Africa's Environmental and Sustainable Development Law for Agenda 2063

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1. Introduction

Subtitled "The Africa We Want," Agenda 2063 is a 24-page non-legal, policy instrument of the African Union (AU), drafted under the leadership of Nkosazana Dlamini Zuma, the immediate past chair of the African Union Commission, and published in 2015 by the AU Commission. It is non-legal because it does not prescribe binding, legal norms. Rather, the instrument is aspirational, setting out what Africa should do to achieve a certain purpose by year 2063, hence why it is styled an "ambitious vision and action plan."[1]

We can have a general idea of the overall purpose by considering how the instrument's proponent, AU, understands it. The AU succinctly describes it as "a strategic framework for the socio-economic transformation of the continent over the next 50 years,"[2] built on and seeking to accelerate past and present initiatives for "growth and sustainable development"[3] in the continent as well as "national, regional, continental best practices."[4] This AU's description gives away at least two illuminating points. First, the instrument is designed for Africa's socio-economic transformation in furtherance of the initiatives for growth and sustainable

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[1] Kaitlyn DeGhetto, Jacob R Gray and Moses N Kiggundu, "The African Union's Agenda 2063: Aspirations, Challenges, and Opportunities for Management Research," *African Journal of Management* 2, no. 1 (2016): 93; Donald L Sparks, "The Sustainable Development Goals and Agenda 2063: Implications for Economic Integration in Africa," *Research in Applied Economics* 8, no. 4 (2016): 45.

[2] "About Agenda 2063," African Union, Last Modified June 21, 2018, https://au.int/agenda2063/about.

[3] Ibid.

[4] Ibid.

development. It is therefore about socio-economic transformation within the context of growth and sustainable development which constitute the ultimate objective, hence not about classical economic development. Second, although gaining traction,[5] the instrument is not novel since it merely continues the work that previous instruments — the Lagos Plan of Action, the Abuja Treaty, the Minimum Integration Programme, the Programme for Infrastructural Development in Africa (PIDA), the Comprehensive Africa Agricultural Development Programme (CAADP), the New partnership for Africa's Development (NEPAD), and regional and national plans and programmes— had started, as complemented by national, regional and continental best practices. Together, the instruments, including Agenda 2063, have moved Africa from its, hitherto, interest in classical economic development[6] toward sustainable development,[7] and practices across countries clearly evidence this move.[8]

Agenda 2063 draws on Africa's diverse sources at the regional, sub-regional and national levels, and, stealthily, from sources at the international level. The African sources include, among others, the Constitutive Act of the AU, the AU Vision, the Eight Priority Areas of the AU's 50th Anniversary Solemn Declaration and the African Aspirations for 2063 at the

[5] Stakeholders have been organizing conference and publication projects on the theme of Agenda 2063. To illustrate conferences, the African Diplomatic Corps, African Women Diplomatic Forum and the Institute of African Studies at Carleton University recently organized a conference titled "The African Union's Agenda 2063: Assessing the Vision for Africa" at Carleton, Canada, in 2015, and the annual conference of the African Bar Association for 2018 at Nairobi, Kenya, is titled "Africa's Socio-Economic and Political Future: African Union's Agenda 2063 in Perspective." Also as examples of publication projects, there are numerous works, for instance "Education Law, Strategy Policy and Sustainable Development in Africa" published by Palgrave Macmillan in 2018 and "A Handbook on Regional Integration in Africa: Towards Agenda 2063" published by the Commonwealth Secretariat in 2017.

[6] Africa hoped to hold on to classical economic growth in the 1960s. See Temitope Tunbi Onifade and Odunola Akinwale Orifowomo, "Differential Treatment in International Environmental Law and the Climate Regime: From 'Common but Differentiated Responsibilities' to 'Common but Differential Responsibilities and Respective Capabilities,'" *University of Ibadan Journal of Public and International Law* 5 (2015): 1.

[7] With the Lagos Plan of Action, Africa gradually moved from classical economic growth to "self-sustained development" while acknowledging environmental limits. See GA Sekgoma, "The Lagos Plan of Action and Some Aspects of Development in Sierra Leone," *Botswana Journal of African Studies* 8, no. 2 (1994): 68; Adebayo Adedeji, "The Monrovia Strategy and the Lagos Plan of Action for African Development- Five Years After," *ECA/Dalhousie University Conference on the Lagos Plan of Action and Africa's Future International Relations: Projections and Implications for Policy-Makers*, Halifax, November 2-4, 1984. Upon the arrival of Agenda 2063, Africa now clearly embraces sustainable development.

[8] It is trite that most countries now embrace sustainable development, even if only rhetorically. Policy documents and sometimes legal instruments mention it.

regional level, and sub-regional frameworks and national plans.[9] International sources such as the UN Charter, International Bill of Human Rights and diverse United Nations General Assembly (UNGA) resolutions invariably inform the African sources,[10] so we can say that the agenda is ultimately influenced by such international instruments.

The agenda outlines seven aspirations that are applicable to various areas of interest. They are: (1) prosperity based on inclusive growth and sustainable development; (2) an integrated continent, politically united and based on the ideals of pan-Africanism and the vision of renaissance; (3) good governance, democracy, respect for human rights, justice and the rule of law; (4) peace and security; (5) strong cultural identity, common heritage, shared values and ethics; (6) people-driven development, relying on the potential of African people, especially its women and youth, and caring for children; and (7) the continent as a strong, united and influential global player and partner. Notwithstanding the diverse areas that the aspirations touch on, they have what could be called "unity of aspirations" in that they are interwoven, so it is not realistic to confine any aspiration into a silo. For instance, it is impossible to achieve inclusive growth and sustainable development without a good governance framework as well as a peaceful and secure environment.

At least five of the aspirations appear to be core to the area of sustainable development, understood as a concept that has redirected attention away from classical economic development. They are Aspirations 1, 3, 5, 6 and 7. Perhaps the most distinct is aspiration 1 on prosperous Africa which explicitly envisions prosperity in terms of "inclusive growth and sustainable development." The aspiration implies that when we talk about prosperity in Africa, we ought to have inclusive growth and sustainable development in mind, not classical

[9] "About Agenda 2063," African Union, Last Modified June 21, 2018, https://au.int/agenda2063/about.
[10] For one account of how some international law sources influenced the African Charter, see UO Umozurike, "The African Charter on Human and Peoples' Rights," *American Journal of International Law* 77, no. 4 (1983): 902.

economic development. Aspiration 3 is broader than 1, but its elements — good governance, democracy, respect for human rights, justice and the rule of law — constitute some of the top human concerns in Africa, and as such serve as the context for a holistic discussion of sustainable development. How could we achieve sustainable development without any of those elements? Like aspiration 3, aspiration 5 also provides a context for sustainable development. However, unlike aspiration 3 which is about ideas that are often considered universal, as originally popularized by the global north, Aspiration 5 deals with themes that bring the issue close to home— cultural identity, common heritage, shared values and ethics with affective effects — which are about advancing peoples' immersed interests in the various dimensions or pillars of sustainable development, for instance social, economic and environmental,[11] among other possibilities across conceptual frameworks.[12] This thread of discussion naturally leads us to aspiration 6 which asserts the idea of people-driven development. This sort of development could mean many things, but scholars have identified some aspects, for instance peoples-based permanent sovereignty over natural resources, which could advance functional distributive justice,[13] building on an "international law within intrastate natural resources allocation" analysis[14] and other distributive justice contributions,[15] in the pursuit of sustainable development. Aspiration 7, realizing that Africa alone does not make a forest, acknowledges that the continent should be a "strong, united and influential global player and partner." Often, many people associate the idea of being strong or influential in global policy with economic

[11] For the links of and interactions across the three pillars, see Hugh Wilkins, "The Integration of the Pillars of Sustainable Development," *McGill International Journal of Sustainable Development Law and Policy* 4, no. 2 (2008): 165; Ana-Maria Teodorescu, "Links Between the Pillars of Sustainable Development," *Annals of University of Craiova - Economic Sciences Series* 1, no. 40 (2012): 168.
[12] See, for example, Lucas Seghezzo, "The Five Dimensions of Sustainability," *Environmental Politics* 18, no. 4 (2009): 539.
[13] Temitope Tunbi Onifade, "Peoples-based Permanent Sovereignty over Natural Resources: Toward Functional Distributive Justice?," *Human Rights Review* 16 (2015): 343.
[14] Lillian Aponte Miranda, "The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-based Development," *Vanderbilt Journal of Transnational Law* 45, no.3 (2012): 785.
[15] Such contributions generally employ common ownership or environmental justice approaches to establish distributive justice claims. See Onifade, see note 13 above.

power, but this is a myopic view since Africa could unite to be strong or influential not just as an economic player, but as a sustainable development leader.

Complementing multidisciplinary efforts on the implementation of Agenda 2063,[16] my contribution addresses if and how existing law could help. Given that the sustainable development concept emerged from and should be understood in the context of the environmental movement,[17] the objective is to examine the interwoven environmental and sustainable development laws that could support Agenda 2063, specifically Aspirations 1, 3, 5, 6 and 7 which are core to sustainable development. As such, the question is about what environmental and sustainable development laws could advance Agenda 2063. To answer this question, I claim that a mix of regional, sub-regional and national environmental and sustainable development laws could advance Agenda 2063.

I limit the scope of the contribution in three major ways. First, since Agenda 2063 appears to encourage African solutions to African problems,[18] I overview the background at the global level, and then explore the substance of the laws at the regional, sub-regional and national levels, so I largely exclude international sources outside Africa. Second, to capture the diversity of sources across civil and common law jurisdictions, I concentrate more on what appears to be the most dominant sources across all legal systems: instruments and provisions that take the form of legal agreements (treaties, conventions, charters and protocols, etc) at the international and regional levels, especially enabling sources such as treaties and conventions, and instruments that take the form of legislation (constitutions, statutes, regulations and orders, etc) at the national level, mainly constitutions and statutes which serve as enabling sources.

[16] Babatunde Fagbayibo, "Nkrumahism, Agenda 2063, and the Role of Intergovernmental Institutions in Fast-tracking Continental Unity," *Journal of Asian and African Studies* 53, no. 4 (2017): 629; Sparks, see note 1 above; DeGhetto, Gray and Kiggundu, see note 1 above.
[17] See World Commission on Environment and Development, *Our Common Future* (Oxford: World Commission on Environment and Development, 1987).
[18] Some of the provisions of Agenda 2063 suggest an underlying idea that Africans should be the ones finding solutions to their problems. See, for example, Paragraph 4.

Third, to adequately explore the legal norms, I pay more attention to the substance of the instruments and provisions, for instance as embedded in aims, objectives and/or principles, as opposed to structures, procedures and processes: the principles serve as the fundamental roadmap that guides actors towards achieving the aims and/or objectives, hence more of concern to law, while the structures, procedures and processes constitute the practical implementation architecture, so they might be of more concern to policy studies.

The contribution is intentionally more descriptive than normative. The idea is to provide an original legal map and analysis of laws useful for practitioners such as lawyers, judges and policy makers, and potentially for law students and scholars.[19] I employ methods from not only law but also policy studies, following two iterative steps. First, I retrieve primary and secondary legal and non-legal policy instruments from the online archives of state and non-state institutions to serve as evidence to build the contribution. The state institutions include regional and sub-regional intergovernmental organizations as well as national governments, while the non-state institutions include academic institutions, think-tanks and other private organizations providing resources on African law. Second, I analyse with qualitative literature review[20] and doctrinal legal method.[21] The review is based on representative and pivotal sources, and the legal method deploys settled doctrines of law in the contribution.

Three sections follow. Section 2 provides a largely analytical, normative background to environmental and sustainable development law in Africa. Section 3, 4 and 5 then doctrinally

[19] Since the contribution is originally for the African Bar Association, which is a professional organization, the type and scope of contribution are fit for purpose.
[20] See David N Boote and Penny Beile, "Scholars Before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation," *Educational Researcher* 34, no. 6 (2005): 3-15; Justus J Randolph, "A Guide to Writing the Dissertation Literature Review," *Practical Assessment Research & Evaluation* 14, no. 13 (2009): 1.
[21] Terry Hutchinson, "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law," *Erasmus Law Review* 8, no.3 (2015): 130.

describes the substance of environmental and sustainable development law at the regional, sub-regional and national levels, respectively. Section 6 concludes.

2. Background to Environmental and Sustainable Development Law in Africa

Sand distinguishes traditional, modern and post-modern eras of environmental law,[22] and his colleagues such as Dodds and Strauss,[23] Rowland,[24] Hecht and Tirpak,[25] Ivanova,[26] and Onifade and Orifowomo[27] refer to some of these eras, albeit hardly making any comparably sharp and/or exhaustive distinction. Based on these scholars' contributions, we can derive a timeline: the traditional era covering the pre-1972 period; the modern era from 1972 to 1992; and the post-modern era starting from 1992.

The eras form the timeline not only for the environmental agenda but also the sustainable development agenda which emerged along the way. The environmental agenda emerged in the traditional era[28] but solidified in the modern era,[29] while the sustainable

[22] Peter H Sand, ed. *The History and Origin of International Environmental Law* (Cheltenham: Elgar, 2015).
[23] Felix Dodds and Michael Strauss, *Only One Earth: The Long Road via Rio to Sustainable Development* (Abingdon, Oxon and New York: Routledge, 2012).
[24] Wade Rowland, *The Plot to Save the World* (Toronto: Clarke, Irwin and Co Ltd 1973);
[25] Alan D Hecht and Dennis Tirpak, "Framework Agreement on Climate Change: A Scientific and Policy History," *Climatic Change* 29, no.4, (1995): 371.
[26] Maria Ivanova, "Designing the United Nations Environment Programme: A Story of Compromise and Confrontation," *International Environmental Agreements* 7, no. 4 (2007): 337.
[27] Onifade and Orifowomo, see note 6 above.
[28] Environmental issues became popular in the 1960s due to at least four factors. First, there was a movement in response to various environmental problems across Europe, the United States and Japan. Second, scholars popularized environmental issues, leading among which was Rachel Carson who published the influential piece titled "Silent Spring." Third, a crew of astronauts released the coloured picture of the earth taken from space, called "Earthrise," and the picture showed the contrast between the blue and white orb of the earth and the grey colour of the moon, suggesting that the earth might be fragile. Fourth, countries started responding to environmental issues through legal innovation, applying civil, common and hybrid legal systems to address environmental problems, leading to increased awareness about environmental issues. See Ivanova, see note 26 above; Sand, see note 22 above; Dodds and Strauss, see note 23 above.
[29] The environmental agenda that we currently know was officially legitimated at the United Nations Conference on the Human Environment (UNCHE) 1972. See generally Philippe Boudes, "United Nations Conference on the Human Environment," in *Green Ethics and Philosophy: An A-to-Z Guide*, ed. Julies Newman (Thousand Oaks: Sage, 2011), 411.

development agenda, building on the earlier pre-modern concept of sustainability[30] and, later, the modern urge for environmental protection, emerged[31] in the modern era and solidified in the post-modern era.[32] The modern and post-modern eras contribute the most to the extant body of environmental and sustainable development law.

