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Multilateral environmental agreements and land and resource rights in Africa

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Many African countries are signatories to a number of international and regional environmental treaties. These include the Ramsar Convention on Wetlands, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the World Heritage Convention, the United Nations Convention to Combat Desertification (UNCCD), the Convention on Biological Diversity (CBD), the United Nations Framework Convention on Climate Change (UNFCCC) and the African Convention on the Conservation of Nature and Natural Resources. Governments should meet their legal obligations under these treaties in such a way that the land and resource rights of the poor in their countries are not compromised.

Introduction

Over the past 70 years, the world's governments have adopted hundreds of multilateral environmental treaties for the protection of flora and fauna and reducing toxic industrial emissions, among other issues. These treaties are legally binding agreements, which form the basis for international law that plays a critical role in setting international norms, and strengthening co-operation among countries with different national interests.

The period between the United Nations Conference on the Human Environment held in Stockholm in 1972 and the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992 was a watershed period for international environmental law. The two meetings and others held within the period established and entrenched key international environmental law principles as states reached political consensus on the need to sustainably manage the environment. Established in 1972, the United Nations Environment Programme (UNEP) is a leading international body with a mandate to promote effective action and to ensure that environmental interests find their way into international policy-making. UNEP remains one of the key players making scientific assessments of the global environment and brokering important global treaties as well as providing a secretariat for several international environmental agreements.

An increasing number of African states are parties to many international environmental agreements that have arisen, especially over the last two decades.

These global treaties are tools for managing 'common' resources shared by several states and constitute the common concern of humankind. Developing countries in Africa and elsewhere were particularly instrumental in the negotiation (and now the implementation) of the UNCCD and the Cartagena Protocol on Biosafety which have direct and immediate impacts on livelihoods in their respective national contexts. The African countries which are signatories to the international environmental agreements are participating in global efforts to implement the conventions.

However, the enhanced pace of environmental treaty-making raises critical issues for many African countries. The increasing interconnectedness of nation states is placing more 'commons' into the realm of international governance, so it is likely that even more international agreements will be negotiated. The penalties for non-compliance with this trend are ghastly for poor countries whose national budgets continue to be funded from bilateral and multilateral sources, often with accompanying conditionalities.

It is essential for African countries to fully appreciate the implications of ratifying the various international agreements. Some of the agreements have detrimental effects on the land and natural resources rights of the African people whose livelihoods are entirely dependent on these resources. Equally important is the realisation that negotiations of such international treaties are becoming more technical, with the result that many African countries are marginalised due to lack of capacity to engage effectively at such fora (UNEP 2002; Kameri-Mbote 2004).

Land and resource rights in the international legal framework can be broadly categorised as vesting in three different entities: the state, the individual and the community of states. International law, being state-centric, has the state as its locus of granting of property rights. Consequently, in all terrestrial ecosystems, states have full rights over their land resources (Kameri-Mbote 2004).

Tragedy of the commons vs tragedy of the enclosure

A widely accepted notion in resource use today is 'the tragedy of the commons' which postulates that when property rights are not assigned in situations of open access, there is an incentive to over-exploit renewable resources. The opposing argument is that when property rights are assigned in these situations, the market will act to balance competing uses in a most efficient way. Guided by the erroneous notion that common property is synonymous with property held in open access, the theory of the tragedy of the commons has been used to justify granting of private property rights to resources held in common.

Research, however, demonstrates that over-exploitation of resources can also occur when common property resources are privatised – the so-called 'tragedy of the enclosure' (Martinez-Alier 1991). If institutional mechanisms for policing use of individualised property are not fully binding on those upon whom they are to operate, or if they are not as far-reaching as the norms which they seek to replace, the result is a tragedy of the enclosure. Tragedies of the enclosure do not necessarily mean that there is anything wrong with the property rights themselves, but they raise the question of whether the property rights are framed at the right level (Kameri-Mbote 2004).

Property rights systems

There are four main property rights regimes or types of tenure in most African states: state; private or individual; communal; and common property that dates back to the historical acquisition of land. Among current property rights systems in Africa, most, if not all, are a legacy of colonialism. These four systems are the leading property rights regimes relevant for land and natural resources management.

