

# Climate change adaptation law and policy in the African Union: Creating legal pathways for adaptation

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## Abstract

Living in a region prone to the impacts and threats of climate change, African countries are already experiencing the drastic effects of climate change. Thus, support for climate change adaptation and its mainstreaming into relevant laws and policies is essential. The main aim of the paper is to discuss the enhancement of the adaptive capacity of African Union (AU) states through adaptation mainstreaming into relevant regional climate change adaptation laws and policies. It argues that Africa may increase its adaptive capacity through the adoption and/or revision and implementation of suitable legislation and policies relating to adaptation.

**Keywords:** *Adaptation mainstreaming, African Union, Law, Legal pathways, Policy*

## Introduction

The last decades have seen an upsurge in climate-induced hazards globally, which threaten human life and property (Malcolm, et al., 2016). The Intergovernmental Panel on Climate Change (IPCC) reported that ‘*the warming of the earth is unequivocal*’, and ‘*human influence on the climate system is clear*’ (2014). More frequent and intense weather events can rupture the infrastructure supporting vital services including energy, transport and health in both urban and rural areas (Ruhl, 2011). Living in a region prone to the impacts and threats of climate change and natural disasters, the people in sub-Saharan Africa are therefore already experiencing the drastic effects of climate change (Jegade, 2016). Adapting to the adverse impacts of climate change will continue to raise legal issues and intensify existing environmental protection regulatory challenges, as human migration and infrastructural development could trigger disputes over environmental, land-use, and legal responses (Bodansky, 2010). In anticipation of the inevitable shift from adaptation planning and policy to adaptation action and the critical role of law in this shift, this paper discusses the role of law in strengthening Africa’s adaptive capacity.

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## Method and analytical framework

The paper utilises the doctrinal method and the functional approach to law as analytical framework to examine how climate change adaptation is being mainstreamed into Africa Union (AU) law and policy. A systematic approach involving basic key terms search was adopted to locate relevant texts and materials for the paper including the UN Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, the Paris Agreement and Conference of the Parties decisions. AU instruments including the Declaration on Climate Change and Development in Africa, Decision on the High Level Work Programme on Climate Change Action in Africa and the draft African Strategy on Climate Change are also discussed. It identifies and discusses climate change adaptation responses likely to put some demand on institutions and legal principles.

## Findings

### Legal pathways for mainstreaming climate change adaptation in the African Union

The UNFCCC provides the key legal framework that articulates the general principles and objectives governing adaptation (Ruhl, 2010). The pivotal nature of adaptation responses in tackling the adverse effects of climate change are underscored in a number of key articles in the UNFCCC text (Freestone, 2012). For instance, article 4.1(f) provides that ‘where feasible, parties are to take climate change considerations into account in their relevant social, economic and environmental policies and actions’. Parties are further to employ suitable techniques, including impact assessments, to curtail the adverse effects of adaptation projects or measures on the economy, public health and the quality of the environment (UNFCCC article 4.1[f]). The rationale of this provision is to caution societies concerning the prospect of the social, economic and environmental policies and actions that fail to consider how climate change considerations degenerate into maladaptation (Farhana and Depledge 2004). In addition, using terms such as “to the extent feasible” and “as formulated and determined nationally” imply that the issue of mainstreaming and the scale and application of impact assessment as issues best to be determined by respective state parties.

In African policy circles, climate change is often regarded as a technical problem which requires technical solutions. Africans have been adjusting to occurrences such as heat waves, drought, flood, and fire for years (Addaney, et al., 2017). Therefore, it can be argued that, to some extent, adapting to climatic changes in their extremes, frequency, and distribution may require simply transforming and strengthening existing adaptation policies and strategies in Africa. In this regard, the AU Assembly has made significant decisions that ignited the advancement of Africa’s common position on climate change. The 8th ordinary session encouraged member states and the Regional Economic Communities (RECs) to incorporate climate change

concerns in their respective development policies and programmes (AU Assembly, 2004). This includes Africa's preparations for the development of a common position on climate change and an inclusive agenda on African climate change programmes. However, some of the adverse effects of climate change introduce completely new forms of challenges that most African countries lack the needed technological and knowledge systems for in order to adapt. For instance, most of the populations in Africa have not dealt with sea level rise on any significant scale (Addaney, et al., 2017). Another example is the mass migration of species in response to changing temperature, hydrology, and other environmental patterns (Abebe, 2014). Although these are not inconceivable climatic events, most African countries lack the requisite models on how to manage them. As a result, designing adaptation strategies for this form of change will involve some level of borrowing from and hybridization of existing policy mechanism and technological methods (Ruhl, 2011). For instance, coastal defence strategies already being used for storm surge protection could be employed as part of the response to sea-level rise and some level of developing new adaptation approach.

