com; and Davidson Iriekpen 'EFCC to Prosecute 6 More Ex-Govs' *THISDAY* 18 July 2007' available at http://www,thisdayonline.com. It should be noted that there are three types of corruption vis-à-vis petty, grand and state corruption. See Michelo Hnadungule *Anti-Corruption Initiatives in Africa: An Overview* (Good Governance Academy, Pretoria, July 2003).

[35] (TI, September 2007). Available at http:///www.transparency.com. This is however an improvement from the result of the 2006 CPI showing that only 2 countries out of the 46 African countries surveyed scored above 5.0, 3 countries scored above 4.0, while 11 scored above 3.0, while the rest scored below 3.0.

[36] *Ibid*. A country or territory's CPI Score indicates the degree of public sector corruption as perceived by business people and country analysts, and ranges between 10 (highly clean) and 0 (highly corrupt)

[37] *Ibid*.

[38] See Elizabeth Blunt 'Corruption "costs Africa billion' *BBC News*, 18 September 2002. Available at http://news.bbc.co.uk/2/hi/afriac/2265387.stm.

[39] *Ibid*. See also 'Africa corruption crisis' *BBC Learning English*, 17 February 2006. Available at http://www.bbc.co.uk/worldservice/leasrningenglish/newsenglish/witn/2006/02/06021.

[40]Adam Lerrick "Aid to Africa at Risk: Covering Up Corruption' *International Economic Report* (Carnegie Mellon Galliot Center for Public Policy, December 2005) 2. See also U4 Anti-Corruption

Corruption has had an adverse effect on the achievement of poverty reduction and sustainable development in Africa.[43] It is a major cause of intractable poverty in Africa,[44] and interlinked with other factors that cause or exacerbate poverty in the region as these factors are in most cases, consequences of pervasive pillage by a long line of African leaders and public officials.[45] The adverse effects of corruption on poverty reduction is evident from the fact that it has robbed the African economy of funds that would have been used in the provision of education, housing, sanitation, healthcare, environmental protection and poverty alleviation, thereby enhancing the non-realisation of socio-economic and environmental rights in the region.[46] It has also stultified socio-economic development in Africa by discouraging investments as investors are wary of doing business in Africa.[47] Furthermore, it has affected the ability of most households especially the poorest, to access some basic needs as the bribe extorted by a public official may mean that households cannot afford school fees for their children, or afford to buy goods to maintain their small businesses and

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Resource Centre 'Africa: Scale of corruption and impact on poor' *U4 Helpdesk Query*, p 4. Available at http://www.u4.no/helpdesk/helpdesk/queries/query20.cfm.

[41] *Ibid*.

[42] For poor household, the African Development Bank estimates that they spend an average of 2-3 % of their income on bribes, while it is an average of 0.9% for rich households. See U4 Anti-Corruption Resource Centre *ibid*. See also 'Corruption "costs Kenya $1bn a year' *BBC News*, available at http://news.bbc.co.uk/2/hi/business/2949586.htm. (Indicating that the Transparency International *Daily Bribery Survey* in 2002 suggested that Kenyans pay on average 16 bribes a month simply to get on with their ordinary lives).

[43] See Transparency International *Poverty, Aid and Corruption* Policy Paper, p 2. Available at http:// www.transparency.org. (Hereinafter TI Policy Paper).

[44] See Gbenga Lawal 'Corruption and Development in Africa: Challenges for Political and Economic Change' (2007) 2 (1) *Humanity and Social Sciences Journal* 1 at 3-4.

[45] Lerrick op *cit* note 40. See also United Nations Conference on Trade and Development (UNCTAD) *The Least Developed Countries Report 2004* (United Nations, New York, 2004) 166; and 'The Cost of Corruption in Africa' *BBC News* 17 February 2006. Available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/472352.stm.

[46] For example, in Nigeria, which is ranked 147 with a low score of 2.2 in the 2007 CPI, there is a low level of infrastructure development, education, employment and environmental protection, while the general standard of living is very low despite its massive oil wealth. The situation is particularly worse in the states where the former governors are accused of massive corruption. This corroborates the conclusion of Transparency International that there is a strong correlation between corruption and poverty. See *op cit* note 35; and Transparency International *Frequently Asked Question About Corruption*, at pp1-2. Available at http://www.transparency.org/news_room/faq/corruption_faq.html. See also Peter Eigen in Transparency International *Corruption Perception Index 2004 (*October 2004) Available at http://www.transparency.org/cpi/2004/dnld/media_pack_en.pdf; and Huguette Labelle 'Opening Statement on the Launch of the 2007 Corruption Perception Index' 26 September 2007.

[47] See Blunt *op cit* note 38; Dr I. El Hadji *Reduction of Corruption I Africa: A Tremendous Challenge*, p5, available at http://www.iespolicy.org/file/Sall%20-%20la%20Corruption%20en%20Afrique.df; and Orla Ryan 'Kenya bribes are growing bigger' *BBC News*. Available at http://news.bbc.co.uk/go/pr/fr/-/2//hi/business/3648885.stm. See also the statement of Kofi Annan, the former UN Secretary-General on the adoption of the UN Convention Against Corruption by the General Assembly. Cited in El Hadji *ibid*, at 1.

sources of income.[48] As aptly stated by Huguette Labelle, the Chair of Transparency International, 'corruption traps millions in poverty.'[49]

These adverse effects of corruption on poverty reduction in Africa contribute albeit indirectly to environmental degradation in the region.[50] This indirect effect is manifested in the form of reduction in economic growth, which in turn adversely affects not only the amount of public fund spent on environmental protection, but also the per capita income of poor people. Thus, at such low levels of per capita income, poor people are usually forced to rely heavily on the ecosystem for their sustenance thereby leading in most cases, to the degradation of the environment.[51] As aptly observed by Johnson, '[t]he very poor were driven to destroy the environment because they had no other possibilities. It was a question of sheer survival. The only hope is to improve their lot dramatically.'[52] The issue of deforestation in Africa exemplifies the effect of income poverty on the environment.[53] Rising demand for fuel wood and charcoal has been identified as one of the major causes of deforestation in the region.[54] Such rising demand is due to the inability of the poor in Africa to access modern and cleaner energy sources caused principally by lack of income.[55] It

[48] See TI policy Paper *op cit* note 43; and TI Global Corruption Barometer *op cit* note 34 at 4.
[49] Quoted in Transparency International *2006 Transparency International Corruption Perception Index* (2006).
[50] Other indirect contributions of corruption to environmental degradation include reduction of access to healthcare and educational facilities, environmental information, public participation in environmental decision-making process, and legal and administrative remedy. In addition, corruption indirectly affects the environment through encouraging the funding of environmentally devastating projects, which are easy targets for siphoning of public money into private pockets. A good example is the Lesotho Highlands Water Project. See Sebastine Levine 'taking on the Goliaths of corruption' *ELDIS.* Available at http:///www.eldis.org/fulext/Lesotho_corruption_dec06.doc. Note that corruption can also contribute to environmental degradation directly. This will be discussed later in this chapter.
[51] See AEO 2 *op cit* note 2 at 13.
[52] Stanley P Johnson (ed) *THE EARTH SUMMIT: The United Nations Conference on Environment and Development (UNCED)* International Environmental Law and Policy Series (Graham & Trotman/Martinus Nijhoff, 1993) 145.
[53] Other adverse effect of income poverty on the environment in Africa include atmospheric pollution through burning of unclean fuel, biodiversity loss through the bush meat trade and other forms of overexploitation, and slums. See Chapter 2 of the AEO 2 *op cit* note 2.
[54] See AEO 2 *ibid*, at 204, 213-214, & 221. See also AEO I *op cit* note 3 at 225; and Rasheed Bisiriyu 'The Connection between energy, poverty and environmental degradation' News & Trends: Africa, *Alexander's Gas & Oil Connections* Vol. 9, Issue #14, Wednesday, July 21, 2004. Available at http://www.gasandoil.com/GOC/news/nta42939.htm.
[55] *Ibid.* See also Maureen Cropper & Charles Griffith 'The Interaction of Population Growth and Environmental Quality' (1994) 84 (2) *American Economic Peer Review Papers and proceedings* 250; and United Nations Environment Programme (UNEP) & International Institute for Sustainable Development (IISD) *Human Well-Being, Poverty & Ecosystem Services: Exploring the Link* (UNEP & IISD, 2004) 18.

should be noted that the adverse effects of the rising demand for fuel wood and charcoal for energy purposes is not restricted to deforestation alone, as it has equally led to loss of biodiversity as well as increased atmospheric air pollution in Africa.[56]

The effect of income poverty induced by corruption is not restricted to overexploitation or degradation of the environment as it equally affects demand for better environmental quality by citizens from their governments.[57] This is based on the assumption that at low levels of income, people in poor countries are more likely to be preoccupied with sustenance and achieving their basic needs than to bother with environmental quality. However, the reverse is the case when such countries became high-income economies as such high income would lead to citizens' demand for stricter and better environmental control from their policy makers.[58] Ruttan observed this relationship in his presidential address to the American Agricultural Economics Association in 1971 when he stated:

> 'In relatively high-income economies, the income elasticity of demand for commodities and services related to sustenance is low and declines as income continues to rise, while the income elasticity of demand for more effective disposal of residuals and for environmental amenities is high and continues to rise. This is in sharp contrast to the situation in poor countries where the income elasticity of demand is high for sustenance and low for environmental amenities.'[59]

The above view has been supported by the empirical findings of environmental economists that there exist a systematic relationship between changes in income and demand for environmental quality.[60] This relationship is explained by means of the

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[56] See AEO 2 *op cit* note 2 at 60, 65, & 251.

[57] See David Hunter, James Salzman & Durwood Zaelke (eds) *International Environmental Law & Policy* 2ed (2002) 1128-1129.

[58] *Ibid*. See also Gene M. Grossman & Alan B. Krueger 'Economic Growth and Development' (1995) 110 *Quarterly Journal of Economics* 353; and M. Munasinghe 'Countrywide Polices and Sustainable Development: Are the Linkages Perverse?' (1998) *International Yearbook of Environmental and Resource Economics 1998/1999 – A Survey of Current Issues* 33.

[59] Vernon W. Ruttan 'Technology and the Environment' (1971) 53 *American Journal of Agricultural Economics* 707 at 707-708.

[60] First articulated in Gene M. Grossman & Alan B. Krueger *Environmental Impact of a North American Free Trade Agreement* Working Paper 3914 (National Bureau of Economic Research, Cambridge). (Hereinafter Grossman & Krueger II). This finding is now supported by series of later literatures on the subject. For a summary of these literatures, see Bruce Yandle, Maya Vijayaraghavan, & Madhusudan Bhatarai The *Environmental Kuznets Curve: A Primer* (PERC Research Study, May 2002) 6-16. Available at http://www.manchester.edu/courses/econ231/yandleetal.pdf.

Environmental Kuznets Curve (EKC). Yandle *et al* articulated the theory behind the EKC as follows:

> '[t]he EKC statistical relationship suggests that as development and industrialization progress, environmental damage increase due to greater use of natural resources, more emission of pollutants, the operation of less efficient and relatively dirty technologies, the high priority given to increases in material output, and disregard for–or ignorance of – the environmental consequences of growth. However, as economic growth continues and life expectancies increase, cleaner water, improved air quality, and a generally cleaner habitat become more valuable as people make choices at the margin about how to spend their incomes. Much later, in the post-industrial stage, cleaner technologies and a shift to information and service-based activities combine with a growing ability and willingness to enhance environmental quality.'[61]

It is therefore apparent from the above that rise in per capita income can help African citizens in demanding better environmental policies from their government in the form of more stringent and strictly enforced environmental standards.[62] However, the theory is not absolute, as certain pollutants such as carbon dioxide and deforestation do not seem to have any empirical correlation with per capita income and thus, do not fit into the EKC model.[63] Despite this, it is submitted that a rise in per capita income can still help in reducing deforestation and carbon dioxide emissions in Africa as there will be less reliance in use of fuel wood, charcoal and other unclean fuels for energy needs, as well as less reliance on environmentally unfriendly modes of transportation such as used or old motor vehicles.[64]

The issue of access to court by litigants exemplifies the relationship between a rise in per capita income and demand for environmental quality. It should be noted that legal

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[61] *Ibid*, at 4. (Citing M. Munasinghe 'Is Environmental Degradation an Inevitable Consequence of Economic Growth: Tunnelling Through the Environmental Kuznets Curve' (1999) 29 (1) *Ecological Economics* 89).

[62] See Grossman & Krueger II *ibid.*

[63] See Nemat Shafik 'Economic Development and Environmental Quality: An Econometric Analysis' (1994) 46 *Oxford Economic Papers* 757. Cited in Yandle et al *op cit* note 60, at 10. See also Mark Thoma 'About That environmental Kuznets Curve…' *Economist View* August 23, 2006. Available at http://economistsview.typepad.com/economistsview/2006/08/about_that_envi.html.

[64] Note that Vehicular emission has been identified as one of the major source of anthropogenic carbon dioxide in Africa. For example, in Tunisia, it has been identified as the lead carbon dioxide emitter. See AEO 2 *op cit* note 2 at 66-67, & & 73.

remedies constitute one of the means by which environmentally conscious citizens can force their government to adopt more stringent environmental regulations or to strictly apply existing environmental regulations and standards.[65] However, access to legal remedies is dependent on the litigants being able to afford it.[66] This invariably means having the financial wherewithal to hire lawyers and use legal institutions as well as offsetting the opportunity cost generated by being away from income-generating activities in the course of the litigation.[67] Such resources are not available to poor people.[68] The situation is more critical where the litigation is in the public interest and may not yield any personal gain to the litigants in the form of adequate monetary compensation when successful. The position is more likely to change as their per capita income rises as they can now afford to not only demand better environmental standards from both government and polluting industries, but also, use the instrumentality of the court in such pursuit where necessary.[69] In addition, better income level will help in pursuing the case to its conclusion thereby avoiding a situation whereby the polluters will avoid prosecution by offering gratifications to the poor plaintiffs to withdraw the suit.[70]

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[65] For example, in India, the court has been used by public-spirited individuals to force the government to strictly enforce environmental law. See Michael Anderson 'Individual Rights to Environmental protection in India' in Alan Boyle & Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Oxford University press, 1998) 211. Such potential also exist in South Africa. See also *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC); *Minister of Health and others v Treatment Action Campaign and others No. 2* 2002 (5) SA 721; *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and another* 2005 (3) SA 156 (C) and *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA). However, such opportunity is highly restricted in Nigeria. See O*ronto-Douglas v Shell Petroleum development Corporation and 5 Others* Unreported Suit No. FHC/CS? 573/93. Delivered on February 17, 1997.

[66] See Michael Anderson *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in the LDC* Paper for Discussion at WDR Meeting 16-17 August 1999, at pp 9-10. Available at http://siteresources.worldbank.org/INTPOVERTY/Resoruces/WDR/DfiD-Projectpapers/anderson.pdf. (Hereinafter Anderson II).

[67] *Ibid*, at 18.

[68] See Engobo Emeseh *The Limitation of Law in Promoting Synergy Between Environment and Development Practices in Developing Countries: A Case Study of the Petroleum Industry in Nigeria*, at pp21-23, available at Http://web.fu-berlin.de/ffu/akumwelt/bc2004/download/emese_f.pdf; and World Resources Institute, UNDP, UNEP, & World Bank *The Wealth of the Poor - managing Ecosystems to Fight Poverty* (WRI, Washington DC, 2005) at 76. (Hereinafter WRI).

[69] See Anderson II o*p cit* note 66 at 9.

[70] In the *Tiomin* case in Kenya, there was the allegation that some of the parties were bought off thereby facilitating easy extra-judicial settlement of the dispute. See Dr Patricia Kameri-Mbote 'Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention' *IERLC Working Paper1 (*2005) 7. Available at www.ielrc.org/content/w0501.pdf.

(b) Low literacy

Low literacy or lack of education is another factor causing or exacerbating poverty in Africa. This is due to the fact that high literacy rate reduces poverty by increasing per capita income while low literacy deprives people of the choices, potential and opportunities to create a better life and lift themselves out of poverty.[71] The effect of low literacy in causing or exacerbating poverty in Africa was noted by the late Julius Nyerere, former president of the United Republic of Tanzania, who observed that 'Education is not a way to escape poverty-it is a way of fighting it'[72] Low literacy leads to reduced employment opportunities and lower wages, which invariably translates to lower per capita income and increased poverty.[73] The increased poverty in turn increases the pressure on goods and services provided by the environment as an increasing number of poor people are now forced to rely on them. In such state of affairs or situation, the environment is most likely to be degraded, as the increased pressure will result in an unsustainable exploitation of the environmental resources.[74]

The effect of low literacy on poverty in Africa is not restricted to low incomes as it equally affects the ability of people to fight corruption that deepens their poverty level. This is based on the ground that there is empirical evidence of a strong correlation between an increase in literacy rate and a reduction in corruption, and vice versa.[75] Thus, at low literacy level with its attendant low per capita income, people are more likely to be corrupt themselves as they are more vulnerable to corruption than

[71] See Jonathan Temple 'The New Growth Evidence' (1999) 37 (1) *Journal of Economic Literature* 112; and Amanda Sives, W. John Morgan & Simon Appleton 'Teachers as Community Leaders: The potential Impact of Teacher Migration on Education for all and the Millennium Development Goals' *International Conference on Adult Education and Poverty Eradication: A global Priority* University of Botswana, 14-16 June, 2004, at p1. Available at http://www.nottingham.ac.uk/education/centres/uccer/botswana.pdf.

[72] Cited in United Nations Education, Scientific, and Cultural Organization (UNESCO) 'Education and Poverty Eradication' *News* International Workshop on Education and Poverty Eradication, Kampala, Uganda, 30 July3 - August, 2001. Available at http://www.unesco.org/education/poverty/news.shtml.

[73] See Institute for Research on Poverty *Education & Poverty* University of Wisconsin-Madison. Available at http://www.irp.wisc.edu/research/education.htm.

[74] Note that the AEO has identified overexploitation of resources as one of the factors threatening Africa's environmental resources. See AEO 2 *op cit* note 2 at 136, 175, 210, 214 & 221.

[75] See Theo Eicher, Cecilia Garcia-Penalosa, & Tanguy van Ypersele *Education, Corruption, and the Distribution of Income* (October 2006) 24-26. Available at http://faculty.washington.edu/te/papers/ept_1.pdf.

those at the higher income bracket.[76] This is evident from the findings of the Kenya Urban Bribery Index, which indicates that those likely to be poor (i.e. the unemployed, those with low education, etc) are more vulnerable to corruption than the better off socio-economic groups.[77] Where the people are not themselves corrupt, their low literacy level will make them less likely to be aware of their rights including the right of access to information about how their government operates, and how to utilise such rights in fighting corruption.[78] In addition, low literacy adversely affects the level of people's knowledge of politics and hence their capacity to assess policies and politicians behaviour. This is because a less educated electorate has lesser capacity to identify corrupt politicians and hence reduce rent-extraction by the political class.[79]

Furthermore, low literacy affects poor people's ability to demand better environmental quality from their government and hence, their capacity to protect the environment on which they depend for their sustenance.[80] Empirical studies have shown that improvement in educational opportunities increases people's perception of the environment and the actual or potential contribution of a healthy environment to their long-term sustenance and well-being, as well as the problems affecting their environment.[81] It is such perception that will drive their demand for better environmental policy from their government in the form of more stringent and more strictly enforced environmental standards. The opposite is obtainable at lower literacy

[76] See Jacques Hallak & Muriel Poisson 'Ethics and corruption in education: an overview' (2005) 1(1) *Journal of Education for International Development* at 2. Available at http://equip123.net.JEID/articles /1/1-3.pdf.
[77] See U4 Anti-Corruption Resource Centre 'Corruption and its impact on the poor' *U4 Helpdesk Query* at p2. Available at http://www.u4.no/helddesk/helpdesk/queries/querry44.cfm.
[78] See WRI *op cit* note 68 at 73.
[79] See Eicher et al *op cit* note 75 at 24-25; and Jelena Budak & Rajeev K. Goel *Economic Reforms and Corruption in Transition Countries* at 6. Available at http://www.eizg.hr/Administrator/FCKeditor/ Userfiles/file/01%20Economic%20Reforms%20and%20Corruption%20%20in%20Transition%20Cou ntries.pdf.
[80] See Lorenzo Pellegrini & Reyer Gerlagh 'Corruption, Democracy, and Environmental Policy: An Empirical Contribution to the Debate' (2006) 15(3) *The Journal of Environment and Development* 332 at 343; and Fabio Granja e Barros, Augusto F. Medonca, & Jorge M. Nogueira *Poverty and Environmental Degradation: the Kuznets Environmental Curve for the Brazilian Case* Department of Economics Working Paper 267 (University of Brasilia, December 2002) 11. Available at http:// www.unb.br/face/eco/epe/TD/267Dec20/Noguira.pdf.
[81] *Ibid*. See also Barros et al *ibid*, at 21; Lorenzo Pellegrini & Reyer Gerlagh 'Corruption and Environmental Policies: What are the Implications for the Enlarged EU?' (2006) 16 *Europe Environment* 139 at 145. (Hereinafter Pellegrini & Gerlagh II).

levels.[82] In addition, at low literacy levels, people's ability or capacity to *inter alia* access relevant environmental information necessary for protecting their environment and maximizing available environmental opportunities; participate effectively in environmental decision-making process in their communities and in broader governance issues; access legal and administrative remedies when their environment is degraded or threatened; and communicate and be reached through the electronic and print media will be adversely affected.[83]

(c) Lack of access to information and public participation

The rights of public access to information and participation are essential for empowering poor people as such rights enhance their abilities as well as opportunities to participate in the decisions that affect their well-being and livelihood. Thus, in the absence of these procedural rights, the prospects of achieving poverty reduction and sustainable development in Africa will be adversely affected.[84] For example, lack of access to information affects the ability of the poor to make informed livelihood choices, as they are unable to access information regarding market prices for their crops, alternative cropping or pest control options, availability of government assistance or training programs, or opportunities for developing new products or markets for environmental goods.[85] Lack of access to such information affects their prospects of escaping the poverty trap, as they are unable to take advantage of new opportunities for generating income and increasing their assets.[86] In addition, lack of information exacerbates poverty as it affects the people's knowledge of their right to land and its resources. As aptly observed by UNDP *et al*,[87] '[f]or the poor, it is their rights and the enforcement of those rights within the law that usually determine whether they will plant, husband, harvest, and successfully manage the natural

[82] See Barros et al *op cit* note 80 at 10-11.
[83] See AEO 2 *op cit* note 2 at 11, and Emese *op cit* note 68.
[84] See AEO 2 *ibid*, at 34; and Department for International Development, United Kingdom (DFID), Directorate General for Development, European Commission (EC), United Nations Development Programme (UNDP), & The World Bank *Linking Poverty Reduction and Environmental Management: Policy Challenges and Opportunities* (The World Bank, July 2002) 32-33.
[85] WRI *op cit* note 68 at 73.
[86] *Ibid*.
[87] UNDP, UNEP, IIED, IUCN, & WRI *Assessing Environment's Contribution to Poverty Reduction* (September 2005).

resource base for environmental income and environmental wealth or work on the margin of subsistence.'[88]

Lack of access to information also affects people's ability to fight corruption that deepens poverty by demanding transparency and accountability in governance from their government. This is due to the fact that in countries where their citizens are uninformed or lacked access to information, there is generally low awareness of what the governments are doing and how they spent their national resources.[89] The low awareness in turn promotes corruption as governments have little incentive to improve performance, deliver on their promises, or even provide basic services at adequate levels, as the possibility of holding them accountable is virtually non-existent.[90] As observed by Transparency International, '[c]orruption thrives in environments where information is either too segregated or aggregated, is not comparable and prevents conclusions on financial resource utilization from being drawn.'[91] This is evident from the findings of Reinikka and Svenson that a newspaper campaign in Uganda informing parents and schools of the fund provided by the government for education substantially reduced the fraction of the funds captured by bureaucrats and politicians, and increased true spending in educational infrastructure.[92]

Furthermore, lack of access to information affects the ability of the poor to protect the environment upon which they depend for their sustenance. This is because lack of access to information limits their ability to be effective players in environmental policy and decision-making process that affects them.[93] Equally affected is their ability to mobilise support to demand sustainable solutions to their environmental

[88] *Ibid*, at 12.
[89] See WRI *op cit* note 68 at 73. See also TI Policy Paper *op cit* note 43 at 9.
[90] *Ibid*. See also Transparency International "Overview' *The role of information in fighting corruption.* Available at http://www.transparency.org/global_priorities/access_information.
[91] See TI Policy Paper *op cit* note 43 at 9.
[92] R. Reinikka & J. Svenson 'Fighting Corruption to Improve Schooling: Evidence from a Newspaper Campaign in Uganda' (2005) 3 *Journal of the European Economic Association* 1. Cited in Eicher et al *op cit* note 75 at 2-3.
[93] See AEO 2 *op cit* note 2 at 34.

problems.[94] As stated by DFID *et al*, '[p]ublic access to information is vital for effective environmental management. A free media has been instrumental in highlighting environmental problems in both the public and the private sectors. In some countries, the State has effectively used public pressure by making information publicly available in order to encourage greater pollution compliance.'[95]

Coupled with the issue of lack of access to information in exacerbating poverty, is lack of public participation especially by the poor in the decision-making process in their countries that affects both their livelihood and well-being including decisions on how government resources are to be distributed, and the environment on which they depend for their sustenance.[96] With regard to the latter, it should be noted that their participation in the policy and planning process is essential to ensuring that key environmental issues that affect their livelihoods and well-being are adequately addressed.[97] In the absence of such participation, not only will development projects such as industries and dams adversely affect the poor through displacement and loss of livelihood, but also rules, intervention and processes otherwise designed to protect the environment, may end up depriving poor people or communities of their livelihood by denying them access to environmental resources or undermining their traditional tenure rights.[98] This in turn stimulates resentment and low support for the environmental rules, interventions and processes from the affected surrounding communities.[99] Such resentment and low support will adversely affect the

[94] See Jona Razzaque 'Implementing international procedural rights and obligations: serving the environment and poor communities' in Tom Bigg & David Satterthwaite (eds) *How to Make Poverty History: The central role of local organizations in meeting the MDGs* (IIED, 2006) 175 at 180.
[95] *Op cit* note 84 at 32.
[96] See WRI *op cit* note 68 at 75. See also UNEP & IISD *Human Well-Being, Poverty & Ecosystem Services: Exploring the Links* (2004) 23.
[97] See DFID et al *op cit* note 84 at 32; Dilys Roe 'The Millennium Development Goals and natural resource management: reconciling sustainable livelihoods and resource conservation or fuelling a divide?' in David Satterthwaite (ed) *The Millennium Development Goals and Local Processes: Hitting the Target or Missing the Point?* (IIED, 2003) 55 at 65; and Sonja Vermeulen 'Reconciling Global and Local Priorities for Conservation and Development' in Dilys Roe (ed) *Millennium Development Goals and Conservation: Managing Nature's Wealth for Society's Health* (IIED, 2004)74 at 77-81.
[98] See Razzaque *op cit* note 94 at 175-176; Roe *ibid*, at 61; and Daniel W. Bromley *Environment and Economy: Property Rights and Public Policy* (Blackwell, Oxford, 1991) 131-132.
[99] Neema Pathak, Ashish Kothari & Dilys Roe 'Conservation with social Justice? The role of community conserved areas in achieving the Millennium Development Goals' in Bigg & Satterthwaite (eds) *op cit* note 94 at 67 & 71.

implementation or long-term viability of the environmental rules and processes, as the affected communities will resort to undermining them.[100]

(d) Lack of access to legal remedy or justice

The right of access to legal remedy when one's right is infringed or threatened is as much important in empowering people as the rights of public access to information and public participation. The absence of this right contributes to 'lawlessness' in a society, and this in turn, causes or exacerbates poverty with adverse consequence for the protection or conservation of the environment and its resources in Africa.[101] Lack of access to justice may be due to either corruption or procedural injustices in the legal or court systems. With regard to the former, citizens especially the poorest may be denied access to justice when they are unable or unwilling to cough up the money needed to speed up the judicial proceedings or to influence its outcome.[102] When this occurs, the ability of the judiciary to render impartial and fair decisions is usually compromised while justice is for sale to the highest bidders or bribers.[103] In such a situation, the enjoyment of democratic right to equal access to courts guaranteed in most African constitutions becomes a mirage. As aptly stated by De Swart, Transparency International Managing Director, '[a]s long as the machinery of law enforcement remains tainted, there can be no equal treatment before the law - as

[100] This is exemplified by the recent report of the poisoning of carnivores by Basongora herdsmen occupying part of Uganda's second largest game park. See 'Carnivores Poisoned in Uganda' *24.ComNews* 26 July 2007. Available at http://www.24.com.news/?=afa&1=607720.

[101] Anderson listed several ways in which lawlessness contributes to poverty. These include unchecked abuse of political power as evidenced by restrictions on freedom of the press and expression that affects global action in response to famine or other major threats to human life, unchecked violence by public officials that deprives poor household of essential income, increase costs, and exacerbate indebtedness; and deprivation of access to public goods as a result of the poor being unable to pay the bribe demanded by officials. See Anderson II *op cit* note 66 at 3-4.

[102] See TI Global Corruption Barometer *op cit* note 34 at 6-7; Transparency International *Summary Report of National Integrity System Studies of DRC, Mauritius, South Africa, Mozambique, Botswana, Zambia and Zimbabwe* (November 2007) 12-14; and Transparency International *The Kenya Bribery Index 2006* (TI-Kenya 2006). (Ranked Kenya Judiciary as the worst sixth offender).

[103] See TI Global Corruption Barometer *ibid*, at 6; and '*Kenya* wields axe on judges' *BBC News* 16 October 2003. Available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/Africa/3195702.stm.

stated in the Declaration - nor can there be any real guarantee of human rights more broadly.'[104]

One of the ways in which lack of access to justice contributes to poverty and subsequent environmental degradation is through its adverse effects on the property rights regime.[105] A weak property rights regime is evidence of the absence of the rule of law, which is an essential precondition for a prosperous economy organised on market principles, while the reverse is the case for a strong property regime.[106] It should be noted that when the governance system is built on the rule of law, such system promotes a stable framework of rights and obligations, which can help in reducing political risks to potential investors and cutting down transaction costs.[107] As argued by Anderson, '[a] legal system which protects property rights and enforces contractual obligations also fosters the development of markets in land, labour, and capital, thereby enhancing economic efficiency.'[108]

Lack of access to justice promotes a weak property rights regime by denying investors and the poor alike, the opportunity to effectively defend their property rights against interlopers including the State and private individuals. As observed by Bromley, '[property] rights can only exit when there is a social mechanism that gives duties and bind individuals [including the State and its agents] to those duties. … The state gives and takes away rights by its willingness – or unwillingness – to agree to protect one's claims in something.'[109] Such a weak property rights regime is inimical to business and investments as it raises costs, discourages risk-taking, and depresses the velocity of economic transactions.[110] This state of affairs endangers the confidence of businesses and investors engaged in both domestic and global transactions that are

[104] Quoted in Transparency International 'No guarantee of human rights while corruption persists' *Press Release*, 10 December 2007. Available at http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_12_10_cape_town_ceremony.
[105] See WRI *op cit* note 68 at 76.
[106] See Anderson II *op cit* note 66 at 2; and WRI *ibid.*
[107] *Ibid*. See also World Bank *World Development Report 1997: The State in a Changing World* (Oxford University Press, New York, 1997) 41.
[108] *Ibid*.
[109] *Op cit* note 98 at 15.
[110] See Anderson II *op cit* note 66 at 2.

desirous of doing business within Africa.[111] The consequence of investors and businesses being wary of doing business in the region is low investments, which in turn exacerbates poverty in the region.

The effect of a weak property rights regime is not restricted to exacerbating poverty as it equally has serious implications for the protection of the environment in the region. This is based on the findings of various environmental economists that property rights enforcement matters for the promotion of environmental protection.[112] The effects of weak property rights on environmental protection can be direct or indirect. The latter is obtainable when the absence of a strong property rights regime leads to low investments and attendant poverty as well as a decrease in per capita income. As earlier noted in this chapter, at low per capita income, there is less demand for environmental quality as poor people will be more interested with issues pertaining to their sustenance.[113] It is direct when a weak property rights regime leads to or encourages the formation of an 'open access' regime. An open access regime usually arises from '[either] the absence or the breakdown of a management and authority system whose very purpose was to introduce and enforce a set of norms of behaviour among participants with respect to…particular natural resources.'[114] Such a regime leads to environmental degradation as there is no constraint on both the number of users and the amount or quantity of environmental resources that each user may extract or use.[115] In addition, it constitutes a disincentive either to take action against persons whose actions degrade property values, or to invest in natural resource management.[116] The latter may lead to poor people prioritising short-term gains, in the face of uncertainty over long-term sustainability thereby causing environmental degradation and exacerbating their poverty.[117] As observed by the World Resource Institute (WRI), '…appropriate property rights regimes are…central to encouraging

[111] See Ryan *op cit* note 47. (Where Luka Obbanda, who is the Director of operations at the Investment promotion Centre in Kenya, linked the increase in potential investors willing to do business in Kenya to drastic fall in corruption).
[112] See Yandle et al, *op cit* note 60 at 13-16.
[113] See also Yandle et al *ibid*, at 14.
[114] Bromley *op cit* note 98 at 30.
[115] See Bromley *ibid*, at 32; and Daniel H. Cole *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* (Cambridge University Press) 5-6.
[116] See Cole *ibid*, at 6; and Yandle et al *op cit* note 60 at 14.
[117] See Pathak et al *op cit* note 99 at 56.

the poor to invest in their land or in resource management in ways that bring economic development and poverty reduction.'[118]

Lack of access to justice also contributes to poverty by affecting the ability of the poor to fight corruption by demanding political accountability from their leaders. This is due to the fact that access to administrative or judicial justice is vital if citizens are to challenge abuse of power and corruption by their public officials.[119] It should be noted that administrative justice is obtained by way of petitioning the appropriate agency for redress or sanctions against the corrupt public officials,[120] while judicial justice is by way of petitioning the courts. With regard to the latter, Anderson has identified two important functions of the courts or judiciary with respect to ensuring political accountability vis-à-vis answerability and enforcement.[121] The former refers to the obligation placed upon public officials to make information available about their activities and to give valid reasons for their action.[122] The latter refers to the ability to impose sanctions on political leaders and other public officials who have acted illegally or otherwise violated their public duties, or to give an authoritative pronouncement on which government actions are legal and which are not.[123] The judiciary exercise these accountability functions principally by means of judicial review of either legislation or administrative actions.[124] Judicial review is vital to curbing corruption by acting as a check on the excesses of legislative and executive arms of government.[125]

However, while the use of judicial review by the courts can provide a powerful tool for accountability, the major drawback is that it can only be activated when a litigant

[118] *Op cit* note 68 at 75.
[119] See Akpo Mudiaga Odje 'Locus Standi: Threat to Anti-Corruption Crusade and Good Governance in Nigeria (1) & (2)' The *Vanguard* January 13 & 20, 2006, at 2. Available at http//www.vanguardngr .com/articles/2002/features/law/law413012006.html; and http://www.vanguard ngr.com/articles/2002/ features/law/law620012006.html.
[120] Such bodies include the Independent Corrupt Practices Commission (ICPC), and Economic and Financial Crimes Commission (EFCC) in Nigeria; Kenya Anti-Corruption Authority (KACA), and the Anti-Corruption Authority of Kenya.
[121] See Anderson II *op cit* note 66 at 6.
[122] *Ibid*.
[123] *Ibid*.
[124] *Ibid*.
[125] *Ibid*, at 7.

has petitioned the court.[126] The ability of a litigant to petition the court for judicial review is limited or dependent on the intersection of two factors vis-à-vis the legal rights and procedural gateways created in law, and the complaints and petitions brought mainly by private individuals.[127] The former factor, which is essentially institutional, is more serious as it has been known to deny access to justice to many people including poor people who can barely afford to resort to litigation in order to force their government to be more accountable.[128] The greatest of these institutional obstacles to access to judicial remedy is the procedural requirement of *locus standi* in public law litigation.[129] This rule of *locus standi* has been employed by the governments or their agencies to frustrate the challenges of their citizens who have resorted to the courts to demand accountability.[130] The effect of this denial of access to judicial remedy is rampant abuse of power and corruption, as public officials are not legally bound to be accountable to their citizens. As observed by Odje regarding the effect of lack of access to justice on corruption in Nigeria:

> 'Some of the consequences of this restriction on access to Court include unbridled profligacy, perfidy and corruption in high places. Thus, elected officials are no longer accountable to the people, whilst the president becomes vested with unlimited powers! The cumulative result being that today, Nigeria is voted by Transparency International as the sixth most corrupt country in the world. Previously, Nigeria had the World Silver Medal for corruption being placed on an "enviable second position"…'

Finally, lack of access to justice affects the ability of the citizens especially the poor to demand for the protection of the environment that is essential to their sustenance. This is more critical where the environmental resources being degraded are national resources for which no particular person can claim a specific tenure rights such as forests and water resources. The lack of access to justice in such a scenario may not be unconnected with the procedural requirement of *locus standi* as most people interested in protecting their national environmental resources may not be able to discharge its onerous requirement. This is apparent in the Nigerian case of *Oronto-*

[126] *Ibid*, at 9.
[127] *Ibid*. Note that the effect of the second factor is apparent from the discussion on the effect of per capita income on environmental litigation.
[128] For institutional obstacles to legal accountability, see Anderson II *ibid*, at 16-17.
[129] For a discussion on locus standi, see chapter 2 of this thesis at fn 356.
[130] See Odje *op cit* note 119 at 3-4.

Douglas v Shell Petroleum Development Company Ltd and 5 others,[131] where the plaintiff, an environmental activist sought to compel the respondents to comply with provisions of the Environmental Impacts Assessment (EIA) Act before commissioning their project (production of liquefied natural gas) in the volatile and ecologically sensitive Niger Delta region of Nigeria. The suit was dismissed on the grounds *inter alia* that the plaintiff has shown no legal standing to prosecute the action.

(e) Armed conflict

Poverty is both a cause and consequence of armed conflicts in Africa.[132] However, this thesis is not concerned with the effect of poverty on armed conflicts but rather on the role of armed conflicts in causing or exacerbating poverty and environmental degradation in Africa.[133] The impacts of armed conflict in causing or exacerbating poverty and environmental degradation in Africa are varied.[134] Such impacts as shown by Draman in his seminal paper can be direct or indirect depending on the effects of armed conflict on poverty.[135] One of such negative effects is that it leads to loss of public entitlements. Directly, it does this by causing a breakdown of public order and infrastructure, while indirectly it affects public entitlements by causing *inter alia* a shrinking revenue base, little public expenditure and rising military expenditure to secure the collapsing State; distribution of public goods and services skewed on geographical, social and gender basis; increased human and property insecurity; and reduction of access to public services including health, and education.[136] Recently Mohammed Chambas, the President of the ECOWAS Commission noted the link between armed conflict and loss of public entitlements in Africa when he observed that 'countries in conflict divert lean resources into purchase for weapons, for

[131] *Supra* note 65. For an equivalent Ugandan decision, see *Byabazaire Grace Thaddeus v Mukwano Industries*, Misc. Application No. 909 OF 2000, High Court of Uganda (Kampala Division).
[132] Rasheed Draman *Poverty and Conflicts in Africa: Explaining a Complex Relationship*, Paper prepared for the Experts Group Meeting on Africa-Canada Parliamentary Strengthening Program, Addis Ababa, may 19-23, 2003, at 5. Available at www.paricent.ca/povertyreduction/seminar/_e.pdf.
[133] For a discussion of the role of poverty in causing conflicts in Africa, see Draman *ibid*, at 7-13; and UNCTAD *op cit* note 45 at 162-165.
[134] See AEO 2 *op cit* note 2 at 392-404.
[135] *Op cit* note 132 at 13.
[136] *Ibid*, at 14, table 5. (Draman adapted Table 5 from Luckman et al (2001) based on their study of Stewart & Fitzgerald (2001) and Stewart et al (1997). See also AEO 2 *op cit* note 2 at 393-397.

survival, children enlist in the military, so the schools system is paralysed and business slowed down…. [The] bottom line is prosperity declines and poverty like a cancer spreads quickly through the system and this is the same story for some of our member states.'[137]

Armed conflict also causes loss of markets and livelihood options. It causes such loss directly through destruction or decay of physical capital and communication infrastructure, or the withdrawal of land and labour force from production as a result of landmines and displacement.[138] The effect is indirect when armed conflict leads to falling gross domestic products (GDP, exports and imports;[139] hyperinflation, exchange rate depreciation, increased debt, high-risk business environment, and market failures; worsening economic conditions such as unemployment, low per capita income and agricultural productions; and environmental degradation.[140] The latter is exemplified by the adverse environmental effects of landmine used in most armed conflicts in Africa. As observed by the African Environmental Outlook 2, landmines have caused:

> '…habitat degradation, reduced access to water points and other vital resource, species loss, alteration of the natural food chain, and additional pressure on the biodiversity. When landmines are found in national parks, game reserves and other conservation areas, they undermine the tourist trade and affect the ability of managers and others to do their work.'[141]

Furthermore, armed conflict leads to loss of civil and social entitlements. Such loss can be direct when the conflict causes the destruction of social capital through

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[137] See Panapress 'Chambas links armed conflict with low development in W/Africa' Afrique en ligne 27 July 2007. Available at http://www.afriqueenligne.fr/Index2.php?option=com_content&d0_pdf.1&id=4063.

[138] *Ibid*. See also AEO 2 *op cit* note 2 at 393.

[139] Note that the effect of armed conflict on exports is relative to the nature of commodity being exported. Thus, if it involves natural resources minerals, oil, gas, diamonds and timbers for which an illicit and lucrative international trade exists, there is increase in exports as the subsequent breakdown of the rule of law enables illicit and illegal exploitation of such resources in order to generate sufficient revenues to support or prolong such conflict. See UNCTAD *op cit* note 45 at 166-173; and AEO 2 *ibid*, at 397-398.

[140] Draman *op cit* note 132. See also AEO 2 *Ibid*, at 395, & 399-403; and Kenya SoE *op cit* note 17 at 18.

[141] *Ibid*, at 395.

population displacement.[142] It is indirect when the conflict leads to shrinking of civil society, or causes institutional failures in coping with stresses and dislocations induced by the conflict such as refugee influx and environmental degradation. With regard to the latter, armed conflict has led to the weakening of environmental institutions and governance systems as environmental and other relevant agencies are constrained by lack of funds or loss of personnel.[143] Such constraints lead to low monitoring and evaluation of environmental resources, as well as encouraging illegal and unsustainable exploitation of natural resources.[144] The resultant degradation usually forces many rural people into a vicious cycle of poverty.[145]

In addition, armed conflict can indirectly lead to loss of civil and social entitlements by heightening competition for resources including environmental resources.[146] Such competition leads to more conflict as individuals or ethnic groups/communities struggle for the remaining environmental resources not decimated by the conflict.[147] The armed conflict can also lead to the breakdown of social cohesion by the weakening or destruction of local communities. This in turn may result in the breakdown of existing safety nets and coping mechanisms, and proliferation of vulnerable groups.[148]

Finally, armed conflict may lead to reverse entitlements or new forms of social inequality.[149] This is direct when the conflict facilitates the direct appropriation of assets, land, sources of livelihood from vulnerable and displaced populations.[150] It is indirect when it leads to rent-seeking and corruption by those with access to the State and military, thereby reinforcing macro-economic distortions and undermining the capacity of the State to provide for pressing developmental needs.[151] This is evidenced by the 2007 CPI that shows that most conflict-torn countries in Africa

[142] Draman *op cit* note 132.
[143] This is exemplified by the impacts of armed conflict on the national parks in the Great Lakes Region of Africa. See AEO 2 *op cit* note 2 at 400-403.
[144] *Ibid*, at 395.
[145] *Ibid*, at 402.
[146] Draman *op cit* note 132.
[147] See AEO 2 *op cit* note 2 at 393.
[148] *Ibid*. See also Draman *op cit* note 132.
[149] Draman *ibid*.
[150] *Ibid*.
[151] *Ibid*. See also AEO 2 *op cit* note 2 at 398.

scored below 2 (sign of rampant corruption).[152] It is also indirect when it leads *inter alia* to new forms of inequality associated with privatisation of violence; bribery and corruption by those controlling weapons, transport routes, food distribution, and access to aid; and heightened insecurity and exploitation of vulnerable groups.[153]

(f) HIV/AIDS

HIV/AIDS is both a cause and consequence of poverty in Africa.[154] Just like the above discussion on armed conflict, this thesis is not concerned with the effect of poverty on proliferation of the disease but rather on the role of the disease in causing or exacerbating poverty and environmental degradation in Africa.[155] Casale and Whitehead have described HIV/AIDS as probably the greatest constraint to the achievement of human and economic development including the MDGs in Africa.[156] Its adverse impacts on the achievement of sustainable development in Africa are varied and can be felt at both macro-economic and micro-economic levels.[157] However, it is at the latter level that the adverse impacts are more significant especially with regard to household income and consumption, on household structure (or dissolution), and on children, particularly in the area of their educational development.[158] Such adverse impacts on the household living conditions derives in great part from the virus's specific demographic effects as it strikes mostly prime-

[152] *Op cit* note 35.
[153] *Ibid*.
[154] See Marisa Casale & Alan Whiteside *The Impact of HIV/AIDS on Poverty, Inequality and Economic Growth* IDRC Working Papers on Globalization, Growth and Poverty Working Paper Number 3 (Health Economics and HIV/AIDS Research Division (HEARD) University of KwaZulu Natal, South Africa, March 2006) 2-3; and Peter Glick *Reproductive Health and Behaviour, HIV/AIDS, and Poverty in Africa* SAGA Working Paper (May 2007) 38-53.
[155] For a discussion of the role of HIV/AIDS in causing or exacerbating poverty in Africa, see Glick *ibid*, at 38-41.
[156] *Op cit* note 154 at 2. See also United Nations *Special session of the General Assembly on HIV/AIDS*, Report of the Secretary-General, 55th session, agenda item 179, 16 February 2001, paragraph 25, p 7. (Warning by the UN Secretary-General that AIDS is reversing decades of development in the hardest-hit regions of the world).
[157] For the impacts at the macro-economic level, see Glick *ibid*, at 41-42; Casale & Whiteside *op cit* note 154 at 17-30; and Dr. Rene Loewensen *HIV/AIDS: Implications for Poverty Reduction* Background Paper prepared for the United Nations Development Programme for the UN General Assembly Special Session on HIV/AIDS, 25-27 June 2001 (UNDP Policy Paper, 2001) 9.
[158] See Glick *ibid*, at 43-52.

aged adults, the most productive human segment of the economy.[159] Thus, for the affected households, this translates to new poverty or increased poverty where they were already poor, as a result of reductions in labour supply, incomes, and farm production as well as the additional burdens of health care expenditures for the ill and funeral costs for the deceased.[160]

In addition, HIV/AIDS may lead to the dissolution of the affected poor household, as survivors especially children move in with relatives or in some cases become destitute.[161] Such children run a greater risk of being malnourished and are usually the first to be denied education when extended families cannot afford to educate all the children of the household. This lack of schooling which most often is combined with lack of proper nutrition makes it particularly difficult for these children to escape the poverty trap, thereby leading to the intensification of a culture of poverty amongst them.[162] The intergenerational impacts of the disease are not limited to orphans as it equally affects the nutrition, health and educational developments of children from poor households who have lost one of their parents to the disease. The worst affected are usually the girls who either have to drop out of school or reduce their hours in school to shoulder some of their family responsibilities.[163]

The above impacts of HIV/AIDS in causing, exacerbating or perpetuating poverty has serious implications for environmental protection in Africa as it equally contributes to environmental degradation in the region. This is due to the fact that as men and women infected with the disease die or become incapable to work and provide for their families, their family members are obligated to find new sources for their income, food and energy needs which most often involves the unsustainable extractions and utilisation of environmental resources.[164] Such environmentally

[159] See Casale & Whitehead *op cit* note 154 at 5; AEO 2 *op cit* note 2 at 5-6; and Jeffery Sach 'The end of poverty' *Environment and Poverty Times* Volume 4, 2005, at p 2.
[160] Glick *op cit* note 154 at 42-46; Casale & Whitehead *ibid*, at 6; and Loewensen *op cit* note 157 at 10.
[161] Glick *ibid*, at 47.
[162] Pieter Fourie 'Africa's New Security Threat: HIV/AIDS and human security in Southern Africa' (2001) 10 (4) *African Security Review* 11. See also Glick *ibid*, at 48-52.
[163] Glick *ibid*, at 52.
[164] See Sach *op cit* note 159 at 3; Melissa Thaxton 'The burden of sub-Saharan Africa: Aids, poverty and natural resource degradation' *Environment &Poverty Times* Volume 4, 2005; Lori Hunter 'HIV/AIDS and the Natural Environment' *Population Reference Bureau*. Available at http://www.prb.

degrading activities include the unsustainable harvesting and sale of forest products such as wild foods and medicinal plants; increased woodcutting in order to produce more charcoal for sale; poaching for the lucrative wildlife trade as well as for food; and increased use of fuelwood for cooking and heating purposes.[165] As aptly observed by Hunter:

> 'Local natural resources not only serve dietary needs, but are often used for energy as well. Additional evidence from South Africa suggests that impoverished households affected by adult mortality are more likely than other households to use fuelwood rather than electricity or paraffin for cooking. Such intensified resource dependence can increase local environmental degradation, particularly in areas already overharvested.'[166]

Other contributions of HIV/AIDS to environmental degradation in Africa may be more direct such as the unsustainable harvesting of forest trees to meet the increasing demand for coffins;[167] loss of traditional knowledge of sustainable land and resource management practices occasioned by its disproportionate impact on women; and loss of human capacity for natural resource management in government, NGOs, communities and donor organisations.[168]

(g) Other factors causing or exacerbating poverty in Africa

Other factors causing or exacerbating poverty and environmental degradation in Africa include unfair trade barriers imposed by developed countries on Africa's exports with adverse consequences for the economy of most African countries, and the crippling debt burdens which has had adverse effects not only on the economies of most countries in Africa but also on their capacity to provide basic services such as

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org/Articles/2006/HIVAIDSandtheNaturalEnvironment.aspx; and Desmond Cohen 'Poverty and HIV/AIDS in Sub-Saharan Africa' *UNDP Issue Paper No. 27*. Available at http://www.undp.org/hiv/publications/issues/english/issue27e.html (narrating the plight of a 14-year old girl orphaned by the disease and who was forced to rely on dwindling environmental resources to take care of her grandfather and sibling dietary and energy needs).

[165] See Thaxton *ibid*.

[166] *Op cit* note 164.

[167] See Thaxton *op cit* note 164.