Throughout the eras, governments have constituted the main organizations that have shaped environmental and sustainable development law. They have done so at the international, regional, sub-regional and national levels. Across these levels, they make and implement instruments and provisions of environmental law. The norms in the provisions constitute the soul, and the instruments make up the flesh.

*2.1.**Evolution***

Africa's traditional era mostly features precolonial, customary foundations of environmental and sustainable development practices.[33] Many African cultures might not explicitly describe such customs as law, but such customs might actually qualify as law, if law is understood as a

[30] The concept of sustainability was conceived in Forestry and Household Economics. See Ina Ehnert, *Sustainable Human Resource Management: A Conceptual and Exploratory Analysis from a Paradox Perspective* (Berlin and Heidelberg: Physica-Verlag, 2009); Ulrich Grober, *Deep Roots- A Conceptual History of "Sustainable Development" (Nachhaltigkeit)* (Berlin: WZB Berlin Social Science Centre, 2007).

[31] The concept of sustainable development mainly resulted from the work of the Intergovernmental Inter-Sessional Preparatory Committee on the Environmental Perspective to the Year 2000 and Beyond and the World Commission on Environment and Development. Nevertheless, it was the report of the Brudtland Commission titled "Our Common Future," adopted by the UNGA via Resolution 42/186 of 11 December 1987, that attracted the most attention to the concept. See World Commission on Environment and Development, see note 17 above.

[32] Sustainable development was official legitimized at the United Nations Conference on Environment and Development (UNCED). The key outcome documents have been the most influential global policy instruments. They are the Rio Declaration on Environment and Development, Agenda for the Twenty-first Century (Agenda 21), Statement of Forest Principles, UN Framework Convention on Climate Change (UNFCCC) and UN Convention on Biological Diversity (UNCBD). See also Stephanie Meakin, *The Rio Summit: Summary of the United Nations Conference on Environment and Development* (Ottawa: Library of Parliament, 1992).

[33] See, for example, BR Akinbola and TT Onifade, "Legal and Administrative Remedies in Environmental Law in Nigeria: Reform Proposition," *Afe Babalola University Ado-Ekiti Law Journal* 1, no. 1 (2013): 320.

body of norms[34] and as a productive of normative order.[35] Along this line of reasoning, scholars have identified environmental and sustainable development norms that qualify as part of the traditional era across countries, for instance in Zimbabwe[36] and Nigeria.[37]

Hence, to tell a more complete story of environmental and sustainable development law, it is imperative to incorporate African customary practices which are not fully covered by most of mainstream scholarship, some of which trace Africa's environment protection efforts back the colonial period.[38] However, telling such as story is beyond the scope of this contribution, and this exclusion is not significant because of the focus on the modern and postmodern eras of environmental and sustainable development law which Africa has fully contributed to shaping.

Africa was part of the development of the modern era and has been significantly involved in the issues in the post-modern era.[39] As for the modern era, participation at the major conferences where important decisions that have shaped environmental and sustainable development law were made is perhaps the best indicator. For instance, the Proceedings of the United Nations Conference on the Human Environment (UNCHE)[40] records 113 states invited in accordance with General Assembly Resolution 2850 (XXVI) who took part in the

[34] Several scholars describe law in terms of norms. See, for example, Hans Kelsen, "On the Basic Norm," *California Law Review* 47, no.1 (1959): 107; Graham Hughes, "Validity and the Basic Norm," *California Law Review* 59, no. 3 (1971): 695; Jeremy Waldron, "Are Constitutional Norms *Legal* Norms?," *Fordham Law Review* 75, no. 3 (2006): 1697; William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge and New York: Cambridge University Press, 2009).

[35] Scholars describe law as a product of legal order, and legal order as a form of normative order. Therefore, law is a product of one form of normative order called legal order. See, for example, Gillian K Hadfield and Barry R Weingast, "What is Law? A Coordination Model of the Characteristics of Legal Order," *Journal of Legal Analysis* 4, no.2 (2012): 471; Gillian K Hadfield and Barry R Weingast, "Microfoundations of the Rule of Law," *Annual Review of Political Science* 17 (2014): 21.

[36] Munyaradzi Mawere, "Traditional Environment Conservation Strategies in Pre-Colonial Africa: Lessons from Zimbabwe to Forget or to Carry Forward into the Future?," *Afro Asian Journal of Social Sciences* 4, no. 4.1 (2013): 1.

[37] Akinbola and Onifade, see note 33 above.

[38] Bolanle T Erinosho, "The Revised African Convention on the Conservation of Nature and Natural Resources: Prospects for a Comprehensive Treaty for the Management of Africa's Natural Resources," *African Journal of International and Comparative Law* 21, no.3 (2013): 378.

[39] For a discussion of modern and postmodern eras, see Sand, see note 22 above.

[40] Chapter VII.

conference, among which are several African countries: Algeria, Botswana, Burundi, Cameroon, Central African Republic, Congo, Dahomey, Egypt, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Lesotho, Liberia, Libyan Arab Republic, Madagascar, Malawi, Mauritania, Mauritius, Morocco, Niger, Nigeria, Senegal, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zaire and Zambia. Some of these countries have been restructured or renamed, for instance Zaire which is now part of Angola and Dahomey which is now Benin Republic. Turning to the post-modern era, the involvement of Africa on key issues appears to be the best indicator. For instance, as part of the developing world, Africa has largely been in support of differential treatment[41] in relevant environmental and sustainable development law fields, including international environmental law and international trade law, for instance as seen from the Doha Round, although, as Jensen submits, their approach has been substantially and politically unfocused.[42]

*2.2.**Organizational Structure***

For making and implementing environmental and sustainable development law in the modern and post-modern eras, Africa is often organized into regional, sub-regional and national levels. There are multiple organizations across the three levels, but we can identify the most influential organizations that have contributed to the making and moulding of environmental and sustainable development law.

African Union (AU), successor to the Organization of African Unity (OAU), is the top regional organization. The United Nations Economic Commission for Africa and the African

[41] See Philippe Cullet, *Differential Treatment in International Environmental Law* (Hants: Ashgate Publishing, 2003); Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford: Oxford University Press, 2006).
[42] Michael Friis Jensen, "African Demands for Special and Differential Treatment in the Doha Round: An Assessment and Analysis," *Development Policy Review* 25, no.1 (2007): 91.

Development Bank are other organizations that substantially contribute to environmental and sustainable development law, but often they also work with or through the AU, so AU remains the central organization.

Arab Maghreb Union (AMU/UMA), the Community of Sahel-Saharan States (CEN-SAD), the Economic Community of West African States (ECOWAS), the East African Community (EAC), the Intergovernmental Authority on Development (IGAD), the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), and the Economic Community of Central African States (ECCAS) are the eight top sub-regional organizations.[43] They make up the regional economic communities (RECs) of the AU and the African Economic Community (AEC). States also cooperate for several reasons under numerous labels, for instance the African Great Lakes Region and the Indian Ocean Commission, but the eight organizations are the foremost multilateral platforms for law-making, perhaps because economic concerns take priority in Africa.

The fifty-four states making up the AU are the countries that contribute the bulk of environmental and sustainable development laws at the national level. Comparing their laws would reveal how they shape environmental and sustainable development law, although such a comparison cannot be possibly exhaustive, given the volume of instruments.

*2.3.**Instruments and Provisions***

Africa's environmental and sustainable development law in the modern and post-modern eras is largely codified in instruments and provisions that form the legal corpus. We can classify

[43] "The Regional Economic Communities (RECs) of the African Union," United Nations Office of the Special Adviser on Africa, Last modified June 21, 2018, www.un.org/en/africa/osaa/peace/recs.shtml; Sparks, see note 1 above.

these instruments and provisions into those indirectly and those directly dealing with environmental protection and sustainable development.

Indirect instruments and provisions do not deal specifically with environmental protection and sustainable development, even where they have some connection to environmental protection and sustainable development. They focus on other subjects, for instance culture, rights, property, health, governance and other concerns that might remotely interact with the environment-development nexus.[44] Such subjects would have some connection to but not directly about environmental protection and sustainable development.

Direct instruments deal specifically with environmental protection and sustainable development. They may specify environmental protection or sustainable development as a policy objective. Alternatively, they could engage themes that would unavoidably impact and associate with environmental protection and/or sustainable development, for instance natural resources, common heritage, self-determination and environmental justice.

Whether direct or indirect instruments, the provisions could be either direct or indirect. In fact, what makes an instrument direct or indirect might be how much direct or indirect provisions it contains. Thus, direct instruments will mostly have direct provisions, while indirect instruments would largely have indirect provisions.

There appears to be some trends across the direct and indirect instruments. These trends appear at the regional and sub-regional levels on the one hand, and at the national level on the other hand. At least two of them are crucial.

First, most regional and sub-regional instruments are more constitutive than substantive. Constitutive instruments mainly establish institutions that may perform

[44] See Tiyanjana Maluwa, "Environment and Development in Africa: An Overview of Basic Problems of Environmental Law and Policy," *African Journal of International and Comparative Law* 1 (1989) 650.

governance functions. Substantive instruments deal more with the regulation of behaviour, for instance by setting "the rules of the game" and the principles thereto.

Second, national instruments appear to take the form of constitutions, sectoral statutes, and environmental and sustainable development statutes. The first two categories are more popular than the last category, although the last category might be more tailor-made. Nonetheless, governments have increasingly deployed environmental and sustainable development statutes to complement constitutions and sectoral statutes.

3. Regional Environmental and Sustainable Development Law in Africa

The AU is the torchbearer of the vision of an "integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena."[45] It pursues this vision with a list of regional charters, treaties, conventions and protocols,[46] from which we can identify environmental and sustainable development instruments and provisions.

There are more of indirect than direct environmental and sustainable development instruments. The indirect instruments include Phyto-Sanitary Convention for Africa 1967, Cultural Charter for Africa 1976, African Charter on Human and Peoples' Rights 1981, Constitutive Act of the African Union 2000, Protocol on the Amendments to the Constitutive Act of the African Union 2003, Convention of the African Energy Commission 2001, Treaty Establishing the AEC 1991 and Agreement for the Establishment of the African Risk Capacity (ARC) Agency 2012. Of these instruments, I zoom in on those that are currently valid or considerably relevant, enable other instruments, and mostly applicable to hydrocarbons and minerals which are the key resource sectors impacting environmental protection and

[45] "Vision and Mission," African Union, Last modified June 21, 2018, https://au.int/en/about/vision.
[46] "OAU/AU Treaties, Conventions, Protocols & Charters," African Union, Last modified June 21, 2018, https://au.int/ar/treaties.

sustainable development, leading to five items: African Charter on Human and Peoples' Rights 1981, Treaty Establishing the AEC 1991, Constitutive Act of the African Union 2000, Convention of the African Energy Commission 2001, and Agreement for the Establishment of the African Risk Capacity (ARC) Agency 2012. The direct instruments are African Convention on the Conservation of Nature and Natural Resources 1968, Revised African Convention on the Conservation of Nature and Natural Resources 2017, Statute of the African Minerals Development Centre 2016, and Bamako Convention on Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa 1991. Like the case of the indirect instruments, I take interest in the instruments that are currently valid or considerably relevant, enable other instruments, and apply mainly to hydrocarbons and minerals as the two key resource streams that impact environmental protection and sustainable development, leading to two items: Statute of the African Minerals Development Centre 2016 and Revised African Convention on the Conservation of Nature and Natural Resources 2017.

These direct and indirect instruments have diverse direct and indirect provisions. The direct instruments have more direct and less indirect provisions, while the indirect instruments have more indirect and less direct provisions.

Table 1: Sample of Regional Environmental and Sustainable Development Laws

Serial Number	Indirect Instruments	Direct Instruments
1	African Charter on Human and Peoples' Rights 1981	Statute of the African Minerals Development Centre 2016

2	Treaty Establishing the AECs 1991	Revised African Convention on the Conservation of Nature and Natural Resources 2017
3	Constitutive Act of the AU 2000	
4	Convention of the African Energy Commission 2001	
5	Agreement for the Establishment of the African Risk Capacity (ARC) Agency 2012	

*3.1.**African Charter on Human and Peoples' Rights 1981***

The member states of the Organization of African Unity (OAU) unanimously[47] agreed to the African Charter on Human and People's Rights at the Eighteenth Assembly of Heads of State and Government in Nairobi, Kenya, on 27 June 1981. Pursuant to the simple majority ratification or adherence requirement of Article 63, the charter came into force on 21 October 1986. The African Union (AU), as successor to the OAU, has inherited the charter.

The charter is all about human rights, evidenced by its features, which D'Sa describes as "distinctive".[48] As such, it is essentially about Aspiration 3 of Agenda 2063, specifically human rights, although it also has provisions addressing the elements of Aspirations 1, 5, 6 and

[47] Rose M D'Sa, "Human and Peoples' Rights: Distinctive Features of the African Charter," *Journal of African Law* 29, no.1 (1985): 72.
[48] See ibid.

7. To sum, the instrument is more about Aspiration 3 than other aspirations, so it has more provisions supporting Aspiration 3 than the others.

Article 2 to 24 provide for various human and peoples' rights. The distinction between human and peoples' rights is intentional, deriving from the variance of the African and western conceptions of human rights.[49] Nonetheless, human and peoples' rights equates with what western scholarship and policy simply understands as human rights. Article 25 and 26 state some of the duties towards achieving such human and peoples' rights. Unlike most instruments providing for the duty of the government to citizens or of aliens to the state, the charter also adds the duty of the individual.[50] This addition means that everyone could be liable for legal duty, from the polity to the individual level. In all, Articles 20, 21, 22 and 24 are the most essential for the human and peoples' rights applicable to environmental protection and sustainable development.

Article 20 could address Aspirations 1, 3, 5 and 6. It asserts the right for existence, understood as encompassing "unquestionable and inalienable right to self-determination," and considers self-determination to mean freedom to freely determine political status and pursue economic and social development based on policy that people freely choose. Self-determination, a problematic concept from its western beginnings[51] that, at the least, now allows people to determine the direction of their lives together with the right to employ resources in such determination,[52] would advance inclusive growth and sustainable development under Aspiration 1, is consistent with the principles of democracy and good

[49] Ibid.
[50] Ibid.
[51] See Edward M Morgan, "The Imagery and Meaning of Self-Determination," *New York Univeristy Journal of International Law and Politics* 20 (1988): 355.
[52] Self-determination was earlier employed for decolonization, but it has other dimensions which could capture the liberty to exploit resources for development. See MK Nawaz, "The Meaning and Range of the Principle of Self-Determination," *Duke Law Journal* (1965): 82. Scholars have deployed the concept for the right to resources. See Miranda, see note 14 above; Onifade, see note 13 above.

governance under Aspiration 3, would advance cultural identity, common heritage and values under Aspiration 5, and would promote people-driven development under Aspiration 6.

