



Title: Agenda 2030: A South African Perspective on the Sustainable  
Development Goals

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by

Ceaser CC

Student Number: 3514271

Supervisor: Prof W Scholtz

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**Declaration**

I declare that **Agenda 2030: A South African Perspective on the Sustainable Development Goals** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

CC Ceaser

Signed:.....

Professor W Scholtz

Signed:.....



## Acknowledgements

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## **Dedication**

This thesis is dedicated to all those affected by the global concern of climate change. Behind the research required to complete this dissertation lies one unavoidable truth: Climate change is real and affects both humans and non-humans alike and urgent action is required to address this issue.

## **Abstract**

Agenda 2030 and Climate Change: a South African Legal Perspective

CC CEASER

3514271

Master of Laws (LLM) Mini-thesis, Department of Public Law and Jurisprudence  
University of the Western Cape

Environmental degradation and the impacts on sustained life for all on Earth has become a global concern. Climate change illustrates one of the Anthropocene affects on continued life for both human and non-humans. The global recognition of the importance of addressing climate change in light of Sustainable development has been well noted in international instruments inter alia the Kyoto Protocol, The Rio Declaration and the Paris Agreement. In recognising the importance of continued sustainable development on Earth, various soft law goals were adopted. The first of these were the Millennium Development Goals (MDGs) providing for global goals of all developing countries. In 2015, a new global list of goals was adopted. The Sustainable Development Goals (SDGs) was a response to the interlinked importance of economic growth, social equity and environmental protection. They are herald as an encapsulation of goals needed in order to attain sustainable growth for humanity on Earth. The implications of the SDGs are however in dispute with many commentators asserting that they re a political declaration. This study seeks to answer this question. In order to do so, this study seeks to provide a historical perspective on the establishment of the SDGs through the development of the sustainable development agenda and thereafter providing the implications of these Global Goals on international law.

South Africa faces tremendous effects as a result of Climate Change. Although regarded as a developing country, its Green House Gas (GHG) emissions and contribution to Climate Change rivals most developed countries. This study seeks to provide an analysis of section 24 of the Constitution of the Republic of South Africa,

1996, the environmental right along with climate change legislation and policies inter alia the Climate Change Bill 2018.

This study will provide that the SDGs are more than a political declaration with special emphasis placed on the impact of Global Goal 13, take action to address climate change and its impact within international law. Thereafter this study will provide how through the recognition of the United Nations (UN), United Nations Framework on Climate Change (UNFCCC) and Inter-governmental Panel on Climate Change Convention (IPCCC) as monitoring and assessing mechanisms to address climate change, Global Goal 13 has legislative, policy and governmental impact on South African law.

**Keywords**

Climate change

Environment

Environmental degradation

Environmental protection

International environmental Law

Millennium Development Goals

Paris Agreement

Rio Declaration

South Africa

Sustainable Development Goals

United Nations Framework Convention on Climate Change

**List of Abbreviations**

CBDR – Common but Differentiated Responsibility

SDG – Sustainable Development Goals

MDG – Millennium Development Goals

UNDP – United Nations Development Program

NDP – National Development Plan

NDC – Nationally Determined Contributions

NEMA – National Environmental Management Act 107 of 1998.

IPCC – Inter-governmental Panel on Climate Change

UNFCCC - The United Framework Convention on Climate Change



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## Chapter 1 - Introduction

### 1.1 Background

Both human and non-human life faces a threat to its continued existence on Earth, due to the continued impact of the Anthropocene.<sup>1</sup>The Anthropocene is a rupture of the Earth system that poses fundamental challenges to humankind and other life on Earth.<sup>2</sup> The imbalance of economic growth and social equity coupled with environmental concerns such as climate change, resource depletion and waste disposal present environmental pressures threatening the possibility of sustainable life on Earth. Climate change in particular presents the single biggest threat to sustainable life on earth with widespread impacts affecting the poorest and most vulnerable.<sup>3</sup>Bearing this in mind that global action needs to be taken in order to continue human development in an environmentally sustainable manner. In order to address these interlinked concerns, the ideal of sustainable development finds relevance.

Sustainable development is regarded as the Leitmotif of International environmental law.<sup>4</sup>During the twentieth century, four aspirations of humanity developed namely the pursuit of peace, freedom, development and the environment.<sup>5</sup> In 1972, The Stockholm Declaration on the Human Environment<sup>6</sup> was of historical importance as it was the first major international document that shifted the paradigm of environmental concerns towards global concerns and furthermore noted the integral impact of

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<sup>1</sup>Kotze LJ 'The Sustainable Development Goals: an existential critique alongside three new-millennial analytical paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 50.

<sup>2</sup>Crutzen PJ (2002) 'Geology of Mankind' *Nature* 415.6867 23 at 23.

<sup>3</sup> United Nations Climate Change Action on Climate and SDGs <https://unfccc.int/action-on-climate-and-sdgs>(accessed on 07 May 2019)

<sup>4</sup> Adelman S 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 22.

<sup>5</sup> National Research Council, Policy Division, Board on Sustainable Development, *Our Common Journey: A Transition toward Sustainability* (Washington, DC: National Academy Press, 1999) 22.

<sup>6</sup> United Nations Environment Programme, Declaration of the United Nations Conference on the Human Environment, Stockholm, UN Doc A/Conf.48/14/Rev.1.

development on them.<sup>7</sup> However, the term Sustainable development was first defined by the Brundtland Commission<sup>8</sup> as

*‘Development that meets the needs of the present while safeguarding Earth’s life support system, on which the welfare of current and future generations depends.’*<sup>9</sup>

This definition formed the basis of the sustainable development agenda. In 1992 the Rio Declaration and Agenda 21<sup>10</sup> further reaffirmed the position of a protected environment in light of the Stockholm Declaration and built upon it.<sup>11</sup> This Declaration contained 27 principles with commitments on economic efficiency, environmental protection and equity.<sup>12</sup> Most notably, two principles, 3 and 4 respectively, make express mention of the integral importance of environmental protection in attaining sustainable development.<sup>13</sup> The acceptance of the non-binding Agenda 21 resulted in the emergence of various environmental conventions, *inter alia* *The Convention of Biological Diversity (CBD)* and *The United Framework Convention on Climate Change (UNFCCC)*.<sup>14</sup> Sustainable development<sup>15</sup> can thus be said to take into account socio-economic needs while attempting to balance it with the protection of the environment for present and future generations.<sup>16</sup> These factors became known as pillars of sustainable development.

In 2000 these aspirations to address global concerns regarding sustainable development as defined above culminated in the establishment of the Millennium

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<sup>7</sup>Brunee J (2009) ‘The Stockholm Declaration and the Structure and Processes of International Environmental Law’ in Chircop A et al (eds), ‘The Future of Ocean Regime – Building: Essays in Tribute to Douglas M Johnston Part II’, the Netherlands: *Koninklijke Brill NV* 47.

<sup>8</sup>World Commission on Environment and Development (Brundtland Commission) 1987

<sup>9</sup> Ibid.

<sup>10</sup>The Rio Declaration on Environment and Development (A/CONF.151/26, vol. I) and Agenda 21 (A/CONF.151/26, vol. II), adopted by the United Nations Conference on Environment and Development on 14 June 1992. (Hereafter the Rio Declaration and Agenda 21 respectively).

<sup>11</sup> Preamble of the Rio Declaration.

<sup>12</sup>Nolon JR and Salkin PE ‘Climate Change and Sustainable Development in a nutshell’ (1<sup>st</sup>ed) 14.

<sup>13</sup>Ibid at 15.

<sup>14</sup>Adelman S ‘The Sustainable Development Goals, anthropocentrism and neoliberalism’ in French D & Kotze LJ (eds) ‘Sustainable Development Goals Law, Theory and Implementation’ (2018) 22.

<sup>15</sup>Verschuuren J “Sustainable Development and the Nature of Environmental Legal Principles”, (2006) 1PER 25.

<sup>16</sup>Brunee J (2009) ‘The Stockholm Declaration and the Structure and Processes of International Environmental Law’ in Chircop A et al (eds), ‘The Future of Ocean Regime – Building: Essays in Tribute to Douglas M Johnston Part II’, the Netherlands: *Koninklijke Brill NV* 47.

Development Goals (MDGs).<sup>17</sup> The MDGs contained eight main goals and are heralded as being centred on addressing the needs of developing countries.<sup>18</sup> Ultimately the MDGs serve as a stepping stone of what humanity could attain through global partnerships.

In 2012 various heads of states convened the 'Rio+20' conference on Sustainable Development.<sup>19</sup> Over a two year period of public consultation and engagement with civil society and other stakeholders around the world by the Open Working Group of the General Assembly on Sustainable Development Goals<sup>20</sup> and the United Nations an adoption of various goals were established.<sup>21</sup> Ultimately an ideal set of goals assisting with *inter alia*, the alleviation of poverty, and promotion of well-being and quality education was adopted.<sup>22</sup> The aforementioned goals are referred to as Sustainable Development Goals (SDGs or Global Goals). The SDGs progressively built on the abovementioned MDGs and attempt to enshrine and further promote the global need to address various topics associated with the ideal of sustainable development with a focus on global partnership.<sup>23</sup> It further focuses on the role of both developed and developing countries in achieving the objective of sustainable development.<sup>24</sup> The 2030 Agenda on Sustainable Development has the main objective of attaining sustainable development for all.<sup>25</sup> A list of 17 SDGs and 169

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<sup>17</sup> See 'List of Millennium Development Goals, and Goal 8 Targets and Indicators' [https://www.un.org/en/development/desa/policy/mdg\\_gap/mdg8\\_targets.pdf](https://www.un.org/en/development/desa/policy/mdg_gap/mdg8_targets.pdf) (accessed 15 May 2019)

<sup>18</sup> Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 222.

<sup>19</sup> Wiik A & Lachernmann F 'Rule of Law and the Sustainable Development Goals' *18 Max Planck Yearbook of United Nations Law (Brill)* (2015) 286 at 291.

<sup>20</sup> The Open Working Group was established on 22nd of January 2013 by decision 67/555 of the General Assembly. <https://sustainabledevelopment.un.org/owg.html> (accessed on 14 May 2019) Also see A/67/L.48/rev.1.

<sup>21</sup> 'Transforming our world: The 2030 Agenda for Sustainable Development' A/Res/70/17.

<sup>22</sup> 'Transforming our world: The 2030 Agenda for Sustainable Development' A/Res/70/1. Also see *The 2030 Agenda for Sustainable Development and the SDGs* [http://ec.europa.eu/environment/sustainable-development/SDGs/index\\_en.htm](http://ec.europa.eu/environment/sustainable-development/SDGs/index_en.htm) (accessed on 21 January 2019).

<sup>23</sup> French D and Kotze LJ 'Introduction' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 1.

<sup>24</sup> Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 222.

<sup>25</sup> 'Transforming our world: The 2030 Agenda for Sustainable Development' A/Res/70/1 6.

targets were adopted by various heads of government on 25 September 2015 at a special UN Summit.<sup>26</sup> These Global Goals are soft law in nature<sup>27</sup> however it could be seen as an imperative step towards the realisation of the ideal of sustainable development due to certain Global Goals being encapsulated in binding international law instruments.<sup>28</sup>

Amongst the aforementioned 17 SDGs is the environmental cluster.<sup>29</sup> These include addressing climate (target 13), life below water (target 14), and life on land (target 15).<sup>30</sup> This indicates that a sustainable environment is an important element of the vision for a sustainable Earth. Various other SDGs include sustainable cities and communities, responsible consumption and production and decent work and economic growth.<sup>31</sup> This supports the view that the sustainable development pillars of protecting the environment, advancing social equity and the promotion of economic stability for all are at the forefront of these SDGs.<sup>32</sup> Much like the pillars of sustainable development, the SDGs are interlinked and the attainment of one of these goals cannot be done without a focus on the attainment of another.<sup>33</sup> The recognition of the environmental goals is an imperative step towards addressing global concerns and has immense potential if implemented by national, regional and the international community.<sup>34</sup> Although these SDGs aspire to attain a sustainable future for all, a lack of proper monitoring and enforcement mechanisms may render these goals as nothing more than mere political aspirations.<sup>35</sup>

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<sup>26</sup>Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 159- 160.

<sup>27</sup>Soft Law is a non-binding standard and non-traditional source of international law referred to in Article 38(1) of the ICJ Statute. Examples are Declarations and Principles. See Ladan MT *Materials and Cases on Public International Law* (2008) at 23-24.

<sup>28</sup>Kotze LJ 'The Sustainable Development Goals: an existential critique alongside three new-millennial analytical paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 49.

<sup>29</sup>French D and Kotze LJ 'Introduction' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 2.

<sup>30</sup>'Transforming our world: The 2030 Agenda for Sustainable Development' A/Res/70/1

<sup>31</sup>*Ibid.*

<sup>32</sup>'Transforming our world: The 2030 Agenda for Sustainable Development' A/Res/70/1 7.

<sup>33</sup>'Transforming our world: The 2030 Agenda for Sustainable Development' A/Res/70/1 7.

<sup>34</sup>Collins LM 'Sustainable Development Goals and human rights: challenges and opportunities' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 80.

<sup>35</sup>Kim RE 'The Nexus between International Law and the Sustainable Development Goals 25 *RECIEL* 15 (2016) 16.

It is well noted that sustainable development is prevalent in the South Africa's environmental law.<sup>36</sup>The environmental right contained in the Constitution<sup>37</sup> provides that the environment is to be protected for present and future generations through legislative and other measures<sup>38</sup> while securing sustainable development.<sup>39</sup> This along with the principles of The National Environmental Management Act (NEMA)<sup>40</sup> that provides *inter alia* development must be socially, environmentally and economically sustainable. This is indicative of South Africa's commitment to the attainment of sustainable development.<sup>41</sup> Sustainable development forms the basis of the environmental right in South Africa and the implications of the SDGs as the direction of the sustainable development agenda within the South African context is important in the continued fulfilment of this ideal.

SDG 13 provides recognition of the UNFCCC as the primary international forum for addressing a climate change response.<sup>42</sup>The Inter-governmental Panel on Climate Change (IPCC) further provides a report assessing the concern of climate change, specifically noting the vulnerability of Africa.<sup>43</sup>Climate change is regarded as an environmental concern stretching across jurisdictions<sup>44</sup> and requiring immediate address. The impact of climate change is felt throughout the world affecting the hospitability for all on Earth.<sup>45</sup> A sustainable and hospitable climate, much like any

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<sup>36</sup>Tladi D 'Strong Sustainability, Weak Sustainability, Inter-generational Equity and International Law: Using the Earth Charter to Redirect the Environmental Ethics Debate 28 *SAYIL*(2003)200 at 200.

<sup>37</sup> The Constitution of the Republic of South Africa, 1996.

<sup>38</sup>Section 24(a).

<sup>39</sup>Section 24(b)(iii).

<sup>40</sup> 107 of 1998.

<sup>41</sup>Section 2 of NEMA.

<sup>42</sup>Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 231.

<sup>43</sup>Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 at 159- 160. Also see IPCC 'Climate Change Synthesis Fifth Report 2014' [https://www.ipcc.ch/site/assets/uploads/2018/02/SYR\\_AR5\\_FINAL\\_full.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf) (accessed 07 May 2019)

<sup>44</sup>Bruneel J (2009) *The Stockholm Declaration and the Structure and Processes of International Environmental Law* in Chircop A et al (eds), *The Future of Ocean Regime – Building: Essays in Tribute to Douglas M Johnston Part II*, the Netherlands: Koninklijke Brill NV 44.

<sup>45</sup> Office of the High Commissioner for Human Rights *Report on the Relationship Between Climate Change and Human Rights* 15 January 2009 UN Doc. A/HRC/10/61, Par 20 to 41, 70, 72 to 77 and 99.

other environmental concern, cannot however be protected to the disadvantage of social or economic benefits of people.

The SDGs provide a global shift towards addressing the needs of all who live on Earth and assessing the impact of this soft law document can prove paramount in achieving the ideal of sustainable development. In order to determine the normative status of the SDGs an investigation of a specific SDG is required in order to establish the potential impact it has on the international community, in particular South Africa.<sup>46</sup> This is to be done by an analysis of the monitoring and enforcement mechanisms of this document and the goals themselves. In light of this position, this paper will seek to address the potential contribution of Global Goal 13, *take urgent action to combat climate change and its impact*<sup>47</sup> on the international community, in particular South Africa. In order to adequately do so, I will provide an analysis of the history and status of the SDGs as the focus of the sustainable development agenda within the international community.

## **1.2 Aims and Objectives**

This paper aims to provide a comprehensive background of the history of the establishment of the SDGs within the global context. This paper will also briefly highlight the SDGs with a focus on the interrelated nature of these goals as comparable to the ideal of sustainable development. This paper aims to provide an analysis of the potential implications of the SDGs as a soft law document and the ideal of sustainable development on international law. The main objective of this paper will be an assessment of Global Goal 13 on law in the South African context.

## **1.3 Significance of the Study**

The SDGs have succeeded in catching the attention of global actors and regarded as the blueprint for a sustainable development in the world.<sup>48</sup> It is an encapsulation of the aspiration of humanity in relation to the pillars of sustainable

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<sup>46</sup>Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 229.

<sup>47</sup>'Transforming our world: The 2030 Agenda for Sustainable Development' A/Res/70/1

<sup>48</sup>Collins LM 'Sustainable Development Goals and human rights: challenges and opportunities' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 67



development.<sup>49</sup> Due to the importance of this document, an analysis of the implementation and monitoring of these goals and targets is required. Climate change has been described as virtually the most problematic global challenge with cataclysmic consequences.<sup>50</sup> The failure to take positive steps towards addressing this growing concern can result in the deterioration of human health and life itself.<sup>51</sup> As such, action towards a global forum has been recognised, namely the UNFCCC, and further reaffirmed through the recognition of Global Goal 13, *take steps to address climate change and its impacts*.<sup>52</sup> The implications of the SDGs, specifically Global Goal 13 within international law are imperative to analyse due to the importance of these goals in relation to the sustainable development agenda and the urgency of addressing the impacts of climate change.

South Africa, like other countries of the Global South, has concerns fulfilling the pillars of sustainable development.<sup>53</sup> Amongst these, South Africa faces the global concern of climate change and its effects on the pillars of sustainable development.<sup>54</sup> The predecessor to the SDGs, the MDGs, are considered a natural fit for South Africa as they aligned seamlessly with our own development agenda as expressed through the Freedom Charter... while the basic rights espoused by the MDGs were already entrenched in our Constitution.<sup>55</sup> This indicates the willingness of the country to implement a Global Goal document aspiring to the continued fulfilment of sustainable development. In order for this to be adequately done, an analysis of the implications of the SDGs is required, specifically a Global Goal

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<sup>49</sup>Preamble of 'Transforming our world: The 2030 Agenda for Sustainable Development' A/Res/70/1

<sup>50</sup>Cameroon E 'Human Rights and Climate Change: Moving from an intrinsic to an instrumental approach' (2010) 38 *Georgia Journal of International and Comparative Law* 673, 675 and 679.

<sup>51</sup>Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan.J. Int'L.* 103, 104.<sup>52</sup>See Goal 13 'Transforming our world: The 2030 Agenda for Sustainable Development' A/Res/70/1

<sup>52</sup>See Goal 13 'Transforming our world: The 2030 Agenda for Sustainable Development' A/Res/70/1

<sup>53</sup>See 'Quarterly Labour Force Survey – QLFS Q1:2019'

<http://www.statssa.gov.za/?p=12115> (accessed 15 May 2019) South Africa's deficient education system <https://www.news24.com/Analysis/south-africas-deficient-education-system-20180507> (accessed 29 January 2019) Stats SA <http://www.statssa.gov.za> (accessed 29 January 2019) for statistics on the socio-economic status on South Africa.

<sup>54</sup>Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 161. Also see African Union/AMCEN-15-REF-11 (2015): - African Strategy on Climate Change (May 2014) at 10-12.

<sup>55</sup>*Millennium Development Goals: Country report 2015* Statistics South Africa, Pretoria: Statistics South Africa, 2015 iii.

#### **1.4 Research Question(s)**

The current sustainable development agenda is highlighted in the establishment and implementation of the SDGs and as such the primary question in this dissertation is what the legal implication of Global Goal 13 in relation to Climate Change are, with special emphasis placed on South Africa.

#### **1.5 Hypothesis**

After having considered the varied views by authors in relation to sustainable development and the SDGs as an encapsulation of the ideal and reviewing of legal instruments relating to the establishment and implementation of the sustainable development agenda, this dissertation moves from a position that the SDGs, specifically Global Goal 13 has more than political implications on South Africa. This position is premised on the fact that the SDGs are indeed a clear encapsulation of the sustainable development agenda and grounded in law.<sup>56</sup> Global Goal 13 provides a clear indicator of a SDG that may have tremendous implications on international law when monitored and enforced by conventions such as the UN, UNFCCC and IPCC in its achievement. Based on this position, the author asserts that Global Goal 13 has legislative, policy and governmental impact on not only international law, but South Africa.