[168] See Hunter *op cit* note 164; and AEO 2 *op cit* note 2 at 6.

health, education, and even environmental management and conservation.[169] Equally relevant is lack of access to appropriate technology that can help in increasing productivity or in providing sustainable solutions to many developmental problems in Africa.[170]

3.3.2 Lack of political will

Allied with poverty in causing the degradation of Africa's environment is the issue of lack of political will on the part of African governments to enforce environmental regulations or to adopt new and proactive regulations that will safeguard the environment from degradation.[171] This reluctance may be due to the economic benefits derived from the activities of the degrading industries in form of revenues and employment opportunities. With regard to the latter, it should be noted that many polluting industries have threatened job cuts when forced to adhere to environmental regulations like changing to cleaner production methods, as it will involve heavy financial expenditure that will render their operations uneconomical.[172] The use of this threat is implicit in the statement of the then Group Managing Director of Shell International Petroleum Company at the parallel annual general meeting of the company held in the Netherlands in May 1996, when he asked '[s]hould we apply the higher-cost western standards, thus making the operation uncompetitive and depriving the local work force of jobs and the chance of development? Or should we adopt the

[169] See Nsongurua J. Udombana 'The Summer has Ended and We are not Saved! Towards a Transformative Agenda for Africa's Development' (2005) 7 *San Diego International Law Journal* 5 at 8; and John Sweeny and Zeena Elton 'Poverty – aid, trade and corruption' *Online opinion* Australia's e-journal of social and political debate, 31 August 2005. Available at http://www.onlineopinion.com.au /print.asp?article =219.

[170] See AEO 2 *op cit* note 2 at 39-41.

[171] See Soji Awogbade 'What is the Place of Environmental Law in Africa's Development?' *AELEX November 9, 2006*, at pp 4-5. Available at http://www.worldservicesgroup.com/publicationspf.asp?Id =1597.

[172] See Adegoke Adegoroye 'The challenge of Environmental Enforcement in Africa: The Nigerian Experience' *INECE Conference Proceedings Volume 1*, Third International Conference on Environmental Enforcement, 25-28 April, 1994, Oaxaca, Mexico, 43 at 49-50, available at http://www.inece.org/3rdvol1/pdf/Adegoro.pdf; and Ifeanyi Anago *Environmental Assessment as a Tool for Sustainable Development: The Nigerian Experience*, FIG XXII International Congress, Washington D.C. USA, APRIL 19-26, 2002, at p4. Available at http://www.fig,net/figtree/pub/figtree_ 2002/Ts10-13/Ts10_3_anago.pdf.

prevailing legal standards at the site, while having clear plans to improve "best practice" within a reasonable timeframe?'[173]

Regarding the reluctance of the governments in Africa to enforce or adopt more stringent environmental regulations due to economic reasons, it is more pronounced where the activities of the polluting or degrading industries is vital to the economy of the country in question. Thus, the fear that the polluting industries may pull out of the country if required to pay huge environmental costs or adopt more stringent environmental procedure is enough to deter the government.[174] As observed by Professor Onokerhoraye with regard to the enforcement of environmental regulations against oil companies in Nigeria, '[a] number of environmental laws geared towards protecting the environment exist but are poorly enforced. The economic importance of petroleum to national development is such that environmental considerations are given marginal attention.'[175] This is more pronounced where the government is actively involved as a major player in the polluting activities through its agencies or public companies. In such a situation, the government will have less incentive to adopt a rigid and effective enforcement of environmental regulations against itself or its joint venture partners.[176] The setting up of the Nigeria Liquefied Natural Gas (NLNG) project at the Bonny, Rivers State of Nigeria, evidences this reluctance when the government is economically actively involved in a project.[177] According to Emeseh:

> '…the mandatory environmental impact assessment required for the establishment of the project was not done until after the project was under way. …. None of the regulatory agencies [involved] attempted to enforce the law and when community problems broke out later, the federal government

[173] Quoted in Human Rights Watch *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities (*January 1999). Available at http://www.hrw.org/reports/1999/nigeria/niew991_05.htm#P500_147118.

[174] See Joshua Eaton 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston University International LJ* 261 at 291.

[175] Professor Andrew G. Onokerhoraye *Towards Effective Environmental and Town Planning Polices for Delta State*, at p 3. Available at http://www.deltastate.gov.ng/environemtnal.htm.

[176] See Eaton *op cit* note 174 at 289 & 291; and Nelson E. Ojukwu-Ogba 'Legal and Regulatory Instruments on Environmental Pollution in Nigeria: Much Talk, Less Teeth' (2006) 8/9 *International Energy law & Taxation Review* 201 at 206.

[177] This project resulted in the *Oronto-Douglas* case *supra* note 65, where the plaintiff sought to compel the defendants to observe the requirements of the EIA Act in Nigeria.

> was actively involved in assisting to a memorandum of understanding (MOU) between the NLNG and the community so that the first shipment of LNG would not be delayed.'[178]

The government's reluctance to strictly enforce or adopt new and proactive environmental regulations may also be driven by the need to attract foreign investments.[179] The quest to attract foreign investments in this manner may be motivated by the need to increase the revenue base of the government as well as to provide jobs for citizens.[180] It may also be motivated by the need to comply with its mandatory economic liberalisation and deregulations requirements, the centre piece of the structural adjustment programmes (SAP) imposed on debtors countries of which many African countries fall into the category, by the international financial institutions spearheaded by the International Monetary Fund (IMF) and the World Bank.[181] Whatever the reason or reasons for attracting foreign investments into Africa in this manner may be, the end result is that it has led to the transfer of environmentally polluting or 'dirty' industries and technologies into Africa with adverse consequences for its environment.[182]

Furthermore, the reluctance to strictly enforce or adopt new and proactive environmental regulations may be due to corruption. This corruption is mostly in the form of either grand or petty corruption. The former affects environmental policy-making while the latter affects environmental policy implementation.[183] The effect of corruption on environmental policy-making is that it affects the stringency of

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[178] *Op cit* note 68 at 18-19.
[179] See Ojukwu-Ogba *op cit* note 176 at 207.
[180] See Eaton *op cit* note 174 at 277; Abdulai Darimani 'Impacts of Activities of Canadian Mining Companies in Africa' *Third World Network – Africa Secretariat* October 31, 2005, at pp 1-2, available at http://www.miningwatch.ca/updir/Africa_case_study.pdf; and Basil Enwegbara 'The Globalization of Poverty' *The Tech* Vol. 121' Issue 26, Tuesday, May 15, 2001. Available at www.tech.mit.edu/ V121/N26/co126basil.26c.html.
[181] *Ibid*, at 2 & 7. See also United Nations Commission on Human Rights (UNCHR) *Economic, Social and Cultural Rights: Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights* Report Submitted by the Special Rapporteur on toxic waste, Mrs Fatma-Zohra Ouhachi-Vesely, E/CN.4/2001/55, 19 January 2001, at pp 15-16, 18 & 22-23, paras 35, 39, 45 & 64 respectively; and Femi Olokesusi & Osita M. Ogbu 'Dirty Industries: A Challenge to Sustainability in Africa' *IDRC*, at 7 &9. Available at http://www.idrc.ca/en/ev-30814-201-1-DO_TOPIC.html.
[182] *Ibid*, at 2-6; and UNCHR *ibid*, at 13-16, paras 22-36.
[183] See J.K. Wilson & R. Damania 'Corruption, Political Competition and Environmental Policy' (2005) 49 (5) *Journal of Environmental Economics and Management* 516. Cited in Pellegrini & Gerlagh *op cit* note 80 at 337.

environmental policies or regulations. Thus, the higher the rate of corruption or rent-seeking, the lower the stringency of the environmental policies adopted by the State.[184] This situation subsists despite the fact that citizens as a result of an increase in their per capita income levels may have demanded for improved environmental quality from their government. The reason for this state of affairs is that the ability of the citizens to influence higher environmental quality as their income increases is dependent on the responsiveness of their governments.[185] As articulated by Pellegrini and Gerlagh in their seminal article:

> '…corruption levels negatively affect the stringency of environmental policies. Our estimates suggest that, at a cross-country level, a one standard deviation decrease in the corruption variable is associated with a more than two-thirds improvement in the Environmental Regulatory Regime Index. This association appears to be statistically significant and robust. The income variable is associated with less variation of the Environmental Regulatory Regime Index; a one standard deviation increase in the income proxy is associated with 0.16 times one standard deviation increase in the ERRI in regression (4), and the statistical significance ranges from 5 to10%.'[186]

When corruption or rent-seeking influences the stringency of environmental regulations or policies, it leads to a form of 'State capture'.[187] State capture refers to the actions of individuals, groups, or firms in both the public and private sectors to influence the formations of environmental laws, regulations, decrees and other government policies to their own advantage as a result of the illicit and non-transparent provision of private benefits to public officials.[188] This evidenced by the decision of the government in Ghana to open up its remaining pristine forest reserves for surface mining irrespective of the ecological consequences.[189] According to

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[184] See Edward B. Barbier, Richard Damania & Daniel Leonard 'Corruption, trade and resource conversion' (2005) 50 *Journal of Environmental Economics and Management* 276 at 277.

[185] See Pellegrini & Gerlagh II *op cit* note 81 at 142-147; and Pellegrini & Gerlagh *op cit* note 80 at 336-337, & 340-344. See also Lorenzo Pellegrini 'Corruption, economic Development and environmental policy' in Eaere Feem Viu *Resources and Environmental Economics: Political Economy of the Environment* (European Summer School, September 1-6, 2003) 2 & 9-11, available at http://www.feem.wes.ie/ess03/students/pellegrini.pdf; and Transparency International *Corruption and the Environment* (School of International & public affairs, Columbia University, April 2006) 13. Available at http://www.watergovernance.org/downloads/Corruption_&_the%20Environment_Columbia_Univ_Ws_May2006.pdf. (Hereinafter Transparency International II).

[186] Pellegrini & Gerlagh II *ibid*, at 146.

[187] See The World Bank *Anti-Corruption in Transition: A Contribution to the Policy Debate* (Washington D.C., 2000). Cited in Svetlana Winbourne *Corruption and the Environment* (MSI, November 2002) 12. Available at http://pdf.dec.org/pdf_docs/PNACT876.pdf.

[188] *Ibid*.

[189] See Darimani *op cit* note 180 at 5.

Darimani, the intense corporate lobbying of five multinational mining companies in Ghana principally influenced the government's decision.[190]

Petty corruption on the other hand, affects the enforcement of environmental policies or regulations.[191] Such corruption occurs mostly at the level of environmental inspections and policing of illegal acts such as poaching, illegal logging, resource trafficking, discharges and emissions.[192] Several studies have shown that environmental regulations are ineffective and unlikely to be enforced if the bureaucrats and political office holders are corrupt.[193] Therefore, it will appear that the implementation of environmental regulations cannot thrive in a polity where there is pervasive corruption.[194] As stated by the Environmental Public Prosecutor of Madrid, '[t]he non-compliance with environmental laws has its roots in the corruption of the political system…. Non-compliance with environmental laws is the best barometer of corruption in a political system.'[195]

The effect of corruption in the implementation of environmental regulations is evidenced by the controversy surrounding the building of the NGLG project in Nigeria. It should be noted that the mandatory EIA procedures before a project of such magnitude can be carried was not done while none of the regulatory environmental agencies intervened. While it has been argued in this thesis that the lack of regulatory intervention is motivated by the need to protect government revenue earning capacity, recent events have shown it goes beyond that. This is due to the recently uncovered evidence of massive corruption by political office holders including the then Military Head of State and Oil Minister with regard to the awarding of the contract for the construction of the NGLG facility.[196] This corruption even

[190] I*bid*.
[191] See UNCHR *op cit* note 181 at 25, para 75.
[192] See Winbourne *op cit* note 187 at 15-16.
[193] See Pellegrini & Gerlagh *op cit* note 80 at 335-336.
[194] See Eaton *op cit* note 174 at 219; and P. Robbins 'The rotten institution: Corruption in natural resource management' (2000) 19 *Political Geography* 423. Cited in Pellegrini & Gerlagh *ibid*, at 336.
[195] Quoted in Pellegrini & Gerlagh *ibid*.
[196] See Halliburton 'Halliburton and Nigeria: A Chronology of Key Events in the Unfolding of Key Events in the Unfolding Bribery Scandal' *Halliburton Watch.* Available at http://www.halliburton.org/about_hal/nigeria_timeline.html. For instances of corruption in the Nigerian oil sector, see 'PDP, Kupolokun, Obaseki may appear in US court - Over N750m bribery allegation - FG to probe top officials' *Nigerian Tribune* 8 November 2007.

though on a grander scale, may best explain the reason why officials of both the erstwhile Federal Environmental Protection Agency (now Ministry of Environment), which was then an integral part of the presidency, and the Department of Petroleum Resources, which is under the supervision of the oil minister, did not intervene.[197]

3.3.3 Weak institutional capacity

Even if there is the political will, the ability of the government to enforce environmental regulations or to adopt new and proactive regulations may be affected by the weak institutional capacity of its regulatory agencies. Such weak institutional capacity is manifested by their lack of scientific and technical expertise.[198] It should be noted that institutional scientific and technical expertise are necessary to monitor compliance with environmental regulations by the regulated industries, or to adopt new regulation as the need arises. Where such expertise is lacking, the regulatory agencies may be forced to rely on self-monitoring by the regulated industries or on the expertise of the regulated industries that can hardly be expected to give honest assistance.[199] As observed by the Special Rapporteur on toxic waste with respect to the illicit trafficking of toxic waste:

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[197] Assuming that the corruption is vertical in which the political office holders in turn bribe the public officials. For instances of such corruption in South Africa, see Institute for Security Studies 'Crook, line and stinker: the story of Hout Bay Fishing' *ISS Newsletter* Editorial Issue No 005, 26 June 2003, available at http://www.issafrica.org/Pubs/Newsletter /Umqol/issue0503.html; and 'South Africa Country Profile' *Business Anti-Corruption Portal*, available at http://ww.business-anticorruption.com/ normal.asp.pageid=98. (Reporting the story of a former deputy Minister who after accepting a donation o behalf of his party granted the permission for the building of a golf estate despite the result of environmental impact studies showing that environmentally sensitive areas would suffer from the estate).

[198] See Ernest M. Makawa 'Experience of Malawi: Public Role in Enforcement' *INECE Conference Proceedings Volume 1*, Fifth International Conference on Environmental Compliance and Enforcement 16-20 November 1998, Monterey, California, USA, 169 at 173. Available at http://www.inece.org/5th vol1/makawa.pdf.

[199] See O.A. Bowen 'The Role of Private Citizens in the Enforcement of Environmental Laws' in J. A. Omotola (ed.) *Environmental Law in Nigeria Including Compensation* (Faculty of Law, University of Lagos, 1990) 165-166; and Anthony Uzodinma Egbu 'Constraints to Effective Pollution Control and Management in Nigeria' (2000) 20 *The Environmentalist* 13 at 15, (observing that neither the FME's Port Harcourt zonal office or the Rivers State Environmental Protection Agency has a laboratory for water and soil analyses in cases of oil pollution, making them to rely on the polluting oil companies for such determination).

> 'Waste tends to move towards areas with weak or non-existent environmental legislation and enforcement. Many developing countries [including Africa] are unable to determine the nature of substances crossing their border. Developing countries often lack adequately equipped laboratories for testing and evaluation and the requisite specialized data systems or information on the harmful characteristics of wastes. In a number of cases, offers made to developing countries by waste traders either did not divulge vital information on the nature of the wastes, or the information was distorted; waste brokers mixed one toxic waste with others, or redefined the waste as resource "good.'[200]

In addition, such expertise is necessary for a successful prosecution of those found infringing environmental regulations, as it will enable the discharge of the stringent burden of proof in criminal cases. As stated by Kidd, discharging this burden involves proving technical and scientific facts where it involves failure to meet prescribed standards, of *mens rea* unless expressly excluded by legislation, and *actus reus*, which might be difficult especially in cases of multiple polluters.[201]

The weak institutional capacity of most environmental regulatory agencies may be caused by the lack of adequate funding by their various African governments.[202] Lack of adequate funding is mostly due to the fact that African nations like other developing nations with developmental needs and declining national revenues most often push environmental issues down to the bottom of their national policy agenda while attaching a higher priority to economic and social issues.[203] In such a situation, the funding of environmental management, conservation, and enforcement institutions is usually insufficient.[204] When under-funded, these regulatory agencies lack the ability to acquire and retain the requisite scientific and technical skills.[205]

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[200] See UNCHR *op cit* note 181 at 16-17, para 36.
[201] Michael Kidd 'Environmental Crime-Time for A Rethink in South Africa?' (1998) 5 *SAJELP* 181 at 198.
[202] See Adegoroye *op cit* note 172 at 48, (pointing out that the problem of poor funding virtually crippled the activities of the defunct Federal Environmental Protection Agency in Nigeria).
[203] For instance in Nigeria, For instance, only 39.2 million Naira of the total fund meant for environment in the First National Development Plan 1962-1968, was disbursed. Similarly, only 14.5 per cent of environmental fund in the Third National Development Plan 1975-1980. See Environmental Right Action (ERA) 'Institutional Framework for the Protection and Management of the Environment' *The Guardian* 8 December 2003 at 72.
[204] See Transparency International II *op cit* note 185 at 14.
[205] See Wilson M.K. Masilingi 'Social-Economic Problems Experienced in Compliance and Enforcement in Tanzania' *INECE Conference Proceedings Volume 3*, Fourth International Conference

Furthermore, it may lead to corruption by creating a situation where poorly paid and unmotivated officials have an incentive not only to exploit loopholes in laws and regulations, but also to take bribes during environmental inspections and the policing of illegal, environmentally related activities.[206]

In addition, weak institutional capacity may due to corruption by public officials. This usually occurs when public officials divert fund allocated for environmental programmes or projects to private pockets.[207] Such fund may be from budgetary or statutory allotment, donations and grants from other bodies. This is exemplified by the action of a former governor in Nigeria who misappropriated N100 million from his State's ecological fund to fund an unknown endeavour of the immediate past president of Nigeria.[208] Finally, armed conflict contributes to low institutional capacity in most African countries by diverting funds mostly to war efforts as well as facilitating loss of enforcement personnel through either death or displacement.[209]

3.4 Conclusion

This chapter shows that despite the existence of regulatory frameworks that African citizens do not experience a right to environment, and this is as a result of environmental degradation. It further shows that the factors responsible for the degradation of Africa's environment are either direct or indirect. Direct factors refer to adverse natural environmental incidents, while indirect factors refer to the socio-economic and political factors that contribute to the occurrence of the adverse natural environment incidents. The thesis identifies and discusses three socio-economic and political factors that are mainly responsible for environmental degradation in Africa namely poverty, lack of political will and weak institutional capacity. These factors

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on Environmental Enforcement, 22-26 April 1996, Chiang Mai, Thailand, 63 at 70-71. Available at http://www.inece.org/3rdvol2/masiligi.pdf.

[206] See Transparency International II *op cit* note 185; and Winbourne *op cit* note 187 at 8.

[207] See Kingsley Nweze 'Senate: Govs Spend Ecological Funds on Entertainment' *THISDAY* 3 January 2008.

[208] See Victor E. Eze 'Monitoring the Dimensions of Corruption in Nigeria' *Nigeria Village Square* Monday, 25 September 2006. Available at http://ww.nigeriavillagesquare.com/articles/victordike/monitoring-the-dimensions-of-corruption-in-ni.html.

[209] See FN 143. See also Reuters 'Gunmen Kill Ranger in DRC' *News24.com* 31 August, 2007.

are not only interlinked but also complement each other in contributing to environmental degradation in Africa. This can be seen from the fact that poverty not only affects the willingness of African countries to adopt and enforce environmental regulations but also the capacity of their regulatory agencies to enforce such regulations. In addition, events or issues that causes or exacerbates poverty in Africa may also be responsible for the reluctance of African governments to enforce existing environmental regulations or adopt new regulations as the need arises. When there is such reluctance in environmental governance, the capacity of environmental institutions to discharge their duties will be seriously eroded.

Having identified and discussed the factors responsible for environmental degradation and non-realisation of the right to environment in Africa, the rest of this thesis will analyse how the MDGs can help in overcoming the above socio-economic and political factors affecting the protection of the environment in Africa, in order to enhance the realisation of this right in Africa. Such discussion invariably necessitates an exploration of the theoretical linkage between the achievement of the MDGs and realisation of the right to environment in Africa.

CHAPTER FOUR

MDGs AND THE RIGHT TO ENVIRONMENT IN AFRICA: A THEORETICAL RELATIONSHIP

'The degradation of ecosystem [environmental] services poses a significant barrier to the achievement of the Millennium Development Goals and to the MDG targets for 2015. Many of the regions facing the greatest challenges in achieving the MDGs overlap with the regions facing the greatest problems related to the sustainable supply of ecosystem (environmental) services. Among other regions, this includes Sub-Saharan Africa….'

(Millennium Ecosystem Assessment *Ecosystem and Human Well-being: Synthesis* (2005)

'I would not be so bold as to claim that achieving all the Millennium Development Goals rests solely on the environment. … However, we do know that in developing Countries it is women and girls who bear the burden of finding water and fuel for their families. Cleaner and more plentiful supplies of water and more reliable and sustainable forms of energy cannot but help in boosting the chances of girls achieving a regular attendance at school. So even here, the environment has some part to play, as it does in areas of child mortality, maternal health and in reversing the spread of disease.'

(Klaus Toepfer, in 'Protecting the Environment: Thread that runs through the Millennium Development Goals' *Press Release*, UNEP/265, 18/02/2005)

4.1 Introduction

A discussion of the theoretical linkage between the MDGs and the right to environment in Africa is an enquiry into whether efforts to achieve the MDGs can lead to the realisation of this right in Africa and vice versa, or rather, why efforts to realise the MDGs would simultaneously advance the right to environment – a question that probes the detailed inter-linkages, rather than the mere statement that achievement of the MDGs simultaneously leads to the 'realisation' of the right. Such an enquiry invariably raises the contested issue of the link between poverty reduction and human development, and environmental protection.

At face value, this link is not apparent. The MDGs are developmental goals aimed principally at poverty reduction and sustainable human development, and do not contain any particular focus or reference to any human rights including the right to environment in their targets and indicators.[1] However, despite the lack of overt reference to human rights in the MDG targets and indicators, several commentators and writers on the link between MDGs and human rights are of the opinion that such a link does exist.[2] Some of them have traced this link to the MDGs parent document- the Millennium Declaration. As emphasized by Mary Robinson, the Millennium Declaration established this organic linkage by including in addition to the eight MDGs, six commitments for promoting human rights, democracy and good governance.[3] Similarly, Selim Jahan is of the view that 'the substantive direct linkages between the MDGs and human rights become even stronger and broad spread when the plane of comparison is changed from the MDGs to the Millennium Declaration itself. The Declaration directly mentions human rights as an absolute requirement for realizing MDGs. It also emphasizes issues of participation and human security, highlighted in a number of articles of the UDHR.'[4]

Other commentators and writers sought to link the MDGs with existing human rights.[5] Foremost among them is Selim Jahan,[6] who while distinguishing between substantive and process linkages of MDGs and human rights, argues:

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[1] See Canada's Coalition to End Global Poverty (CCIC) *The Politics of the Millennium Development Goals: Human Rights and Poverty Eradication* A summary Report of a CCIC-NSI Conference, May 26-28, 2005, Ottawa, Ontario, p 2. Available at http://www.ccic.ca/e/doc/002_and_200505_ politics_ of_mdgs_ conf_report.pdf.

[2] See Carol Welch, Coordinator, UN Millennium Campaign, in Human Rights & Democracy *Implementing The Millennium Development Goals: Our Human Rights Obligation* Conference Report, Ottawa, 8-9 June 2005. (International Centre for Human Rights and Democratic Developments, 2005) 12.

[3] See Center for Human Rights and Global Justice *Human Right Perspective on the Millennium Development Goals: Conference Report* (New York: NYU School of Law, 2003) 6-7. Available at http://www.nyuhr.org/images/NYUCHRGJMDGREPORT2003.pdf. (Hereinafter CHRGJ Conference Report).

[4] *Human Rights-Based Approach to Poverty Reduction- Analytical Linkages, Practical Work and UNDP* Paper presented in the High-Level Seminar under Global Partnership for Development on Right to Right to Development, UN Office of the High Commissioner on Human Rights, Geneva, 9-10 February 2004, p 2. Available at http://www.undp.org/poverty/docs/HRPR.doc See also Genevieve Renard Painter *Gender, Millennium Development Goals, and Human Rights in the Context of the 2005 Review Processes* (Gender and Development Network, October 2004) 5. Available at http:// www.choike.org/documents/mdg_ women2004.pdf.

[5] See Painter *ibid.*

[6] Senior Adviser, Employment for Poverty Reduction, Bureau for Development Policy, United Nations Development programme (UNDP), New York.

> 'These goals are solidly anchored both in terms of substance as well as process, into human rights. In term of substantive linkages, MDGs, by focusing on deprivations in basic dimensions of human lives, represent human rights. For example, poverty is termed as the greatest denial of human rights… In terms of the process linkage, monitoring MDGs can bring in the dimensions of transparency and accountability – important elements of the Human Rights framework. The substantive linkages between the MDGs and human rights can be *direct* or *indirect*. The direct linkages between the two become more obvious when one compares the various goals of the MDGs with Articles 25 and 26 [and 28] of the Universal Declaration of Human Rights (UDHR). …MDGs and human rights also have strong indirect substantive linkages through the paradigm of human development.'[7]

Similarly, Professor Jeffery Sach while noting that the human rights agenda is much broader than the MDGs, focuses on the complementary linkage between the MDGs and human rights.[8] For him 'The convergence of the two sets of concerns extends beyond the simple definitional overlap. Human rights are instrumentally critical in ensuring empowerment, voice, access to social services, and equality before the law, and are therefore essential in achieving poverty reduction. At the same time, overcoming poverty is absolutely critical in securing civil and political rights, economic and social rights, and human security.… There is a tight link that goes in both directions: human rights support poverty reduction goals and poverty reduction supports the non-economic dimension of human rights.'[9]

In the same vein, the United Nations Development Programme (UNDP) in its 2003 Human Development Report,[10] while focusing principally on socio-economic and cultural rights, as well as recognising the fact that full realisation of such rights requires more than achieving the MDGs states that 'Achieving the Goals will advance human rights. Each Goal can be directly linked to Economic, social and cultural rights enumerated in the Universal Declaration of Human rights (articles 22, 24, 25, 26) and other human right instruments.… The full realisation of [these] rights requires far

[7] *Op cit* note 4 at 1-2.
[8] See CHRGJ Conference Report *op cit* note 3 at 10.
[9] *Ibid*, at 10-11-12; See also Painter *op cit* note 4 at 8-10; and United Nations General Assembly *Implementation of the Millennium Declaration: Report of the Secretary-General* Follow-Up to the Outcome of the Millennium Declaration, A/58/323, 2 September 2003, pp 13-15.
[10] *Human Development Report 2003: Millennium Development Goals - A compact among nations to end human poverty* (New York, Oxford University Press, 2003) 28. (Hereinafter HDR 2003).

more than achieving the [MDGs]. But achieving the goals is an important step towards that end.'[11]

It is apparent from the above arguments and comments that while the human rights agenda is much broader than the MDGs, a link exists between MDGs and human rights that is complementary in nature as the achievement of the MDGs will enhance the realisation of human rights and vice versa.[12] While agreeing with the above views expressed on this linkage, the position of the linkage between the MDGs and right to environment is however not clear as most of their references to human rights are to internationally recognised socio-economic and cultural rights as well as civil and political rights. Even the Millennium Declaration which as argued above provides the basis for linking human rights and the MDGs, does not make any express reference to the right to environment.[13] It may be argued that if the achievement of the MDGs can enhance the realisation of these rights, it will also contribute to the eventual realisation of the right to environment. This argument is tenable to a certain extent. However, it should be noted that the MDGs could be achieved in a manner, which though environmentally unsustainable may advance the realisation of these rights especially the socio-economic rights.[14] Thus, it cannot be taken for granted that once the MDGs enhance the realisation of these rights, the realisation of the right to environment will necessarily follow.

Therefore, there is the need for an exploration of not only the possible linkages between the achievement of the MDGs and realisation of these civil, political, socio-economic and cultural rights, but also, the right to environment. This exploration is pertinent because as aptly observed by Sanderson and Redford, 'Achieving the goal of liberating half the world's poor from their poverty by 2015 will either mark the true

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[11] *Ibid.* See also Professor Phillip Alston in CHRGJ Report op *cit* note 3 at 13; and Sakiko Fukuda-Parr 'Millennium Development Goals: Why They Matter' *Global Governance* Volume 10, Section: 4, October 1, 2004.

[12] See also chapter 2 of this thesis at 59-60. (Arguing that realisation of the rights guaranteed in the African Charter on Human and Peoples' Rights are essential to the achievement of poverty reduction objectives including the MDGs in Africa).

[13] See United Nations General Assembly *United Nations Millennium Declaration* Resolution Adopted by the General assembly A/Res/55/2, 18 September 2000, section V, para 25. (Hereinafter Millennium Declaration).

[14] See Yaa Ntiamoa-Baidu *Address* Presented in the Informal Interactive Hearings of the UN General Assembly, United Nations Headquarters, New York, 23-24 June 2005; and Walter Reid, Director, Millennium Ecosystem Assessment, in Human Rights & Democracy *op cit* note 2 at 20.

beginning of sustainability or the end of biodiversity at the hands of best-intentioned policies.'[15]

4.2 Link between MDGs and Right to Environment

Presently, there is no evidence of any literature overtly exploring and analysing the link between achieving the MDGs and realising the right to environment in Africa. However, there is a wealth of literature exploring the link between achieving the MDGs and enhancing the protection of the environment. This literature is unanimous in establishing that there is a mutual relationship between the MDGs and environmental protection. They contend that protecting the environment will enhance the achievement of the MDGs, while the achievement of the MDGs will enhance the protection of environment in Africa. An overview of this literature is therefore necessary.

Articulating this mutual link through the biodiversity conservation angle, Roe and Elliot are of the view that poverty reduction is critical for long term conservation success while biodiversity conservation is crucial in poverty reduction and achieving the MDGs. They further argue that biodiversity conservation is not only relevant to the achievement in Africa of MDG 7 on environmental sustainability, but also MDGs 1-6.[16] Recognising that Africa is rich in biological resources, they suggest that the conservation of such resources will enable the flourishing of biodiversity-based enterprises that will be crucial in meeting the estimated seven (7) per cent annual economic growth needed for the achievement of the MDGs in Africa provided that the market, production opportunities and appropriate policy frameworks exist.[17]

Similarly, Hazlewood *et al* are of the opinion that given the mutual link between the achievement of the MDGs and environmental conservation, that 'biodiversity conservation cannot be tackled separately from wider development concerns, and

[15] S. Sanderson & K. Redford 'Contested relationship between biodiversity conservation and poverty reduction' (2003) 37 *Oryx* 389-390.
[16] Dilys Roe & Joanna Elliott 'Meeting the MDGs – Is Conservation Relevant? In Dilys Roe (ed) *Millennium Development Goals and Conservation: Managing Nature's Wealth for Society's Health* (IIED, 2004) 7 at 13 -16.
[17] *Ibid*, at 17. See also Maryanne Grieg-Gran & Joshua Bishop 'How Can Markets for Ecosystem Services Benefit the Poor? In Roe (ed) *ibid*, 55 at 55-57.

efforts to eradicate poverty must go hand-in-hand with action to conserve biological resources and maintain healthy ecosystems.[18] They further argue:

> 'The Millennium Development Goals (MDGs) provide a framework for integrating biodiversity conservation into a broader development policy agenda focussed on poverty reduction and human development… While MDG 7…directly concerns biodiversity, the wise use of biological resources clearly underpins the range of development priorities encompassed by all eight MDGs… Because biodiversity is such an important asset for the poor, progress toward achieving the MDGs will not be sustainable unless conservation and wise use of biodiversity is built into the process.'[19]

Chivian also approaches the issue of the link from a biodiversity angle.[20] However, he focuses on the impact of biodiversity conservation on the achievement of human health-related MDGs.[21] He states that 'Human health is dependent on the biodiversity and the natural function of a healthy ecosystem… Without a healthy population, a nation cannot hope to develop sustainably or to achieve true prosperity.'[22] According to him, biodiversity supports human life and promote health by *inter alia* providing basic ecosystem services; providing medicines from plants, animals and microbes on land, in lakes and rivers, and in the oceans; helping in medical research; and supporting the agriculture and marine food web.[23] He also lists some empirical examples of the biodiversity-human health linkages in support of his argument that biodiversity conservation is necessary towards the realisation of the MDGs on human health.[24]

The Millennium Ecosystem Assessment (MA) approaches this mutual link between the achievement of the MDGs and environmental conservation from an ecosystem angle.[25] An ecosystem is defined as 'a dynamic complex of plant, animal, and micro-organism communities and the nonliving environment interacting as a functional

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[18] Peter Hazlewood, Geeta Kulshrestha & Charles McNeill 'Linking Biodiversity Conservation and Poverty Reduction to Achieve the Millennium Development Goals' in Roe (ed) *op cit* note 16 at 144.
[19] *Ibid*, at 146-148.
[20] Eric Chivian 'Beyond Wildlife- Biodiversity and Human Health' in Roe (ed) *op cit* note 16 at 25.
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid*, at 26-27.
[24] *Ibid*, at 27-33.
[25] Millennium Ecosystem Assessment *Ecosystem & Human Well-Being: Synthesis* (Island Press, Washington DC, 2005). (Hereinafter MA General Synthesis).

unit.'[26] For the MA, since ecosystem services contribute significantly to global employment and economic activities, the degradation of such ecosystem services represents a loss of a capital asset essential to poverty reduction and hence the achievement of the MDGs.[27]

In contrast, Roe approach on this linkage does not focus on biodiversity or ecosystem, but on the management of their resources through the natural resource management angle. Roe is of the opinion that natural resource management is central to the achievement of most of the MDGs.[28] He therefore argues that 'the very nature of sustainable development emphasizes the integration of its three pillars…and this implies a need not just to focus on one goal in order to achieve environmental sustainability but to examine how environment – and natural resource management – can be integrated across the goals…. Natural resource management is not just the business of MDG 7, rather, it underpins the achievement of the majority of the other seven goals….'[29]

It is apparent from the above arguments that despite the different conceptualisations of the link between MDGs and right to environment, there is a mutual linkage which exists between the achievement of the MDGs and the conservation of the environment. While agreeing with the views expressed above, they do not address or resolve the issue of the link between MDGs and right to environment, even though it is arguable that the right to environment is inherent in the environmental or biodiversity conservation that will be enhanced by the achievement of the MDG in Africa**.** However, the realisation of this right as evidenced by the discussion in chapter two of this thesis, presupposes not only the conservation of biodiversity (living) but also non-living or man-made components of the natural world such as landscape, shrines, monuments among others. In addition, it entails not only the conservation of the environment, but also includes the promotion of human health and well-being.[30]

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[26] See *ibid*, at V.
[27] *Ibid*, at 49.
[28] Dilys Roe 'The Millennium Development Goals and natural resource management: reconciling sustainable livelihoods and resource conservation or fuelling a divide?' in David Satterthwaite (ed) *The Millennium Development Goals and Local Processes: Hitting the Target or Missing the Point?* (IIED, 2003) 55 at 55. (Hereinafter Roe II).
[29] *Ibid*, at 66.
[30] See pp 61-64.

Thus, it cannot be lightly assumed that the realisation of this right is inherent in every environmental conservation endeavour. This is evidenced by the siting of national parks and other protected areas that while yielding benefits for the international community, had excluded the surrounding local communities that have previously depended on the ecosystem services provided by these natural resources.[31]

This thesis will differ from earlier literature by expressly exploring the theoretical link between the achievement of the MDGs and realisation of the right to environment. However, a discussion of this linkage raises the issue of the content of the substantive right to environment in Africa.[32] Resolving this issue is important as it will help in exploring the extent of the link between the achievement of the MDGs and realisation of the right to environment.

4.2.1. Content of the Right to Environment in Africa

The substantive content of the right to environment is difficult if not impossible to define.[33] This difficulty is mostly due to various adjectives that have been used in qualifying the right in international, regional and national human rights and environmental instruments.[34] These qualifying adjectives represent environmental standards of varying specificities thereby making it difficult to have a generally recognised and precise minimum standard of environmental quality that allows the attainment of human health and well-being.[35] In essence, these adjectives represent different national and regional articulations of the content of the right to environment thereby making it virtually impossible to have a unanimous consensus on the

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[31] See Agenda 21, at chapter 3, para 2; Roe *op cit* note 28 at 61; and Neema Pathak, Ashish Kothari & Dilys Roe 'Conservation with social Justice? The role of community conserved areas in Achieving the Millennium Development Goals' in Tom Bigg & David Satterthwaite (eds) *How to Make Poverty History: The central role of local organizations in meeting the MDGs* (IIED, 2006) 55 at 56.

[32] The procedural content of the right is apparent from the earlier discussion of the procedural nature of the right to environment in chapter one of this thesis and is not controversial as it enjoys a universal consensus.

[33] Alexandre Kiss & Dinah Shelton *International Environmental law* (Transnational Publishers, Inc, 1991) 22.

[34] In addition and to a lesser extent, the term 'environment' is controversial as it can be interpreted in many different ways. See Kiss & Shelton *ibid*, at 22, and Luiz E. Rodriguez-Rivera 'Is the Human Right to Environment Recognised under International Law? It Depends on the Source' (Winter 2001) 12 *Colorado J. Int'l Envtl L. & Policy* 1 at 10.

[35] See Dinah Shelton 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stanford JIL* 103 at 134-135.

dimension of the environment that will protected by the right and what degree of environmental change is permissible by the right. As summed up by Boyle:

> 'Definitional problems are inherent in any attempt to postulate environmental rights in qualitative terms. What constitutes a satisfactory, decent, viable, or healthy environment is bound to suffer from uncertainty and ambiguity. Arguably it may even be incapable of substantive definition, or prove potentially meaningless and ineffective, like the right to development, and undermine the very notion of human rights. At best, it may suffer from cultural relativism, particularly from a North-South perspective, and lack the universal value normally thought to be inherent in human rights…. Yet there is little international consensus on the correct terminology. Even the Ksentini Report cannot make up its mind, referring variously to the right to a "healthy and flourishing environment" or to a "satisfactory environment" in the body of the report and then to the right to a "secure, healthy and ecologically sound environment" in the draft principles. Other formulations are equally diverse. Principle 1 of the Stockholm Declaration talks of an "environment of a quality that permits a life of dignity and well-being", while Article 24 of the African Charter on Humans and Peoples' Rights refers to a "general satisfactory environment favourable to their development." What any of these means is largely a subjective value judgement.'[36]

In view of the difficulty in having a universally acceptable definition of the substantive content of the right to environment, it has been suggested that the best way out of this definitional muddle is to allow supervisory institutions and courts to develop their own interpretations, as they have done for many other human rights.[37] As argued by Shelton:

> 'Establishing the content of a right through reference to independent and variable standards is used in human rights, especially with regard to economic entitlements. Rights to an adequate standard of living and to social security are implemented in varying measures by individual states based on general treaty provisions, according to changing economic indicators, needs, and resources. No precise standard exists, nor can such a standard be established in human rights treaties. Instead, the conventions states rights to "adequate" living conditions for health and well-being and to social security without defining the term further. The "framework" treaty allows national and local regulations to elaborate on these rights, since norms are easier to define and amend on the local level and are more responsive to the needs of the community. A similar approach should be utilized to give meaning to a right to environment….'[38]

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[36] Alan Boyle 'The Role of International Human Rights Law in the Protection of the Environment.' In Alan Boyle & Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Oxford University press, 1998) 50.
[37] Kiss & Shelton *op cit* note 33 at 23-25.
[38] *Op cit* note 35 at 136.

This thesis agrees with the above suggestion. This is due to the fact that the content of the right is inherently relativistic to have a common universal core meaning applicable to all societies. Therefore, what constitutes the content of the right is inherently subject to different definitions and interpretations as different societies have various ideas as to the dimensions of the environment to be protected by the right, as well as the degree of environmental change permissible by the right. For the global North, the right is envisaged in terms of the protection and conservation of a healthy or clean environment for the benefit of individuals whose conditions of life are threatened by environmental factors such as noise disturbances or air pollution arising from airports and motorways and industrial pollution. For most countries in the global South who unlike the North are less preoccupied with industrial pollution, such right should encompass other pressing livelihood issues such as access to fresh water, food and energy supplies. Coupled to the above is the fact that both environmental threats and the resulting necessary measures are subject to constant change based on advances in scientific knowledge and models of the environment.[39] Therefore, 'it is impossible for a human rights instrument to specify precisely the products which should not be used or the chemical composition of the air which must be maintained. These matters will vary in the same way that the economic situations of communities change.'[40]

Based on the above, this thesis accepts the fact that national and international supervisory institutions and courts, which have historically provided substantive interpretation to vague and abstract terms found in local and international human rights instruments, are equally capable of bringing substantive content to the right to environment.[41] However, in determining the substantive content of this right, the supervisory institutions and courts will have to weigh the conflicting visions and values of human society, while their decision must reflect the society's perception of the environment which should be preserved and from which each person should benefit.[42] With regard to weighing conflicting visions and values, many human rights presently allow a significant 'margin of appreciation' to those who interpret and apply

[39] Shelton *op cit* note 35 at 136.
[40] Shelton *ibid*.
[41] See Kiss & Shelton *op cit* note 33 at 23-24; Shelton *op cit* note 35 at 135; and Rodriguez-Rivera *op cit* note 34 at 13.
[42] *Ibid*. See also Shelton *ibid*, at 135 & 137.

them nationally subject to a measure of international 'boundary control'.[43] The European Court of Justice has affirmed this doctrine of margin of appreciation on numerous occasions in environmental cases before it under the provisions of article 8 of the European Human Rights Convention.[44] Recently in *Fadeyeva v Russia*,[45] the Court reiterated this doctrine by stating:

> 'The Court recalls that in deciding what is necessary for achieving one of the aims mentioned in Article 8 § 2 of the Convention, a margin of appreciation must be left to the national authorities, who are in principle better placed than an international court to evaluate local needs and conditions. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the justification given by the State is relevant and sufficient remains subject to review by the Court (see, among other authorities, Lustig-Prean and Beckett v. the United Kingdom, nos. 31417/96 and 32377/96, 27 September 1999, §§ 80-81)'[46]

The fact that supervisory institutions and courts are better placed to articulate the content of this right is evidenced by the decision of the African Commission on Human and Peoples' Rights (African Commission) in *Social and Economic Rights Action Center (SERAC) and another v Federal Republic of Nigeria*.[47] This decision was pursuant to a complaint brought against the Federal Republic of Nigeria alleging *inter alia* the violation of article 24 of the African Charter on Human and Peoples' Rights.[48] As noted in chapter two of this thesis, Africa was the first region to explicitly recognise this right in its human rights system by virtue of the above article 24, while most African countries have also provided for this right in their constitutions and other human rights and environmental legislation.[49] However, the content of the right is vague, as the Charter assigns no precise content to the right.[50]

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[43] Boyle *op cit* note 36 at 51.
[44] See *Powell and Rayners v the United Kingdom* (1990) ECHR 2 (21 February 1990); Taskin *and others v Turkey* Application no. 46117/99, (Chamber); and *Oneryildiz v Turkey* Application no. 48939/99, (Grand Chamber); and *Hatton and others v the United Kingdom* (2003) ECHR 338 (8 July 2003), (Grand Chamber).
[45] Application no. 55723/00 (Chamber).
[46] Para 102. See also *Hatton* case *ibid*, at para 98.
[47] Communication 155/96, Decision of the African Commission on Human and Peoples' Rights. (Interpreting this right under the African Charter). Available at http://www.cesr.org/text%20files% final% 20Decision%2000%20the%Ecosoc%20matter.pdf. (Hereinafter *SERAC* Communication).
[48] Adopted June 27, 1981, OAU Doc.CAB/LEG/76/3 rev.5, 21 *ILM* 58 (1982), entered into force October 21, 1986. (Hereinafter African Charter).
[49] See also Carl Bruch, Wole Coker, & Chris Van Arsdale 'Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protection in Africa' (2000) 7 *SAJELP* 21.
[50] See Fatsah Ouguerouz *African Charter on Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (New York: Kluwer Law International, 2003)

The communication thereby provided the African Commission with the opportunity to formally interpret the content of this right. In its decision, the African Commission held that the right to a general satisfactory environment:

> '[R]equires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and secure an ecologically sustainable development and use of natural resources…. Government compliance with the spirit of Article 24…must also include ordering or at least permitting 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 material and activities, and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'[51]

These obligations as spelled out by the African Commission have both substantive and procedural aspects. The procedural aspect reflects generally recognised procedural environmental rights which include access to environmental information, participation in the environmental decision-making process, and access to administrative and legal remedies when one's environmental rights are impaired or threatened.[52] The substantive aspect of the obligations includes the prevention of pollution and ecological degradation, promotion of conservation, and securing an ecologically sustainable development and use of natural resources.[53] These substantive obligations identify the substance of the right that is the environmental quality that the States are obliged to respect, promote and protect through legislative and other measures.[54] By doing so, it can be argued that the above decision gives meaning to the substantive content of the right to environment guaranteed under

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3641; Robin Churchill 'Environmental Rights in Existing Human Rights Treaties' in Boyle & Anderson (eds) *op cit* note 36 at 106; and Morne van der Linde & Lirette Louw 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the *SERAC* Communication' (2003) 3 *African HRLJ* 167 at 174.

[51] Paras 52-53.

[52] See para 10, Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, 3-14 June, 1992, at Rio de Janeiro, Brazil; and part III, Draft Principles on Human Rights and the Environment, in UN Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment*, Final Report of the Special Rapporteur, UN Doc. E/CN.4/1994/9 (July 6 1994) 74, (hereinafter Draft Principles).

[53] See van der Linde & Morne *op cit* note 50 at 178.

[54] See part II, Draft Principles *ibid*; and *HTF Developers (Pty) LTD v Minister of Environmental Affairs and Tourism and others* 2006 (5) SA 512 at 518E-G.

article 24 of the African Charter.[55] However, the decision did not entirely exhaust the question of the substantive content of the right as the African Commission failed to pronounce itself on the core content and minimum obligation of article 24 of the Charter.[56]

As a result, the African Commission has left the question of the degree of pollution and environmental degradation that the States are obliged to prevent and the degree that should be allowed in a given situation in order not to stultify socio-economic development in the region unanswered. In addition, it left open the question of the kind of conservation envisaged by the right. Concerning the latter, it is submitted that despite this omission, the environmental conservation envisaged under the right is the type that will enhance the well-being of Africans by securing for them an ecologically sustainable development. This is apparent from the provisions of article 24 of the African Charter, which guarantees for Africans an environment of such quality that is favourable to their development.[57] Therefore, it will be contrary to the spirit of article 24 if States are to adopt and promote conservation policies that focus exclusively on protectionism and human exclusion from ecological resources.[58] This can be inferred from the decision of the Kenyan High Court in *Abdikadir Sheikh Hassan and 4 others v Kenya Wildlife Service*,[59] where the applicants sought an injunction preventing the respondent (KWS), from translocation of a rare endangered species of animals called the 'hirola' on the ground that such action would deprive their local community of a species that forms part of their natural heritage and local ecology. The injunction was granted, but on the ground that the Kenyan Constitution and other relevant statutes relied upon by the respondent did not entitle it to translocate the animals.[60]

[55] See *HTF Developers* case *ibid*.
[56] This is in contrast to its decision regarding the right to housing in paragraphs 60 & 61 of the judgement. See van der Linde & Louw *op cit* note 50 at 179.
[57] See chapter two of this thesis at 61-63.
[58] As will be discussed later in this thesis, most poor Africans and households are depended on these resources for their sustenance. Thus, adopting such policies will adversely impact on their food security, culture and livelihood thereby exacerbating poverty. See Roe *op cit* note 28 at 56 & 61.
[59] Civil Case No. 2059 of 1996, High Court of Nairobi.
[60] Note that the decision can be justified under articles 22 and 24 of the African Charter to which Kenya is a party. It must be noted that while the respondent may have the conservation and management of the animal in mind, the fact the translocation will adversely affect the socio-cultural development of the indigenous community made it contrary to the spirit of the Charter.