The way in which persons vested with property rights deal with those rights determines the efficacy of those rights in promoting resource management objectives. Since property rights provide an incentive to conserve and use resources sustainably, it is important to assign the rights to the persons interacting closely with the resources. Where no property rights exist, resources are accessed in an open access system that may have implications for sustainable resource management, especially in the context of poverty, unemployment and other survival challenges.

Common property

Common property resources are those not controlled by a single entity, with access being limited to an identifiable community which has set rules on the way those resources are to be managed. These rules may exclude others. There are separate entitlements to the commons for each user, and no one user has the right to abuse or dispose of the property.

In the context of natural resources, the existence of global problems has led to the development of new regimes for regulating access to the common resources. Common heritage resources belong to all but can only be exploited in a way that benefits all, even those who do not partake in the direct exploitation of these resources. The benefits from such exploitation should be redistributed from countries which have the technological and financial capacity to exploit the resources to countries which do not. This implies that all potential users must receive a portion of any benefits while sharing the duties.

State property

Today, states represent important property rights holders whose rights are granted by international law. States are also granted permanent sovereignty over their own natural resources. Thus, states can own, directly control and utilise land and natural resources through any of their administrative structures or grant user rights to preferred beneficiaries. States are in a peculiar position as grantors and guarantors of property rights, both at the local and international level, as well as holders in their own right.

In postcolonial societies the destabilisation caused by colonial rule contributed to the breakdown of social, political and economic communal structures which saw states moving in to replace the centres of power in all areas, including property holding. In the process, states took over most of the properties previously held by communities and have thus come to monopolise common property resources. This development has implications for land reform in many African countries and puts states in an unfair position in respect of mediating property relations.

Private property

Private property rights denote entitlement that defines an owner's rights, privileges and limitations for use of a resource. Such entitlement includes property rights entitlements such as exclusivity, universality, transferability and enforceability. The recognition and enforcement of these rights depend on the machinery put in place by the state.

Holders of private property rights can be corporations or individuals who can exclude others from the benefits of their property and regulate its use (in compliance with the laws of the state). Changes in property rights are generally towards individualisation and away from communal property rights. In Africa, national corporations and multinational corporations, originating mainly in developed countries, privately own a vast amount of land and natural resources. Globalisation of international trade is facilitating this trend across the continent. For example, in biotechnology, the entry of multinational corporations has led to the type of commodification where the freedom of farmers to save seed has been circumscribed (Kameri-Mbote 2004).

Communal tenure

Communal tenure is the most complicated regime since its creation was primarily based on alienation. Natural resources management is a series of mechanisms conducted by local people following rules they have inherited under the guidance of some legitimate local authority. The imposition of different property rights regimes for land and other resources and an attempt to separate the management of land from other resources has resulted in confusion over land and resource tenure (Moyo 1995).

The social, institutional, administrative and legal issues of communal tenure determine utilisation, ownership rights and interaction over natural resources in African communal areas. A range of property regimes with different legislation and administrative structures, different resource endowments, population densities, infrastructural development and rules and regulations govern the allocation and management of the land and natural resources.

International treaties

The international legal framework alternates between two extreme positions, namely common heritage (broadly defined), and private rights (narrowly defined). There have been a number of international agreements on these issues. There are those that emphasise common heritage principles and others that provide for private/individual rights such as the International Union for the Protection of New Varieties of Plants (UPOV), and the Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS). In between these two groups are agreements such as the Convention on Biological Diversity which provides for state, community and individual/private property rights (Kameri-Mbote 2004).

The African Convention

The African Convention on the Conservation of Nature and Natural Resources harnesses the natural and human resources of the continent for the total advancement of Africans in all spheres of human endeavour. The instrument supports the utilisation of natural resources to satisfy the needs of people according to the carrying capacity of the environment. To achieve these objectives, the convention creates 'conservation areas' or protected natural resource areas for conservation and protection of soil, water, flora and fauna resources under state control. State parties assume legislative obligations to adopt adequate legislation aimed at the protection of resources, and hence such legislation is inevitably based on the national processes of each of the party states. The convention can therefore be seen as instrumental in shaping state policies of the parties in enhancing the conservation of nature and natural resources.