#### **1.6 Preliminary Literature Review**

Sustainable development and the history thereof are widely discussed by notable commentators. Verschuuren has described sustainable development as an ideal worth aspiring to as oppose to a hard-fast principle.<sup>57</sup> The content of this ideal and status within international law has been stated to be that of an ideal and of little to no enforcement without global actors making an effort towards its implementation.<sup>58</sup> Although many definitions for sustainable development has been created, the one by the Brundtland Commission is still regarded as the encapsulation of this ideal.

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<sup>56</sup>Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 229.

<sup>57</sup>Verschuuren J "Sustainable Development and the Nature of Environmental Legal Principles", (2006) 1 PER 25.

<sup>58</sup>Orellana M 'Governance and the Sustainable Development Goals: The Increasing Relevance of Access Rights in Principle 10 of the Rio Declaration' 25 *RECIEL* 50 (2016) at 51.

The history of the sustainable development agenda has been fully exhausted by authors due largely to its importance and impact. An examination of the development of the sustainable development ideal is made by Adelman in which he highlights the development of this agenda.<sup>59</sup> Collins regards the SDGs as a comprehensive and ambitious vision of development seeking to eradicate social, economic and environmental concerns.<sup>60</sup> Collins further states that the SDGs are interlinked to the fulfilment of human rights.<sup>61</sup> Ladan asserts that the specific Global Goal 13 has links to the full achievement of not only the pillars of sustainable development, but the full enjoyment of human rights.<sup>62</sup> Knox asserts however that the SDGs set out an aspiration agenda is not constructed or focused enough to promote human rights or environmental protection.<sup>63</sup> The link between climate change and sustainable development law is vastly discussed by Nolan and Salkin.<sup>64</sup> They highlight the historical, scientific and legal background of addressing climate change as it links to the ideal of sustainable development.<sup>65</sup>

The key concern regarding the SDGs is the status and implications on international law and individual countries such as South Africa. Kim states that the SDGs are political in nature and not legal rules requiring implementation in a manner consistent with rights and obligations under international law.<sup>66</sup> French agrees with Kim in stating the SDGs provide political commitment however has no legal basis therefore do not amount to soft law.<sup>67</sup> Persson et al provide a differing opinion in this regard and assert that the SDGs do possess some normative status in comparison to the

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<sup>59</sup>French D and Kotze LJ 'Introduction' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 4.

<sup>60</sup>Collins LM 'Sustainable Development Goals and human rights: challenges and opportunities' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 67.

<sup>61</sup>Ibid at 71.

<sup>62</sup>Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 at 171.

<sup>63</sup>Knox JH 'Human Rights, Environmental Protection, and the Sustainable Development Goals' 24 *Washington International Law Journal* 517 (2015) at 18.

<sup>64</sup>See Nolan JR and Salkin PE 'Climate Change and Sustainable Development in a nutshell' (1<sup>st</sup>ed).

<sup>65</sup>See Nolan JR and Salkin PE 'Chapter One: Historical, Scientific and Legal Background' in Nolan JR and Salkin PE 'Climate Change and Sustainable Development in a nutshell' (1<sup>st</sup>ed) 1 -44.

<sup>66</sup>Kim RE 'The Nexus between International Law and the Sustainable Development Goals' 25 *RECIEL* 15 (2016) 16.

<sup>67</sup>French D 'The Global Goals: Formalism Foregone, Contested Legality and "Re-Imagining of International Law"' (2017) *Ethiopian Yearbook of International Law* 164 -165.

MDGs, however are too complex to achieve a measurement of outcome.<sup>68</sup> Bernard and Scholtz however assert that the SDGs are not only precise, but more than a mere political declaration.<sup>69</sup> They assert that through focused analysis of a particular Global Goal insight into the potential implications of the SDGs on international law can be gained.<sup>70</sup> The significance of an analysis into Global Goal 13 will shed light on these conflicting views and provide valuable insight into the potential influence the SDGs hold on not only international law, but the most vulnerable countries in relation to the effects of climate change and the continued attainment of sustainable development.

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<sup>68</sup>Persson A et al 'Follow-up and Review of the Sustainable Development Goals: Alignment vs. Internalization 25 *RECIEL* 59 (2016) 68.

<sup>69</sup>Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 226.

<sup>70</sup>*Ibid* at 226.

## **1.7 Methodology**

This research will be conducted through a desktop study. Various primary sources will be utilized *inter alia*, case reports, legislation, policies and official documents as well as various international instruments. The secondary sources utilized will be international case reports as well as the opinions of various commentators. The methodology will follow a conceptual analysis and interpretation approach of the Sustainable development goals and constructing a narrative of the history of its establishment, implementation and possible implications.

## **1.8 Chapter Outline**

### **Chapter 1 – Overview of the study**

This chapter will cover a brief introduction of the paper, identifying the purpose, core objectives and providing an outline of how the objectives will be met. As this chapter serves as merely an outline and foundation of the subsequent argument contained throughout the paper it will be brief.

### **Chapter 2 – Sustainable Development – The Environmental Lietmotiv**

This chapter will focus on the history of the development and adoption of the SDGs. In this chapter I will address the ideal of sustainable development through its introduction into the environmental law arena, the developments made by the Stockholm Declaration, and the establishment of the Millennium Development Goals and ultimately the establishment of the Sustainable Development Goals. The concept of sustainable development will be discussed extensively and analysed.

### **Chapter 3 –An Analysis of the Sustainable Development Goals**

This chapter will focus on an in depth legal analysis of the SDGs. This will be done by highlighting the soft law nature of the document and enforcement of it on the international community. Furthermore an analysis in light of sustainable development will be conducted. Special emphasis will be placed on the status of the SDGs within the international community and possible implications thereof.

### **Chapter 4 – SDGs, Climate Change and International Environmental Law**

This chapter will further highlight the content of these goals as interlinked and interrelated. Thereafter attention will be drawn towards the 'environmental' SDGs with emphasis placed on the status of target 13 within the international community.

### **Chapter 5 – South Africa, Climate Change and Sustainable Development**

This chapter will provide an analysis of the South African position in light of sustainable development. An analysis of section 24 of the Constitution will be conducted in this chapter. This chapter will thereafter provide an analysis on the implications of the Sustainable development Goals on South Africa in light of target 13.

### **Chapter 6 – Conclusion**

This brief chapter will conclude the analysis of the implications of the sustainable development goals, specifically target 13 on South African law.

## **Chapter 2: Sustainable Development – An analysis of the Environmental Lietmotiv**

### **2.1 Introduction**

The development of international environmental law has been described to comprise of three stages: (a) a conservationist stage; (b) a pollution prevention stage and (c) a sustainable development stage.<sup>71</sup> The need to balance economic growth, social equity and environmental concerns resulted in the formulation of the concept of sustainable development. This concept is regarded as the most imperative in the realm of international environmental law and as such forms the foundation of subsequent discussion on South African climate change law. This chapter will therefore seek to provide a brief historical perspective on this progressive development of sustainable development. In order to fully discuss the development of sustainable development, the concepts of inter and intra generational equity as well as the integration of the concept will be discussed. The concept contains numerous weaknesses in light of being the guiding concept of international environmental law however two of these shortcomings will be discussed namely the sustainable development concept being economically focused and having a lack of conceptual development in light of the ecological crisis. As the sustainable development agenda developed, the Millennium Development Goals (MDGs) was adopted. These goals were regarded as the first list of goals towards the attainment of sustainable development. The MDGs are regarded as a list of actionable goals towards the attainment of sustainable. As such an analysis will be conducted with emphasis placed on MDG 7.

This chapter moves from the position that sustainable development is an ill-suited mechanism for international environmental law and has significant shortcomings from an environmental ethics standpoint. Despite this, it is regarded as the driver of the international environmental law regime. The chapter further posits that the development of sustainable development does occur through the MDGs, providing further integration of the concept on international and national law.

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<sup>71</sup>Bolansky D (2011:f 21)

## 2.2 The Progression of Sustainable Development in International Environmental Law

The relationship between man and nature has been described as man having merely a usufruct over nature, neither for consumption nor profligate waste.<sup>72</sup> International environmental law has been described as one of the most remarkable exercises in international law making. It is comparable only to human rights and international trade law in its form and scale.<sup>73</sup> Although legal cases such as *Trail Smelter Arbitration*<sup>74</sup> and environmental writing such as *Silent Spring*<sup>75</sup> shed light on the need to address environmental concerns, the first significant development arose in 1972. In 1972 the Stockholm Declaration was adopted.<sup>76</sup> The Stockholm Declaration contains a set of common principles that act as a guide for people of the world in the preservation and enhancement of the human environment with institutions being adopted as the result.<sup>77</sup> The Stockholm Declaration does not define sustainable development but what would later become the pillars of sustainable development are prevalent throughout the declaration. These are contained in principle 3<sup>78</sup>, 5<sup>79</sup>, 8<sup>80</sup>, 13 and 14<sup>81</sup> respectively.<sup>82</sup> For purposes of this chapter, the contribution made by the Stockholm Declaration is that although it did not contain nor define sustainable

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<sup>72</sup> Marsh GP 'Man and Nature: Physical Geography as Modified by Human Action' (1864:36).

<sup>73</sup> Birnie P, Boyle A and Regwell C 'International Law and the Environment' Oxford University Press, 3<sup>rd</sup> ed 2009, p1.

<sup>74</sup> 33 *AIJL* (1939) 182 & 35 *AIJL* (1941).

<sup>75</sup> See Carson R 'Silent Spring' (2002).

<sup>76</sup> UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994, (hereafter the Stockholm Declaration).

<sup>77</sup> Weiss EB (2011) 'The Evolution of International Environmental Law' Japanese Yearbook of International Law Vol 54 pp 1-27 at 16. Also see Freestone D (1994) 'The Road from Rio: International Environmental Law after the Earth Summit' *Journal of Environmental Law* 6 (2) January 193 -218 at 196. See for instance the United Nations Environment Programme <http://www.unep.org> (accessed on 20 August 2019)

<sup>78</sup> Principle 3 provides that the vital renewable resources must be maintained and wherever practicable restored and improved.

<sup>79</sup> Principle 5 provides that the non-renewable resources must be employed in such a way to guard against future exhaustion and ensure benefits from such employed be to the benefit of all people.

<sup>80</sup> Principle 8 provides the economic and social components and states they are essential for ensuring for favourable living and working conditions for man and the improvement of the quality of life.

<sup>81</sup> Principle 13 and 14 read together provide that in order to achieve rational management of resources, which is an essential tool for the reconciliation of any conflict between the needs of development and protection of the environment, and improve the environment, States should adopt an integrated and coordinated approach to their development planning to ensure compatibility with the need to protect and improve the environment for the benefit of all.

<sup>82</sup> *ibid.*



development, it successfully laid the foundation for the recognition of the interlinked nature of the environment and economic development.

The concept of sustainable development is one that encompasses the balancing of social, economic and environmental concerns in a manner that ensures the progress of all people. Developing states required their socio-economic developmental needs to be met while the developed states shifted their focus towards the importance of environmental protection for the sustainability of life. The concept of sustainable development came about as a compromise of the negotiations between both the needs of the developing and developed. It is described as a 'diplomatic trick' to unite all stakeholders under a common banner.<sup>83</sup>

Sustainable Development only defined in 1983 by the World Commission on Environment and Development.<sup>84</sup> The commission defined sustainable development to mean development 'that meets the needs of the present without compromising the ability of future generations to meet their own needs.'<sup>85</sup>The definition of sustainable development contained in the Report was ground-breaking as it provided a definition for the term highlighting the interlinked nature of social needs, economic growth and environmental protection in international environmental law. As evident from the definition, the term sustainable development took into account both present and future generations, terms later referred to as 'inter' and 'intra' generational equity respectively. Although an argument is made that the Brundtland Report failed to move the environmental agenda forward because of the lack of clear recommendations for the implementations of its goals<sup>86</sup>, the most significant contribution made by the commission was the definition of sustainable development.<sup>87</sup> At this point, the concept successfully brought both the developing and developed states in alignment in that, in principle, environmental considerations

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<sup>83</sup>Vinuales JE (2013) 'The Rise and Fall of Sustainable Development' *RECIEL* at 4.

<sup>84</sup>*Ibid.*

<sup>85</sup>See generally WCED 'Our common Future – Towards Sustainable Development.'

<sup>86</sup>England P (1993) 'Problems and Prospects for the Implementation of Sustainable Development in Developing Countries: A Critique of the Brundtland Report' 2 *Griffith Law Review* Vol. 2 No. 2 147 at 159.

<sup>87</sup>Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 179.

would be as important towards development as the need to economic and social concerns. This, from a conceptual term, was the basis of sustainable development.<sup>88</sup>

Twenty years after the Stockholm Declaration, the Earth Summit,<sup>89</sup> held in Rio de Janeiro, was a historical gathering of representatives of most of the world's nations. This was done in an effort to rethink economic development and to discover ways to develop without continued pollution to the Earth, and prevent exploiting its natural resources such as water and air.<sup>90</sup>This development further enforced environmental concerns on the same footing as economic and social growth.<sup>91</sup>The Earth Summit resulted in the adoption of the Rio Declaration on the Environment and Development,<sup>92</sup> Agenda 21, the United Nations Framework Convention on Climate Change (UNFCCC),<sup>93</sup> the Convention on Biological Diversity (CBD)<sup>94</sup> and a Declaration on Forests.<sup>95</sup> The Declaration sought to balance environmental and development concerns with its primary focus being on the role of environmental protection in facilitating sustainable development.<sup>96</sup> The overarching objective of the declaration is the co-operation to foster international agreements to protect that integrity of the global environmental and development systems.<sup>97</sup>This once again aligned the compromise between the developmental needs of the developing and environmental concerns of the developed under the auspices of sustainable development. The Rio Declaration and Agenda 21 constituted a comprehensive

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<sup>88</sup>Vinuales JE (2013) 'The Rise and Fall of Sustainable Development' *RECIEL* at 6.

<sup>89</sup>United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992.

<sup>90</sup>Nolon JR and Salkin PE 'Climate Change and Sustainable Development in a nutshell' (1<sup>st</sup>ed) 3.

<sup>91</sup>Vinuales JE (2013) 'The Rise and Fall of Sustainable Development' *RECIEL* at 6.

<sup>92</sup>Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (1992).

<sup>93</sup>UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.

<sup>94</sup>United Nations Conference on Environment and Development, Convention on Biological Diversity, U.N. Doc. DPI/1307 (1992), reprinted in **31 I.L.M. 818** (1992).

<sup>95</sup>United Nations Conference on Environment and Development Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, U.N. Doc. A/CONF.151/16/Rev.1 (1992), reprinted in **31 LLM. 881** (1992).

<sup>96</sup> Principle 4 of the Rio Declaration.

<sup>97</sup> Carter S and Barnard M 'Demystifying the Global Climate Change Regime' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 3-5.

global plan for sustainable development.<sup>98</sup>This was the first Declaration that centred on the concept of sustainable development with express recognition of the definition provided by in the Brundtland Report.<sup>99</sup>The core of the Declaration is a commitment to economic efficiency, environmental protection and social equity.<sup>100</sup>Principle 1 of the Declaration provides *inter alia* that the integration of the environment and development concerns and greater attention to the fulfilment of basic needs, improved living standards and protected and managed ecosystems and safer, prosperous future for all.<sup>101</sup>Principle 3<sup>102</sup> and 4<sup>103</sup> of the Declaration further provides for the interlinked nature of sustainable development.<sup>104</sup>In addition to this, Principle 10 provides that:

‘at a national level, each individual state shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous material and activities in their communities and States shall make information widely available.’<sup>105</sup>

Furthermore, principle 27 of the Declaration provides a developmental approach and states that international law has to develop the concept of sustainable development.<sup>106</sup>The Rio Declaration and Agenda 21 was an important instrument in the environmental law arena as it provided what became considerations of state to take into account sustainable development into lawmaking efforts.

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<sup>98</sup>The Rio Declaration on Environment and Development (A/CONF.151/26, vol. I) and Agenda 21 (A/CONF.151/26, vol. II), adopted by the United Nations Conference on Environment and Development on 14 June 1992. (Hereafter the Rio Declaration and Agenda 21 respectively).

<sup>99</sup>See preamble of the Rio Declaration.

<sup>100</sup>Nolon JR and Salkin PE ‘Climate Change and Sustainable Development in a nutshell’ (1<sup>st</sup>ed) 14.

<sup>101</sup> Principle 1.1 of the Rio Declaration.

<sup>102</sup> . Principle 3 provides that the right to development must be fulfilled so as to equitably meet developmental environmental needs of present and future generations.

<sup>103</sup> Principle 4 provides that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. This principle associates intergenerational equity with the right to development.

<sup>104</sup> Fuentes X ‘International Law-making in the Field of Sustainable Development: The Unequal Competition between Development and the Environment’ in Schrijver N and Weiss F (eds.) ‘International Law and Sustainable Development, Principles and Practice’ (2004) 7.

<sup>105</sup>Principle 10 of the Rio Declaration. Also see Collins LM ‘Sustainable Development Goals and human rights: challenges and opportunities’ in French D &Kotze LJ (eds) ‘Sustainable Development Goals Law, Theory and Implementation’ (2018) 79.

<sup>106</sup>Birnie P & Boyle A ‘International Law and The Environment’ (2002: 84).

## 2.3 Sustainable Development – Status, Significance and Critic

### 2.3.1 Legal Status of Sustainable Development

Although it is easy to ascertain the three facets of sustainable development, the normative influence and legal status in relation to areas of human rights, international economic and international environmental law is harder to identify.<sup>107</sup>

Sustainable development comprises of four legal elements namely the need to preserve natural resources for the benefit of future generations (intergenerational equity); the sustainable exploitation of natural resources (sustainable use); the equity between states in the utilisation of natural resources (the principle of equitable use or intra-generational equity) and to ensure environmental considerations being integrated into economic and other development plans and actions (the principle of integration).<sup>108</sup> The imperative and interlinked nature of these elements in the concept of sustainable development further enhances the concept being included into the international environmental regime. The most pertinent of these is the utilisation of intergenerational equity in bringing claims by members of the present generation under the auspices of sustainable development.<sup>109</sup>

As evident from the abovementioned instruments, sustainable development has over time developed as the concept in which economic and social growth are to be balanced with environmental concerns. Subsequent international instruments have been adopted with express mention made to sustainable development being central in its objectives. Case law such as *Gabcikovo-Nagymaros*<sup>110</sup> has highlighted the recognition of sustainable development as a driving force for international environmental law.<sup>111</sup> The Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons recognised the environment as not merely being an abstraction, but representation of living space, the quality of life and health of human beings

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<sup>107</sup> Boyle A & Freestone D 'Introduction' in Boyle A & Freestone D (eds.) 'International Law and Sustainable Development: Past Achievements and Future Challenges' (1999) 7.

<sup>108</sup> Sands P & Peele J (2013: 207)

<sup>109</sup> Sands P & Peele J (2013: 208)

<sup>110</sup> The Case Concerning Gabcikovo-Nagymaros Dam (Hungary v Slovenia) 1998 *ILM* 168.

<sup>111</sup> The Case Concerning the Gabcikovo-Nagymaros Dam (1997) *ICJ Report* 7 para 140. Also see Lowe V 'Sustainable Development and Unsustainable Arguments' in Boyle A & Freestone D (eds.) 'International Law and Sustainable Development: Past Achievements and Future Challenges' (1999) 7. Also see Kotze L et al 'Climate Change Law and Governance – Setting the Scene' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 1-18.

including those of future generations.<sup>112</sup> Most notably the *Pulp Mill case*<sup>113</sup> highlighted the interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection. This, the court regarded as is the essence of sustainable development.<sup>114</sup> It can thus be safe to state that over time, the concept of sustainable development is increasingly relied upon as the guiding principle of international environmental governance. One can therefore say that sustainable development cannot be seen as separate from international environmental law. Its incorporation into international and national law and policy is vast.

The incorporation of the concept is however flawed due to its vagueness. The concept is so constructed in order to allow both the developed and developing states to agree, however its lack of concrete guidelines provides a lack of implementation on a universal basis.<sup>115</sup> This provides a unique concept being included in law, one that does derive legal status but remains difficult to fully articulate and implement. Due to this an assertion is made that sustainable development itself is not a hard fast rule can be attained, but an ideal that should be strived towards.<sup>116</sup> The concept of sustainable development has however become a binding norm of international law.<sup>117</sup> Integration of the concept is essential towards the continued protection of the environment, albeit on a secondary basis, as will be discussed momentarily. The element of integration is a commitment of environmental considerations being incorporated into economic and social development.<sup>118</sup> This is done none more so during the *Iron Rhine* case in which it was stated that the integration of appropriate

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<sup>112</sup> (1996) ICJ Reports 226.

<sup>113</sup> *Pulp mills on the River Uruguay (Argentina v Uruguay ICJ Rep.* (2010).

<sup>114</sup> Ibid at para 177. Also see Barral V (2012) 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' *The European Journal of International Law* Vol 23 no.2 377-400 at 377.