With regard to pollution and ecological degradation, it will be far-fetched to assume that the African Commission envisaged an ideal environment free from all types of pollution and ecological degradation as not only is such an environment virtually impossible to attain but also such environment may not be conducive to the socio-economic development of the region.[61] Even the Commission implicitly recognised the impossibility of having such an ideal environment in Africa. This view was apparent when the Commission upheld the right of Nigeria through the Nigerian National Petroleum Corporation (NNPC) and its joint partners to produce oil despite the associated oil pollution and other ecological degradation, of which the income derived thereon, will be used to fulfil the economic and social rights of Nigerians.[62] However, this decision was made subject to the proviso that the Nigerian government must take necessary steps to protect its citizens especially the inhabitants of the host villages and towns from the adverse effects of such pollution and environmental degradation.[63]

It is apparent from the above decision that the African Commission's reference to prevention of pollution and ecological degradation does not imply an ideal environment totally free from pollution and ecological degradation. However, this does not answer the question of the degree of pollution and ecological degradation that the States are obliged to prevent in terms of article 24. To ascertain this, this thesis will have recourse to other regional and national courts decisions on the right to environment.[64] The European Court of Justice (ECJ) has repeatedly held that not every instance of pollution or ecological degradation will lead to a violation of article 8, the article usually invoked in cases involving environmental concern.[65] According to the Court 'the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the

[61] The fact that Africa and other developing countries need to pollute to certain extent in order to sustain their socio-economic development, which is reflected in the international environmental principle of Common But Differentiated Responsibility, has been recognised in the Climate Change Convention and its Kyoto Protocol leading to lack of binding commitments on developing countries. See art 3, Climate Change Convention; and art 5, Montreal Protocol on Substances that Deplete the Ozone layer.
[62] See *SERAC* communication *supra* note 47 at para 54.
[63] *Ibid*.
[64] This is line with articles 60 & 61 of the African Charter that allows the Commission to consider other relevant international and regional human rights principles, customs recognised as laws, general principles of law recognised by African states and legal precedent and doctrines.
[65] See *Hatton* case *supra* note 44 at paras 129 & 130; *Michael Ashworth and others v United Kingdom*; and *Powell and Rayner v. the United Kingdom* 9310/81 [1990] ECHR 2 (21 February 1990), para 45.

rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment.'[66]

The Court further held that such harmful or adverse effects of pollution and ecological degradation must attain a certain minimum level or severity if they are to fall within the scope of article 8.[67] This can be attained when 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.'[68] The assessment of the minimum level or severity by the Court is relative and depends on all the circumstances of the case such as the intensity and duration of the nuisance, its physical and mental effects, and general environmental context.[69] Thus, the Court will usually find no arguable claim under article 8 if 'the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.'[70] Thus, in *Moreno Gomez v. Spain*,[71] where the applicant complained of noise and disturbances from nightclubs near her home, the Court held that '[i]n view of its [noise] volume – at night and beyond permitted levels – and the fact that it continued over a number of years, the Court finds that there has been a breach of the rights protected by Article 8.'[72]

Most national courts in Africa have adopted the same position as the European Court of Human Rights with regard to the degree of pollution and environmental degradation that should be tolerated and which will not amount to a violation of the right to environment in Africa**.** This position is reflected in the South African case of *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd and others*,[73] where the applicant sought for an order directing *inter alia* investigation, evaluation and assessment of the impact of the noxious gases emitted from the first respondent's

[66] *Kyrtatos v Greece* 41666/98 (2003) ECHR 242 (22 May 2003), para 52.
[67] See *Fedeyeva* case *supra* note 45 at para 69.
[68] *Lopez-Ostra v Spain* (1994) ECHR, series A, No. 303C, para 51. See also Guerra *and Others v. Italy* 14967/89 [1998] ECHR 7 (19 February 1998), para 57.
[69] *Fedeyeva* case *supra* note 45 at para 69.
[70] *Ibid*.
[71] 4143/02 [2004] ECHR 633 (16 November 2004).
[72] Para 60. But see *Hatton* case *supra* note 44 at para 118.
[73] 2004 (2) SA 393 (Eastern Cape Division).

tannery and a directive that the fourth respondent, who is the head of the Eastern Cape Department of Environmental Affairs and tourism, should take whatever steps that may be necessary in the light of the findings of the investigation. While granting the application,[74] the Court held:

> '…even if the Court had the power of making such an order [closure of the respondent's polluting factory], the exercise thereof had to be determined largely by proof of the level and severity of the offending pollution. One would be far more inclined to direct closure of a factory where there is evidence of persistent, serious and ongoing pollution than in a case where, even if there was a degree of pollution, it could neither be regarded as particularly serious, nor likely to persist indefinitely in the future.'[75]

It further held:

> '…it is clear from the evidence as whole that there has been a pollution of the environment…at a level which had to be regarded as "significant''….. The undisputed evidence showed that even the most minute concentration of [the malodorous hydrogen sulphide] in the atmosphere was detected by the human nose as a stink similar to rotten eggs. Therefore, the [hydrogen sulphide] generated by the first respondent would regularly have been detectable to the persons working nearby on the premises of the applicant. One should not be obliged to work in an environment of stench and to be in an environment contaminated by [hydrogen sulphide] was adverse to one's well-being.'[76]

The above case was not brought under section 24 of the Constitution of the Republic of South Africa,[77] guaranteeing the right to an environment that is not harmful to health or well-being in South Africa, but rather under articles 28 and 32 of the National Environmental Management Act.[78] It however explicitly set the baseline pollution level that a developing country like South Africa can tolerate and which will not amount to a violation of the right to environment in the country. Prior to it, South African courts have not hesitated in finding a violation of this right in severe environmental pollution.[79]

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[74] At 418F/G-G/H.
[75] At 410H-I/J.
[76] At 415A/B-E.
[77] Act No. 108 of 1996.
[78] No 107 of 1998.
[79] See *Health v Woodcarb (Pty) Ltd v another* 1996 (3) SA 155 (N).

Like South Africa, Nigerian Courts appear to take the view that the pollution and ecological degradation must be significant to amount to a violation of the right to environment. This is evident in the decision of the Federal High Court in *Jonah Gbemre v Shell Petroleum Development Company Nigerian Limited and others*,[80] which is the only Nigerian court decision dealing specifically with a violation of the right to environment. It should be noted that the applicant in his supporting affidavit contends that the massive, relentless and continuous gas flaring by the 1st and 2nd respondents in his community adversely affected the community's right to environment as well as their constitutionally guaranteed rights to life and dignity of human person by *inter alia* poisoning and polluting their environment; exposing them to an increased risk of premature death, respiratory illnesses, asthma and cancer; polluting food and water; causing painful breathing, chronic bronchitis, decreased lung function and death in the community; and reducing their crop production as well as adversely impacting on their food security.[81] The Court appears to have agreed with the applicant's argument by holding that 'the actions of the 1st and 2nd respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's community is a gross violation of their fundamental right to life (including healthy environment) and dignity of human person as enshrined in the Constitution.'[82]

Similarly in Kenya, the Nairobi High Court held in *Peter Kinuthia Mwaniki and others v Peter Njuguna Gicheha and others*,[83] that the plaintiffs' 'entitlement to a clean and healthy environment is "likely to be contravened" if the defendants…., start their operations of the slaughter of animals in the butchery they have built and in defiance of all directives to stop the construction of a butchery whose operation will breach the provision of the Act [Environmental Management and Co-ordination Act].'[84] It should noted that the basis of this decision was the unchallenged evidence of the plaintiffs that the defendants, if allowed to operate the butchery, were likely to

[80] Suit No: FHC/B/CS/53/05. Delivered November 14, 2005 (Benin division).
[81] The verifying affidavit can be downloaded at http://www.climatelaw.org/cases/casedocuments /nigeria/ni-pleadings.doc. For adverse impacts of gas flaring on human health and environment in the Niger Delta region of Nigeria, see Environmental Rights Action (ERA) & The Climate Justice Programme *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity* (Amsterdam, June 2005) 19-29.
[82] *Supra* note 80 at para 4.
[83] Civil Case 313 of 2000. Cited as (2006) eKLR.
[84] *Ibid*, at 9-10.

infringe the plaintiff's right to environment as noxious odours and effluents from the butchery would constitute a permanent nuisance,[85] and therefore, adversely affect their health, homes and farms.[86]

Based on the above regional and national court decisions, it can be argued that the pollution and environmental degradation that States are obliged to prevent under article 24 of the African Charter, must be of such significant level, severity or persistence as to render impossible the enjoyment of the right to environment.

4.2.2 Theoretical linkages

Having established the content of the right to environment in Africa, the thesis will now proceed to discuss the linkage between the achievement of the MDGs and realisation of the right in Africa and vice versa.

(a) Extreme poverty and hunger (MDG 1)

MDG 1 focuses on the income dimension of poverty and attendant hunger and malnutrition. It aims to halve the proportion of people living on less than a dollar a day and those who suffer from hunger by 2015.[87] A well-conserved or healthy environment can help or accelerate the achievement of these targets in Africa. This is due to the fact that the environment underpins the economy of most African nations and provides many products and services that are essential to the increment of per capita income and hunger reduction.[88] These include food, fibre, fuel, mineral and genetic resources, biochemicals, medicines and pharmaceuticals, ornamental services, fresh water, air quality and climate regulation, erosion and pest regulation, soil formation, and photosynthesis.[89] It also provides tourism (including eco-tourism) opportunities. Tourism is presently a key economic sector in many countries and

[85] There was no evidence on record that the defendants have made adequate provisions for waste disposal. See *ibid*, at 9.
[86] *Ibid*, at 2-5.
[87] Targets 1 & 2.
[88] See MA General Synthesis *op cit* note 25 at 40; and International Food Policy Research Institute (IFPRI) Ending Hunger in Africa: Prospects for the Small Farmer (Washington, DC, 2004) 2. Available at http://www.ifpri.org/pubs/ib/ib16.pdf.
[89] *Ibid*.

generates millions of dollars in foreign exchange earnings as well as contributing to employment opportunities that are essential to the increment of per capita income and reduction of hunger.[90]

Africa is presently experiencing severe income poverty and food shortages in most of its sub-regions.[91] Between 1981 and 2001, the number of people living on less than $1 per day in Sub-Saharan Africa doubled from 164 millions to 316 million,[92] while the UN World Food Programme (WFP) estimates that 30 million people are going hungry across Africa from the west, to the horn and the south in 2006.[93] Most Africans experiencing income poverty or hunger are usually found in the rural areas.[94] These poor rural Africans are highly dependent on services provided by their environment such as agriculture, grazing and hunting, for subsistence.[95] It can therefore be argued that poor rural Africans have closer ties with the environment, and therefore, are more vulnerable to the disadvantages associated with environmental degradation as their welfare depends to a large extent on the viability of the environment.[96] For these poor rural Africans, the importance of a well-conserved environment that will improve their livelihood options as well as lead to their enjoyment of the right to environment

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[90] See United Nations Environment Programme *African Environmental Outlook 2: Our Environment, Our Wealth* (UNEP, 2006) 88-90 & 157-158, (hereinafter AEO 2); Martin Plaut 'Africa's hunger - a systemic crisis' *BBC News* 31 January 2006. Available at http://news.bbc.co.uk/go/pr/fr/1/hi/ world/ africa/4662232.stm; and Abraham McLaughlin & Christian Allen Purefoy 'Hunger is Spreading in Africa' The Christian Science Monitor 1 August 2005. Available at http://www.csmonitor.com/2005/ 0801/p01s02-woaf.html. See also Achim Steiner 'Speaking Notes of the UNEP's Executive Director on the Launch of the African Environmental Outlook 2' Nairobi, 27 June 2006. Available at http://www.unep.org/Documents. Multilingual/Default.Print.asp?DocumentID+481&…

[91] See AEO 2 *ibid*, at 12.

[92] S. Chen & M. Ravallion *How have the world's poorest fared since the early 1980's?* World Bank Policy Research Working Paper 3341 (World bank, 2004), cited in AEO 2 *ibid*. Note that the outlook in North Africa is much better as the proportion of its people living below the $1 poverty line declined from 2 per cent in 1999 to 1.9 in 2001. See UN Statistics Division *Millennium Indicators database, World and Regional Trends* (UN Statistics Division, 2004). Available at http://millenniumindicators. un.org/unsd/ mi/mi_worldregn.asp.

[93] See BBC News 'Q&A: Africa's permanent food crisis' *BBC News 24*, 17 January 2006. Available at http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/4620130.stm.

[94] This means that poverty is more prevalent in rural than urban areas in Africa. See AEO 2 *op cit* note 90, at 13; MA General Synthesis *op cit* note 25, at 61; and International Fund for Agricultural Development (IFAD) *Enabling the Rural Poor to Overcome their Poverty: Strategic Framework for IFAD 2002-2006* (Rome, 2002), (putting the estimate of rural poor at 75 per cent).

[95] For example, in rural Zimbabwe, one third of total household income stems from the bulk of environmental resources. See United Nations Development Programme (UNDP) *The Poverty-Environment Nexus: Reinforcing Linkages* Practice Note (October 2004) 6. See also AEO 2 *ibid*.

[96] See UNDP Practice Note *ibid*, and Bakary Kante 'The Environment, the wealth of the poor? *Poverty & Environment Times* No. 2, March 2004; and Hazlewood et al *op cit* note 18 at 144.

and other human rights cannot be overemphasised.[97] As noted by Bakary Kante,[98] 'For the poor, nature offers a series of goods of inestimable value, on which they depend absolutely: That sums up their life. Environmental damage, which represents a financial loss for the rich, is a much more serious matter for the poor, leading to the loss of their livelihood.'[99]

The fact that most of the African poor are heavily dependent on the environment for their sustenance makes the promotion of the right to environment vital to the achievement of the targets of MDG 1. As apparent from the earlier discussion in this chapter on the content of the right to environment in Africa, the right as provided under the African Charter envisages not only environmental protection and conservation but also the promotion of sustainable development. Sustainable development requires that citizens have sustainable access to the resources and services provided by the environment for their sustenance.[100] One of such ecosystem services is food. Food derived from the environment can be direct as in the form of wild crops and fruits, fishes, and meat derived from wild animals.[101] It can also be indirect in form of agriculture which is dependent on the ecosystem for the provision of supporting services like natural habitat for wild pollinators that are essential to food crops; natural predators that control crop pests and soil organisms that are important to productivity; watershed protection and hydrological stability including recharging of water tables and buffering of extreme hydrological conditions that might otherwise precipitate drought or flood conditions; maintenance of soil fertility through storage and cycling of essential nutrients; and breakdown of waste and pollutants.[102] Food can

[97] See AEO 2 *op cit* note 90; MA General Synthesis *op cit* note 25 at 49 & 61; and Department for International Development, United Kingdom (DFID), Directorate General for Development, European Commission (EC), United Nations Development Programme (UNDP), & The World Bank *Linking Poverty Reduction and Environmental Management: Policy Challenges and Opportunities* (The World Bank, July 2002) 14.

[98] Director, Division of Environmental Policy Development and Law (DPDL), United Nations Environment Programme (UNEP), Nairobi.

[99] *Op cit* note 96. See also Sue Mainka, Jeff McNeely & Bill Jackson *Depend on Nature: Ecosystem Services supporting Human Livelihoods* (IUCN, 2005) 16-17.

[100] This is apparent from the use of the phrase 'ecologically sustainable development and use of natural resources' by the Commission. See *SERAC* communication s*upra* note 47 at para 52. See also Johan Hattingh & Robin Attfield 'Ecological Sustainability in a Developing Country such as South Africa: A Philosophical and Ethical Inquiry' (Summer 2002) 6 (2) *The International Journal of Human Rights* 65 at 75-76 & 88.

[101] See United Nations Environment Programme (UNEP) & International Institute for Sustainable Development (IISD) *Human Well-Being, Poverty & Ecosystem Services: Exploring the Link* (UNEP & IISD, 2004) 14.

[102] DFID et al *op cit* note 97.

also be obtained from livestock farming and farmed fisheries that are dependent on the environment not only for the provision of suitable habitats, but also, for genetic resources including those from wild and semi-domesticated sources for their sustenance.[103]

Food derived from a healthy environment is important in achieving the MDG hunger reduction target in rural Africa.[104] Both wild and agriculture-based food are vital to the reduction of prevalence of underweight children under five, and the proportion of population below the minimum level of dietary energy consumption in Africa. This is more necessary in the rural areas where most times parents and other villagers are forced to rely on meat from wild animals (bush meat) and livestock, wild fruits, and fish caught from their or neighbouring village streams or rivers, as well as crops harvested from their farms, for sustenance as the money to purchase food from the market is not readily available.[105] However, it is not only the rural Africans that benefit from food provided by their immediate environment. Poor urban Africans also depend on the environment for their dietary energy needs. From the author's personal experience,[106] most urban poor Africans have rural family or individual farms that they cultivate during the farming seasons, and which provides a substantial bulk of their dietary needs throughout the year. In addition to the rural farmlands, they also rent, lease, or were simply allowed the use of land located on the periphery or yet-to-be developed urban areas for cultivation.[107] Furthermore, wild and agriculture food products 'imported' from the rural areas are vital in feeding the urban poor. A healthy environment usually determines the availability and rate of transmission of these products from the rural to the urban areas and this in turn determines their premium

[103] See UN Millennium Project *Environment and Human Well-Being: A Practical Strategy* Summary version of the report of the Task Force on Environmental Sustainability (Earth Institute, Columbia University, New York, 2005) 3.
[104] See target 2 and associated indicators.
[105] See UNEP & IISD *op cit* note 101 at 14-15.
[106] The author's family has some parcels of land in both the rural and urban areas that are used for cultivation of staple foods like cassava, yams, and variety of vegetables. These farms produced enough cassava, an important staple food in Nigeria that provides a substantial part of the family's dietary energy needs throughout the year.
[107] See AEO 2 *op cit* note 90 at 9; and John Ambler Attacking *Poverty While Improving the Environment: Towards Win-Win Policy Options* (Poverty & Environment Initiative, UNDP & EC, 1999) 29.

and affordability in urban markets. Thus, a degraded rural environment will adversely affect the ability of the urban poor to obtain adequate nutrition.[108]

In addition to providing food, the environment generates income for poor Africans in both urban and rural areas.[109] Research has shown that poor rural households often derive a significant share of their income from environmental resources.[110] Such income is known as environmental income and includes income from natural systems such as forests, grasslands, lakes, and marine waters, as well as income from the output of agro-ecosystems (agricultural income).[111] Environmental income might accrue to households through direct use of ecosystem services. It can also accrue by way of poor households 'exporting' goods harvested from ecosystems, such as fish, herbs, or fuelwood, or their excess farm products to the urban areas as most subsistence or co-operative farms, which constitute 90 per cent of Africa's agricultural production are located in the rural areas.[112] They also derive income from livestock farming, small-scale farmed fisheries and forest products.[113] With regard to the latter, additional to the fees that the rural communities earn from loggers, hunters and tourists, non-timber forest products (NTFPs) currently constitute a huge opportunity for increasing the income potential of rural African communities.[114] The urban poor are also utilising the products and services provided by the environment in increasing their income as evident by the trade in urban markets of agricultural products derived from urban and rural areas, forest products and fresh-water products like fish, crabs and shrimps.[115]

For a biodiversity-rich region like Africa, income derived from environmental products and services like tourism, bush meat, timber and other forest products, are essential to the achievement of the MDG target on the reduction of the proportion of people whose income is less than one dollar a day. It will not only help in increasing

[108] See Ambler *ibid*, at 28-29.
[109] *Ibid*, at 5.
[110] DFID et al *op cit* note 97 at 12. See also World Resources Institute, UNDP, UNEP, & World Bank *The Wealth of the Poor - managing Ecosystems to Fight Poverty* (WRI, Washington DC, 2005) at 34. (Hereinafter WRI).
[111] WRI *ibid.*
[112] *Ibid*, at 34. See also DFID et al *op cit* note 97 at 82-83.
[113] *Ibid*.
[114] See AEO 2 *op cit* note 90 at 199-200.
[115] See WRI *op cit* note 110 at 35; and Ambler *op cit* note 107 at 30.

per capita income and purchasing power of poor Africans, but also in reducing the incidence and depth of poverty in Africa. In addition, such income will help in increasing the share of the poorest quintile in national consumption.[116] Presently, NTFPs more than other non-oil or mineral environmental products may provide opportunities for poor Africans to increase their per capita income through the sale and export of such products for medicinal, cosmetics, agricultural and pharmaceutical purposes.[117]

On the other hand, the achievement of the targets of MDG 1 can enhance the conservation of the environment and realisation of the right to environment in Africa. It should be noted that poverty has been recognised as a major challenge to achievement of sustainable development in Africa.[118] As noted by Johnson, 'The very poor were driven to destroy the environment because they had no other possibilities. It was a question of sheer survival.'[119] For MDG 1 to contribute to the realisation of the right to environment in Africa, measures aimed at the implementation of its targets in Africa must promote the protection, conservation and sustainable use of the environmental resources. Such environmentally-friendly policies can help in discharging the obligation imposed on States by the African Charter to fulfil the right to environment.[120] For the policies to achieve this, they must *inter alia*, encourage investment in environmental management such as in the areas of increasing access to water supply and sanitation, soil conservation measures, sustainable energy sources, climate change adaptations, and protecting and restoring natural ecosystems.[121] Such

[116] See target 1 and associated indicators. See also Roe & Elliot *op cit* note 16 at 16.
[117] See Jay Mcgown *Out of Africa: Mysteries of Access and Benefit Sharing* (The Edmonds Institute, Washington, 2006); and Rachel Wynberg *Bioprospecting, Access and Benefit-sharing in South Africa: Towards A Strategic Assessment* A paper prepared for the National Botanical Institute as a contribution towards the Southern African Biodiversity Support Programme and National Biodiversity Strategy and Action Plan, pp30-32. Available at http://www.environment.gov.za.
[118] See Agenda 21 *supra* note 31 at chapter 3, para 1; AEO 2 note *op cit* 90 at 12 &27; paras 7 & 62, Plan of Implementation of the World Summit on Sustainable Development (September 2002), (hereinafter WSSD PoI); and para 23, Action Plan of the Environment Initiative of the New Partnership for Africa's development (June 2003), (hereinafter NEPAD-EAP).
[119] Stanley P. Johnson (ed) *THE EARTH SUMMIT: The United Nations Conference on Environment and Development (UNCED)* International Environmental Law and Policy Series (Graham & Trotman/Martinus Nijhoff, 1993) 145. See also German Advisory Council on Global Change (WGBU) *World in Transition: Fighting Poverty Through Environmental Policy* (Earthscan, 2005) 40-41. Available at http:// www.wbgu.de/wbgu_jg2004_engl.pdf.
[120] See *SERAC* communication *supra* note 47 at para 47.
[121] See Steve Bass, Tom Bigg, Josh Bishop & Dan Tunstall 'Sustaining the Environment to Fight Poverty and Achieve the Millennium Development Goals' (2006) 15 (1) *RECIEL* 39 at 45-47. See also

investment will not only improve the opportunities of poor Africans whose livelihoods depend on environmental assets, but will also lessen their vulnerabilities to environmental hazards.[122]

In addition, such policies must translate to governance practices that increase not only the poor's access to vital natural resources, but also, their ability to govern those resources so that they can share in the income derived from them.[123] This will encourage better environmental management by ensuring not only the conservation and long-term sustainability of official protected areas, but also continuation of traditional conservation and sustainable-use practices, revival or modification of traditional conservation practices, or new conservation initiatives especially when faced with external or internal threats to their resources or access to their resources.[124]

(b) Education and promotion of gender equality (MDGs 2 & 3)

The face of poverty in Africa is mostly exemplified by women and children.[125] Poverty as noted in chapter one of this thesis, is multidimensional and goes beyond lack of income.[126] Given the multidimensionality of poverty, it has been recognised that one of the major routes for tackling poverty is through the promotion of education especially for children and women.[127] However, the promotion of education to a

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Balakrishna Pisupati & Emilie Warner Biodiversity & the Millennium Development Goals (IUCN, 2003) 11.

[122] *Ibid*, at 39-40.

[123] WRI *op cit* note 110 at 12. See also Pisupati & Warner *op cit* note 121 at 12; United Nations Development Programme (UNDP) *Sustaining the Environment to Fight Poverty and Achieve the MDGs: The Economic Case and Priorities for Action*, Environment for the MDGs, A message to the 2005 World Summit (Poverty-Environment Partnership, 2005) at 6-7; and Wynberg *op cit* note 117 at 31, (giving example of the benefit accruing to the San people from the commercialization of the plant hoodia).

[124] See Pathak et al *op cit* note 31 at 58-59.

[125] See Millennium Campaign 'Goal 3: Promote Gender Equality and Empower Women', available at http://www.millenniumcampaign.org/site/pp.asp?c=grKVL2NLE&b=186382; Millennium Campaign 'Goal 4: Reduce Child Mortality', available at http://topics.developmentgateway.org/special/gender, (hereinafter Millennium Campaign II); and United Nations Cyberschoolbus 'Goal 3: Promote Gender Equality and Empower Women', *Millennium Campaign*. Available at http://www.un.org/cyberschool bus/mdgs/goal3.asp#.

[126] At p2.

[127] See Calyn Hambuba 'A Woman's worth' *Poverty & Environment Times* Volume 2, March 2004; Refugees International 'The Achievement of Universal Primary Education' Available at http://www.refugeesinternational.org/content/article/detail/6473?PHPSESSID=31af1eb70cbf011b084f 24583e00ba48; Sonja Vermuelen 'Reconciling Global and Local Priorities for Conservation and Development' in Roe (ed) *op cit* note 16 at 74; Genevieve Renard Painter *Gender, Millennium Development Goals, and Human Rights in the Context of the 2005 Review Processes* (Gender and

certain extent is dependent on the conservation of the environment and the realisation of the right to environment.[128] Evidence has shown that in circumstances where this right has been infringed by the polluting and other environmentally degrading activities of multinational companies and other private individuals, or by the exclusion of people from accessing natural resources within their communities albeit in a sustainable manner, that the ability of the affected host communities to send or retain their children in school is seriously affected.[129]

As discussed earlier in this chapter, poor urban and rural African households rely heavily on environmental products and services as a source of wealth from which to generate income and improve their livelihoods. For most of African countries where there is no free primary, secondary and tertiary education, or available scholarships or stipends, the additional income generated from environmental assets is important for the education of their children. Therefore, if this income source is threatened by environmental degradation, their capacity to send to or retain their children especially girls in school will be seriously diminished.[130] It should be noted that in many poor households in Africa, girls' education is regarded as a luxury to be encouraged only when there is additional income. The predominant thinking is that unlike boys who are usually regarded as the future of the family, girls will get married when they reach adulthood, and therefore, the benefits of their education will accrue mostly to their future husbands. Given this predominant thinking, when the income level decreases as a result of environmental degradation, girls have the fewest education options as they are forced to drop out of school or are not enrolled entirely.[131]

Furthermore, in most African households, the burden of household duties such as cooking, fetching water, and gathering of wood, falls disproportionately on women

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Development Network, October 2004) 21-22; Focus on Global South *Anti Poverty or Anti Poor? The Millennium Development Goals and the Eradication of Extreme Poverty or Hunger* (December 2003) 6; and CHRGJ Conference Report *op cit* note 3 at 18.

[128] See Dr Claude Martin 'Protecting the Environment: Thread That Runs through Millennium Development Goals' *Press Release* UNEP/265, 18/02/2005. Available at http://www.un.org/News/docs / 2005/unep265.doc.htm.

[129] See Human Rights Watch *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities (*January 1999). Available at http://www.hrw.org/reports/ 1999/ nigeria/niew991_05.htm#P500_147118; and Roe *op cit* note 28 at 61.

[130] *Ibid*. See also Mainka et al *op cit* note 99 at 13.

[131] See Irene Dankelman 'No hope without gender equality' (2005) 4 *Poverty & Environment Times* at 14-15.

and children especially female children.[132] In addition, women and children are in charge of many agricultural activities like cultivating, sowing, and weeding of farmlands, and gathering of NTFPs such as edible foods for the family's nutritional needs, medicinal plants for ailments, and fodder for family livestocks.[133] The ability or capacity of women and children in performing these household functions is usually affected adversely in instances of environmental degradation as they are forced to travel longer distances and spent more time in activities like collection of water and NTFPs.[134] Precious time lost that would have been used in performing other household duties, and which in turn, impacts on the amount of time available for schooling and indulging in other livelihood improvement and income-generation activities.[135] As aptly observed by Pisupati and Warner, '…[the] conservation of water resources and associated biodiversity can substantially reduce the burden on women and girl child to focus attention on education and livelihood improvement activities as well as providing some sources of income through NTFP production and natural resource management, including growing of fodder or fuel wood resources.'[136]

These impacts of a healthy environment on the attainment of educational objectives have made the promotion of the right to environment relevant to the achievement of the targets of MDGs 2 and 3 in Africa.[137] Similarly, the achievement of MDGs 2 and 3 can enhance the conservation of the environment and realisation of the right to environment in Africa. This can be seen from the fact that improvement in education will improve people's perception of the environment and the actual or potential contribution of a healthy environment to their long-term sustenance and well-being.[138]

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[132] See AEO 2 *op cit* note 90 at 8; and Pisupati & Warner *op cit* note 121 at 13.

[133] *Ibid*. See also United Nations Environment Programme (UNEP) *Women and the Environment* (Division of Environmental Policy Development and Law, 2004) 32-35.

[134] *Ibid*. See also Dankelman *op cit* note 131; and Tim Hirsch 'Ecosystem protection, a key to development' (2005) 4 Environment & Poverty Times 1.

[135] *Ibid*, at 12. See also Pisupati & Warner *op cit* note 121 at 13; Hazlewood et al *op cit* note 18 at 147; and Roe & Elliot *op cit* note 16 at 15.

[136] See AEO 2 *op cit* note 90 at 17; Hirsch *op cit* note 134; and Martin *op cit* note 128.

[137] For example, the income realised from a healthy environment can enhance net enrolment ratio in primary education, proportion of pupils starting grade 1 who reach grade 5, and literacy rate of 15–24 year-olds. This will help in achieving the target of ensuring universal primary education in Africa. In addition, the environmental income and the time saved on doing household chores can help in achieving the target of gender equality and women empowerment by enhancing the ratio of girls to boys in primary, secondary and tertiary education; and the ratio of literate women to men, 15–24 years old. See MDGs 1 & 2 and associated indicators.

[138] For empirical studies on the relationship between education and environmental protection, see Lorenzo Pellegrini & Reyer Gerlagh 'Corruption, Democracy, and Environmental Policy: An Empirical Contribution to the Debate' (2006) 15(3) *The Journal of Environment and Development* 332

Most importantly, such improvement will broaden their knowledge of the options they can utilise to either demand or coerce their government into adopting more stringent or more strictly enforced environmental standards. This is due to the fact that even if average Africans are aware of the economic, spiritual and cultural importance of natural resources and other environmental assets, their ability to ensure the conservation of these assets is dependent on their level of literacy which in turn influences their ability *inter alia*, to access relevant environmental information necessary for protecting their environment and maximising available environmental opportunities, to participate effectively in environmental decision-making processes in their communities and broader governance issues, to access legal and administrative remedies when their environment is degraded or threatened, communicate, to be reached through the electronic and print media, and to fight corruption and demand better governance from their government.[139]

Furthermore, improved education of African women and children will improve their capacity not only to conserve and manage the environment, but also to maximise environmental opportunities.[140] This can be seen from the fact that since women and children especially girls are reliant on environmental resources for the discharge of their household duties as well as the sustenance of their families, they tend to be more knowledgeable about the existence and management of their local environmental resources than their male counterparts.[141] This expertise therefore makes women vital in any effort to conserve the environment and realise the right to environment in Africa.[142] As observed by Sandra Lee, Conservation Minister of New Zealand, in a speech to the intergovernmental Committee for the Cartegena Protocol on Biosafety, a subsidiary body of the Conference of the Parties (CoPs), in The Hague in 2002:

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at 343; and Fabio Granja e Barros, Augusto F. Medonca, & Jorge M. Nogueira *Poverty and Environmental Degradation: the Kuznets Environmental Curve for the Brazilian Case* Department of Economics Working Paper 267 (University of Brasilia, December 2002) 11. Available at http:// www.unb.br/face/eco/epe/TD/267Dec20/Noguira.pdf.

[139] See AEO 2 *op cit* note 90 at 11; WSSD PoI *supra* note 118 at para 116; Agenda 21 *supra* note 31 at chapter 36; and para 14, *A strategic Plan to Build Africa's Capacity to Implement Global and Regional Environmental Conventions*, Annex 1, NEPAD-EAP *supra* note 118.

[140] See Dankelman *op cit* note 131; and Eileen Kane 'So much yet to learn about girls' education' *Poverty & Environment Times* Volume 4, 2005.

[141] See AEO 2 *op cit* note 90 at 8; and UNEP 2004 *op cit* note 133 at 32-37.

[142] Several international environmental instruments have recognised the role of women in environmental conservation. See Agenda 21 *supra* note 31 at chapter 24; preamble to the Convention on Biological Convention. 31 *I.L.M.* 818 (1992) Adopted on June 2, 1992 at the United Nations Conference on Environment and Development (UNCED) Rio, Brazil.(the Convention) In force since Dec.29, 1993; and WSSD PoI *supra* note 118, at para 40(f).

> 'We also need to give greater recognition to the role of women in conservation. Women have a vital role to play in affecting community choices, as key decision makers, as important players in economic and political processes in some societies, and through their influence on the next generation. We need to recognise this, and take concrete steps to build their capacity, by addressing issues of empowerment for women in all societies and by providing them with access to information and tools for good biodiversity management.'[143]

There is an abundance of evidence about the positive role of women in the conservation of the environment.[144] This would not have been possible if these women have no access to improved education and literacy.[145] A case in point is the widely known national case of the Chipko movement in India, made up primarily of village women who stopped commercial logging in the 1970s by physically embracing trees in their community forest.[146] Their protest led to a re-evaluation of the country's forest policy and a ban by the Indian Supreme Court on green felling in the Himalayas.[147] The 'Save Our Seed Movement', which sprang up in the aftermath of the Chipko's victory has led to the in situ preservation of a rich variety of traditional seeds, thereby ensuring food security and the well-being of both the people and the land.[148] In Africa, the Green Belt Movement set up in 1977 by the National Council of Women of Kenya, founded by Wangari Maathai is playing a significant role in combating desertification, restoring soil fertility and protecting water catchment areas in Kenya.[149]

For the achievement of the targets of MDGs 1 and 2 to contribute to the realisation of the right to environment in Africa, measures and policies implementing these targets must include additional elements. Such elements include promoting the teaching of facts about the environment as well as environmental rights, enhancing the understanding of the interplay between human actions and environmental impacts in order to foster a stronger sense of environmental responsibility, and fostering local

[143] Quoted in UNEP 2004 *op cit* note 133 at 40.
[144] See UNEP 2004 *ibid*, at 8-12, 34, 48, & 54-55.
[145] See statement credited to Swabra Aboud, a 16-year-old girl living in Kiunga Marine Reserve, Northern Kenya. Quoted in UNEP 2004, *ibid*, at 44.
[146] *Ibid*, at 44.
[147] *Ibid*.
[148] *Ibid*, at 44-45.
[149] *Ibid*, at 12-13, & 54.

and indigenous knowledge especially on the conservation and management of their environmental resources.[150] Such environmentally-friendly MDG policies can help in discharging the obligation imposed on parties to promote through teaching and education, knowledge of the right to environment as guaranteed under the African Charter.[151]

(c) Human Health (MDGs 4- 6)

A healthy environment is vital to the promotion of good human health in Africa.[152] Human health as defined by the World Health Organization (WHO) is a state of complete physical, mental and social well-being.[153] Environmental products and services derived from a healthy and well-functioning environment are therefore vital in ensuring this human physical, mental and social well-being.[154] One of the environmental products essential to human health is fresh water. It is vital to health-related human activities like growing food, drinking, personal hygiene, washing, cooking and the dilution and recycling of wastes.[155] However, the availability of fresh water is dependent on the health of the environment as it regulates many aspects of the hydrological (water) cycle and associated geophysical processes such as evaporation and the functioning of the climate system.[156] Thus, when the environment is degraded, its function of ensuring adequate availability of fresh water for human uses will be impinged with adverse consequences for human health and food production.[157] Unclean water together with associated inadequate sanitation and hygiene is estimated to be causing the death of 1.8 million people globally, of which 1.6 million are children.[158]

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[150] See WBGU *op cit* note 119 at 54-55.
[151] See African Charter *supra* note 48 at art 25; and *SERAC* communication *supra* note 47 at para 46.
[152] See Agenda 21 *supra* note 31 at chapter 6, para3; NEPAD-EAP *supra* note 118 at para 132; and AEO 2 *op cit* note 90 at 9.
[153] See Millennium Ecosystem Assessment *Ecosystems and Human Well-Being: Health Synthesis* (World Health Organization, 2005). (Hereinafter MA Health Synthesis).
[154] See Chivian *op cit* note 20 at 26.
[155] See MA Health Synthesis *op cit* note 153.
[156] *Ibid*.
[157] *Ibid*.
[158] *Ibid.* See also B. Gordon, R. Mackay & E. Rehfuess *Inheriting the World: the Atlas of Children's Environmental Health and the Environment* (World Health Organization, Geneva, 2004). Available at htt://www.who.int/ceh/publications/en/atlas.pdf.

In addition to water, the environment provides both wild and agriculture-based (managed) food essential to good human health and life. In African countries, and especially in the rural and poor sections of the urban areas, the health of human communities is often directly dependent on the locally productive natural environment providing sources of basic nutrition.[159] Local food production is critical in preventing hunger in areas where the poor do not have the capacity to purchase food from elsewhere.[160] Wild food is important locally in many developing countries, often bridging the hunger gap created by stresses such as droughts and civil unrest.[161] Wild and managed food production is dependent on a healthy environment in the form of watershed services, pollination, pest regulation and soil formation.[162] Therefore, when the environment is degraded, its ability to provide food is adversely affected, leading in conjunction with some socio-economic factors, to severe cases of hunger and malnutrition among poor Africans.[163] Malnutrition accounts for nearly 10 per cent of the global disease burden.[164] This is particularly severe in poorest countries with the highest mortality rates as between one-sixth and one-quarter of the burden of disease is related to childhood and maternal malnutrition.[165]

The environment also provides medicine for the prevention and cure of many human ailments in Africa. Most Africans, especially the poor, are dependent on plant-based traditional medicine for their ailments. The World Health Organization (WHO) estimates that 80 per cent of the world's population from developing countries rely mainly on traditional medicines for primary health care.[166] This dependence according to the United Nations Environment Programme (UNEP) cannot be attributed only to both culture and tradition as 'equally important is the fact that the poor have cheaper and easier access to traditional medicines than to modern health facilities.'[167] Even for those relying on orthodox or synthetic medicines, the environment still plays a vital

[159] *Ibid.*
[160] *Ibid.*
[161] *Ibid.*
[162] See MA General Synthesis *op cit* note 25 at 61.
[163] *Ibid.* See also MA Health Synthesis *op cit* note 153; and Jeevan Vasagar 'Plenty of food – yet the poor are starving' *Environment & Poverty Times* Volume 14, 2005, at pp 16-17.
[164] MA Health Synthesis *ibid.*
[165] *Ibid*. See also AEO 2 *op cit* note 90 at 9.
[166] See Chivian *op cit* note 20 at 27.
[167] See UNEP & IISD *op cit* note 101 at 19.

role as the natural provider of the compounds from which these drugs are derived.[168] Some of the better known drugs derived from natural sources include aspirin, digitalis and quinine. A recent report by Jay Mcgown has documented some of the actual or potential drugs that will be derived from Africa's indigenous natural resources.[169] Environmental degradation not only reduces the availability of plant-based traditional medicine but also that of natural medicinal compounds. The story of the potential anti-HIV drug *Calanolide* provides a perfect example of this assertion.[170]

Furthermore, a healthy environment also regulates infectious diseases by reducing the risk of contracting some of them by either the 'dilution effect', controlling populations of vectors, hosts, and parasites, and/or reducing the number of ecological refugees who were forced by ecological disasters to migrate to other communities or countries, and which in turn favour the transmission of diseases from one location to another where the population might be more susceptible.[171] Environmentally degrading human activities usually breach the disease regulating function of the natural environment leading to the emergence or re-emergence of some diseases like malaria, bilharzia, HIV/AIDS, Lyme disease, yellow fever among others.[172] As stated by the WHO:

> 'Infectious disease risks are affected particularly by destruction of, or encroachment into, wildlife habitat, particularly through logging and road building; changes in the distribution and availability of surface waters, such as through dam construction; irrigation and stream diversion; and agricultural land-use changes, including proliferation of both livestock and crops. The reasons for the emergence or re-emergence of some diseases are unknown, but the main biological mechanisms that have altered the incidence of many infectious diseases are clear: altered habitat features leading to changes in the number of vector breeding sites or reservoir host distribution; niche invasions of new species or interspecies host transfers; changes in biodiversity, including loss of predator species and changes in host population density; human-induced genetic changes of disease vectors or pathogens (such as mosquito resistance to pesticides or emergence of environmental

[168] It is estimated that of the 119 chemical compounds derived from 90 plant species, 74 per cent of these are used as drugs. See Pisupati & Warner *op cit* note 121 at 16.
[169] *Op cit* note 117.
[170] See Chivian *op cit* note 20 at 32.
[171] *Ibid*, at 27. See also United Nations Environment Programme (UNEP) *Global Environment Outlook Yearbook 2004/2005: An Overview of Our Changing Environment* (2005).
[172] *Ibid*, at 28-33. See also MA Health Synthesis *op cit* 153; and Bruce A. Wilcox & Duane J. Gubler 'Environmental change and infectious diseases' *Environment & Poverty Times* Volume 4, 2005.

> contamination by infectious disease agents antibiotic-resistant bacteria); and environmental contamination by infectious disease agents.'[173]

Other environmental products and services that are essential to the attainment of humans' physical, mental and social well-being include nutrients and waste management, processing and detoxification; climate regulation; cultural, spiritual and recreational services; and fuel for cooking and heating purposes.[174]

Given the dependence of human health on the environment, the conservation of the environment and realisation of the objectives of the right to environment guaranteed under the African Charter is crucial to the achievement of the targets of human health related MDGs in Africa.[175] These objectives such as pollution prevention, environmental conservation and ecologically sustainable development not only guarantees a healthy environment vital to the prevention of many human diseases but also guarantee access to environmental resources that can be used in preventing, controlling and treating human diseases.

On the other hand, the achievement of human-health MDGs is vital to environmental conservation and realisation of the right to environment in Africa. As aptly stated by Johnson '…for the vast mass of the world's population, there would be no real improvement in the environment as they experienced it on a day to day basis unless basic standards of environmental health care were met.'[176] The WSSD recognised this link between human health and right to environment by stating that 'the goals of sustainable development can only be achieved in the absence of a high-prevalence of debilitating diseases…'[177] A high burden of debilitating diseases as presently being experienced in most African countries increases the incidence of poverty which in turn places excessive pressure on the environment as more people are forced to

[173] See MA Health Synthesis *ibid*.
[174] *Ibid*. It should be noted that an estimated one-fifth of the total burden of disease in developing countries and 30 per cent in sub-Saharan Africa has been attributed to environmental factors. See K. Lvovsky *Health and the Environment* Strategy Papers, No.1 (Environment Department, World Bank, 2001).
[175] These targets include reducing by two thirds, between 1990 and 2015, the under-five mortality rate; reducing by three quarters, between 1990 and 2015, the maternal mortality ratio; halting by 2015 and beginning to reverse the spread of HIV/AIDS; halting by 2015 and beginning to reverse the incidence of malaria and other major diseases. See targets 5-8.
[176] *Op cit* note 119 at 167.
[177] *Supra* note 118 at para 53.

depend on environmental resources.[178] A debilitating disease such as HIV/AIDS, which has caused a decline in adult prevalence rate in sub-Saharan Africa, has not only affected the productive capacity but also the environmental managerial capacity.[179] This can be seen from the fact that women, who in most part of Africa assumed major responsibility for environmental stewardship, are mostly adversely affected by the pandemic.[180] As observed by Thaxton on the negative impacts of HIV/AIDS on the environment in some African countries:

> 'Because Aids often affects people in their prime working ages – between 25 and 45 – the poverty that the epidemic precipitates can severely degrade natural resources and agricultural productivity. These impacts can be particularly severe in regions and communities where livelihoods depend a great deal on forests, agriculture or fishing. As men and women with Aids die or become too ill to work, their family members are often forced to find new sources – which can ultimately lead to more intense and less sustainable use and extraction of resources. In eastern and southern Africa, such practices often include the unsustainable harvesting and sale of forest products…. Woodcutting is on the increase to charcoal for sale, especially when families face severe food shortages. In coastal areas, widowed women and their children, desperate to make a living from declining shallow water fish stocks, are increasingly using small-mesh fishing nets fuelling the vicious cycle of resource degradation.'[181]

It is therefore evident from the above discussion that there is a mutual link between the achievement of the human health MDGs and realisation of the right to environment. The recognition of this link in policies or measures implementing the targets of MDGs 3-6 is important for the enhancement of environmental conservation in Africa because as Chivian noted 'People will not do what is necessary to protect the global environment until they begin to understand the risks that disruptions to physical, chemical, and biological systems present to themselves and to their children. There is no more effective way to help them achieve this understanding than to frame discussions about development and the environment in the concrete, personal terms of human health.'[182]

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[178] See Jeffery Sach 'The end of poverty' *Environment and Poverty Times* Volume 4, 2005 at pp 2-3; Melissa Thaxton 'The burden of sub-Saharan Africa: Aids, poverty and natural resource degradation' *Environment &Poverty Times* Volume 4, 2005; and UNEP & IISD *op cit* note 101 at 15.
[179] AEO 2 *op cit* note 90 at 5-6.
[180] *Ibid*.
[181] *Op cit* note 178.
[182] *Op cit* note 20 at 35.

(d) Environmental sustainability (MDG 7)

The link between the right to environment in Africa under the African Charter and MDG 7 on environmental sustainability is explicit as the latter embodies targets that are in consonance with the objectives of the right vis-à-vis prevention of pollution, environmental conservation, and ecologically sustainable development. Thus, the realisation of the right to environment is vital to achieving the target of integrating the principles of sustainable development into country policies and programme and reversing the loss of environmental resources as the right encourages the conservation and protection of environmental resources.[183] The healthy environment brought about by such environmental conservation and protection, will help in boosting the proportion of land area covered by forest through the promotion of conservation methods such as the forestation or reforestation of previously degraded lands, or protection of existing forests.[184] Such an environment can also boost the ratio of area protected to maintain biodiversity to surface area through the establishment of protected areas.[185] However, the integrity and long-term sustainability of the forests and protected areas is dependent to a certain extent on the surrounding communities' perception of the contribution of such areas to their health and well-being.[186]

In addition, a healthy environment can help in achieving the target of halving the proportion of people without sustainable access to safe drinking water and basic sanitation by 2015.[187] This is based on the fact that a healthy environment is important in regulating the hydrological cycle by ensuring the conservation of water catchments, wetlands, swamps, forests and flood plains, and other associated geophysical processes that are essential to sustainable delivery of water supply,[188] while the income derived from such an environment will help in the provision of adequate sanitation facilities. In addition, a healthy environment is vital to achieving a significant improvement in the lives of at least 100 million slum dwellers as the income or additional income derived from the environment will help in increasing the proportion of households with access to secure tenure either through private

[183] See target 9.
[184] See indicator 25.
[185] See indicator 26.
[186] See Roe *op cit* note 28 at 57-58 & 60-62.
[187] See target 10 and associated indicators. See also Agenda 21 *supra* note 31 at chapter 18, paras 1&2.
[188] See Roe & Elliot *op cit* note 16 at 15; and MA Health Synthesis *op cit* note 153.

ownership or through government social housing schemes by 2020.[189] Such an environment will also help in cushioning or minimising the destructive effects of industrial pollution and natural disasters like flooding, hurricane, and tsunami on lands and houses, thereby reducing the incidence of slums in urban areas.[190]

On the other hand, the achievement of MDG 7 will help in reducing environmental pollution and degradation, and ensuring the conservation of the environment thereby enhancing the realisation of the right to environment in Africa. As observed by the MA, 'Achievement of this goal will require at a minimum, an end to the current unsustainable uses of ecosystem services such as fisheries and fresh water and an end to the degradation of other services such as water purification, natural hazard regulation, disease regulation, climate regulation and cultural amenities.'[191] Thus, achieving the target of integrating the principles of sustainable development into country policies and programmes and reversing the loss of environmental resources can boost the realisation of this right in Africa by increasing the proportion of land area covered by forest, as well as the ratio of area protected to maintain biological diversity to surface area. This is however subject to the requirement that such forests and protected areas must contribute to the livelihoods and socio-economic advancement of the surrounding communities. Failure to do so will negate the spirit enshrined in the right to environment under the African Charter. In addition, a reduction in the amount of energy use per $1 GDP (PPP), carbon dioxide emissions per capita and consumption of ozone-depleting CFCs (ODP tons), and proportion of population using solid fuels, can help in arresting environmental pollution and degradation in Africa, thereby enhancing the realisation of the right to environment.

[189] See target 11 and associated indicator. Secure tenure refers to households that own or are purchasing their homes, are renting privately or are in social housing or subtenancy. Households without secure tenure are defined as squatters (whether or not they pay rent), homeless and households with no formal agreement. See United Nations Development Group *Indicators for Monitoring the MDGs: Definition, Rationale, Concepts and Sources* (United Nations, New York, 2003) 68. Available at http://devdata.worldbank.org/ gmis/mdg/UNDG%20document_final.pdf.

[190] See UNEP & IISD *op cit* note 101 at 16; Hanna Reid 'Africa: a crucible for climate change and poverty' in Bigg & Satterthwaite (eds) *op cit* note 31 at 168-169; Grahame Russell 'Hurricane Mitch: not just a natural disaster' *Poverty & Environment Times* Volume 2, March 2004, p13; and United Nations Environment Programme 'Protecting the Environment: A Thread that Runs Through the Millennium Development Goals' UNEP GC/GMEF 23 *ROA News* 8 June 2005, p4.

[191] See MA General Synthesis *op cit* note 25 at 61.

Furthermore, achieving the target of halving the proportion of people without sustainable access to safe drinking water and basic sanitation is important to the realisation of the right to environment in Africa as it will not only ensure ecologically sustainable development, but also that the water regulation and provisioning function of the ecosystem is maintained. In addition, achieving the target of having a significant improvement in the lives of at least 100 million slum dwellers can enhance environmental conservation and protection by acting as an incentive for the slum dwellers to invest in the improvement of their home and surrounding land especially in the area of sanitation. Finally, achieving the above targets can help in tackling overcrowding, inadequate housing, inadequate access to clean water and sanitation, and deteriorating air quality in Africa's urban slums. These environmental issues together constitute what has become known as the 'brown agenda'.[192] The brown agenda has been identified as the most immediate and critical environmental problem facing cities in the Southern hemisphere including Africa, and thus, its eradication is vital to the realisation of the right to environment for urban dwellers in Africa.[193]

(e) Global partnership for development (MDG 8)

The realisation of the right to environment in Africa can also enhance the achievement of MDG 8. While this may not be readily apparent as this MDG focuses on means of achieving the first seven goals and is principally directed towards the developed countries, it is doubtful if presently, the developed nations will be willing to channel efforts towards the achievement of the global partnership for development in countries or regions that condone massive environmental degradation and its associated human rights abuses.[194] Such policy inclination is evident in the decision of

[192] See J. Leitmann 'The World Bank and Brown Agenda' (1994) 16 (2) *Third World Planning Review* 131.

[193] See Jo Beall, Owen Crankshaw & Susan Parnell 'Victims, Villains and Fixers: the Urban Environment and Johannesburg's Poor' (2000) 26 (4) *Journal of Southern African Studies* 833 at 835. (Citing C.J. Bartone, J. Bernstein, J. Leitmann & J. Eigen *Towards Environmental Strategies for Cities: Policy Considerations for Urban Environmental Management in Developing Countries* Urban Management Programme Policy Paper No. 18 (Washington D.C., 1994).

[194] For example, the goal of the Millennium Challenge Account (MCA) set up by the Bush Administration as evidence of the US policy commitment towards the achievement of the MDGs by developing countries, is to fund projects developing countries that govern justly, invest in their people, and encourage economic freedom. The first condition is measured in term of government control of corruption, and promotion of rule of law, voice and accountability, civil liberties, and political rights (see Steve Radelet 'Will the Millennium Challenge Account Be Different?'(2003) *The Washington Quarterly* 171 at 175). This implicates the right to environment and concomitant process rights such as

Britain in suspending a planned increase in aid to the Ethiopian Government over human rights abuses,[195] as well as the 16 June 2006 decision of the Millennium Challenge Corporation (MCC) suspending Gambia from eligibility for MCA assistance due to human rights abuses, restrictions on civil liberties and press freedom, and worsened anti-corruption efforts.[196] Perhaps, the best example with regard to abuse of the right to environment and its concomitant process rights was evidenced by the economic and other sanctions imposed by the international community on the then late General Sani Abacha's dictatorship in the Nigeria for the execution of Mr. Ken Saro Wiwa, an environmental activist, in November 1995.[197]

The achievement of MDG 8 is vital to environmental conservation and the realisation of the right to environment in Africa as it emphasises a partnership between developed and developing countries in order to address sustainability issues, which cannot be addressed alone by the developing countries.[198] Such sustainability issues which are beyond the capacity of national governments in Africa, and which requires international actions, relate mostly to resource constraints, international policies and systemic asymmetry in governance.[199] Tackling these obstacles is very important for reducing poverty which has been identified by NEPAD as the main cause of environmental degradation in Africa.[200] Thus, achieving the target of developing an open, rule-based, predictable, non-discriminatory trading and financial system including a commitment to good governance, development and poverty reduction

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the right to free environmental expression and association. In contrast, Chinese development policy in the areas of trade, aid, and debt relief to African countries has been widely criticized for its apparent disregard for the human rights records of the African leaders with whom they are forming relationships. See Eleanor Robb 'Debt relief, aid and trade concessions further strengthen Sino-African relations' *MediaGlobal Newswire Service* 6 November 2006. Available at http://mediaglobal.org/index.php/2006/11/06/debt-relief-aid-and-trade-concessions-further-strengthen-sino-african-relations.