The third special session of the African Ministerial Conference on the Environment (AMCEN) in Nairobi in May 2009 presented a decisive occasion in the response of Africa to the threats of climate change. The Nairobi Declaration on the African Process for Combating Climate Change was adopted by the Ministers<sup>2</sup> to serve as a unified manifestation of the continent's determination to play a pivotal role in addressing the challenge of climate change. The Declaration emphasises the determination of the AMCEN to assimilate adaptation measures into national and regional development plans, policies and strategies, where appropriate, in order to guarantee adaptation to climate change in key areas, such as the environment and energy security (AMCEN, 2009). Nevertheless, many African countries apart from Kenya are yet to adopt substantive climate change law. The Kenyan Climate Change Act of 2016 contains some relevant provisions on adaptation mainstreaming. For instance, under article 3(2) of the Climate Change Act (2016), on the objects and purposes, it provides that:

*'without prejudice to subsection (1), this Act shall be applied in all sectors of the economy by the national and county governments to (a) mainstream climate change responses into development planning, decision making and implementation; (b) build resilience and enhance adaptive capacity to the impacts of climate change; (c) formulate programmes and plans to enhance the resilience and adaptive capacity of human and ecological systems to the impacts of climate change; (d) mainstream and reinforce climate change disaster risk reduction into strategies and actions of public and private entities; (e) mainstream intergenerational and gender equity in all aspects of climate change responses'*

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<sup>2</sup> See 15th ordinary session of the Executive Council 24-30 June 2009, Sirte, Libya EX CL/Dec 502(XV) Decision on the Report of the African Ministerial Conference on the Environment (AMCEN) Special Session on Climate Change Doc EX CL/519(XV).

These provisions are very progressive and comply with the normative standards of relevant international and regional climate change adaptation policies, including the Cancun Adaptation Framework and the draft AU Climate Change Strategy. Regarding its implementation, it is too early to have a fair assessment on how it has translated into practice.

The Draft AU Strategy on Climate Change is still under development (AU Draft Strategy 2014). It, however, contains vital guidelines on adaptation. The overall objective of this strategy is to enable the continent achieve “*climate-smart*” socio-economic development. Regarding Africa’s position on adaptation, it underscores that the importance of recognising the fact that adaptation is an overriding priority for the African continent. It places an urgent call for the implementation of adaptation measures and actions, including through the provision of substantial new and additional public financial resources, environmentally sound technologies and capacity building in a predictable and prompt manner (AU Draft Strategy 2014). The AU draft strategy (2015) outlines some major considerations on adaptation to guide member states including:

*‘The focus of adaptation must shift from vulnerability assessment to the implementation of adaptation programmes... Funding by developed countries for adaptation must reflect responsibility for economic and social damages resulting from climate change in the context of their historical contributions to greenhouse gases and current climate change...Funding for implementation of adaptation must be massively scaled up, in accordance with the need, and must go beyond the mainstreaming of adaptation into the development process, and include stand-alone adaptation projects’.*

Another tricky situation is that, it is not all the effects of climate change that are necessarily harmful at all locations and times (Ruhl 2012). Due to the fact that countries and different regions on the continent are likely to have different contours of the favourable and harmful effects, opting for adaptation strategies at any scale could be a highly contested legal and policy decision. In addition to the direct beneficial and harmful effects of climate change in Africa, adaptation measures such as human migration, water resources management, and new infrastructure development will lead to secondary impacts that require management responses. In its present form, the AU draft climate change strategy does not adequately address the novel policy concerns presented by scale of adaptation which require new forms of decision-making processes. For example, although coastal storm surge barriers are already subject to regulatory mechanisms, they have not been fully applied on the scale that might be necessary if most African countries were to build comprehensive sea wall infrastructure along their coasts.