<sup>115</sup> Vinuales JE (2013) 'The Rise and Fall of Sustainable Development' *RECIEL* at 4.

<sup>117</sup> Lowe V 'Sustainable Development and Unsustainable Arguments' in Boyle A & Freestone D (eds.) 'International Law and Sustainable Development: Past Achievements and Future Challenges' (1999) 20.

<sup>117</sup> Lowe V 'Sustainable Development and Unsustainable Arguments' in Boyle A & Freestone D (eds.) 'International Law and Sustainable Development: Past Achievements and Future Challenges' (1999) 20.

<sup>118</sup> Sands P & Peele J (2013: 215)

environmental measures in the design and implementation of economic development is a prerequisite of international law.<sup>119</sup>

This concept and its legal significance cannot therefore be overstated as the *Leitmotif* of international environmental law.<sup>120</sup> It is regarded as intertwined with the continued development of international environmental law and as such subsequent development of environmental law will always take into account the realisation of sustainable development.<sup>121</sup> An argument has been made that although international law is not bound to require development to be sustainable, the process of a development decision has to promote sustainable development.<sup>122</sup> As evident from the above, sustainable development is indeed central towards any international environmental law development and subsequent discussion. Due to the importance of this concept in global environmental governance and subsequent development of the agenda in the form of the MDGs and SDGs, an analysis of the shortcomings of the concept is required.

### **2.3.2 The Shortcomings of Sustainable Development**

Sustainable development is a deceptively simple idea that is vastly incorporated into international and national law, however its meaning is widely contested.<sup>123</sup> Although sustainable development is regarded as the *Leitmotif* of international environmental law, it is not without inherent flaws and shortcomings. For purposes of this dissertation, the author will identify two of the most relevant weaknesses of sustainable development namely (a) its interpretation being economically focused and (b) its lack of development in light of the current ecological crisis.

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<sup>119</sup>Belguim/Netherlands (Iron Rhine arbitration) Award of 24 May 2005, Permanent Court of Arbitration Award Series, The Iron Rhine (IJzeren Rijn) arbitration (Belguim-Netherlands) Award of 2005 (2007) para 59 and 243.

<sup>120</sup>Kotze L et al 'Climate Change Law and Governance in South Africa – Setting the Scene' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 1-18.

<sup>121</sup>Fuentes X 'International Law-making in the Field of Sustainable Development: The Unequal Competition between Development and the Environment' in Schrijver N and Weiss F (eds.) 'International Law and Sustainable Development, Principles and Practice' (2004) 8-9.

<sup>122</sup>Boyle A & Freestone D 'Introduction' in Boyle A & Freestone D (eds.) 'International Law and Sustainable Development: Past Achievements and Future Challenges' (1999) 17.

<sup>123</sup>Handl G (1995) 'Sustainable Development: General Rules versus Specific Obligations in Lang W (ed.) *Sustainable Development and International Law* at 39.

### **2.3.2.1 An Economically Focused Concept**

As stated above, the Brundtland Report defined sustainable development. Although it has stood the test of time there are various contentions made that it is focused on economic growth as oppose to environmental protection. This could be due to the phrasing of the definition contained in the Brundtland Report various interpretations can be adduced as a result.<sup>124</sup> One such interpretation has a contradictory outcome, i.e. that economic growth was the result of an environmental crisis and therefore economic growth does not provide a viable mechanism to address this, regardless of how sustainable its approach is.<sup>125</sup> It has been described as economic development that is complementary to environment and society as a process of development that emphasises intergenerational equity.<sup>126</sup> This has resulted in the long term problem as economic development would take precedent over environmental protection causing further environmental degradation. Escobar asserts that sustainable development focuses not so much on the negative consequences of economic growth on the environment as on the effects of environmental degradation on growth and potential of growth.<sup>127</sup> It has been appropriately stated that nothing in nature grows forever and uncontrollable economic growth is cancerous.<sup>128</sup>

The concept of sustainable development is structured in such a manner that if environmental protection were to be in conflict with development considerations, the latter would take precedent. He contends that this would not be at issue; however it does create an issue in instance where developmental objectives are camouflaged with secondary environmental objectives.<sup>129</sup> On this basis a contention can be made

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<sup>124</sup>Ibid. Also see generally the developments of principles of sustainable development in international law in Silveira MPW & Ruis B (1996) 'International Law for Sustainable Development: An Attempt at Definition' 2 *NAFTA: Law and Bus Rev. Am* 12.

<sup>125</sup>Ibid at 19.

<sup>126</sup>Kumi E, Arhin AA and Yeboah T (2014) 'Can Post-2015 Sustainable Development Goals Survive Neoliberalism? A Critical Examination of the Sustainable Development Nexus in Developing Countries' *Environment Development and Sustainability* 16 539 -554 at 544.

<sup>127</sup>Escobar A (1996) 'Constructing Nature: Elements for Post-structural Political Ecology' in Peet R and Watts M (eds.) *Liberation Ecologies: Environment Development, Social Movements* *Routledge* 51-52.

<sup>128</sup>Raworth K (2017) 'Doughnut Economics: Seven Ways to Think like a 21<sup>st</sup> Century Economist' *Random House*.

<sup>129</sup>Vinuales JE (2013) 'The Rise and Fall of Sustainable Development' *RECIEL* at 6.

that environmental concerns is secondary when measured with the concept of sustainable development.<sup>130</sup>

What is needed most is a new global organising principle centred on one test, whether a particular economic activity is ecologically sustainable.<sup>131</sup> The Leitmotif of international environmental law should indeed derive from an ecological standpoint and further development in this regard should lean towards an environmental concerns being addressed as oppose to economic development.<sup>132</sup>

### **2.3.2.2 Lack of Conceptual Development in light of the ecological crisis**

Some view sustainable development as being focused on environmental protection while neglecting development<sup>133</sup> while others regard sustainable development to not be doing sufficient in relation to environmental protection.<sup>134</sup> The author of this dissertation is in agreement with the later. Bosselman, in his analysis of sustainable development has two approaches to sustainability, a term that has developed as a by-product of sustainable development.<sup>135</sup> He posits that 'weak' sustainability is based on an anthropocentric model highlighted in the Brundtland definition. He states that all three aims contained in sustainable development are equal and with this approach environmental protection is only utilised as a tool for human survival.<sup>136</sup> He contrasts this to 'strong' sustainability in which an ecocentric approach would be favoured. This is highlighted in instruments such as the World Charter for Nature<sup>137</sup> and the Earth Charters<sup>138</sup> of 1982 and 2000 respectively. Strong sustainability in his view would hold environmental protection as the overarching aim

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<sup>130</sup>Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 229.

<sup>131</sup>Adelman S 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 39.

<sup>132</sup>Vinuales JE (2013) 'The Rise and Fall of Sustainable Development' *RECIEL* at 6.

<sup>133</sup> Fuentes X 'International Law-making in the Field of Sustainable Development: The Unequal Competition between Development and the Environment' in Schrijver N and Weiss F (eds.)

'International Law and Sustainable Development, Principles and Practice' (2004) 11.

<sup>134</sup> Richardson BJ (2016) 'The emerging age of ecological restoration law' *RECIEL* 25(3) 277-290 at 277.

<sup>135</sup>Vinuales considers the term sustainability as inadequate to organise efforts in addressing environmental concerns on the basis of sustainable development. See Vinuales JE (2013) 'The Rise and Fall of Sustainable Development' *RECIEL* at 5.

<sup>136</sup>Bosselmann K 'The concept of sustainable development' in Bosselmann K and Grinlinton D (eds.) 'Environmental law for sustainable development (1997)

<sup>137</sup> The World Charter for Nature UNGA Res. 37/7 (XXVII) 22 ILM 455 (1983).

<sup>138</sup>UN General Assembly, World Charter for Nature., 28 October 1982, A/RES/37/7



in this regard.<sup>139</sup> Tladi in his assessment of Bosselmann's position asserts that economic growth should not form part of the sustainable development equation and must be subject to both developmental and ecological needs.<sup>140</sup> He asserts that the best approach to sustainable development would be an integration of environmental concerns with developmental ones with the focus being on the upliftment of the worlds' poor.<sup>141</sup> This removal of economic growth from the sustainable development equation is one however that would not occur, however an increased emphasis on environmental protection in the development of the concept is a necessity, Richardson, to this point, asserts that law has to develop with a focus being on restoration as a mechanism to improve ecological services. The concept of sustainable development need not merely take into account environmental protection but has to develop with the notion that restoration is the necessary twin of sustainability.<sup>142</sup> This is a glaring omission in the current sustainable development model. Although the focus of the concept is on intergenerational equity no mention is made to mechanisms that address the restoration of the effects of the ecological crisis. This is an increasingly alarming omission in the concept of sustainable development, especially in light of the ecological crisis and urgent action being required to address it.

Sustainable development is no longer capable of guiding global environmental governance as it fails to take a clear stance where there are tradeoffs between environmental, social and economic considerations.<sup>143</sup> Sustainable development as the Leitmotif is ill suited to ensure the longevity of sustained life on Earth as it lacks development in light of the ecological crisis. Furthermore, the concept should be developed in order to address economic growth and social necessity however this has to be within the limits of the planetary boundaries. The definition of sustainable

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<sup>139</sup> See Bosselmann K and Richardson B 'Introduction: New Challenges for Environmental law and policy' in Bosselmann K and Richardson B 'Environmental Justice and Market Mechanisms: Key Challenges for environmental law and policy (1999).

<sup>140</sup> Tladi D (2003) 'Strong Sustainability, Weak Sustainability, Inter-generational Equity and International Law: Using the Earth Charter to Redirect the Environmental Ethics Debate' 28 *South African Yearbook of International Law* 200 at 204.

<sup>141</sup> Ibid at 206.

<sup>142</sup> Richardson BJ (2016) 'The emerging age of ecological restoration law' *RECIEL* 25(3) 277-290 at 277.

<sup>143</sup> Vinuales JE (2013) 'The Rise and Fall of Sustainable Development' *RECIEL* at 7.

development should be redefined to mean development made in order to meet the needs of the present while safeguarding the Earth's essential life support system on which the welfare of current and future generations depends.<sup>144</sup> Sustainable development as an ideal, although inherently flawed forms the basis of all future development in the international environmental law regime. It is central to international environmental law and the trajectory of development as highlighted by the above soft law documents with sustainable development at its core are generally incorporated into both international and national environmental law and policy. Subsequent instruments such as the Millennium Development (MDGs) which will be discussed in this chapter and the central focus of this dissertation, the SDGs will be analysed taking into account these shortcomings.

## **2.4 The Advent of the Millennium Development Goals**

### **2.4.1 Legal Adoption of the MDGs**

The sustainable development agenda has been encapsulated and expanded upon by the Stockholm Declaration, the Brundtland Commission and the instruments adopted by the Earth Summit. The next milestone in the sustainable development agenda arose in September 2000. The Millennium Development Goals (MDGs) were regarded as a roadmap towards the attainment of sustainable development containing eight specific goals that all UN member states committed to achieve by 2015.<sup>145</sup>

These eight MDGs include the eradication of poverty;<sup>146</sup> the achievement of universal primary education<sup>147</sup>; promotion of gender equality and empowerment of women<sup>148</sup>; reduction in child mortality<sup>149</sup>; the ensuring of environmental sustainability<sup>150</sup> and the development of global partnership for development.<sup>151</sup>

The goals contained in the MDGs are limited and selective, prioritizing certain objectives; there is a measure of accountability through the MDGs design; the time

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<sup>144</sup> Griggs D, Stafford Smith M, Gaffney O et al 'Sustainable Development Goals for People and Planet' *Nature* 495 at 306.

<sup>145</sup> Ibid.

<sup>146</sup> MDG 1

<sup>147</sup> MDG 2

<sup>148</sup> MDG 3

<sup>149</sup> MDG 4

<sup>150</sup> MDG 7

<sup>151</sup> MDG 8

bound basis of their attainment ensures that attainment occurs immediately as oppose to progressive realization.<sup>152</sup> In addition to this, the MDGs have various institutional bodies towards the promotion of the MDGs including the Millennium Project,<sup>153</sup> the Millennium Campaign,<sup>154</sup> efforts to produce National MDG Reports<sup>155</sup> in every developing country and global efforts by almost every international developmental agency.<sup>156</sup> The MDGs provided what seems to be a list of goals that encompass the pillars of sustainable development. Being the predecessor of the SDGs, an analysis of the legal status and environmental protection and lastly its shortcomings will be conducted. This will be done in order to indicate its implementation into international and national law and policy.

#### **2.4.2 Legal Status of the MDGs**

The MDGs are of import in sustainable development and the development of international environmental law due to the establishment of a checklist of goals to attain in order to meet the ideal of sustainable development. It drew a linkage between environmental protection and the attainment of both human rights and development. This is a monumental milestone in the development of sustainable development. The MDGs are however criticised for merely amounting to a shopping list of goals that risk the omission of important issues in other imperative areas of development and human needs.<sup>157</sup> Despite this, the MDGs have become the most important focus to promote human development and dramatically reduce poverty, the socio-economic pillars of sustainable development.<sup>158</sup> In the final MDG Report of 2015, UN Secretary General Ban Ki Moon noted that the MDGs are the most

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<sup>152</sup> Alston P (2005) 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' *Human Rights Quarterly* Vol 27 No.3 755-829 at 756.

<sup>153</sup> See 'Millennium Project' <http://www.millennium-project.org/> (accessed on 10 September 2019)

<sup>154</sup> See 'Millennium Campaign: Voices Against Poverty' <https://sdgactioncampaign.org/tag/un-millennium-campaign/> (accessed on 10 September 2019)

<sup>155</sup> For purposes of this thesis the country report will be limited to South Africa. See 'Millennium Development Goals: Country report 2015' *Statistics South Africa Pretoria Statistics South Africa 2015* ISBN 978-0-621-43861-1. (Hereafter referred to as South Africa MDG Report).

<sup>156</sup> Alston P (2005) 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' *Human Rights Quarterly* Vol 27 No.3 755-829 at 757.

<sup>157</sup> Wiik A, Lachenmann F 'Rule of Law and the Sustainable Development Goals' 18 *Maxx Planck Yearbook of United Nations Brill* 286 at 288.

<sup>158</sup> Alston P (2005) 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' *Human Rights Quarterly* Vol 27 No.3 755-829 at 755 -756.

successful anti-poverty movement in history.<sup>159</sup> The collective efforts on global, regional, national and local levels in the attainment of the MDGs were unprecedented.<sup>160</sup>

The implementation of the MDGs in countries indicates that these MDGs indeed have normative influence on international and national law. South Africa for example, being party to the MDG Declaration, has actively taken steps towards the realisation of the Millennium Goals. In doing so, South Africa has submitted six reports on the progressive of attaining the MDGs. In the foreword of the final report, submitted in 2015, the then Minister of the Presidency: Planning, Monitoring and Evaluation TJ Radebe stated that the MDGs were a natural fit for South Africa and seamlessly align with the development agenda and the implementation of the goals was a confirmation of developmental path of the country.<sup>161</sup> For purposes of this dissertation the final report indicates that South Africa reflects on not only the successes and challenges but lessons learnt from the MDGs and how these should be integrated into the post-2015 development agenda and SDGs in order to complete the unfinished work in the MDGs.<sup>162</sup> This point will be further elaborated on in subsequent chapters. At this juncture it is sufficient to note that South Africa has taken active measures towards the attainment of the eight MDG goals and as such have significant normative status and influence towards the national sustainable development agenda.

#### **2.4.3 Environmental Law and the MDGs – MDG 7**

The Millennium Project Task Force 1 on Poverty and Economic Development report noted three forms of human poverty. This includes (1) income poverty; (2) social service poverty and (3) environmental poverty inclusive of the lack of or degradation of core environmental resources needed for human well-being.<sup>163</sup> Among the MDGs is MDG 7. This MDG seeks to ensure environmental sustainability. The targets of

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<sup>159</sup>United Nations 'The Millennium Development Goals Report 2015' 1 July 2015 ISBN 978-92-1-1-101320-7 (hereafter referred to as Final MDG Report 2015).

<sup>160</sup>Nanda VP 'The Journey from the Millennium Development Goals to the Sustainable Development Goals' (2016) 44 *Denv. J. Int'l L. & Pol'y* 389 at 395.

<sup>161</sup>Final MDG Report 2015 at 3.

<sup>162</sup>South Africa MDG Report at iii.

<sup>163</sup>Pangestu M & Sachs J (2004) 'Millennium Project, An Enhanced Strategy for Reducing Extreme Poverty by the Year 2015: Interim Report of the Millennium Project Task Force on Poverty and Economic Development' 4 available at [www.unmillenniumproject.org/documents/tfoneinterim.pdf](http://www.unmillenniumproject.org/documents/tfoneinterim.pdf) (accessed on 18 August 2019)

this MDG is (a) to integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources; (b) the reduction of biodiversity loss, achieving a significant reduction in the rate of loss by 2020; (c) to halve the proportion of the population without sustainable access to safe drinking water and basic sanitation by 2015 and (d) to achieve a significant improvement in the lives of at least 100 million slum dwellers by 2020.<sup>164</sup>

In the Final MDG Report<sup>165</sup> there were mixed results in the attainment of environmental sustainability.<sup>166</sup> Despite its successes, the Report shows that the most vulnerable people were indeed left behind.<sup>167</sup> As evident from the above, global action yielded tremendous results in environmental sustainability for human development. This could only be attained through the political will and international commitment by all states.

MDG 7 has the inherent weakness of being anthropocentric, much like the underlying concept of sustainable development itself. This position is premised on the fact that the abovementioned target 7b was only premised on conservation of biodiversity loss in relation for continued food supply and ecosystem services in relation to human need.<sup>168</sup> Upon the end of the 2015 mandate set by the MDGs, the successes and shortcomings of the MDGs were mixed and it became clear that a revised global set of goals and targets were required.<sup>169</sup> These goals, although linked to the MDGs in being an actionable list of global goals, would represent the next milestone of the sustainable development agenda. These goals are further required to be more expansive than the MDGs and encompass much more than the eight aspirations contained in the MDGs.<sup>170</sup>

South Africa, in its final MDG report noted that South Africa is a major emitter of carbon dioxide emissions and accounts for about 65% of Africa's emissions.<sup>171</sup>

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<sup>164</sup> See Goal 7 the MDGs.

<sup>165</sup> See n. 82.

<sup>166</sup> See n. 82 at 52 - 61.

<sup>167</sup> Nanda VP 'The Journey from the Millennium Development Goals to the Sustainable Development Goals' (2016) 44 *Denv. J. Int'l L. & Pol'y* 389 at 397.

<sup>168</sup> See n.84.

<sup>169</sup> Nanda VP 'The Journey from the Millennium Development Goals to the Sustainable Development Goals' (2016) 44 *Denv. J. Int'l L. & Pol'y* 389 at 392.

<sup>170</sup> *Ibid* at 396.

<sup>171</sup> South Africa MDG Report at 99.

Furthermore it noted that South Africa has successfully achieved its medium targets for the reduction of ozone-depleting substances and the phasing out of the consumption of bromo-chloromethane (BCM) consumption. Furthermore, it noted that 75.5 percent of the population have access to an improved sanitation facility however notes the concerns of reliable and sustainable water supply.<sup>172</sup>

As stated above, despite the MDGs not being regarded as 'hard' law, the normative significance of these goals are derived from the political will towards attaining it and furthered by State accountability towards implementing these goals. However, as will be indicated below, this is done on a voluntary basis. While there was substantial progress made in the achievement of the MDGs, significant disparities and gaps remained with the unfinished agenda left for the successor SDGs.<sup>173</sup>

## **2.5 Conclusion**

Although vastly criticised for not being the best suited concept of environmental law and having numerous shortcomings, as highlighted throughout this chapter, sustainable development has become the essential component to drive environmental law. Its development is established throughout international instruments. The two shortcomings of being economically focused and not taking into account the ecological crisis are well noted and require redress in subsequent international instruments developing the concept such as the MDGs and subsequent SDGs.

The MDGs was the first attempt at an actionable list of goals that would attain sustainable development. These goals provided a more attainable mechanism towards meeting the ideal of sustainable development through providing through targets and goals. This is a milestone towards further development of the sustainable development agenda. MDG 7 expressly provides for an environmental component towards the attainment of sustainable development. This MDG in particular places environmental concerns on the same basis as its social and economic counterparts. The inclusion of the MDGs in national reports, as provided above, indicates further implementation and further development of the sustainable development concept. Upon the end of the mandate of the MDGs, further implementation of sustainable

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<sup>172</sup>South Africa MDG Report at 100.

<sup>173</sup>Ibid at 401.

development would be linked to a similar list of global goals. These goals would, much like the MDGs, further the sustainable development agenda, and build on the foundation laid by the MDGs. Chapter 3 will provide an analysis of the Sustainable Development Goals (SDGs) as the next milestone of the sustainable development agenda and assesses its adoption, legal status and normative impact on international law.