[195] See Chris Albin-Lackey 'Why Turn a Blind Eye to Tyranny?' *International Herald Tribune*, 4 July 2005.

[196] See Curt Tarnof *Millennium Challenge Account* CRS Report for Congress (Congressional Research Service, August 2006) 1.

[197] It is widely believed that the late Saro Wiwa was judicially murdered to paved the way for the oil giant Shell to continue the exploitation of oil in the Ogoni region of the Nigerian Niger Delta. Under Saro Wiwa's leadership of MOSOP, a local Ogoni organisation, the Ogoni people were able to halt the environmentally degrading oil production activities of Shell, as well as drawing international attention to their plights.

[198] See WSSD PoI *supra* note 118 at para 81; Monterrey Consensus of the International Conference on Financing for development, at para 4, (hereinafter Monterrey Consensus); and Pisupati & Warner *op cit* note 121 at 23.

[199] See Sakiko Fukuda-Parr 'Millennium Development Goal 8: Indicators for International Human Rights Obligations?' (2006) 28 (4) Human *Rights Quarterly* 966 at 976-978.

[200] See NEPAD-EAP *supra* note 118 at para 23.

nationally and internationally will help in tackling poverty in Africa thereby enhancing the conservation of the environment and realisation of the right to environment.[201] The same is applicable with regard to achieving the targets of addressing the special needs of the least developed countries, landlocked countries and small island developing nations; and comprehensively dealing with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term.[202]

African countries either fall under the category of developing countries, least developing countries, landlocked countries or small island developing States respectively.[203] For most of these African countries, income from environmental resources is a major contributor to their gross domestic product (GDP), employment and foreign exchange. Agriculture is presently a vital economic activity providing livelihood and employing more than 50 per cent of the labour force, as well as serving as the basis for many industries.[204] This dependence on agriculture makes these African countries vulnerable to shocks associated with agricultural products and productions such as the HIV/AIDS pandemic, land degradation and desertification, climate variability and change, invasive alien species, armed conflicts, unfair international trade practices, and low commodity prices at the international market.[205] The same applies to other African countries relying on other environmental resources other than agriculture for their economic growth and development.[206] The economic decline associated with these factors exacerbates the poverty situation in Africa, which in turn leads to more and more Africans increasingly dependant on the

[201] See target 12. See also IRIN 'BURKINA FASO: Sahelian cotton farmers on their knees' Humanitarian News and Analysis. *UN Office for the Coordination of Humanitarian Affairs*, 22 December 2006. Available at http://www.irinnews.org/report.aspx?reportid=62888. (Reporting the adverse effects of U.S cotton subsidies at the macro-economic and micro-economic levels in Burkina Faso).

[202] See targets 13, 14, & 15 respectively.

[203] See AEO 2 *op cit* note 90 at 13; NEPAD-EAP *supra* note 118 at para 1; and Kelvin C. Kennedy 'The Incoherence of Agricultural, Trade, and Development Policy for Sub-Saharan Africa: Sowing the Seeds of False Hope for Sub-Saharan Africa's Cotton Farmers?' (Winter 2005) 14 *Kansas Journal of Law and Public Policy* 307 at 308-309.

[204] *Ibid*, at 82-84. See also Kennedy *ibid*, at 311.

[205] *Ibid*, at 91-95. See also IRIN *op cit* note 201; Sach *op cit* note 178; and IRIN 'BURKINA FASO: Counting the damage to agriculture' Humanitarian News and Analysis. *UN Office for the Coordination of Humanitarian Affairs*, 21 September 2007. Available at http://www.irinnews.org/Report.aspx? ReportId= 74432.

[206] Note that due to the high premium presently attached to crude oil, key oil producers in Africa have been showing impressive growth. Before then, due to oil glut, most of their economies stagnated from the early eighties to the late nineties. See AEO 2 *ibid*, at 87.

environment. This high dependence usually leads to unsustainable exploitation of environmental resources and further degradation of the environment, and which in turn exacerbates poverty in Africa.[207]

For these African countries, increased official development assistance (ODA) represents a window of opportunity for them to undertake economic, social and environmental development necessary to achieve the MDGs and lift their people out of poverty, thereby enhancing environmental conservation and realisation of the right to environment.[208] The World Bank estimates that it will take an increase in foreign aid of up to US$ 40 to 60 billion per year to reach the MDGs.[209] Achieving this increase will require at least a doubling of ODA.[210] This figure can only be realised if developed countries increase their net total ODA to both developing and least developing countries, proportion of total bilateral, sector-allocable ODA to basic social services, proportion of untied bilateral ODA, and proportion of ODA received in both landlocked countries and small island developing States as proportion of their gross national income (GNI).[211]

In addition, African countries will benefit from improved market access for their exports especially primary commodities like cotton, tea and other agricultural products. Increased market access will generate more income for developing countries, which will greatly enhance the ability of many African countries to achieve the MDGs by 2015 as well as environmental conservation.[212] Despite the contribution of greater market access in enhancing the achievement of the MDGs and environmental conservation in Africa, current unfair trade protectionist practices especially in agricultural products by developed countries, in form of price-distorting

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[207] See NEPAD-EAP *supra* note 118 at para 3. See also Adriana Fabra 'The Intersection of Human Rights and Environmental Issues: A Review of Institutional development at International Level' Background Paper 3 *Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment*, January 14-16, 2002, Geneva, available at http://uchchr.ch/environment/bp3.pdf.

[208] See NEPAD-EAP *ibid*, at para 148; Agenda 21 *supra* note 31 at chapter 33, para 15; WSSD PoI *supra* note 118, at para 85; and Monterrey Consensus *supra* note 198 at paras 37 & 39. See also HDR 2003 *op cit* note 10 at 146.

[209] See S. Devarajan, M.J. Miller & E.V. Swanson *Development Goals: History, Prospects and Costs* (World Bank, 2002). Cited in Pisupati & Warner *op cit* note 121 at 23.

[210] *Ibid*.

[211] See indicators 33-37 respectively. See also Monterrey Consensus *supra* note 198 at paras 39-46; and WSSD PoI *supra* note 118 at para 85.

[212] See Pisupati & Warner *op cit* note 121 at 24; DFID et al *op cit* note 97 at 96.and HDR 2003 *op cit* note 10 at 154.

subsidies, high tariffs and duties, and restrictive quotas, restrict market access for developing countries' agricultural products, textiles, and clothing.[213] These unfair trade practices adversely affect the economy of African countries leading to increases in poverty and environmental degradation.[214] For these African countries, increases in the proportion of total imports from developing and least developing countries admitted free of duties into developing countries, reduction in average tariffs imposed by developed countries on agricultural products, textiles, and clothing from developing countries, and increases by developed countries in agricultural support and in the proportion of ODA provided to help build trade capacity, are essential if they are to reduce poverty and achieve the MDGs by 2015.[215]

Furthermore, most African countries are saddled with unsustainable levels of debts that exacerbates their poverty level as it not only hampers their economic growth but also their ability to provide basic services to their people including environmental management and conservation.[216] For these African countries, their ability to reduce poverty and achieve environmental conservation is dependent on the sustainability of their debt burden.[217] Developed countries can help ensure this sustainability by ensuring that the number of African countries that have reached their Highly Indebted Poor Countries (HIPC) decision points and numbers that have reached their HIPC completion point are increased, increased debt relief committed under the HIPC initiative, and that national debts are sustainable in the long term by ensuring that debt service payments reflect a low percentage of government revenue.[218]

Equally important to environmental conservation and the realisation of the right to environment in Africa is the MDG target of developing and implementing in co-operation with developing countries strategies for decent and productive work for

[213] See DFID et al *ibid*, at 52-53.
[214] See Pisupati & Warner *op cit* note 121 at 24-25; and United Nations Cyberschoolbus 'Goal 8: Develop a global partnership for development' Millennium Campaign. Available at http://www.un.org/ cyberschool bus/mdgs/goal8.asp#.
[215] See indicators 38-41 respectively. See also Monterrey Consensus *supra* note 198 at paras 26-38; and WSSD PoI *supra* note 118 at paras 90-99.
[216] DFID et al *op cit* note 97 at 59.
[217] *Ibid*. See also Pisupati & Warner *op cit* note 121 at 24; and HDR 2003 *op cit* note 10 at 244.
[218] See Indicators 42-44 respectively. See also Monterrey Consensus *supra* note 198 at paras 47-51; and WSSD PoI *supra* note 118 at para 89.

their youths.[219] Such productive work will not only enhance the youth's income earning potential but also the conservation of the environment as there will be less dependence on environmental resources.[220] In addition, achieving the target of providing in co-operation with pharmaceutical companies, access to affordable essential drugs in developing countries is essential to environmental conservation.[221] As earlier noted in this chapter, debilitating diseases like HIV/AIDS, malaria and tuberculosis that have led to a decline in adult prevalence rate in Africa, have affected both the productive and environment management capacity of African countries. Increasing the proportion of Africans with sustainable access to affordable essential drugs will reduce adult mortality and this will in turn enhance both the productive and environment management capacity of African countries leading to the realisation of the right to environment.

Furthermore, achieving the target of making available in co-operation with the private sector, the benefits of new technologies especially in the areas of information and communication is essential to improving environment conservation and livelihood of poor Africans.[222] This can be seen from the fact that improved access to technological innovations including cell phones, telephones and personal computers can increase productivity resulting in increased household incomes. It will also help in providing sustainable solutions to many development problems such as disease, transport, energy, water supply and sanitation that will enhance environmental conservation and realisation of the right to environment.[223] In addition, increased access to information and communication technologies will increase people awareness of the importance and actual or potential threat to their environment, and enhance their ability to protect and conserve it.

4.3 Conclusion

This chapter establishes a theoretical linkage between the achievement of the MDGs and realisation of the right to environment in Africa. This linkage as argued in this

[219] See target 16 and associated indicator.
[220] See target 16 and associated indicator. See also AEO 2 *op cit* note 90 at 5.
[221] See targets 17 and associated indicator. See also WSSD PoI *supra* note 118 at para 100.
[222] See target 18 and associated indicators. See also WSSD PoI *ibid*, at paras 52,105 & 106.
[223] See DFID et al *op cit* note 97 at 40-42; Pisupati & Warner *op cit* note 121 at 25; and HDR 2003 *op cit* note 10 at 157.

chapter is substantively mutual in nature, to the extent that environmentally-friendly policies or measures implementing the MDGs in Africa can help in discharging some of the obligations imposed on States by the African Charters with regard to the right to environment. Thus, it is now apparent that environmental protection is no mere luxury to be attained after socio-economic targets has been achieved, as any sustainable efforts to achieve the MDGs in Africa must take cognisance of the environmental dimension of development.[224] Africa can no longer afford to ignore the protection of the environment as a healthy or well-conserved environment can generate massive natural wealth that can help in stimulating economic development and the achievement of the MDGs in Africa.[225] As stated by Dr. Abdul-Hakim Elwaer, president of the African Ministerial Conference on the Environment (AMCEN), 'Economic development in Africa is underpinned by the quality and integrity of the natural resource base. The region's environmental assets provide opportunities for Africa to achieve the objectives of the New Partnership for Africa's development (NEPAD) and make good progress towards meeting the targets of the Millennium Development Goals (MDGs). Africa cannot, therefore, afford to lose its environmental assets through degradation.'[226]

The above argument should not be taken as implying that only the realisation of the right to environment will advance the achievement of the MDGs in Africa as other human rights are equally important,[227] or that only the achievement of the MDGs will enhance the realisation of the right to environment for average Africans as other policy initiatives are equally important, while the MDGs may still be achieved in Africa without the realisation of this right. The main argument in this chapter is that the two concepts have a theoretical albeit mutual linkage. Such linkage has a wider implication as it can be utilised by policy-makers in ensuring that measures implementing the MDGs, concurrently enhance the realisation of the right to environment in Africa.

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[224] *Ibid*, at v & 7-10. See also Ambler *op cit* note 107 at 35.
[225] See Ambler *ibid*, at 35; and *Steiner op cit* note 90 at 1-2.
[226] See Foreword to the AEO 2 *op cit* note 90 at xxii.
[227] Even then, Professor Sach argued that not everything about poverty reduction (aim of the MDGs) can be resolved through a human rights approach or through empowerment, inclusion or voice, and that instead poverty reduction entails technical, economic issues, and analytical questions about how to organise economic institutions. See CHRGJ Conference Report *op cit* note 3 at 10.

However, for the MDGs to enhance the realisation of this right, the goals must encourage the promotion of appropriate policies that can help in tackling or eradicating the political and socio-economic factors militating against the realisation of the right in Africa. In essence, the MDGs must promote appropriate reform in the policies of African governments and that of the international communities especially developed countries that perpetuate the existence of these militating factors. The next chapter of this thesis will discuss the role of the MDGs in this regard.

CHAPTER FIVE

MDGs AND POLICY REFORM TOWARDS THE REALISATION OF THE RIGHT TO ENVIRONMENT IN AFRICA

5.1 Introduction

In the preceding chapter, it was stated that for the MDGs to enhance the realisation of the right to environment in Africa, the MDGs must encourage the promotion of appropriate policies that could help in tackling or eradicating the political and socio-economic factors militating against environmental protection and the realisation of the right in Africa. Promoting such policies means that there must be a change or reform in current African States and developed countries policies that perpetuate these militating factors. This raises the issue of the role of the MDGs in guiding or stimulating national and international policy reform towards the realisation of the right to environment in Africa. In essence, this is a question of whether and how the MDGs can be used as a tool to promote the adoption of relevant policies that will overcome the militating factors identified in chapter three of this thesis. It should be noted that the reference to international policy reform is an acknowledgement of the fact that Africa's deepening environmental problems are not only self-imposed but also externally-imposed, albeit indirectly by international and developed countries' policies that cause as well as exacerbate such problems.

Resolving the issue of the role of the MDGs in guiding national and international policy reform invariably involves an exploration of the type of obligations imposed by the MDGs on State parties, and whether such obligations are sufficient to influence State parties to undertake policy reform towards the achievement of sustainable objectives including the MDGs and the right to environment in Africa.

5.2 Normative Nature of the MDGs

An analysis of the normative nature of the MDGs involves the examination of the nature of obligation imposed by the parent document, the Millennium Declaration, which was adopted by the member States of the United Nations (UN) at the

Millennium Summit.[1] Generally, declarations including those adopted by the UN General Assembly are regarded as 'soft law', and thus, legally non-binding.[2] The effect of this is that norms or goals derived from soft law instruments impose no legally-binding or hard obligations on State parties towards their implementation.[3] However, this does not mean that such instruments have no normative value as States' behaviour towards their negotiations suggest that 'States do not view such "soft" recommendations [or declaration] as devoid of at least some political significance, if not, in the long term, any legal significance.'[4] This supports the earlier observation of the late Justice Baxter that while these instruments do not create legal obligations, '[they] are intended to create pressures and to influence the conduct of States and to set the development of international law in new courses.'[5] More recently, Boyle made a similar observation when he stated:

> '...[while] it is characteristic of all of them [soft law instruments] that they are carefully negotiated, and often carefully drafted statements, which are in some cases intended to have some normative significance despite their non-binding, non-treaty form. There is at least an element of good faith commitment, and in many cases, a desire to influence state practice and an element of law-making intention and progressive development.'[6]

The argument that a soft-law instrument or some of its provisions may in the long term have a legal significance is evidenced by the crystallisation of some soft norms into 'hard norms', either by virtue of incorporation in a treaty or by becoming a

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[1] See United Nations General Assembly *Millennium Declaration* A/Res/55/2, September 18, 2000. (Hereinafter Millennium Declaration). The Millennium Summit was held in September 2000.

[2] See David Hunter, James Salzman & Durwood Zaelke (eds) *International Environmental Law & Policy* 2ed (Foundation Press, New York, 2002) 349; John Dugard *International Law: A South African Perspective* 3ed (Juta & Co Ltd, 2005) 38; Ian Brownlie *Principles of International Law* 6ed (Oxford University Press, 2003) 15; R.R. Baxter 'International Law in "Her Infinite Variety' (1980) 29 (4) *The International and Comparative Law Quarterly* 549 at 557-563; C. M. Chinkin 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 (4) *The International and Comparative Law Quarterly* 850 at 851-852; Alan E. Boyle 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 (4) *The International and Comparative Law Quarterly* 901 at 901-902.

[3] See Baxter *ibid*, at 559-560; Boyle *ibid*, at 902; Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 *Michigan J.I.L*. 420; Michele Olivier 'Enforcement of International Environmental Law' (2002) 9 *SAJELP* 151 at 157; and G.L. Lugten 'Soft law with hidden teeth: the case for a FAO international plan of action on sea turtles' (2006) 9 (2) Journal of International Wildlife Law & Policy 155.

[4] Dupuy *ibid*. See also Brownlie *op cit* note 2; Dugard *op cit* note 2; and Geoffrey Palmer 'New Ways to Make International Environmental Law' (1992) 86 (2) *AJIL* 259 at 270. This has been recognised by the International Court of Justice in *Legality of the Threat or Use of the Nuclear Weapon* (1996) I.C.J. Reports 226 at para 70.

[5] *Op cit* note 2 at 559.

[6] *Op cit* note 2 at 902. See also Patricia Birnie & Alan Boyle *International Law and The Environment* 2ed (2002) 25.

customary norm of international law.[7] The 1982 UN Convention on the Law of the Sea (UNCLOS) is a good example of treaties giving binding force to soft-law instruments by incorporation.[8] This is due to the fact that UNCLOS implicitly incorporated both the recommendations and resolutions of the International Maritime Organisation (IMO) under provisions variously requiring or permitting States to apply 'generally accepted rules and standards established through the competent international organisation or general diplomatic conference.'[9] Perhaps the 1948 Universal Declaration on Human Rights (UDHR)),[10] which is universally recognised as a high-ranking document of political and ethical value containing norms of aspiration that have become the crystallisation point for legal developments in the area of human rights at both the national and international levels,[11] provides a better example of a declaration whose provisions have crystallised into hard law. This is due to the fact that most of the UDHR's provisions were incorporated and elaborated in the two foremost UN human rights treaties vis-à-vis the International Covenant on Civil and Political Rights (ICCPR);[12] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[13] In addition, many of its provision have been incorporated into customary international law binding on all States.[14] Such hard obligation applies, regardless of the fact that the UN General Assembly did not view the UDHR as imposing legal obligations on States at the time of its adoption in 1948.[15]

[7] See Dugard *op cit* note 2 at 34-37; Chinkin *op cit* note 2 at 856-859; Brownlie *op cit* note 2 at 14-15; Boyle *op cit* note 2 at 906 and Antonio Cassese International *Law* (2001) 161. See also *North Sea Continental Shelf Cases* (FRG/Denmark; FRG/Netherlands) (1969) I.C.J. 3 at 44 (Judgment of Feb. 20); and *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.) (Merits) (1986) I.C.J. Reports 14 at 99-100 (Judgment of June 27).

[8] See Boyle *ibid*.

[9] See Arts 207-212, 1982 UN Convention on the Law of Sea.

[10] G.A. Res. 217, UN Doc.A/810 (1948)

[11] See Elbe Riedel 'Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?' (1991) 2 *European JIL* 58 at 69.

[12] Dec. 16, 1966, 999 U.N.T.S. 171. Entered into force on 23 March 1976.

[13] Dec. 16, 1966, 993 U.N.T.S. 3. Entered into force on 3 January 1976.

[14] This has been confirmed by states in intergovernmental and diplomatic settings, in arguments submitted to judicial tribunals, by the actions of intergovernmental organisations, and in the writings of legal scholars. For a comprehensive discussion of this transformation, see Hurst Hannum 'The Status of the Universal Declaration of Human Rights in National and International law' (1996) 25 *Georgia Journal of International and Comparative Law* 287; and Richard B. Lillich 'The Growing Importance of Customary International Human Rights Law' (1995/1996) 25 *Georgia Journal of International and Comparative Law* 1.

[15] The obligation applies mostly to countries that did not sign either the ICCPR or the ICESCR or both.

Specifically on the normative status of the MDGs, it should be noted that the Millennium Declaration like the UDHR, was overwhelmingly approved by UN member States. Most importantly, the Declaration was adopted by the largest-ever gathering of world leaders in history.[16] This has made the Declaration which represents a statement of values, principles and objectives for the international agenda for the twenty-first century, to be regarded as 'a historic Declaration with a vision for the future.'[17] In addition, like the UDHR and its provisions, commitments to the development goals in the Declaration (MDGs) were subsequently reinforced or confirmed in the resolutions of other international forums as evidenced by the WTO's Doha Ministerial Declaration;[18] the Monterrey Consensus;[19] the World Summit for Sustainable Development (WSSD) Declaration and Plan of Implementation;[20] UN Food and Agriculture Organisation (FAO) Voluntary Guidelines for the Implementation of the Right to Adequate Food;[21] and the 2005 World Summit Outcome.[22] Finally, like the UDHR which has been the foundation of much of post-1945 development of human rights at both the national, regional and global levels, the MDGs are now generally regarded as driving a new era in international development.[23] This was evident in the statement of Gordon Brown, then U.K. Chancellor of the Exchequer, that the MDGs 'were not a casual commitment. Every world leader signed up. Every international body signed up. Almost every single country signed up. The world in unison accepting the challenge and agreeing the changes necessary to fulfil it - rights and responsibilities accepted by rich and poor alike.'[24]

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[16] See United Nations (UN) *World Leaders Adopt 'United Nations Millennium Declaration' at Conclusion of Extraordinary Three-Day Summit* Press Release GA/9758, 8 September 2000.

[17] See Sam Nujoma, President of Namibia (as he then was) and the Co-Chairperson of the Millennium Forum. Quoted in *ibid*.

[18] Adopted at the WTO Ministerial Conference, held on 14 November 2001, in Doha.

[19] A/CONF.198/11, 22 March 2002. Adopted at International Conference on Financing for Development. (Hereinafter Monterrey Consensus).

[20] Adopted at the World Summit for Sustainable Development (WSSD), held from 26 August - 4 September 2002, at Johannesburg, South Africa.

[21] See United Nations (UN) Committee *on World Food Security Adopts Right to Food Guidelines* Press Release SAG/299, 24 September 2004.

[22] Adopted by the UN General Assembly at the Millennium+5 Summit held from 14-16 September 2005, at UN Headquarters, New York.

[23] See UN Millennium Project *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (UNDP 2005) 4. (Hereinafter UN Millennium Project); *and In larger freedom: towards development, security and human rights for all* Report of the Secretary-General, A/59/2005, 21 March 2005, at p 10, para 29. (Hereinafter UN S-G Report 2005).

[24] Speech at the National Gallery of Scotland, 6 January 2005. Reported in BBC NEWS, 6 January 2005. Available at http://news.bbc.co.uk/1/hi/uk_politics/4151525.stm.

The manner of the adoption of the MDGs and their subsequent re-affirmation in these international forums, have given rise to the issue of whether the MDGs like some provisions of the UDHR, have crystallised into international customary norms and are therefore legally binding on States parties? Professor Alston articulated this question when he observed:

> 'When large numbers of heads of state or government congregate together, along with foreign ministers and other dignitaries, and solemnly declare their abiding commitment to meet a set of MDGs – as they did in the context of the 2000 Millennium Declaration, and again at both the Johannesburg World Summit on Sustainable Development and the Monterrey Consensus, each in 2002 – there would seem to be good reason to assume that they meant what they said and that they had thereby undertaken a form of obligation which should have some legal consequences. This, after all, is the trajectory that many commentators argue occurred in relation to the Universal Declaration of Human Rights, adopted on the agreed basis that it did not generate any legally binding obligations, and then claimed by many some decades later to have attained the status of customary law as a result of having been so consistently endorsed and invoked by governments of every kind.'[25]

Presently, some commentators are of the view that the MDGs reflect customary international law. Nankani *et al*, in their seminal article on the mutual convergence between human rights principles and poverty reduction strategies papers (PRSPs), suggest that the MDGs 'arguably have the status of international customary law.'[26] Nankani *et al* did not overtly provide a legal basis for their suggestion, but it can be assumed that they were influenced by the universal participation of UN member States in the preparation and adoption of the Millennium Declaration.[27] Earlier, Economist and UN watchdog, Joan Veon in observing that the Millennium Summit marked the first time since 1945 that the Heads of State have convened to set a programme of action to reform the UN, further argues that because over 152 Heads of State signed the resulting Millennium Declaration, both the Declaration and its goals

[25] Philip Alston *A Human Rights Perspective on the Millennium Development Goals* Paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development, p 19, at para 35.
[26] Gobind Nankani, John Page and Lindsay Judge, 'Human Rights and Poverty Reduction Strategies: Moving Towards Convergence?' in Philip Alston and Mary Robinson (eds.), Human Rights and Development: Towards Mutual Reinforcement (Oxford, Oxford University Press, 2005) 496-497.
[27] This may be implicit in their statement that the MDGs were endorsed by 191 nations at the UN Millennium Summit in 2000. See *ibid*, at 478.

have been 'automatically incorporate[d] into international law.'[28] This argument was endorsed by 'Discerning the Times', an organisation representing private groups that are hostile to the UN and to what they see as its ambitions towards world government, when it stated:

> 'Although some might say that Veon is probably stretching it a bit, it is significant that it was the heads of state themselves that represented the nations rather than having the nation-states' normal ambassador represent them in the Summit deliberations. It was the heads of state who signed the Millennium Declaration. This, in fact, does give the UN all the authority it needs to move ahead and implement all of the changes that are included in the Declaration that do not require a change in the UN Charter.'[29]

This thesis while agreeing with Professor Hannum that principles initially considered by the international community to be 'only' goals or aspirations can develop into binding norms over time, if they become accepted as customary international law,[30] rejects the argument as to the customary international law status of the MDGs. The rationale for the rejection is that it is premature at this stage to accord such legal status to the MDGs. It should be noted that establishing the existence of a norm of customary international law requires proof of an identifiable State practice (*usus*), accompanied by evidence that States recognise the practice as obligatory. In essence, States must approach a practice with a sense of legal obligation (*opinion juris sive necessitatus*), as opposed to motives of courtesy, fairness, or morality.[31] This is explicit in *North Sea Continental Shelf Cases*, where the International Court of Justice (ICJ) held:

> 'not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring

[28] Quoted in 'UN Millennium Declaration--"Mandate" for global governance' *Discerning the Times Digest* September 2000. Available at http://www.discerningtoday.org/un_Millennium_declaration.htm. See also Deborah K. Dunn & Gary Chartier 'Pursuing the Millennium Goals at the Grassroots: Selecting Development Projects Serving Rural Women in Sub-Saharan Africa' (2006) 15 UCLA Women's L.J. 71 (arguing that the endorsement of the MDGs by the UN's member States qualify the goals as official commitments that form, at least in broad terms, part of the legal framework of international human rights protections); and Smita Narula 'The Right to Food: Holding Global Actors Accountable Under International Law' (2006) 44 *Columbia Journal of Transnational Law* 691 at 789, (arguing that because of the universal participation of states in the preparation and adoption of the MDGs, the MDGs should be viewed as evidence of customary international law).
[29] *Ibid.*
[30] *Op cit* note 14 at 319.
[31] See Brownlie *op cit* note 2 at 8; Dugard *op cit* note 2 at 29; and Hunter et al *op cit* note 2 at 312.

> it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis.'[32]

In proving *opinio juris*, evidence that States approach a certain practice with a sense of legal obligation according to Hunter *et al*, 'is a factual matter that can be determined by consideration of a wide range of… [material sources].'[33] These include *inter alia* diplomatic correspondences, government policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, the practice of international organisations, legal briefs endorsed by the States, resolutions and declaration of the United Nations.[34]

Thus, while it can be argued that the behaviour of UN member States in unanimously adopting the MDGs at the Millennium Summit and subsequently reaffirming their commitments to the goals in other international forums as well as in regional, sub-regional and national policy documents, is evidence of State practice,[35] it is doubtful if these commitments have been made with the requisite intention to be bound (*opinio juris*). This is based on the fact that the text of the resulting declarations shows no intention on the part of States to be legally bound by their commitments to the MDGs.[36] Even if the non-binding nature of the MDGs commitments were not apparent from the text of these declarations, it would still be difficult to assume *opinio juris* from State practice with regard to the MDGs, and therefore argue that the States intend to assume binding obligations for the achievement of these goals. This is due to the fact that a similar argument with regard to the customary status of the entire UDHR (a document having some similarities with the MDGs) and not just to a limited range of its component rights, is contested by many scholars and has not been widely

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[32] *Supra* note 7 at 44, para 77. Reaffirmed in *Military and Paramilitary Activities in and Against Nicaragua* case *supra* note 7 at 109-109, para 207.
[33] *Ibid*.
[34] *Ibid*. See Brownlie *op cit* note 2 at 6. See also Restatement (Third) of the Foreign Relations Law of the United States (1987), s 701.
[35] See s 102 of the Restatement *ibid*, which recognises collective state action as evidence of state practice. For a discussion of what constitutes State practice, see Dugard *op cit* note 2 at 29-33; and Brownlie *op cit* note 2 at 6-8.
[36] For example, the 2005 World Summit Outcome merely reiterate the strong but not the binding determination of the states 'to ensure the timely and full realization of the development goals and objectives agreed at the major United Nations conferences and summits, including those agreed at the Millennium Summit that are described as the Millennium Development Goals, which have helped to galvanize efforts towards poverty eradication.' *Supra* note 22 at para 17.

endorsed by States.[37] Those provisions of the UDHR which have been rejected as having attained such status and therefore not legally binding, relate mostly to socio-economic rights, while those that have been accepted as attaining the status of customary international law relate to most of the civil and political rights under the Declaration.[38] It is therefore doubtful that States that have traditionally refused to assume binding legal obligations with regard to the socio-economic rights in the UDHR are willing to accept such an obligation with regard to the MDGs which reflects most of these rights.[39]

It is also highly doubtful whether developed countries would be willing to accept a binding obligation with regard to MDG 8 on the global partnership, which is not only vital to the achievement of other MDGs, but also, constitutes the basis upon which developing countries agreed to the MDG package. Presently, there has been persistent rejection of a binding obligation by developed countries with regard to similar provisions (international duty to cooperate) in the UN Charter, UDHR, ICESCR, and several other multilateral declarations.[40] The same attitude will invariably apply to their obligation under MDG 8.[41] As observed by Alston, 'the persistent rejection of such a claim [the obligation to provide assistance] by developed countries, and the failure of even the most generous of donors to locate their assistance within the context of such an obligation, would present a major obstacle to any analysis seeking to demonstrate that such an obligation has already become part of customary law.'[42] The fact that developed countries that actively collaborated in elaborating the goals, may not be willing to accept a binding legal obligation with regard to MDG 8,

[37] See Alston *op cit* note 25 at para 36; Lillich *op cit* note 14 at 2-7; Hannum *op cit* note 14 at 323-333 & 340; and Narula *op cit* note 28 at 780-781, & 793-795. At the other extremes, are some States and scholars that were unwilling to ascribe legal content to any of the Declaration's provisions per se, as well as some writers that continue to reject the relevance of the Universal Declaration to their own societies, because of the Declaration's purportedly Western bias. See Hannum *ibid*, at 333-334.
[38] See Restatement *supra* note 34 at s 702; and Hannum *op cit* note 14 at 341-350.
[39] For example, the United States have persistently refused to accord the status of fundamental rights to these socio-economic rights, while most developing nations have continued to whittle down the importance of these rights in their constitutional provisions by classifying them as non-justiciable entitlements. See Hannum *ibid*, at 348; and Dejo Olowu 'Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees' (2006) 69 *Saskatchewan L. Rev.* 39.
[40] See Alston *op cit* note 25 at 22- 23, paras 42-46. See also Narula *op cit* note 28 at 793-795 (showing evidence of persistent U.S. objection to the right to food or the legal obligation to feed others); and Sakiko Fukuda-Parr 'Sakiko Fukuda-Parr 'Millennium Development Goal 8: Indicators for International Human Rights Obligations?' (2006) 28 (4) Human *Rights Quarterly* 966 at 976.
[41] *Ibid*, at para 42.
[42] *Ibid*, at 23, para 46.

impacts on the attitude of developing countries towards MDGs 1-7. It is therefore doubtful that developing countries would agree to assume a binding legal obligation with regard to these goals by acknowledging their customary norm status.[43] As observed by Fukuda-Parr, 'developing countries are not interested in opening themselves up to global accountability unless there is a real commitment to joint accountability.'[44]

It is therefore apparent from the above discussion that norms or goals contained in a declaration such as the MDGs are not legally binding unless they have crystallised into 'hard law', by virtue of incorporation into a treaty or by becoming customary international law. Prior to the crystallisation, they can only impose political and moral obligation on the State parties.[45] In essence, only political and moral pressure can be brought on State parties to comply with their obligations under the MDGs. This raises the possibility that the MDGs may suffer the fate of other international development goals in prior UN declarations and resolutions which have ended up being mere aspirations.[46] It appears that the MDGs will not end up as mere aspirations despite its soft norm nature. This is due to their universal endorsement and adoption by the UN Heads of State and world leaders, the entire UN system, Bretton Woods Institutions (BWIs), major donor agencies, and the wider international community.[47] By virtue of this universal adoption, the MDGs have not only mustered unprecedented political consensus on common objectives, but also, are now generally accepted as a blueprint for poverty reduction and overall sustainable development of developing countries in the 21st century.[48] As aptly stated by Attaran '…the MDGs have become important

[43] *CF* professor Alston argument that the limited scope of the MDGs when compared to the expansive nature of socio-economic rights in the UDHR, coupled with the fact that the MDGs have been affirmed, reiterated, and restated in ways and forms and with greater frequency and insistence than economic and social rights have ever been, that 'it can plausibly be claimed that at least some of the MDGs reflect norms of customary international law.' *Op cit* note 25 at 22, para 42.

[44] Sakiko Fukuda-Parr 'Millennium Development Goals: Why They Matter' (2004) 10 *Global Governance* 395 at 397. (Fukuda-Parr II).

[45] See Olivier *op cit* note 3.

[46] See United Nations Development Programme (UNDP) *Human Development Report 2003: Millennium Development Goals - A compact among nations to end human poverty* (New York, Oxford University Press, 2003) 29-31, particularly Box 1.2, (hereinafter HDR 2003); and Richard Jolly *Global Goals: The UN Experience* HDR 2003 Background Paper (UNDP: Human Development Report Office, 2003) 9.

[47] See chapter one of this thesis at p7.

[48] *Ibid*. See also Sakiko Fukuda-Parr *The Millennium Development Goals and Human Development* International Symposium, Tokyo, 9 October 2002, at p2, (hereinafter Fukuda-Parr III), Kofi Annan in United Nations *Millennium Development Goals Report 2005* (United Nations, New York, 2005) 3, UN Millennium Project *op cit* note 23 at 2-4, and Genevieve Renard Painter *Gender, Millennium*

not just within the UN, but also as the zeitgeist of the global development enterprises.'[49]

In addition, unlike prior development goals that were overly ambitious with no clear and tested processes for generating the desired results, or any defined and monitorable trajectories for reaching them,[50] the MDGs set simple and quantifiable targets with a time frame for achievement and indicators to monitor implementation.[51] This has made Fukuda-Parr to argue that 'the MDGs are more powerful tools than mere UN declarations.'[52] Presently, the UN system has put in place a global monitoring process to gauge progress towards the achievement of the MDGs. These include, at the global level, the Secretary-General's Annual Reports on Progress towards Implementation of the Millennium Declaration;[53] the annual UN Millennium Development Reports;[54] and the five-yearly comprehensive report on progress toward achieving the MDGs.[55] It should be noted that these reports are mandated by the UN General Assembly and

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Development Goals, and Human Rights in the Context of the 2005 Review Processes (Gender and Development Network, October 2004) 25 (where a staff member of the United Kingdom Department for International Development (DFID) remarked that the Millennium Declaration and the MDGs represent the first international consensus about a vision for the future since the UDHR).

[49] Amir Attaran 'An Immeasurable Crisis? A Criticism of the Millennium Development Goals and Why They Cannot be Measured (2005) 10 *Plos Med* 2.

[50] See John Roberts 'Millennium Development Goals: Are International Targets Now More Credible?' (2005) 17 *Journal of International Development* 113 at 114.

[51] Fukuda-Parr *op cit* note 40 at 969; and Ciara Gaynor 'Structural Injustice and the MDGs: A Critical Analysis of the Zambian Experience' (2005) *Trocaire Development Review* 57 at 77. For a criticism of some of the MDGs quantitative indicators, see Attaran *op cit* note 49. But see J.W. McArthur, J.D. Sachs, G. Schmidt-Traub 'Response to Amir Attaran' (2005) 2 (11) *PLoS Med* 379. Presently, some of the MDGs have been achieved even in some of the poorest countries in sub-Saharan Africa. See Salil Shetty 'The Millennium Campaign: Getting governments to keep their promises' (2005) 48 (1) *Development* 25 at 27 & 29; and Eveline Herfkens *The United Nations' MDG Campaign for a Better World & Religious Responses* Speech delivered at the On The Role of American Religious Communities in Achieving the Millennium Development Goals: A Consultation, *The* Church Center at the United Nations New York, 8 June 2005, pp2-3. Available at http://www.Millenniumcampaign.org/atf/cf/D15FF017-0467-419B-823ED6659E0CCD39}/SPEECH_NY_CHURCH%20CENTRE_08-06-2005.DOC.

[52] Fukuda-Parr II *op cit* note 44 at 397.

[53] For example of such reports, see *Implementation of the United Nations Millennium Declaration*, Report of the Secretary-General, A/59/282, 27 August 2004. It should be noted that these reports usually highlight particular themes. In 2002, the annual report focused on progress made in the prevention of armed conflict and the treatment and prevention of diseases, including HIV/AIDS and Malaria. In 2003, emphasis was placed on strategies for development and strategies for sustainable development. In 2004, it was on bridging the digital divide and curbing transnational crime.

[54] Based on the data and annual technical assessments of overall progress, produced under the leadership of the UN Department of Economic and Social Affairs (DESA), in collaboration with relevant agencies. For an example of such reports, see United Nations (UN) *The Millennium Development Goals Reports 2007* (New York, 2005).

[55] The first comprehensive five-yearly report on progress toward achieving the MDGs was prepared in 2005. See UN S-G MDG Report 2005 *op cit* note 23.

reaffirmed at the Monterrey Conference.[56] At national level, country monitoring reports are prepared and reviewed. The purpose of the country reports is to 'serve as catalysts for public mobilisation aimed at a more vigorous national debate on how the MDGs apply to each country's situation and link with development priorities and policy choices. Indeed, this debate will not be restricted to developing countries: used properly, the MDG reports will help focus attention and stimulate action in the developed world on aid, trade, debt relief, new technology and investment flows.'[57] In addition, civil society organisations around the world are creating their own set of reports in order to ensure that governments are held to the highest possible standards of performance.[58]

Furthermore, the MDGs are the first international goals to recognise, at the highest political levels, that poverty in the poorest countries can be dramatically reduced only if developing countries put well designed and well implemented plans in place to reduce poverty, and only if rich countries match their efforts with substantial increases in support in the areas of access to trade, aid, debt relief, and technology transfer.[59] In essence, the MDGs drive a new era in international development as they represent a partnership between developed and developing countries based on a shared responsibility to take joint actions towards poverty reduction. The partnership was affirmed at the November 2001 launch of the Doha Round on international trade,[60] and reaffirmed at both the Monterrey Conference, and the WSSD.[61]

Based on the above unique features, it can be argued that the MDGs by representing an unprecedented and global political consensus on time bound quantified targets, are not shorn of normative importance as they have become an important tool of political

[56] See Monterrey Consensus *supra* note 19 at paras 71-72.
[57] United Nations Development Programme (UNDP) *The UN and the MDGs: A Core Strategy*, at p6, para 31. Available at http://mdgr.undp.sk/PAPERS/UN%20MDG%20Core%20Strategy.doc. See also Mark Malloch Brown *Keynote Address*, given at the Opening Plenary of the 14th EFC Annual General Assembly (AGA) and Conference 'Foundations for Europe: The Citizen Facing Challenges of Globalisation', held on 1June 2003, at p2. Available at http://www.efc.be/ftp/public/EFC_Speeches/MarkMallochBrown.pdf.
[58] See EndPoverty 2015 'Millennium Campaign'. Available at http://www.endpoverty2015.org/goals
[59] UN Millennium Project *op cit* note 23, at 2-3. See also Fukuda-Parr *op cit* note 40, at 969; Andy Haines & Andrew Cassels 'Can the Millennium development goals be attained?' (2004) 329 *BMJ* 394.
[60] See Monterrey Consensus *supra* note 19 at para 4.
[61] See WSSD PoI *supra* note 20 at part 3.

mobilisation for the achievement of poverty reduction and sustainable development.[62] As a tool of political mobilisation, the MDGs can be used to hold governments and international institutions accountable to their millennium commitments to eradicate global poverty in the twenty-first century.[63] In essence, the MDGs provide a framework of accountability for national governments, bilateral and multilateral donors, and many other actors that have a role in sustainable development such as local non-governmental organisations (NGOs), international NGO networks, women's group, trade unions, private businesses, global corporations, the media, the judiciary and indeed all of us who are in fact global citizens.[64] Accountability as used in this thesis concerns the responsibility of individual governments towards their people, and the responsibility of all governments towards the international community in meeting their Millennium commitments to eradicate global poverty and achieve sustainable development in the twenty-first century.[65]

However, the accountability framework provided by the MDGs lies principally at the political level, unlike that for the realisation of human rights which is backed by a different and broader range of institutions and mechanisms at national level (including courts, national human rights institutions, informal or community-based mechanisms) and international level (including the treaty bodies).[66] This is due to fact that since the MDGs are not legally binding, the only way in which governments will actually act is when there is pressure from citizens and the international community to hold them to account for their promises.[67] This is the motivation for the promotion by UN system of a systematic procedure for global monitoring and support, in the form of the

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[62] See Sakiko Fukuda-Parr III *op cit* note 48; and Fukuda-Parr II *op cit* note 44.

[63] See UN Millennium Project *op cit* note 23 at 3; Haines and Cassels *op cit* note 59; Shetty *op cit* note 51 at 27; Herfkens *op cit* note 51 at 3; and Rory Mungoven in Center for Human Rights and Global Justice *Human Right Perspective on the Millennium Development Goals: Conference Report* (New York: NYU School of Law, 2003) 24, available at http://www.nyuhr.org/images/NYUCHRGJMDGREPORT2003.pdf, (hereinafter CHRGJ Conference Report).

[64] Sakiko Fukuda-Parr III *op cit* note 48 at 2; and Fukuda-Parr II *op cit* note 44. See also Mungoven *ibid*; and Roger Williamson *The Millennium Development Goals: Ensuring Achievability and Accountability* Wilton Park Paper (December 2005) 12. Available at http://www.wiltonpark.org.uk/document/conferences/WP786/pdf/WP786.pdf.

[65] Adopting Professor Alston's view in CHRGJ Conference Report *op cit* note 63 at 15.

[66] This is a major weakness which can potentially affect the willingness of countries to meet their obligations under the MDGs. See Paul J. Nelson 'Human Rights, the Millennium Development Goals, and the Future of Development Cooperation' (2007) 35 (12) *World Development* 2041 at 2045-2046.

[67] See Nelson *ibid*; Herfkens *op cit* note 51 at 3 & 8-10; Shetty *op cit* note 51 at 27; and Salil Shetty 'Making Hard Choices in a Shared World' (2005) *Trocaire Development Review* 17 at 21, (hereinafter Shetty II).

preparation and publication of periodic progress reports, which can be used by civil society to monitor and hold governments accountable for slow progress towards meeting the Goals.[68] It is also the rationale behind the UN's institution of a global information campaign on the MDGs which seeks to encourage the emergence of broad, self-sustaining and pragmatic coalitions of partners for action on the MDGs.[69] The UN Millennium Campaign aims to create the necessary conditions for creative political pressure at the global level to 'increase support for development assistance, trade opportunities, debt relief, technology transfer and other support needed to achieve the MDGs',[70] and at the national level to 'build coalitions which can place the MDGs at the very centre of national debates and action on priorities, policies and resource allocations through a process that is conceived, managed and owned by local actors.'[71]

5.3 Role of MDGs in Guiding Policy Reform

As evident from the discussion in the preceding section of this chapter, the normative value of the MDGs lies in the fact that they have provided a framework that can be

[68] See Williamson *op cit* note 64 at 11-12; and Gaynor *op cit* note 51.

[69] The global Millennium Campaign which received support at the Monterrey Conference (see Monterrey Consensus *supra* note 19, at para 71) targets intergovernmental and international bodies/forums at global and regional levels; national governments and legislatures; civil society organisations; the private sector; and the media. This has borne fruit as NGOs, faith-based organisations, local authorities, youth groups, parliamentarians, the media, celebrities, and the general public have become involved in campaigning for the MDGs. Presently, hundreds of groups consisting of millions of individuals from rich and poor countries alike have launched campaigns promoting the Millennium Goals at the national level all across the world. Southern campaigns are monitoring budgets and national poverty-reduction strategies, lobbying governments, and raising public awareness and support for the Goals through various creative approaches. In the North, campaigners are demanding that governments adopt specific targets and deadlines on their commitments (i.e. aid, debt and trade) - well in advance of 2015- to ensure poor countries a fair chance of meeting the Goals. In countries all across the world, diverse groups representing millions of individuals are moving nations toward achievement of the Goals every day. In addition, The Millennium Campaign has been involved in creating a global coalition of civil society – non-governmental organizations, faith-based organizations, trade unions among others – with national chapters in over one hundred countries. This global coalition is called the Global Call to Action Against Poverty, or GCAP. See generally UN Millennium Campaign at http://www.Millennium campaign.org/. See also Herfkens *op cit* note 51 at 8-10; and Shetty *op cit* note 51 at 27-28. See also 'The Mayors of the world commit to redoubling the efforts to achieve the MDGs' 1 April 2008, available at http://www.endpoverty2015.org/africa/news/mayors-world-commit-redoubling-efforts-achieve-mdgs/01/apr/08; 'African Leaders Call on a Shift from Charity to Justice' 27July 2007, available at http://www.Millenniumcampaign.org/site/apps/nlnet/content3.aspx?c=grKVL2NLE&b=1000769&content_id={90AC0C56-7503-4309-ACA4-BC64A945E191}&notoc=1; and Rev. Russell L. Meyer 'Being a Good Neighbor" Makes Friends', available at http://us.Millenniumcampaign.org/atf/cf/{5A1C66F3-73B8-4C9A-80CB61CF9AA5BEA4}/Being%20a%20Good%20Neig hbor.doc.

[70] UNDP *op cit* note 57 at 4, para 22. See also Shetty *op cit* note 51 at 27.

[71] *Ibid*, at 6, para 36.

used to hold governments, international agencies and donors accountable to their millennium commitments. Meeting these commitments as evidenced from the Millennium Compact, affirmed at the Monterrey Conference, requires developing countries taking full responsibility for their own development by mobilising adequate political will to undertake structural reforms that will improve their effective use of resources. Such structural reforms include the institution of sound macro-economic policies and solid democratic institutions, strengthening governance, combating corruption, gender mainstreaming, respect for human rights and environmental protection. On the part of developed countries, the Compact requires them to commit themselves to supporting developing countries' efforts through enhanced resource flows, and a more development-friendly international trading and financial environment.[72] These requirements implicate not only economic and social reform, but also, critical dimensions of good governance at the national and international levels.[73]

It is therefore submitted that the role of MDGs in guiding national and international policy reform towards the realisation of the right to environment in Africa is that as a framework of accountability, they can be used to hold both African countries and the international community accountable to their commitments under the Millennium Compact to create the enabling environment for the achievement of poverty reduction and sustainable development in the region. In essence, the MDGs can be used to promote socio-economic reform and good governance, two ingredients that are vital in creating the enabling environment for tackling the socio-economic and political issues militating against the realisation of the right to environment in Africa. This assertion recognises the composite nature of the right, as well as the fact that the causes of environmental degradation and non-realisation of the right to environment are varied and go beyond purely environmental issues, to include wider socio-economic and political issues. It should be noted that the vital role of socio-economic

[72] See Monterrey Consensus *supra* note 19 at paras 4 & 6-67; Millennium Declaration *supra* note 1 at paras 12-13; United Nations *Report of the International Conference on Financing for Development*, A/CONF.198/11 (New York, 2002) at 38-39, para 30 (1)-(3); 51, para 54(2) & 62-63, para 25 (2)-(3), (hereinafter Monterrey Conference Report); WSSD PoI *supra* note 20 at paras 3-4; and UN S-G MDG Report 2005 *op cit* note 23 at 12, para 32.