Article 21 could also address Aspirations 1, 3, 5 and 6. It builds on the idea of self-determination in Article 20 by providing for the right to freely dispose of wealth and natural resources, reinforcing what Haugen implies as the resource dimension to self-determination,[53] which is exercisable in the exclusive interest of people. This right could advance inclusive growth and sustainable development under Aspiration 1, respect democracy and be in line with good governance under Aspiration 3, acknowledge common heritage under Aspiration 5, and promote people-driven development under Aspiration 6. The Article states the caveat on spoliation wherein those disposed of their resources shall have the right to lawful recovery and adequate compensation. However, this caveat is more in theory, as widespread practice evidences dispossession of resources without adequate compensation.[54]

Article 22 could similarly address Aspirations 1, 3, 5 and 6. It specifies the right to economic, social and cultural development of people, specifically their freedom, identity and the equal enjoyment of the common heritage of mankind. Economic, social and cultural development aligns with the economic and social pillars of sustainable development, which are interwoven with the environmental pillar as Murphy shows,[55] and could foster inclusive growth under Aspiration 1, democracy, human rights and the rule of law under Aspiration 3, the idea of common heritage under Aspiration 5, and people-driven development under Aspiration 6.

[53] Hans Morten Haugen, "People's Right to Self-determination and Self-governance over Natural Resources: Possible and Desirable?" *Nordic Journal of Applied Ethics* 8, no.1 (2014): 3. See also Hans Morten Haugen, "The Right to Self-determination and Natural Resources: The Case of Western Sahara," *Law, Environment and Dev*elopment Journal 3, no.1 (2007): 72.
[54] See Onifade, see note 13 above.
[55] Kevin Murphy, "The Social Pillar of Sustainable Development: A Literature Review and Framework for Policy Analysis," *Sustainability: Science, Practice and Policy* 8, no.1(2012): 15.

According to Article 22, states have the duty to ensure the exercise of the right to economic, social and cultural development.[56]

Article 24 could then address Aspirations 1, 3 and 5. It adds the rights of peoples to "a general satisfactory environment favourable to their development," and has formed the basis for successful environmental litigation.[57] As already appraised by scholars,[58] such a right could be an integral part of and as such advance inclusive growth and sustainable development under Aspiration 1, human rights and justice under Aspiration 3, cultural ways of life under Aspiration 5, and people-driven development under Aspiration 6. It is therefore core to sustainable development. When interpreted outside the context of sustainable development, the provision could be understood in terms of economic growth, but the concept of sustainable development now fully incorporates the sense of development in Article 24.

But, not so fast! Confirming its plague of pessimism,[59] the charter has practical limitations that we have seen from the activities of its establishments, most notably the African Commission on Human and Peoples' Rights.[60] For instance, nothing stops governments from undermining implementation, since implementation might ultimately rest on political will. Nonetheless, the problem is not the instrument *per se*, but rather how the world is organized. With a few exceptions, for instance in international criminal law, the Westphalia sovereignty

[56] See also Onifade, see note 13 above.
[57] See *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria* (2001) AHRLR 60.
[58] See, for example, Justice C Nwobike, "The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria," *African Journal of Legal Studies* 1, no. 2 (2005): 129; Emeka Polycarp Amechi, "Enhancing Environmental Protection and Socio-Economic Development in Africa: A Fresh Look at the Right to a General Satisfactory Environment Under the African Charter on Human and Peoples' Rights," *Law, Environment and Development Journal* 5, no.1 (2009): 60.
[59] See Chidi Anselm Odinkalu, "Analysis of Paralysis or Paralysis by Analysis- Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights," *Human Rights Quarterly* 23, no.2 (2001): 327.
[60] See Gino J Naldi, "Limitation of Rights under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights," *South African Journal on Human Rights* 17, no.1 (2001): 109.

model gives governments the ability to considerably avoid international obligations,[61] so the charter also suffers from this general limitation of international law.

There are other trite limitations of the charter. For instance, one leading source of concern is the equivocation in the drafting, including the use of "clawback clauses" which may, among others, subject provisions to national law or allow too much administrative discretion, hence creating legal uncertainties.[62] These limitations might affect the ability of the instrument to advance Agenda 2063. Perhaps professional skilfulness on the part of practitioners, for instance creativity at the bar and judicial activism on the bench, could help mitigate the potential negative impacts.

*3.2.**Treaty Establishing the African Economic Community 1991***

The member states of OAU agreed to the Treaty Establishing the AEC at Abuja, Nigeria, on 3 June 1991. Reflecting its place of creation, it is also known as the Abuja Treaty. It came into force on 12 May 1994, following Article 101 which provides for two-thirds ratification and deposit of instruments by member states. Like the African Charter, the AU has also inherited the treaty.

Unlike the African Charter which is more of a substantive instrument for human rights, the treaty is more of a constitutive instrument for economic development, although it makes non-economic provisions as well.[63] As a predominantly economic instrument, it creates an institution, AEC, to address more of Aspiration 1 and perhaps Aspiration 6, and less of

[61] See Onifade, see note 13 above.
[62] See Naldi, see note 60 above; Melkamu Aboma Tolera, "Absence of a Derogation Clause under the African Charter and the Position of the African Commission," *Bahir Dar University Law Journal* 4, no.2 (2014): 229.
[63] Jeggan Senghor, "Treaty Establishing the African Economic Community: An Introductory Essay," *African Yearbook of International Law* 1 (1993): 183, 184.

Aspirations 3, 5 and 7, as they relate to sustainable development. Thus, it is more about Aspiration 1 and 6, and less about aspirations 3, 5 and 7.

The fundamental or sacred substance[64] of the treaty is in Articles 3 and 4. Article 3 provides for the principles. Article 4 states the objectives.

The principles in Article 3 clearly support Aspirations 1, 3, 6 and 7. Almost all provisions from paragraphs (a) to (h) — on equality and interdependence of states; solidarity and collective self-reliance; inter-state cooperation, harmonisation and integration; observance of legal system of the community; peaceful dispute settlement; human and peoples' rights; and accountability, economic justice and participation in development— are relevant for advancing inclusive growth and sustainable development under Aspiration 1. The provisions on observance of legal system of the community, peaceful dispute settlement, human and peoples' rights, and accountability, economic justice and participation in development address a mix of procedural and substantive concerns that are germane for good governance, democracy, respect for human rights, justice and the rule of law in Aspiration 3. Where there is popular participation, wherein ordinary people contribute to the moulding of public policy issues, for instance as Good applies it to Botswana,[65] people could seek to advance their cultural identity, common heritage, shared values and ethics under Aspiration 5, as well as people-driven development in Aspiration 6. At the least, the peaceful dispute settlement piece could also advance unity under Aspiration 7, given that settlement of disagreements promotes unity.

Article 4 outlines strong objectives that could drive Aspirations 1, 5, 6 and 7. Having established the AEC under Article 2, the objectives of the community under Article 4(1) are: promotion of economic, social and cultural development, and the integration of African

[64] See also ibid.
[65] Kenneth Good, "Towards Popular Participation in Botswana," *The Journal of Modern African Studies* 34, no.1 (1996): 53.

economies to increase economic self-reliance and promote an endogenous and self-sustained development; establishing, on a continental scale, framework for developing, mobilising and utilising the human and material resources of Africa to achieve a self-reliant development; promotion of co-operation to raise living standards of African peoples, and maintaining and enhancing economic stability, fostering close and peaceful relations among member states and contributing to Africa's progress, development and economic integration; and coordination and harmonization of policies among existing and future economic communities in order to foster the gradual establishment of the Community. These objectives clearly demonstrate not only the devotion to economic development in tandem with Aspiration 1, but other non-economic aspirations[66] such as the people drive in Aspiration 6 as well as the human and material resources that could accommodate cultural identity, values and ethics in Aspiration 5. The provisions in furtherance of the objectives under Article 4(2), including those on the "strengthening of existing regional economic communities and the establishment of other communities where they do not exist," and on relevant agreements, investment, trade and other market measures, would also make Africa a strong and influential global player and partner in line with Aspiration 7.

Overall, the treaty could significantly raise the development spirit of Agenda 2063, but its contribution to its predominantly economic theme would depend on how politicians, diplomats, businesses and other relevant stakeholders play their roles to strengthen the AEC. Since politics and economics play a prominent role in shaping the preferences of such stakeholders, there are many variables that might impact the treaty. To illustrate, business

[66] See also Senghor, see note 63 above.

stakeholders might not foster the perceived non-economic,[67] social ideals of the treaty, for instance raising living standards or economic justice.

*3.3.**Constitutive Act of the African Union 2000***

The member states of OAU adopted the Constitutive Act of the African Union at Lomé, Togo, on 11 July 2000. The charter entered into force on 26 May 2001, replacing the Charter of the OAU which had been adopted at Addis Ababa, Ethiopia, on 25 May 1963. Following the instrument's entry into force, pursuant to Article 28 which requires the deposit of the instruments of ratification by two-third majority, to replace the OAU charter,[68] Thabo Mbeki, OAU's last chairperson, officially took steps[69] to replace the OAU with the AU at Durban, South Africa, on 9 July 2002, marking the transition from the OAU regime to the AU regime. Nonetheless, the AU inherited the values and instruments of the OAU,[70] although there are important differences in the concerns of both organizations.[71]

Less like the African Charter and more like the AEC treaty, the Constitutive Act is apparently a constitutive instrument, establishing the AU under Article 2 and making

[67] When an objective is considered non-economic, this is generally understood in the sense of classical or neo-classical economics. As such, non-economic objectives do not prioritize the values that matter to businesses in the classical or neo-classical sense, for instance profitability and efficiency.
[68] C Anyangwe, "The Constitutive Act of the African Union," *Zambia Law Journal* 38 (2006): 43-108; Tiyanjana Maluwa, "The Constitutive Act of the African Union and Institution-Building in Post-Colonial Africa," *Leiden Journal of International Law* 16 (2003): 157.
[69] Thabo Mbeki took the official step to change OAU to AU, but the political process of transforming OAU to the AU was pioneered by Muammar Gaddaffi of Libya.
[70] See also Nsongurua J Udombana, "The Institutional Structure of the African Union: A Legal Analysis," *California Western International Law Journal* 33, no.1 (2002): 69.
[71] For instance, while the OAU was more concerned with the security of African governments and the protection of the independence of African states, the AU is now also emphasizing welfare and unity issues in addition to security. The difference reflects the circumstances surrounding the treaties. For instance, the timing of the OAU treaty necessitated its focus on post-colonial issues, while the timing of the AU Act makes it important to address sustainable development and globalization concerns. See generally Anyangwe, see note 68 above; Maluwa, see note 68 above. See also Corinne AA Packer and Donald Rukare, "The New African Union and Its Constitutive Act," *American Journal of International Law* 96, no.2 (2002): 365; Wanyama Masinde and Christopher Otieno Omolo, "The Road to East African Integration," in *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, eds. Emmanuel Ugirashebuja et al. (Leiden and Boston: Brill Nijhoff, 2017), 1.

provisions for its operation. However, unlike both the African Charter and the AEC treaty which are more about human rights and economic development respectively, the treaty appears to balance diverse human development interests, although Isanga notes that the instrument also has much of human rights provisions.[72] But then, there are significant non-human rights provisions that make he Act a relatively more holistic instrument for sustainable development, with crucial provisions in Articles 3 and 4 as applicable to Agenda 2063.

Article 3 provides for the fourteen objectives of the organization, which readily support all the sustainable development aspirations of Agenda 2063: achieving greater unity and solidarity of African countries and peoples; defending the sovereignty, territorial integrity and independence of member states; hastening political and socio-economic integration; promoting and defending Africa's common position; encouraging international cooperation, taking into consideration the United Nations Charter 1945 and the Universal Declaration of Human Rights 1948; promoting peace, security and stability; promoting democratic principles and institutions, popular participation and good governance; promoting and protecting human and people's right in line with the African Charter and other human rights instruments; creating necessary conditions that allow the continent to be relevant in global economy and international negotiations; promoting sustainable development in its economic, social and cultural aspects, and allowing for economic integration; promoting cooperation across all human fields to raise living standards; coordinating and harmonizing policies across regional economic communities; advancing development through research; and working with partners to prevent diseases and promote good health. Without a doubt, these objectives could variously support Aspiration 1, 3, 5, 6 and 7.

[72] Joseph M Isanga, "The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation," *Santa Clara Journal of International Law* 11, no.2 (2013): 267.

Although the provisions could address the aspirations in an interwoven manner, it is possible to trace direct links with the aspirations, among other potential permutations. Socioeconomic integration and sustainable development could advance inclusive growth and sustainable development in Aspiration 1. Democratic principles, popular participation and good governance could advance governance, democratic, rule of law and human rights under Aspiration 3, and people-driven development under Aspiration 6. Human and peoples' rights would undoubtedly address the human rights component of Aspiration 3 and might help with the cultural right components of Aspiration 5. The provisions on the conditions for relevance in the global economy and international negotiations as well as partnership to prevent diseases and promote good health would advance unity and partnership under Aspiration 7.

Article 4 provides for the sixteen principles, which Maluwa describes as "radically expanded principles with potentially far-reaching implications,"[73] that should guide the AU, most of which deal with regional and interstate diplomacy. At least five of the principles could advance the sustainable development Aspirations of Agenda 2063: participation of the African peoples in the organization's activities; peaceful resolution of conflicts; the right of states to request intervention from the organization; respect for democratic principles, human rights, the rule of law and good governance; and promotion of social justice to ensure balanced economic development. Where peoples participate in AU's activities, they could contribute to decision-making, which satisfies the demands of democracy and good governance under Aspiration 3, and could advance inclusive growth and sustainable development under Aspiration 1. To promote human rights, justice and the rule of law under Aspiration 3, the provisions on peaceful resolution of conflicts and the right to request intervention might come in handy. Social justice could also advance Aspirations 1, 3 and 6. Perhaps the provision on democratic principles,

[73] Maluwa, see note 68 above, 163.

human rights, the rule of law and good governance, which could clearly support Aspiration 3, is the clearest.

A normative strength of the Act is that it has triggered other instruments, for instance the African Charter on Democracy, Elections and Governance, the Protocol on the Establishment of the African Court of Human and Peoples' Rights and the Protocol on the Statute of the African Court of Justice and Human Rights,[74] which could also further advance sustainable development aspirations under Agenda 2063, but the instrument appears to suffer a fate comparable to that of the African charter. This fate borders on the diffulty in implementation.[75] Having been tested in countries such as Zimbabwe, Kenya, Darfur, Sudan and Libya,[76] the preponderance of evidence suggests that it has not lived to expectation. It appears that the limitation is due to the predominant power of national governments. This reality stems from the Wesphalian model of sovereignty which gives national governments superior power and the comparatively weak state of regional law.

*3.4.**Convention of the African Energy Commission 2001***

The member states of the defunct OAU adopted the Convention of the African Energy Commission at Lusaka, Zambia, on 11 July 2001. The instrument came into force on 13 December 2006, after satisfying the requirements of Article 27 on the deposit of instruments of ratification. Like other instruments of the OAU, the AU has inherited the convention.

More like the Constitute Act and the AEC Treaty, but less like the African Charter, the convention is also more of a constitutive instrument, establishing the African Energy

[74] Isanga, see note 72 above.
[75] See Frans Viljoen and Evarist Baimu, "Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples'Rights and the African Court of Justice," Netherlands Quarterly of Human Rights 22, no.2 (2004): 241.
[76] Isanga, see note 72 aboves.