## **Chapter 3 – An Analysis of the Sustainable Development Goals**

### **3.1 Introduction**

The following chapter will provide an in-depth legal analysis of the SDGs. The author will highlight the adoption of the SDGs, through the Working Group, as well as the content of the SDG document with emphasis on the environmental cluster. In this chapter the relationship to the sustainable development agenda will also be reflected on. In order to discuss the implications of the SDGs on law, the significance and criticism of the document will be highlighted in addition to the legal considerations of the adoption of the SDGs. This chapter moves from the position that the SDGs are an encapsulation of the sustainable development agenda and as a result of the adoption of monitoring and assessment mechanisms to attain these goals, the SDGs have not only political, but policy considerations on international environmental law.

### **3.2 Adoption of SDGs – The Advent and Process of the Open Working Group (OWG)**

In 2012 the UN established an Open Working Group(OWG)that was mandated to develop a list of global goals that had the central theme of sustainable development.<sup>174</sup> In contrast to the MDGs,<sup>175</sup> the OWG comprised of both the developed North and the developing South with the objective of having a geographically fair, equitable and balanced proposal for the SDGs.<sup>176</sup> The Rio+20 Summit<sup>177</sup> conducted intergovernmental negotiation and open ended dialogue with civil society, interest groups, and businesses.<sup>178</sup> This transparency and civil involvement was essential to ensure all facets of sustainable development were addressed and further expanded on<sup>179</sup> while meeting the needs of all people, ensuring nobody was left behind. The 2012 conference further emphasized that every state has the responsibility to respect, protect and promote human rights and

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<sup>174</sup>See 'Open Working Group on Sustainable Development Goals' A/67/L.48/rev.1

<sup>175</sup> Chapter 2 at 2.4.

<sup>176</sup>Adelman S 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 33.

<sup>177</sup>See 'United Nations Conference on Sustainable Development, Rio +20'  
<https://sustainabledevelopment.un.org/rio20> (accessed 29 July 2019)

<sup>178</sup>Orellana M (2016) 'Governance and the Sustainable Development Goals: The Increasing Relevance of Access Rights in Principle 10 of the Rio Declaration' 25 *REICEL* 50 at 52. Also see Bergling P & Sophie J (2015) 'The New Black on the Development Catwalk: Incorporating Rule of Law into the Sustainable Development Goals 24 *Washington International Law Journal* 435 at 435.

<sup>179</sup>Nanda VP (2016) 'The journey from the millennium development goals to the sustainable development goals' *Denver Journal of International Law and Policy* 44(3) 389-412 at 404.



democracy, good governance. It further reiterated that the rule of law is essential for sustainable development.<sup>180</sup>The SDGs were developed in a transparent manner with outreach and civil society taken into account.<sup>181</sup>The appropriateness of this approach is valuable as only through the collective actions of civil society, states and international organisations can these important goals be realised.

The importance of this approach in the adoption process in contrast to the MDGs are best highlighted in the 2013 High-Level Panel of Eminent Persons Report on the state of the MDGs.<sup>182</sup> This report stated that ‘the next development agenda [has to ensure] that in the future neither income nor gender, nor ethnicity, disability nor geography will determine whether the person lives or dies or whether the mother can give birth safely or whether a child born has a fair chance in life.’<sup>183</sup>This is done in an effort to address the abovementioned contention that the MDGs resulted in people being left behind.<sup>184</sup>Furthermore, a global set of 230 indicators that monitor progress was proposed by the Inter-agency and Expert Group on the SDGs. This proposal was agreed upon by the 47<sup>th</sup> Session of the United Nations Statistical Commission.<sup>185</sup> This acceptance was significant in that the monitoring of progress for the SDGs was inclusive of all parties and remained transparent. The SDG resolution document can thus be said to have come as a result of the inclusive and transparent intergovernmental process open to all stakeholders.<sup>186</sup>

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<sup>180</sup> United Nations Conference on Sustainable Development, Rio de Janeiro, Bra, June 20-22, 2012, the Future We Want 9, 10 UN Doc. A/CONF 216/L.1 (June 19, 2012).

<sup>181</sup> United Nations General Assembly Resolution A/Res/70/1. Transforming our World: The 2030 Agenda for Sustainable Development (September 2015) para 248.

<sup>182</sup>See ‘The Secretary-General’s High-Level Panel of eminent persons on the Post-2015 Development Agenda’ <https://www.un.org/sg/en/management/hlppost2015.shtml> (accessed 29 July 2019)

<sup>183</sup> United Nations ‘A Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development’ *UN Publications* (2013:7).

<sup>184</sup> Chapter 2 at 2.4.

<sup>185</sup> UN ‘UN Statistical Commission Agrees on Global Indicator Framework’ (11 March 2016) <http://www.un.org/sustainabledevelopment/blog/2016/03/un-statistical-commission-endorses-global-indicator-framework/> (accessed 06 July 2019.)

<sup>186</sup>Bergling P & Sophie J (2015) ‘The New Black on the Development Catwalk: Incorporating Rule of Law into the Sustainable Development Goals 24’ *Washington International Law Journal* 435 at 438. Also see Nanda VP (2016) ‘The journey from the millennium development goals to the sustainable development goals’ *Denver Journal of International Law and Policy* 44(3) 389-412 at 404.

### 3.3 Content of the Global Goals

The SDG document comprised of a list containing 17 goals and 169 targets for the achievement of sustainable development.<sup>187</sup> These global goals are regarded as essential in addressing all the facets of sustainable development.<sup>188</sup> These include the eradication of poverty (SDG 1), zero hunger (SDG 2), inclusive and equitable quality education (SDG 4), gender equality and empowerment for women and girls (SDG 5), sustained and inclusive economic growth as well as productive employment (SDG 8).<sup>189</sup> There is no explicit environmental SDG unlike the abovementioned MDG 7. The environmental SDGs or 'environmental cluster' however comprise of the sustainable management of water resources,<sup>190</sup> climate change,<sup>191</sup> the conservation and sustainable use of marine resources,<sup>192</sup> and biodiversity.<sup>193</sup> In addition to this, the 2030 Agenda contains 89 of the total 169 targets relating to the environment and environmentally related issues.<sup>194</sup> This is indicative of the overall importance of environmental protection in the attainment of sustainable development under the auspices of the 2030 Agenda.

Lastly, in keeping with the transparency of the adoption of the SDGs, the SDGs also call for public access to information and participation in decision making as a way of strengthening institutions on all levels.<sup>195</sup> It further calls for the strengthening and

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<sup>187</sup>UN General Assembly, Transforming our world : the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

<sup>188</sup>Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 at 169.

<sup>189</sup>UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

<sup>190</sup>SDG 6

<sup>191</sup> SDG 13

<sup>192</sup> SDG 14

<sup>193</sup> SDG 15

<sup>194</sup> These targets include access to and control over land and natural resources, the reduction of vulnerability to climate related extreme events, ensuring sustainable food production and implement resilient agricultural practices taking into account the maintenance of ecosystems and the improvement of water quality through the reduction of pollution, elimination of dumping and the minimizing of hazardous chemicals and materials. See Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 242.

<sup>195</sup>Bergling P & Sophie J (2015) 'The New Black on the Development Catwalk: Incorporating Rule of Law into the Sustainable Development Goals 24 *Washington International Law Journal* 435 at 438. Also see Sanchez Castillo-Winckels N 'How the Sustainable Development Goals promote a new conception of ocean commons governance' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 145.

revitalization of Global Partnership for Sustainable Development.<sup>196</sup> This includes enhancing capacity building and targeted capacity building in developing countries to support national plans to implement the SDGs cooperation across the North-South divide.<sup>197</sup> Social necessity, sustained economic growth and environmental protection are all highlighted throughout the list of goals.<sup>198</sup> On this basis the SDGs prima facie constitute the principal roadmap for sustainable development around the world for the next 15 years and are altogether much more comprehensive and ambitious than the ambit of the MDGs.<sup>199</sup> Although the goals are universal and notes that they are indivisible and interconnected, their main objective is that no one should be left behind.<sup>200</sup> The SDGs are interlinked and interrelated and correctly so, due to the overarching interlinked nature of sustainable development.

Universality of the SDGs is a key of the sustainable development agenda.<sup>201</sup> While the MDGs focused on addressing the plight of the developing countries, the SDGs apply to developed countries as well with an effort towards global action being required.<sup>202</sup> Furthermore, the narrow MDG 7 was replaced with a multitude of environmentally focused goals addressing areas of environmental concerns, as will be discussed momentarily.

Authors have made numerous observations about the content of the SDGs. Kotze states that the SDGs are cast in aspirational language attempting to convey the determination of the world to improve the lives of people, protection of the environment, foster peaceful inclusive global partnership and ensure everyone has a

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<sup>196</sup> SDG 17.

<sup>197</sup> SDG target 17.9.

<sup>198</sup> In the Preamble of the SDGs the Agenda emphasises the three facets of sustainable development and highlights its interlinked nature.

<sup>199</sup> Kotze LJ 'The Sustainable Development Goals: an existential critique alongside three new-millennial analytical paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 42.

<sup>200</sup> Long G 'Underpinning commitments of the Sustainable Development Goals: Indivisibility, universality, leaving no one behind' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 91.

<sup>201</sup> Lode B, Schonberger P, Toussaint P (2016) 'Clean air for all by 2030: Air Quality in the 2030 Agenda and in International Law' *RECIEL* 25(1) 27-38 at 28. Also see Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 at 191-192.

<sup>202</sup> In its Preamble, the Agenda emphasises that all countries and stakeholders will implement this plan as well as recognising the incomplete work of the MDGs.

prosperous and fulfilling life.<sup>203</sup> Collins asserts that upon analysis of the SDGs, two objectives that cannot be captured in current human rights law are addressed by the SDGs. She states that the SDGs highlight specific targets that seek to eliminate inequalities among states<sup>204</sup> and attempt to protect the interest of future generations. Despite this she asserts that differentiation is required between the respective countries, this is reminiscent of concepts in climate change as will be discussed in the subsequent chapter.<sup>205</sup> The SDGs are flexible and articulated in such a way that encourages the taking account of national capacity and development while respecting national policies and priorities.<sup>206</sup> The SDGs offer vast improvements to the sustainable development agenda by addressing critical systematic barriers to sustainable development such as environmental degradation, inequality and weak institutional capacity.<sup>207</sup> In light of the ecological crisis and taking into account the need for collective global action to address these concerns, the author shares the above assertions. The SDGs provide an individual focus on respective goals and require global action towards respective areas of the environment.

### **3.4 Legal Status of the SDGs**

The SDGs has been compared to the Charter of United Nations in terms of significance.<sup>208</sup> Although the SDGs are indeed significant to the sustainable development agenda, there are varied criticisms levied against it. The most pertinent of these is the vagueness of the normative impact these documents possess. Various authors contest the normative influence of the SDGs on the international community. For instance, an assertion is made that in order for the SDGs to have normative impact they are required to exhibit a sense of movement of contribution

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<sup>203</sup>Kotze LJ 'The Sustainable Development Goals: an existential critique alongside three new-millennial analytical paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 44. Also see, United Nations General Assembly 'Transforming our world: the 2030 Agenda for Sustainable Development', A/RES/70/1 (21 October 2015).

<sup>204</sup> SDG 10.

<sup>205</sup>Collins LM 'Sustainable Development Goals and human rights: challenges and opportunities' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 85.

<sup>206</sup> McIntyre O 'International water law and SDG 6: mutually reinforcing paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 178.

<sup>207</sup>Nanda VP (2016) 'The journey from the millennium development goals to the sustainable development goals' *Denver Journal of International Law and Policy* 44(3) 389-412 at 411-412.

<sup>208</sup> Collins LM 'Sustainable Development Goals and human rights: challenges and opportunities' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 66.

towards formal legality and challenge the international community to change. The SDGs lack in both these aspects and as a result they cannot even amount to soft law.<sup>209</sup> Perssons et al however assert that the SDGs have some form of normative value, however consider them to be on the softest end of the 'hard-to-soft' normative impact due to the lack of binding legal commitments to be achieved.<sup>210</sup> A varied opinion posits that the SDGs constitute nothing more than political non legal aspirations, however it does not diminish its significance that states themselves attribute to the eventful fulfilment of the goals.<sup>211</sup> Kim asserts that the SDGs are political in nature, however certain SDGs have binding impact on the international community.<sup>212</sup>

The author shares the position held by Perssons et al that the SDGs do possess normative value, however due to the lack of enforcement mechanisms contained within the SDG document itself it cannot amount to hard law. The normative influence of these Global Goals is however tied to the regimes that do possess more binding effects on international law. This assertion forms the basis for the authors view that respective SDGs do indeed possess normative influence on international law. The SDGs, are of a soft law nature with characteristics mirroring international law and can further the attainment of international law objectives.

It is noteworthy to mention that much like the MDGs, the SDGs requires state's willingness to implement and aspire towards its achievement.<sup>213</sup> The SDG document is contained in a United Nations General Assembly (UNGA) resolution and it is not considered binding or 'hard law'.<sup>214</sup> Despite this, in the assessment of the SDGs one can safely deduce there indeed is a relationship between international law and

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<sup>209</sup> French D (2017) 'The Global Goals: Formalism Foregone, Contested Legality and "Re-imaginings of International Law"' *Ethiopian Yearbook of International Law* 164-165.

<sup>210</sup> Person A, Weitz N and Nilsson M (2016) 'Follow-up and Review of the Sustainable Development Goals: Alignment vs. Internalization' *RECIEL* 25(1) 59 at 60.

<sup>211</sup> Kotze LJ 'The Sustainable Development Goals: an existential critique alongside three new-millennial analytical paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 45.

<sup>212</sup> Kim RE (2016) 'The Nexus between International Law and the Sustainable Development Goals' *REICL* 25 (1) at 16

<sup>213</sup> Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 at 170.

<sup>214</sup> Sanchez Castillo-Winckels N 'How the Sustainable Development Goals promote a new conception of ocean commons governance' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 121.

SDGs. Law has been stated to be deeply, intrinsically and persistently anthropocentric. It is further instrumental in naturalising the idea of human sovereignty over nature as a possession.<sup>215</sup> An assertion is made that law has the ability to further empower the attainment of the SDGs or become a hindrance on the continued realisation of sustainable development.<sup>216</sup> The author shares this view as although existing law provide the basis of the attainment of sustainable development, the enactment of new laws takes time to be in effect and more dynamic and urgent action is required in order to address key issues, in this case, climate change and its effects on sustained life. The 71<sup>st</sup> session of the UNGA, the Sixth Committee (Legal) made the observation that besides the rule of law being included as a self standing SDG the rule of law was a mechanism towards the realisation of various SDGs.

The SDGs are collectively agreed to be non-binding in nature, however the normative status and possible implications on international law have authors providing differing opinions.<sup>217</sup> In an analysis of the SDGs, an author states that there are various forms of law namely formal, procedural and substantive rule of law. In application, he asserts that the formal and procedural rule of law contained in SDG 16 is a prerequisite for the effective implementation and achievement of the substantive SDGs contained in Agenda 2030.<sup>218</sup>

The legal status and legal consideration of the SDGs are thus a point of reference in assessing the normative status and influence in international law. The link between the SDGs and law are clearly visible as indicated above and on this basis the author asserts that because of this, they do not merely amount to political aspirations. As stated above, the SDGs, are a resolution of the UNGA and on this basis there is legal significance in this instrument. As will be discussed later, institutional organisations that monitor and assess progress of the attainment of respective SDGs are a clear indicator that the SDGs are soft law in nature. This assertion is

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<sup>215</sup>Adelman S 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 28.

<sup>216</sup>French D and Kotze LJ 'Introduction' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 4.

<sup>217</sup> GA/L/3519 5 October 2016. Also see Soninen N 'Torn by (un)certainity – can there be peace between rule of law and other Sustainable Development Goals' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 250.

<sup>218</sup>Soninen N 'Torn by (un)certainity – can there be peace between rule of law and other Sustainable Development Goals' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 252.

crucial in the overall development of the sustainable development agenda, specifically in respect of the environmental cluster. As stated by Cooper and French, within an increasingly voluntarist system of cooperation, such as the SDG agenda, a normative framework is much more than simply useful; it is essential.<sup>219</sup> This position will be further imperative in the analysis of the linkages between Global Goal 13 and the climate change regime in chapter 5.

### **3.5 Agenda 2030 and the Environment**

References are made throughout the Global Goals document of the importance of environmental protection as it relates to sustainable development. The Agenda envisions a world in which consumption and production patterns and use of natural resources from air to land, from rivers, lakes and aquifers to oceans and seas are sustainable. It further provides that development and application of technology be climate-sensitive, respect biodiversity and are resilient with human living in harmony with nature and wildlife and other living species being protected.<sup>220</sup> Most notably, the agenda states that natural resources depletion and adverse impacts of environmental degradation add to and exacerbate the list of challenges humanity faces. Lastly, it expressly recognises climate change as one of the greatest challenges of our time and its adverse impacts undermining the ability of all countries to achieve sustainable development.<sup>221</sup> The recognition of the importance of environmental protection as a core component of sustainable development is thus evident. Environmental protection does not imply ignorance of the plight of the developing in light of poverty and its importance to human development; however, it cannot be prioritized over the ever-increasing environmental pressures of the Anthropocene.<sup>222</sup> This is reminiscent of the preambular provisions of the importance

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<sup>219</sup>Cooper N & French D 'SDG 17: partnership for the Goals – cooperation within the context of a voluntarist framework' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 303.

<sup>220</sup> SDG Agenda p6.

<sup>221</sup> SDG Agenda p8.

<sup>222</sup> The term 'Anthropocene' was first introduced by Stoermer and Crutzen in 2000. This term is accepted to mean that the Earth has left its natural geological epoch with human activities becoming so profound that they rival the forces of nature with the Earth rapidly moving into a less biologically diverse, less forested, warmer and wetter state. See Steffen W, Crutzen PJ, McNeil J et al (2011) 'The Anthropocene: Conceptual and Historical Perspectives' *Philosophical Transactions of the Royal Society* 369, 843. Also see Gemenne F 'The Refugees of the Anthropocene' in Mayer B & Crépeau F (eds.) 'Research Handbook on Climate Change, Migration and the Law' (2017) 403. Also see Steffen W, Crutzen PJ and McNeil J (2007) 'The Anthropocene: Are Humans Now Overwhelming the Great

of environmental protection contained in the Rio Declaration. This position is such an imperative consideration in light of environmental degradation and the effects of climate change on humanity, most notably the most vulnerable countries. As evident from the preamble of the SDG Agenda, environmental concerns are an important component in the attainment of sustainable development. This raises the question as to how the agenda seeks to address these environmental concerns within its 17 goals.

### **3.6 Environmental SDG cluster**

To reiterate, the environmental SDGs or ‘environmental cluster’ comprise of the sustainable management of water resources,<sup>223</sup> climate change,<sup>224</sup> the conservation and sustainable use of marine resources,<sup>225</sup> and biodiversity.<sup>226</sup> The compartmentalising of respective environmental issues as SDG goals further reinforce the belief that sustainable development can only be attained when each component of environmental protection is emphasised on and addressed. The environmental cluster of SDG goals further reinforces the importance of the pillar of environmental protection as an essential towards the realisation of sustainable development.

The environmental cluster of the SDGs are considered *prima facie* praiseworthy as they include the restoration of water-related ecosystems, halting of biodiversity loss, an end to overfishing, deforestation and desertification and combating climate change which are essential to ecological sustainability. The problem with the SDGs in light of achieving this, is however a contradiction with the underlying objective of sustainable development.<sup>227</sup> This is due to the conceptual thinking that economic and social development under the auspices of sustainable development is equal to environmental protection. Although this is a positive step towards the current and

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Forces of Nature’ *Ambio* 36 at 614. Also see Gemenne F ‘The Refugees of the Anthropocene’ in Mayer B & Crépeau F (eds.) ‘Research Handbook on Climate Change, Migration and the Law’ (2017) 387-388.

<sup>223</sup>SDG 6

<sup>224</sup>SDG 13

<sup>225</sup>SDG 14

<sup>226</sup>SDG 15

<sup>227</sup> Chapter 2 at 2.3.2.



future development of international environmental management, the compartmentalisation thereof could present problems.<sup>228</sup>

Despite this, the amount of emphasis on the protection of the environment by the SDGs can play a significant role in current and future environmental governance.<sup>229</sup> Much like other aspects of the SDGs, the environmental cluster has differing opinions regarding its impact. In an analysis of SDG 6, it was argued that the goal may be a catalyst for the improvement of the development of international water law.<sup>230</sup> General Comment 15<sup>231</sup> corresponds closely to the requirements of equitable access and affordability of the water resource as highlighted in Global Goal 6 as it notes the three common factors of availability, quality and accessibility.<sup>232</sup> In an analysis of the implication of SDG 11 on international law, authors assert that the role of cities in being sustainable has tremendous links to climate change.<sup>233</sup>

Upon evaluation of the environmental SDGs, some of these are vague while others are very specific.<sup>234</sup> For instance, Target 14.5 provides that by 2020 conserve at least 10 per cent of coastal and marine areas consistent with national and international law and based on the best available scientific information and Target 12.3 provides that by 2030 to half per capita global food waste and retail and consumer level and reduce food losses along production and supply chains including post-harvest losses'.<sup>235</sup> The vagueness of certain SDG targets has the potential of providing an opportunity for a more ambitious action taken. The SDGs promote a new conception

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<sup>228</sup>Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 223.