[73] See Aisha Ghaus-Pasha *Governance for the Millennium Development Goal: Core Issues and Good Practices* (UNDESA 2006) 16-18. (Note that environmental protection is implicated in economic and social reform).

reform and good governance, in creating an enabling environment for the achievement of sustainable development objectives including the realisation of the right to environment, has been recognised in many forums.[74]

The utility of the MDG as a framework of accountability, in promoting socio-economic reform and good governance, is evident from the fact that national governments, bilateral and multilateral donors, and many other actors that have a role in development and the protection of the environment, can use the significant political commitment generated by the goals to demand substantive, equality-driven environmental and socio-economic reform, and good governance at the national and international levels.[75] Thus, developing countries and civil society both in the developing and developed countries can demand development-friendly economic and environmental policies from developed countries, as well as insist on better governance in the international financial and trading systems; citizens can insist on better governance from their governments, as well as social, economic and environmental policies favourable to their developmental needs; and donors can insist

[74] See United Nations Development Programme (UNDP) *Governance for Sustainable Human Development* UNDP Policy Document (New York, January 1997) 9-11, available at http://www.pogar.org/publications/other/undp/ governance/ undppolicydoc97-e.pdf. See also Kofi Annan in *We the People: The Role of the United Nations in the 21st Century 7*, G.A. Res. 2000, U.N.Doc. A/54/2000, at 22; Millennium Declaration *supra* note 1, at para 13; UN S-G MDG Report 2005 *op cit* note 20 at 13, para 36; *Road Map Towards the Implementation of the Millennium Declaration: Report of the Secretary-General* A/56/1326, September 6, 2001, at p 19 (para 82), 25 (para 128) & 36 (part V), (hereinafter MDG roadmap); Monterrey Consensus *supra* note 19 at paras 11, 40 & 61; WSSD PoI *supra* note 20 at paras 4, 62(a), 138 & 141; 2005 World Summit Outcome *supra* note 22 at paras 11, 24(b) 39 & 68; and Economic Commission for Africa *Governance for a Progressing Africa: Fourth African Development Forum* (UNECA, 2005) (where the Executive Secretary of UNECA acknowledged that 'no matter what sectoral problem or national challenge we face, over and over again, governance turns out to be pivotal.'). See also Shadrack Gutto 'Modern "Globalisation" and the Challenges to Social, Economic and Cultural Rights for Human Rights Practitioners and Activists in Africa' (Oct.-Dec. 2000) *Afr. Legal Aid* 12 at 13; Nsongurua J. Udombana 'How Should We Then Live? Globalization and the New Partnership for Africa's Development' (2002) 20 *Boston University Int'l L.J.* 293 at 320-345; Shedrack C. Agbakwa 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Hum. Rts. & Dev. L.J.* 177 at 181; and Ministerial Statement, *Conference of African Ministers of Finance, Planning and Economic Development/Fortieth session of the Commission*, Addis Ababa, Ethiopia, 2-3 April 2007, at paras 7-9, available at http://www.sarpn.org.za/ documents/d0002484/Ethiopia_Conference_Apr2007.pdf.

[75] See UN Millennium Project *op cit* note 23 at 3; HDR 2003 *op cit* note 46 at 15; and Fukuda-Parr III *op cit* note 48 at 2; and James Mayers 'Editorial - Forests and the Millennium Development Goals: could do better!' *ETFRN NEWS 47/48: Forests and the Millennium Development Goals*, European Tropical Forest Research Network, available at http://www.etfrn.org/etfrn/newsletter/news4748/nl47_ oip_01.htm.

on better environmental and socio-economic policies, improved governance, and greater accountability in the use of donor assistance in poor countries.[76]

However, the term 'good governance' is vague and susceptible to different interpretations.[77] This raises the issue of the meaning of good governance and what aspects of such governance at the national and international levels, as can be promoted by the MDGs, are essential to complement socio-economic reform in providing the enabling environment that will ensure both the achievement of poverty reduction and realisation of the right to environment. Governance is 'the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.'[78] Governance has an economic, political and administrative dimension.[79] The first is 'the decision-making processes that affect a country's economic activities and its relationships with other economies', the second dimension refers to 'process[es] of decision-making to formulate policy', while the last dimension refers to 'the system of policy implementation.'[80] Governance includes

[76] This is evident in the Millennium Challenge Account (MCA) set up by the Bush Administration to provide substantial new foreign assistance to low-income countries beginning in fiscal year 2004. MCA will be devoted to projects in nations that 'govern justly, invest in their people and encourage economic freedom.' This is reflected in 19 selection indicators including natural resource management, land tenure, the primary school completion rate of girls, civil and political liberties, control of corruption, rule of law, and voice and accountability. The presence or absence of these indicators is a critical factor in distinguishing developing countries eligible for funding and those to be excluded. Such stringent eligibility requirements for MCA compacts have helped in promoting good governance by stimulating policy reforms in some African countries particularly in the areas of fighting corruption, improving government transparency and promoting women's rights. This is referred to as the "MCA effect." See Bread for the World *Millennium Challenge Account: Overview*, available at http:// www.bread.org /learn/global-hunger-issues/Millennium-challenge-account/; The White House *The Millennium Challenge Account*, available at http://www.whitehouse.gov/infocus/developing nations/ Millennium.html; and US Department of State 'Millennium Challenge Account' *FactSheet*, Bureau of Oceans and International Environmental and Scientific Affairs, Washington, D.C., August 23, 2002, available at http://www.state.gov/g/oes/rls/fs/2002/12952.htm.

[77] For example, the BWIs have been accused of using their notion of good governance to justify all measures necessary to complement and reinforce neo-liberal economic policies while leaving the social model untouched, thereby derailing the capacity of developing countries to achieve sustainable development. See Alejandro Bendana 'Good Governance" and the MDGs: Contradictory or Complementary?' *Focus on Global South*, 12 October 2004. For different definitions of good governance, see Navin Girishankar, Linn Hammergren, Malcolm Holmes, Stephen Knack, Brian Levy, Jennie Litvack, Nicholas Manning, Richard Messick, Jeffrey Rinne & Helen Sutch 'Governance' in Jeni Klugman (ed) *A Sourcebook for Poverty Reduction Strategies*, Volume 1-Core Techniques and Cross-Cutting Issues (World bank, October 2002) 271.

[78] 1997 UNDP Policy Document *op cit* note 74 at 12.

[79] *Ibid*, at 12.

[80] *Ibid*.

the State, but reaches beyond it by including the private sector and civil society, with each domain having a role albeit different to play in the governance of a State.[81] The State includes political and public sector institutions, the private sector covers private enterprises and the informal sector in the marketplace, while civil society comprises 'individuals and groups (organised or unorganised) interacting socially, politically and economically - regulated by formal and informal rules and laws.'[82]

Good governance denotes a system of governance that is *inter alia* 'participatory, transparent and accountable. …effective and equitable. … promotes the rule of law. [It] ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.'[83] Good governance encompasses the three dimensions of governance, and defines the processes and structures that guide political and socio-economic relationships in a given society.[84] The United Nations Development Programme (UNDP) lists nine mutually reinforcing characteristics of good governance: participation, rule of law, transparency, responsiveness, consensus orientation, equity, effectiveness and efficiency, accountability, and strategic vision.[85] Similarly, Kofi Annan, former UN Secretary-General lists the characteristics of good governance as comprising the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the participation of all citizens in the decisions that affect their lives.[86] For the purpose of this thesis, these expressions of good governance are reduced to three inter-related features i.e. firstly, the rule of law which includes the notion of effective state (political and public sector) institutions, accountability and transparency; secondly, respect for human rights; and thirdly, the

[81] For example, civil society organisations which are the host of associations around which society voluntarily organises, mediate the interaction between individuals and the state. See UNDP Policy Document *ibid*, at 13-14.
[82] *Ibid*, at 14.
[83] *Ibid*, at 12. For a similar definition, see the European Union definition of good governance at http:// www.europa.eu.int/.
[84] *Ibid*, at 12-13.
[85] *Ibid*, at 15-16.
[86] *Op cit* note 74. Note that the World Bank also established seven principles of governance. These principles coincide with the UNDP nine characteristics. See Thomas Fleiner 'Comparative Constitutional and Administrative Law' (2001) 75 *Tulane L. Rev.* 929 at 938-939 (citing Susan George 'The World Bank and Its Concept of Good Governance' in Jochen Hippler (ed) *The Democratisation of Disempowerment* (1995) 205 at 207.

existence of democratic processes which enable and promote pluralistic and non-discriminatory participation.[87]

Good governance has been specifically linked to the achievement of sustainable development objectives including poverty reduction, achievement of the MDGs, and realisation of the right to environment.[88] As stated by UNDP '[t]he institutions of governance in the three domains (state, civil society and the private sector) must be designed to contribute to sustainable human development by establishing the political, legal, economic and social circumstances for poverty reduction, job creation, environmental protection and the advancement of women.'[89] An exploration of these aspects of good governance essential to creating the enabling environment for the achievement of sustainable development objectives including the MDGs and right to environment in Africa is therefore necessary.

5.3.1 Rule of law

The term 'rule of law' does not have a precise definition, and its meaning can vary between different nations and legal traditions.[90] For the purpose of this thesis, the rule of law can be understood as denoting 'a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions.'[91] In its most basic sense, it guarantees to the citizens and residents of the country 'a stable, predictable and

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[87] Adopting Hernández-Truyol's three-factor formulation of the essential characteristics of good governance. See Berta E. Hernández-Truyol 'Cuba and Good Governance' (2004) 14 *Transnat'l L. & Contemp. Problems* 655 at 658-659.

[88] See Millennium Declaration *supra* note 1 at para 13; Monterrey Consensus *supra* note 19 at paras 11& 61; WSSD PoI *supra* note 20 at paras 4, 62(a), 138 & 141; and 2005 World Summit Outcome *supra* note 22 at paras 11, 24(b) & 39. See also Kofi Annan *op cit* note 74; and Girishankar et al *op cit* note 77 at 271.

[89] See 1997 UNDP Policy Document *op cit* note 74 at 15. See also UNDP 1994 Initiatives for Change. Cited in 1997 UNDP Policy Document *ibid*, at 9.

[90] See Anton Fagan 'Delivering Positivism from Evil' in David Dyzenhaus (ed) *Recrafting the Rule of Law: The Limits of Legal Order* (Hart Publishing, Oregon, 1999) 107-111; Christine Sypnowich 'Utopia and the Rule of Law' in Dyzenhaus (ed) *ibid*, at 179; Allan C. Hutchinson 'The Rule of Law Revisited: Democracy and Court' in Dyzenhaus (ed) *ibid*, at 198-201; Helen Yu & Alison Guernsey 'What is the Rule of Law?' *The University of Iowa Center for International Finance and Development*, available at http://www.uiowa.edu/ifdebook/faq/Rule_of_ Law.shtml; and Barbara Billingsley 'Rule of law: what is it? Why should we care?' *LawNow*, April-May 2002, available at http://findarticles.com/p/articles/mi_m0OJX/is_5_26/ai_n25039328.

[91] Yu & Guernsey *ibid*.

ordered society in which to conduct their affairs.'[92] The key elements of the rule of law include *inter alia* the making or existence of reasonable and fair laws and regulations including human rights, environmental and economic laws, that are relevant to the social needs and aspirations of society; reasonable degrees of understanding and general commitment in the society as a whole (institutions and entities, public and private, including the State itself) to the principle of governance in accordance with the law; equality before the law and non-discrimination of citizens; and independent, efficient and accessible judicial systems.[93]

The first steps toward establishing the rule of law in a society involves the setting up of the institutional structures and mechanisms that not only respect the basic rights of all citizens but also treat them fairly.[94] This requires outlining the roles, responsibilities, and limitations of power of the different branches of government (clear separation of power) coupled with transparent and clear accountability norms.[95] It also requires that 'all three pillars of government – executive, legislative, and judicial – are well resourced and staffed to function effectively.'[96] An independent, well resourced and adequately staffed judiciary, along with an accountable bureaucracy and police force is essential to enforce laws and ensure that all citizens are treated fairly.[97] In addition, anti-corruption strategies stipulating effective codes of conduct and transparent procedures for procurement and contracts are essential to combat corruption and promote integrity in governance.[98] Equally essential is

[92] *Reference re Secession of Quebec* (1998) 2 S.C.R. 217 at 262, para 70 (Canadian Supreme Court). See also Gita Welch & Zahra Nuru *Governance for the Future: Democracy and Development in the Least Developed Countries* (UN-OHRLLS & UNDP, 2006) 41-42.
[93] See Welch & Nuru *ibid*, at 181-182; Sypnowich *op cit* note 90 at 179-10; Neil Maccormick 'Rhetoric and the Rule of Law' in Dyzenhaus (ed) *op cit* note 90 at 165; James Triggs 'Authority, democracy and the rule of law' (2008) 30 *Australian Bar Review* 221 at 222-223; Sachiko Morita & Durwood Zaelke 'Rule of Law, Good Governance, and Sustainable Development', *INECE Conference Proceedings Volume 1*, Seventh International Conference on Environmental Compliance and Enforcement 9-15 April 2005, at p 16, available at http://www.inece.org/ conference/7/ vol1/05_Sachiko_Zaelke.pdf; Professor Shadrack B. O. Gutto *The Rule of Law, Human and Peoples' Rights and Compliance/Non-Compliance with Regional and International Agreements and Standards by African States*, Paper prepared for presentation at the African Forum for Envisioning Africa to be held in Nairobi, Kenya, 26 – 29 April 2002, available at http://www.worldsummit2002.org/texts/ ShadrackGutto2.pdf, (hereinafter Gutto II); and Swiss Agency for Development and Cooperation (SDC) *Governance –Human Rights – Rule of Law: a Glossary of some Important Terms*, at p2. Available at http://www.deza.admin.ch/ ressources/resource_en_24370.pdf
[94] UN Millennium Project *op cit* note 23 at 115. See also Ghaus-Pasha *op cit* note 73 at 20.
[95] *Ibid.*
[96] *Ibid.* See also Welch & Nuru *op cit* note 92 at 48.
[97] Ghaus-Pasha *op cit* note 73 at 20. See also Welch & Zuru *op cit* note 92 at 134-144.
[98] *Ibid.*

protection from arbitrary government action – ranging from unpredictable, unclear, ad-hoc and discriminatory regulations and taxes to outright corruption.[99]

The rule of law is a vital component of good governance which can be promoted by the MDGs. The utility of the MDGs in promoting the rule of law is as a framework for holding States accountable to their millennium anti-poverty commitments, the goals can be used by African citizens, civil society actors and donors to demand for responsive national governance based on the rule of law in Africa.[100] The same is applicable to African nations, civil society actors and citizens of developed countries, who can use the MDGs to demand the rule of law in the international trading and financial systems.[101] The demand for the rule of law at the national and international levels is necessary as it is vital to the achievement of sustainable development objectives including the MDGs and realisation of the right to environment in Africa.[102] As aptly argued by Shelton, '…the rule of law – provides the indispensable foundation for achieving all three of the…essential and interrelated aspects of sustainable development. If economic…and social development, and environmental protection are visualised as the rings of the planet Saturn, then the rule of law forms

[99] *Ibid*. See also Billingsley *op cit* note 90.

[100] For example, the stringent eligibility requirements for MCA compacts have stimulated policy reforms in some developing countries, particularly in the areas of fighting corruption, improving government transparency and promoting women's rights. See Millennium Challenge Corporation (MCC) *Overview*, at p12, available at http:www.mc.gov. (showing the effect of the MCA in promoting transparency and reinforcing anti-corruption campaign in Nicaragua); and Curt Tarnof *Millennium Challenge Account* CRS Report for Congress (Congressional Research Service, August 2006) 1 (stating that the MCC Board suspended The Gambia from eligibility for MCA assistance due to *inter alia* worsened anti-corruption efforts).

[101] See Ghaus-Pasha *op cit* note 73 at 62; Federal Government of Germany 'Africa: Commitments will be honoured' Friday, 8 June 2007, available at C:\Users\Proline-User\Documents\G8 Summit 2007 Heiligendamm - Africa Commitments will be honoured.htm (the G8 reiterating that honouring their MDG commitments is dependent on the African partners honouring their commitments on good governance and democracy); and Mary Robinson *Renewing the Commitment to the Rule of Law and Human Rights: The Way Forward* Dankwart A. Rustow Memorial Lecture, presented by the Ralph Bunch Institute for International Studies and the CUNY Graduate Center Department of Political Science, 21 September 2004, at pp8-9, available at http://www.realizingrights.org/?option=content&task=view&id=53.

[102] See 2005 Word Summit Outcome *supra* note 22 at para 11; and United Nations Office on Drugs and Crime (UNODC) 'Rule of law: A "missing" Millennium Development Goal' 15 April 2008, available at http://www.unodc.org/unodc/en/frontpage/rule-of-law-a-missing-millennium-development-goal.htm. (The head of UNODC, Mr Antonio Maria Costa argues that where the rule of law is weak or absent, crime and corruption hold back development and democracy. This can cause conflicts, mass poverty and environmental degradation, creating further instability).

the planet itself: its gravitational pull holds the rings together and ensures their continued existence, stability and functioning.'[103]

Satisfying the demand of the rule of law for sustainable development requires that the government maintains or promotes the independence and integrity of the judiciary. An ineffective legal system including a corrupt and politicised judiciary is not only a weak link in the governance structure but also erodes the public confidence in elected government.[104] In addition, laws and regulations no matter how good or benign to citizens well-being and development, are meaningless and cannot contribute to sustainable development without a transparent, efficient and effective judicial system to enforce them.[105] The importance of a transparent, effective and independent judicial system to the achievement of sustainable development objectives is that it offers 'an arena in which people can hold political leaders and public officials to account, protect themselves from exploitation by those with more power, and resolve conflicts that are individual or collective.'[106]

An effective judicial system also enhances and guarantees the protection of property rights, which is central to the development of strong market economies that generate the wealth necessary for lifting people out of poverty. It is now a common view among development theorists, policymakers and multilateral institutions including the World Bank, that unchecked abuses of political power can undermine economic development, and that the rule of law is an essential precondition for a prosperous economy organised according to market principles.[107] The rule of law, it is argued, not only ensures life and personal security, but also, provides a stable framework of rights

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[103] See Dinah Shelton 'Sustainable development comes from Saturn' in *Our Planet*, the Magazine of the United Nations Environment Programme, Vol. 15, No.3, at p20, (hereinafter UNEP Magazine). See also Welch & Nuru *op cit* note 92 at 30; Morita & Zaelke *op cit* note 93 at 1; Tommy Koh 'Rule of man or rule of law?' in UNEP Magazine *ibid*, at 14.

[104] See Ghaus-Pasha *op cit* note 73 at 58.

[105] See Morita & Zaelke *op cit* note 93 at 1; and Welch & Nuru *op cit* note 92 at 126-127.

[106] Michael Anderson *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in the LDC* Paper for Discussion at WDR Meeting 16-17 August 1999, at p1. Available at http://www.ids.ac.uk/ids/bookshop/wp/wp178.pdf. See also Welch & Nuru *op cit* note 92 at 118; and Monterrey Conference Report *op cit* note 72 at 39.

[107] *Ibid*, at 2. See also Yu & Guernsey *op cit* note 90. Even for China, an authoritarian state, the rapid transformation and growth of its economy has been traced to its rule of law reforms in the areas of contract, property, and administrative law, and strengthening of law-related institutions. See Yu & Guemsey *op cit* note 90 at 5; and Dr. O.P. Sharma Rule *of Law and Public Administration: A Case Study of South Asia*, at pp16-18. Available at http://topics.developmentgateway.org/governance/rc/filedownload.do~itemId=1109707.

and obligations which can help to reduce political risk to investors and cut down transaction costs.[108] Therefore, a legal system that protects property rights and enforces contractual obligations also fosters the development of markets in land, labour, and capital, thereby enhancing economic efficiency.[109] The reverse is the case where the legal system does not protect property right.[110] Such a legal regime also has positive effects on of the protection of the environment and realisation of the right to environment.[111] As evident from the discussion in chapter three of this thesis, the positive environmental effects can be direct or indirect. The latter is obtainable where the increased investment and attendant increase in per capita income leads to stronger demand for environmental quality. It is direct through discouraging the formation of an 'open access' regime, or avoiding the 'tragedy of the commons' situation, by not only enhancing the regulation of the number of users and the quantity of environmental resources that each user may extract or use, but also, by acting as an incentive for people to invest in natural resource management, or to take action against persons whose actions degrade their environment or property values.[112]

A transparent, effective and independent judicial system is also equally important in empowering the poor to claim their right to environment. This importance is necessitated by the fact that the poor are 'most at risk from the abuse of political power, and are least able to protect themselves against the injury and economic loss consequent upon such abuse. In countries all over the world, the poor are more likely to be victims of police violence than the rich. …they are more likely to be ignored or mistreated by bureaucrats, are most vulnerable to being left destitute by petty

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[108] *Ibid*.
[109] *Ibid*. See also World Bank *World Development Report 1997: The State in a Changing World* (Oxford University Press, New York, 1997) 41.
[110] See WDR 1997 *Ibid*; Morita & Zaelke *op cit* note 93 at 2; and Francis N. Botchway 'Good Governance: The Old, the New, the Principle, and the Elements' (2001) 13 *Fla. J. Int'l L.* 159 at 195.
[111] See Daniel W. Bromley *Environment and Economy: Property Rights and Public Policy* (Blackwell, Oxford, 1991) 30-32; Daniel H. Cole *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* (Cambridge University Press) 5-8; Neema Pathak, Ashish Kothari & Dilys Roe 'Conservation with social Justice? The role of community conserved areas in achieving the Millennium Development Goals' in Tom Bigg & David Satterthwaite (eds) *How to Make Poverty History: The central role of local organizations in meeting the MDGs* (IIED, 2006) 56; World Resources Institute, UNDP, UNEP, & World Bank *The Wealth of the Poor - managing Ecosystems to Fight Poverty* (WRI, Washington DC, 2005) at 75-76, (hereinafter WRI); and Bruce Yandle, Maya Vijayaraghavan, & Madhusudan Bhatarai The *Environmental Kuznets Curve: A Primer* (PERC Research Study, May 2002) 13-16, available at http://www.manchester.edu/courses/econ231/yandle etal.pdf.
[112] Pp 141-142.

corruption, and are least likely to have the skills and resources necessary to "work" the state machinery.'[113] These factors are 'not just symptoms of poverty: they are part of its cause and a most fundamental aspect of its manifestation.'[114] The rule of law therefore helps in poverty reduction and realisation of the right to environment, by guaranteeing an independent, effective and transparent judicial system that will constrain or prevent those acts of lawlessness including environmental degradations, which cause or exacerbate the physical vulnerability and powerlessness of the poor.[115]

However, the effectiveness of the judicial system in constraining or preventing these acts of lawlessness is dependent on the ability of the poor to access legal services, protection, and redress. This is more important with regard to the court system where one of its key characteristics is that it is essentially reactive and is driven by social forces. That is, in most cases, the court will only commence proceedings, receive evidence, and give judgement once a litigant have petitioned it.[116] As evident from the discussion in chapter three of this thesis and several other studies, the poor face several obstacles in their quest to access justice including petitioning the court in order to obtain redress for breaches of their rights.[117] These obstacles which may be occasioned by lack of financial resources, illiteracy, corruption, legal and procedural barriers, or due to institutional weakness and failures, affect not only the ability of the poor to escape the poverty trap, but also, their ability to realise the right to environment.

Promoting the rule of law for sustainable development involves not only strengthening the judicial system, but also, guaranteeing or facilitating access to justice for all citizens, especially the most vulnerable individuals in society.[118] This will involve improving or reforming the judiciary in Africa, in order to make them pro-poor. Required actions in this area include the wide distribution of adequately funded and staffed courts in local communities and rural areas, in order to minimise

[113] Anderson *op cit* note 106 at 2-3.
[114] *Ibid*, at 3.
[115] See Christopher Weeramantry 'Justice can be shortsighted' in UNEP Magazine *op cit* note 103 at 7. For the various ways in which lawlessness contributes to poverty, see Anderson *op cit* note 106 at 3-5.
[116] Anderson *ibid*, at 7.
[117] Chapter 3 at 133-134, & 140-145. See also Anderson *ibid*, at 10-20; Welch & Nuru *op cit* note 92 at 131-133; and Girishankar et al *op cit* note 77 at 287-291.
[118] See Welch & Nuru *ibid*, at 127.

the long delays in procuring justice; access to legal aid; and tackling judicial corruption by demanding judicial accountability.[119] Judicial accountability is essential if judges are to decide cases fairly and impartially, and for the public including the poor, to perceive the judiciary as an impartial, accessible body that strives to protect their rights and not that of vested interests.[120] As observed by Welch and Nuru, 'if the judicial system is weak and unpredictable, then efforts to provide remedies through the courts will be problematic. It is at the judicial level that corruption does the greatest harm [to the poor] and where reforms have the greatest potential to improve the situation.'[121]

In addition, it will involve legal reforms that will enhance the poor's access to legal remedies. This will include liberalising the *locus standi* rule to create greater access for individuals and NGOs acting in the public interest in instances of environmental degradation, corruption and other abuses of office; eliminating antiquated laws with anti-poor bias; and reducing legal technicalities and simplifying legal language.[122] Furthermore, increasing the poor's access to legal information including environmental information, as well as raising their legal literacy level, is vital to improving their ability to access legal remedies.[123] Also, the role of civil society organisations including NGOs in promoting or procuring access to justice for the poor should be supported and strengthened.[124] This is very important as in most instances of environmental degradation, the hope of the poor in getting legal or judicial redress rests mostly on the activities of the NGOs.[125]

Instituting or improving the rule of law for the achievement of sustainable development in a society also requires an efficient, responsive, transparent and

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[119] See Professor Njuguna Ng'ethe, Dr Musambayi Katumanga & Gareth Williams *Strengthening the Incentives for Pro-Poor Policy Change: An analysis of drivers of change in Kenya* (DFID, May 2004) 25. Available at http://www.gsdrc.org/docs/open/DOC24.pdf.

[120] See Welch & Nuru *op cit* note 92 at 135-136; and ANSA-Africa 'Kenya: PM criticizes the judiciary' *Kenya Broadcasting Corporation*, 24 October 2008.

[121] *Ibid*, at 135.

[122] Anderson *op cit* note 106 at 24.

[123] *Ibid*.

[124] *Ibid*. See also Ghaus-Pasha *op cit* note 73 at 60.

[125] For example, the communication brought against the Nigerian government for environmental and other abuses against the Ogoni minority group of Nigeria, was instituted on their behalf by an NGO. See *Social and Economic Rights Action Center (SERAC) and another v Federal Republic of Nigeria* Communication 155/96, Decision of the African Commission on Human and Peoples' Rights. (Interpreting this right under the African Charter). Available at http://www.cesr.org/text%20files%final %20Decision%2000%20the%Ecosoc%20matter.pdf. (Hereinafter *SERAC* communication).

accountable public administration.[126] Such a public administration system is not only of paramount importance for the proper functioning of a country, it is also the basic means through which government strategies to achieve sustainable development objectives including the MDGs and environmental protection can be implemented.[127] This is evident from the fact that a skilled and properly managed public administration system contributes to economic development by boosting private sector productivity.[128] In addition, such a public administration system is not only efficient in the use of public resources and effective in delivering public goods, but also, is capable of meeting the public expectations with regard to ensuring equitable distribution and access to opportunities, as well as the sustainable management of natural resources.[129] The latter will include the enforcement of environmental regulations or the adoption of new and proactive regulations when the need arises. Furthermore, such a public administration system significantly improves the chances of preventing corruption from taking root and from flourishing.[130]

Therefore, the rule of law by encouraging or promoting the existence and development of an efficient, responsive, transparent and accountable public administration, contributes to the sustainable development of a society. It should be noted that one of the key government institutions to be affected by the absence of the rule of law is the public administration. In such a situation, the public administration system is usually characterised by institutional deficiencies, non-transparency, limited accountability, low salaries and inadequate performance appraisals, in addition to the standard problems of political interference in specific situations, and government's widespread and intricate interventions that delay actions, create unwarranted power and provide opportunities for corruption.[131] This results in a lack of public confidence and widespread cynicism about the performance of government. Such a public attitude not only undermines democratic institutions, but also, has pernicious consequences, which in extreme cases could result in an outbreak of conflicts as

[126] See Sharma *op cit* note 107 at 14; and Shelton *op cit* note 103.
[127] Ghaus-Pasha *op cit* note 73 at 24. See also UN General Assembly in Resolution 57/277 of December 2002.
[128] See Sharma *op cit* note 107 at 5.
[129] See Ghaus-Pasha *op cit* note 73 at 24.
[130] Welch & Nuru *op cit* note 92 at 65.
[131] See Sharma *op cit* note 107 at 15; Girishankar et al *op cit* note 77 at 273; and Ng'ethe et al *op cit* note 119 at 21-24.

disgruntled elements may find a veritable instrument of destabilisation in the poor who are mostly affected by the inefficient public administration.[132]

The rule of law also requires the promotion or improvement of accountability and transparency in the conduct of governmental affairs, which is essential for tackling the hydra-headed problems of corruption and other abuses of power that deepen poverty and environmental degradation in Africa. Accountability and transparency are key pillars of good governance and the rule of law as they constitute essential characteristics of well-functioning institutions and good public sector performance.[133] This is apparent from the fact that accountability compels the State, the private sector and civil society to focus on results, seek clear objectives, develop effective strategies, and monitor and report on performance, while transparency promotes openness of the democratic process through reporting and feedback, clear processes and procedures, and the conduct and actions of those holding decision-making authority.[134] It should be noted that accountability implies holding individuals and organisations responsible for their performance as objectively as possible.[135] As aptly stated by the UNDP in its *2002 Human Development Report* '[a]ccountability is about power—about people having not just a say in official decisions but also the right to hold their rulers to account.… Today the insistence that public officials be held accountable is extending to corporations, multinational organisations and others who have more power in public decision-making.'[136] Accountability has four closely linked and inter-related dimensions vis-à-vis financial accountability, administrative accountability, political accountability, and social accountability.[137] Transparency on the other hand, refers to all means of facilitating citizens' access to information and their understanding of decision-making mechanisms.[138]

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[132] See Girishankar et al *op cit* note 77 at 285; Shadrack C. Agbakwa 'A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa (2003) 47 (1) *JAL* 38 at 44-45, (hereinafter Agbakwa II); and Andr, Mbata B. Mangu 'The Conflict in the Democratic Republic of Congo and the Protection of Rights under the African Charter' (2003) *AHRLJ* 235 at 239.
[133] See Girishankar et al *ibid*, at 276.
[134] Ghaus-Pasha *op cit* note 73 at 28.
[135] Welch & Nuru *op cit* note 92 at 174. See also SDC *op cit* note 93 at 3.
[136] *Human Development Report 2002: Deepening democracy in a fragmented world* (Oxford University Press, New York, 2002) at 65.
[137] Welch & Nuru *op cit* note 92 at 174.
[138] *Ibid*. at 182.

Accountability and transparency at the national level requires the presence of democratic mechanisms that can prevent concentrations of power and encourage accountability in a political system. This includes the right to vote and other mechanisms for promoting or encouraging citizens' participation and voice in governance.[139] It should be noted that participation of the public in formal political and administrative processes is vital to empowering the poor as it enables them to debate and potentially influence broad policy directives, budget priorities, and programme designs including those relating to issues over the protection of their environment.[140] It is also vital to monitoring accountability in governance as poor people can give valuable feedback on failures in service delivery and obstacles to access.[141] For public participation in governance to be sustainable, it needs to be embedded in and supported by formal structures at the national level.[142] This can be in the form of legal and constitutional mandates guaranteeing citizen participation in governance including regular, competitive and fair elections, and equal protection under electoral rules.[143] A competitive and fair election conducted under a democratic form of government enables citizens to hold their politicians accountable for their policies.[144]

Another democratic mechanism, a clear constitutional separation of power between the different branches of government coupled with effective checks and balances so that no branch of government exceeds its authority and dominates the others, is essential in ensuring accountability and transparency in a political system.[145] However, this is dependent on the existence of competent oversight bodies and entities that are required to ensure that the various organs and agencies of government are held accountable for discharging their duties reasonably and in the manner intended.[146] One of the most important oversight institutions is the judiciary, which

[139] See Ghaus-Pasha *op cit* note 73 at 55.
[140] See Girishankar et al *op cit* note 77 at 275; and Ghaus-Pasha *op cit* note 73 at 28.
[141] See Girishankar et al *ibid*.
[142] *Ibid*.
[143] *Ibid*. For an example of such constitutional mandates, see ss 19 (2) & (3) (a) (right to election and vote respectively) & 33 (public participation) of the Constitution of the Republic of South Africa Act No. 108 of 1996.
[144] See Millennium Project *op cit* note 23 at 116; HDR 2002 *op cit* note 136 at 54; and Rt Hon Raila Odinga, Prime Minister of Republic of Kenya, *Leadership and Democracy in Africa*, Tuesday 22 July 2008, at pp6-7. Available at http://www.chathamhouse.org.uk/files/11845_220708odinga.pdf.
[145] See Girishankar et al *op cit* note 77 at 277; and Ghaus-Pasha *op cit* note 73 at 28.
[146] Ghaus-Pasha *ibid*.

should remain independent, impartial and unaffiliated with political ties and parties, and enforce the rule of law.[147] Parliamentary or legislative oversight mechanisms such as independent audit institutions are also critical for ensuring accountability as they enable the legislative branch of government to hold the executive accountable for budget execution and results achieved.[148]

Furthermore, right of access to public information must be enhanced and promoted. This requires the governments to publish or provide *inter alia* public access to laws and regulations; budgets, official data and performance indicators; fully audited account of the central bank and of the main state enterprises such as those related to extractive industries; procurement rules; and incomes and assets of public officials and parliamentarians.[149] In addition, government are required to provide legal protection for the press and strengthen media freedom, in order to facilitate public access to a flow of information including environmental information.[150] Access to public information is vital in ensuring accountability and transparency in governance as it enables citizens to aware of what their government is doing and how their national resources are being utilised. This will minimise the potential for corruption which '…thrives in environments where information is either too segregated or aggregated, is not comparable and prevents conclusions on financial resource utilization from being drawn.'[151] This is evident from the findings of Reinikka and Svenson that a newspaper campaign in Uganda informing parents and schools of the fund provided by the government for education substantially reduced the fraction of the funds captured by bureaucrats and politicians, and increase true spending in educational infrastructure.[152] It is not only the fight against corruption that can be enhanced by access to information as it will equally enable the poor to protect the environment on which they depend for their sustenance. As aptly stated by DFID *et al*:

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[147] *Ibid*. See also Girishankar et al *op cit* note 77 at 277; and Welch & Nuru *op cit* note 92 at 134.
[148] See Girishankar et al *op cit* note 77 at 277.
[149] See UN Millennium Project *op cit* note 23 at 116-118.
[150] *Ibid*. See also Ghaus-Pasha *op cit* note 73 at 19.
[151] Transparency International *Poverty, Aid and Corruption* Policy Paper, at p 9. Available at http://www.transparency.org. (Hereinafter TI Policy Paper).
[152] R. Reinikka & J. Svenson 'Fighting Corruption to Improve Schooling: Evidence from a Newspaper Campaign in Uganda' (2005) 3 *Journal of the European Economic Association* 1.

> '[p]ublic access to information is vital for effective environmental management. A free media has been instrumental in highlighting environmental problems in both the public and the private sectors. In some countries, the state has effectively used public pressure by making information publicly available in order to encourage greater pollution compliance.'[153]

Finally, strengthening the watchdog role of civil society is essential to ensuring accountability and transparency in a political system.[154] This will involve removing restrictive legislation that not only tightens government control over the civil society, but also, reduces their ability to check nepotism, corruption and 'elite capture' through monitoring the public and private sector at all levels. Equally important is the relaxation of the *locus standi* rule which constrains the ability of the civil society in instituting public interest litigation against the government.

Promoting the rule of law at the global level also requires accountability and transparency. Unlike the position at the national level where accountability and transparency is required to tackle the issues of corruption and other abuses of power, accountability and transparency is required at the global level to ensure open, rule-based, predictable, non-discriminately trading and financial systems, and to ensure that the financial resources and capacities necessary to achieve sustainable development objectives including the MDGs are mobilised at the global level.[155] However, like the position at the national level, accountability and transparency at the global level, requires the presence of democratic mechanisms that can prevent concentrations of power and encourage accountability in global governance. Such mechanisms will be evident from the later discussion in this chapter on global democratic governance.

5.3.2 Respect for human rights

The MDGs as a framework of accountability can also be used by citizens, civil society actors, and donors in demanding or promoting respect for human rights in

[153] Department for International Development, United Kingdom (DFID), Directorate General for Development, European Commission (EC), United Nations Development Programme (UNDP), & The World Bank *Linking Poverty Reduction and Environmental Management: Policy Challenges and Opportunities* (The World Bank, July 2002) 32.
[154] See Welch & Nuru *op cit* note 92 at 92-93.
[155] See Ghaus-Pasha *op cit* note 73 at 20.

Africa.[156] Respect for human rights, which includes a mandate that States respect not only civil and political rights, but also, social, economic, and cultural rights as well as solidarity or group rights, is not only a central objective of good governance, but also, essential for the achievement of sustainable development objectives including poverty reduction and environmental protection.[157] This is because these rights ensure empowerment, voice, access to social services, and equality before the law.[158] Thus, respect for certain civil and political rights such as access to information including environmental information, public participation in governance including environmental decision-making process, and access to justice in instances of environmental harm, is essential to environmental protection and realisation of the right to environment. In addition, respect for all human rights including socio-economic and environmental rights, is essential to the prevention of armed conflicts and civil wars, as it not only provides citizens with political stability, but also, socio-economic security including employment, healthcare and shelter.[159] As aptly observed by Agbakwa, '[d]enial of socio-economic rights (or any rights at all) is hardly conducive to peaceful co-existence. It is usually a wellspring of popular discontent and violent conflicts.'[160] This is evident from the present situation in the Niger Delta region of Nigeria where the environmentally degrading activities of multinational oil companies in collaboration with the State, as well as the overall neglect of the socio-economic needs of the region by successive governments in Nigeria, has led to armed conflict and other social ills such as kidnappings and armed robberies.[161]

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[156] *Ibid*, at 47 & 61. See also Bread for the World *op cit* note 76 (effect of the MCA stringent criteria in promoting respect for human rights); Tarnoff *op cit* note 100 (suspension of Gambia from eligibility for MCA assistance due to human rights abuses, and restrictions on civil liberties); and Chris Albin-Lackey 'Why Turn a Blind Eye to Tyranny?' *International Herald Tribune*, 4 July 2005 (Britain suspended a planned increase in aid to the Ethiopian Government over human rights abuses).

[157] See Millennium Declaration *supra* note 1 at para 24; Monterrey *supra* note 19 at para 11; WSSD *supra* note 20 at paras 5 & 138; and 2005 World Summit Outcome *supra* note 22 at paras 12& 24 (b) .

[158] See Agbakwa II *op cit* note 132 at 58-62.

[159] See preambular paragraph 3, UDHR *supra* note 10; Agbakwa II *ibid*, at 38-47; Rachel Murray 'Preventing Conflicts in Africa: The Need for a Wider Perspective' (2001) 45 (1) *JAL* 13; and United Nations Development Programme (UNDP) *Human Development Report 2005: International cooperation at a crossroads-Aid, Trade ad Security in an unequal world* (New York, 2005) 165-167.

[160] *Op cit* note 132 at 42.

[161] For a detailed discussion of the situation in the Niger Delta region of Nigeria, see Dr Victor Ojakorotu *Natural Resources and Conflicts within African States: Oil, Niger Delta and Conflict in Nigeria* Paper Presented at The United Nations University (UNU) Global Seminar on 'Africa's Natural Resources: Conflict, Governance and Development', held at the Wits Club, University of the Witwatersrand, Johannesburg, South Africa, 29-30 October 2008. (Not yet published).

The utility of respect for human rights in advancing sustainable development is best illustrated by the well-known example provided by Amartya Sen in his pioneering work on the causative role of civil and political rights such as the right of free expression and participation in political life in avoiding famines.[162] His analysis points to the empirical regularity that famines never occur in a functioning democracy with a reasonable degree of civil-political freedom, especially with the existence of a relatively free press that is allowed to openly criticise the government.[163] The reason for this regularity lies in the fact that democratically elected politicians cannot be oblivious to the popular pressure that the civil society including a free media would mobilise in the event of famine, with the result that the government tends to take appropriate preventive measures before an impending famine has the chance to strike.[164]

Ensuring respect for human rights is only possible when States establish transparent, accountable systems of governance, grounded in the rule of law, and provide access to justice for all members of society, paying special attention to the most vulnerable groups in society.[165] Welch and Nuru identify three different mechanisms through which States guarantee respect for human rights.[166] These include the existence or promulgation of laws consistent with international human rights standards. This will include laws that are not discriminatory but instead empower the vulnerable groups in society — women, children, minorities and indigenous peoples such as those providing for their or their representatives' access to information and justice, and participation in governance including environmental decision-making process. The other mechanisms which already have been discussed in this chapter involve the institutional separation of powers with an independent judiciary; and the establishment of effective functioning courts and judiciary. In addition to the courts, independent human rights institutions or ombudsman offices, as well as effective law enforcement outfits are equally relevant.

[162] Amartya Sen *Development as Freedom* (Knopf, New York, 1999) 146-160.
[163] *Ibid*.
[164] *Ibid*.
[165] See Welch & Nuru *op cit* note 92 at 118.
[166] *Ibid*.

5.3.3 Democracy

Democracy or democratic governance is another important aspect of good governance which can be promoted using the MDGs. This is due to the fact that as a framework for holding governments accountable to their millennium anti-poverty commitments, the MDGs can be used by African citizens, civil society actors and donors to demand for democratic governance in Africa.[167] The same is applicable to African nations, civil society actors and citizens of developed countries, who can used the MDGs to demand for democratic governance in the international trading and financial systems.[168] Democratic governance according to Welch and Nuru, ' is a system of governance that incorporates into the notion of good governance, not only efficient processes, but also principles and institutions that secure the civic rights and freedoms of all people, including the poorest of the poor and marginalized groups.'[169] Such conception of democratic governance is people-centred as reflected in the etymology of democracy, which literally means rule by the people.[170] In essence, rule by the people 'sums up well the human development approach to governance because it expresses the idea that people come first: governance must conform to the needs of people, not vice versa.'[171]

The demand for democratic governance is vital as the existence of democratic processes, principles and institutions, which enable and promote pluralistic and non-discriminatory participation, is indispensable to the achievement of sustainable

[167] See MCC *op cit* note 100; Ghaus-Pasha *op cit* note 73 at 47-48; Garth Luke 'A Global Movement Towards Justice: Small Steps towards Big Goals' *Harambee* Vol 13, Issue 2, June 2004, at p2, available at http://tear.org.au/resources/harambee/042/03_global_movment.htm (reporting that the government of Rwanda and civil society groups used the MDGs as a framework for discussion on thorny political issues); Elizabeth Spiro Clark 'The Millennium Challenge Account: Spur to Democracy?' (April 2005) *Foreign Service Journal* 31 at 33 (Expressing the opinion of Emmanuel Gyimah-Boadi, director of the Ghana Center for Democracy and Development, that the MCA will be 'a real incentive for democratic progress' in Africa); and Sheila Herrling & Steve Radelet 'Round Five of the MCA: Which Countries are Most Likely to be Selected for FY2008?' *MCA Monitor Analysis*, Center for Global Development, November 26, 2007, at p 11 (stating that despite the fact that Tunisia has passed the MCA eligibility indicators for the third year in a row, it has been consistently overlooked by the MCC as it is not a democracy).
[168] See Ghaus-Pasha *ibid*, at 62; Shetty *op cit* note 51 at 28; and Hassen Lorgat & Marta Garrich 'Civil Society Speaks - Millennium Development Goals not our Panacea but must be Engaged with' *newritings*, 17 May 2007, available at http://newritings.wordpress.com/2007/05/17/civil-society-speaks-millennium-development-goals-not-our-panacea-but-must-be-engaged-with/.
[169] *Op cit* note 92 at 32.
[170] Welch & Nuru *ibid.*
[171] HDR 2002 *op cit* note 136 at 54.

development objectives including poverty reduction and realisation of the right to environment.[172] The UNDP has identified the promotion of participation through democratic governance as the third pillar of a 21st century human development strategy.[173] Similarly, the *2005 South African MDG Report* states that the key to the institution of policies and programmes for the improvement of the quality of life of all people of South Africa is the creation of a democratic state and the extension of a universal franchise.[174] The link between democratic governance and the achievement of equitable socio-economic development has been comprehensively analysed by the UNDP in its 2002 *Human Development Report*. The Report finds that '[a]dvancing human development requires governance that is democratic in both form and substance—for the people and by the people.'[175] This finding is based on the premise that democratic governance is not only valuable in its own right, but also, can advance human development.[176] The Report gives three reasons for its conclusion. First, 'enjoying political freedom and participating in the decisions that shape one's life are fundamental human rights: they are part of human development in their own right. … Democracy is the only political regime that guarantees political and civil freedoms and the right to participate—making democratic rule a good in itself.'[177] Secondly, 'democracy helps protect people from economic and political catastrophes such as famines and descents into chaos [including civil wars and armed conflicts];'[178] and thirdly, 'democratic governance can trigger a virtuous cycle of development—as political freedom empowers people to press for policies that expand social and economic opportunities, and as open debates help communities shape their priorities.'[179]

Democratic governance is also vital for the third aspect of sustainable development – environmental protection, which is essential to the realisation of the right to

[172] See Monterrey Consensus *op cit* note 19 at paras 11 & 61; 2005 World Summit Outcome *supra* note 22 at para 24 (a); and Millennium Declaration *supra* note 1 at paras 6 & 13.
[173] The first two being investing in education and health, and promoting equitable economic growth. See HDR 2002 *op cit* note 136 at 53.
[174] See Government of the Republic of South Africa *Millennium Development Country Report 2005* (2005) 9. Available at http://www.undp.org.za/mdgcr.doc. (Hereinafter South African MDG Report 2005).
[175] HDR 2002 *op cit* note 136 at 3. see Generally Chapter two of the Report dealing with '[d]emocratic governance for human development'
[176] *Ibid*.
[177] *Ibid*.
[178] *Ibid*.
[179] *Ibid*.

environment.[180] This is due to the fact that the protection or conservation of the environment generally fares badly under autocratic governments than under democratic ones, as evidenced by the poor environmental performance of both the apartheid and military regimes in both South Africa and Nigeria respectively.[181] Furthermore, the environmental calamity of the former Soviet Union and the Eastern Communist Bloc attests to the negative effects of autocratic regimes on the protection of the environment. Such poor environmental performance is mostly due to autocratic governments' abject disregard for the natural environment in preference for political and economic considerations.[182] This is exacerbated by 'a [general] lack of transparency—autocratic governments are notoriously poor in monitoring environmental pollution, collecting information about polluters, tabulating the data and releasing it to the public.'[183] In contrast, democratic governance, by encouraging political freedom and participation in the decisions that shape one's life – underpinned by freedom of speech and thought, freedom of information, free and independent media and open political debate, gives citizens a voice that allows them to be heard in public policy-making.[184] The resultant public pressure can influence decisions and actions of public officials as well as private agents with regard to environmental pollution and other environmental abuses.[185] As aptly observed by James Kraska:

> '…open societies are far more likely to produce effective political counterweights to polluting commercial enterprise.… This is because the transparency and the widespread distribution of information in a free society encourage better environmental practices… Democratic regimes tend to distribute information about the environment, around which popular expressions of concern can collect. In a free society, people may gather unhindered to form interest groups and to lobby for stricter regulations. Principles of open debate permit environmentalists to distribute educational materials and promote new ideas. The flow of information in a democracy also

[180] See James C. Kraska 'Global and Going Nowhere: Sustainable Development, Global Governance & Liberal Democracy' (2006) 34 *Denver J. Int'l L. & Policy* 247 at 279.
[181] See South African MDG Report *op cit* note 174 at 45-46; Raewyn Peart & Jessica Wilson 'Environmental Policy-making in the New South Africa' (1998) 5 *SAJELP* 237 at 238-240; and Joshua Eaton 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston University International LJ* 261 at 266-271.
[182] See Kraska *op cit note* 180 at 302; Peart & Wilson *ibid*, at 239; and Eaton *ibid*, at 289 &291.
[183] *Ibid*. Citing Cynthia B. Schultz & Tamara Raye Crockett 'Economic Development, Democratization and Environmental Protection in Eastern Europe' (1990) 18 *B. C. Envtl. Aff. L. Rev.* 53 at 62. See also Peart & Wilson op cit note 181 at 239-240.
[184] HDR 2002 *op cit* note 136 at 56-57.
[185] *Ibid*. See also South African MDG Report *op cit* note 174 at 45.

> informs a free media, making it more likely that the government will be challenged on environmental issues.'[186]

However, the links between democratic governance and sustainable human development though strong, are not automatic. This is due to the fact that the links can be broken when a small elitist or corrupt group dominates economic and political decision-making processes.[187] Such domination biases government policies, programmes and spending, away from the poor as social interests including environmental protection, as well as economic priorities play little role in the allocation of public resources or utilisation of environmental resources.[188] In such situations, for example, as capital-intensive defence and infrastructure projects may offer more opportunities for kickbacks than, for instance, spending on primary education, government spending allocations may be biased away from pro-poor expenditure.[189] This was evident in some African countries like Lesotho regarding the Lesotho Highlands Water Project;[190] and Nigeria regarding the purchase of new presidential jets, the construction of Abuja national stadium, and the implementation of the National Integrated Power Project (NIPP) where the sum of $16 billion was allegedly spent under the last civilian administration of President Obasanjo, as stated derisively by Nigerians, to 'buy darkness.'[191] This was also evident in the Arms Deal scandal which is presently haunting key men in both the erstwhile Mbeki administration and upper echelons of the ruling party in South Africa.[192] As reported by Megan Power & Jocelyn Maker, by the time President Thabo Mbeki (as he then

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[186] *Op cit* note 180 at 304.

[187] HDR 2002 *op cit* note 136 at 3, 63-64, & 65-69. See also Rod Alence 'Political institutions and developmental governance in sub-Saharan Africa' (2004) 42 (2) *Journal of Modern African Studies* 163 at 146; and Patrick Chabal 'The quest for good government and development in Africa: is NEPAD the answer?' (2002) 73 (3) *International Affairs* 447 at 448-450 & 462.

[188] See Chabal *ibid*, at 451-454, 457 & 460; Alence *ibid*, at 165-167; Girishankar *op cit* note 77 at 272; Peart & Wilson *op cit* note 181 at 239; and Kraska *op cit* note 180 at 304.

[189] *Ibid*, at 273. See also Peter Eigen 'Kickback fightback' in UNEP Magazine *op cit* note 103 at 25.

[190] See Sebastine Levine 'taking on the Goliaths of corruption' *ELDIS*. Available at http:///www.eldis.org /fulext/Lesotho_corruption_dec06.doc.

[191] See Victor Efeizomor 'Obasanjo Spent $ 13bn on Power Sector, Says Elumelu' *ThisDay* Monday, 2 June 2008; Leon Usigbe & Tordue Salem 'How Obasanjo spent $13bn on power – Minister' *Vanguard*, Tuesday, 11 March 2008; Louis Odion 'The politics of darkness' *NigeriaExchange*, 26 February 2008, available at http://www.ngex.com/news/public/article.php?ArticleID=884; Idowu Samuel & Bola Badmus 'OBJ Aided Chinese Firm To Loot N116b' *Tribune* 15 March 2008; John Abba-Ogbodo 'Obasanjo Awarded NIPP Contracts Without Tenders Board, Says MD' *Guardian* Saturday, 15 March 2008; and Nsongurua J. Udombana 'The Summer has ended and we are not Saved! Towards a Transformative Agenda for Africa's Development' (2005) 7 *San Diego Int'l L.J*. 5 at 45. (Hereinafter Udombana II).