Commission as an organization within the AU under Article 2. Following Article 2(2), the commission draws its members from the AU states.

Largely like the African Charter and the AEC treaty which focus on human rights and economic development subjects respectively, and hardly like the Constitutive Act which has a more holistic subject, the convention creates the African Energy Commission to address one main subject, energy, which is considered a high-ranking challenge across many Africa countries.[77] The key substance of the convention, which is important for sustainable development, is under Article 3.

Article 3 provides for twelve guiding principles which could variously foster Agenda 2063: developing energy use to advance economic and social development, eradicate poverty, combat desertification, and advancing standards and quality of life; cooperating on energy, especially through joint energy resource development, and identifying and promoting regional and sub-regional projects; developing and utilizing sustainable and environmentally sound energy; accelerating the implementation of the Abuja Treaty through the integrated, coordinated and harmonized use of energy, and the energy policy and programme development and implementation; promoting research and development, while encouraging the transfer of technology in the energy sector; enhancing integration, collective self-reliance, security and reliability of energy supply among member states; cooperating at the regional, sub-regional and interstate levels on training and development of human resources in the energy field; harmonizing standards and procedures in the energy sector; promoting energy trade and technical assistance among member states; promoting partnership among member states' enterprises and institutions by creating favourable conditions; sharing costs equitably in the

[77] African countries occupy among the highest ranking places that lack energy. See, for instance, Phoebe Parke, "Why are 600 Million Africans Still Without Power." CNN, April 1, 2016. Accessed June 21 2018. https://edition.cnn.com/2016/04/01/africa/africa-state-of-electricity-feat/index.html; "Countries with the Lowest Access to Electricity," World Facts, Last modified June 25, 2017, https://www.worldatlas.com/articles/countries-with-the-lowest-access-to-electricity.html.

implementation of the convention in a spirit of good governance and transparency; and settling disputes peacefully. At the least, these principles could advance Aspirations 1, 3 and 6: most could help with growth and sustainable development in Aspiration 1, given their focus on energy, which is a key sector that could drive growth and development; sharing costs in the spirit of good governance and transparency could support Aspiration 3; and where there is training and development of human resources, for instance in line with local content policies,[78] this could result into people-driven development in Aspiration 6.

But then, how well the convention performs to advance the aspirations of Agenda 2063 might depend on some variables beyond the control of its provisions and proponents. The convention pays more attention to the cooperation between states, but not the collaboration between states and the private sector. The world standard for energy sector operations, like most other areas of resource policy, is for governments and the private sector to partner, especially in energy development.[79] Unfortunately, the government and the private sector are driven by different values: the government might consider more than economic concerns such as profitability and efficiency, for instance social justice and energy security, but the private sector might only seek to maximize economic interests. Therefore, there might be a conflict of values between the government and the private sector, with the potential to slow the implementation of the convention for environmental and sustainable development ends.

*3.5.**Agreement for the Establishment of the African Risk Capacity (ARC) Agency 2012***

[78] For a discussion of local content policies in Africa, see Jesse Salah Ovadia, "Local Content Policies and Petro-Development in Sub-Saharan Africa: A Comparative Analysis," *Resources Policy* 49 (2016): 20; Chilenye Nwapi, "A Survey of the Literature on Local Content Policies in Oil and Gas Industry in East Africa," *University of Calgary School of Public Policy Technical Paper* 9, no. 16 (2016), accessed June 21 2018. https://www.policyschool.ca/wp-content/uploads/2016/05/local-content-east-africa-nwapi.pdf.

[79] See Temitope Tunbi Onifade, "Alberta, Canada, Royalty Review and Its Lessons for Resource Economies," *Journal of Energy & Natural Resources Law* 35, no.2 (2017): 171.

The member states of AU entered into the Agreement for the Establishment of the African Risk Capacity (ARC) Agency at Pretoria, South Africa, on 23 November 2012. The agreement is not yet in operation. Subject to ratification, acceptance or approval based on Article 26(6), the agreement will enter into force 30 days from the date that the tenth instrument of ratification, acceptance or approval is deposited with the Chairperson of the AU Commission, following Article 26 (8). As at 7 June 2018, five countries — Chad, Gambia, Mali, Mauritania, Senegal — had ratified, acceded or approved, and deposited the instrument evidencing such, so there is still the need for five other countries to do the same. In total, thirty-three countries — Benin, Burkina Faso, Burundi, Central African Republic, Chad, Côte d'Ivoire , Comoros, Congo, Djibouti, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Liberia, Madagascar, Mali, Malawi, Mozambique, Mauritania, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, Sao Tome & Principe, Sudan, Togo, Zambia and Zimbabwe— had signed as at the said date.

The agreement is also more of a constitutive instrument like the AEC Treaty, the AU Constitutive Act and the African Energy Commission Convention in that it establishes an institution, and less of a substantive instrument like the African Charter. As such, under Article 2, it creates the African Risk Capacity (ARC) Agency as a specialized agency of the AU to help member states to improve their capacities to better plan, prepare and respond to extreme weather events and natural disasters, and provides for its functions under Article 4. Reinforcing the purpose of the agency, the substantive norms on environmental protection and sustainable development are under Article 3.

Article 3 states the single objective of the agency: to assist "Member states to reduce the risk of loss and damage caused by Extreme Weather Events and Natural Disasters affecting Africa's populations by providing targeted responses to disasters in a more timely, cost-effective, objective and transparent manner." This objective could mainly advance sustainable

development under Aspiration 1, and potentially good governance, democracy and human rights under Aspiration 3.

Sustainable development is often conceived to have three dimensions: economic, social and environmental.[80] Where the agency successfully handles risks, it undoubtedly contributes to all three dimensions, especially environmental sustainability. To illustrate, it could prevent or reduce economic loss and the destruction of socio-cultural artefacts, and enhance the mitigation of or adaptation to environmental problems. Its Extreme Climate Facility initiative already evidences its contribution to environmental protection.[81]

Some may wonder how the agency could advance good governance, democracy and human rights. This would depend on how the agency approaches risk handling, whether through risk analysis or risk governance. Risk analysis is the classical method which relies on technical parameters.[82] It is done by experts. Risk governance is considered a superior model that builds on risk analysis to incorporate technical along with other societal parameters[83] which may not be captured in technical terms, for instance values that play out in risk decisions.[84] Experts and the public contribute to it. Where the agency adopts risk governance rather than risk analysis, then it could accommodate people's interests by involving them in decision-making, hence advancing democracy and human rights thereto. Ultimately, such a

[80] See Wilkins, see note 11 above; Teodorescu, see note 11 above.
[81] Ekhosuehi Iyahen and Joanna Syroka, "Chapter 20- Managing Risks from Climate Change on the African Continent: The African Risk Capacity (ARC) as an Innovative Risk Financing Mechanism," in *Resilience: The Science of Adaptation to Climate Change,* ed. (New York: Elsevier, 2018) 243.
[82] Andreas Klinke and Ortwin Renn, "Adaptive and Integrative Governance on Risk and Uncertainty," *Journal of Risk Research* 15, no. 3 (2012): 273.
[83] Marjolein B.A. van Asselt and Ortwin Renn, "Risk Governance," *Journal of Risk Research* 14, no. 4 (2011): 431-449; Wee Lim, "Understanding Risk Governance: Introducing Sociological Neoinstitutionalism and Foucauldian Governmentality for Further Theorizing," *International Journal of Disaster Risk Science* 2, no.3 (2011): 11.
[84] Andreas Klinke and Ortwin Renn, "Expertise and Experience: A Deliberative System of a Functional Division of Labor for Post-normal Risk Governance," *Innovation: The European Journal of Social Science Research 27*, no.4 (2014): 442.

risk handling approach constitutes enhanced governance, and we could describe such as good governance.

*3.6.**Statute of the African Minerals Development Centre 2016***

The member states of AU recently adopted the Statute of the African Minerals Development Centre during the Twenty-Sixth Ordinary Session of the Assembly at Addis Ababa, Ethiopia, on 31 January 2016. Like the ARC Agreement, the statute is yet to enter into force. It is opened to signature, ratification or accession under Article 23, and following Article 24, it will enter into force thirty days after fifteen state parties deposit the instrument of ratification to, as stated under Article 23, the Chairperson of the Commission, or, with regards to states that accede, the date of such accession. As at 7 June 2018, only Guinea had acceded and deposited the instrument, so fourteen states remain. Six other countries — Comoros, Ghana, Mali, Sierra Leone, Sudan, and Zambia — had only signed.

The statute is more in the constitutive category of the AEC Treaty, the AU's Constitutive Act and the African Energy Commission Convention in that it creates an institution, and less in the substantive category of the African charter. It appears to be most comparable to the African Energy Commission Convention because it also creates a specialized agency. By section 2, the statute establishes the African Minerals Development Centre as a specialized agency of the African Union responsible for mineral resources development in Africa, specifically the implementation of the African Mining Vision (AMV), a development instrument[85] considered "a landmark in mining sector governance in Africa…"[86] and "a broad

[85] Kojo Busia and Charles Akong, "The African Mining Vision: Perspectives on Mineral Resource Development in Africa," *Journal of Sustainable Development Law and Policy* 8 (2017): 145.
[86] Chilenye Nwapi, "Realizing the African Mining Vision: The Role of Government-Initiated International Development Think-Tanks," *Journal of Sustainable Development Law and Policy* 7, no.1 (2016): 158.

philosophical articulation of the steps that African countries need to take in order to retain a greater share of the revenues accruing from the development of its mineral resources."[87] The statute is therefore essentially an effort to provide legal drive to the African Minerals Development Centre to play its role in the pursuit of the AMV, spelt out in Article 4.

The key substantive provision that could support Agenda 2063 is under Article 3 on the objectives. The main objective, which is general in nature, is thus "to coordinate and oversee the implementation of the AMV and its Action plan to enable the mineral resource sector play its role in the social and economic transformation, inclusive growth and sustainable development of African economies, in conjunction with Member States, RECs, the private sector, civil society organizations including women and youth organizations, collaborating institutions and other key stakeholders." Five specific objectives follow: ensure the existence of coherent policy, regulatory and legal frameworks for various stages of mineral processing and handling at the national level, harmonized regionally and continentally; develop diversified and globally competitive mineral industry that contributes to economic and social growth through economic linkages; contribute to the continent's regional integration agenda and the boosting of intra-African trade; promote good governance in mineral development to better local communities; foster sustainable development principles, employing environmentally and socially responsible mining that respects human rights, health and safety of the local communities, workers and other stakeholders; and contribute to the Plan of Action for Accelerating Industrial Development of Africa by promoting beneficiation, value addition, industrial linkages, responsible investments, innovation and diversification.

The general and specific objectives could collectively advance Aspirations 1, 3, 5, 6 and 7. The general objective is core to Aspiration 1, 3 and 6. Where the AMV advances social

[87] Ibid.

and economic transformation, inclusive growth and sustainable development, which scholars such as Busia and Akong see as part of its development essence,[88] then this would directly boost inclusive growth and sustainable development under Aspiration 1, and where the AMV collaborates with stakeholders such as member states, RECs, the private sector, and civil society organizations such as women and youth, this would advance people-driven development in Aspiration 6.[89] The specific objectives are more relevant to Aspirations 1, 3, 5 and 7. Coherent frameworks, diversified and competitive mineral industry, regional integration agenda and intra-African trade, and sustainable development principles would advance sustainable development in Aspiration 1; the provisions on good governance and sustainable development principles address Aspiration 3; involving stakeholders such as women and youth align with the idea of people-driven development in Aspiration 5; and a diversified and globally competitive industry would advance Aspiration 7.

The statute could enhance the contribution of Agenda 2063 to the mineral sector, which is key in Africa.[90] If so, then the sector could advance sustainable development across the continent, especially countries with comparatively predominant mineral sectors such as Burkina Faso, Burundi, Cape Verde, Central African Republic, Congo, Egypt, Ghana, Sudan and Swazi Land.

*3.7.**Revised African Convention on the Conservation of Nature and Natural Resources 2017***

The member states of AU adopted a new African Convention on the Conservation of Nature and Natural Resources during the Second Ordinary Session of the Assembly of the Union in

[88] See Busia and Akong, see note 85 above.
[89] See also Nwapi, see note 86 above.
[90] See Håvard Halland, Martin Lokanc and Arvind Nair, eds, *The Extractive Industries Sector: Essentials for Economists, Public Finance Professionals, and Policy Makers* (Washington, DC: World Bank Group, 2015).

Maputo, Mozambique, on 11 July 2003. They recently adopted a revised version on 7 March 2017, which came into force 6 April 2017. The said original and revised versions result from a major revision of the first African Convention on the Conservation of Nature and Natural Resources, which also doubles as the "first multilateral instrument for the regulation and protection of the African environment, adopted by independent African states"[91] at Algiers, Algeria, in 15 September 1968.

As at 7 June 2018, the African Union had not updated its archives[92] to show that the instrument has entered into force, so we can conclude that the official requirements have not been met. Article XXXVIII provides that the convention "shall come into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification, acceptance, approval or accession with the Depository, who shall inform the States…" The first leg of the requirement on the deposit of the fifteenth instrument has been met since sixteen countries— Angola, Benin, Burkina Faso, Burundi, Chad, Côte d'Ivoire, Comoros, Congo, Ghana, Libya, Lesotho, Liberia, Mali, Niger, Rwanda, and South Africa — have ratified, accepted, approved or acceded, and then deposited. Combined, forty-two countries have also signed, and only thirteen — Algeria, Botswana, Cameroon, Cape Verde, Egypt, Eritrea, Malawi, Morroco, Mauritania, Mauritius, Sahrawi Arab Democratic Republic, Seychelles and Tunisia — have not. The second leg of the requirement, that the depository shall inform the states, must therefore be the missing step.

The revised convention is more substantive than constitutive, so it has more similarities with the African Charter than the AEC Treaty, Constitutive Act, the African Energy Commission Convention and the Statute of the African Minerals Development Centre. It has

[91] Erinosho, see note 38 above, 383. See also Morne van der Linde, "A Review of the African Convention on Nature and Natural Resources," *African Human Rights Law Journal* 2 (2002): 33.
[92] "OAU/AU Treaties, Conventions, Protocols & Charters," African Union, Last modified June 21, 2018, https://au.int/ar/treaties.

the highest number of provisions that could advance sustainable development aspirations under Agenda 2063.

Articles II, III and IV appear to be the fundamental provisions. Article II states the three objectives of the instrument as enhancing environmental protection, fostering the conservation and sustainable development of natural resources, and harmonizing and coordinating policies in the fields of environmental protection, conservation and sustainable natural resources, "with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes." Article III identifies three principles that should guide actions and implementation steps pursuant to the instrument: the right of peoples to a satisfactory environment favourable to their development; the duty of states to individually or collectively ensure the enjoyment of the right to development; and the duty of states to ensure that they meet developmental and environmental needs in a sustainable, fair and equitable manner. Article IV states that parties "shall adopt and implement all measures necessary to achieve the objectives…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."

Several other relevant provisions are under Articles IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XVI, XVII, XVIII, XIX, XX. They deal with specific resources such as land and soil, water, vegetation, species and genetic diversity, protected species and conservation areas; actions such as trade in specimens and products thereof, and processes and activities impacting environment and natural resources; and issues and expectations on sustainable development and natural resources, and traditional rights of local communities and indigenous knowledge.