<sup>229</sup>Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 224.

<sup>230</sup>Spijker O (2016) 'The Cross- Fertilisation Between the Sustainable Development Goals and International Water Law *REICL* 25(1) 39.

<sup>231</sup> CESCR 'General Comment No. 15: The Right to Water (Arts 11 and 12 of the Covenant) 20 January 2003 UN Doc E/C. 12/2002/11.

<sup>232</sup> McIntyre O 'International water law and SDG 6: mutually reinforcing paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 179.

<sup>233</sup> Phillip Aust H & du Plessis A 'Good urban governance as a global aspiration on the potential and limits of SDG 11' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 213.

<sup>234</sup> Knox JH (2015) 'Human Rights, Environmental Protection and the Sustainable Development Goals' *Washington International Law Journal* 24 at 517.

<sup>235</sup> UN General Assembly, Transforming our world : the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

of oceans commons governance through encouraging public participation in building effective, accountable and transparent institutions.<sup>236</sup>In an assessment of the impact of SDG 16 in relation to SDG 14, an assertion is made that SDG 16 promotes a new conception of oceans commons governance by aiming to build strong institutions and ensuring public access to information and participation in decision making.<sup>237</sup>It has been further argued that the SDGs as soft law upon an analysis of the relationship between the SDGs and international air quality law.<sup>238</sup>The individual approach to each of these Global Goal and collective action taken towards its attainment has a more ambitious effect on addressing environmental degradation than one overarching goal such as MDG 7. This is due to an individualistic approach towards realisation of environmental protection under the auspices of sustainable development.

As such, in order to fully assess the implication of climate change on the international community, one has to assess the environmental goals individually. This will be conducted in the subsequent chapter. Although the SDG environmental cluster constitute an extensive mandate towards international development efforts over the course of the 2030 Agenda, the developmental focus of the SDGs with disregard towards the protection of planetary boundaries clearly indicate that environmental concerns remains a secondary concern of the international community.<sup>239</sup>The environmental cluster of the SDGs can adequately further the importance of environmental protection in the attainment of sustainable development. As stated throughout the preceding chapters, the common concern of climate change is an imperative requiring global address and the author will contend in chapter 4 that upon analysis, Global Goal 13 has links to the climate change regime and indeed has normative influence.

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<sup>236</sup> Sanchez Castillo-Winckels N 'How the Sustainable Development Goals promote a new conception of ocean commons governance' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 146.

<sup>237</sup> Sanchez Castillo-Winckels N 'How the Sustainable Development Goals promote a new conception of ocean commons governance' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 126.

<sup>238</sup> Lode B, Schonberger P and Toussaint P (2016) 'Clean Air for all by 2030? Air Quality in the 2030 Agenda and International Law' *REICL* 25(1) 27 at 38.

<sup>239</sup> Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 249.

### 3.7 Legal Effect and Contribution of the SDGs on International Law

As stated above, the author is of the position that the SDGs constitute soft law while being linked to law in the continued effort towards the attainment of sustainable development. The legal effect and contribution towards international law is thus too an imperative consideration in the analysis of the SDGs. Although the SDGs are non-binding in nature, it does not mean that they are incapable of influencing international and national law and policy.<sup>240</sup> The SDGs are noted to require a complex mix of policy actions because they cannot be achieved with mere improvements in economic growth and industrialisation.<sup>241</sup>

Various authors provide differing opinions on the impact of the SDGs on international law. Kim, for instance, asserts that the SDGs are grounded in international law and made consistent with existing commitments expressed in various binding international agreements and other soft law instruments.<sup>242</sup> Kotze takes the position that the SDGs set out non-binding objectives and targets; however some of the goals are encapsulated in international binding instruments, requiring global action towards being attained. This could contribute towards the successful implementation of the SDGs in international law.<sup>243</sup> The interplay between the SDGs and existing international instruments reinforces the international law regime. The SDGs represent a novel approach in international policy making and proceed on the basis of political commitment as opposed to binding legal norms.<sup>244</sup> As evident from the MDG successes indicated above,<sup>245</sup> political will coupled with state action and global unity significantly contribute towards the sustainable development agenda and have a far-reaching effect on international law.

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<sup>240</sup>This position is evident through the recent 'Handbook for the preparation of Voluntary National Reviews' released by the HLPF. See [https://sustainabledevelopment.un.org/content/documents/25245Handbook\\_2020\\_EN.pdf](https://sustainabledevelopment.un.org/content/documents/25245Handbook_2020_EN.pdf) (accessed on 02 Feb 2020).

<sup>241</sup>United Nations (2019) 'Report of The Secretary-General on SDG Progress 2019 Special Edition' 32-33.

<sup>242</sup> Kim R (2016) 'The Nexus between International Law and the Sustainable Development Goals' *Review of European, Comparative and International Environmental Law* 25(1) at 15.

<sup>243</sup>Kotze LJ 'The Sustainable Development Goals: an existential critique alongside three new-millennial analytical paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 49.

<sup>244</sup>McIntyre O 'International water law and SDG 6: mutually reinforcing paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 178.

<sup>245</sup> Chapter 2 at 2.4.

A global response plays an important role in the coordination of residual responsibility of the international community and effectively the attainment of sustainable development goals.<sup>246</sup>The SDGs require perform the dual function of providing the basis of global cooperation towards attaining sustainable development while simultaneously requiring such action towards its attainment. In a 2005 World Summit Outcome the General Assembly stated that the United Nations are to play a fundamental role in the promotion of international cooperation in the implementation of development goals and actions collectively agreed upon by the international community.<sup>247</sup>

Much like the above mentioned MDGs, institutions that monitor the attainment of the SDGs were created. One such institution is the High Level Political Forum<sup>248</sup> (HLPF) that was created alongside the SDGs.<sup>249</sup> It is an informal multilateral forum with the mandate of review and follow-up of sustainable development.<sup>250</sup>The SDGs also have national SDG bodies and an active network of actors including cities and private sector actors.<sup>251</sup>The United Nations Development Programme (UNDP)<sup>252</sup> undertakes to analyse the development interventions in their contribution towards the attainment of the SDGs in light of the 2016 Global Sustainable Development Report.<sup>253</sup> In an assessment of SDG 17, an assertion is made that although the SDG 17 places explicit emphasis on global partnership in the achievement of the 2030 Agenda, to regard it as the sole standing recognition of the importance of global partnership would be a fallacy.<sup>254</sup> They regard global partnership as inherent to many other

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<sup>246</sup>United Nations (2019) 'Report of The Secretary-General on SDG Progress 2019 Special Edition' 39.

<sup>247</sup> United Nations General Assembly Resolution 60/1, 2005 para 38. Also see Cooper N & French D 'SDG 17: partnership for the Goals – cooperation within the context of a voluntarist framework' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 273.

<sup>248</sup>See 'High-Level Political Forum' <https://sustainabledevelopment.un.org/hlpf> (accessed 29 July 2019)

<sup>249</sup>*Ibid*,

<sup>250</sup> UNGA Resolution A/RES/67/290, Format and Organisational Aspects of High-Level Political Forum on Sustainable Development (9 July 2013)

<sup>251</sup>United Nations (2019) 'Report of The Secretary-General on SDG Progress 2019 Special Edition' 32-35.

<sup>252</sup>See <http://www.undp.org/> (accessed 01 August 2019)

<sup>253</sup> UN Division for Sustainable Development (eds.) 'Global Sustainable Development Report'(2016:3).

<sup>254</sup>Cooper N & French D 'SDG 17: partnership for the Goals – cooperation within the context of a voluntarist framework' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 279.

SDGs and recognise its broadened development from the MDGs.<sup>255</sup>This is evident throughout the monitoring mechanisms contained within the agenda as well. The utilisation of such monitoring mechanisms contained in the agenda places sustainable development at the forefront of development in international law.

The review process contained in the 2030 Agenda also has the effect of promoting national and international initiatives towards the realisation of sustainable development.<sup>256</sup>Despite the SDGs not being legally binding in the strict sense of the word, they are deeply rooted in international law and call for states to fulfil legally binding obligations in light of the vision encapsulated by the agenda.<sup>257</sup>The SDGs, if properly implemented, have tremendous potential, both internationally and on respective national states. The inclusion of the attainment of socio-economic empowerment through environmentally focused targets and the emphasis placed on the role of a healthy environment as a catalyst of sustainable development. This is supported by the fact that the agenda highlights the importance of environmental targets in the full attainment of these goals, many of which represent fundamental human rights. The agenda provides a simple lesson in the authors' estimation, without furthering the human right to a healthy environment, the attainment of fundamental human rights will be impossible.

The SDGs, being of a soft law nature and being linked to law clearly indicates significance towards the development of the sustainable development agenda and international law. Furthermore, the creation of the institutions monitoring the process of attainment of the SDGs as highlighted above, the SDGs further reinforces this position. The significance on international law can only be measured through the assessment of impact of a respective SDG on the international community.<sup>258</sup> This position will further be elaborated on in the subsequent chapter. The remainder of this chapter will address the shortcomings of the SDGs in order to provide a holistic

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<sup>255</sup>Ibid.

<sup>256</sup>Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 230.

<sup>257</sup>Sanchez Castillo-Winckels N 'How the Sustainable Development Goals promote a new conception of ocean commons governance' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 122-123.

<sup>258</sup>Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 243.

understanding of contentions made against the agenda itself, most notably its relation to the concept of sustainable development itself as well as the monitoring mechanisms contained within the Agenda itself.

### **3.8 Shortcomings of the SDG Agenda**

In order to provide a holistic understanding of the SDGs and authors contentions as to the binding nature and suitability of the Agenda the author will identify the three of the most relevant criticisms of the SDGs namely (a) the inherent flaws contained in the SDGs based on the underlying concept of sustainable development, (b) the anthropocentric nature of the SDGs in light of the ecological crisis and (c) the lack of enforcement in relation to the attainment of the SDGs themselves.

#### **3.8.1 The Continuation of an Outdated Concept – Sustainable Development and the SDGs**

As the title indicates, there is an interlinked relationship between sustainable development and the Global Goals.<sup>259</sup>As stated earlier, sustainable development as the *Leitmotif* of international environmental law is ill-suited as the driver to ensure the longevity of sustained life on Earth due to its economic focus and lack of conceptual development in light of the ecological crisis.<sup>260</sup>In this chapter the author contends that it can be extended to the SDGs as the agenda is premised on the concept of sustainable development. The concept of sustainable development has severe shortcomings in the longevity of sustained life on Earth and further conceptual development is required in order to account for the current ecological needs required.

The SDGs are still premised on the position that development is a viable mechanism to address environmental concerns. An assertion is made that SDGs promote the delusion that capitalism is the solution rather than the cause of the Earth's sustainability, ecological degradation and the accompanying destruction.<sup>261</sup> An argument is made that the SDGs represent the next iteration of a tired development vision tried before, based on the decades old definition contained in the

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<sup>259</sup>Horvath, Z. (2016) 'Transforming Our World New Agenda and Goals for Sustainable Development' *Hungarian Yearbook of International Law and European Law* 167-194 at 168.

<sup>260</sup> Chapter 2 at 2.3.2.

<sup>261</sup>Adelman S 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 17.

Brundtland Commission.<sup>262</sup> On this basis the SDGs aim to do nothing but serve a deeply entrenched anthropocentric agenda.<sup>263</sup> The SDGs attempt to address the inherent weaknesses of sustainable development through providing a more expansive list of environmentally focused goals. These environmentally focused goals are however still limited on the basis of economic development and addressing social inequalities. This is apparent when reading the SDGs as a whole, and more specifically upon analysis of the wording of the respective environmental cluster goals. This attempt does not sufficiently deal with the inherent shortcomings of sustainable development mentioned above.<sup>264</sup> For purposes of this dissertation however, this shortcoming has not invalidated its influence on international law.

### **3.8.2 An Anthropocentric Agenda - The Appropriateness of the SDGs in the Ecological Crisis**

In the run up to the finalisation of the SDGs, Griggs et al proposed that the definition for sustainable development should be redefined to mean development that meets the needs of the present while safeguarding Earth's life-support system, on which the welfare of current and future generations depends.<sup>265</sup> This would have been a more appropriate approach in light of the ecological crisis as oppose to the definition contained in the SDG document that arose from the Brundtland Commission. Much like mentioned prior, sustainable development is criticised for being anthropocentric, the SDGs suffer the same shortcoming.

The SDGs affirm people at the centre of sustainable development<sup>266</sup> and as a result its interpretation can be considered to be of an anthropocentric nature. The appropriateness of this approach has been highly contested it is generally agreed that an ecocentricism approach is viable. Ecocentricism attempts to overcome the anthropocentric approach and sees the intrinsic and moral value in nature. The Earth and universe are viewed as interconnected and interlinked for the survival of all living beings with law being a reflection thereof<sup>267</sup> This model of the interlinked inclusion of

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<sup>262</sup>Ibid at 49.

<sup>263</sup>Ibid at 58.

<sup>264</sup> Chapter 2 at 2.3.2.

<sup>265</sup> Griggs D, Stafford Smith M, Gaffney O et al 'Sustainable Development Goals for People and Planet' *Nature* 495 at 306.

<sup>266</sup>United Nations General Assembly Resolution A/Res/70/1. Transforming our World: The 2030 Agenda for Sustainable Development (September 2015) para 1.

<sup>267</sup>Richardson BJ 'The Emerging Age of Restoration Law (2016) *RECIEL* 25(3) 277-290 at 277.

the environment for its own intrinsic value was highlighted in the preamble of the Rio Declaration.<sup>268</sup> Alternatively to this, a pluralistic approach, encompassing the human focused anthropocentric approach and the ecocentric model and seeking to balance the two in order to ensure the sustainability of all life on Earth, would too be an appropriate avenue in the sustainable development agenda. Although the SDGs further the sustainable development agenda and provide progress towards the same trajectory as the Rio Declaration, it reinforces the belief that the environment is to be protected merely for human need. An assertion is therefore made that the SDGs fail due to the fact that they are too anthropocentric. The SDGs provide an anthropocentric conception of development while failing to address the impact of sustained life of the Anthropocene.<sup>269</sup> Kotze supports this view stating that the SDGs are wholly inappropriate to provide any sustainable future for all living beings on Earth in the Anthropocene.<sup>270</sup> It has been stated that any future developmental paradigms must expressly recognise the Earth System as a prerequisite for sustained life on Earth. Furthermore, the Planetary Boundaries framework is required to be implemented alongside any such agenda.<sup>271</sup>

The SDGs can be considered to represent the best hope for human rights into the future.<sup>272</sup> Despite the SDGs being prima facie praiseworthy, it has inherent contradictions in these goals and objectives. For instance, the SDGs attempt to eradicate poverty in all forms however to do so continuously and sustainably, the Earth system would not be kept intact.<sup>273</sup> This would be in clear contradiction with the environmental cluster and require a balancing of the objectives. This balancing, if

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<sup>268</sup> In Chapter 1 of the Rio Declaration, specifically s1.1, the declaration emphasises the integration of the environment and development concerns and greater concerns as a catalyst of the fulfilment of basic needs, improved living standards as well as better protected and managed ecosystems and a safer, more prosperous future.

<sup>269</sup> Adelman S 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 33.

<sup>270</sup> Kotze LJ 'The Sustainable Development Goals: an existential critique alongside three new-millennial analytical paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 60.

<sup>271</sup> Steffen W, Richardson K, Rockstrom J et al (2015) 'Planetary Boundaries: Guiding Human Development on a Changing Planet' *Science* 347 (6223) at 744.

<sup>272</sup> Collins LM 'Sustainable Development Goals and human rights: challenges and opportunities' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 90.

<sup>273</sup> Kotze LJ 'The Sustainable Development Goals: an existential critique alongside three new-millennial analytical paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 48.



conducted under the balancing occurring within sustainable development as it currently stands would yield a similar result of placing socio-economic needs above environmental concerns. Environmental concerns could be at the back of the line for more economic objectives or merely being emphasised to serve human needs. The need for a more progressive stance on the development of an environmentally focused agenda is not only needed, but in light of the ecological crisis, is essential in order to support continued life on Earth.

### **3.8.3 The Lack of Enforcement in the Attainment of the SDGs**

The SDGs are a statement rather than a binding treaty.<sup>274</sup> This presents a disadvantage in terms of compelling State actors to comply with its objectives however can be advantageous as the inflexibility of law could hinder the attainment of these important goals. This approach is vastly more concrete than its predecessor, the MDGs.<sup>275</sup> The SDGs expressly recognise international monitoring and assessment mechanisms, most notably the UNFCCC, as will be discussed in the subsequent chapter.<sup>276</sup> This along with the abovementioned HLPF provides indicators that the SDGs provide a basis for the sustainable development agenda while simultaneously assisting in the monitoring and assessment of these goals. The significance of this in the continued realisation of all facets of sustainable development is unparalleled.

The SDGs include goal specific means of implementation (MOI)<sup>277</sup> however there is a failure to hold specific actors accountable. This results in a lack of accountability in terms of attaining the SDGs.<sup>278</sup> Although the SDGs set out many important goals, the targets often do not contain concrete and focused language that can effectively

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<sup>274</sup>Pogge T & Sengupta M (2015) 'The Sustainable Development Goals (SDGs) as Drafted: Nice Idea, Poor Execution' 24 Washington International Law Journal 571 at 572.

<sup>275</sup>UN General Assembly, Transforming our world : the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

<sup>276</sup> Global Goal 13 expressly recognises the UNFCCC as an institution in addressing climate change.

<sup>277</sup>Our Common future provides that the means of implementation are a mechanism to encourage global partnership towards the attainment of each of the 17 SDGs. See UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

<sup>278</sup>Pogge T & Sengupta M (2015) 'The Sustainable Development Goals (SDGs) as Drafted: Nice Idea, Poor Execution' 24 Washington International Law Journal 571 at 572.

promote human rights or environmental protection.<sup>279</sup> Despite this the SDG document arguably represents the most cohesive global policy consensus since the adoption of the United Nations Declaration of Human Rights.<sup>280</sup>

Global partnership is an imperative consideration towards the realisation of the SDGs. This has been attempted in various concepts contained in the sustainable development agenda stemming from the Stockholm Declaration.<sup>281</sup> On this basis global partnership is an imperative towards the realisation of all facets of sustainable development.<sup>282</sup> Although SDG 17 is an important consideration for the achievement of the SDGs, it seemingly fails to reflect the complexity and richness of the objectives contained in the other 16 Global Goals.<sup>283</sup> Global partnership as a self standing SDG is a step in the right direction, mechanisms for the monitoring and assessment of progress made towards the realisation of the SDGs are too praiseworthy, however with the lack of enforcement holding states accountable towards the achievement of SDGs, the successes of this agenda might be hindered. This position can however become binding on states through the adoption of laws and regulations taking into account the specific targets of the SDGs as its objectives and purpose. The subsequent chapter will discuss this position further; however as the present it is sufficient to state that the SDGs enhance sustainable development to the point that it may becoming more binding in nature and enforcing with political cooperation and will in doing so.

The SDG agenda call for a framework that is robust, voluntary, effective, participatory; transparent an integrated in order to assist countries on maximizing and tracking progress in the implementation of the Agenda and ensure nobody is left behind.<sup>284</sup> The agenda provides that the goals can be met within the framework of a revitalized Global Partnership for Sustainable Development, supported by the

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<sup>279</sup> Knox JH (2015) 'Human Rights, Environmental Protection, and the Sustainable Development Goals' 24 *Washington International Law Journal* 518.

<sup>280</sup> Collins LM 'Sustainable Development Goals and human rights: challenges and opportunities' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 81.

<sup>281</sup> See Chapter 2 Stockholm Declaration.

<sup>282</sup> SDG 17.

<sup>283</sup> Cooper N & French D 'SDG 17: partnership for the Goals – cooperation within the context of a voluntarist framework' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 283.

<sup>284</sup> SDG Agenda para 72.

policies and actions indicated in the Addis Ababa Action Agenda<sup>285,286</sup>It further refers to implementation of strategies and programmes of action with the express inclusion of inter alia the Vienna Programme of Action for Landlocked Developing Countries for the Decade 2014-2024,<sup>287</sup>Programme of Action<sup>288</sup>as well as the African Union's Agenda 2063 <sup>289</sup> and the programme of the New Partnership for Africa's Development.<sup>290</sup>The Agenda further provides that all countries, public policies and mobilization and effective use of domestic resources are central to our common pursuit of sustainable development and the attainment of the SDGs.<sup>291</sup>

Orellana asserts that the HLPF...can play an important role with regard to global accountability for the attainment of the SDGs. This occurs on a global, regional and sub-national level.<sup>292</sup>The follow up and review mechanism contained in the agenda is guided on various principles. One of these principles is that each country will track its progress of the implementation of the goals and targets under the auspices of sustainable development.Furthermore, these countries will maintain a long-term orientation with the identification of achievements, challenges and gaps in the attainment of the SDGs. The universal nature of the agenda requires the efforts of supporting countries and encourages a global partnership towardsthe attainment of these imperative goals. The author asserts that the monitoring of the implementation of these goals is an indicator of its influence on respective nations law and policy as well as international law.