[192] On the scandals from the fall out of the arms deal, see 'Mbeki took R30-million and gave some to Zuma' *Sunday Times*, 3 August 2008, at p1; and 'The big con' Sunday *Times*, 10 August 2008, at 1.

was) sealed the ZAR36 billion arms deal in 1999, 'he had spent the equivalent of: that year's entire housing budget; or more than half of the investment in municipal infrastructure; or almost half the education budget.'[193]

Thus, if democratic governance is to continue to be responsive to the needs and aspirations of ordinary citizens, there is the need to strengthen its links with sustainable development. The best way to achieve this is by African governments strengthening democratic institutions and promoting democratic politics.[194] Strengthening democratic institutions is necessary as they implement policies that are necessary to democracy and development.[195] Most importantly, they constitute formal accountability mechanisms through which citizens can check the powers of their elected leaders and influence decisions including those relating to the protection of their environment, thereby forcing governments to 'internalise' the social costs of their opportunistic behaviour.[196] Strengthening democratic institutions requires the development of stronger vehicles for formal political participation and representation through political parties and electoral systems, to prevent subversion by corruption or moneyed interests (elite capture).[197] Also important is strengthening checks on arbitrary power by separating powers among the executive, an independent judiciary and the legislature, as well as by creating effective independent entities such as ombudspersons, electoral commissions and human rights commissions.[198] Furthermore, strengthening democratic institutions requires decentralising democratically by devolving power from the central government to provinces and villages, underpinned by stronger local democratic institutions and practices such as widening participation by marginalised group and increasing the accountability of local public officials.[199] The development of free and independent media, as well as a vibrant civil society, able to monitor government and private business and provide

[193] See 'The warnings Mbeki chose to brush aside' in Sunday Times *ibid*, at p5.
[194] HDR 2002 *op cit* note 136 at 64. See also Chabal *op cit* note 187 at 456
[195] Nsongurua J. Udombana 'Articulating the Right to Democratic Governance in Africa' (2003) 24 *Michigan J. Int'l L.* 1209 at 1271. (Hereinafter Udombana III).
[196] See Udombana III *ibid*, at 1272; HDR 2002 *op cit* note 136 at 64; and Alence *op cit* note 187 at 166-167 & 173-176.
[197] HDR *ibid*, at 69-71. See Udombana *ibid*; and Rt. Hon. Raila A Odinga, Prime Minister of the Republic of Kenya, *Democracy and the Challenge of Good Governance in Africa*, Paper Delivered at the 25th Anniversary of The Guardian Newspaper in Lagos, Nigeria, on 9 October 2008. Available at http://www.africanloft.com/raila-odinga-africa-is-a-continent-of-huge-contrasts-kenyan-prime-minister addresses-nigerian-media-house/.
[198] HDR *ibid*, at 71-74. See also Alence *op cit* note 187 at 175-177; and Udombana III *ibid*.
[199] *Ibid*, at 74-75.

alternative forms of political participation, are vital to strengthening democratic institutions.[200]

The strengthening of democratic institutions is not enough, it must be accompanied by the promotion of democratic politics. Democratic politics is essential towards enabling citizens especially the poor and the marginalised to claim their rights and overcome institutional obstacles.[201] In the absence of democratic politics, public decisions in democracies including those relating to the protection of the environment as well as the utilisation of the resources may end up responding more to interest groups such as big business or the corrupt elite than to the public.[202] When people enjoy civil and political liberties, they can put pressure on public decision-making for their interests.[203] As observed by the UNDP in its *2002 Human Development Report* '[a]n alert citizenry is what makes democratic institutions and processes work. Political pressure from below is usually the most effective trigger of change.'[204] Such pressure can crystallise into new environmental activism that leads to greater government responsiveness to environmental matters.[205] It can also influence the development of macro-economic policies that contribute to enhancing the basic capabilities of the poor such as the allocation of an adequate proportion of public expenditure for basic education and health services; the channelling of more credit to sectors like agriculture and promoting development of small and medium-scale enterprises and micro-credit; or/and the institution of pro-poor trade policy that would focus on providing incentives for the export of labour-intensive manufactures and providing some protection to small farmers to ensure food security and rural livelihoods.[206] As observed by Ghaus-Pasha, an important issue in the promotion of pro-poor policies is 'the nature of political and economic institutions. Those in which

[200] *Ibid*, at 75-79. See also Chabal *op cit* note 187 at 452 & 457; and Udombana III *op cit* note 195 at 1274-1276.
[201] *Ibid*, at 79. See also Alence *op cit* note 187 at 176-178; and Udombana III *ibid*, at 1283.
[202] See Fukuda-Parr III op *cit* note 48 at 5.
[203] *Ibid*.
[204] HDR 2002 *op cit* note 136 at 79.
[205] See Kraska *op cit* note 180 at 279 & 304.
[206] See Ghaus-Pasha *op cit* note 73 at 23-24; Lorna Gold 'Are the Millennium Development Goals addressing the underlying causes of injustice? Understanding the risks of the MDGs' (2005) *Trocaire Development Review* 23 at 33-35; and Fukuda-Parr III *op cit* note 48 at 5.

policy making is transparent and participatory are more likely to promote the adoption of pro-poor policies.'[207]

Currently, the expansion of democratic politics has led to an upsurge in civic activism around the world demanding greater accountability of government authorities.[208] The civil society actors are using new and innovative approaches to get their messages heard, and expanding their role from watchdogs that monitor to active participants in setting agendas.[209] This includes the examination of public spending and in some cases, participation in the development of official budgets.[210] Their examinations of public budgets which ensure efficiency in the use of public resources are helping to open the budgetary process which traditionally has been shrouded in official secrecy, to the voices of ordinary people.[211] Such initiatives have led to participatory budgeting—more systematic, institutionalized public participation in the preparation of budgets--which not only promotes transparency and accountability in budgeting and public spending, but also helps in re-orienting public spending in Africa to areas vital to the poor such as schooling, health care, roads, water supply and electricity.[212] The promotion of democratic politics requires expanding capabilities such as education to enable people to play a more effective role in such politics; strengthening political and civil society institutions to help democratic institutions better represent the people; and strengthening civil and political liberties including access to information and a free media, and freedom of expression and association.[213]

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[207] *Ibid*, at 24.
[208] HDR 2002 *op cit* note 136 at 79. See also Odinga *op cit* note 144 at 7, (arguing that such demand for accountability is possible because citizens have the right to elect or dismiss governments).
[209] *Ibid*.
[210] *Ibid*. See also Welch & Nuru *op cit* note 92 at 92-95.
[211] *Ibid*, at 79-81. For examples of NGOs involved in budget monitoring in Africa, see African Budget Project, which is the regional partner of the International Budget Project (IBP) and works to build capacity to participate in the budget process throughout African countries; Institute for Democracy in South Africa (IDASA) Budget Information Service; and Uganda Debt Network.
[212] *Ibid*, at 80-81. See also Helena Hofbauer *Sustained Work and Dedicated Capacity: IDASA's Experience in Applied Budget Work in South Africa* Case study prepared for the research project 'Lessons from Civil Society Budget Analysis and Advocacy Initiatives' (May 2006), available at http://www.internationalbudget.org/casestudies.htm (provides an analysis of the nature and impact of applied budget work conducted by BIS in South Africa); and Paolo de Renzio, Vitus Azeem, & Vivek Ramkumar *Budget Monitoring as an Advocacy Tool: Uganda Debt Network* Case study prepared for the research project 'Lessons from Civil Society Budget Analysis and Advocacy Initiatives' (April 2006), available at http://www.internationalbudget.org/casestudies.htm (provides an analysis of the nature and impact of applied budget work conducted by UDN in Kenya).
[213] *Ibid*, at 3 & 79. See also Odinga *op cit* note 144 at 7.

The promotion of democratic governance at the national level in Africa needs to be matched by equivalent political will of the major international power brokers to institute democratic governance at the global level, especially in the international trading and financial systems, if the goals of sustainable development are to be achieved in Africa.[214] As aptly stated by Welch and Nuru, 'as long as opportunities, voice and representation are not equitably distributed at the global level, [least developing countries (LDCs] will continue to be constrained in their efforts to overcome their [sustainable] development challenges.'[215] Instituting democratic governance at the international level for sustainable development requires the restructuring of the present global governance system in order to be more effective and more reflective of democratic principles.[216] This entails promoting greater pluralism in global governance which will expand the space for all developing countries including African countries, and non-state actors to influence global policies and hold powerful actors accountable.[217] The need for greater pluralism in global governance was underscored by the *2002 Human Development Report*, which shows the role of non-state actors in reshaping global politics by exerting pressure on politicians and corporations in developed countries to respond to the needs of developing countries.[218] The success of the civil society in the areas of debt relief and access to essential HIV/AIDS medicines shows that deepening the role of civil society in global governance has the potential to help developing countries change industrial nations' policies on trade and market access, access to technologies, international resource mobilisation, and global environmental issues.[219]

In addition to greater pluralism, democratic reforms are needed in international institutions to make them more responsive to the needs of developing countries including African countries.[220] This is very important in improving the global legitimacy of these international institutions as many people in developing countries

[214] See WSSD *supra* note 20 at paras 4 & 141; and 2005 World Summit Outcome *supra* note 22 at paras 35-36 & 39.
[215] *Op cit* note 92 at 171.
[216] See Welch & Nuru *ibid*, at 162; and HDR 2002 *op cit* note 136 at 102.
[217] Welch & Nuru *ibid*; and HDR 2002 *ibid.*
[218] *Op cit* note 136 at 102-112.
[219] For example, Oxfam, an influential international development NGO has had a remarkable impact in changing the negotiating agenda and actual WTO policies in favour of poor countries. For a critical analysis of this impact, see Susan Ariel Aaronson & Jamie M Zimmerman 'Fair Trade?: How Oxfam Presented a Systemic Approach to Poverty, Development, Human Rights, and Trade' (2006) 28 (4) *Human Rights Quarterly* 998. See also HDR 2002 *op cit* note 136 at 118-120.
[220] See HDR 2002 *ibid*, at 112.

do not believe that institutions such as the International Monetary Fund (IMF), World Bank and World Trade Organisation (WTO) represent their interests, or that these entities are adequately accountable for what they do.[221] The legitimacy of the BWIs (IMF and World Bank) has been questioned in three primary areas: their internal governance structures, their policy prescriptions, and their perceived associations with the so-called Washington Consensus.[222] With regard to their internal governance structure, nearly half of the voting power in these institutions rests in the hands of seven countries. This voting power is exercised in the formal decision-making bodies—the executive boards—of each institution.[223] In addition, there are informal influences and traditions that shape the work of these organisations. These informal processes further weight the scales in favour of industrial countries.[224]

These institutions have also been criticised for basing their economic advice and policy conditionality on a narrow world view that reflects the interests of their most powerful members.[225] In particular, they are widely perceived as being overly accountable to their largest shareholder, largely through informal influences such as the location and staffing of the organisations and their susceptibility to pressure on select issues.[226] The concerns over the interests that the institutions represent have been heightened as the institutions have begun to prescribe policies over a broader range of issues as conditions for economic assistance through their adoption of the neo-liberal 'Washington Consensus', which privileged the market as the location of economic decision-making.[227] Even the BWIs official line on good governance imposed on developing countries as conditions for economic assistance, has been

[221] *Ibid*.
[222] Welch & Nuru *op cit* note 92 at 171.
[223] See HDR 2002 *op cit* note 136 at 113.
[224] An example of such processes is evident in the situation where the heads of the World Bank and IMF are chosen according to a political convention whereby the United States and Europe nominate their candidate for each respectively. Other countries and critics have branded such arrangement as 'undemocratic and insufficiently accountable'. See HDR 2003 *ibid*; and Welch & Nuru *op cit* note 92 at 158.
[225] See HDR 2003 *ibid.*
[226] *Ibid*.
[227] Used to describe the set of market oriented reforms prescribed by the World and IMF, which the state-directed economies of Latin America should adopt to spur economic growth. Although the consensus formula was geographically and historically specific, it gained acceptance as dilution of the policies emanating from the Thatcher and Reagan administrations, and has been applied to development choices in Asia and Africa. The checklist of principles includes fiscal discipline, tax reform that lowered marginal rates and broadened the tax base, trade and investment liberalisation, privatisation, deregulation, secure property rights and redirection of public spending towards areas that offer higher investment return, such as healthcare and education. See Kraska *op cit* note 180 at 298.

accused of reflecting the neo-liberal principles of the Consensus as it implies 'placing the State and society at the service of the market, under the presumption that economic growth alone will deliver development.'[228] The result as stated by the *2002 Human Development Report*, is 'a new kind of division between creditor countries on one hand, who enjoy increased decision-making power and have used it to expand conditionality, and borrowing or debtor countries on the other, who view conditionality as externally imposed.'[229]

These policy prescriptions which are usually tied to the approval of new loans or debt reduction to developing and emerging economies have been criticised as increasingly impinging on the domestic policies of the States, as well as affecting their domestic capacity to retain and assign resources to fulfil human needs and rights or to ensure environmental sustainability.[230] The negative effect of such conditionality is evident from the socio-economic and environmental devastations of the structural adjustment programmes (SAPs) imposed on developing countries including African countries in the late 1980s.[231] African countries were forced to comply with SAPs and other policy prescriptions despite oppositions from their citizens, in order to obtain new loans/aid and debt reductions, or to reschedule existing debts.[232] In addition, their compliance with these prescriptions is vital if they are to obtain the IMF stamp of approval. Such stamp of approval signals to the rest of the international community including bilateral donors, other international financial institutions, and even the private sector that it is safe to lend or invest in the affected country.[233]

In view of the impacts of the decisions of the BWIs on sustainable human development in Africa, there is the need to increase or improve the representation of

[228] Bendana *op cit* note 77 at 1-2. See also Hernández-Truyol *op cit* note 87 at 662-666.
[229] *Op cit* note 136 at 114.
[230] HDR 2002 *ibid*, at 113-114. See also Alejandro Bendana *op cit* note 77 at 4; Gold *op cit* note 206 at 34 & 35; Su-ming Khoo 'The Millennium Development Goals: A Critical Discussion (2005) *Trocaire Development Review* 43 at 46; and Chantal Thomas 'Does the "Good Governance Policy" of the International Financial Institutions Privilege Markets at the Expense of Democracy?' (1999) 14 *Conn. J. Int'l L.* 551 at 555-559.
[231] *Ibid*. See also Dzodzi Tsikata 'Effects of structural adjustment on women and the poor' *Third World Network*, available at http://www.twnside.org.sg/adjus-cn.htm; Udombana *op cit* note 74 at 312-317; United Nations Environment Programme *African Environmental Outlook 2: Our Environment, Our Wealth* (UNEP, 2006) 15-17; and Gaynor *op cit* note 51 at 72-77.
[232] See Tsikata *ibid*; Udombana *ibid*, at 315-316; *and* Gaynor *ibid*, at 74.
[233] See Gaynor *ibid*, at 76; Gold *op cit* note 206 at 35; Bendana *op cit* note 77 at 5; and Caoimhe de Barra 'Addressing Aid Effectiveness: A Key Challenge in Meeting the MDGs (2005) *Trocaire Development Review* 103 at 114-115.

African countries in their governance structure if they are to be responsive to the needs of the region.[234] Such action will not only increase their global legitimacy but also the acceptance of their policy prescriptions as African countries will feel a sense of ownership, and thus, will no longer regard the policy prescriptions as policy impositions by the BWIs on behalf of their economic masters.[235] Most importantly, participation in the governance structure of the institutions will enable African countries to influence the policy prescriptions to be friendly to their long-term sustainable development aspirations as 'the foreign and undemocratic control of SAPs [and other policy prescriptions] is an important factor in the stringency of conditionalities and their lack of attention to the social effects and the long-term development aspirations of adjusting countries and their population.'[236]

The BWIs can improve the representation of African countries in their governance structure in a number of ways such as by increasing the proportion of basic votes allocated to each member in order to restore a degree of parity in voting strength for developing countries; and enhancing the voice of developing countries within the institutions.[237] The latter will involve adopting an open and more substantive process for the selection of the heads of the institutions, and increasing the number of seats for developing countries as well as female representatives on the executive boards.[238] Furthermore, the institutions should be made to be more accountable for their actions, not just to their board members, but also, to the people affected by their decisions by improving transparency in their decision-making process, as well as monitoring and evaluating their rules, decisions, policies and actions.[239]

Democratic principles are also required in the WTO. Reforms in the governance of the WTO should focus on introducing more transparency and formality in the 'green room' process by which countries excluding most developing countries currently reach informal trade agreements.[240] Presently, the fact that actual decision-making occurs in the exclusive 'green room' has led to the WTO being accused of being one

[234] See HDR 2002 op cit note 136 at 114.
[235] See Welch & Nuru *op cit* note 92 at 171.
[236] Tsikata *op cit* note 231.
[237] HDR 2002 op cit note 136 at 114.
[238] *Ibid*, at 114-115.
[239] *Ibid*, at 115-116.
[240] See Welch & Nuru *op cit* note 92 at 171.

of the least transparent international organisations.[241] Thus, democratic reform of WTO decision-making processes will require consideration of concrete proposals for improving transparency and participation in the WTO system.[242] These include ensuring that WTO consultations, discussions, negotiations and decision-making are made truly transparent, participatory and democratic; and putting in place procedures that will enable developing countries to voice their interests and exercise their rights. The latter will involve granting developing countries more input and influence in the WTO meetings and trade negotiations, as well as the dispute settlement procedure.[243] This is very important if the WTO is shed its tag of being 'a veritable nightmare' for certain sectors of humanity, notably developing countries and women.[244] In addition, the organisation needs to establish a formal consultative process in which stakeholders from poor countries, including civil society and trade unions, for example, are involved in discussions. Furthermore, developing countries should be better represented in the WTO secretariat, especially in senior positions.[245]

5.4 Conclusion

This chapter shows that despite the soft nature of the MDGs, the goals still have important normative value as they provide a framework for holding governments accountable to their millennium anti-poverty commitments. Meeting these commitments involves the creation of an enabling environment at the national and international levels for the achievement of poverty reduction and sustainable development vis-à-vis instituting sound socio-economic reform and strengthening good governance. This chapter therefore argues that the role of the MDGs in guiding or stimulating national and international policy reform towards the realisation of the right to environment in Africa is that as a framework of accountability, they can be used to promote good governance and socio-economic reform, two ingredients that are vital in tackling the militating factors identified in chapter three of this thesis. The

[241] See HDR 2002 *op cit* note 136 at 120-121.
[242] *Ibid*, at 121.
[243] *Ibid*.
[244] See Joe Oloka-Onyango & Deepika Udagama *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights* Preliminary Report Submitted by J.Oloka-Onyango and Deepika Udagama, in Accordance with Sub-Committee Resolution 1999/8, at para. 15, U.N. Doc. E/CN.4/Sub.2/2000/13 (2000).
[245] HDR 2002 *op cit* note 136 at 121.

chapter also defines and clarifies the notion of good governance that could be promoted by MDGs at the national and international levels towards the achievement of sustainable development in Africa vis-à-vis rule of law, respect for human rights, and democracy. Both socio-economic reform and good governance that could be promoted by the MDGs are complementary and thus, must be pursued concurrently in the achievement of sustainable development in Africa.[246] As aptly argued by Udombana, '[n]ew substantive, equality driven, social and economic reform is one side of the coin: responsible, clean and effective governance is the other side.'[247] The use of the Millennium Challenge Account (MCA) by the US government in catalysing policy reform in some recipient or eligible African countries (the 'MCA effect'),[248] points to the utility of using the MDGs in promoting good governance and socio-economic reform in Africa.

Having proposed that the MDGs, as a framework of accountability, could be used to promote national and international policy reform towards the realisation of the right to environment in Africa, the next chapter will analyse relevant international and regional policies for the achievement of the MDGs in Africa in order to determine how they can contribute to the protection of the environment and realisation of the right in Africa.

[246] See Gutto *op cit* note 74.
[247] See Udombana *op cit* note 74.
[248] See MCC *op cit* note 100; and Bread for the World *op cit* note 76.

CHAPTER SIX

ANALYSIS OF POLICIES FOR THE ACHIEVEMENT OF THE MDGS IN AFRICA

6.1 Introduction

In the preceding chapter, it was proposed that despite the soft nature of the MDGs, the goals could be used in guiding or stimulating national and international policy reform towards the realisation of the right to environment in Africa. This assertion is based on the argument that by providing a framework for holding governments accountable to their millennium anti-poverty commitments, the MDGs can be used to promote good governance and socio-economic reform at national and international levels, two ingredients that are vital in creating the enabling environment for tackling the militating factors identified in chapter three of this thesis. Presently, the MDGs have given renewed vigour to the achievement of poverty reduction and sustainable development in developing countries.[1] This is evident from the fact that several developing countries including African countries, in order to achieve faster progress on reducing human poverty, have not only aligned their national development policies with the MDGs, but also, have increased social spending and launched new programmes in support of the Goals.[2] The alignment is necessary as most African countries have been pursuing the underlying objectives of the MDGs for decades, and this perhaps obviates the need for the adoption of a separate policy document for the

[1] See David Dickson 'How "Scientific" Are the Millennium Development Goals' *One World* Global Policy Forum, September 19, 2005, available at http://www.globalpolicy.org/socecon/develop/2005/0919scient.htm; Amir Attaran 'An Immeasurable Crisis? A Criticism of the Millennium Development Goals and Why They Cannot be Measured' (2005) 10 *Plos Med* 2; Kepa Artaraz 'MDGs Mask Injustice and Inequality in Latin America' *1d21* Global Policy Forum, November 2005, available at http://www.globalpolicy.org/socecon/inequal/2005/11mask.htm; and Lorna Gold 'More than Just a Numbers Game? Ensuring that the Millennium development Goals Address Structural Injustice' *Center Focus*, Issue # 168, September 2005, available at http://www.coc.org/pdfs/coc/cf/2005/cf168_2005-09_more.pdf.

[2] See United Nations Development Programme *Human Development Report2003- Millennium Development Goals: A compact among nations to end human poverty* (New York, Oxford University Press, 2003) 30-31, available at http://hdr.undp.org/reports/global/2003/pdf/hdr03_complete.pdf, (hereinafter HDR 2003) 30-31; Commission of the European Communities *The Millennium Development Goals - State of Play*, Commission Staff Working Paper, SEC(2008) 433, Brussels, at pp 11-12; Government of the Republic of South Africa *Millennium Development Country Report 2005* (2005) 68-69, available at http://www.undp.org.za/mdgcr.doc; and Government of the Republic of South Africa *Millennium Development Goals Mid-Term Country Report* (September 2007) 56, available at www.undp.org.za/docs/mdg_midterm.pdf.

achievement of the MDGs.[3] For example, in South Africa, the government's Programme of Action towards meeting the MDGs is predicated upon achieving the four key objectives of the Reconstruction and Development Programme (RDP) adopted in 1994.[4]

Furthermore, the MDGs have influenced the adoption of policies aimed at the achievement of poverty reduction and sustainable development in developing countries including African countries. In Africa, these include, at the regional level, the New Partnership for Africa's Development (NEPAD), and at the sub-regional level, a good example is the Regional Indicative Strategic Development Plan (RISDP) launched by the Southern African Development Commission (SADC) in March 2004. At the global level, the 2002 Group of Eight Most Industrialised Democracies (G8) African Action Plan, the 2005 European Consensus for Development adopted by the European Community, the Millennium Challenge Account, and several other development assistance policies by developed countries were influenced by the MDGs.[5] For the purpose of this thesis, this chapter will analyse only the major policies adopted for the achievement of the MDGs in Africa to ascertain how they would contribute to the realisation of the right to environment in the region. These are NEPAD and the G8 African Action Plan.[6] The analysis explores the extent to which these policy documents aim to create the enabling environment at the national and global levels for the achievement of poverty reduction and environmental protection in Africa. Specifically, the analysis will focus on how these policies promote socio-economic reform and good governance, as essential elements in the achievement of poverty reduction and sustainable development in their text.

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[3] See the National Planning Commission *Namibia 2004: Millennium Development Goals Report* (August, 2004) 1; The Ministry of Planning and National Development MDGs Status Report for Kenya 2005 (2005) 9-10; Government of the Republic of Sierra Leone *Millennium Development Goals Report for Sierra Leone 2005* (2005) 1; Government of Uganda *MDG Report 2003* (2003) 6-7; United Republic of Tanzania *IDT/MDG Progress: International / Millennium Declaration Development Goals*, at p3; and Federal Republic of Nigeria *Millennium Development Goals Report 2004* (2004) 64.

[4] See SA MDG Report 2005 *op cit* note 2 at 9 & 68-69.

[5] See generally OECD Development Assistance Committee (DAC) *Development Co-Operation Report 2007* volume 9, no. 1 (OECD, 2008) 67-107.

[6] The focus on NEPAD and the G8 Action Plan is due to the following reasons. First, NEPAD is considered by both African countries and the international community as the principal strategy for the achievement of the MDGs in Africa. Secondly, the G8 Action Plan is more encompassing than other policies adopted by developed nations due to the composition of the G8, the fact that the Action Plan was adopted by both the G8 and representatives of the European Union (EU), and that the G8 promised under the Action Plan to pursue their commitments through the international institutions to which they belong (see para 10).

6.2 New Partnership for Africa's Development (NEPAD) Strategic Framework Document.

The NEPAD strategic framework document is the positioning document of the New Partnership for Africa's Development (NEPAD).[7] NEPAD is a common development initiative launched by the then Organisation of African Unity (OAU, now African Union (AU) on 23 October 2001, in Abuja, Nigeria. The initiative has its origin in President Mbeki's African Renaissance theory and began as the *Millennium Partnership for the Africa Recovery Programme Plan* (MAP),[8] which was articulated by Mbeki himself, President Obasanjo (Nigeria), and President Bouteflika (Algeria);[9] and President Wade's (Senegal) *Omega Plan for Africa* (Omega Plan), which has the same sentiments as the MAP.[10] Both plans were presented as separate initiatives to the OAU Heads of State and Government at its Fifth Extraordinary Summit in Sirte, Libya in 2001. The Summit later endorsed the plans in its Declaration on the New Common Initiative as 'work done regarding the revival and development of Africa' by the various presidents involved.[11] However, to avoid a possible clash of the goals of both projects, the plans were merged to create 'a single coordinated and inclusive plan for Africa's renewal based on the two initiatives', and approved at the 2001 OAU Lusaka Summit as the 'New African Initiative (NIA)' with a programme of action.[12]

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[7] *The New Partnership for Africa's Development (NEPAD)* (October 2001). (Hereinafter NEPAD framework document).

[8] See New Partnership for Africa's Development (NEPAD) *The Millennium Partnership for African Recovery Programme* (March 2001) 1. Available at http://www.nepad.org.ng/PDF/About%20Nepad/map3A.pdf. The key priorities of MAP were to promote peace, security and governance, to invest in Africa's people, to diversity Africa's production and exports, and to invest in infrastructural development in the continent. It also emphasises the importance of mobilising existing human and material resources, and using them in bold and imaginative ways to eradicate poverty and to uplift the people of the continent.

[9] See Dani Nabudere *NEPAD: Historical Background and Prospects*, paper presented at the World Summit on Sustainable Development, Johannesburg, South Africa, August 2002, at p8, available at http://www.world summit2002.org/texts/DaniWNabudere.pdf; and Chris Landsberg NEPAD: *What is it? What is missing?* Paper written for NALEDI, at pp2-4, available at http://www.sarpn.org.za/documents/d0000550/P503_Landsberg.pdf.

[10] See New Partnership for Africa's Development (NEPAD) *The Omega Plan for Africa* (May 2001), para 19. Available at http://www.sarpn.org.za/NEPAD/Omega.pdf. However, unlike MAP, the Omega plan focused mainly on infrastructural development.

[11] *Declaration on the New Common Initiative*, AHG/Decl. 1(XXXVII), at para 4, adopted at the 37th Session of the Assembly of Heads of State and Government of the OAU from 9 to 11 July 2001 in Lusaka, Zambia. (Hereinafter the Common Initiative Declaration).

[12] *Ibid*, at paras 5, 8 & 9. See also New Partnership for Africa's Development (NEPAD) *A New African Initiative: Merger of the Millennium Partnership for the African Recovery Programme (MAP) and Omega Plan* (2001). Available at http://www.nepad.org.ng/PDF/About%20Nepad/NAI.pdf. President Mubarak of Egypt later identified with presidents Mbeki, Obasanjo, Bouteflika, and Wade as the original initiators of NEPAD.

The document resulting from the merger became the NEPAD framework document and the name of the initiative was changed from NIA to NEPAD at the meeting of the Heads of States and Government Implementation Committee (HSGIC) in Abuja, Nigeria on 23 October 2001.[13]

NEPAD was conceived as 'Africa's principal agenda for economic development, providing a holistic, comprehensive integrated strategic framework for the socio-economic development of the continent, within the institutional framework of the African Union.'[14] It was envisioned as a home-grown strategy by which Africa claims ownership of its own development agenda.[15] Africa sees NEPAD as an instrument for weaving together many of its numerous domestic problems such as poverty, lack of investment capital, political instability, corruption, and general economic downturn.[16] NEPAD is therefore a pledge by African leaders, based on a common vision and a firm and shared conviction, that they have a pressing duty to the African people to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development, and at the same time to participate actively in the world economy and body politic.[17] NEPAD is anchored on the determination of Africans to extricate themselves and the continent from the strong grip of underdevelopment and exclusion in a globalising world.[18] It is predicated on a call for a new relationship of 'constructive partnership' between Africa and the international community based on shared responsibility and mutual interest. Its ultimate aim is to narrow and eventually overcome the development gap between the poor African states and the rich industrialised countries.[19]

Most importantly, NEPAD is also Africa's original initiative towards the achievement of the MDGs. This is evident in the NEPAD framework document which identifies as

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[13] See Nabudere *op cit* note 9; and Prof Kinfe Abraham *The New Partnership for Africa's Development (NEPAD)* Horn of Africa Democracy and Development International Lobby, available at http://www.aksophiabooks.org/ occasionalp1_19.htm.

[14] Department of Foreign Affairs, South Africa, *Background on the New Partnership for Africa's Development* May 2002. Available at http:// www.au2002.gov.za/docs/background/nepad.htm.

[15] See Francis Nwonwu 'NEPAD: A New Agenda or Another Rhetoric in Africa's Political Adventurism?' (2006) 2 *Africa Policy Journal* 1 at 2; and Nsongurua J. Udombana 'How Should We Then Live? Globalization and the New Partnership for Africa's Development' (2002) 20 *Boston University Int'l L.J.* 293 at 295.

[16] Nwonwu *ibid*, at 2.

[17] See NEPAD framework document *supra* note 7 at para 1.

[18] *Ibid.*

[19] *Ibid*, at paras 5-8.

one of its two main goals 'ensur[ing] that the continent achieves the agreed International Development Goals (IDGs) [now generally known as MDGs 1-7].'[20] Similarly, the NEPAD Secretariat in its Report to the Heads of State and Government Implementation Committee (HSGIC), states that 'NEPAD represents the logical response by Africa to the UN Secretary-General's call for the implementation of Sustainable Development Initiatives for Africa and for the achievement by Africa of the Millennium Development Goals.'[21] However, it is doubtful if NEPAD emanated directly from the need to achieve the MDGs in Africa. This is due to the fact that the mandate giving by the then OAU to the presidents of Algeria, Nigeria and South Africa to engage the developed North with a view to developing a constructive partnership for the regeneration of the Continent, and which subsequently led to the development of the MAP, preceded the adoption of the Millennium Declaration.[22] Despite this, it can be argued that the MDGs greatly influenced the development of NEPAD. This is based on the ground that not only is NEPAD's goals similar to the MDGs, but also the Steering Committee for the formulation of the MAP was established after the UN Millennium Summit in September 2000.[23] Further evidence of the influence of the MDGs on the development of NEPAD is provided by the fact that the Compact for African Recovery, a product of the Economic Commission for Africa (UNECA), which became an important document for cementing the MAP and OMEGA Plan together into the New African Initiative-NAI, represented an important

[20] *Ibid*, at para 68. The other goal being the achievement and sustenance of an average gross domestic product (GDP) growth rate of above 7 per cent per annum for the next 15 years. Even this goal is related to the MDGs as the African Development Bank has identified the achievement of an economic growth of at least 7 per cent per annum as necessary for the achievement of MDG 1. See NEPAD document *ibid*, at para 147; and African Development Bank *African Development Bank Report 2004: Africa in the Global Trading System* (ADB/Oxford University Press, 2004).

[21] New Partnership for Africa's Development *Report to the Heads of State Implementation Committee* July-Oct. 2002, at p 3. In addition, it appears that most African countries regard NEPAD as the regional framework for achieving the MDGs. See SA MDG Report 2007 *op cit* note 2 at 46-47; and Gabriël H Oosthuizen 'SADC—its own biggest obstacle in achieving the MDGs?' *IPS*, Tuesday, 11 November 2008.

[22] Mandate given at the OAU Summit of July 2000, held at Lome, Togo. Further evidence that NEPAD did not emanate from the MDGs is evident from the fact that even before the OAU mandate and subsequent formulation of the MAP, that the then South African President, Thabo Mbeki had not only conceived of such a plan, but also, went about mobilising support for his plan with the external powers even before it was drafted. See Nabudere *op cit* note 9 at 5-6.

[23] See Landsberg *op cit* note at 9.

component of UNECA's response to the implementation of the Millennium Declaration.[24]

The NEPAD framework document embodies a holistic, comprehensive and integrated strategic framework for the sustainable development of Africa. It provides a vision for Africa, a statement of the problems facing the continent and a programme of action to deal with these problems in order to realize the vision.[25] It also states the new political will of African leaders to hold themselves accountable for Africa's development by taking joint responsibility for the promotion of policies, mechanisms and institutions that will enhance the achievement of socio-economic development in the region.[26] Such expression of willingness by African leaders to hold themselves accountable to creating the enabling environment for the achievement of sustainable development in Africa is consistent with the obligation under the Millennium Compact affirmed at the Monterrey Conference on Financing for Development.[27] The NEPAD framework document identifies NEPAD's long-term objectives as the eradication of poverty; the placement of African countries both individually and collectively, on a path of sustainable growth and development; halting the marginalisation of Africa in the globalisation process; and promotion of the role of women in all activities.[28] The goals as set out in the NEPAD framework document are the achievement and sustenance of an average gross domestic product (GDP) growth rate of above 7 per cent per annum for the next 15 years; and ensuring that the continent achieves the agreed International Development Goals (IDGs).[29]

To achieve these objectives and goals, African leaders through the NEPAD framework document acknowledges the need for a new and radical approach to the pursuit of sustainable development programme in the region.[30] They therefore endorse

[24] The Compact also engendered the propositions of MAP and Omega Plan with 'good governance' as the pivot from which 'enhanced partnerships' with the donors was to be envisioned. See Nabudere *op cit* note 9 at 9.
[25] See NEPAD framework document *supra* note 7 at parts I- V.
[26] *Ibid*, at para 49.
[27] See United Nations General Assembly *Millennium Declaration* A/Res/55/2, September 18, 2000, at paras 12-13, (hereinafter Millennium Declaration); and Monterrey Consensus of the International Conference on Financing for Development, A/CONF.198/11, 22 March 2002, at paras 4 & 6-67. (Hereinafter Monterrey Consensus).
[28] *Ibid*, at para 67.
[29] *Ibid*, at para 68.
[30] *Ibid*, at para 70.

good governance as a basic requirement for the achievement of sustainable development objectives including the protection of the environment in the region.[31] Such endorsement, which is one of the major features distinguishing NEPAD from previous regional socio-economic development frameworks,[32] is motivated by the fact that 'African leaders have learned from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for sustainable development,'[33] and are therefore 'making a pledge to work, both individually and collectively, to promote these principles in their countries and sub regions and on the continent.'[34] To promote these enabling conditions for sustainable development in Africa particularly good governance, the NEPAD framework document sets out some initiatives in the areas of democracy and political governance, and economic and corporate governance.[35] To some extent, the Peace and Security Initiative is also important to the promotion of good governance as it recognises that long-term conditions for ensuring peace and security in Africa require policy measures to address *inter alia* the political vulnerabilities on which conflict is premised.[36]

The Democracy and Political Governance Initiative sets out the commitment by African leaders to 'respect the global standards of democracy, which core components include political pluralism, allowing for the existence of several political parties and workers' unions, fair, open, free and democratic elections periodically organised to

[31] *Ibid*, at para 79. See also New Partnership for Africa's Development (NEPAD) *NEPAD: An introduction* (NEPAD Secretariat, 2004) at 4; New Partnership for Africa's Development (NEPAD*) the Declaration on Democracy, Political, Economic and Corporate Governance*, AHG/235 (XXXVIII) Annex I, Assembly of Heads of State and Government, Thirty-Eighth Ordinary Session of the Organization of African Unity, 8 July 2002, Durban, South Africa, at para 5; L. Aluko-Olokun *The New Partnership for Africa's Development*, Addis Ababa 7th March 2002, available at http://www.uneca.org/eca_resources/Speeches/2002_speeches/030702presentation_nepad_amb_aluko_olokun.htm; Ernest Harsch 'Momentum builds for African plan: Donors pledge support, as African leaders fine-tune "New Partnership' *Africa Recovery*, Vol.15 #4, December 2001, p10, available at http://www.un.org/ecosoc dev/geninfo/afrec/vol15no4/154nepad.htm; and Okezie Chukwumerije 'Peer Review and the Promotion of Good Governance in Africa.' (2006) 32 *North Carolina J. Int'l L. & Com. Reg.* 49 at 63.

[32] See Professor Okey Onyejekwe in IRIN 'AFRICA: Interview with governance expert Prof Okey Onyejekwe' *UN Office for the Coordination of Humanitarian Affairs*, 16 October 2003, available at http://www.irinnews.org/report.aspx?reportid =46722; and United Nations Economic and Social Council *What NEPAD Implies for African Policy Makers*, E/ECA/CM.1/2, 30 September 2002, at p2.

[33] NEPAD framework document *supra* note 7 at para 71.

[34] *Ibid*.

[35] *Ibid*, at paras 72-92.

[36] *Ibid*, at para 73.

enable the populace to choose their leaders freely.'[37] The Initiative therefore aims to 'contribute to strengthening the political and administrative framework of participating countries, in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law.'[38] Under the Initiative, NEPAD States are required to 'undertake a series of commitments towards meeting basic standards of good governance and democratic behaviour while, at the same time, giving support to each other.'[39] In addition, NEPAD leadership will undertake a process of targeted capacity-building initiatives in order to strengthen political governance and build NEPAD members capacity to meet their commitments. Such initiatives will focus on administrative and civil services; strengthening parliamentary oversight; promoting participatory decision-making; undertaking judicial reforms; and adopting effective measures to combat corruption and embezzlement.[40] The Initiative is strengthened by and supports the Economic and Corporate Governance Initiative, with which it shares key features, and taken together will contribute to harnessing the energies of the continent towards sustainable development and poverty eradication.[41]

African leader's endorsement of good governance as a prerequisite for the achievement of sustainable development is further expounded in the NEPAD Declaration on Democracy, Political Economic and Corporate Governance,[42] which arguably provides an action plan for the implementation of both the Democracy and Political Governance, and the Economic and Corporate Governance Initiatives under the NEPAD document.[43] The Declaration not only reiterates that democracy and good

[37] *Ibid*, at para 79.
[38] *Ibid*, para 80. For elements of the initiative, see para 81.
[39] Participating states will be supported in undertaking such desired institutional reforms where required. NEPAD framework document *ibid*, at 82.
[40] *Ibid*, at para 83. The Economic and Corporate Governance Initiative aims to promote throughout the participating countries a set of concrete and time-bound programmes aimed at enhancing the quality of economic and public financial management as well as corporate governance. NEPAD framework document *ibid*, at para 88.
[41] *Ibid*, at para 80.
[42] *Supra* note 31. This Declaration is further supported with respect to Economic and Corporate Governance Initiative by the Framework for the Implementation of Banking and Financial Standards and Action Plan on Money Laundering. See New Partnership for Africa's Development (NEPAD) *A Summary of NEPAD Action Plans* (NEPAD Secretariat, 2005) 24-34.
[43] This is due to the fact that the Declaration was specifically related to the NEPAD framework in terms of its democracy and good governance objectives and goals (see Vincent O. Nmehielle 'The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?' (2003) 7 *Sing. J. Int'l & Comp. L*. 412 at FN 84). In addition, any further doubt has been dispelled by the NEPAD

governance are vital to the eradication of poverty and fostering of socio-economic development in Africa, but also, states the determination of African leaders to work together in policy and action in pursuit of democracy and good political governance; economic and corporate governance; socio-economic development; and the implementation of an African Peer Review Mechanism.[44] The Socio-Economic Development objective sets out the determination of African leader to effectively tackle poverty through *inter alia* good governance, peace and security; gender equality; enhanced openness to international trade and investment; and allocation of appropriate funds to social development.[45] The Economic and Corporate Governance objective aims to promote good economic and corporate governance including transparency in financial management as essential pre-requisites for promoting economic growth and reducing poverty.[46] African leaders therefore approved eight prioritised codes and standards that have 'the potential to promote market efficiency, to control wasteful spending, to consolidate democracy, and to encourage private financial flows….'[47]

The Democracy and Good Political Governance objective under the Declaration reaffirms African leaders' commitment to the promotion of democracy and its core values such the rule of law, individual and collective freedom, equality, liberty and adherence to the principle of separation of power in their respective countries.[48] It also states their determination to restore stability, peace and security in the region, and advance the cause of human rights especially that of ethnic minorities, women and children especially in conflict situations.[49] It further reiterates their belief in just, honest, transparent, accountable and participatory government and probity in public life, and contains their undertaking to combat and eradicate corruption, which they acknowledge retards economic development and undermines the moral fabric of society. Such determination to combat corruption, as well as the NEPAD leadership

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Secretariat which listed the Governance Declaration under the action plan for the implementation of its Democracy and Political Governance Initiative. See A Summary of NEPAD Action Plan *ibid*, at p2.

[44] *Supra* note 31 at paras 5-6.

[45] *Ibid*, at paras 20-27.

[46] *Ibid*, at para 16.

[47] *Ibid*, at para 18. They also approved other codes and standards in transparency and financial management which include recommendations on anti-money laundering. See para 19; and NEPAD Action Plan on Money Laundering in A Summary of NEPAD Action Plans *op* note 42.

[48] *Ibid*, at para 7.

[49] *Ibid*, at paras 9-10.

undertaking to encourage the adoption of effective measures towards combating corruption under the NEPAD framework document,[50] influenced the adoption of the AU Anti-corruption Convention.[51] The Convention aims *inter alia* to promote and strengthen mechanisms required to prevent, detect, punish and eradicate corruption and related offences in each State party; promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights; and establish the necessary conditions to foster transparency and accountability in the management of public affairs.[52]

The Declaration also sets out an action plan for achieving its democracy and good political governance objective.[53] Under the Action Plan, African leaders agreed in support of democracy to *inter alia* ensure that national constitutions reflect democratic ethos and supports demonstrably accountable governance; promote political representation; strengthen and establish an appropriate electoral administration and oversight bodies; and enforce strict adherence to the AU's position on unconstitutional change of governments.[54] In support of good governance, they agreed *inter alia* to ensure accountable, efficient and effective civil service; and ensure the effective functioning of parliaments and other accountability institutions as well as the independence of the judiciary in their respective countries.[55] Finally, to promote and protect human rights, they agreed *inter alia* to facilitate the development of civil society organizations (CSOs) and strengthen human rights at the national, sub-regional and regional levels; and ensure responsible free expression, inclusive of the freedom of the press.[56]

Perhaps the greatest commitment by African leaders to promote good governance as integral to the achievement of sustainable development in Africa will be through their implementation of the African Peer Review Mechanism (APRM) under the Declaration. The implementation of the APRM reflects the determination of NEPAD

[50] *Supra* note 7 at para 83.
[51] This is implicit in the 12th preambular paragraph of the *African Union Convention on Preventing and Combating Corruption*, adopted 11 July 2003.
[52] *Ibid*, at art 2.
[53] *Supra* note 31 at paras 12.
[54] *Ibid*, at para 13
[55] *Ibid*, at para 14.
[56] *Ibid*, at para 15.