Given the foregoing provisions, the convention could advance Aspiration 1, 3, 5 and 6. The instrument appears to provide the most exhaustive treatment of Aspiration 1. Articles

II, III, IV and most of the other relevant provisions are about sustainable development, incorporating its elements[93] and focusing more on the environmental protection pillar. Article III specifies the environmental and sustainable development rights of peoples and duty of states, and other provisions acknowledge the traditional rights of local communities and indigenous peoples, in line with the human rights component of Aspiration 3. Article IV adds ethical and traditional values which could advance the cultural considerations in Aspiration 5. Across the provisions, the idea that stakeholders such as communities and indigenous peoples should be involved accords with people-driven development under aspiration 6.

The convention provides relatively balanced provisions on environmental and development concerns, so it might be the best regional instrument for driving sustainable development, seen in its holistic sense,[94] under Agenda 2063. Sustainable development is essentially about such a balance.

4. Sub-Regional Environmental and Sustainable Development Law in Africa

The Assembly of the African Union pursues regional integration as an overarching development strategy, and the Observatory on Regional Integration in Africa[95] has identified the five key pillars of development: trade and market integration; macroeconomic policy convergence; free movement of persons; peace, security, stability and governance; and harmonization of sectoral policies.[96] While integration dates back to the South African Customs

[93] See Erinosho, see note 38 above.
[94] Ibid.
[95] The Observatory on Regional Integration in Africa is a one-stop shop for information for Africa's regional integration Agenda. See "About Observatory on Regional Integration in Africa," United Nations Economic Commission for Africa, Last modified June 21, 2018, https://www.uneca.org/oria/pages/about-observatory-regional-integration-africa.
[96] "Key Pillars of Africa's Regional Integration," United Nations Economic Commission for Africa, Last modified June 21, 2018, https://www.uneca.org/oria/pages/key-pillars-africa%E2%80%99s-regional-integration.

Union, there are currently eight units of integration recognized by the AU,[97] forming the RECs and AEC, and also making up the building block of the AU—AMU/UMA, CEN-SAD, ECOWAS, EAC, IGAD, SADC, COMESA, and ECCAS — responsible for implementing these pillars, employing relevant instruments. These eight units principally focus on economic integration, as conceptualized to have three stages — free trade area, customs union and common market[98] — which mainly covers the first two pillars of development that the Observatory on Regional Integration in Africa identifies,[99] but they also facilitate social, political, environmental and other societal forms of integration. Although with several common challenges,[100] the eight units of integration have, at the least, reflected the post-hegemonic development of "new multilateral equilibrium in the absence of a hegemonic power,"[101] modernized and localized hitherto colonial efforts at integration in the post-colonial period,[102] materialized the early ideas of African Diaspora-driven Pan-African Movement,[103] and brought the pan-Africanist ambition of the leaders of Ghana and Guinea, Kwame Nkrumah and Sekou Toure respectively, for an African model of regional integration in the 1960s to fruition.[104]

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97 See also Richard Frimpong Oppong, "The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web," *African Journal of International and Comparative Law* 18 (2010): 92; Abiodun Odusote, "Integration of Regional Economic Communities as Panacea for Africa's Economic Growth: Lessons from Comparative Models," *Acta Universitatis Danubius. Relationes Internationales* 8, no 2 (2015), accessed June 21, 2018, url: http://journals.univ-danubius.ro/index.php/internationalis/article/view/3132/3824.

98 See Martha Belete Hailu, "Regional Economic Integration in Africa: Challenges and Prospects," *Mizan Law Review* 8, no.2 (2014): 299.

99"About Observatory on Regional Integration in Africa," United Nations Economic Commission for Africa, Last modified June 21, 2018, https://www.uneca.org/oria/pages/about-observatory-regional-integration-africa.

100Oppong, see note 97 above; Odusote, see note 97 above; Hailu, see note 98 above.

101 Masinde and Omolo, see note 71 above.

102 There were efforts to integrate Africa by the colonial governments. The leading colonial regional integration organizations include the French West Africa (Afrique Occidental Francaise [AOF]) made up of Cote d'Ivoire, Dahomey, French Guinea, French Soudan, Mauritania, Niger, Senegal and Upper Volta, and the French Equatorial African Federation (Afrique Equatorial Francaise [AEF]) made up of Chad, Central African Republic, Congo, Gabon and Cameroon. See Gilbert M Khadiagala, "Institution Building in Africa," *Asian Development Bank Working Paper Series on Regional Economic Integration* 85 (2011), accessed June 21 2018. https://aric.adb.org/pdf/workingpaper/WP85_Khadiagala_Institution_Building.pdf.

103 Anyangwe, see note 68 above.

104 See Khadiagala, see note 102 above.

These sub-regional organizations employ far more indirect than direct instruments. Most indirect instruments take the form of constitutive treaties that establish and regulate the sub-regional organizations, but there are also agreements and declarations that establish such organizations or regulate specific issues. The key indirect instruments are Treaty Instituting the Arab Maghreb Union 1989, Revised Treaty Establishing the Community of Sahel-Saharan States 2013, Revised Treaty of the Economic Community of West African States 1993, Treaty for the Establishment of the East African Community 1999, Agreement Establishing the Inter-Governmental Authority on Development 1996, Declaration by the Heads of State or Government of Southern African States 1992, Treaty of the Southern African Development Community 1992, Treaty Establishing a Common Market for Eastern and Southern Africa 1993, and Treaty Establishing the Economic Community of Central African States 1983. The direct instruments include Supplementary Act Relating to the ECOWAS Environmental Policy 2008 and the Protocol on Environment and Natural Resources Management 2006,

Like the regional instruments, these sub-regional instruments have a mix of direct and indirect provisions. Accordingly, direct instruments have more direct provisions and indirect instruments have more indirect provisions.

Further to the sub-regional instruments recognized by the AU,[105] there are also other multilateral and bilateral instruments, backing some of the other sub-regional organizations that Anyangwe identifies,[106] focusing on specific environmental and sustainable development subjects at the sub-regional level. They appear to be more direct than indirect, for instance the Pact on Security, Stability and Development for the Great Lakes Region and its Protocol Against the Illegal Exploitation of Natural Resources, and the Convention for the Protection of

[105] Anyangwe, see note 68 above.
[106] Examples include Economic Community of Great Lakes countries (CEPGL), Mano River Union (MRU), Central African Economic and Monetary Community (CEMAC) and Indian Ocean Commission (IOC). See ibid.

the Natural Resources and Environment of the South Pacific Region. However, they do not fall squarely under the jurisdiction of the eight regional organizations.

Table 2: Sample of Sub-Regional Environmental and Sustainable Development Laws

Serial Number	Sub-regions	Indirect Instruments	Direct Instruments
1	AMU/UMA	Treaty Instituting the Arab Maghreb Union 1989	
2	CEN-SAD	Revised Treaty Establishing the Community of Sahel-Saharan States 2013	
3	ECOWAS	Revised Treaty of the Economic Community of West African States 1993	Supplementary Act Relating to the ECOWAS Environmental Policy 2008
4	EAC	Treaty for the Establishment of the East African Community 1999 as amended through 2007	Protocol on Environment and Natural Resources Management 2006
5	IGAD	Agreement Establishing the Inter-Governmental Authority on Development 1996	
6	SADC	Declaration by the Heads of State or Government of Southern African States and the Treaty of the Southern African Development Community 1992	

7	COMESA	Treaty Establishing a Common Market for Eastern and Southern Africa 1993	
8	ECCAS	Treaty Establishing the Economic Community of Central African States 1983	

*4.1.**Treaty Instituting the Arab Maghreb Union 1989***

Morocco, Algeria, Libyan Arab Jamahiriya, Mauritania and Tunisia agreed to the Treaty Instituting the Arab Maghreb Union at Marrakesh, Morocco, on 17 February 1989. Following Article 19, the treaty became effective after the five countries ratified based on their internal procedures

The treaty is mainly a constitutive instrument. Under Article 1, it creates the AMU to, as McKeon Jr notes, promote political and economic integration and, notably, give member states more leverage with the European Economic Community.[107] Article 2 and 3 outline the provisions that regulate the work of the AMU, among which we can identify those applicable to the sustainable development[108] aspirations of Agenda 2063.

Article 2 outlines the aims of the AMU in light of the member states' history, socio-cultural ties and economic ambition[109]: strengthening the brotherhood ties linking the member states and their peoples to one another; achieving progress and prosperity of the member states' societies, and defending their rights; contributing to the preservation of peace based on justice and equity; pursuing a common policy in different areas; and working, gradually, to achieve

[107] Robert K McKeon Jr, "The Arab Maghreb Union: Possibilities of Maghrebine Political and Economic Unity, and Enhanced Trade in the World Community," *Penn State International Law Review* 10, no.2 (1992): 263.
[108] See also Mahi Tabet-Aoul, "Environment and Sustainable Development in the Maghreb," *Middle East Institute*, June 1, 2011, www.mei.edu/content/environment-and-sustainable-development-maghreb.
[109] McKeon Jr, see note 107 above.

free movement of persons and services, goods and capital among member states. Where the AMU strengthens the ties linking peoples, this could advance Aspiration 5 on cultural identity and shared values. Achieving progress and prosperity could further inclusive growth and sustainable development under Aspiration 1. Defending the rights of member states' societies and the preservation of peace based on justice and equity could advance the provision of Aspiration 3 on human rights and justice.

Article 3 builds on the common policy provision in Article 2 by identifying the policy goals in the international, defence, economic and cultural fields. As for the international field, the goal is to achieve concord of member states and create among them a close diplomatic cooperation using dialogue. In the field of defence, the goal is to preserve member states' independence. The economic field has the goal to achieve industrial, agricultural, commercial and social developmen, and take steps for this purpose, particularly by setting up joint ventures and facilitating programmes. In the cultural field, the goal is to facilitate cooperation to promote education at various levels, safeguarding the spiritual and moral values from the tolerant teachings of Islam, preserving the identity of the Arab nation, and to take the necessary measures in furtherance of the foregoing, particularly by exchanging teachers and students, and creating joint university and cultural institutions as well as joint institutions specialized in research. In all, the international field could advance unity and strength in Aspiration 7; the economic field could advance inclusive growth and sustainable development under Aspiration 1; and the cultural field could promote some values and ethics under Aspiration 4.

Despite these provisions, the challenges of the AMU might have a negative impact on the application of the treaty to drive Agenda 2063. These challenges include the disagreement

between Morocco and Algeria on the Western Sahara,[110]existing European alliances[111] and political context in general[112] which might impair or delay treaty implementation and/or impact, for instance as we have seen in trading[113] and the economy.[114]

*4.2.**Revised Treaty Establishing the Community of Sahel-Saharan States 2013***

Libya, Mali, Chad, Niger, Sudan and Burkina Faso agreed to the original Treaty Establishing the Community of Sahel-Saharan States at Tripoli, Libya, on 4 February 1998. At an extraordinary session of the community's Conference of Heads of State and Government at N'Djamena, Chad, in February 2013, whose purpose was to restructure and revive the community, the Revised Treaty Establishing the Community of Sahel-Saharan States replaced the 1998 instrument.

Both the original and the revised treaty are constitutive instruments like the AMU treaty, but they have some differences. Article 1 of the original treaty created CEN-SAD as an economic community[115] to implement a strategy based on an institutional development plan that would be integrated in national development plans, and then identifies education as a medium for such a plan, among other economic-based provisions.[116] Going by this provision, the organization could advance environmental and sustainable development objectives through

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[110] Tabet-Aoul, see note 108 above.

[111] See Abderrahmen Messaoudi, "Arab Maghreb Union: Achievement and Prospects" (MSc thesis, Naval Postgraduate School, 1994).

[112] See Luis Martinez, "Algeria, the Arab Maghreb Union and Regional Integration," Euro Mesco, October, 2006, www.euromesco.net/images/59_eng.pdf.

[113] Wadia Ait Hamza, "The Maghreb Union is One of the World's Worst-Performing Trading Blocs. Here are the Fives Ways to Change That," World Economic Forum, June 1, 2017, www.weforum.org/agenda/2017/06/five-ways-to-make-maghreb-work/.

[114] Mohamed Finaish and Eric Bell, *The Arab Maghreb Union* (Washington, DC: International Monetary Fund, 1994).

[115] The formation of CEN-SAD was facilitated by Muammar Gaddaffi of Libya, taking advantage of the political tension over the recognition of the Western Sahara which had slowed down the progress of the AMU. See Khadiagala, see note 102 above.

[116] See ibid.

education. However, this provision is too distant from environmental protection and sustainable development, so it might be difficult to employ it to drive sustainable development aspirations. The revised instrument has fixed this problem. It explicitly adds sustainable development as an area of cooperation. This seems to be a transition from the prior focus on economic development *simpliciter* to sustainable development, underlining the importance of the environmental consideration underlying sustainability.

The revised treaty is therefore an excellent instrument to support the sustainable development aspirations of Agenda 2063, especially Aspiration 1 on inclusive growth and sustainable development. However, the treaty provides more rhetoric than practical steps for achieving sustainable development, perhaps affected by its lack of clear identity and relative newness.[117]

*4.3.**Revised Treaty of the Economic Community of West African States 1993 and the Supplementary Act Relating to the ECOWAS Environmental Policy 2008***

Dahomey, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Upper Volta agreed to the original Treaty of the Economic Community of West African States at Lagos, Nigeria, on 28 May 1975. Cape Verde joined in 1979 to make the sixteenth member state. About eighteen years later, Benin Republic, Burkina Faso, Cape Verde, Code D'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo, making up the ECOWAS, agreed to the Revised Treaty at Cotonou, Benin Republic, 24 July 1993. Following section 92(2) of the revised treaty, the revised treaty has replaced the 1975 treaty, upon the coming into force of the former on 23 August 1995 in line with its Article 89. Nonetheless,

[117] See ibid.

Article 92(3) provides that the subsidiary instruments made pursuant to the original treaty shall remain valid and in force.

Like the AMU and CEN-SAD treaties, both the original and the revised treaties are constitutive instruments of ECOWAS. The original treaty established the ECOWAS, mainly for economic, development and prosperity purposes,[118] under Article 1 while the revised treaty reaffirms the establishment under Article 2. However, the treaties are different in at least two respects, one regarding history, and the other, substance. First, on history, the revised treaty incorporates developments in West African and the World beyond the original treaty,[119] and such developments include the emergence and solidification of the concept of sustainable development in the 1980s and 1990s respectively. Second, on substance, the original treaty appears to focus more on classical economic development[120] under the aim in Article 2 and general undertaking in Article 3, while the revised treaty focuses on sustainable development[121] under the aims and objectives in Article 3 and the fundamental principles in Article 4.