It is important to note that in pursuing such policies, access to the same resources by local communities is restricted, for instance, through the creation of conservation areas, which are not open for access by communities. In such cases communities may lose what they had always regarded as ancestral or communal land. Such

communities may become hostile to 'conservation areas' if the creation of such areas means limiting access and control of land and the natural resources on it, and in extreme cases, the denial of previously real or imagined rights over land. However, Article XIV of the convention tries to remedy this problem by providing that the contracting states shall take all necessary legislative measures to reconcile customary rights with the provisions of the convention (Kameri-Mbote 2004).

Law of the Sea

The seas are rich in aquatic life oil, copper, cobalt and other minerals and access to and exploitation of these resources is increasing. The Convention on the Law of the Sea was adopted in 1982 in Montego, Jamaica, to abate marine ecosystems degradation, which cuts across national boundaries, and to establish co-operation among the party states. Aquatic animals account for more than 17% of animal protein in human diet and over 30 countries derive one-third of their animal protein from seafood, yet these resources are being over-harvested or their habitats destroyed. At the same time, hazardous waste and nuclear testing activities continue to be carried out in the seas (SARDC, no date).

World Heritage Convention

The convention affirms respect for the principle of sovereignty of the states on whose territory cultural and natural heritage is situated. State parties recognise that their national heritage constitutes a world heritage whose protection is bestowed on the international community as a whole. However, the convention requires state parties to set up a framework for national protection of cultural and natural heritage.

Unlike most other international agreements, the convention unequivocally recognises the sovereignty of the states on whose territory such resources are situated, and expressly does not prejudice property rights provided by national legislation. Adopted within the general conference of the United Nations Educational, Scientific Cultural Organisation (Unesco) in 1972, the convention is the first international environmental agreement which recognises the overriding interest of the global community in the management of domestic resources. However, the convention impinges on the rights of people to land and resources where designated sites enclose areas that are vital for the community and thus curtails the community's access to the resources.

The UN Convention to Combat Desertification

Two-thirds of the African continent consists of deserts or drylands and 73% of its agricultural drylands are severely or moderately degraded. Desertification has its greatest impact on the African continent and as such Africa was particularly instrumental in the negotiation of the United Nations Convention to Combat Desertification (SARDC, no date).

Ratified in 1994, Article 9(1) of the UNCCD requires that parties prepare national action programmes that are closely inter-linked with other efforts to formulate national policies for sustainability. Such programmes may include resettlement of communities where activities which threaten to cause desertification are carried out, and regulation of access and control of other natural resources, especially water and forests. This has a direct impact on land and other natural resource rights as it involves a re-definition of rights through the national processes of legislation and implementation of other national policies.

The provisions of Article 10(2) require that the national action programmes specify the respective roles of government, local communities and land users and the available and needed resources. In essence, the article recognises that the programmes contemplated have a direct relevance to the local communities whose access, control and ownership of land and other resources may be adversely affected. It is for this reason that local communities must be actively involved in the designing of such projects, lest they view them as disruptive of their rights to land and other natural resources.

CITES

CITES bans trade in endangered species of wildlife flora and fauna in order to preserve genetic diversity. The convention came into force in 1975 and the agreed endangered species covered by the agreement are classified into three appendices. Species can be removed or moved from one appendix to another, with approval of party states.

A CITES permit system provides mechanisms for trade regulation under which member states are required to provide annual reports to the CITES secretariat on the amounts of trade in listed species. The secretariat acts as the intermediary between the exporting and importing states and confirms the authenticity of the trade documents.

As early as 1979, developing countries argued that wildlife conservation should not be at the expense of national economic development and that there ought to be economic benefits emanating from controlled species if the protection of their habitat from human encroachment was to be justified. In 1989, CITES listed the African elephant in Appendix 1, which effectively bans trade in elephant products (trade and hide), despite opposition from some southern African member states. Most southern African countries have communal wildlife management projects in which local communities participate in management activities and derive benefits from wildlife.

One weakness of CITES is its provision for exceptions for countries that reserve their rights with respect to particular species, provided that such member notifies other countries of the intention not to comply with trade restriction on the species. The insistence on reservations exemplifies the parties' increasing disenchantment with the wildlife conservation approach of CITES rather than a management approach to wildlife. CITES remains state-centred rather than people-centred, which potentially undermines its effectiveness if the needs of people to access land and resources are not taken care of by the state parties.