States not only to enshrine core governance standards and practices, but also to provide a process for ensuring that members comply with them.[57] As stated by Paul Kagame, President of Rwanda, 'NEPAD countries decided to "develop a culture of peer-assessment in order to determine to what extent [they] are complying with agreed codes, standards, and commitments that underpin good governance and sustainable development."'[58] The APRM base document describes the mechanism as 'an instrument voluntarily acceded to by Member States of the African Union as an African self-monitoring mechanism.'[59] The primary purpose of the APRM is 'to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs for capacity building.'[60] Its overarching goal is 'for all participating countries to accelerate their progress towards adopting and implementing the priorities and programmes of … [NEPAD], achieving the mutually agreed objectives and compliance with best practice in respect of each of the areas of governance and development.'[61]

This thesis does not wish to evaluate the merits of the APRM and its process as that is not the focus of this thesis.[62] Suffice it to say that APRM is an innovative strategy that has the potential of breaking the past doctrine and practice of non-interference in the internal affairs of AU member States, as it aims at objective and constructive criticism that is bound to affect State practice in various areas to accord with international best

[57] See also NEPAD framework document *supra* note 7 at para 84. (Providing that the Heads of State Forum on the New Partnership for Africa's Development will serve as a mechanism through which the leadership of the New Partnership for Africa's Development will periodically monitor and assess the progress made by African countries in meeting their commitment towards achieving good governance and social reforms).
[58] Quoted in Chukwumerije *op cit* note 31 at 69, FN 107.
[59] AHG/235 (XXXVIII) Annex 2, Assembly of Heads of State and Government, Thirty-Eighth Ordinary Session of the Organization of African Unity, 8 July 2002, Durban, South Africa, at para 1.
[60] APRM base document *ibid*, at para 3.
[61] See *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism* NEPAD/ HSGIC-03-2003/APRM/Guidelines/OSC, 9 March 2003, at para 1.3. (Hereinafter APRM Guidelines)
[62] However, there is an abundance of scholarly articles on the subject. For example, see Chukwumerije *op cit* note 31; Nwonwu *op cit* note 15 at 13-16; Vincent Nmehielle 'The African Peer Review Mechanism under the African Union and its Initiative: the New Partnership for Africa's Development' (2004) 98 *Am. Soc'y Int'l L. Proc.* 240; and Chris Stals 'the African Peer Review Mechanism as an Integral Part of the New Partnership for Africa's Development' (2004) 4 *African HRLJ* 121.

practices elsewhere.[63] In addition, apart from encouraging members to adopt and implement policies and practices consistent with the mutually agreed upon values and standards of good governance and socio-economic development, the APRM also aims at promoting greater transparency in the affairs of its participants by requiring public disclosure of government policies, measures, and practices.[64] Such public disclosure creates greater transparency in the conduct of public affairs and which in turn promotes good governance. Furthermore, the implementation of the APRM can help in regaining the confidence of foreign investors and governments in the economic and political stability of the region as it signals the seriousness of African countries in their commitment to good governance. This in turn will attract more foreign investment, aid and debt relief to the region.[65] This is evident in the statement of the former prime minister of Canada, Jean Chretién that Canada's financial support would '[f]ocus on those countries that demonstrate a commitment to democracy, good governance and human rights or accede to the APRM.[66]

In addition to prescribing the conditions for the achievement of sustainable development, the NEPAD document stipulates some priority sectors where policy reforms and increased investment are required in order to enhance poverty reduction and achievement of sustainable development in Africa. These include infrastructure; human resource development; agriculture; environment; culture; and science and technology.[67] These sectoral priorities together with good governance also reflect areas where structural reforms are required of African countries in term of the Millennium Compact in order to achieve sustainable development in Africa.[68] Most importantly, the implementation of these sectoral priorities can positively affect environmental protection and realisation of the right to environment in Africa. Such positive effects can be indirect by virtue of tackling the root causes of poverty, which has been identified by NEPAD as the main cause and consequence of environmental

[63] See Nmehielle *op cit* note 43 at 432; and Onyejekwe *op cit* note 32.
[64] Chukwumerije *op cit* note 31 at 73-75.
[65] *Ibid*, at 77-78. See also NEPAD framework document *supra* note 7 at paras 147, 149, 151 & 154; and NEPAD Secretariat 'Ghana, a Model for APRM' *NEPAD News*, 16 May 2007. Available at http://www.nepad.org/2005/news/wmview.php?ArtID=86.
[66] Quoted in Nwonwu *op cit* note 15 at 20.
[67] *Ibid*, at part B.
[68] See United Nations *Report of the International Conference on Financing for Development*, A/CONF.198/11 (New York, 2002) at 38-39, para 30 (3); 51, para 54(2) & 62-63, para 25 (2), (hereinafter Monterrey Conference Report); and Monterrey Consensus *supra* note 27 at paras 4 & 6-8.

degradation.[69] For example, under the Infrastructure Initiative which recognises that structural gap in infrastructure in Africa constitutes a very serious handicap to economic growth and poverty reduction,[70] NEPAD seeks *inter alia* to improve access to, and affordability and reliability of infrastructure services for both firms and households.[71] Such access to affordable and reliable infrastructure services such as energy, transportation, information and communication technologies, water and sanitation, can enhance the productivity of both households and firms leading to economic growth and rise in per capita income.[72] As argued in chapter three of this thesis, at a high level of per capita, the environment gains as citizens are not only likely to move to cleaner sources of energy, thereby leading to less demand for fuelwood and charcoal which has been identified as one of the major causes of deforestation in the region,[73] but also, demand stricter and better environmental control from their policymakers and governments.[74]

On the other hand, other NEPAD sectoral initiatives may have direct positive effects on the protection of the environment and realisation of the right to environment. These include the Environment Initiative and to a certain extent, the Culture Initiative which invariably may involve the protection or conservation of the environment upon which most of Africa's culture is based.[75] The Environment Initiative recognises that a healthy and productive environment is a prerequisite for NEPAD as it is vital to creating the social and ecological base upon which the partnership can thrive.[76] Most importantly, NEPAD recognises that 'a core objective of the Environment Initiative must be to combat poverty and contribute to socio-economic development in Africa. … [and] that measures taken to achieve a healthy environmental base can contribute

[69] New Partnership for Africa's Development (NEPAD*) Action Plan of the Environment Initiative of the New Partnership for Africa's Development* (June 2003), para 23. (Hereinafter NEPAD-EAP). Sectoral initiatives that can have such indirect positive effects on environmental protection in Africa include infrastructure, human resource development; agriculture; culture and science and technology.
[70] See NEPAD framework document *supra* note 7 at para 105.
[71] *Ibid*, at para 101.
[72] See Pieter van Geel 'A Law of Energy' in *Our Planet*, the Magazine of the United Nations Environment Programme, Vol. 15, No.3, at pp11-12. (Hereinafter UNEP Magazine).
[73] See United Nations Environment Programme *African Environmental Outlook 2: Our Environment, Our Wealth* (UNEP, 2006) at 204, 213-214, & 221; and Rasheed Bisiriyu 'The Connection between energy, poverty and environmental degradation' News & Trends: Africa, *Alexander's Gas & Oil Connections* Vol. 9, Issue #14, Wednesday, July 21, 2004. Available at http://www.gasandoil.com/GOC/news/nta42939.htm.
[74] Pp 132-134.
[75] See NEPAD framework document *supra* note 7 at paras 143-144.
[76] See *ibid*, at paras 138 & 142.

greatly to employment, social and economic empowerment, and reduction of poverty.'[77] These provisions constitute an unequivocal recognition by NEPAD of the linkages between poverty and environmental degradation in Africa. This recognition is very important to environmental protection and realisation of the right to environment as it shows the strong determination of African leaders to nurture the natural environment upon which the region's socio-economic development depends. However, the Initiative has been criticised for implying that 'when protection of the environment conflicts with opportunities for economic development, the latter will be given priority.'[78] It should be noted that the same criticism was proffered against the formulation of the right to environment under the African Charter on Human and Peoples Rights and thus, the argument in chapter two of this thesis applies. In addition, it is doubtful if such was the intention of the framers as NEPAD calls for a coherent action plan and strategies to address the region's environmental challenges while at the same time combating poverty and promoting socio-economic development.[79]

To implement the Environment Initiative, the AU adopted the Action Plan of the Environment Initiative of NEPAD (NEPAD-EAP) at its July 2003 Summit.[80] NEPAD-EAP is not only the main regional policy instrument for environmental protection in Africa, but also, constitutes a coherent, strategic and long-term programme of action for Africa's sustainable development.[81] It reflects Africa's common and shared sustainable development problems and concerns.[82] It is to be used in addressing the region's numerous environmental challenges while simultaneously promoting sustainable development and combating poverty.[83] In addition, it sets out collective and individual responsibilities and actions that African countries will adopt and implement to maintain the integrity of the environment, and ensure the sustainable use of their resources through partnership with the international

[77] *Ibid*, at para 138.
[78] See Leslie C. Clark 'A Call to Restructure Existing International Environmental Law in Light of Africa's Renaissance: the United Nations Convention to Combat Desertification and the New Partnership for Africa's Development (NEPAD)' (2003) 27 *Seattle U. L. Rev.* 525 at 549.
[79] See Executive Summary, NEPAD-EAP *supra* note 69 at V, para 4.
[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid*. See also NEPAD-EAP *supra* note 69 at paras 1 & 3. (Recognising the interaction between poverty and environmental degradation in Africa).

community.[84] The Action Plan recognises that the environment is a cross-cutting issue and thus, 'it is important that environmental considerations should be duly taken into account during the implementation phase of all programmes of NEPAD.'[85]

Most importantly, the Action Plan is integrated in the sense that 'it takes full consideration of economic growth, income distribution, poverty eradication, social equity and better governance as part and parcel of Africa's environmental sustainability agenda'[86], and therefore, recognises the need for the Environment Initiative not to be implemented in isolation but in harmony with other components of NEPAD.[87] The Plan is built on the principles *inter alia* that emphasis is placed on those activities and processes that will add new and significant value to existing national, sub-regional and regional environmental management activities, and that activities are to be implemented in such a way as to ensure that Africa learns from its previous efforts and achievements while taking into account the experience gained in other regions of the world.[88] Its overall objectives are to improve environmental conditions in Africa, in order to contribute to the achievement of economic growth and poverty eradication; build Africa's capacity to implement regional and international environmental agreements; and to effectively address the African environmental challenges within the overall context of the implementation of NEPAD.[89] To achieve the above overall objectives, NEPAD-EAP identifies six (6) programmatic areas and related project activities.[90]

The NEPAD framework document does not only provide for enabling conditions as well as priority sectors where policy reforms and increased investment are required to enhance the achievement of sustainable development in Africa, it also provides for the means of mobilising resources to that effect. This section of the document is equally important as it seeks not only to encourage good governance and socio-economic

[84] *Ibid*.
[85] NEPAD-EAP *supra* note 69 at para 9.
[86] *Ibid*, at para 34.
[87] *Ibid*.
[88] *Ibid*, at para 35.
[89] *Ibid*, at para 38.
[90] These include combating land degradation, drought and desertification; conservation of Africa's wetlands; preventing, controlling and managing invasive alien species; conservation and sustainable use of marine, coastal and freshwater resources; combating climate change; and enhancing cross-border conservation and management of natural resources in Africa. See generally paras 42-132 *ibid*.

reform in Africa, but also, aims to encourage good governance and socio-economic reform at the global level that are necessary to support Africa's effort in achieving sustainable development. For instance, in the Capital Flows Initiative, NEPAD while noting that the bulk of the resources needed to achieve its goals will have to be obtained from outside the continent, also acknowledges the need for good economic and political governance within the region in order to create the enabling environment for improved resource inflow into Africa. It therefore states that the basic principle of the Initiative is that 'improved governance is a necessary requirement for increased capital flows, so that participation in the Economic and Political Governance Initiatives is a prerequisite for participation in the Capital Flows Initiative.'[91]

The Capital Flows Initiative aims at increasing domestic resource mobilisation through increased national savings, effective tax collection system, rationalisation of government expenditure and reversing capital flight.[92] It also seeks more equitable debt relief for NEPAD participating States through the extension of debt relief beyond its current levels which still require debt service payments amounting to a significant portion of the resource gap.[93] In addition, the Initiative seeks increased ODA flows in the medium term, as well as reform of the ODA delivery system, to ensure that flows are more effectively utilised by recipient African countries.[94] To achieve this, NEPAD aims *inter alia* to constitute an ODA forum for developing a common African position on ODA reform; engage through the ODA forum, with donor agencies to establish a charter for development partnership; and establish an independent mechanism for assessing donor and recipient country performance.[95] The Initiative further seeks to increase private capital flows to Africa, as an essential component of a sustainable long-term approach to filling the resource gap.[96] NEPAD identified the first priority in this regard as addressing investors' perception of Africa as a 'high risk' continent, especially with regard to security of property rights, regulatory frameworks and markets, through the implementation of its initiatives in the areas of

[91] *Supra* note 7 at 147.
[92] *Ibid*, at para 148. See also The Market Access Initiative aims to improve Africa's share in global trade. Paras 157-173.
[93] *Ibid*, at paras 149-150.
[94] *Ibid*, at para 151.
[95] *Ibid*, at para 152.
[96] *Ibid*, at para 153.

peace and security, political and economic governance, infrastructure and poverty reduction .[97]

Finally, the NEPAD framework document calls for a global partnership for the purpose of achieving sustainable development in Africa.[98] It recognises that 'a critical dimension of Africans taking responsibility for the continent's destiny is the need to negotiate a new relationship with their development partners',[99] and therefore advocates for the establishment of a new relationship with developed countries and multilateral agencies. In proposing the partnership, NEPAD while recognising that Africa holds the key to its own development,[100] envisages the following responsibilities and obligations of the developed countries and multilateral institutions. These responsibilities and obligations which involve elements of good governance and socio-economic reform at the global level, include accelerating debt reduction for heavily indebted African countries and improving debt relief strategies for middle-income countries; increased aid flows; facilitating access to existing drugs for Africans suffering from infectious diseases; improved trade access and negotiation of more equitable terms of trade for African countries within the WTO multilateral framework; supporting governance reforms of multilateral financial institutions to better cater for the needs and concerns of countries in Africa; and setting up co-ordinated mechanisms to combat corruption effectively, and committing themselves to the return of monies (proceeds) of such practices to Africa.[101]

The above discussion shows that the NEPAD framework document constitutes a valuable policy document for the pursuit of good governance and socio-economic reform in Africa. However, the utility of the document is not limited to the above objectives as it aims also at encouraging good governance and socio-economic reform at the global level necessary to support Africa's effort in achieving sustainable development objectives including poverty reduction and the protection of the environment. In addition, by emphasising *inter alia* peace, democracy, good

[97] *Ibid*, at para 154. For the actions to increase private capital flow, see para 155. See generally A Summary of NEPAD Action Plan *op cit* note 42 at 72-76. (Providing a summary of the plan of action to the Capital Flows Initiative).
[98] *Ibid*, at chapter V. For implementation of NEPAD, see chapter VI.
[99] *Ibid*, at 186.
[100] *Ibid*, at para 205.
[101] *Ibid*, at 188.

governance, human rights, education, health, debt relief and environmental protection, the NEPAD document underscores a renewed desire by Africa leaders for a holistic African development.[102] Most importantly, by the emphasis on good governance and socio-economic reform, it can be argued that the NEPAD document constitutes a grand African development initiative designed as a means of discharging the region's obligation under the Millennium Compact affirmed at the Monterrey Conference. This perhaps explains why NEPAD and its framework document have received widespread support within and outside Africa including the UN General Assembly which adopted NEPAD as the general framework around which the international community including the United Nations system should concentrate its efforts for Africa's development.[103]

Despite the widespread support, NEPAD has equally been criticised on many fronts. Most of these criticisms relate to issues arising from the manner of the formulation and adoption of NEPAD and its framework document as it has been accused of being a top-down strategy conceived and hatched by a handful of African heads of state.[104] In addition, NEPAD has been criticised for its perceived capitulation to the global capitalist market, and its large-scale concession to the precepts of the neo-liberal orthodoxy that perpetuates an unfavourably skewed distribution of resources, wealth, and power.[105] Furthermore, critics are skeptical NEPAD will be unable to honour its own commitments on good governance and human rights, and that the peer review mechanism will not be effective given the reluctance of the AU and African leaders to criticise and ostracise one another.[106] This is perhaps the most important criticism of NEPAD as African leaders have mostly been reluctant to implement the objectives of

[102] See Nmehielle *op cit* note 43 at 430.
[103] See *United Nations Declaration on the New Partnership for Africa's Development* G.A. Res. 57/2, P 6, U.N.GAOR, 57th Sess., U.N. Doc. A/Res/57/2 (Sept. 16, 2002). In addition, the IMF, World Bank, the European Commission and G8 have endorsed NEPAD. See NEPAD-EAP *supra note* 69, at paras 6 & 7.
[104] See Nwonwu *op cit* note 15 at 21-22; Iraqi Al Sherbini 'NEPAD and the African development critical review of some major issues.' In El-Sayyid (ed) *Neo-Liberalism and African Development Strategies: Prospects of the New Partnership for African Development* 27 (2003) 49-73. Cited in Nwonwu *ibid*, at 21.
[105] See Nwonwu *ibid*, at 22; Abraham *op cit* note 13 at 8; Chukwumerije *op cit* note 31 at 59; Ian Taylor 'The New Partnership for Africa's Development and the Global Political Economy: Towards the African Century or Another False Start?', available at http://www.codesria.org/Links/ conferences/ Nepad/ taylor.pdf; and Sean OíDriscoll 'NEPAD Seeks to Revitalize Africa but Faces Criticism and its Own Ailments' *The Washington Diplomat*, September 2004; available at http://www.washington diplomat.com/0409/ a4_09_04.html.
[106] See Abraham *ibid*.

the programme. For instance, the political systems in many African nations portray clear deviations from the NEPAD objectives of democracy, good political and corporate governance, respect for human rights, and the rule of law.[107] In addition, only 26 African nations have signed up to the APRM, while a paltry five (5) nations have so far been peer-reviewed since the inception of the process. This is highly unacceptable for a region where its leaders claim to regard good political and economic governance as indispensable to the achievement of their development, and have pledged to hold themselves accountable for instituting such governance.

6.3 Group of Eight Industrialised Nations (G8) African Action Plan

The Action Plan was adopted by the Heads of State and Government of the G8 and the representatives of the European Union at their 2002 Summit held in Kananaskis, Canada. The Action Plan was adopted in response to the invitation from African leaders, extended first at the 2001 Genoa Summit and reaffirmed in the NEPAD framework document, to build a new partnership between Africa countries and the international community especially the developed countries, based on mutual responsibility and respect.[108] The Action Plan therefore constitutes G8's initial response, designed to encourage the imaginative effort that underlies the NEPAD and to lay a solid foundation for future cooperation.[109] The Action Plan acknowledges that the case for action in Africa is compelling and that many initiatives designed to spur Africa's development have failed to deliver sustained improvements to the lives of individual women, men and children throughout Africa.[110] It further acknowledges that NEPAD offers something unique as the initiative *inter alia* constitutes a pledge by African leaders to the people of Africa to consolidate democracy and sound economic management, and to promote peace, security and people-centred development; states the undertaking of African leaders to formally hold each other accountable for the achievement of the pledge; and emphasises good governance and human rights as necessary preconditions for Africa's recovery.[111]

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[107] See Nwonwu *op cit* note 15 at 24-25; and NEPAD Secretariat 'African Peer Review Mechanism (APRM) gathers momentum' *NEPAD News*, 14 May 2007.
[108] See G8 *Africa Action Plan*, Sommet Kananaskis Summit, Canada, 2002, at para 1. Available at http://www.iss.co.za/af/regorg/nepad/g8africaplan.pdf.
[109] *Ibid*.
[110] *Ibid*, at para 2.
[111] *Ibid*, at para 3.

The Action Plan therefore welcomes the commitment of African leaders under NEPAD. In support of the NEPAD objectives, each G8 member State agree to establish enhanced partnerships with African countries whose performance reflects the NEPAD commitments.[112] Such African countries are to be selected on the basis of measured results such as their level of political and financial commitment to good governance and the rule of law, investing in their people, and pursuing policies that spur economic growth and alleviate poverty.[113] For African countries that satisfy these conditions, the G8 member States pledge to match their commitment with an equivalent commitment on their part to 'promote peace and security in Africa, to boost expertise and capacity, to encourage trade and direct growth-oriented investment, and to provide more effective official development assistance.'[114] This is a very important provision as it indicates the willingness of developed countries to hold themselves accountable for creating the global enabling environment conducive to the achievement of NEPAD objectives. Such commitment is consistent with their obligation under the Millennium Compact to support developing countries efforts towards the achievement of sustainable development.[115]

The utility of the Action Plan does not lie only in the fact that developed countries have pledged to hold themselves accountable for promoting the global enabling condition for the achievement of sustainable development in the region, as the Plan can also be used to encourage the pursuit of good governance and socio-economic reform by African countries. This evident from the fact that the G8 under the Action Plan hinged their selection criteria for the eligibility into the enhanced African partnership on the basis of a recipient country's level of political and financial commitment to good governance and socio-economic reform. Further evidence that the G8 through the Action Plan seeks to enhance the promotion of good governance and socio-economic reform in Africa, is provided by their endorsement of the APRM, which they emphasise will inform their considerations of eligibility for enhanced partnerships.[116] In essence, African countries' accession and submission to the APRM

[112] *Ibid*, at paras 3 & 4.
[113] *Ibid*, at para 4.
[114] *Ibid*.
[115] See FN 27.
[116] *Ibid*, at para 7.

process is vital to engaging the trust of the G8 member States.[117] For African countries that do not yet meet the standards of NEPAD, but which are clearly committed to and working towards its implementation, the G8 promised to work with them.[118]

However, the G8 member States will not work with 'governments which disregard the interests and dignity of their people.'[119] This provision constitutes a declaration by the G8 that they are no longer prepared to work with oppressive and autocratic governments in Africa as such partnership only ends up in propping such regimes, and does not contribute to the socio-economic development of their citizens. This appears to be a complete break from the era where western nations lent money or offered other forms of assistance to authoritarian African regimes, without regard to their human rights or governance records, provided they served their strategic interests as exemplified by the erstwhile Mobutu's regime in the former Zaire (now Democratic Republic of Congo).[120] It should be noted that the fact that the G8 is not prepared to work with oppressive government does not mean that foreign assistance will be denied in areas where such denial would have direct adverse effects on the already deprived population of the recalcitrant country. This is because the Action Plan holds that the G8 commitment to respond to situations of humanitarian need and address core issues of human dignity and development is independent of particular regimes.[121]

Most importantly, the Action Plan recognises the achievement of the MDGs as an integral component of the enhanced partnership with Africa.[122] Such recognition shows that the achievement of the MDGs which as argued earlier is the principal goal of NEPAD is also the main motivation behind the pledge by the G8 to enter into enhanced partnership with NEPAD participating States. Further evidence that G8 intends to use the Action Plan to enhance the achievement of the MDGs in Africa, is provided by the fact that the Action Plan states the desire of the G8 member States to

[117] See NEPAD secretariat *op cit* note 65.
[118] See G8 African Action Plan *supra* note 108 at para 7.
[119] *Ibid*.
[120] See Joseph Stiglitz *Globalisation and its Discontent* (2003) 244, (rightly arguing that when the IMF and World Bank lent money to the late Mobutu, they knew that it will not be used to advance economic development, but instead to enrich Mobutu); and Steve Radelet 'Will the Millennium Challenge Account be Different' (2003) 26 (2) *The Washington Quarterly* 171 at 174-175.
[121] *Supra* note 108 at para 8.
[122] *Ibid*.

fulfil the commitments they made at the 2002 Monterrey Conference, especially in the area of increasing the flow of official development assistance (ODA) to developing countries.[123] The G8 intends that 'in aggregate half or more of our new development assistance could be directed to African nations that govern justly, invest in their own people and promote economic freedom.'[124] Such action will serve the twin purpose of supporting the objectives of NEPAD and helping to 'ensure that no [African] country genuinely committed to poverty reduction, good governance and economic reform will be denied the chance to achieve the Millennium Goals through lack of finance.'[125]

The Action Plan is to be pursued by the G8 in their individual and collective capacities, and through the international institutions to which they belong.[126] The latter will include the International Monetary Fund (IMF), World Bank, and World Trade Organisation (WTO) that are currently being dominated by members of the G8. The above provision therefore constitutes a pledge by the G8 to ensure that the activities of these organisations enhance the achievement of sustainable development in Africa. This pledge by implication involves restructuring the governance structure of the organisations to accommodate the interest of African countries. The G8 also pledges that '[w]e will continue to maintain a constructive dialogue with our African partners in order to achieve effective implementation of our Action Plan and to support the objectives of the NEPAD.'[127]

To demonstrate their support for the enhanced partnership with African countries, the G8 made various commitments in support of the NEPAD. Such commitments involve areas where the G8 members pledge to undertake socio-economic reform towards the achievement of sustainable development in Africa. They include the promotion of peace and security;[128] strengthening institutions and governance by *inter alia* supporting the NEPAD's priority political governance objectives; strengthening capacity-building programmes related to economic and corporate governance in Africa; supporting the African peer-review arrangements; giving increased attention

[123] *Ibid*, at para 9.
[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*, at para 10.
[127] *Ibid*.
[128] *Ibid*, at part I.

to and support for African efforts to promote and protect human rights; and intensifying support for the adoption and implementation of effective measures to combat corruption, bribery and embezzlement.[129] They also agree to foster trade, investment, economic growth and sustainable development in Africa by *inter alia* helping the region to attract internal and external investment, and implement policies conducive to economic growth; providing greater market access for African products; improving the effectiveness of ODA, and strengthening ODA commitments for enhanced-partnership countries.[130]

Furthermore, the G8 promise to implement debt relief through the Heavily Indebted Poor Countries (HIPC) Initiative, and to provide additional debt relief on a case-by-case basis, to countries that have suffered a fundamental change in their economic circumstances due to extraordinary external shocks. They also promise to expand knowledge *inter alia* by improving and promoting education and expanding digital opportunities; supporting efforts to ensure equal access to education by women and girls; and working with African partners to increase assistance to Africa's research and higher education capacity in enhanced-partnership countries.[131] Other commitments relate to improving health and confronting HIV/AIDS; increasing agricultural productivity by *inter alia* making support for African agriculture a higher international priority in line with the NEPAD's framework and priorities; and improving water resource management.[132]

It is apparent from the above discussion that this Action Plan, serves as an instrument for discharging the obligation of these G8 member States under MDG 8 as it contains their promise of reforms in the areas of trade, ODA, and debt relief, as well as to help Africa to participate effectively in the international financial and trading systems. However, the G8 commitments are predicated on African leaders demonstrating a political and financial commitment to good governance and sound socio-economic reform. In essence, the Action Plan reiterates the Millennium Compact and sets out a new vision of partnership between the G8 and Africa based on mutual accountability

[129] *Ibid*, at part II.
[130] *Ibid*, at part III.
[131] *Ibid*, at parts IV-V.
[132] *Ibid*, at parts VI-VIII.

and respect.[133] This G8 policy position is exemplified by the statement of George Bush, the US President during the launching of the Millennium Challenge Account (MCA),[134] which is the US main policy instrument for discharging its obligation under MDG 8 that '[w]e must tie greater aid to political and legal and economic reforms.'[135]

From an environmental perspective, the Action Plan does not contain much commitment to the conservation and protection of the environment in Africa, save for improving water resource management, thereby making the document appear more interested in Africa's socio-economic development. Despite this neglect, the Action Plan constitutes an important policy document for the protection of the environment and realisation of the right to environment in Africa. This is due to the fact that achieving the commitments stated in the Action Plan can help in reducing poverty, the main cause of environmental degradation in Africa. In addition, by emphasising good governance and sound socio-economic reform as prerequisites for the G8 commitments, the Action Plan constitutes a vital instrument for the promotion of the two factors, which as noted in the preceding chapter are vital ingredients in creating the enabling environment for the achievement of sustainable development objectives including right to environment in Africa.[136]

However, the G8 commitments in the Action Plan have been criticised for not doing enough to help sustainable development in Africa, despite the then Canadian Prime Minister hailing the Action Plan as 'a deal that represents a new beginning and fresh hope for the African continent',[137] and African leaders being optimistic about its effectiveness.[138] Critics and activists have said that the G8 commitments amount to

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[133] See Group of Eight *Progress report by the G8 Africa Personal Representatives on implementation of the Africa Action Plan* (G8 Gleneagles, 2005) para 6. Available at http://www.g8.de/Contentm/DE/ Artikel/G8Gipfel/Anlage/Abschlusserkl_C3_A4rungen/wv-afrika-annexen,property=publicationFile. pdf.

[134] MCA was set up by the current Bush Administration in March 2002 to reward developing nations that 'govern justly, invest in their people and encourage economic freedom.' See The White House *The Millennium Challenge Account*. Available at http://www.whitehouse.gov/ infocus/developing nations/ millennium.html. See also Economic Commission for Africa *Governance for a Progressing Africa: Fourth African Development Forum* (UNECA, 2005) 7.

[135] The White House *ibid*.

[136] Pp 13-15.

[137] See 'G8 agrees Africa action plan' *BBC News*, Thursday, 27 June, 2002.

[138] See BBC News *ibid*; Kathleen Deering Ubyssey 'NGOs slam G8 Africa Action Plan' *Brock Press*, available at http://media.www.brockpress.com/media/storage/paper384/news/2002/07/02/FeaturesNgos

very little. According to Phil Twyford, Oxfam international advocacy director, '[t]hey are offering peanuts to Africa and repackaged peanuts at that.'[139] For Mara Vanderslice, spokesperson for Jubilee USA Network, the Action Plan does not adequately address the issue of debt cancellation for African countries which is vital to poverty reduction as African countries will continue to 'spend more than $13.5 billion per year servicing debt to foreign creditors, … [which] is more than the entire amount of aid that's being currently offered by G8 leaders.'[140] She describe the HIPC Initiative as inefficient in reducing debt as it requires a country to have a debt totalling more than 150 per cent of their annual exports to qualify for debt relief, and said that '[The G8 countries] need to acknowledge these debts are fundamentally unpayable and need to be cancelled outright immediately.'[141] Other critics feel that the commitments in the Plan are too broad and lack the guidelines necessary to solve Africa's problems.[142] Perhaps like NEPAD, the main criticism of the Action Plan is whether it will not end up as a mere declaration of intent as exemplified by the recent collapse of the Doha Development Round of trade negotiations caused mostly by the reticence of developed nations to remove their trade distorting agricultural subsidies. This occurred despite the declaration by the G8 under the Action Plan that they are committed to the Doha development agenda and implementation of the WTO work programme.[143]

6.4 Conclusion

The discussion in this chapter shows that the MDGs have influenced the adoption of policies for the achievement of sustainable development in Africa. An analysis of the major policy documents shows that these policies promote good governance and socio-economic reform at both the national and global levels, as indispensable to the achievement of sustainable development objectives including poverty reduction and realisation of the right to environment in Africa. The fact that these policy documents

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-Slam.G8.Africa.Action.Plan-257333.shtml; and Common Dreams News Center 'Peanuts": G8 Leaders Launch New Plan for Africa, Activists Angry' *Agence France Presse* Friday, June 28, 2002 , available at http://www.commondreams.org/headlines02/0628-03.htm;

[139] Quoted in Common Dreams News Center *ibid.*

[140] Quoted in Ubyssey *op cit* note 138.

[141] *Ibid*.

[142] *Ibid*.

[143] *Supra* note 108 at part III.

were adopted to achieve the MDGs in Africa gives credence to the argument in the preceding chapter that the MDGs can be used to promote good governance and socio-economic reform. The analysis in this chapter also shows that these policy documents embody the political commitments of both African and developed countries to hold themselves accountable for creating the enabling environment for the achievement of sustainable development in Africa by instituting good governance and sound socio-economic reform at the national and international levels. Such declaration of intent which was principally motivated by the need to achieve the MDGs and overall sustainable development in Africa points to the normative importance of the MDGs as a framework of accountability.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

The discussion in this thesis shows that despite the fact that the MDGs are soft norms and therefore not legally binding, they are not shorn of normative value as they have provided a framework for holding governments accountable to their millennium anti-poverty commitments. Discharging these commitments as evident from the Millennium Compact affirmed at the Monterrey Conference on Financing for Development,[1] requires both developing and developed countries to create the enabling environment at the national and global levels, for the achievement of poverty reduction and sustainable development, via the institution of good governance and sound socio-economic reform.[2] This thesis therefore argues that the role of the MDGs in guiding or stimulating national and international policy reform towards the realisation of the right to a environment in Africa, is that as a framework of accountability, they can be used to promote good governance and socio-economic reform, two ingredients that are vital in tackling the socio-economic and political factors militating against the realisation of the right in Africa.

In arriving at this conclusion, the thesis makes use of a multidisciplinary range of materials in addressing the principal questions raised by the research. It finds that there is an established right to environment in Africa, and that the right has not been realised in the region as a result of environmental degradation. In enquiring into the causes of environmental degradation in Africa, the thesis finds that the poor state of the environment is not due to lack of regulatory frameworks, but rather by inter-related socio-economic and political factors, of which poverty has been identified as the most dominant. It further finds that it is due to this lacuna that the MDGs which have given renewed vigour to the achievement of poverty reduction and sustainable development become relevant to the realisation of the right to environment in Africa. In examining the role of the MDGs in guiding or stimulating national and

[1] Held in March 2002.

[2] See Monterrey Consensus of the International Conference on Financing for Development, A/CONF. 198/11, 22 March 2002, at paras 4 & 6-67, (hereinafter Monterrey Consensus); and United Nations *Report of the International Conference on Financing for Development*, A/CONF.198/11 (New York, 2002) at 38-39, para 30 (1)-(3); 51, para 54(2) & 62-63, para 25 (2)-(3), (hereinafter Monterrey Conference Report).

international policy reform that will tackle these militating factors, the thesis finds that there exists a linkage albeit theoretical between the achievement of the MDGs and realisation of the right to environment. It also finds that despite the fact that the MDGs are soft norms, they are not shorn of normative importance, and thus, can be used in guiding or stimulating national and international policy reform towards the realisation of the right to environment in Africa. This finding is based on the ground that the MDGs, by mustering unprecedented political consensus, have metamorphosed into a framework for holding governments accountable to their millennium commitments to create the enabling environment for poverty reduction and achievement of sustainable development, via institution of good governance and sound socio-economic reform. Finally, the thesis finds that the MDGs have influenced the adoption of policies and these policies advocate both good governance and socio-economic reform as indispensable to the achievement of sustainable development objectives including poverty reduction and right to environment in Africa.

However, the utility of the MDGs in promoting good governance and sound socio-economic reform is dependent on their continuing political relevance as a framework of accountability. This is turn is dependent on the mobilisation of the MDGs by national governments, bilateral and multilateral donors, NGOs and various other actors that have a role in the promotion of Africa's sustainable development.[3] The United Nations (UN) through the Millennium Campaign has done a lot in mobilising political support for the MDGs by informing, inspiring and encouraging people's involvement and action for the realisation of the goals. This is a very important initiative in promoting citizens' efforts to hold their government and international institutions to account for their Millennium anti-poverty promises. The ability of citizens to hold their politicians accountable is vital in building the relevant political support for the MDGs.[4] As observed by Herfkens, 'I know how politicians work. They do care. But they ask themselves "can I win or lose votes if I show leadership on pro-development issues?'[5] Similarly, Shetty argues that 'the only way in which

[3] See Paul J. Nelson 'Human Rights, the Millennium Development Goals, and the Future of Development Cooperation' (2007) 35 (12) *World Development* 2041 at 2046.
[4] See UN Millennium Campaign at http://www.Millenniumcampaign.org/site/pp.asp?c=grKVL2NLE&b=72249
[5] Eveline Herfkens *The United Nations' MDG Campaign for a Better World & Religious Responses* Speech delivered at On the Role of American Religious Communities in Achieving the Millennium Development Goals: A Consultation, the Church Center at the United Nations New York, 8 June 2005,

governments will actually act is when there is pressure from citizens to hold them to account for their promises.'[6]

It is in the area of public advocacy and creating public and international awareness about the goals that the co-operation of the NGOs is vital as more still need to be done with regard to creating awareness.[7] However, as noted in chapter one of this thesis, the goals were not well-received by the human rights, environment and development advocates and communities, even though their criticisms centred not on the need for the MDGs, but the inadequacies relating to most of their targets and indicators.[8] Such an attitude may cause the NGOs not to align their goals with the objectives of MDGs, thereby adversely affecting the main avenue through which the public may be sensitised about the MDGs. Thus, if the public are to be sensitised about the MDGs as well as to be able to hold their politicians to account, then NGOs need to support the MDGs by re-aligning their goals with the objectives of the MDGs. One way of doing this is for the NGOs to take cognisance of the fact that the relevance of the MDGs does not lie in their individual goals, targets and indicators, but in the overall framework they establish. In essence, they should take heed of Williamson's suggestion that the MDGs should be used as a 'benchmark for moving forward on the key [environmental], social and economic issues of our age.'[9] This suggestion is more pertinent with regard to using the MDGs to promote the realisation of the right to environment. A composite right, which as evident from the discussion in chapter two cuts across the whole spectrum of major NGOs activities vis-à-vis environmental protection, human rights, and development.

However, the degree to which governments can be held accountable to their MDGs commitments is dependent on whether governments are amenable to being held to account by their citizens and the wider international community. The current situation in Zimbabwe points to the fact that where a government is intransigent, there is little

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at p8. Available at http://www.Millenniumcampaign.org/ atf/cf/D15FF017-0467-419B823ED6659E0 CCD39}/SPEECH_ NY_CHURCH%20CENTRE_08-06-2005.DOC.

[6] Salil Shetty 'The Millennium Campaign: Getting governments to keep their promises' (2005) 48 (1) *Development* 25 at 27.

[7] See Herfkens *ibid*, at 8-10; and Shetty *ibid*, at 28.

[8] Pp 11-12.

[9] Roger Williamson *The Millennium Development Goals: Ensuring Achievability and Accountability* Wilton Park Paper (December 2005) 8. Available at http://www.wiltonpark.org.uk/document/ conferences/WP786/pdf/WP786.pdf.

possibility of the citizens and the international community holding the State accountable to its millennium commitment to create the enabling environment for the achievement of poverty reduction and sustainable development. The recent collapse of the Doha Round of Trade Negotiations also shows the limit to which developed nations can be held accountable to their millennium commitment by the global citizenry and developing nations. Presently, the Millennium Declaration,[10] the Monterrey Consensus,[11] the New Partnership for Africa's Development (NEPAD),[12] and the G8 African Action Plan,[13] embody in principle the commitment of both developed countries and African leaders to hold themselves accountable for creating the enabling environment for the achievement of poverty reduction and sustainable development in Africa. What is needed is for them to translate their commitment into concrete action. This is necessary if the MDGs are to be useful in tackling the underlying causes of environmental degradation and non-realisation of the right to environment in Africa.

For African countries, this involves mobilising adequate political will to institute or undertake good governance and sound socio-economic reform. What African leaders are required to do in order to improve governance is already apparent from the discussion in chapter five of this thesis on the aspects of good governance as can be promoted, which are essential to complement socio-economic reform in providing the enabling environment for the achievement of sustainable development objectives. Regarding sound socio-economic reform, African countries need to restructure and reinvigorate their regulatory and economic policies in order to reduce their marginalisation, speed up their integration into the globalisation process, and combat poverty.[14] Required actions in this area include removing obstacles to private investment by streamlining and strengthening their domestic legal frameworks for doing business, improving public investment in infrastructure, and providing education to ensure that domestic firms respond to new opportunities associated with

[10] United Nations General Assembly *Millennium Declaration* A/Res/55/2, September 18, 2000, at paras 12-13.
[11] *Supra* note 2 at para 4.
[12] *The New Partnership for Africa's Development (NEPAD)* (October 2001), at para 49. (Hereinafter NEPAD framework document).
[13] G8 *Africa Action Plan*, Sommet Kananaskis Summit, Canada, 2002, at para 4.
[14] Nsongurua J. Udombana 'The Summer has ended and we are not Saved! Towards a Transformative Agenda for Africa's Development' (2005) 7 *San Diego Int'l L.J.* 5 at 54.

greater integration.[15] In addition, African countries need to invest in their health and educational infrastructures, as improving both health and education of their citizens will lead to higher productivity and per capita income, and which in turn will positively affect the protection of the environment. Some African countries like South Africa has to a certain extent improved its health and educational facilities, while others like Nigeria has witnessed a steady deterioration of such facilities, thereby depriving poor Nigerians access to good education and healthcare.[16]

African countries should also improve the protection of their environment through enforcing environmental regulations and adopting new ones when the need arises, as well as making funds available for fighting environmental degradation. In addition, they must tackle corruption in the environmental sector in order to improve the enforcement of environmental regulations, as well as to prevent a situation where money budgeted for the environment is misappropriated.[17] The improvement of environmental protection is very important to the achievement of overall sustainable development in the region because of the reliance of most of their citizens on the environment for their sustenance. In addition, they should reform their agricultural policies including promoting agricultural research, since agriculture is the dominant sector of the region's economy.[18] This is necessary to avoid a situation where a country like Nigeria has gone from being the major exporter of palm products to being a net importer of the same product incidentally from Malaysia, who acquired the technical knowledge relating to its cultivation from Nigeria. Most importantly, African countries need to entrench the human dimension in all their development policies. As aptly argued by Udombana, '[h]umanity must be the objective and supreme beneficiary of development, otherwise development becomes a meaningless vanity and vexation of the spirit.'[19] To achieve this, African countries must take tangible measures that will deliver to its citizens basic needs such as nutritional food, affordable housing, clean drinking water, effective and affordable drugs, reliable

[15] World Bank *Global Economic Prospects 2004: Realizing the Development Promise of the Doha Agenda* (World Bank, 2003) at xv-xvi.
[16] Some commentators may contest the issue of South Africa having improved its educational and health facilities. However, when compared to most African countries, it can be argued that the government of South Africa has really tried in this regard.
[17] For example, see Kingsley Nweze 'Senate: Govs Spend Ecological Funds on Entertainment' *THISDAY* 3 January 2008.
[18] See Udombana *op cit* note 14 at 56-57.
[19] *Ibid*, at 57.

electricity and telecommunications, functional educational systems, and efficient transportation networks.[20]

The New Partnership for Africa's Development (NEPAD) despite its shortcomings offers a common programmatic tool for the achievement of good governance and socio-economic reform in Africa. Its major problem as stated in the preceding chapter is whether member States of the African Union can mobilise enough political will to translate their provisions into concrete results.[21] Presently, despite the pledge of African leaders under NEPAD to hold themselves accountable for creating the enabling environment for the achievement of sustainable development, the problem of bad governance is still afflicting many countries in the region. This is exemplified by the Zimbabwe crisis where Robert Mugabe, its 84-year old dictator, recently expressed his contempt for democracy in the wake of the March 2008 general election which he lost that '[w]e are not going to give up our country for a mere X on a ballot. How can a ballpoint pen fight the gun?'[22] He went on to declare that only God would dethrone him.[23] These chilling words came from a man whose brutal regime and repressive polices have not only decimated the economy, but also, have plunged a country once hailed as the 'food basket' of southern Africa into a country where most of its citizens are dependent on food aid. It should be noted in a situation of bad governance as currently being experienced in Zimbabwe, while the resulting poverty, disease and hunger grab world attention, the environment is usually the silent victim or consequence.[24]

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[20] Udombana *ibid*, at 59.

[21] See Patrick Chabal 'The quest for good government and development in Africa: is NEPAD the answer?' (2002) 73 (3) *International Affairs* 447; and Professor Okey Onyejekwe in IRIN 'AFRICA: Interview with governance expert Prof Okey Onyejekwe' *UN Office for the Coordination of Humanitarian Affairs*, 16 October 2003, available at http://www.irinnews.org/report.aspx?reportid =46722. (Both arguing that African leaders are half-heartedly committed to multiparty democracy was a way to access foreign resources and even sometimes a mechanism for self-perpetuation).

[22] Quoted in Rt. Hon. Raila A Odinga, Prime Minister of the Republic of Kenya, *Democracy and the Challenge of Good Governance in Africa*, Paper Delivered at the 25th Anniversary of The Guardian Newspaper in Lagos, Nigeria, on 9 October 2008. Available at http://www.africanloft.com/raila-odinga-africa-is-a-continent-of-huge-contrasts-kenyan-prime-ministeraddresses-nigerian-media-house/.

[23] See Rt Hon Raila Odinga, Prime Minister of Republic of Kenya, *Leadership and Democracy in Africa*, Tuesday 22 July 2008, at p4. Available at http://www.chathamhouse.org.uk/files/11845 _22070 8odinga.pdf. (Hereinafter Odinga II).

[24] See 'Economic woes take toll on environment in Zimbabwe' *Business Report*, 30 August 2007; and Masimba Biriwasha 'Zimbabwe: A cry for the environment' *Ecoworldly*, 30 July 2008.

Exacerbating the situation is the unwillingness of African leaders to hold each other accountable for bad governance. Raila Odinga, the Prime Minister of Kenya recently decried this trend when he observed with respect to the attitude of African leaders to the sham June 2008 run-off election in Zimbabwe, that 'the African Union singularly failed in condemning the sham elections in Zimbabwe at the recent summit in Egypt. They neither made specific demands on Mugabe nor condemned him resoundingly.[25] The AU's inaction is different from the recent stringent criticisms of the legitimacy of President Mugabe's administration by some southern African countries during the recent 2008 Southern African Development Community (SADC) Summit.[26] The AU needs to toe the same line and must not hesitate to condemn sham elections and other manifestations of bad governance in Africa. In addition, the AU must actively encourage its member States to sign up to the African Peer Review Mechanism (APRM), which is essential to the realisation of the NEPAD objectives of reducing poverty and placing the continent on a path of sustainable growth and development.

The commitment of African nations must be matched by equivalent commitment on the part of developed nations towards meeting their millennium commitment to create the global enabling environment for the achievement of poverty reduction and sustainable development in Africa. This implies meeting their commitments on aid, debt and trade under MDG 8, especially in relation to Africa. So many promises have been made by developed nations in relation to Africa as evident by the G8 African Action Plan and the supporting Gleneagles Communiqué.[27] However, recent evidence has shown that while there has some progress in reducing Africa's debt burden, the attitude of developed countries towards meeting their commitments have at best been tepid.[28] The major challenge is for developed nations to concretise their commitments

[25] Odinga *op cit* note 22 at 4-5. It appears that the failure of African leaders to hold each other accountable is legendary. See Dr. Ubong E. Effeh 'Sub-Saharan Africa: A Case Study on How not to Realize Economic, Social and Cultural Rights, and a Proposal for Change' (2005) 3 *Northwestern University J. Int'l Hum. Rts.* 2 at 10-13

[26] The President of Botswana refused to attend the Summit on the ground of the illegitimacy of Mugabe's government. See ETV 'Zambia calls Zimbabwe bye-election a blot on democracy' & 'Botswana Boycott SADC Summit', eNews *Prime Time*, 16 August 2008; and 'Botswana Refuses to Recognize Mugabe as President of Zimbabwe,' *BBC Monitoring Africa*, 8 July 2008.

[27] See G8 Africa Action Plan *supra* note 13, at para 1; and 'The Gleneagles Communiqué on Africa' (2006) 12 *Law and Business Review of the Americas* 245.

[28] See United Nations *Millennium Development Goals Report* (New York, 2008) 44-48; and United Nations Economic and Social Council, Economic Commission for Africa & African Union Commission Assessing *Progress in Africa towards the Millennium Development Goals Report 2008*, E/ECA/COE/27/10AU/CAMEF/EXP/10(III), 6 March 2008, at pp 18-19.

into actions as such is critical for the achievement of sustainable development objectives including poverty reduction and realisation of the right to environment in Africa.

BIBLIOGRAPHY

A. STATUTES/CONVENTIONS

National

Kenya

Constitution of the Republic of Kenya (Revised Edition), 1998.

Environmental Management and Coordination Act No. 8 of 1999.

Kenya National Commission on Human Rights Act No. 9 of 2002.

Nigeria

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Vol. 1, LFN 2004

Constitution of the Federal Republic of Nigeria, 1999.

Federal Environmental Protection Agency (FEPA) Act, 1988, Cap F10 *LFN* 2004

National Human Rights Commission Act of 1995.

South Africa

Constitution of the Republic of South Africa, 1996.

Environmental Conservation Act No. 73 of 1989.

National Environmental Management Act No. 107 of 1998.

National Environmental Management: Air Quality Act No. 39 of 2004.

National Environmental Management: Biodiversity Act No. 10 of 2004.

National Environmental Management Act: Protected Areas Act No. 57 of 200.

National Water Act No.36 0f 1998.

South African Human Rights Commission Act No. 54 of 1994.

India

Indian Constitution, 1950.

US

Restatement (Third) of the Foreign Relations Law of the United States (1987).

International

Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal, 1987.

Convention on Biological Convention, 1992

Regional

Additional Protocol to the American Convention on Human Rights, 1988

African Charter on Human and Peoples' Rights, 1981.

African Charter on the Rights and Welfare of the Child, 1990.

African Convention on the Conservation of Nature and Natural Resources, 1968.

African Convention on the Conservation of Nature and Natural Resources (revised edition) 2003.

African Union Charter, 2000.

Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 1991.

European Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998.

European Convention on Civil Liability from Activities Dangerous to the Environment, 1993.

Organisation of African Unity (OAU) Charter, 1963.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1994

Protocol on the Statute of the African Court of Justice and Human Rights, 2008

B.CASES

National

Canada

Reference re Secession of Quebec (1998) 2 S.C.R. 217

Costa Rica

Carlos Roberto Mejia Chacon v. Municipalidad de Santa Ana Judgment No. 3705-93, Supreme Court, Constitutional Chamber, July 30, 1993.

Kenya

Sylvia C. Endere versus Karen Roses Ltd, HCCC (Nakuru) No. 298 of 2005. Reported on [2006] eKLR (Kenya).

Sha Vershi Devshi and Company Ltd v The Transport Licensing Board (1971) EALR 289 (Kenya).

Abdikadir Sheikh Hassan and 4 others v Kenya Wildlife Service, Civil Case No. 2059 of 1996, High Court of Nairobi (Kenya).

Kenya Bankers Association & Others versus Minister for Finance & another No.4, (2002) 1 KLR at 61 (Kenya).

Law Society of Kenya v Commissioner of Land and others, Civil Case No. 464 of 2000, High Court of Kenya.

Samson Lereya and 800 others v The Attorney General and 2 Others, HCCC No. 115 of 2006. Reported in [2006] eKLR (Kenya)

Wangari Mathai v the Kenya Times Media Trust Civil, Case No. 5403 0f 1989, High Court of Kenya.

Peter Kinuthia Mwaniki and others v Peter Njuguna Gicheha and others, Civil Case 313 of 2000. Cited as (2006) eKLR (Kenya).

Rodger Muema Nzioka and 2 others v Tiomin Kenya limited, Civil Case No.97 of 2001, High Court of Kenya, Mombassa.

Park View Shopping Arcade Ltd v Charles M. Kangethe and 2 others (2004) eKLR at 21 (Kenya).

Nigeria

Abacha v Fawehinmi (2000) FWLR 585.

Adediran and another v Interland Transport Limited (1992) 9 NWLR (Part 214) 155.

Adewole v Jakande (1981), 1 N.C.L.R. 152.

Attorney-General, Ondo State v Attorney-General, Federal Republic of Nigeria (2002), 9 Sup. Ct. Monthly 1 (Nig. Sup. Ct.) (Ondo State, Nigeria)

Jonah Gbemre v Shell Petroleum Development Company of Nigeria and 2 Others Suit No: FHC/B/CS/53/05. Delivered 14 November 2005.

Inyangukwo v Akpan (1985) 6 NCLR 770.

Mobil Producing Nigeria Unlimited v Lagos State Environmental Protection Agency (2001) 8 NWLR. (Pt 715) 489 (CA), (2003) FWLR (Pt 137) 1029 (SC).

Ogugu v the State (1994) 9 NWLR (Part 366) 1.

Okogie (Trustees of Roman Catholic Schools) and other v Attorney-General, Lagos State (1981) 2 NCLR 337.

O*ronto-Douglas v Shell Petroleum development Corporation and 5 others*, Unreported Suit No. FHC/CS/573/93. Delivered on February 17, 1997.

O*ronto-Douglas v Shell Petroleum development Corporation and others* (1999) 2 NWLR 466 (CA).

Owodunni v Registered Trustees of Celestial Church of Christ and others (2000) 10 NWLR (Pt. 675) 315.

Ransome-Kuti v Attorney-General, Federation (2002) FWLR 1643.

Irene Thomas and others v Reverend Olufosoye (1986) 1 NWLR 669.

Uganda

Byabazaire Grace Thaddeus v Mukwano Industries, Misc. Application No. 909 OF 2000, High Court of Uganda (Kampala Division).

South Africa

BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs 2004 (5) SA 124 at 142F (W).

Department of Agriculture: MEC Conservation and Environment and another v HTF Developers (Pty) Limited, Case CCT 07/32.

Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others 1999 (2) SA 709 (SCA).

Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and another 2005 (3) SA 156 (C).

Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga, and others, Case CCT 67/06, Delivered on 7 June 2007.

Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga, and others 2007 (2) SA 163 (SCA).

Government of the Republic of South Africa and others v Grootboom and others 2001 (1) SA 46 (CC).

Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd and others 2004 (2) SA 393.

HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and others 2004 (5) SA 124 (W).

In re: Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC).

Johann De Kock v Minister of Water Affairs and Forestry and others Case No. CCT 30/05.

MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Limited and another 2006 (5) SA 483 (SCA).

Minister of Health v Woodcarb (Pty) Ltd v another 1996 (3) SA 155.

Minister of Health and others v Treatment Action Campaign and others No. 2 2002 (5) SA 721.

Minister of Public Works and others v Kyalami Ridge Environmental Association and another 2001 (3) SA 1151.

Minister of Water Affairs and Forestry v Stilfontein Gold Mining CO Ltd and others 2006 (5) SA 333.

Petro Props (Pty) Ltd v Barlow and another 2006 (5) SA 160 (W).

Trustee, Biowatch Trust v Registrar: Genetic Resources and others 2005 (4) SA 111 (T).

Van Huysteen NO and other v Minister of Environmental Affairs and Tourism and others 1995 (9) BCLR 1191 (C).

Wildlife Society of South Africa and others v Minister of Environmental Affairs and Tourism and others 1996 (3) SA 1095.

India

Abhilash Textile v Rajkot Municipal Corporation (1988) AIR 57 (Gujurat).

Kinkri Devi v Himachal Pradesh (1988) AIR 4.

L.K. Koolwal v Rajasthan (1988) AIR 2 (High Court of Rajasthan).

Subash Kumar v State of Bihar, AIR 1991 SC, 1991 (1) SCC 598.

M.C Mehta v Union of India (1989) 9 SCC 589.

Prakash *Mani Sharma v Ministers of Council* Writ Nos. 2961 and 2052.

Sachidanand Pande v State of West Bengal (1987) AIR (SC) 1109.

Mohd Nanif Qureshi v State of Bihar (1958) AIR (SC) 731.

Damodhar Roa v Municipal Corp of Hyderabad (1987) AIR 171.

Charan Lal Sahu v Union of India (1990) AIR (SC) 1480.

State of Madras v Champakam Dorairajan (1951) AIR (SC) 226.

Philippines

The Philippines: Supreme Court Decision in Minor Oposa v Secretary of the Department of Environment and Natural Resources (DENR) 33 ILM 173 (1994).

International

Concluding Observations on Lithuania, (2001) U.N. CRC, U.N. Doc. CRC/C/15/Add .146.

Legality of the Threat or Use of the Nuclear Weapon (1996) I.C.J. Reports 241.

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.) (Merits) (1986) I.C.J. Reports 14.

North Sea Continental Shelf Cases (FRG/Denmark; FRG/Netherlands) (1969) I.C.J. Reports 3.

Regional

Amnesty International v Zambia Communication No. 212/98, Twelfth Annual Report of the Commission-1998/99.

Avocats Sans Frontieres ex rel. Gaetan Bwampamye v Burundi Communication No. 231/99, 2000-2001, Afr. Ann. Act. Rep., Annex V.

Civil liberties Organisation (In re Nigerian Bar Association) v Nigeria, Communication No. 101/93, 1994-1995, Afr. Ann. Act. Rep., Annex VI.

The Social and Economic Rights Action Center (SERAC) and another v Nigeria, *Communication* 155/96.

Constitutional Rights Project v Nigeria Communication No. 60/91, 1994-1995, Afr. Ann. Act. Rep., Annex VI.

Fadeyeva v Russia, Application no. 55723/00 (Chamber).

Anna Maria Guerra and 39 Others v Italy (1998) I ECHR, Case 14967/89, delivered 19 February 1998.

Hatton and others v the United Kingdom (2003) ECHR 338 (8 July 2003) (Grand Chamber).

Kyrtatos v Greece 41666/98 (2003) ECHR 242 (22 May 2003).

Legal Resources Foundation v Zambia Communication No. 211/98, paras 59-60.

Lopez-Ostra v Spain (1994) ECHR, series A, No. 303C.

Moreno Gomez v. Spain 4143/02 [2004] ECHR 633 (16 November 2004).

Nationale des Droits de l'Homme et des Libertes v Chad, Communication No. 74/92, 1995-1996, Afr. Ann. Rep. Annex VII.

Powell & Rayner v United Kingdom 172 Eur. Ct. H.R. (Ser. A) at 5 (1990).

Purohit v Gambia, Communication No. 241/2001.