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<sup>285</sup>United Nations General Assembly Resolution A/Res/69/313. Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)

<sup>286</sup> SDG Agenda para 40.

<sup>287</sup>Vienna Programme of Action for Landlocked Developing Countries for the Decade 2014-2024 A/CONF.225/111 Adoption of the final outcomes of the Conference available at <https://digitalibrary.un.org/record/783720?ln=en> (accessed 19 February 2020).

<sup>288</sup> UN General Assembly 'Vienna Declaration and Programme of Action' 12 July 1993 A/CONF.157/23

<sup>289</sup>Agenda 2063: The Africa we want. A shared strategic framework for inclusive growth and sustainable development. First ten-year implementation plan 2014-2023. Available from [www.un.org/en/africara/osaa/pdf/au/agenda2063-first10yearimplementation.pdf](http://www.un.org/en/africara/osaa/pdf/au/agenda2063-first10yearimplementation.pdf). (accessed on 09 February 2020)

<sup>290</sup> New Partnership for Africa's Development (NEPAD) AHG/235 (XVIII) available at <https://www.un.org/en/africa/oosa/pdf/aprm-declaration.pdf> accessed 19 February 2020. Also see SDG Agenda para 42.

<sup>291</sup> SDG Agenda para 21.

<sup>292</sup> Orellana M (2016) 'Governance and the Sustainable Development Goals: The Increasing Relevance of Access Rights in Principle 10 of the Rio Declaration' 25 *RECIEL* 50 at 50.

Due to the non binding nature of the SDGs, it provides an opportunity for the adoption of a more ambitious action towards the realisation of sustainable development. This position is premised on the fact that through monitoring and assessment mechanisms as well as subsequent binding agreements on states, an SDG can indeed become binding in nature. The 2030 Agenda contains lofty ambitions and stirring rhetoric, but lack enforcement mechanisms.<sup>293</sup> It is noteworthy that much like sustainable development, an anthropocentric nature does not preclude it from finding influence in law. The monitoring mechanisms, the international instruments in place towards the attainment of the SDGs as well as the voluntary action of States the SDGs have sufficient weight behind it in order to drive the sustainable development agenda forward. On this basis the author asserts that the SDGs do indeed have normative influence on international law.

### **3.9 Conclusion**

Sustainable development seems ill-suited to provide a clear position in instances of a trade-off between economic gain and environmental protection.<sup>294</sup> Through the SDG agenda an anthropocentric sustainable development approach is merely continued with environmental protection only being an obligation as far as it is for human development, needs and survival. The agenda furthers the environmental pillar of the sustainable development agenda through the compartmentalisation of environmental protection through individual SDGs as imperative towards attaining the concept. The SDGs are considered to be of a soft law nature that mirrors international law. Furthermore, the normative effect of the agenda is that it represents the next milestone towards the attainment of sustainable development. Although sustainable development is flawed and requires development, it is recognised as imperative within law. The SDGs have significance in the larger global law, politics and governance scheme. With the advent of binding agreements and monitoring and assessment mechanisms such as the HLPF as well as the follow up and review approach contained in the agenda, SDGs have the capacity to further the enforcement of the sustainable development agenda. The Working Group has

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<sup>293</sup>Adelman S 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 34.

<sup>294</sup>Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 242.

emphasised the need for a firm shift in the sustainable development paradigm. The abovementioned legal considerations and relationship to sustainable development further highlight the SDGs having normative impact on global environmental governance. The express recognition of global partnership in relation to achievement of the SDGs further support the view that not only are the SDGs linked to law, but influence international law making and policy. This is done despite the lack of binding mechanisms and the voluntary review process contained in the SDGs itself and non binding nature of the document.

## **Chapter 4 – SDGs, Climate Change and International Environmental Law**

### **4.1 Introduction**

Climate change has been determined to be a common concern of mankind which requires global effort to mitigate the effects thereof.<sup>295</sup> The IPCC recognised the link between sustainable development and climate change, noting that climate change poses an increasing threat to equitable and sustainable development. It urged that climate policy be aligned with sustainable development and requires attention to adaptation and mitigation as well as strategies and action to be pursued towards climate-resilient pathways to sustainable development.<sup>296</sup> This chapter will be premised on SDG 13 and its impact on international law, i.e. whether the targets set by this Global Goal has influence on the climate change regime in the international context.

This chapter moves from the position that Global Goal 13 can bolster the implementation of key concepts of the climate change regime. These include common but differentiated responsibility (CBDR), mitigation and adaptation measures. As such, it provides normative influence in the form of furthering the climate change regime. Global Goal 13 therefore has contribution in the climate change regime and international law.

### **4.2 UNFCCC**

Climate law has been described as the protection of people and planet against global warming by seeking and enforcing ways to reduce greenhouse gas (GHG) emissions.<sup>297</sup> The first international instrument in the climate change regime is the UNFCCC. As stated above, the UNFCCC is one of five principal instruments adopted as a result of the Rio Conference.<sup>298</sup> This convention was premised on addressing climate change and signatory states were bound with the ultimate objective of the stabilization of GHG concentrations in the atmosphere at a level that

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<sup>295</sup> Preamble of the UNFCCC..

<sup>296</sup> Intergovernmental Panel on Climate Change Synthesis Report (2014:90)

<sup>297</sup> See generally Reynolds J 'Climate Engineering and International Law' and Ghaleigh NS 'Carbon Capture and Storage as a bridging technology' in Farber DA and Peeters M (eds.) 'Climate Change Law' (2016). Also see Farber DA and Peeters M 'The emergence of global climate law' in Farber DA and Peeters M (eds.) 'Climate Change Law' (2016) 688.

<sup>298</sup> Carter S and Barnard M 'Demystifying the Global Climate Change Regime' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 3-2.

would prevent dangerous anthropogenic interference with the climate system.<sup>299</sup> The preamble reaffirmed the change in the Earth's climate and its adverse effects are a common concern of humankind while recognising that the large share of historical and current GHG emissions are due to the developed states. This position would lead to the development of emission contributions and targets in the climate change regime, as will be discussed momentarily. It further noted that addressing climate change would require global action and all countries would be requiring action in light of their common but differentiated responsibilities and respective capabilities (CBDRRC). The introduction of this concept would become imperative in relation to the overall development of the climate change regime.

The UNFCCC provided what would become the catalyst for furthering the climate change regime as an authority that bound states towards addressing climate change.<sup>300</sup> The convention is premised on the protection of the climate system for the benefit of present and future generations of humankind in light of the CBDRRC principle while placing specific emphasis on the special needs and circumstances of developing countries being given consideration. The concepts of inter and intra generational equity are akin to the attainment of sustainable development. These are included in the abovementioned objective of the UNFCCC. The UNFCCC further notes the different historical responsibilities for causing climate change as well as their different capabilities to address it.<sup>301</sup>

The UNFCCC specifically provides, in article 3(1), that parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity, in accordance with their common but differentiated responsibilities and respective capabilities.<sup>302</sup> It further provides that developed country parties should take the lead in combating climate change and the adverse effects thereof.<sup>303</sup> The UNFCCC differentiates between developed and developing countries because of the historical contribution of developed countries to climate

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<sup>299</sup> Article 2 of the UNFCCC

<sup>300</sup> Article 3 of the UNFCCC.

<sup>301</sup> Bodansky D. "The Paris Climate Change Agreement: A New Hope?" 110 (2016): 288 at 298.

<sup>302</sup> Article 3(1) of the UNFCCC.

<sup>303</sup> Article 3(1) of the UNFCCC. Also see Wang X et al 'Research and scholarship on climate change law in developing countries' in Farber DA and Peeters M (eds) 'Climate Change Law' (2016) 119.

change and greater capacity to implement strong mitigation policies.<sup>304</sup> Although the developed-developing dichotomy has been replaced by a more dynamic approach, Article 3(1) of the UNFCCC still finds relevance and is considered an imperative provision in the climate change regime. The UNFCCC provides mechanisms for the proper implementation and compliance of the ambitions contained in the convention. These include a burden sharing mechanism in which developing countries are depended on assistance of developed countries in order to effectively implement commitments under the auspices of the UNFCCC.<sup>305</sup> It is an example of the recognition of climate change as a global dilemma and the need for a global solution.<sup>306</sup>

One of the most notable contributions of the UNFCCC was the establishment of COP decisions in relation to continued action in addressing climate change.<sup>307</sup> The Kyoto Protocol, adopted in conjunction with the Rio Declaration, was one of the first of such decisions. The Kyoto Protocol provides a legally binding quantified emission limitation and reduction commitments for developed country parties based on a reduction target.<sup>308</sup> A central obligation placed on these developed states is the requirement to meet existing commitments under the conventions in order to meet sustainable development, taking into account developed country obligations to provide assistance in the form of finance, technology transfer and capacity building<sup>309</sup> This targets and movement of action towards emission reductions in an effort to the realisation of sustainable development has stood throughout subsequent COP decisions.<sup>310</sup>

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<sup>304</sup>Dubois SM. "The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?" 25 (2016) *RECIEL*: 151 at 151.

<sup>305</sup> See article 4 of the UNFCCC. Also see Stoll P 'The Climate as a global concern' in Farber DA and Peeters M 'Climate Change Law' (2016) 136.

<sup>306</sup> Carter S and Barnard M 'Demystifying the Global Climate Change Regime' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 3-21.

<sup>307</sup> See [http://unfccc.int/essential\\_background/convention\\_bodies/items/2629.php](http://unfccc.int/essential_background/convention_bodies/items/2629.php) accessed (05 March 2020), It is noteworthy to mention that the COP has two subsidiary bodies that undertake technical discussions namely the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Tehnological Advice (SBSTA). This holds true to the linkages between the science behind climate change and international climate law.

<sup>308</sup>Wewerinke-Singh M (2019:50)

<sup>309</sup>Article 3(1) of the Kyoto Protocol.

<sup>310</sup> Various COP decisions were reached between the Kyoto Protocol of 1994 and the most recent COP held in Paris in 2012 inter alia UNFCCC Decision 2/CP.15, Copenhagen Accords (UN Doc.



### 4.3 Paris Agreement

Until this point, the onus of addressing climate change was focused on developed states to take substantial steps in the efforts in addressing climate change. This position shifted upon the most recent COP decisions, the Paris Agreement. It was adopted on the 12<sup>th</sup> December 2015 at a Conference of the Parties (COP21) to the UNFCCC.<sup>311</sup> The Paris Agreement on Climate Change is regarded as an inclusive and ambitious international agreement to combat climate change with a fine balance between the requirements of differentiation and ambition.<sup>312</sup> It marked a decisive step forward in the gradual blurring of country categories and better takes into account diverse national circumstances, capabilities and vulnerabilities.<sup>313</sup> In its mandate, the Paris agreement has key objectives that address climate change in mitigation, adaptation, financing as well as loss and damage. The main aims of climate change as contained in the Paris Agreement are contained in articles 2 and 4.1.<sup>314</sup> Both these articles highlight the long term mitigation objective of holding the increase in global average temperature to well below 2 degrees Celsius above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5 degree Celsius above pre-industrial levels.<sup>315</sup>

The Paris Agreement is stated to provide the first ever consensus on the need for comprehensive global action as oppose to the developing/ developed dichotomy utilised in the Kyoto Protocol.<sup>316</sup> It further notes the desire to increase the ability to

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FCCC/CP/2009/11/Add.1.30 March 2010) and UNFCCC, Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (UN Doc. FCCC/CP2010/7/Add.1, 15 March 2011). Various other climate change documents were too adopted, most notably the Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Decision 1/CP.17 (Dec 11, 2011) in COP Report No.17, Addendum, at 2, UN Doc. FCCC/CP/2011/9/Add.1 (March 15, 2012) and Bali Action Plan. Also see Bodansky D. "The Paris Climate Change Agreement: A New Hope?" 110 (2016) and Dubois SM. "The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?" 25 (2016) *RECIEL*: 151.

<sup>311</sup>Conference of the Parties, *Adoption of the Paris Agreement*, U.N Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015).

<sup>312</sup>Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 at 162.

<sup>313</sup>Dubois SM. "The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?" 25 (2016) *RECIEL*: 151 at 151.

<sup>314</sup>Bodansky D., "The Paris Climate Change Agreement: A New Hope?" 110 (2016): 288 at 302.

<sup>315</sup> Article 2.1(a) of the Paris Agreement.

<sup>316</sup> Farber DA and Peeters M 'The emergence of Global climate law' in Farber DA and Peeters M (eds.) 'Climate Change Law' (2016) 696.

adapt to the adverse impacts of climate change while fostering climate resilience and low greenhouse gas emissions development.<sup>317</sup> Most notably, the Paris Agreement states that the agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances.<sup>318</sup>

The inclusion of the words '*in light of different national circumstances*' provide an increase of the range of factors, serving as a basis for determining differentiation between states. It provides a flexible and evolutionary interpretation of the CDRRC principle.<sup>319</sup> This approach is contained throughout the entire content of the agreement and various references are made to this approach. The Paris Agreement is stated to seemingly abandon the developed-developing bifurcation with most commitments in the agreement applying to all parties.<sup>320</sup> The Paris Agreement further addresses mitigation through the establishment of National Determined Contributions (NDC) contained in article 3 and 4. It provides that in order to achieve the aims highlighted in article 2 each party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. In doing so, they shall pursue their own domestic measures with the aim of achieving such contributions.<sup>321</sup> Furthermore, it places an obligation on developed country parties to take the lead by undertaking economy wide absolute emission reduction targets while developing countries should continue to enhance their mitigation efforts and progressively move towards economy wide emission reductions.<sup>322</sup> This holds true to the CDRRC principle while broadening it '*in light of different national circumstances*.' The approach taken in the Paris Agreement covers far more than countries than the Kyoto Protocol.<sup>323</sup>

It further reaffirms global cooperation by providing that the COP will periodically take stock of the implementation of the NDCs submitted by the states with the purpose of

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<sup>317</sup> Article 2.1(b) of the Paris Agreement.

<sup>318</sup> Article 2.2 of the Paris Agreement.

<sup>319</sup> Dubois SM. "The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?" 25 (2016) *RECIEL*: 151 at 153.

<sup>320</sup> Bodansky D., "The Paris Climate Change Agreement: A New Hope?" 110 (2016): 288 at 317.

<sup>321</sup> Article 4 of the Paris Agreement.

<sup>322</sup> Article 4.4 of the Paris Agreement.

<sup>323</sup> Dubois SM. "The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?" 25 (2016) *RECIEL*: 151 at 155.

achieving the long term goals in what it refers to as a global stock take.<sup>324</sup> The first stock take will be conducted in 2023 and has the objective of informing the parties of enhancing their actions and support in the achievement of the mitigations aims contained in article 2.<sup>325</sup>

The most notable contribution made by the Paris Agreement in relation to addressing climate change is in the area of adaptation. Mitigation is a collective action problem requiring international cooperation but adaptation provides primarily local benefits which would encourage countries to have incentive to adapt.<sup>326</sup> The Agreement provides that parties are to establish the global goal of adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change.<sup>327</sup> Furthermore, it provides expressly for the sharing of information, good practices and experiences learned including science, planning, policies and implementation measures.<sup>328</sup>

The agreement provides that parties should submit and update periodically adaptation communication which may include its priorities, implementation and support needs without creating any additional burden for developing countries.<sup>329</sup>. This read together with article 9.4 provides that scaled-up financial resources should aim to achieve a balance between adaptation and mitigation taking into account country-driven strategies and the priorities and needs of developing countries. The emphasis placed on the continued sustainability of the developing countries and those vulnerable to the adverse effects of climate change contained throughout this provision is linked to the CBDRRC principle. Furthermore it is in line with the article 3(1) of the UNFCCC and imperative in the realm of addressing climate change. This aspect further highlights the notion of global partnership between the developed and developing in addressing the concern of climate change.

Lastly, the aspect of loss and damages finds relevance in an analysis of the Paris Agreement and its link to the climate change regime. Developed states have generally resisted efforts to address loss and damage with the fear that it could

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<sup>324</sup> Article 14 of the Paris Agreement.

<sup>325</sup> Ibid.

<sup>326</sup> Bodansky D., "The Paris Climate Change Agreement: A New Hope?" 110 (2016): 288 at 308.

<sup>327</sup> Article 7.1 of the Paris Agreement.

<sup>328</sup> Article 7.7 (a) of the Paris Agreement.

<sup>329</sup> Article 7.10 of the Paris Agreement.

eventually lead to claims for liability and compensation.<sup>330</sup> This fear has however not prevented loss and damages being included in the Paris Agreement. It provides that parties recognise the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change.<sup>331</sup> This position is significant for two reasons. First, it brings the issue of loss and damages within the scope of the Paris Agreement while separating it from adaptation and creating a first step towards liability and compensation being claimable by developing and vulnerable countries.<sup>332</sup> This is however not a strong provision as the provision makes reference many mitigation measures such as early warning systems, emergency preparedness and slow onset events. Despite this, these measures require cooperation and facilitation in order to enhance understanding, action and support the appropriate approach to a global effort in addressing climate change.<sup>333</sup> This mechanism requires developed countries to take the lead in addressing this issue and providing the required support to their developing and vulnerable counterparts, in essence taking them as a global partner towards addressing any retrospective adverse effects of climate change. In doing so, loss and damages places the CBDRRC principle at the core in its approach to dealing with loss and damage and provides a global responsibility in addressing climate change. The CBDRRC principle provides an approach that is inclusive of the individual circumstances of each country in relation to addressing climate change and the aspect of loss and damages further places an onus of responsibility on developed states to assist in furthering the contribution made by developing states. This approach to loss and damages further entrenches global partnership in the realm of addressing climate change.

The Paris Agreement is a more pragmatic undertaking that provides for a unified and inclusive approach bringing both the North and South to the table while taking into account the respective capabilities in light of national circumstances of each state. The instrumental approach taken by the Paris Agreement with the inclusion of goals, the NDCs, transparency standards and oversight mechanisms along with the review of climate change related measures serves to contribute to an efficient climate

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<sup>330</sup>Bodansky D., "The Paris Climate Change Agreement: A New Hope?" 110 (2016): 288 at 309.

<sup>331</sup> Article 8.1 of the Paris Agreement.

<sup>332</sup>Bodansky D., "The Paris Climate Change Agreement: A New Hope?" 110 (2016): 288 at 309.

<sup>333</sup> Article 8 of the Paris Agreement.

change regime under the auspices of sustainable development.<sup>334</sup> Its mitigation, adaptation as well as loss and damage approach provides a unified front providing that the developed should take the lead in addressing the climate emergency while bringing developing to the table in a dynamic approach. The Paris Agreement is a progressive development of the CBDRRC principle and represents a good balance between ambition, differentiation and support.<sup>335</sup> The Paris Agreement lacks individual country commitments and compliance mechanism and acts on a voluntary basis.<sup>336</sup> The author asserts that this voluntary approach does not adequately address the urgency of addressing climate change, however does provide a substantive leap forward in dealing with this global concern.

#### **4.4 SDG 13 – Climate Change**

SDG 13 states that urgent action is required to combat climate change as well as its impacts.<sup>337</sup> It includes strengthening resilience and adaptive capacity to climate related hazards and natural disasters,<sup>338</sup> the integration of climate change measures into national policy adoption, strategies and planning,<sup>339</sup> the inclusion of climate education,<sup>340</sup> awareness raising and human and institutional capacity on climate change mitigation, adaptation and impact reduction.<sup>341</sup> Most notably, Global Goal 13 provides for the promotion of mechanisms for raising capacity for effective climate change related planning and management, specifically for vulnerable countries, i.e. least developed countries and small island developing states in accordance with the provisions of the UNFCCC.<sup>342</sup> It is noteworthy to mention the wording of the Global Goal itself. It prescribes various obligatory verbs encompassing mitigation and adaptation of the climate emergency, calling for the adoption of national policy, planning measures and the utilisation of technology in relation to capacity building for

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<sup>334</sup> Wegener L (2020) 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' available at <https://www.cambridge.org/core/terms>. <https://doi.org/10.1017/52047102519000396> accessed (02 March 2020).

<sup>335</sup> Ibid at 159.

<sup>336</sup> Farber DA and Peeters M 'The emergence of global climate law' in 'Farber DA and Peeters M 'Climate Change Law' (2016) 699.

<sup>337</sup> Global Goal 13.

<sup>338</sup> Target 13.1.

<sup>339</sup> Target 13.2.

<sup>340</sup> Target 13.b.

<sup>341</sup> Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 at 167.

<sup>342</sup> Target 13.b.

developing States. This creates a more binding nature to aspects of mitigation, adaptation and the use of measures to bolster capacity building. Furthermore, the wording of the abovementioned targets is indicative of a global partnership in respect of taking climate action. This read together with the self standing SDG of global partnership highlighted in chapter 3 provides a unifying effect in the attainment of Global Goal 13.