## Conclusion

The impacts of climate change in Africa are likely to prompt adaptation responses that touch on many aspects of law and policy decision-making. While it is too early to predict which path is more apt, there just has not been enough climate change legislation at the domestic level on

the continent. To engender a great deal of legal development regarding adaptation and its incorporation in relevant sectors will therefore require envisioning scenarios in which current legal frameworks and institutions at the continental and national levels in Africa will be tested. Therefore, the AU and other policy makers have to do more than just waiting for those scenarios to fully develop. The time is ripe for an active conversation on how climate change adaptation will transform law and policy on the African continent. As the AU has not yet adopted any substantive regional treaty on climate change adaptation (and mitigation), it should endeavour to adopt a substantive regional framework convention to govern adaptation and to provide guidelines on how adaptation can be mainstreamed into national adaptation policies and strategies.

## References

- 15th ordinary session of the Executive Council 24-30 June 2009, Sirte, Libya EX CL/Dec 502(XV).
- Abebe, M.A. (2014) 'Climate Change, Gender Inequality and Migration in East Africa', *Washington Journal of Environmental Law & Policy* (4), 2.
- Addaney, M., Boshoff, E. & Oyetola, B. (2017) 'The climate change and human rights nexus in African', *Special Edition on the Environment and International Law. Amsterdam Law Forum* 9(3), 5–28.
- African Union (2004). 'Assembly of the African Union the Second Extraordinary Session', Sirte, Libya, 28th February.
- Araos, M., Ford, J., Berrang-Ford, L., Biesbroek, R., and Moser, S. (2016). 'Climate change adaptation planning for Global South megacities: the case of Dhaka', *Journal of Environmental Policy and Planning*, 19(6), 682-696.
- Bodansky, D. (2010). 'Climate Change and Human Rights: Unpacking the Issues', *Georgia Journal of International and Comparative Law* 38(3), 511-24.
- Decisions adopted by the African Ministerial Conference on the Environment and its 12th session. Available: [http://www.unep.org/roa/Amcen/Amcen\\_Events/12th\\_Session\\_AMCEN/index.asp](http://www.unep.org/roa/Amcen/Amcen_Events/12th_Session_AMCEN/index.asp) Accessed 31 March 2010.
- Deschenes, O. & Greenstone, M. (2007). 'The Economic Impacts of Climate Change: Evidence from Agricultural Output and Random Fluctuations in Weather', *American Economic Review* 97(1), 354.
- Draft African Union Strategy on Climate Change, (2015). Available: [http://www.un.org/en/africa/osaa/pdf/au/cap\\_draft\\_auclimatestrategy\\_2015.pdf](http://www.un.org/en/africa/osaa/pdf/au/cap_draft_auclimatestrategy_2015.pdf)
- Farhana, Y and Depledge, J. (2004). 'The International Climate Change Regime: A Guide to Rules, Institutions and Procedures', Cambridge, Cambridge University Press.

- Freestone, D. (2012). 'The International Legal Framework for Adaptation', in Michael B.G. & Fischer, K.K. (Eds), *The Law of Adaptation to Climate Change: U.S. and International Aspects*, Chicago, American Bar Association.
- Government of Kenya, (2016). 'Climate Change Act No 11 of 2016', National Council for Law Reporting.
- Intergovernmental Panel on Climate Change (IPCC) (2014a). 'Summary for policymakers'. In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Field, C.B., Barros, V.R., Dokken, D.J., Mach, K.J., Mastrandrea, M.D., Bilir, T.E., Chatterjee, M., Ebi, K.L., Estrada, Y.O., Genova, R.C., Girma, B., Kissel, E.S., Levy, A.N., MacCracken, S., Mastrandrea, P.R., & White, L.L. (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1-32.
- Jegede, O.A. (2016). 'The climate change regulatory framework and indigenous peoples' lands in Africa: Human rights implications'. Pretoria, Pretoria University Law Press.
- Report of the African Ministerial Conference on the Environment (AMCEN) Special Session on Climate Change Doc EX CL/519(XV).
- Ruhl, J.B. (2011). 'General Design Principles for Resilience and Adaptive Capacity in Legal Systems - With Applications to Climate Change Adaptation', *North Carolina Law Review* 89, 1373.

- Ruhl, J.B. (2012). 'The Political Economy of Climate Change Winners', *Minnesota Law Review* 97, 206.
- Ruhl, J.B. (2010). 'Climate Change Adaptation and the Structural Transformation of Environmental Law'. *Environmental Law* 40(2), 363, 431.
- United Nations Framework Convention on Climate Change (UNFCCC), 4 June 1992, 31 ILM 849.