Oneryildiz v Turkey, Application no. 48939/99 (Grand Chamber).

Taskin *and others v Turkey* Application no. 46117/99 (Chamber).

Velasquez v Honduras (1988) 4 Inter-AM. Ct. H.R (Ser. C) 155

Yanomani v Brazil Inter-Am C.H.R, 1984-1985 Annual Report 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985).

C. BOOKS

Earl Babbie & Johann Mouton *The Practice of Social Research* (Oxford University Press, 2001).

Tom Bigg & David Satterthwaite (eds) *How to Make Poverty History: The central role of local organizations in meeting the MDGs* (IIED, 2006).

Patricia Birnie & Alan Boyle *International Law and the Environment* 2ed (Oxford University Press, New York, 2002).

Alan Boyle & Michael R Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996).

Daniel W. Bromley *Environment and Economy: Property Rights and Public Policy* (Blackwell, Oxford, 1991).

Daniel H. Cole *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* (Cambridge University Press, 2002).

John Dugard *International Law: A South African Perspective* 3ed (Juta & Co Ltd, 2005).

David Dyzenhaus (ed) *Recrafting the Rule of Law: The Limits of Legal Order* (Hart Publishing, Oregon, 1999)

David Hunter, James Salzman & Durwood Zaelke (eds) *International Environmental Law & Policy* 2ed (Foundation Press, New York, 2002)

Department for International Development, United Kingdom (DFID), Directorate General for Development, European Commission (EC), United Nations Development Programme (UNDP), & The World Bank *Linking Poverty Reduction and Environmental Management: Policy Challenges and Opportunities* (The World Bank, July 2002).

Stanley P Johnson (ed) *THE EARTH SUMMIT: The United Nations Conference on Environment and Development (UNCED)* International Environmental Law and Policy Series (Graham & Trotman/Martinus Nijhoff, 1993).

Jeni Klugman (ed) *A Sourcebook for Poverty Reduction Strategies*, Volume 1-Core Techniques and Cross-Cutting Issues (World bank, October 2002).

Alexandre Kiss & Dinah Shelton *International Environmental law* (Transnational Publishers Inc, New York, 1991).

Alexandre Kiss & Dinah Shelton *International Environmental Law* 2ed (Transnational Publishers Inc, New York, 2002).

Rachel Murray *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing, UK, 2000).

Dilys Roe (ed) *Millennium Development Goals and Conservation: Managing Nature's Wealth for Society's Health* (IIED, 2004).

Jan Glazewski *Environmental Law in South Africa* 2ed (Lexis Nexis Butterworth, Durban, 2005) 77.

Jonathan Grix *The foundations of Research* (Palgrave Macmillan, New York, 2004).

J. Mouton *How to Succeed in Your Master's and Doctoral Studies* (Van Schaik, Pretoria, 2001).

J. A. Omotola (ed) *Environmental Law in Nigeria Including Compensation* (Faculty of Law, University of Lagos, 1990).

Peter Oluyede *Constitutional Law in Nigeria* 1ed (Evans Press, Lagos, 1992).

Fatsah Quguergouz *African Charter on Human and People's Rights: A comprehensive for Human Dignity and Sustainable Development in Africa* (Kluwer law Institute, New York, 2003).

G. Samuel *Epistemology and Method in Law* (Aldershot, Ashgate, 2002).

David Satterthwaite (ed) *The Millennium Development Goals and Local Processes: Hitting the target or missing the point?* (IIED, 2003).

Amartya Sen *Development as Freedom* (Knopf, New York, 1999) 87-98.

U. Oji Umozurike *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, 1997).

United Nations development Programme (UNDP) *Indicators for Monitoring the MDGs: Definition, Rationale, Concepts and Sources* (United Nations, New York, 2003)

UN Millennium Project *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (UNDP 2005).

D. JOURNAL ARTICLES

Susan Ariel Aaronson & Jamie M Zimmerman 'Fair Trade?: How Oxfam Presented a Systemic Approach to Poverty, Development, Human Rights, and Trade' (2006) 28 (4) *Human Rights Quarterly* 998.

Shedrack C. Agbakwa 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Hum. Rts. & Dev. L.J.* 177.

Shadrack C. Agbakwa 'A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa (2003) 47 (1) *JAL* 38.

Phillip Alston ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78 *American JIL* 607.

G.O. Anoliefo, O.S. Isikhuemhen & N.R. Ochije ‘Environmental Implications of the Erosion of Cultural Taboo Practices in Awka-South Local Government Area of Anambra State, Nigeria: 1. Forest, Trees, and Water Resource Preservation’ (2003) 16 *Journal of Agricultural and environmental Ethics* 281.

Sumudu Atapattu ‘The Right to a Health Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law’ (Winter 2002) 16 *Tulane Envtl. LJ* 65.

Amir Attaran ‘An Immeasurable Crisis? A Criticism of the Millennium Development Goals and Why They Cannot be Measured (2005) 10 *Plos Med* 2.

Edward B. Barbier, Richard Damania & Daniel Leonard ‘Corruption, trade and resource conversion’ (2005) 50 *Journal of Environmental Economics and Management* 276.

R.R. Baxter ‘International Law in "Her Infinite Variety’ (1980) 29 (4) *The International and Comparative Law Quarterly* 549.

Alan E. Boyle ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 (4) *The International and Comparative Law Quarterly* 901.

Carl Bruch, Wole Coker & Chris VanArsdale ‘Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa’ (2000) 7 *SAJELP* 21.

C. M. Chinkin ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 (4) *The International and Comparative Law Quarterly* 850.

Okezie Chukwumerije ‘Peer Review and the Promotion of Good Governance in Africa.’ (2006) 32 *North Carolina J. Int'l L. & Com. Reg.* 49.

Leslie C. Clark ‘A Call to Restructure Existing International Environmental Law in Light of Africa's Renaissance: the United Nations Convention to Combat Desertification and the New Partnership for Africa's Development (NEPAD)’ (2003) 27 *Seattle U. L. Rev.* 525.

Maureen Cropper & Charles Griffith ‘The Interaction of Population Growth and Environmental Quality’ (1994) 84 (2) *American Economic Peer Review Papers and Proceedings 250*.

Kerry Cuomo ‘Human Rights and the Environment: Common Ground’ (1993) 18 *Yale JIL* 227.

Caoimhe de Barra ‘Addressing Aid Effectiveness: A Key Challenge in Meeting the MDGs (2005) *Trocaire Development Review* 103.

Shubhankar Dam & Vivek Tewary 'Polluting Environment, Polluting Constitution: Is a "Polluted" Constitution Worse than a Polluted Environment?' (2005) 17 (3) *Journal of Environmental Law* 383.

Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 *Michigan J.I.L.* 420.

Joshua Eaton 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston University International LJ* 261.

Kaniye S.A. Ebeku 'The Right to a Healthy Environment and the African Commission' (2003) 3 *African HRLJ* 149.

Anthony Uzodinma Egbu 'Constraints to Effective Pollution Control and Management in Nigeria' (2000) 20 *The Environmentalist* 13.

Basil Enwegbara 'The Globalization of Poverty' *The Tech* Vol. 121' Issue 26, Tuesday, May 15, 2001.

L. Feris 'The Asbestos Crisis - the Need for Strict Liability for Environmental Damage' (1999) *Acta Juridica* 287.

Pieter Fourie 'Africa's New Security Threat: HIV/AIDS and human security in Southern Africa' (2001) 10 (4) *African Security Review* 11.

Sakiko Fukuda-Parr 'Millennium Development Goals: Why They Matter' *Global Governance* Vol. 10, section 4, October 1, 2004.

Sakiko Fukuda-Parr 'Millennium Development Goal 8: Indicators for International Human Rights Obligations?' (2006) 28 (4) Human *Rights Quarterly* 966.

Ciara Gaynor 'Structural Injustice and the MDGs: A Critical Analysis of the Zambian Experience' (2005) *Trocaire Development Review* 57.

Jan Glazewski 'Environmental Justice and the New South African Democratic Legal Order' (1999) *Acta Juridica* 6.

Lorna Gold 'Are the Millennium Development Goals addressing the underlying causes of injustice? Understanding the risks of the MDGs' (2005) *Trocaire Development Review* 23.

Gene M. Grossman & Alan B. Krueger 'Economic Growth and Development' (1995) 110 *Quarterly Journal of Economics* 353.

Shadrack Gutto 'Modern "Globalisation" and the Challenges to Social, Economic and Cultural Rights for Human Rights Practitioners and Activists in Africa' (Oct.-Dec. 2000) *Afr. Legal Aid* 12.

Andy Haines & Andrew Cassels 'Can the Millennium development goals be attained?' (2004) 329 *BMJ* 394.

Jacques Hallak & Muriel Poisson 'Ethics and corruption in education: an overview' (2005) 1(1) *Journal of Education for International Development* 2.

Hurst Hannum 'The Status of the Universal Declaration of Human Rights in National and International law' (1996) 25 *Georgia Journal of International and Comparative Law* 287.

Berta E. Hernández-Truyol 'Cuba and Good Governance' (2004) 14 *Transnat'l L. & Contemp. Problems* 655.

Johan Hattingh & Robin Attfield 'Ecological Sustainability in a Developing Country such as South Africa: A Philosophical and Ethical Inquiry' (Summer 2002) 6 (2) *The International Journal of Human Rights* 65.

Laura Horn 'The Implications of the Concept of Common Concern of a Human Kind on a Human Right to a Healthy Environment' (2004) 1 MqJICEL 233.

Kelvin C. Kennedy 'The Incoherence of Agricultural, Trade, and Development Policy for Sub-Saharan Africa: Sowing the Seeds of False Hope for Sub-Saharan Africa's Cotton Farmers?' (Winter 2005) 14 *Kansas Journal of Law and Public Policy* 307.

Su-ming Khoo 'The Millennium Development Goals: A Critical Discussion (2005) *Trocaire Development Review* 43.

Michael Kidd 'Environmental Crime-Time for A Rethink in South Africa?' (1998) 5 *SAJELP* 181 at 198.

Richard N. Kiwanuka 'The meaning of "people" in the African Charter of Human and Peoples' Right' (1988) 82 *American JIL* 80.

Heinz Klug 'Five Years on: How Relevant is the Constitution of the New South Africa?' (2002) 26 *Vermont L. Rev.* 805.

James C. Kraska 'Global and Going Nowhere: Sustainable Development, Global Governance & Liberal Democracy' (2006) 34 *Denver J. Int'l L. & Policy* 247.

Gbenga Lawal 'Corruption and Development in Africa: Challenges for Political and Economic Change' (2007) 2 (1) *Humanity and Social Sciences Journal* 1.

John Lee 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2002) 25*Columbia J Envtl L* 283.

Richard B. Lillich 'The Growing Importance of Customary International Human Rights Law' (1996) 25 *Georgia Journal of International and Comparative Law* 1.

Tinashe Madava ‘Illicit dumping of toxic wastes breach of human rights’ (2001) 28 (88) *Review of African Political Economy* 288.

J.W. McArthur, J.D. Sachs, G. Schmidt-Traub ‘Response to Amir Attaran’ (2005) 2 (11) *PLoS Med* 379.

John Cantius Mubangizi 'The Constitutional protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation’ (2006) 2 *African Journal of Legal Studies* 1.

Smita Narula ‘The Right to Food: Holding Global Actors Accountable Under International Law’ (2006) 44 *Columbia Journal of Transnational Law* 691.

Paul J. Nelson ‘Human Rights, the Millennium Development Goals, and the Future of Development Cooperation’ (2007) 35 (12) *World Development* 2041 at 2046.

James W. Nickel ‘The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification’ (1993) 18 *Yale JIL* 281.

Vincent O. Nmehielle ‘The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?’ (2003) 7 *Sing. J. Int'l & Comp. L.* 412.

Vincent Nmehielle ‘The African Peer Review Mechanism under the African Union and its Initiative: the New Partnership for Africa's Development’ (2004) 98 *Am. Soc'y Int'l L. Proc.* 240.

Francis Nwonwu ‘NEPAD: A New Agenda or Another Rhetoric in Africa’s Political Adventurism?’ (2006) 2 *Africa Policy Journal* 1.

Tunde I. Ogowewo ‘Wrecking the Law: How Article III of the Constitution of the United States led to the Discovery of a Law of Standing to Sue in Nigeria’ (2000) 26 *Brooklyn JIL* 527.

Nelson E. Ojukwu-Ogba ‘Legal and Regulatory Instruments on Environmental Pollution in Nigeria: Much Talk, Less Teeth’ (2006) 8/9 *International Energy law & Taxation Review* 201.

Patrick Okonmah ‘‘Right to A Clean Environment: A Case for the People of Oil-Producing Communities in the Nigerian Delta’ (1997) 41 *JAL* 60.

Michele Olivier ‘Enforcement of International Environmental Law’ (2002) 9 *SAJELP* 151.

Dejo Olowu ‘Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees’ (2006) 69 *Saskatchewan L. Rev.* 39.

John Ovink 'Transboundary Movement of Hazardous Waste, the Basel and Bamako Conventions: Do Third World Countries Have a Choice?' (1995) 13 *Dick. J. Int'l of Law* 281.

Geoffrey Palmer 'New Ways to Make International Environmental Law' (1992) 86 (2) *AJIL* 259 at 270.

Raewyn Peart & Jessica Wilson 'Environmental Policy-making in the New South Africa' (1998) 5 *SAJELP* 237.

Lorenzo Pellegrini & Reyer Gerlagh 'Corruption, Democracy, and Environmental Policy: An Empirical Contribution to the Debate' (2006) 15(3) *The Journal of Environment and Development* 332.

Lorenzo Pellegrini & Reyer Gerlagh 'Corruption and Environmental Policies: What are the Implications for the Enlarged EU?' (2006) 16 *Europe Environment* 139 at 145.

Steve Radelet 'Will the Millennium Challenge Account Be Different?'(2003) *The Washington Quarterly* 171.

John Roberts 'Millennium Development Goals: Are International Targets Now More Credible?' (2005) 17 *Journal of International Development* 113.

Luiz E. Rodriguez-Rivera 'Is the Human Right to Environment Recognised under International Law? It Depends on the Source' (Winter 2001) 12 *Colorado J. Int'l Envtl L. & Policy* 1.

Vernon W. Ruttan 'Technology and the Environment' (1971) 53 *American Journal of Agricultural Economics* 707.

S. Sanderson & K. Redford 'Contested relationship between biodiversity conservation and poverty reduction' (2003) 37 *Oryx* 389-390.

Dinah Shelton 'Human Rights, Environmental Protection, and the Right to Environment' (1991) 28 *Stanford JIL* 103.

Salil Shetty 'The Millennium Campaign: Getting governments to keep their promises' (2005) 48 (1) *Development* 25.

Chris Stals 'the African Peer Review Mechanism as an Integral Part of the New Partnership for Africa's Development' (2004) 4 *African HRLJ* 121.

Phia Steyn 'The Lingering Environmental Impact of Repressive Governance: The Environmental Legacy of the Apartheid Era for the New South Africa' (December 2005) 2 (3) *Globalizations* 391.

Jennifer A. Storm 'South Africa's New Environmental Policies: Making Green the New Dominant Color' (1997) 9 *Georgetown Int'l Envtl. L. Rev.*641.

Jonathan Temple 'The New Growth Evidence' (1999) 37 (1) *Journal of Economic Literature* 112.

Dire Tladi 'Of Course for Human: A Contextual Defence of Intergenerational Equity' (2002) 9 *SAJELP* 177.

James Triggs 'Authority, democracy and the rule of law' (2008) 30 *Australian Bar Review* 221.

Nsongurua J. Udombana 'How Should We Then Live? Globalization and the New Partnership for Africa's Development' (2002) 20 *Boston University Int'l L.J.* 293

Nsongurua J. Udombana 'Between Promise and Performance: Revisiting States' Obligations Under the African Human Rights Charter' (2004) 40 *Stanford JIL* 105.

Nsongurua J. Udombana 'The Summer has Ended and We are not Saved! Towards a Transformative Agenda for Africa's Development' (2005) 7 *San Diego International Law Journal* 5.

Morne Van der Linde 'African Responses to Environmental Protection' (2002) 35 *CILSA* 99.

Morne van der Linde 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the *SERAC* Communication' (2003) 3 *African HRLJ* 167.

Tobias P. van Reenen 'Locus Standi in South African Environmental Law: A Reappraisal in International and Comparative Perspective' (1995) 2 *SAJELP* 12.

E. INTERNET RESOURCES

Prof Kinfe Abraham *The New Partnership for Africa's Development (NEPAD)* Horn of Africa Democracy and Development International Lobby, available at http:// www.aksophiabooks.org/ occasionalp1_19.htm.

Adegoke Adegoroye 'The challenge of Environmental Enforcement in Africa: The Nigerian Experience' *INECE Conference Proceedings Volume 1*, Third International Conference on Environmental Enforcement, 25-28 April, 1994, Oaxaca, Mexico.

African Conservancy *The Environmental and Cultural Disintegration of Africa* Available at http://www.africanconservancy.org/about/documents/Problem_1206.pdf.

African Commission on Human and Peoples Rights (ACHPR) OAU-*OUA Information Sheet No 1: Establishment* (ACHPR Secretariat). Available at http:// www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.1.doc.

John Agbonifo 'The Colonial Origin and Perpetuation of Environmental Pollution in the Postcolonial Nigerian State'. Available at http://lilt.ilstu.edu/critique/fall 2002docs/jagbonifo.pdf.

Philip Alston *A Human Rights Perspective on the Millennium Development Goals*, Paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development. Available at http://www.hurilink.org/tools/HRs Perspectives_on_the_MDGs--Alston.pdf.

John Ambler Attacking *Poverty While Improving the Environment: Towards Win-Win Policy Options* (Poverty & Environment Initiative, UNDP & EC, 1999).

Ifeanyi Anago *Environmental Assessment as a Tool for Sustainable Development: The Nigerian Experience Congress*, FIG XXII International, Washington D.C. USA, APRIL 19-26, 2002. Available at http://www.fig.net/pub/fig_2002/Ts10-3/TS10_3_ anago.pdf.

Michael Anderson *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in the LDC*, Paper for Discussion at WDR Meeting 16-17 August 1999. Available at http://siteresources.worldbank.org/INTPOVERTY/ Resoruces/WDR/DfiD-Projectpapers/ anderson.pdf.

Anne N. Angwenyi *Environmental Legislation and Domestication of International Environmental Law in Kenya*, Paper presented at the Sesei Programme Sub-Regional Legal Workshop held in Nairobi, 13th -17th December 2004 (NEMA Kenya, 2004). Available at http://www.nema.go. ke/envilegilation.asp#.

Kepa Artaraz 'MDGs Mask Injustice and Inequality in Latin America' *1d21 Global Policy Forum*, November 2005. Available at http://www.globalpolicy.org/socecon/ inequal/2005/11mask.htm.

Soji Awogbade 'What is the Place of Environmental Law in Africa's Development?' *AELEX November 9, 2006*. Available at http://www.worldservicesgroup.com/ publicationspf.asp?Id =1597.

Achoka Awori 'African Perspective on Environment and Development' *Voice From Africa* UN-NGLS. Available at http//www.unngls.org/documents/publicastions.en/ voices.africa/number5/vfa5.04.thm#top.

Alejandro Benjana "Good Governance' and the MDGs: Contradictory or Complementary' *Global Policy Forum*, 12 October 2004.

Barbara Billingsley *Rule of law: what is it? Why should we care?*, available at http://findarticles.com/p/articles/mi_m0OJX/is_5_26/ai_n25039328.

Rasheed Bisiriyu 'The Connection between energy, poverty and environmental degradation' News & Trends: Africa, *Alexander's Gas & Oil Connections* Vol. 9, Issue #14, Wednesday, 21 July, 2004. Available at http://www.gasandoil.com/GOC/ news/nta42939.htm.

Elizabeth Blunt 'Corruption "costs Africa billion' *BBC News*, 18 September 2002. Available at http://news.bbc.co.uk/2/hi/afriac/2265387.stm.

Canada's Coalition to End Global Poverty (CCIC) *The Politics of the Millennium Development Goals: Human Rights and Poverty Eradication* A Summary Report of a CCIC-NSI Conference, May 26-28, 2005, Ottawa, Ontario. Available at http://www .ccic.ca/e/doc/002_and_200505_politics_of_mdgs_ conf_report.pdf.

Marisa Casale & Alan Whiteside *The Impact of HIV/AIDS on Poverty, Inequality and Economic Growth*, IDRC Working Papers on Globalization, Growth and Poverty Working Paper Number 3 (Health Economics and HIV/AIDS Research Division (HEARD) University of KwaZulu Natal, South Africa, March 2006).

Desmond Cohen 'Poverty and HIV/AIDS in Sub-Saharan Africa' *UNDP Issue Paper No. 27*. Available at http://www.undp.org/hiv/publications/issues/english/issue 27e.html.

Committee on Agriculture 'Follow-up to the World Summit on Sustainable development (WSSD)' COAG/2003/INF/2, Seventeenth Session, Rome, 31 March-4 April, 2003.

'Corruption "costs Kenya $1bn a year' *BBC News*, available at http://news.bbc.co.uk/2/hi/business/2949586.htm.

Abdulai Darimani 'Impacts of Activities of Canadian Mining Companies in Africa' *Third World Network – Africa Secretariat*, 31 October 2005.

Rasheed Draman *Poverty and Conflicts in Africa: Explaining a Complex Relationship*, Paper prepared for the Experts Group Meeting on Africa-Canada Parliamentary Strengthening Program, Addis Ababa, 19-23 May 2003. Available at www.paricent.ca/povertyreduction/seminar/_e.pdf.

David Dickson 'How "Scientific" Are the Millennium Development Goals' *One World* Global Policy Forum, September 19, 2005. Available at http://www.globalpolicy.org/socecon/develop/2005/ 0919scient.htm.

Fabio Granja e Barros, Augusto F. Medonca, & Jorge M. Nogueira *Poverty and Environmental Degradation: the Kuznets Environmental Curve for the Brazilian Case* Department of Economics Working Paper 267 (University of Brasilia, December 2002) 11. Available at http:///www.unb.br/face/eco/epe/TD/267Dec20/Noguira.pdf.

Theo Eicher, Cecilia Garcia-Penalosa, & Tanguy van Ypersele *Education, Corruption, and the Distribution of Income* (October 2006). Available at http:// faculty.washington.edu/te/papers/ept_1.pdf.

Engobo Emeseh *The Limitation of Law in Promoting Synergy Between Environment and Development Practices in Developing Countries: A Case Study of the Petroleum Industry in Nigeria*. Available at Http://web.fuberlin.de/ffu/akumwelt/bc 2004/ download/emese_f.pdf.

Victor E. Eze 'Monitoring the Dimensions of Corruption in Nigeria' *Nigeria Village Square* Monday, 25 September 2006. Available at http://www.nigeriavillagesquare. Com/articles/victordike/ monitoring-the-dimensions-of corruption-in-ni.html.

Adriana Fabra & Eva Arnal *Review of Jurisprudence on Human Rights and the Environment in Latin America*, Background Paper No.6, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva. Available at http://www.uchchr.ch/environment/bp6.html.

Adriana Fabra *The Intersection of Human Rights and Environmental Issues: A Review of Institutional development at International Level*, Background Paper 3, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva. Available at http://uchchr.ch/environment/bp3.pdf.

Focus on Global South *Antipoverty or Anti Poor? The Millennium Development Goals and the Eradication of Extreme Poverty or Hunger* Discussion Paper, Asia Pacific Civil Society Forum, Bangkok, Thailand, 6-8 October 2008 (December 2003).

Sakiko Fukuda-Parr *The Millennium Development Goals and Human Development* International Symposium, Tokyo, 9 October 2002.

German Advisory Council on Global Change (WGBU) *World in Transition: Fighting Poverty Through Environmental Policy* (Earthscan, 2005) 40-41. Available at http:// www.wbgu.de/wbgu_jg2004_engl.pdf.

Aisha Ghaus-Pasha *Governance for the Millennium Development Goal: Core Issues and Good Practices* (UNDESA 2006).

Peter Glick *Reproductive Health and Behaviour, HIV/AIDS, and Poverty in Africa* SAGA Working Paper (May 2007).

Lorna Gold 'More than Just a Numbers Game? Ensuring that the Millennium development Goals Address Structural Injustice' *Center Focus*, Issue # 168, September 2005. Available at http://www.coc.org/pdfs/coc/cf/2005/cf168_200509_ more.pdf.

Ian Golding, Odin K. Knudsen & Dominique Van der Mensbrugghe *For Whom the Bell Tolls: Incomplete Trade Liberalization and Developing Countries* Paper presented at the International Conference: Agricultural Policy Reform and the WTO: Where are We Heading? Capri Italy, on 23-26 June 2003.

B. Gordon, R. Mackay & E. Rehfuess *Inheriting the World: the Atlas of Children's Environmental Health and the Environment* (World Health Organization, Geneva, 2004). Available at htt://www.who.int/ceh/publications/en/atlas.pdf.

Richard Griggs 'The Cultural Dimensions of Environmental Decision-Making' *Independent Projects Trust (South Africa)*. Available at http://www.gdrc.org/decision/ edm-culture.html.

Halliburton 'Halliburton and Nigeria: A Chronology of Key Events in the Unfolding of Key Events in the Unfolding Bribery Scandal' *Halliburton Watch*. Available at http://www.halliburton.org/ about_hal/nigeria_timeline.html.

Dr I. El Hadji *Reduction of Corruption in Africa: A Tremendous Challenge*. Available at http://www.iespolicy.org/file/Sall%20-%20la%20Corruption%20en%20Afrique.df.

Eveline Herfkens *The United Nations' MDG Campaign for a Better World & Religious Responses*, Speech delivered at the On The Role of American Religious Communities in Achieving the Millennium Development Goals: A Consultation, *The* Church Center at the United Nations New York, 8 June 2005, pp2-3. Available at http://www.Millenniumcampaign.org/atf/cf/D15FF017-0467-419B-823ED6659E0CC D39}/SPEECH_ NY_CHURCH%20CENTRE_08-06-2005.DOC.

Helena Hofbauer *Sustained Work and Dedicated Capacity: IDASA's Experience in Applied Budget Work in South Africa* Case study prepared for the research project 'Lessons from Civil Society Budget Analysis and Advocacy Initiatives' (May 2006). Available at http://www.internationalbudget.org/casestudies.htm.

Lori Hunter 'HIV/AIDS and the Natural Environment' *Population Reference Bureau*. Available at http://www.prb.org/Articles/2006/HIVAIDSandtheNaturalEnvironment aspx.

IRIN 'BURKINA FASO: Sahelian cotton farmers on their knees' *Humanitarian News and Analysis*, UN Office for the Coordination of Humanitarian Affairs, 22 December 2006. Available at http://www.irinnews.org/report.aspx?reportid=62888.

International Union for the Conservation of Nature (IUCN) *An Introduction to the African Convention on the Conservation of Nature and Natural Resources* IUCN Environmental Policy and Law Paper No. 56 (2004) 1.

Selim Jahan *Human Rights-Based Approach to Poverty Reduction- Analytical Linkages, Practical Work and UNDP*, Paper presented at the High-Level Seminar under Global Partnership for Development on Right to Right to Development, UN Office of the High Commissioner on Human Rights, Geneva, 9-10 February 2004. Available at http://www.undp.org/poverty/docs/HRPR.doc.

Chris Landsberg NEPAD: *What is it? What is missing?* Paper written for NALEDI. Available at http://www.sarpn.org.za/documents/d0000550/P503_Landsberg .pdf.

Adam Lerrick "Aid to Africa at Risk: Covering Up Corruption' *International Economic Report* (Carnegie Mellon Galliot Center for Public Policy, December 2005).

Sebastine Levine 'taking on the Goliaths of corruption' *ELDIS*. Available at http:///www.eldis.org/fulext/Lesotho_corruption_dec06.doc.

Dr. Rene Loewensen *HIV/AIDS: Implications for Poverty Reduction* Background Paper prepared for the United Nations Development Programme for the UN General Assembly Special Session on HIV/AIDS, 25-27 June 2001 (UNDP Policy Paper, 2001) 9.

K. Lvovsky *Health and the Environment* Strategy Papers, No.1 (Environment Department, World Bank, 2001).

Sue Mainka, Jeff McNeely & Bill Jackson *Depend on Nature: Ecosystem Services supporting Human Livelihoods* (IUCN, 2005).

Ernest M. Makawa 'Experience of Malawi: Public Role in Enforcement' *INECE Conference Proceedings Volume 1*, Fifth International Conference on Environmental Compliance and Enforcement 16-20 November 1998, Monterey, California, USA.

Jay Mcgown *Out of Africa: Mysteries of Access and Benefit Sharing* (The Edmonds Institute, Washington, 2006).

Maurice Odhiambo Makoloo, Benson Owuor Ochieng, & Collins Odote Oloo *Public Interest Environmental Litigation in Kenya: Prospects and Challenges*, Ecogovernance Series NO. 4 (An Institute for Law and Environmental Governance (ILEG), Nairobi, February 2007).

Dr Claude Martin 'Protecting the Environment: Thread That Runs through Millennium Development Goals' *Press Release* UNEP/265, 18/02/2005. Available at http://www.un.org/News/docs/ 2005/unep265.doc.htm.

Wilson M.K. Masilingi 'Social-Economic Problems Experienced in Compliance and Enforcement in Tanzania' *INECE Conference Proceedings Volume 3*, Fourth International Conference on Environmental Enforcement, 22-26 April 1996, Chiang Mai, Thailand.

Dr Patricia Kameri-Mbote *Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention* IERLC Working Paper 1 (2005). Available at www.ielrc.org/content/w0501.pdf.

Millennium Campaign *Trade: The Role of the Doha Round in Achieving the MDGs*, available at http://www.Millenniumcampaign.org/UN_HongHong_Leaflet_Round2 [1]-doha.

Sachiko Morita & Durwood Zaelke 'Rule of Law, Good Governance, and Sustainable Development'. Available at http://www.inece.org/ conference/7/ vol1/05_Sachiko_ Zaelke.pdf.

James C. Murombezi *Pre-colonial and colonial conservation practices in southern Africa and their legacy today* (IUCN, February, 2003).

Noel Mwakugu 'Kenya re-invents corruption' *BBC News* 23 February 2004. Available at http://news.bbc.co.uk/o/pr/fr/2/hi/Africa/350 6433.stm.

Dani Nabudere *NEPAD: Historical Background and Prospects*, paper presented at the World Summit on Sustainable Development, Johannesburg, South Africa, August 2002.

Shadrack W. Nasong'o & Wilfred N. Gabsa 'Environmental Policy and Politics of Ecologism in Cameroon and Kenya'. Available at http://www.jsdafrica.com/Jsda/Fall winter2000/articlespdf/ARCEnvironmental%20Policy%20and%20the%20Politics%20of%20Ecologism.pdf.

NEPAD Secretariat 'Ghana, a Model for APRM' *NEPAD News*, 16 May 2007. Available at http://www.nepad.org/2005/news/wmview.php?ArtID=86.

Michael Ochieng Odhiambo 'Legal and Institutional Constraints to Public Interest Litigation as a Mechanism for the Enforcement of Environmental Rights and Duties in Kenya' *INECE Conference Proceedings Volume 2*, Fifth International Conference on Environmental Compliance and Enforcement 16-20 November 1998, Monterey, California, USA.

Joe Oloka-Onyango & Deepika Udagama *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights* Preliminary Report Submitted by J.Oloka-Onyango and Deepika Udagama, in Accordance with Sub-Committee Resolution 1999/8, U.N. Doc. E/CN.4/Sub.2/2000/13 (2000).

Femi Olokesusi & Osita M. Ogbu 'Dirty Industries: A Challenge to Sustainability in Africa' *IDRC*. Available at http://www.idrc.ca/en/ev-30814-201-1DO_ TOPIC.html.

Victor Rodriguez Rescia 'The Right to a healthy environment in the Inter-American System for the Protection of Human Rights: In Search of the implementation of a regional litigation strategy' (Translated by Carla Garcia Zendejas). Available at http://www.elaw.org/assets/ word/interamerican.victor.article.2003.eng.doc.

Genevieve Renard Painter *Gender, Millennium Development Goals, and Human Rights in the Context of the 2005 Review Processes* (Gender and Development Network, October 2004). Available at http://www.choike.org/documents/mdg_women2004.pdf.

Lorenzo Pellegrini 'Corruption, economic Development and environmental policy' in Eaere Feem Viu *Resources and Environmental Economics: Political Economy of the Environment* (European Summer School, September 1-6, 2003). Available at http://www.feem.wes.ie/ess03/students/pellegrini.pdf.

Balakrishna Pisupati & Emilie Warner Biodiversity & the Millennium Development Goals (IUCN, 2003).

Martin Plaut 'Africa's hunger - a systemic crisis' *BBC News* 31 January 2006. Available at http://news.bbc.co.uk/go/pr/fr//1/hi/world/africa/4662232.

Steve Radelet, Sarah Rose & Sheila Herrling *Adding Natural Resource Indicators: An Opportunity to Strengthen the MCA Eligibility Process* (Center for Global Development, November 2006).

Peter Roderick, Co-Director, Climate Justice Programme Climate change in the courts: Summary of cases, Wild Law Conference, September 2007. Available at http://www.climatelaw.

Orla Ryan 'Kenya bribes are growing bigger' *BBC News*. Available at http://news.bbc.co.uk/go/pr/fr/-/2//hi/business/3648885.stm.

Dr Jonah Razzaque *Human Rights and the Environment: Development at the National Level, South Asia and Africa* Background Paper No.4, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, January 14-16, 2002, Geneva. Available at http://www.uchchr.ch/environment/bp4.html.

Dr. O.P. Sharma Rule *of Law and Public Administration: A Case Study of South Asia*, at pp16-18. Available at http://topics.developmentgateway.org/governance/rc/file download.do~itemId=1109707.

Dinah Shelton *Human Rights, Health and Environmental Protection: Linkages in Law and Practice*, A Background Paper for WHO (World Health Organization, 2002).

Dinah Shelton *The Links Between International Human Rights Guarantees and Environmental Protection*, University of Chicago Center for International Studies, 16 April 2004.

Dinah Shelton *Human Rights and Environmental Issues in Multilateral Treaties Adopted Between 1991 and 2001*, Background Paper No. 1, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, January 14-16, 2002, Geneva.

Achim Steiner 'Speaking Notes of the UNEP's Executive Director on the Launch of the African Environmental Outlook 2' 27 June 2006. Available at http://www.unep.org.

John Sweeny and Zeena Elton 'Poverty – aid, trade and corruption' Online opinion *Australia's e-journal of social and political debate*, 31 August 2005. Available at http://www.onlineopinion.com.au /print.asp?article=219.

Melissa Thaxton 'The burden of sub-Saharan Africa: Aids, poverty and natural resource degradation' *Environment &Poverty Times* Volume 4, 2005.

'The Cost of Corruption in Africa' *BBC News* 17 February 2006. Available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/472352.stm.

Ian Taylor 'The New Partnership for Africa's Development and the Global Political Economy: Towards the African Century or Another False Start?' Available at http://www.codesria.org/Links/ conferences/ Nepad/ taylor.pdf.

Transparency International *Poverty, Aid and Corruption* Policy Paper. Available at http://www.transparency.org.

Transparency International *Corruption and the Environment* (School of International & public affairs, Columbia University, April 2006). Available at http://www.water governance.org/downloads/Corruption_&_the%20Environment_Columbia_Univ_Ws _May2006.pdf.

Dzodzi Tsikata 'Effects of structural adjustment on omen and the poor' *Third World Network*. Aavailable at http://www.twnside.org.sg/adjus-cn.htm.

Hon. John Udeh *Petroleum Revenue Management: the Nigerian Perspective* Workshop on Petroleum Revenue Management, (Oil, Gas, Mining and Chemical Department of the WBG and ESMAP) Washington D.C., October 23-24, 2002. Available at http://www.esrthinsittute.columbia.edu/igsd/STP/Oil%20revenue%20 management?General%20oil%20documents/Nigeria/Nigeria%20petroluem%revenue %management%20Udepaper.pdf.

U4 Anti-Corruption Resource Centre 'Africa: Scale of corruption and impact on poor' *U4 Helpdesk Query*. Available at http://www.u4.no/helpdesk/helpdesk/queries/ query20.cfm.

United Nations High Commissioner for Human Rights *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (United Nations, 2002). Available at http://www.ohchr.org/english/issues/docs/guidelinesfinal-poverty.doc.

Jan Vandermoortele, Kamal Malhotra & Joseph Anthony Lim *Is MDG 8 on Track as a Global Deal for Human Development* (United Nations Development Programme, New York, 2003).

Gita Welch & Zahra Nuru *Governance for the Future: Democracy and Development in the Least Developed Countries* (UN-OHRLLS & UNDP, 2006).

Roger Williamson *The Millennium Development Goals: Ensuring Achievability and Accountability* Wilton Park Paper (December 2005). Available at http://www.wilton park.org.uk/document/conferences/WP786/pdf/WP786.pdf.

Rachel Wynberg *Bioprospecting, Access and Benefit-sharing in South Africa: Towards A Strategic Assessment* A paper prepared for the National Botanical Institute as a contribution towards the Southern African Biodiversity Support Programme and National Biodiversity Strategy and Action Plan. Available at http://www.environment .gov.za.

Bruce Yandle, Maya Vijayaraghavan, & Madhusudan Bhatarai The *Environmental Kuznets Curve: A Primer* (PERC Research Study, May 2002). Available at http:// www.manchester.edu/courses/econ231/yandleetal.pdf.

Helen Yu & Alison Guernsey 'What is the Rule of Law?' *The University of Iowa Center for International Finance and Development*, available at http://www.uiowa. edu /ifdebook/faq/Rule_of_ Law.shtml.

F. REPORTS

African Development Bank *Achieving the Millennium development Goals in Africa: Progress, Prospects, and Policy Implications* (Global Poverty Report, June 2002).

Center for Human Rights and Global Justice *Human Right Perspective on the Millennium Development Goals: Conference Report* (New York: NYU School of Law, 2003).

Department of Environmental Affairs and Tourism (DEAT) *South Africa Environmental Outlook: A Report on the States of the Environment – Executive Summary and Key Findings* (DEAT, Pretoria, 2006).

Earth Justice *Issue Paper: Human Rights and the Environment – Case Studies* Additional Materials for the Fifty-Eight Session of the United Nations Commission on Human Rights, Geneva, March 18-April 26, 2002.

Earth Justice *Issue Paper: Human Rights and the Environment – Developments* Materials for the Fifty-Eight Session of the United Nations Commission on Human Rights, Geneva, March 18-April 26, 2002.

Earth Justice *Issue Paper: Human Rights and the Environment*, Material for the 60th Session of the United Nations Commission on Human Rights, Geneva, March 15-April 23, 2004. (Earth Justice, 2004).

Environmental Rights Action (ERA) & The Climate Justice Programme *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity* (Amsterdam, June 2005).

Lucy Emerton, Francis Karanja & Sam Gichere *Environment, Poverty & Economic Growth in Kenya: What are the Links, and Why do They Matter?* Policy Brief No. 2 (IUCN, December 2001). Available at http//www.borderdiversity.org/dcforum/User _Files/Policy _brief_No_2_Kenya.pdf.

Group of Eight *Progress Report by the G8 Africa Personal Representatives on Implementation of the Africa Action Plan* (G8 Gleneagles, 2005).

Michelo Hnadungule *Anti-Corruption Initiatives in Africa: An Overview* (Good Governance Academy, Pretoria, July 2003).

Human Rights Watch *NIGERIA-THE OGONI CRISIS: A Case-Study of Military Repression in South Eastern Nigeria* (July 1995) Vol. 7, No.5.

Human Rights Watch *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (January 1999).

G8 GLENEAGLES *Progress Report by the G8 African Personal Representatives on the Implementation of the African Action Plan* (DFID, July 2005).

International Fund for Agricultural Development (IFAD) *Rural Poverty Report 2001: The Challenge of Ending Rural Poverty* (Oxford University Press, 2001).

Japan International Cooperation Agency JICA) *Country Profile on Environment: Nigeria* (November 1999).

Millennium Ecosystem Assessment *Ecosystem & Human Well-Being: Synthesis* (Island Press, Washington DC, 2005).

Millennium Ecosystem Assessment *Ecosystem & Human Well-Being: Health Synthesis* (Island Press, Washington DC, 2005) 50.

MDGs Status Report for Kenya 2005 (Ministry of Planning and National Development, 2005).

Millennium Project *Environment and Human Well-Being: A Practical Strategy*, Summary Version of the Report of the Task Force on Environmental Sustainability (Earth Institute, New York, 2005).

National Environmental Management Authority (NEMA) *State of Environment (SoE) Report for Kenya, 2003* (NEMA, 2003).

Professor Njuguna Ng'ethe, Dr Musambayi Katumanga & Gareth Williams *Strengthening the Incentives for Pro-Poor Policy Change: An analysis of drivers of change in Kenya* (DFID, May 2004). Available at http://www.gsdrc.org/docs/open /DOC 24.pdf.

Nigeria Millennium Development Goals 2006 Report (The National Planning Commission, Abuja, 2006).

South African Human Rights Commission *The Right to a Healthy Environment*, 5th Economic and Social Rights Report Series, 2002/03 Financial Year (21 June 2004).

South Africa: Millennium Development Country Report 2005.

Transparency International *Report on the Transparency International Global Corruption Barometer 2007* (Policy and Research Department, 2007).

Transparency International *Corruption Perception Index 2004 (*October 2004).

Transparency International 2006 Transparency International Corruption Perception Index (2006).

Transparency International *2007 Transparency International Corruption Perception Index (CPI)* (September 2007).

Transparency International *Summary Report of National Integrity System Studies of DRC, Mauritius, South Africa, Mozambique, Botswana, Zambia and Zimbabwe* (November 2007).

Transparency International *The Kenya Bribery Index 2006* (TI-Kenya 2006).

United Nations *Report of the United Nations Conference on Environment and Development,* Rio de Janeiro, 3-14 June, 1992. A/CONF.151/26, Vol.1, (12 August 1992).

United Nations *Report of the International Conference on Financing for Development,* A/CONF.198/11 (New York, 2002).

United Nations (UN) *The Millennium Development Goals Reports 2007* (New York, 2005).

United Nations *Special session of the General Assembly on HIV/AIDS,* Report of the Secretary-General, 55th session, agenda item 179, 16 February 2001.

United Nations Conference on Trade and Development (UNCTAD) *The Least Developed Countries Report 2004* (United Nations, New York, 2004).

UN Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment*, Final Report of the Special Rapporteur, UN Doc. E/CN.4/1994/9 (July 1994) 74.

United Nations Commission on Human Rights (UNCHR) *Economic, Social and Cultural Rights: Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights* Report Submitted by the Special Rapporteur on toxic waste, Mrs. Fatma-Zohra Ouhachi-Vesely, E/CN.4/2001/55, 19 January 2001.

United Nations Development Programme (UNDP) *Governance for Sustainable Human Development* UNDP Policy Document (New York, January 1997).

United Nations Development Programme (UNDP) *Human Development Report: Human Development to Eradicate Poverty* (UNDP, 1997).

United Nations Development Programme (UNDP) *Human Development Report: Human Rights and Human Development* (UNDP, 2000).

United Nations Development Programme (UNDP) *Human Development Report 2002: Deepening democracy in a fragmented world* (Oxford University Press, New York, 2002).

United Nations Development Programme (UNDP) *Human Development Report 2003-Millennium Development Goals: A compact among nations to end human poverty* (New York, Oxford University Press, 2003).

United Nations Development Programme *Human Development Report 2005--International Cooperation at a crossroad: Aid, trade and security in an unequal world* (New York, 2005).

United Nations Development Programme (UNDP) *The Poverty-Environment Nexus: Reinforcing Linkages* Practice Note (October 2004).

United Nations Environment Programme (UNEP) *African Environmental Outlook: Case Studies* (UNEP, Earthprint, 2004).

United Nations Environment Programme (UNEP) *African Environment Outlook: Past, Present and Future Perspectives* (UNEP, 2002).

United Nations Environmental Programme (UNEP) *African Environmental Outlook 2: Our Environment, Our Wealth* (2006).

United Nations Environment Programme (UNEP) *Global Environment Outlook Yearbook 2004/2005: An Overview of Our Changing Environment* (2005).

United Nations Environment Programme (UNEP) *Women and the Environment* (Division of Environmental Policy Development and Law, 2004).

United Nations Environment Programme (UNEP) & International Institute for Sustainable Development (IISD) *Human Well-Being, Poverty & Ecosystem Services: Exploring the Link* (UNEP & IISD, 2004).

United Nations General Assembly *Follow-up to the Outcome of the Millennium Summit* A/ 55/162, December 14, 2000.

United Nations General Assembly *Road Map Towards the Implementation of the Millennium Declaration: Report of the Secretary-General* A/56/1326, September 6, 2001.

United Nations General Assembly *Follow-up on the Outcome of the Millennium Summit* A/Res/56/95, 20 January 2002.

United Nations General Assembly *Implementation of the United Nations Millennium Declaration: Report of the Secretary-General* A/58/323' 2 September 2003.

United Nations General Assembly Implementation of the United Nations Millennium Declaration: Report of the Secretary-General A/59/282, August 27, 2004.

United Nations *Millennium Development Goals Report 2005* (United Nations, New York, 2005).

United Nations Statistics Division *Millennium Indicators database, World and Regional Trends* (UN Statistics Division, 2004). Available at http://millennium indicators.un.org/unsd/ mi/mi_worldregn.asp.

Carol Welch, Coordinator, UN Millennium Campaign, in Human Rights & Democracy *Implementing The Millennium Development Goals: Our Human Rights Obligation* Conference Report, Ottawa, 8-9 June 2005 (International Centre for Human Rights and Democratic Developments, 2005).

World Bank *World Development Report 1997: The State in a Changing World* (Oxford University Press, New York, 1997).

World Resources Institute, UNDP, UNEP, & World Bank *The Wealth of the Poor - managing Ecosystems to Fight Poverty* (WRI, Washington DC, 2005).

G. NEWSPAPERS, MAGAZINES AND ELECTRONIC NEWS (E-NEWS)

Tunde Akingbade 'Nigeria Under Toxic Waste Threat…As Devil's Trinity Hits West Africa Again' *Sunday Sun* Friday, 13 October 2006.

James Brooke 'Waste Dumpers Turning to West Africa' *The New York Times*, 17 July 1988.

'Corruption still a problem in Africa, says UN' *The Cape Times* 14 March 2006.

Irene Dankelman 'No hope without gender equality' (2005) 4 *Poverty & Environment Times* 14.

Sean OíDriscoll 'NEPAD Seeks to Revitalize Africa But Faces Criticism and Its Own Ailments' *The Washington Diplomat*, September 2004.

Victor Efeizomor 'Obasanjo Spent $ 13bn on Power Sector, Says Elumelu' *ThisDay* Monday, 2 June 2008.

Environmental Right Action (ERA) 'Institutional Framework for the Protection and Management of the Environment' *The Guardian* 8 December 2003 at 72.

ETV 'Zambia calls Zimbabwe bye-election a blot on democracy' & 'Botswana Boycott SADC Summit', *eNews Prime Time*, 16 August 2008.

Ray Faure 'Survey shows signs of "rampant corruption" in Africa' *Mail & Guardian* 18 October 2005.

Tommy Koh 'Rule of man or rule of law?' in *Our Planet*, the Magazine of the United Nations Environment Programme, Vol. 15, No.3 at 14.

'Mbeki took R30-million and gave some to Zuma' *Sunday Times*, 3 August 2008, at p1.

New York Times 'A Lethal Cloud Falls on India: An Anguished Community Mourns Its Dead' 6 December 1984, at A1.

Kingsley Nweze 'Senate: Govs Spend Ecological Funds on Entertainment' *THISDAY* 3 January 2008.

John Abba-Ogbodo 'Obasanjo Awarded NIPP Contracts Without Tenders Board, Says MD' *Guardian* Saturday, 15 March 2008.

Louis Odion 'The politics of darkness' *NigeriaExchange* 26 February 2008.

Nosike Ogbuenyi & Deji Elumonye 'EFCC Recovers N100bn Assets from Ex-Govs' *THISDAY*, 12 June 2007.

Akpo Mudiaga Odje 'Locus Standi: Threat to Anti-Corruption Crusade and Good Governance in Nigeria (1) & (2)' The *Vanguard*, 13 & 20 January 2006.

Tim Hirsch 'Ecosystem protection, a key to development' (2005) 4 Environment & Poverty Times 1.

'PDP, Kupolokun, Obaseki may appear in US court - Over N750m bribery allegation - FG to probe top officials' *Nigerian Tribune* 8 November 2007.

Idowu Samuel & Bola Badmus 'OBJ Aided Chinese Firm to Loot N116b' *Tribune* 15 March 2008.

Dinah Shelton 'Sustainable development comes from Saturn' in *Our Planet*, the Magazine of the United Nations Environment Programme, Vol. 15, No.3, at p20.

'The big con' Sunday *Times*, 10 August 2008, at p1.

Christopher Weeramantry 'Justice can be shortsighted' in *Our Planet*, the Magazine of the United Nations Environment Programme, Vol. 15, No.3, at 7.

Leon Usigbe & Tordue Salem 'How Obasanjo spent $13bn on power – Minister' *Vanguard*, Tuesday, 11 March 2008.

John Yeld 'State of SA environment is worsening' The *Cape Argus* 3 July 2007.

H. POLICY DOCUMENTS

Action Plan of the Environment Initiative of the New Partnership for Africa's development (June 2003).

Draft Principles on Human Rights and Environment, June 1994.

Economic Recovery Strategy for Wealth and Employment Creation, 2003 (Kenya).

National Environment Action Plan 1994 (Kenya).

National Economic Empowerment and Development Strategy, 2004.

National Policy on Environment: Revised Edition, 1999 (Nigeria).

New Partnership for Africa's Development (October 2001).

United Nations Resolution A/RES/45/94, 19 December 1990.

White Paper on Environmental Management Policy for South Africa, 1996.

White Paper on Reconstruction and Development: Government's Strategy for Fundamental Transformation September1994 (South Africa).

I. DECLARATIONS AND RESOLUTIONS

.

Doha Ministerial Declaration, November 2001.

G8 Africa Action Plan, June 2002

Johannesburg Declaration on Sustainable Development, September 2002.

Monterrey Consensus of the International Conference on Financing for Development, March 2002.

NEPAD Declaration on Democracy, Political Economic and Corporate Governance, 2002.

Rio Declaration on Sustainable Development, 1992.

Stockholm Declaration of the United Nations Conference on Human Environment, 1972.

United Nations General Assembly *Millennium Declaration* A/Res/55/2, September 2000.

United Nations Declaration on the New Partnership for Africa's Development A/Res/57/2, 16 September 2002.

World Summit on Sustainable Development Plan of Implementation, September 2002.