The Convention on Biological Diversity

Adopted in 1992 in Nairobi (Kenya) but entered into force in 1993, the Convention on Biological Diversity is a landmark international agreement in many respects. It addressed biodiversity issues comprehensively for the first time, and marked the first time that genetic diversity was specifically covered in a binding global treaty. It was also the first time that the conservation of biodiversity was recognised as a common concern for humankind.

The CBD represents the middle ground in the debate on property rights and biodiversity conservation. Its main concerns are conservation of biodiversity, the development of biotechnology, access to biodiversity and biotechnology and international equity.

While developed countries pressed for consideration of biodiversity as common heritage of humankind that should be exploited and conserved for the benefit of all humankind, they were unwilling to concede to sharing its benefits. On the other hand, developing countries demanded that biotechnology innovations arising out of biodiversity resources extracted from their territories be made available to them free of charge. The resulting CBD is riddled with contradictions as it tries to accommodate differences between the two sides.

The convention recognises different potentially conflicting rights over resources. It affirms the rights of states to natural resources within their jurisdictions and effectively debunks the common heritage concept, introducing the notion of common concern. The convention is silent on which rights should prevail in the event of a conflict. It does not specifically address the rights of communities apart from a cursory mention of indigenous and local communities in one article (Kameri-Mbote 2004).

The Ramsar Convention

Many wetland habitats have international importance and yet are subjected to adverse human activities. Wetlands are sensitive to trans-boundary pollution activities. Many wetland fauna species are migratory and their conservation and management require co-operation at international level. The Ramsar Convention on Wetlands was adopted in 1971 in Iran and came into force in 1975. It provides an international co-operation framework for the conservation of wetland habitats of international importance.

The Lusaka Agreement

The Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora was signed in 1994. It seeks to reduce and ultimately eliminate illegal trade in wild fauna and flora in Africa. It arose from the realisation among African states that there is scope for illegal trade in fauna and flora across the continent, giving rise to large-scale poaching and depletion of the continent's biodiversity.

The convention promotes enforcement measures applicable under both CITES and the Convention on Biological Diversity. It is in fact a regional instrument for the implementation of CITES. According to Article 4 of the convention, state parties assume the basic obligations to individually and/or jointly investigate and prosecute cases of illegal trade in wild fauna and flora.

However, most African state parties have adopted policies and legislations which are meant to protect flora and fauna, but which have the practical effect of severely restricting the access, control and in some cases ownership of environmental resources like forests and water, even to the indigenous communities.

The Bamako Convention

African countries refused to ratify the 1989 Basel Convention because it did not expressly oppose the dumping of dangerous chemicals on the continent, so they in turn developed their own convention in 1991. The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa aims to promote the development of cleaner production methods and sound management of hazardous waste produced from Africa (SARDC, no date).

Other agreements

Several other international, regional and sub-regional treaties and sub-regional bodies of significance to Africa's sustainable development have not been discussed here. Most African economic sub-regional blocs have established environmental programmes as part of their political and development agendas. The African Ministerial Conference on Environment (AMCEN) of 1985 is one such policy forum. The New Partnership for Africa's Development (Nepad) is yet another coherent, strategic and long-term programme of action promoting Africa's sustainable development and whose Environment Initiative is to be implemented in harmony with the rest of the programme's overall objectives and programmes.

Conclusion

Each environmental convention was adopted in response to specific environmental challenges at a specific time. This means there is no single overarching blueprint for the evolution of international law and institutions. As a result there is growing concern about fragmentation of environmental policy-making and the possibility that overlapping activities and contradictory policies could undermine being able to find good solutions.

In addition to access to basic services, markets, education and healthcare, poverty reduction in Africa is mainly predicated on land productivity. Secure rights to land and other resources underpin secure livelihoods by reducing vulnerability to shocks. Access to land and natural resources is therefore an important prerequisite to ensure that poor people are able to contribute to, and benefit from, economic growth.

Economic liberalisation and subscription to international treaties without intra-state political liberalisation affects the realisation of land and resource rights at national level. International agreements will only be effective if national governments have the human, institutional and financial capacity to implement them. There is therefore need to build capacity and develop national consultative legislation which serves the interests of a particular country and protects vulnerable groups.

Practical collaboration on conventions is important between national governments, the UNEP secretariat and other multilateral international bodies, relevant government ministries and civil society. Within the scope of such collaboration, national requirements for conventions can be streamlined, common positions developed, and information exchange and scientific and technical co-operation promoted.

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