#### **4.5 The Link between Global Goal 13 and the Climate Change regime**

The Agenda expressly recognises the UNFCCC as the primary international, intergovernmental forum for negotiating the global response to climate change.<sup>343</sup> This read together with the mobilization required to implement the Agenda through Global Partnership based in a spirit of strengthened global solidarity. The objectives of the UNFCCC act as a mechanism towards the realisation of Global Goal 13 and share similarities. The link between Global Goal 13 and the Paris Agreement goes beyond the objective of keeping the global temperature below 1.5 degrees Celsius pre-industrial level.

The abovementioned Article 3(1) of the UNFCCC, which makes reference to the need to address climate change for present and future generations, is similar to the objectives in Global Goal 13, most notably the target of awareness raising and human and institutional capacity on climate change mitigation, adaptation and impact reduction and climate education. In effect, the objective contained in Global Goal 13 can serve to bolster the obligations placed on states under the auspices of the Paris Agreement due to the recognition of the same objective, or vice versa. The SDGs are similar to the later adopted Paris Agreement as it adopts what Long refers to as a 'global-yet-voluntary, universal-yet-national compromise.'<sup>344</sup> This is evident through Voluntary National Review mechanism employed in the monitoring of the implementation of the SDGs. The Paris Agreement are essential to creating the best chance of achieving the SDGs by 2030 while specific objectives of Global Goal 13 further enhance concepts and obligations in the Paris Agreement. The most notable

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<sup>343</sup> In its footnote, Global Goal 13 makes expressly acknowledges the UNFCCC as the primary international intergovernmental forum for negotiating the global response to climate change.

<sup>344</sup> Long G ' Underpinning commitments of the Sustainable Development Goals: Indivisibility, universality, leaving no one behind' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 94. Also see Andresen S (2015) 'International Climate Negotiations: Top-down, Bottom-up or a Combination of Both?' *International Spectator* 50(1) 15-30.

of the enhancements made is the emphasis placed on global solidarity in relation to achieving Global Goal 13 strengthening the CBDRRC principle, as envisioned by the abovementioned provisions discussed in the Paris Agreement. Furthermore, It could potentially have significant impact on the state of economy and well being in the most vulnerable countries such as Africa, Asia, Latin America and other Small Island States.<sup>345</sup>In the recent Global Conference on Strengthening Synergies between the Paris Agreement and the 2030 Agenda in Copenhagen<sup>346</sup> it was stated that the exploitation of synergies and co-benefits while taking collaborative and coordinated efforts to achieve both the SDGs and implementation of the Paris Agreement is critical. It further recorded that there has been advances in the implementation of the SDGs.<sup>347</sup>This provides an indication of the normative influence a Global Goal can have on a regime such as climate change.

The intertwined nature of Global Goal 13 and the climate change regime in relation to objectives, mitigation, adaptation and the CBDRRC principle are however overshadowed by the urgency of this issue. The Copenhagen Conference noted that to reach the 2030 goals progress needs to realize more quickly and more evenly across countries and regions. It also noted that only through coordinated, inclusive and synergistic efforts across all levels and sectors and throughout the UN system to address both climate change and the SDGs will make a difference.<sup>348</sup>More urgent steps are required in the realm of climate change, with more drastic and enforceable mechanisms being required. The global partnership established between the developed and developing in relation to taking action against climate change are visible and emphasised as essential in the achievement of both Global Goal and upholding of the provisions of the Paris Agreement.

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<sup>345</sup>Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 at 196

<sup>346</sup> 'Global Conference on Strengthening Synergies between the Paris Agreement and The 2030 Agenda for Sustainable Development: Maximizing Co-Benefits by Linking Implementation across SDGs and Climate Action' *UN City Copenhagen 1-3 April 2019 Outcome Summary*.

<sup>347</sup> 'Global Conference on Strengthening Synergies between the Paris Agreement and The 2030 Agenda for Sustainable Development: Maximizing Co-Benefits by Linking Implementation across SDGs and Climate Action' *UN City Copenhagen 1-3 April 2019 Outcome Summary* p1

<sup>348</sup> 'Global Conference on Strengthening Synergies between the Paris Agreement and The 2030 Agenda for Sustainable Development: Maximizing Co-Benefits by Linking Implementation across SDGs and Climate Action' *UN City Copenhagen 1-3 April 2019 Outcome Summary* p1.

## 4.6 Conclusion

The concept of sustainable development is imperative to international environmental law, as discussed in the previous chapter; however a tremendous shortcoming lies in the fact that it is rarely conducive to global environmental protection due to a lack of specific amounts indicating the balance between environmental protection and development.<sup>349</sup>As it relates to a climate-resilient pathway envisioned by the IPCC, substantial steps have been taken, most notably the UNFCCC and its subsequent COP decisions. The Paris Agreement is the most recent development to the current position in addressing climate change. This is due to the expansion of the CBDR principle to include the words 'in light of different national circumstances'. The aspects of adaptation, mitigation and loss and damages contained throughout the Paris Agreement emphasises global partnership as an essential component towards addressing climate change. Global Goal 13 provides, in its wording, a more obligatory approach towards mitigation, adaptation and information sharing in an effort to address climate change. It calls for national responsibility in the form of capacity building, the implementation of national measures to address aspects of adaptation and mitigation and the creation of awareness across all levels. Furthermore, it provides for technological and information sharing as a form of assistance to the most vulnerable states to the effects of climate change. Linkages are therefore apparent between the climate change regime, characterised by the CBDRRC principle and global partnership, and Global Goal 13. The author asserts that Global Goal 13 has the normative effective of furthering the CBDRRC principle as well as global solidarity in relation to climate change.

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<sup>349</sup>Scholtz W and Barnard M 'The environment and the Sustainable Development Goals: "We are on a road to nowhere"' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 242.



## **Chapter 5 – South Africa, Climate Change and Sustainable Development**

### **5.1 Introduction**

The cumulative effects of climate change are already being felt in Africa.<sup>350</sup> The threat of climate change significantly impacts the concept of sustainable development in South Africa with policy papers and legislation being adopted in relation to addressing climate change. The normative framework on climate change in South Africa reflects an attempt to balance the social and economic needs with its obligations under the auspices of the international climate change regime. This chapter assesses the concept of sustainable development in the South African context. This will thereafter be followed by an analysis of South Africa's position on addressing climate change. This will be done with an analysis of legislative and other measures highlighted and considered. In doing so, the normative impact of the SDGs, specifically Global Goal 13 will be highlighted in relation to these policy papers and legislative measures. This chapter moves from the position that South Africa could be normatively influenced by Global Goal 13. This is done through the recognition of the actions taken by the state in aligning itself with the CBD/RRCA principle and global partnership in relation to climate change. In order to prove this position consideration will be placed on the efforts by the state to achieve Global Goal 13 through legislation and policy papers, most notably the Climate Change Bill of 2018, in addition to the voluntary obligations taken by the State in relation to addressing climate change and its impact.

### **5.2 An Analysis on Sustainable Development in South Africa**

Sustainable development, as highlighted above, comprised of three pillars: economic growth, social necessity and environmental protection.<sup>351</sup> These three pillars are expressly provided for in section 24 of the Constitution with sustainable development being expressly identified. Section 24 provides for the environmental right. It states that 'everyone has the right to an environment that is not harmful to their health and well-being<sup>352</sup> and the environment is to be protected for the benefit of present and future generations.<sup>353</sup> Furthermore, section 24 provides that the State has the obligation to enact reasonable legislative and other measures that prevent pollution

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<sup>350</sup>Intergovernmental Panel on Climate Change Synthesis Report (2014:90)

<sup>351</sup>Chapter 2 at 2.2.

<sup>352</sup> Section 24(a).

<sup>353</sup> Section 24(b).

and ecological degradation<sup>354</sup>; promote conservation<sup>355</sup> and secure ecological sustainable development and the use of natural resources while promoting justifiable economic and social development.<sup>356</sup>In essence section 24 provide for the concepts of intra- and inter- generational equity<sup>357</sup> and lastly highlights the notion of sustainable development through reasonable legislative and other measures.<sup>358</sup> It is important to note is that in the interpretation of section 24, economic and social development is regarded as essential to the well-being of human beings with environmental concerns being included as well.<sup>359</sup> The environmental right takes cognisance of the sustainable utilisation of the environment in a morally and ethically responsible manner, free from exploitation in light of economic and social development.<sup>360</sup> The formulation of section 24 was stated to be of an anthropocentric nature in order to meet the urgent need for development within the South African context. That interest of the environment will be balanced with socio-economic interest using concept of sustainable development.<sup>361</sup> This position is an imperative consideration in understanding the South African approach to addressing climate change, as will be discussed shortly.

This position was confirmed by the courts in *Fuel Retailers*<sup>362</sup> in which it was held that environmental considerations will be balanced with socio-economic considerations through sustainable development.<sup>363</sup> Environmental degradation, including climate change, constitutes an infringement of various human rights, including the right to life<sup>364</sup> and dignity.<sup>365</sup> In addition, the affects of the global climate

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<sup>354</sup> Section 24(b)(i).

<sup>355</sup> Section 24(b)(ii).

<sup>356</sup> Section 24b)(iii).

<sup>357</sup> Ibid.

<sup>358</sup> Section 24 (b). See Scholtz W *The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa*.

<sup>359</sup>Verschuuren J *Sustainable Development and the Nature of Environmental Legal Principles* (2006) 1 PER 8

<sup>360</sup>HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2006 (5) SA 512(T) para 18.

<sup>361</sup>Scholtz W *The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa* 74.

<sup>362</sup>Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC).

<sup>363</sup>Ibid at para 45.

<sup>364</sup> Section 11 of the Constitution.

<sup>365</sup> Section 10 of the Constitution.

causes, as noted above, causes tremendous harm to human beings healthcare, medical and food security.<sup>366</sup>This constitutional provision thus empowers the right to a healthy and conducive environment for all while taking measures to ensure the longevity of sustained life for present and future generations.

Section 24 provides that legislation is required to be enacted in order to realise the environmental right. The National Environmental Management Act 107 of 1998 (NEMA) is the main legislation regarding the environment and environmental protection.<sup>367</sup> NEMA provides a definition of sustainable development as 'the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.'<sup>368</sup>NEMA provides an encapsulation of sustainable development and obligates organs of state to take into account the environmental impact, social necessity and economic development. Sustainable development under the auspices of NEMA is supported by various principles; most notably polluter pays and risk aversion approach to polluting activities. This coupled with the Environmental Impact Assessment provides support to the efforts of the State towards attaining sustainable development.<sup>369</sup>It is thus prevalent to note that the attainment of sustainable development is considered to be central to South Africa's environmental legislation and policy.<sup>370</sup> This is further relevant in relation to the States effort towards meeting its socio-economic needs with environmental protection required of it in a manner consistent with its common but differentiated responsibility towards the global environment.

### **5.3 South Africa and the International Climate Change Regime**

South Africa has played a leading role in the global climate change action as a member of BASIC,<sup>371</sup> the African Group of Climate Change Negotiators<sup>372</sup> as well as

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<sup>366</sup>Motloun TW *Human Rights and International Environmental Law: Towards the Development of an International Environmental Law* (published LLM Thesis, UWC, 2018) 13.

<sup>367</sup> Preamble of NEMA.

<sup>368</sup> Section 2 (o) of NEMA.

<sup>369</sup> Section 24 of NEMA provides for environmental authorisation taking into account the potential consequences for or impacts on the environment of listed activities or specified activities to be considered, investigated, assessed and reported and subsequently approved.

<sup>370</sup>Kotze L et al 'Climate Change Law and Governance – Setting the Scene' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 1-19.

<sup>371</sup> Kidd M describes BASIC as a grouping consisting of Brazil, South Africa, India and China. The group was established in 2009 before the Copenhagen COP (COP 15). See Kidd M 'South Africa,

the G77.<sup>373</sup>As such, South Africa is regarded as an important member of the developing world in the international climate change regime.<sup>374</sup>Despite this South Africa have significant carbon footprint rivalling that of developed states. This is largely due to a reliance on the use of minerals in the generation of energy, most notably coal.<sup>375</sup> South Africa remains committed to making a fair contribution towards addressing GHG emissions however this is done subject to its developmental objectives in light of poverty elimination and the eradication of inequality.<sup>376</sup>This is its response to climate change, being informed by the findings of the IPCC.<sup>377</sup>The global effort to mitigation and adaptation in respect of climate change has become an inevitable and unavoidable part of climate law.<sup>378</sup> Various international and national assessments and research papers have stated that South Africa is likely to be vulnerable to the adverse effects of climate change.<sup>379</sup>As such, South Africa is in a position, much like other developing states, to meet its developmental needs while ensuring a sustainable environment. South Africa thus utilises sustainable development in order to meet this objective.

The abovementioned international climate change instruments and scientific reports have implications on South Africa's position on climate change. The above discussed

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Climate Negotiations and the UNFCCC' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 4-5.

<sup>372</sup> This body was established at the COP21 in Berlin in 1995 as an alliance of African member states in order to have representation of the interests of Africa in climate change negotiations. Further information regarding the group is available at <https://africangroupofnegotiators.org/> accessed on (09 March 2020).

<sup>373</sup>The G77 is the largest intergovernmental organization of developing countries in the United Nations and provides the developing South with a collective voice an enhanced negotiating capacity on all major international economic and developmental issues. More information on the G77 is available at <https://www.g77.org/doc/> accessed (09 March 2020).

<sup>374</sup> Kidd M 'South Africa, Climate Negotiations and the UNFCCC' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 4-11.

<sup>375</sup>Kotze et al 'Climate Change Law and Governance in South Africa- Setting the Scene' in Humby et al 'Climate Change, Law and Governance' (2016) 1-5.

<sup>376</sup> South Africa's Intended Nationally Determined Contribution 2. Also see Kotze L et al 'Climate Change Law and Governance in South Africa – Setting the Scene' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 1-24.

<sup>377</sup>South Africa Intended National Contribution to the UNFCCC p1 available at <https://www4.unfccc.int> (accessed 25 March 2020)

<sup>378</sup>Odeku K & Meyer E (2010) 'Climate Change Surge: Implementing Stringent Mitigation and Adaptation Strategies' in South Africa *Journal of African Law* 54 159 at 164-166.

<sup>379</sup>Midgley G 'Scientific Aspects of Climate Change and their Impacts in South Africa' in Humby et al 'Climate Change, Law and Governance in South Africa' (2016) 2-1.

UNFCCC South Africa ratified in August 1997.<sup>380</sup> The state regularly reports to the UNFCCC secretariat on how it meets its obligations under the UNFCCC.<sup>381</sup> South Africa subsequently acceded to the Kyoto Protocol in 1997, recognising that the commitments set out in the UNFCCC were insufficient to achieve its ultimate objective of making a fair contribution to the stabilization of GHG emissions.<sup>382</sup> South Africa has announced that it would act voluntarily to reduce domestic GHG emissions.<sup>383</sup> This is evident from the statement that the country will contribute its fair share towards the common responsibility for the future and committed itself to having its actions being measurable, reportable and verifiable.<sup>384</sup> This is further evident of the states commitment to be influenced by climate change instruments, irrespective of its binding nature on the state itself. South Africa further relies on the latest scientific information regarding climate change and its impact, namely the IPCC.<sup>385</sup> It is noteworthy to mention that none of these instruments obligate South Africa towards participating in addressing global climate change; however the voluntary nature of being guided by these instruments indicates that they do indeed have normative influence on the shaping of the above discussed legislative and other measures.

The South African international commitment can be summed up with the use of the term 'Peak, Plateau and Decline'.<sup>386</sup> The reasoning behind this approach is to account

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<sup>380</sup>Odeku K & Meyer E (2010) 'Climate Change Surge: Implementing Stringent Mitigation and Adaptation Strategies' in *South Africa Journal of African Law* 54 159 at 182. Also see Kotze L et al 'Climate Change Law and Governance in South Africa – Setting the Scene' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 1-9.

<sup>381</sup> Brown DA, Glider A & Kotze L 'South Africa and Climate Change Ethics' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 7-5 & 6.

<sup>382</sup> Ibid.

<sup>383</sup> Statement by South Africa to the UNFCCC COP 13 Plenary, 12 December 2007 available at [www.environment.gov.za](http://www.environment.gov.za) accessed (07 March 2020).

<sup>384</sup> Official letter to the UNFCCC dated 29 January 2010 available at [https://unfccc.int/files/meetings/cop\\_15/copenhagen\\_accord/application/pdf/southafricacphaccord\\_ap\\_p2.pdf](https://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/southafricacphaccord_ap_p2.pdf) accessed (07 March 2020). Also see Brown DA, Glider A & Kotze L 'South Africa and Climate Change Ethics' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 7-6.

<sup>385</sup> South Africa Intended National Contribution to the UNFCCC p1 available at <https://www4.unfccc.int> (accessed 25 March 2020)

<sup>386</sup>In 2009, South Africa's Department of Environmental Affairs stated that it will continue to rise its national GHG emissions until 2025, which the state refers to as its peak, thereafter until 2035 its emissions will continue to plateau and thereafter decline in absolute terms. See Official letter to the UNFCCC dated 29 January 2010 available at [https://unfccc.int/files/meetings/cop\\_15/copenhagen\\_accord/application/pdf/southafricacphaccord\\_ap\\_p2.pdf](https://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/southafricacphaccord_ap_p2.pdf) accessed (07 March 2020). Also see South Africa Intended National Contribution to the UNFCCC p12 available at <https://www4.unfccc.int> (accessed 25 March 2020). Also see Kotze L et al

for the need for economic development in this country while taking cognisance of the need to contribute towards the global effort of addressing climate change. This model prima facie has a contradictory objective to that of the 2030 Agenda due to the 2035 decline envisioned by the state. Despite this, Global Goal 13 provides normative influence in the country's addressing of climate change. From an international perspective, the state relies on the UNFCCC in order to support its approach.<sup>387</sup> The balancing contained in the concept of sustainable development of economic, social and environmental pillars is the driving force of this decision.

#### **5.4 South Africa and the Paris Agreement**

South Africa is also a signatory state to the Paris Agreement. In its aim to contribute towards the alleviation of climate change, South Africa provides that it will continue to utilise its coal fired power stations until 2020 and thereafter begin to reduce its emissions.<sup>388</sup> The author contends that the use of coal powered fire stations can be described as inadequate towards addressing the need for energy supply within the country and the long term environmental effects are already being felt by society in terms of both economic sustainability and the protection of society's health. This however does not desway from the fact that South Africa has consciously made the effect towards being party to an agreement addressing climate change. This position is evident in the NDC released by South Africa in which the state provided that its NDC is premised on the adoption of a comprehensive, ambitious, fair, effective and binding multilateral rules-based agreement under the UNFCCC while balancing it with the priorities of economic and social development as well as poverty

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'Climate Change Law and Governance in South Africa – Setting the Scene' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 1-13.

<sup>387</sup> South Africa uses Article 4.7 of the UNFCCC that provides the extent to which developing country parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country parties.

<sup>388</sup> See South Africa Intended Nationally Determined Contribution available at <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/South%20Africa%20First/South%20Africa.pdf> accessed (09 March 2020).

alleviation.<sup>389</sup> South Africa is committed to work with others to ensure temperature increases are kept well below the 2 degree Celsius above pre-industrial levels.<sup>390</sup>

### **5.5 South Africa and the MDGs**

In its final report on the MDGs released in 2015, South Africa acknowledged its contribution as a major emitter of carbon dioxide emissions. It furthermore noted that South Africa is in the process of implementing green economy policies and programmes while recognising that it has achieved its medium term targets for reducing ozone-depleting substances (ODSs).<sup>391</sup> As evident from the above, it is clear South Africa not only took heed of its international obligation towards the attainment of the MDGs, however their actions resulted in a normative influence on the South African position to climate change. As stated by the country report, environmental sustainability has been mainstreamed into development policies and plans, creating the necessary regulatory and enabling framework for driving progress towards this goal in the coming years.<sup>392</sup> This indicates South Africa's position in relation to the continued effort to meet sustainable development. Upon the ending of the MDG mandate, the question turned to whether South Africa would seek to continue the work of the MDGs through the SDG agenda and whether the agenda would have normative influence on South Africa.

This question is answered in the affirmative in the same country report of South Africa. The state emphasises the integration of the SDGs with the provision of adequate direction, effective planning, development of appropriate policies and budgets and the construction of appropriate national monitoring and reporting systems. It further noted that that the SDGs were required to be crafted in order to meet the historical issues being dealt with in the State as well as the emerging challenges such as climate change.<sup>393</sup> In its overall assessment of MDG 7, it further states that it is necessary to implement appropriate interventions for a smooth transition towards the SDGs.<sup>394</sup> On this basis, the author asserts that much like the

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<sup>389</sup><https://climateactiontracker.org/countries/south-africa/pledges-and-targets/> accessed (24 March 2020).