Thus, the provisions of the revised treaty in support of the sustainable development aspirations of Agenda 2063 are mainly under Articles 3 and 4, which could drive Aspirations 1 and 6 at the least. Article 3(1) states the overall aim of the ECOWAS in support of inclusive growth and sustainable development under Aspiration 1. The aim is "to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African

[118] Michael P Okom, "Economic Integration in ECOWAS: 40 Years After," *European Scientific Journal* 12, no. 19 (2016): 1857.
[119] See Kofi Oteng Kufour, "Law, Power, Politics and Economics: Critical Issues Arising Out of the New ECOWAS Treaty," *African Journal of International and Comparative Law* 6 (1994): 429.
[120] See Bruce Zagaris, "The Economic Community of West African States (ECOWAS): An Analysis and Prospects," *Case Western Reserve Journal of International Law* 10 (1978): 93.
[121] See Nneoma Nwogu, "Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS," *Journal of Human Rights* 6, no. 3 (2007): 345.

Continent." Article 2 then supports Aspirations 1 and 6, although it contains more of economic and financial issues, and less of environmental protection and legal aims. Various economic, financial, social and environmental provisions support inclusive growth and sustainable development in Aspiration 1, and "the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organisations and socio-professional organisations such as associations of the media, business men and women, workers, and trade unions" would support Aspiration 6 on peoples-driven development.

Enacted to support the ECOWAS Environmental Policy at the Thirty-Fifth Ordinary Session of the Authority of Heads of State and Government at Abuja, Nigeria, on 19 December 2008, the Supplementary Act Relating to the ECOWAS Environmental Policy 2008 is a substantive instrument that makes further provisions which could complement the ECOWAS revised treaty in supporting Agenda 2063. Articles 3 to 6 on the scope of application, vision, objectives and initiatives could further sustainable development considerations in Agenda 2063, especially Aspiration 1. Perhaps the most specific is Article 5 which states the objective of the ECOWAS Environmental Policy in line with the environmental protection pillar of the sustainable development component under Aspiration 1: "to reverse the state of degradation of natural resources and to improve the quality of their living conditions and environment, to conserve biological diversity, so as to secure a healthy and productive environment by improving the ecosystem balance and the well-being of the population." Article 7(2) then provides for guiding principles that could advance Aspiration 1, 3 and 6, divided into ECOWAS guiding principles and environmental issue-specific principles. The guiding principles include the principles of complementarity (comparative advantages of the various countries, ecological zones and production basins must be taken into account) which could drive inclusive growth and sustainable development under Aspiration 1, solidarity (the

organization should guarantee minimum cohesion among its members and shall pool financial, human and institutional resources so as to reduce existing disparities) which could foster good governance and justice under Aspiration 3, and consultation or participation (the permanent involvement of environmental actors in the implementation, monitoring-evaluation and the possible revisions of the West African environmental policy) which would advance people-drive in Aspiration 6. The issue-specific principles include precaution (where there is no scientific certainty on risks, decision-makers should not postpone the adoption of measures that could prevent possible sanitary or environmental hazards) and prevention (to consider preventive measures in human activities that concern the environment, so that any existing risk is not ruled out) which would promote sustainable development under Aspiration 1 and transparency (actions detrimental to the environment and its inhabitants should be notified and accepted by the relevant authorities and made known to the public) which could advance people-driven development in Aspiration 6.

Overall, ECOWAS as an institution faces challenges that might undermine the potential of the treaty and supplementary act. Some challenges affect the treaty directly. To illustrate, Kufour identifies the problem of ambiguity and the lack of binding force of some organs.[122] There are other problems more associated with the institutional architecture which also impact the implementation of the treaty. Lokulo-Sodipe and Osuntogun identify the challenges of inadequate institutional capacity and lack of commitment by states, [123]and Okom asserts that it is "unanimous amongst stakeholders … that the ECOWAS ship of State is still rigmaroling at the shore still looking forward to commencing its voyage."[124] Scholars have also made suggestions on how to address some of the challenges,[125] which could perhaps facilitate the

[122] Kufour, see note 119 above.
[123] JO Lokulo-Sodipe and AJ Osuntogun, "The Quest for a Supranational Entity in West Africa: Can the Economic Community of West African States Attain the Status?," *Potchefstroom Electronic Law Journal* 16, no.3 (2013): 212.
[124] Okom, see note 118 above.
[125] See, for example, Lokulo-Sodipe and Osuntogun, see note 123 above; Kufour, see note 119 above.

implementation of the environmental and sustainable development provisions of the treaty in support of Agenda 2063.

*4.4.**Treaty for the Establishment of the East African Community 1999***

Kenya, Uganda and Tanzania signed the Treaty for the Establishment of the East African Community at Arusha, Tanzania, on 30 November 1999, to re-establish the EAC. The treaty entered into force on 7th July 2000 pursuant to Article 152, and was amended 14 December 2006 and 20 August 2007 based on Article 150. There are now six member states with the addition of Burundi, Rwanda, South Sudan, all within the Great Lakes Region.

The treaty is also a constitutive instrument, so it is in the category of the AMU, CEN-SAD and ECOWAS treaties. It re-establishes[126] the EAC, in advancing previous efforts for a sub-regional community in East Africa,[127] under Article 2(1) and lays the groundwork for the East African Customs Union and a Common Market, as part of the community under Article 2(2), which have now been established. Unlike its predecessor, the new EAC under the treaty aims at "more than trade liberalization and harmonization in infrastructure and services,"[128] as it represents a more holistic institution that seeks to become a political federation and advance public participation.[129] The objectives, fundamental principles and operational principles under Articles 5, 6 and 7 respectively are the key provisions that could support sustainable development under Agenda 2063.

[126] See Masinde and Omolo, see note 71 above.
[127] See Ugirashebuja et al., eds, *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Leiden and Boston: Brill Nijhoff, 2017); Wilbert TK Kaahwa, "The Institutional Framework of the EAC" in in *East African Community Law: Institutional, Substantive and Comparative EU Aspects,* eds. Emmanuel Ugirashebuja et al. (Leiden and Boston: Brill Nijhoff, 2017) 43; Masinde and Omolo, see note 71 above.
[128] Kaahwa ibid.
[129] Ibid.

Article 5 provides for diverse, albeit broad,[130] objectives that could advance Aspirations 1,3,5 and 6. Article 5(1) and (2) cover policies, programmes and institutions that would advance economic, social, political, cultural and other ends in line with Aspirations 1, 3, 5 and 6. Article 5(3) then specifies "sustainable growth and development," raising the "standard of living and improve the quality of life of … populations," "sustainable utilisation of the natural resources" and the protection of "the natural environment" which could variously boost Aspiration 1; "people-centered mutual development" and "mainstreaming of gender in all its endeavours and the enhancement of the role of women" potentially in furtherance of Aspiration 6; and "partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development" which could support Aspiration 1, 3 and 6.

Article 6 identifies the six principles that would guide the objectives, sometimes considered to be problematic when set against international standards,[131] but which could nevertheless support Aspiration 3. They are: "mutual trust, political will and sovereign equality"; "peaceful co-existence and good neighbourliness"; "peaceful settlement of disputes"; "good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights"; "equitable distribution of benefits"; and "co-operation for mutual benefit."

Article 7 reinforces the ideas of good governance which could apparently support Aspiration 3, and also introduces other principles that could advance Aspirations 1, 5 and 6.

[130] Elvis Mbembe Binda, "The Legal Framework of the EAC" in in *East African Community Law: Institutional, Substantive and Comparative EU Aspects,* eds. Emmanuel Ugirashebuja et al. (Leiden and Boston: Brill Nijhoff, 2017),103.
[131] Khoti Chilomba Kamanga and Ally Possi, "General Principles Governing EAC Integration" in *East African Community Law: Institutional, Substantive and Comparative EU Aspects,* eds. Emmanuel Ugirashebuja et al. (Leiden and Boston: Brill Nijhoff, 2017), 202.

The idea of equitable distribution of benefit would support inclusive growth and sustainable development under Aspiration 1, and cultural variables and people-driven development under Aspirations 5 and 6 respectively would benefit from "people-centered co-operation" as well as "multi-level participation and the involvement of a wide range of stakeholders."

To complement the treaty on environmental protection and sustainable development, the EAC agreed to the Protocol on Environment and Natural Resources Management as a subsidiary instrument to the treaty at Arusha, Tanzania, on 3 April 2006. In view of Article 45 which requires that for the instrument to come into force, there should be "ratification and deposit of instruments of ratification with the Secretary General by all the Partner States," the instrument is not yet in force, given that Tanzania has not ratified.

By Article 51, the protocol abrogates the Memorandum of Understanding between the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda for Cooperation in Environment Management hitherto incorporated under Article 142 of the treaty. It therefore replaces that memorandum as the key substantive environmental and natural resources management instrument. Given its subject area as expanded by Article 3 to cover sustainable environment and the management of diverse resources, it could significantly support the sustainable development Aspirations of Agenda 2063.

The prime provision supporting Aspirations 1, 3, 5 and 6 is Article 4 which outlines the principles of environment and natural resources management under paragraph 2, and by paragraph 1, incorporates the principles of the community to cover the objectives under Article 5, commitment of partner states under Article 6, cooperation on environment and natural resources management under Article 7, and sustainable development under Article 8. The principles of environment and natural resources management could advance Aspirations 1, 3, 5 and 6. Fundamental right to live in a clean and healthy environment could mainly advance

human rights in Aspiration 3. Poverty eradication and food security, cooperation in environmental and natural resources management, public participation, prior informed consent, notification on activities having transboundary impacts and information sharing could support people-driven development under Aspiration 6. Sustainable development, environmental impact assessment, and environmental audit and monitoring could foster inclusive growth and sustainable development under Aspiration 1 as well as people-driven development under Aspiration 6. Environmental impact assessment, environmental audit and monitoring, polluter pays, user payers, prior planning, unity and coherence of shared ecosystems, intergenerational and intragenerational equity, subsidiarity in the management of the environment and natural resources, and state responsibility to prevent harm could variously promote good governance, democracy, respect for human rights, justice and the rule of law under Aspiration 3. The preventive and precautionary principles could advance sustainable development under Aspiration 1 and justice under Aspiration 3.

Article 5 identifies five objectives that are driven by the principles, which have the potential to essentially support Aspirations 1, 3 and 6. Promoting sustainable development as well as sustainable utilization of environment and natural resources by preventing detrimental activities, and fostering "closer cooperation for judicious, sustainable and coordinated management, conservation, protection and utilisation of the environment and natural resources" are pathways to inclusive growth and sustainable development. Where states promote capacity building and environmental awareness, this could support people-driven development under Aspiration 6. Cooperation in the management of environment and natural resources, alongside the promotion of development and harmonization of policies, could variously foster sustainable development under Aspiration 1 and good governance under Aspiration 3.

Despite these laudable provisions of the EAC treaty, it seems that achieving the objectives of the instrument might be challenging. At least four problems illustrate how. First, the instrument has lofty ideas but lacks adequate implementation strategies that would drive necessary action.[132] In fact, Masinde and Omolo seem to join a league of scholars that consider the EAC to be too ambitious. Given the existing challenges of insecurity and political instability in the region, the ambition might not be realistic for decision-making and implementation by the EAC, and this might explain the absence of consensus on issues.[133] Second, state sovereignty remains a challenge for regionalism envisaged by the treaty because states retain powers that undermine the ability of the EAC to make final definitive decisions. Although, as Ruhangisa observes, EAC law is intended to be higher than national law,[134] Binda averts our minds to the reality that the EAC could only act as far as the competence that states give it,[135] more so that national law is the primary driver of implementation.[136] Third, Kaahwa identifies the "reluctance to agree on a common platform premise on the nature and extent of immunities and privileges."[137] This lack of agreement undermines the institutional capacity set up by the treaty.

*4.5.**Agreement Establishing the Inter-Governmental Authority on Development 1996***

[132] Masinde and Omolo, see note 71 above.
[133] See Sebastiano Rwengabo, "Consensus and the Future of the East African Community," *ACODE Policy Brief*, 2016, http://www.acode-u.org/Files/Publications/PBP_36.pdf .
[134] John Eudes Ruhangisa, "The Scope, Nature and Effect of EAC Law," in *East African Community Law: Institutional, Substantive and Comparative EU Aspects,* eds. Emmanuel Ugirashebuja et al. (Leiden and Boston: Brill Nijhoff, 2017), 139.
[135] See Binda, see note 131 above.
[136] See Tomasz P Milej, "What Is Wrong about Supranational Laws? The Sources of East African Community Law In Light of the EU's Experience," *ZaöRV* 75 (2015): 579.
[137] Kaahwa, see note 127 above.

Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan and Uganda concluded the Agreement Establishing the Inter-Governmental Authority on Development at Kenya on 21 March 1996. Following Article 21, the instrument came into force the same year.

The agreement established the IGAD under Article 1A, ostensibly as a development organization whose mandate later expanded to cover other areas,[138] to replace the Intergovernmental Authority on Drought and Development (IGADD) which was established by an earlier, 1986 instrument. IGADD was an intergovernmental organization established in 1986 to manage drought and development.[139] IGAD has expanded these areas of cooperation, potentially in support of Agenda 2063.

The principles in Article 6 as well as the aims and objectives in Article 7 could advance Aspirations 1, 3, 5 and 6. Article 6 outlines six principles, at least three of which could advance Aspirations 1, 3 and 6. The principle of peaceful settlement of conflicts within and across states through dialogue could advance sustainable development under Aspiration 1 and rule of law under Aspiration 3; mutual and equitable sharing of benefits would advance inclusive growth under Aspiration 1 and people-driven development under Aspiration 6; and recognition, promotion and protection of human and people's rights would undoubtedly advance Aspiration 3.

The aims and objectives under Article 7 could promote much more of Aspiration 1 and less of Aspiration 6. The sustainable development provisions that could support Aspiration 1 cover diverse areas such as development strategies, policy harmonization in various sectors, enabling environment, food security and disaster management, sustainable development and

[138] Tim Murithi, "Inter-governmental Authority on Development on the Ground: Comparing Interventions in Sudan and Somalia," *African Security* 2 (2009): 136. See also Abubakar O Sulaiman and Ifeanyi Chuckwu Agoha, "South Sudan Negotiated Independence: A Critique of African Union's Role," *European Journal of Sustainable Development* 2, no. 3 (2013): 145.
[139] Ibid.

environmental protection, together with complementary infrastructure such as transport and energy, programmes within the framework of sub-regional cooperation, common markets and the AEC, and research and development along with the application. Intrastate conflict resolution through dialogue under paragraph g might advance people-driven development under Aspiration 6.

IGAD has performed some of its roles under the agreement, perhaps best exemplified by its role in negotiating peace, leading to the creation of South Sudan.[140] Paradoxically, the South Sudan example also illustrates some of the challenges of the treaty. In its work at South Sudan, IGAD was not able to considerably retain participation by relevant civil society groups and political parties, and focused too much on formalities and legality rather than actual reconciliation,[141] apparently because it lacks adequate provisions to facilitate public participation and actual reconciliation which are core to sustainable development.

*4.6.**Declaration by the Heads of State or Government of Southern African States and the Treaty of the Southern African Development Community 1992***

Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe agreed to the Declaration by the Heads of State or Government of Southern African States and the Treaty of the Southern African Development Community at Windhoek, Namibia, on 17 August 1992. Based on Article 41, the instrument came into force on 30 September 1993, and pursuant to Article 44, replaces the Memorandum of Understanding on the Institutions of the Southern African Development Coordination Conference which was agreed to on 20 July 1981.

[140] Sulaiman and Agoha, see note 138 above.
[141] Ibid.

The instrument creates the SADC under Article 2, essentially to foster economic and political ties,[142] replacing the Southern African Development Coordination Conference which was established in 1980[143] to neutralize South Africa's economic domination and advance the region towards sustainable economic development.[144] Article 3 outlining the principles governing the SADC and Article 4 providing for the objectives could advance some sustainable development aspirations in Agenda 2063.

Article 3 provides five principles, three of which could advance at least Aspirations 3 and 7. The first, perhaps most popular but recently challenging principle, given the clog in the wheel of sub-regional jurisdiction, [145] is on human rights, democracy and the rule of law, which expressly touches on the human rights, democracy and the rule of law elements of Aspiration 3. The second is the principle of equity, balance and mutual benefit which could further advance justice and the rule of law under Aspiration 3. The third is on the peaceful settlement of disputes, potentially facilitating unity under Aspiration 7.

Article 4 identifies several objectives that could promote Aspirations 1 and 6. Clearly potentially in support of inclusive growth and sustainable development under Aspiration 1 are, among others, the objectives on: development and economic growth, alleviation of poverty, enhancement of the standard and quality of life and supporting the socially disadvantaged; the promotion of self-sustaining development based on collective self-reliance; and achieving sustainable utilisation of natural resources and effective environmental protection. Strengthening and the consolidation of the long standing historical, social and cultural affinities

[142] Muna Ndulo, "Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)," *African Yearbook of International Law* 4 (1996): 195. See also Tapiwa Shumba, "Revisiting Legal harmonisation under the Southern African Development Community Treaty: The Need to Amend the Treaty," *Law, Democracy and Development* 19 (2015): 127.
[143]Aslan Khuseinovich Abashidze, Denis Andreevich Gugunskiy, Aleksandra Evgen'evna Koneva and Aleksandr Mikhailovich Solntsev, "Judicial Body of the Southern African Development Community: Problem of Jurisdiction," *Mediterranean Journal of Social Sciences* 6 (2015): 259;Shumba ibid; Ndulo ibid.
[144] Ndulo ibid.
[145] Frederick Cowell, "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction," *Human Rights Law Review* 13, no. 1 (2013): 153.

and links, and evolution of common political values, systems and institutions would advance shared values and common heritage under Aspiration 5.

Some key challenges of the SADC framework are the inability to compel performance, lack of adequate infrastructure and foreign influence. Asmelash illustrates the performance challenge with the failure of the SADC member states to sanction Zimbabwe to comply with the framework and the poor drafting of the instruments,[146] and Sirota identifies inadequate enforcement mechanisms.[147] Ndulo adds the challenges of inadequate infrastructures, focusing on the need for harmonization of laws. As Sirota hints, the problem of foreign influence stems from the reliance on foreign finance which limits the ability to independently control the agenda of the SADC, with effect of undermining the work of the organization under the framework, including its potential for driving sustainable development under Agenda 2063.

*4.7.**Treaty Establishing a Common Market for Eastern and Southern Africa 1993***

Angola, Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somali, Sudan, Swaziland, Tanzania, Uganda, Zaire, Zambia and Zimbabwe agreed to the Treaty Establishing a Common Market for Eastern and Southern Africa at Kampala, Uganda, on 5 November 1993. In line with Article 194, the instrument entered into force at Lilongwe, Malawi, on 8 December 1994.

Also a constitutive instrument like the AMU, CEN-SAD, ECOWAS and EAC treaties, the instrument creates COMESA and determines its membership under Article 1. Article 3

[146] Henok Asmelash, "Southern African Development Community (SADC) Tribunal," in *Max Planck Encyclopedia of International Procedural Law* 2017. Accessed June 20, 2018. url: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991562.
[147] Benjamin Sirota, "Sovereignty and the Southern African Development Community," *Chicago Journal of International Law* 5 (2004): 343.

providing for the aims and objectives, and article 6 stating the fundamental principles of the market could support sustainable development under Agenda 2063.

The aims and objectives under Article 3 could mainly support Aspirations 1 and 7. The provisions on sustainable growth and development, joint development and macroeconomic policies, enabling environment for investment, and other economic aims could advance inclusive growth and sustainable development under Aspiration 1. Cooperation "in strengthening the relations between the Common Market and the rest of the world and the adoption of common positions in international fora" would undoubtedly advance Aspiration 7 which envisages Africa as a strong, united and influential global player and partner.

There are ten fundamental principles under Article 6, but only five appear to be important for some of the environmental protection and sustainable development Aspirations of Agenda 2063, specifically Aspirations 3, 6 and 7. At least four principles support good governance, democracy, respect for human rights, justice and the rule of law under Aspiration 3: recognizing, promoting and protecting human and peoples' rights; accountability, economic justice and popular participation; recognizing and observing the rule of law; and promoting and sustaining democratic system of governance. Economic justice and popular participation would advance people-driven development under Aspiration 6. Peaceful settlement of disputes and active cooperation could promote unity under Aspiration 7.

One central challenge of the COMESA treaty is that it has not considerably advanced its objectives. Scholars provide insight into why this is so. Although focusing on the failure to achieve deeper trade integration, Dirar notes the multiplicity of membership[148] as a contributing factor that might have derailed the organization from achieving its objectives,[149]

[148] Luwam Dirar, "Common Market for Eastern and Southern African Countries: Multiplicity of Membership Issues and Choices," *African Journal of International and Comparative Law* 18 (2010): 217.
[149] Note that this problem is not unique to COMESA. See Oppong, see note 97 above.

and this is only possible because the treaty does not prevent it. To illustrate, Kenya, Uganda, Burundi and Rwanda are members of both COMESA and EAC, and, although with some advantages such as the capture of economic gains,[150] this multiple membership could lead to divided loyalty, especially for COMESA which appears to be weaker than the EAC.

*4.8.**Treaty Establishing the Economic Community of Central African States 1983***

Angola, Burundi, Cameroon, Central African Republic, Congo, Gabon, Equatorial Guinea, Rwanda, Sao Tome and Principe, Chad and Zaire agreed to the Treaty Establishing the Economic Community of Central African States at Libreville, Gabon, on 18 October 1983. The treaty came into force in 18 December 1984, pursuant to Article 93.

The treaty also joins the league of constitutive instruments such as the AMU, CEN-SAD, ECOWAS, EAC and COMESA treaties by establishing the ECCAS under Article 2. Article 3 states the principles and Article 4 outlines the aims of the community. These provisions on the principles and aims could further the sustainable development aspirations of Agenda 2063.

Article 3 shows that, unlike most other sub-regional organizations, ECCAS explicitly adopts the principles of international law, mainly those "governing relations between States, in particular the principles of sovereignty, equality and independence of all States, good neighbourliness, non-interference in their internal affairs, non-use of force to settle disputes and the respect of the rule of law in their mutual relations." Sovereignty could advance sustainable development under Aspiration 1 by allowing states to exploit their resources, promote cultural variables under Aspiration 5 by preventing erosion of ways of life, and

[150] Hailu, see note 98 above.

facilitate people-driven development where peoples-based permanent sovereignty has its way.[151] Respect for the rule of law could foster good governance, democracy, respect for human rights, justice and other elements of the rule of law that could be incidental to Aspiration 3. Non-forceful dispute settlement could promote unity under Aspiration 7.

Article 4 has what appears to be general and specific aims, many of which could advance Aspirations 1, 3, 5, 6 and 7. The specific aims provide the key goals to achieve the general aim. The general aim is "to promote and strengthen harmonious cooperation and balanced and self-sustained development in all fields of economic and social activity," with focus on wide-ranging sectors, and "to achieve collective self-reliance, raise the standard of living of… peoples, increase and maintain economic stability, foster close and peaceful relations between Member States and contribute to the progress and development of the African continent." This aim could clearly apply to inclusive growth and sustainable development under Aspiration 1. The specific aims touch on issues such as trade and development policies, for instance elimination of trade barriers, development of common tariffs and the establishment of a Cooperation and Development Fund, which could largely support sustainable development Aspiration 1, although provisions such as harmonization of policies to promote culture might advance shared values and ethics under Aspiration 5.

However, there has been slow implementation of ECCAS treaty for at least three reasons. First, there has been Armed conflict in most member states. [152] Second, there is no regional mechanism to manage conflict.[153] Third, there is low level of members states'

[151] See Onifade, see note 13 above.
[152] Khadiagala, see note 102 above.
[153] Ibid.

commitments.[154]Altogether, these problems have relegated the implementation of the treaty for sustainable development, although there are already efforts for revitalization.[155]

5. National Environmental and Sustainable Development Law in Africa

The fifty-four states of the AU have all embraced environmental protection and economic development as policy goals, although they appear to prioritize the latter over the former, as gathered from their participation in the international fora.[156] Sustainable development serves as a meeting point that harmonizes their environmental and economic ambitions, and since it evolved as part of the environmental protection agenda, both environmental protection and sustainable development are interwoven, so states cannot fully embrace one without the other.

All the states have environmental and/or sustainable development instruments, but most of them employ more indirect than direct instruments. The indirect instruments take two major forms. The first form is the constitution. The second form comprises of statutes applicable to specific resources such as hydrocarbons and minerals, or to sectors such as electricity and mining. Consider that, just like statutes could be subsidiary to constitutions, the regulations, orders and agreements made pursuant statutes are extension of such statutes. The direct instrument takes one major form. They appear as statutes that address environmental and sustainable development issues. Also, like we have for the indirect instruments, the regulations and orders made pursuant are an extension of such statutes. Thus, constitutions and statutes are the enabling source for other subsidiary sources.

[154] Ibid.
[155] Ibid.
[156] Onifade and Orifowomo, see note 6 above.

Table 3: Sample of National Environmental and Sustainable Development Laws

Serial Number	Countries	Instruments[157]		
		Constitutions[158]	*Sectoral Statutes*[159]	*Environmental and Sustainable Development Statutes*[160]
1	Algeria	Algeria's Constitution 1989 Reinstated 1996 as amended through 2008	Hydrocarbons Law 2005 amended through 2013; Mining Law 2014	Law on the Promotion of Renewable Energies in the Context of Sustainable Development 2004
2	Angola	Angola's Constitution 2010	Petroleum Activities Law 2004; Mining Code 2011	General Environmental Law 1998
3	Benin	Benin's Constitution 1990	Petroleum Code 2006; Mining and Mineral Taxation Code 2006	Environmental Impact Study Regulations Decree 2011; Framework Law on the Environment 1999
4	Botswana	Botswana's Constitution 1966 as amended through 2002	Petroleum (Exploration and Production) Act 1983 Mines and Minerals Act 1999	Atmospheric Pollution (Prevention) Act 1971; Environmental Impact Assessment Act 2011
5	Burkina Faso	Burkina Faso's Constitution 1991 as amended through 2012	Mining Code 2003; Mining Legislation 2005; Mining Code 2015	Environmental Code 2013
6	Burundi	Burundi's Constitution 2005	Mining and Petroleum Act 1976; Mining Code 2013	Code on the Environment 2000
7	Cape Verde	Cape Verde's Constitution 1980 as amended through 1992	Mining Code 2003	Environmental Policy Act 1993; Decree Regulating Environmental Impact Assessment 2006

[157] To avoid including defunct or repealed laws, the laws are crosschecked against online news sources to ascertain if they were recently revised. While all efforts have been made to ensure they are not defunct or repealed, this crosscheck process might not be flawless, given that it depends greatly on the online presence of the respective countries. Also, laws may be repealed or become defunct during the period of this research, and as such might not be reflected as at the time of the publication.

[158] While government websites are consulted to confirm the constitutions, the major source is the Constitute Project.

[159] In addition to government websites, other sources consulted include the websites of the African Mining Legislation Atlas, the World Law Guide, the World Intellectual Property Organization, the Sabin Centre on Climate Change at Columbia University and the Minerals Yearbook.

[160] Some of the laws are crosschecked in other sources, for example, David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human rights, and the Environment* (Vancouver: UBC Press 2011).

8	Cameroon	Cameroon's Constitution 1972 as amended through 2008	Petroleum Code 1999; Mining Code 2001; the Gas Code 2012; Mining Code 2016	Framework Law on Environmental Management 1996
9	Central African Republic	Central Africa Republic's Constitution 2013	Mining Code 2009	Environmental Code 2007
10	Chad	Chad's Constitution 1996 as amended through 2005	Mining Code 1995; Petroleum Revenue Management Law 1999 as amended through 2006	Framework Law on the Environment 1998
11	Comoros	Comoro's Constitution 2001 as amended through 2009	Mineral Substances Regime 1954; Petroleum Code 2012	Framework Law Relating to the Environment 1994
12	Cote d'Ivoire	Cote d'Ivoire Constitution 2000	Mining Code 2014, Petroleum Code 1996 as amended through 2012; Application Decree 1996	Framework Law Concerning the Environmental Code 1996
13	Democratic Republic of the Congo	Democratic Republic of Congo's Constitution 2005 as amended through 2011	Mining Code 2002; Petroleum Code 2015	———
14	Republic of the Congo	Congo's Constitution 2001	Mining Code 2005; Minerals Decree 2007	Environmental Protection Law 1991
15	Djibouti	Djibouti's Constitution 1992 as amended through 2010	Petroleum Code 2005; Mining Code 2016	Environment Code 2009
16	Egypt	Egypt's Constitution 2014	Fuel Materials Law 1953; Mining and Quarries Law 1956; Natural Gas Law 1980; Mineral Resources Law 2014	Environmental Law 1994
17	Equatorial Guinea	Equatorial Guinea's Constitution 1991 as amended through 2012	Hydrocarbons Law 2006; Mining Law 2006; Petroleum Regulations 2013	Environmental Law 2003
18	Eritrea	Eritrea's constitution 1997	Mining Act 1995; Petroleum Proclamation 2000 and the Revised Petroleum Regulations 2000	Environmental Protection, Administration and Restoration Proclamation 2017
19	Ethiopia	Ethiopia's Constitution 1994	Mining Proclamation 1993 as amended through 1998; Petroleum Operations Proclamation 1986;	Environmental Impact Assessment Proclamation 2002;

			Sustainable Development of Mineral Resources Proclamation 2000 as amended by Mining Operation (Amendment) Proclamation 2013	Environmental Pollution Control Proclamation 2002
20	Gabon	Gabon's Constitution 1991 as amended through 1997	Hydrocarbons Code 2014; Mining Code 2014 (dated 30 January 2015)	Environmental Code 1993
21	Gambia	Gambia's Constitution 1996 as amended through 2004	Minerals Act 1953 as consolidated to the Minerals Act 1963; Petroleum Act 2004 as amended through 2007	Environmental Protection Act 1988; National Environmental Management Law 1994
22	Ghana	Ghana's Constitution 1992 as amended through 1996	Mining Health Areas Act 1925; Minerals and Mining Law 2006; Petroleum (Exploration and Production) Act 2016	Environmental Protection Agency Act 1994
23	Guinea	Guinea's Constitution 2010; Law L/2011/006/CNT on the Mining Code of the Republic of Guinea 2011, amended in 2013 by Law L/2013/053/CNT	Petroleum Code 2014; Mining Code 2011 as amended through 2013	Environment Code 1987
24	Guinea-Bissau	Guinea-Bissau's constitution 1984 as amended through 1991	Petroleum Law 2014; Mining Code 2014	Basic Law on the Environment 2011
25	Kenya	Kenya's Constitution 2010	Petroleum (Exploration and Production) Act 1984 as revised through 2012; Mining Act 2016	Environmental Management and Coordination Act 1999 as revised through 2012
26	Lesotho	Lesotho's Constitution of 1993 as amended through 1998	Land Act 2010 (applicable to oil and gas); Miners and Minerals Act 2005	Environment Act 2008
27	Liberia	Liberia's Constitution 1986	New Petroleum Law of Liberia 2002 as revised through 2014; Minerals and Mining Act 2006	Environmental Protection and Management Act 2002
28	Libya	Libya's Constitution 2011	Petroleum Law of 1955; Mining and Quarrying Law 1971	Environment Protection and Improvement Law 2003; Environmental Protection Law 1982; Law for the Prevention

				of Oil Pollution in the Sea 1973
29	Madagascar	Madagascar's Constitution 2010	Petroleum Code 1996; Mining Code 1999 as amended through 2005; Enforcement of Mining Code Decree 2006	Environment Malagasy Charter 2015; Decree on the Compatibility of Investments with the Environment 1999 as amended through 2004; Order on Environmental Assessment 2001
30	Malawi	Malawi's Constitution 1994 as amended through 1999	Petroleum (Exploration and Production) Act 1983; Mines and Minerals Act 1981	Environmental Management Act 1996
31	Mali	Mali's Constitution 1992	Petroleum Code 2004; Mining Code 2012	Malian Environmental Impact Assessment Decree 1999
32	Mauritania	Mauritania's Constitution 1991 as amended through 2012	Petroleum Code 2010 as amended through 2015; Mining Code 2008 as amended through 2012	Environment Code 2000; Environmental Impact Study Decree 2004 as amended through 2007
33	Mauritius	Mauritius's Constitution 1968 as amended through 2011	Minerals Act 1966; Petroleum Act 1970	Environment Protection Act 2002 as amended through 2008
34	Morocco	Morocco's Constitution 2011	Hydrocarbons Code (Hydrocarbons Law 1999, supplemented by Hydrocarbons Decree 1993 as amended through 2000); Mining Code 2015	Environmental Protection Act 1996; National Charter for Environment and Sustainable Development 2010
35	Mozambique	Oil and Gas Upstream Operations law 2015	Mining Law 2002; Decree on the Environmental Regulation for Mining Activities 2004; Petroleum Law 2014	Environmental Law 1997
36	Namibia	Namibia's Constitution 1990 as amended through 2010	Petroleum (Exploration and Production) Act 1991; Petroleum Products and Energy Act 1990 as amended through 2003; Minerals (Prospecting and Mining) Act 1992	Environmental Management Act 2007

37	Niger	Niger's Constitution 2010	Mining Code 1993 as amended through 2007; Petroleum Code 2007	Rural Code 1993; Framework Legislation for the Environmental Sector 1998
38	Nigeria	Nigeria's Constitution 1999	Petroleum Act 1969; Mining and Minerals Act 2007; Petroleum Industry Governance Act 2017	Environmental Impact Assessment Act 1992
39	Rwanda	Rwanda's Constitution 2003 as amended through 2010	Petroleum Exploration and Production Law 2016; Mining Law 2008 as amended through 2014	Organic Law on Protection, Conservation and Promotion of the Environment 2005
40	Sao Tome and Principe	Sao Tome and Principe's Constitution 1975 as amended through 1990	Oil Revenue Management Law 2004; Fundamental Law on Petroleum Operations 2009	General Law on Environment 1999; Law on Environmental Impact Survey 1999
41	Senegal	Senegal's Constitution 2001 as amended through 2009	Petroleum Code 1998; Mining Code 2003 and Mining Code 2016	Environment Code 2001
42	Seychelles	Seychelles's Constitution 1993 as amended through 2011	Petroleum Mining (Pollution Control) Act 1976; Minerals Act 1962	Environmental Protection Act 2016
43	Sierra Leone	Sierra Leone's Constitution 1991 Reinstated 1996 as amended through 2008.	Petroleum (Exploration and Production Act) 2011; Mines and Minerals Act 1994 as amended through 1999	Environmental Agency Protection Act 2008 as amended through 2010
44	Somalia	Somalia's Constitution 2012	Petroleum Law 2008; Mining Code 1984	———
45	South Africa	South Africa's Constitution 1996 as amended through 2012	Mineral and Petroleum Resources Development Act 2002	National Environmental Management Act 1998
46	South Sudan	South Sudan's Constitution 2011	Petroleum Act 2012; Mining Act 2012	———
47	Sudan	Sudan's Constitution 2005	Mineral Wealth and Mining Resources Development Act 2015	Environmental Protection Act 2001
48	Swazi Land	Swazi Land's Constitution 2005	Mines and Minerals Act 2011	Environmental Management Act 2002

49	Tanzania	Tanzania's Constitution 1977 as amended through 1995	Petroleum Act 2015; Mining Act 2010	Environmental Management Act 2004
50	Togo	Togo's Constitution 1992 as amendment through 2007	Mining Code 1996; Hydrocarbons Code 1999	Environment Code 1988; Environmental Impact Studies Decree 2006
51	Tunisia	Tunisia's Constitution 2014	Hydrocarbons Code 1999 as supplemented in 2002; Mining Code 2003	Air Pollution and Noise Emissions Law 2007; National Agency for Environmental Protection Code 1988 as amended through 2000; Environmental Impact Study Decree 2005
52	Uganda	Uganda's Constitution 1995 as amended through 2005	Mining Act 2003; Petroleum (Exploration, Development and Production) Act 2013 (the Upstream Act) and the Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act 2013	National Environmental Act 1995
53	Zambia	Zambia's Constitution 1991 as amended through 2009	Petroleum (Exploration and Production) Act 2008; Mines and Minerals Development Act 2015	Environmental Protection and Pollution Control Act 1990; Environmental Management Act 2011
54	Zimbabwe	Zimbabwe's Constitution 2013	Petroleum Act 2006 as amended through 2011; Mines and Minerals Act 1963 as amended through 1997	Environment Management Act 2002 as amended through 2004

*5.1.**Constitutions***

Constitutions appear to be the strongest source of environmental and sustainable development law in Africa. All fifty-four countries' constitutions have environmental protection and/or sustainable development provisions that could support Agenda 2063.

Constitutions apparently fall in the category of constitutive instruments in that they essentially create and regulate the basic organs of the state — the executive, the legislature and the judiciary— at the relevant administrative levels, depending on the system of governance, for instance federal versus unitary models. These institutions would invariably govern environmental protection and sustainable development under Agenda 2063.

Thus, the sample laws show the basic function of constitutions as governance, and they often have specific governance provisions that would support sustainable development aspirations under Agenda 2063. Such governance provisions might therefore advance the institutional foundation for inclusive growth and sustainable development under Aspiration 1, and good governance, democracy, respect for human rights, justice and the rule of law under Aspiration 3. Whether and to what extent they do so would vary based on the specific provisions and the institutional context.

Meanwhile, constitutions could also be considered substantive instruments because they often regulate behaviour and interactions, including rights, duties and everything in-between. In fact, their substantive functions probably constitute the most visible role they play in environmental and sustainable development law. They often provide for environmental and development rights, although the exact model of incorporation usually varies significantly.

At one end of the spectrum are countries that frame environmental protection and/or sustainable development as a right of citizens. This "rights" model could take various, often polarized forms. Such forms include positive versus negative rights, and group versus personal rights.

Reading a few constitutional environmental and sustainable development provisions would quickly reveal the polarity of positive and negative rights. First, the right may be positive wherein it might be easily justiciable, for instance as we have in Angola, Benin, Cameroon,

Cape Verde, Chad, Republic of the Congo, Democratic Republic of Congo, Egypt, Kenya, Mali, Niger, Rwanda, Somalia, South Africa, Sudan, South Sudan, Togo, Uganda and Zimbabwe. Where there are positive rights, one could make claims against the government,[161] so such rights appear to be the best embodiment of environmental protection and/or sustainable development. The right might come with duties on the part of governments and/or citizens, for instance in the interest of all, current or future citizens, among other potential beneficiaries. Second, the right may also be negative or in form of state policy, for instance in the case of Burundi, Central African Republic, Eritrea, Equatorial Guinea, Gabon, Gambia, Lesotho, Malawi, Namibia, Nigeria, Senegal, Seychelles, Swazi Land, Tunisia and Zambia. This is a second-best form of incorporation. Where there are negative rights, then the government ought to desist from encroaching on such,[162] so it makes more sense as a duty of the state than a right, although it is still generally better than non-justiciable state policies that might only serve as principles that government could decide to follow or not.

Perhaps less noticeable is the distinction of group and personal rights. While countries such as Sudan and South Sudan provide for community, common or people's rights, most other countries, for instance Angola, Ethiopia, Cameroon, Cape Verde, Chad, Republic of the Congo, Egypt and Uganda, provide for individual rights or a collection of such individual rights to form "collective rights".

At another end of the spectrum are countries that frame environmental protection and/or sustainable development as a duty of citizens. They include Mauritania, Seychelles and Swazi Land which couch the rights more as citizen's obligation. To illustrate this model, the duty

[161] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford and New York: Oxford University Press, 2009); David P Currie, "Positive and Negative Constitutional Rights," *University of Chicago Law Review* 53 (1986): 864.
[162] See Currie ibid.

could be to perform certain functions to support environmental protection and/or sustainable development.

The rights-duties spectrum might determine how constitutions support Aspirations 1, 3, 5 and 6 which could all be incorporated as rights and duties. For instance, constitutions providing for positive rights might significantly boost human rights under Aspiration 3 or cultural rights under Aspiration 5, or group rights under Aspiration 6, but those with negative rights might not.

Howbeit, constitutions could hinder the aspirations of Agenda 2063. Across the sample countries, common constitutional clauses that do so include those on state ownership and control of resources. By denying people of their liberty on and access to resources for development, such clauses could hinder inclusive growth and sustainable development under Aspiration 1, human rights in Aspiration 3, cultural variables under Aspiration 5 and people-driven development under Aspiration 6.

*5.2.**Sectoral Statutes***

Statutes complement constitutions in the regulation of specific sectors, so they might significantly advance sustainable development aspirations of Agenda 2063 as applicable to such sectors, although they might not be as strong as constitutions in the hierarchy of laws. While the constitution is more popular among citizens, sectoral statutes are probably more popular among industry experts in the sectors. They guide industry activities, for instance in the oil, gas and mining sectors, so most people in the field feel their impact directly, especially through the subsidiary sources such as regulations, orders and agreements.

Sectoral statutes regulating environmental protection and sustainable development are largely substantive. As such, they regulate behaviour and interaction within specific sectors, including the rights and duties of state and market actors.

The sectoral statutes that might potentially advance Agenda 2063 might depend on the dominating industry and other contexts. For instance, countries that have comparatively dominating mineral industries such as Burkina Faso, Burundi, Cape Verde, Central African Republic, Congo, Egypt, Mozambique, South Africa and Swazi Land seem to have relatively advanced mineral regimes, while those having comparatively dominating hydrocarbon industry such as Sao Tome and Principe, Namibia and Nigeria appear to have relatively advanced hydrocarbon regimes that might come in handy.

In any event, the sample laws reveal that almost every sectoral statute would support sustainable development Aspirations of Agenda 2063, although specific approaches might be different. Most countries have hydrocarbon and mineral statutes that provide for environmental and sustainable development norms that could support sustainable development under Aspiration 1, human rights under Aspiration 3, cultural considerations under Aspiration 5 and people-driven development under Aspiration 6. Such provisions have become a standard across hydrocarbon and mineral sectors.

Nonetheless, sectoral statutes are reputed for being pro-industry, so they could readily hinder some of the aspirations of Agenda 2063. They are designed essentially for environmental and resource exploitation, rather than environmental protection and sustainable development. Therefore, they prioritize economic values such as marginal productivity, profit maximization and efficiency, over largely non-economic normative values of Agenda 2063 such as inclusivity under Aspiration 1, human rights and justice under Aspiration 3, cultural interests under Aspiration 5 and people drive under Aspiration 6.

*5.3.**Environmental and Sustainable Development Statutes***

Statutes specifically providing for environmental and sustainable development norms might be stronger than sectoral statutes but are weaker than constitutions in the hierarchy of laws, with effect on their potential to support the sustainable development aspirations of Agenda 2063. Yet, they have the comparative advantage of treating environmental and sustainable development issues most exhaustively.

The sample laws show that most countries have environmental and sustainable development statutes that would support sustainable development under Agenda 1 and human rights under Agenda 3, while some countries have such statutes that could support cultural considerations under Aspirations 5 and people-driven development under Aspiration 6. Apart from few countries such as Algeria, Congo, Somali and South Sudan which appear to lack specific environmental instruments, most countries have environmental protection and/or sustainable development instruments that could support sustainable development under Aspiration 1 and/or human rights under Aspiration 3. Comparatively fewer countries have statutes that could advance cultural considerations under Aspiration 5 and people-driven development under Aspiration 6.

Notably, statutes may undermine some aspirations of Agenda 2063. For instance, Nigeria's resource ownership and control provisions under the Petroleum Act 1969 might undermine inclusive growth under Aspiration 1, cultural considerations under Aspiration 5 and people-driven development under Aspiration 6.

6. Conclusion

Again, what environmental and sustainable development laws could advance Agenda 2063? The results show that a mix of regional, sub-regional and national environmental and sustainable development laws could advance Agenda 2063. International law also plays a role by shaping and working alongside the regional, sub-regional and national laws, but it does not substantially feature in the analysis.

Across the regional, sub-regional and national levels, there are more indirect than direct environmental and sustainable development laws that could support Agenda 2063. Table 1 shows the regional instruments; Table 2 shows the sub-regional instruments; and Table 3 shows the national instruments. Professional and scholarly interpretations, for instance within the academia and the courts, of how indirect laws could work to advance Agenda 2063 might boost the chances of the relevant instruments, while direct laws might readily work without much help.

There also appears to be a mix of constitutive and substantive instruments across the three levels. There are more constitutive than substantive laws at the regional and sub-regional levels, and comparatively far more substantive than constative laws at the national level. However, whether sustainable development laws are constitutive or substantive does not have much significance for their ability to support Agenda 2063, given that their distinction might only be descriptive.

The overall finding suggests that there are already numerous environmental and sustainable development laws that could advance Agenda 2063 as shown in Tables 1, 2 and 3. At least one significant lesson from this is that the priority of stakeholders should be how these laws are applied to drive the various aspirations, rather than making new laws. Existing laws could be effective, and deploying them would be efficient. They could be effective because they could drive the various aspirations across the regional, sub-regional and national levels,

and they would be efficient by preventing a waste of resources in the creation of new laws. This is not to say that jurisdiction should not enact new laws where existing laws are defective or ineffective.