<sup>390</sup> South Africa Intended National Contribution to the UNFCCC p1 available at <https://www4.unfccc.int> (accessed 25 March 2020)

<sup>391</sup> MDG Country Report South Africa p12.

<sup>392</sup> Country Report p 21.

<sup>393</sup> Country Report p15.

<sup>394</sup> Country Report p107.

actions taken by South Africa in relation to the attainment of the MDGs and the desire to continue the work of the agenda post-2015, it too is normatively influenced by the SDGs.

### **5.6 South Africa on Climate Change – An Analysis of Law and Policy**

South Africa has stated that the key challenge for South Africa is to drive, at an economy-wide scale, financing of and investing in the transition to a low carbon and climate resilient economy and society.<sup>395</sup> The strengthening of domestic institutions in developing countries is imperative towards addressing climate change and its effects.<sup>396</sup> Furthermore, as stated in foreign jurisprudence, *due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigation measures – the court concludes that the State has a duty of care to take mitigation measures.*<sup>397</sup> Mitigation should be the priority of every country with the requirement being the development of enforceable international and national standards that are reasonably generic while taking into account the individual needs of states.<sup>398</sup>

South Africa refers to climate change as an ongoing trend of change in the Earth's general weather conditions as a result of an average rise in the temperature of the Earth's surface often referred to as global warming.<sup>399</sup> Climate change seriously threatens to undermine many of the sustainable development advances being made in South Africa.<sup>400</sup> The state has expressed its vulnerability to the impacts of climate change, particularly in respect of water and food security as well as health, human settlements, infrastructure and ecosystem services.<sup>401</sup> The state recognises its

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<sup>395</sup> South Africa Intended National Contribution to the UNFCCC p8 available at <https://www4.unfccc.int> (accessed 25 March 2020)

<sup>396</sup> Wang X et al 'Research and scholarship on climate change law in developing countries' in Farber DA and Peeters M (eds.) 'Climate Change Law' (2016) 122.

<sup>397</sup> See *Environment-People-Law v Minister of Environmental Protection, Lviv Circuit Admin Court (2009)*; *Friends of the Earth Canada v The Governor in Council [2008] FC 1183 (Can)*. Also see *Gerrard MB and Wilensky M 'The role of the national courts in GHG emissions reductions'* in Farber DA and Peeters M (eds.) 'Climate Change Law' (2016) 366.

<sup>398</sup> Lehmann K 'South Africa's Climate Change Commitments and Regulatory Response Potential' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 8-2.

<sup>399</sup> The National Climate Change Response White Paper, 2011 8.

<sup>400</sup> Midgley G 'Scientific Aspects of Climate Change and their Impacts in South Africa' in Humby et al 'Climate Change, Law and Governance in South Africa' (2016) 2-12.

<sup>401</sup> South Africa Intended National Contribution to the UNFCCC p1 available at <https://www4.unfccc.int> (accessed 25 March 2020)



responsibility to curb its GHG emissions through a number of legal measures and policies premised on this position. South Africa, as a developing country, is mainly vulnerable to climate change as it is the highest emitter of GHGs in Africa.<sup>402</sup>

The country's position on climate change developed from a long process that includes inter alia climate change conferences,<sup>403</sup> public participation and numerous parliamentary portfolio committee meetings and implementation of legislation.<sup>404</sup> South Africa has followed an approach to climate change law and governance that is premised on the efforts of all legal order. The government thereafter bears a special obligation to design and implement domestic strategies and action plans that facilitate addressing adaptation measures while taking measures to mitigate GHG emissions.<sup>405</sup>

As previously mentioned, South Africa expresses its national response has to consider both development needs and climate change imperatives due to the challenges faced by the state as still developing along with the priorities to eliminate poverty and eradicate inequality.<sup>406</sup> There are various policy papers that South Africa has adopted to meet the MDGs, which were the international goals the country aspired to at the time of its adoption. The same is true for its legislative measures enacted recently. A national climate change response strategy has developed over time that promotes and strengthens integration between the various programmes and governmental departments in order to maximise the benefits of the country towards minimizing the negative impacts of climate change.<sup>407</sup>

Various government publications have provided a position on climate change taking into account the international instruments mentioned that will be discussed shortly.

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<sup>402</sup>Odeku K & Meyer E (2010) 'Climate Change Surge: Implementing Stringent Mitigation and Adaptation Strategies in South Africa' *Journal of African Law* 54 159 at 160.

<sup>403</sup> The National Climate Change Conference held in Midrand in 2005 and The Climate Change Summit held in Midrand in March 2009.

<sup>404</sup>Kotze L et al 'Climate Change Law and Governance in South Africa – Setting the Scene' in Humby T 'Climate Change Law and Governance in South Africa' (2016) 1-11.

<sup>405</sup>Kotze L et al 'Climate Change Law and Governance in South Africa – Setting the Scene' in Humby et al 'Climate Change Law and Governance in South Africa' (2016) 1-6. Also see Burnell O (2009) 'Climate Change and democratisation: A complex relationship' *Policy Paper Heinrill Boll Stiftung* 1-47.

<sup>406</sup> South Africa Intended National Contribution to the UNFCCC p2 available at <https://www4.unfccc.int> (accessed 25 March 2020)

<sup>407</sup>Odeku K & Meyere E (2010) 'Climate Change Surge: Implementing Stringent Mitigation and Adaptation Strategies in South Africa' *Journal of African Law* 54 159 at 159-160.

South Africa is compelled to take into account international law it is a party to through section 39 and section 231 of the Constitution respectively.<sup>408</sup> The South African NDC to the UNFCCC was stated to be formulated in the context of its on environmental and climate change regime, taking into account various legislative and other measures.<sup>409</sup> The most pertinent of these are the National Climate Change Response Strategy 2004, The National Climate Change Response Green Paper 2010, The National Climate Change Response White Paper 2011 and the Climate Change Bill of 2018.

The National Climate Change Response Strategy 2004 provided that at the time legislation addressing climate change was not appropriate, however current legislation could be amended to provide for addressing climate change.<sup>410</sup> It is noteworthy to mention that this strategy document makes explicit mention of the government's intention that GHG emissions and inventories.<sup>411</sup> This further highlighted the interrelationship between air quality and climate change through air quality legislation.<sup>412</sup> The National Climate Change Response Green Paper 2010 highlights that South Africa is both a contributor to and potential victim of the global concern of climate change largely due to its fossil fuel dependency for economic sustainability.<sup>413</sup> It provides that the objectives are that South Africa takes into account the principles of equity and common but differentiated responsibilities and respective capabilities as well as inter-generational commitment to section 24 of the Constitution. This will be done in order to make a fair contribution towards achieving stabilisation of GHG concentrations in the atmosphere and effectively adapt and manage unavoidable and potential damaging climate change impacts by implementation of interventions that build and sustain South Africa's social, economic and environmental resilience and emergency response capacity.<sup>414</sup> These

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<sup>408</sup> Section 39 provides that in interpretation of the Bill of Rights any court, tribunal or forum must take into account international law while section 231 provides the procedure for the implementation of international law into South African legislation.

<sup>409</sup> South Africa Intended National Contribution to the UNFCCC p2 available at <https://www4.unfccc.int> (accessed 25 March 2020)

<sup>410</sup> South African National Climate Change Strategy 2004 29.

<sup>411</sup> Kotze L et al 'Climate Change Law and Governance in South Africa- Setting the Scene' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 1-11.

<sup>412</sup> See Kotze L et al 'Climate Change Law and Governance in South Africa' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 1-23.

<sup>413</sup> National Climate Change Response Green Paper 2010 5.

<sup>414</sup> Ibid.

objectives are a clear encapsulation of the objectives of the previously discussed UNFCCC. This illustrates South Africa's commitment to take positive steps to address its reliance on coal-fired power stations as its main energy source and in doing so mitigate its GHG emissions.

The National Climate Change Response White Paper 2011 emphasises South Africa's commitment to build climate resilience in the country, its economy and its people. Furthermore, it highlights the transition to a climate-resilient, equitable and internationally competitive lower-carbon economy and society in a manner that simultaneously addresses South Africa's over-riding national priorities for sustainable development, job creation, improved public and environmental health, poverty eradication and social equality.<sup>415</sup> Bearing this in mind, this response paper provides the objective is to effectively manage climate change impacts through intervention and build and sustain South Africa's social, economic and environmental resilience and emergency response capacity and, like the Green Paper, make a fair contribution to the global stabilisation of the GHG concentration in the atmosphere.<sup>416</sup> The White Paper further provides principles underlying its objectives inter alia common but differentiated responsibilities and respective capabilities, equity, uplifting the poor and vulnerable and addressing the special needs and circumstances of its people. Additional principles include polluter pays, informed participation, the precautionary principle and sustainable development.<sup>417</sup> The NCCRP further provides the South Africa will continue to meaningfully engage in the current multilateral negotiations to further strengthen and enhance the international response to the climate change crisis.<sup>418</sup> In assessing these objectives and principles, it is evident that the objective of the White Paper aspires towards a low-carbon emitting system while doing so on the basis of social equity, a precautionary approach and upholding all of the pillars of sustainable development.

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<sup>415</sup> Brown DA, Glider A & Kotze L 'South Africa and Climate Change Ethics' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 7-5.

<sup>416</sup> Government of the Republic of South Africa *National Climate Change Response White Paper* 2011) GN 757 GG 34695 of 19 October 2011 (hereafter NCCRP) 11.

<sup>417</sup> NCCRP 12.

<sup>418</sup> NCCRP s1. Also see Kidd M 'South Africa, Climate Negotiations and the UNFCCC' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 4-6.

These policies ultimately led to the position changing in the 2004 Strategy plan and the drafting of the Climate Change Bill 2018 (the Bill). In its preamble the bill acknowledges the urgency of climate change and states that an effective, progressive and incremental response is required. It provides that the state is guided by the current international climate change regime, as discussed in chapter 3, by stating that *the Republic has committed, internationally, to communicate and implement an effective nationally determined climate change response, including mitigation and adaptation actions that represents the Republic's fair contribution to the global climate change response.* Most notably, the preamble of the Bill recognises the need to the implementation of a national climate change instrument in the context of an *environmentally sustainable development framework* that integrates the pillars of sustainable development as well as the employment objectives to meet its own national development goals. The preambular provisions indicate the states willingness to not only take action towards climate change, but do so in a manner consistent with the sustainable development agenda and international climate law.

This Bill contains similar objectives as the abovementioned Green and White Paper respectively while providing for the coordinated and integrated response to climate change and its impacts by all spheres of government in accordance with the principles of cooperative governance.<sup>419</sup> It further seeks to address all spheres of governance, obligating coordination and harmonisation of policies, plans and decision of those exercising functions affecting or affected by climate change.<sup>420</sup> The Bill further highlights CBDRRC as contained in the Paris Agreement as a driving principle, acknowledging international equity and its own contribution towards taking urgent action to combat climate change and its impacts.<sup>421</sup>

Chapter 2 of the Bill provides the establishment of a national environmentally sustainable development framework which has to include *inter alia* mechanisms, systems and procedures to give effect to the Republic's obligations in terms of international climate change related agreements, such as the one concluded in the abovementioned Paris Agreement.<sup>422</sup> This too is indicative of the states willingness

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<sup>419</sup> Climate Change Bill 2018.

<sup>420</sup> Section 7 of the Climate Change Bill 2018.

<sup>421</sup> See s3(c) of the Climate Change Bill 2018.

<sup>422</sup> Section 6 of the Climate Change Bill 2018.

to be guided by the international climate change regime. The Bill further obligates all organs of state to coordinate and harmonise its policies that effect or are affected by climate change to ensure the risks of impact and associated vulnerabilities are taken into account as well as give effect to the national mitigation and adaptation objectives of the act.<sup>423</sup> The consideration of the risks and vulnerabilities, adaptation and mitigation objectives is influenced by the international climate change regime.

The Bill provides the states objectives in relation to adaptation and mitigation respective. Its National Adaptation Strategy is stated to focus on achieving *inter alia* a reduction in the vulnerability of society, the economy and the environment to the effects of climate change, strengthening the resilience of the socio-economic and environmental system and enhancing the adaptive capacity of the national environment and economic impacts of climate change.<sup>424</sup> As stated in its NDC, the state needs time for development, which it believes is necessary to eliminate poverty, reduce inequality, increase employment and promote inclusive economic growth while seeking to mitigate and assist in the adaptation of the impact of climate change.<sup>425</sup> As such, the bill provides a carbon budget approach to its mitigation measures. It provides that the Minister of Environmental Affairs (the Minister) must determine a GHG threshold for the determination of an allocated carbon budget per person.<sup>426</sup> This threshold requires a person to prepare, submit and implement a GHG mitigation plan that describes the mitigation measures the person will take in order to comply with the allocated carbon budget.<sup>427</sup> This mitigation plan is subject to the requirements and approval of the minister for no longer than three successive five year periods and reviewed every five years in accordance with the national GHG emission trajectory.<sup>428</sup> Lastly, the Bill provides that the Minister may make regulations that will promote the national framework in relation to climate change to include *inter alia* any matter necessary to give effect to the Republics obligations in relation to its international climate change agreements.

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<sup>423</sup> Section 7 of the Climate Change Bill 2018.

<sup>424</sup> Section (4)(a) of the Climate Change Bill 2018.

<sup>425</sup> South Africa Intended National Contribution to the UNFCCC p11 available at <https://www4.unfccc.int> (accessed 25 March 2020).

<sup>426</sup> Section 13 of the Climate Change Bill 2018.

<sup>427</sup> Section 13(7) of the Climate Change Bill 2018.

<sup>428</sup> Section 13(4),(5) and (6) of the Climate Change Bill 2018 respectively.

## **5.7 Global Goal 13 and South Africa – The Possible Normative Influence**

The SDGs provide an opportunity for the furtherance of the sustainable development agenda in Africa as it creates an opportunity towards inclusive, universal, integrated, locally-focused and technology-driven development.<sup>429</sup> In the sustainable development agenda of South Africa, the SDGs could provide a mechanism towards addressing the abovementioned issues faced by the state and provides a trajectory the country can strive towards. The critical challenge of the implementation of the SDGs are dependent on local planning and service delivery, community buy in and local leadership.<sup>430</sup> Policy papers and governmental action is therefore a clear indicator of a States willingness to be normatively influenced by the agenda and specific goals. In order for the SDGs to be attained it requires the collective action of parliamentarians, oversight functions, budgetary allocations, advocacy and dialogue with civil society.<sup>431</sup> Such actions can thus too be seen as an indicator of a country's willingness to be bound by the ambitions of the Global Goal. An assertion can therefore be made through an analysis of the Bill and its provisions, most notably its adaptation, mitigation and recognition of the CBD/RRCC principle, South Africa is acting in alignment with the international climate change regime and normatively influenced by the targets of Global Goal 13.

## **5.8 Conclusion**

South Africa is in the position of being a developing state while simultaneously being the largest African contributor of GHGs. The concept of sustainable development has been encapsulated in the highest law of the country through its environmental right and further entrenched in environmental law through NEMA. It is further supported by various principles contained in NEMA namely the polluter pays and risk aversion approach to polluting activities and environmental authorisation in the form of Environmental Impact Assessments. This provides an indication that South Africa seeks to attain sustainable development within the purview of its common but differentiated responsibility to global environmental protection. South Africa is a notable leader in addressing climate change having been a member of the G-77 and

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<sup>429</sup>Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 at 170.

<sup>430</sup>Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 at 170.

<sup>431</sup>Ladan MT 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22 *SAJELP* 159 at 178.

BASIC groups in relation to the threat of climate change on the developing south. The states membership is indicative of its contribution towards the global partnership in addressing climate change and its potential consequences.

As indicative of the above, South Africa has numerous policies and legislative measures in place that address climate change, most notably the Climate Change Bill of 2018. As demonstrated, the Bill emphasises the states willingness to contribute towards action against climate change and its impacts. This is emphasised by its preambular provisions, its adaptation and mitigation strategy as well as regulations to be made by the minister responsible. It has also acknowledged the CBDRRC principle the Paris Agreement which, as previously discussed, has the same targets envisioned by Global Goal 13 of the SDGs. Through its recognition of these principles in relation to addressing climate change on a national level, South Africa has been normatively influenced by Global Goal 13. The pre-2015 actions taken by the State in the attainment of the MDGs, most notably MDG7 including inter alia the adoption of policies and programmes are indicative of the normative influence the MDGs had on South Africa. This position is further highlighted when the State discussed the SDGs and the need to further transition the Agenda into South Africa's ambitions. As such, Global Goal 13 can be said to have more than mere political standing the South African context. It can be considered a driver towards the states climate change agenda and has considerable normative influence on legislative and other measures, as envisioned by the section 24 of the Constitution.

## Chapter 6 – Conclusion

The concept of sustainable development is the *Leitmotiv* of international environmental law and considers balancing of the pillars of economic growth, social necessity and environmental protection.<sup>432</sup> The SDG agenda can be considered as the next milestone of encapsulating the sustainable development agenda.<sup>433</sup> This dissertation has explored the concept to sustainable development in order to determine the relationship between Global Goal 13 and international law as well as South Africa. The central premise of this dissertation is whether the Global Goal 13 induces international and national compliance, with emphasis placed on South Africa and its contribution towards addressing climate change.<sup>434</sup>

The concept of sustainable development has been noted to be long standing; however its economic focus and lack of conceptual development in light of the ecological crisis are considered to be tremendous shortcomings inherent in the concept itself.<sup>435</sup> The conclusion reached in this chapter was that the concept of sustainable development is anthropocentric and ill-suited as the *Leitmotiv* of environmental law. Despite this, the concept of sustainable development has been encapsulated and developed into an agenda that the international community has bound itself to attaining.<sup>436</sup> Furthermore, the mixed results of the MDGs, specifically MDG 7 required a renewed focus on the sustainable development agenda that built upon the successes of the SDGs while further expanding on the shortcomings of the document.<sup>437</sup> This set the foundation for the establishment of the SDGs, the central inquiry of this dissertation.

Chapter 3 traced the development and adoption of the SDG goals from the Rio+20 Summit working group throughout the ultimate formulation of the 17 SDGs and 169 indicators. These Global Goals were a vast improvement of the MDGs in its range of targets and objectives towards attainment.<sup>438</sup> These Global Goals comprised of

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<sup>432</sup> Kotze L et al 'Climate Change Law and Governance in South Africa – Setting the Scene' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 1-18.

<sup>433</sup> See 'Open Working Group on Sustainable Development Goals' A/67/L.48/rev.1

<sup>434</sup> Chapter 1 at 1.4.

<sup>435</sup> Chapter 2 at 2.3.2.

<sup>436</sup> Chapter 2 at 2.4.

<sup>437</sup> Chapter 2 at 2.4.3.

<sup>438</sup> Kotze LJ 'The Sustainable Development Goals: an existential critique alongside three new-millennial analytical paradigms' in French D & Kotze LJ (eds) 'Sustainable Development Goals Law, Theory and Implementation' (2018) 42.



various aspects of the three pillars of sustainable development including sustainable cities, promotion of education and the environmental cluster. The SDGs were significant as it provided a step forward towards the sustainable development agenda. Although the SDGs were an improvement from its predecessor, the MDGs, due to its being grounded in sustainable development it merely continues the flawed work of the Brundtland Commission in its mandate of sustainable development.<sup>439</sup> The environmental cluster is significant as it compartmentalises various aspects of environmental considerations, namely water, biodiversity, marine life and climate change.<sup>440</sup> The author contends that these goals are of a soft law nature and have a linkage to law. This chapter concludes that the environmental cluster is furthermore significant to international environmental law because of its potentially legally binding capabilities on international instruments.<sup>441</sup> The author contends that the SDGs have normative influence on international law as it gives guidance to further development of global law and policy.<sup>442</sup>

Climate change under the auspices of the 2030 Agenda, is the global goal utilised in the analysis of the normative influence on international and national law in this dissertation. On this basis, the author provides an analysis of the current international climate change regime in relation to the linkages between the objectives of Global Goal 13 and the current climate change regime. In order to adequately do so, the author provided a comprehensive analysis of the global climate law framework through an analysis of the UNFCCC and its COP decisions, most notably the Paris Agreement. Upon analysis it is concluded that there are various linkages between the current climate change regime and Global Goal 13. These include keeping the global temperature below 2 degrees Celsius, which is the central objective of both the international climate change regime and Global Goal 13, the voluntary national review mechanism of the SDG agenda having the same voluntary characteristics as the NDCs in the Paris Agreement and both of these instruments adopting a global-yet-voluntary, universal-yet-national approach.<sup>443</sup> Furthermore, the adoption of the

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<sup>439</sup> Chapter 3 at 3.8.

<sup>440</sup> See SDG 6, SDG 13, SDG 14 and SDG 15 respectively.

<sup>441</sup> Chapter 4 at 4.5.

<sup>442</sup> Chapter 3 at 3.9.

<sup>443</sup> Long G ' Underpinning commitments of the Sustainable Development Goals: Indivisibility, universality, leaving no one behind' in French D & Kotze LJ (eds) 'Sustainable Development Goals

HLPF provides for the possibility of objectives of Global Goal 13 becoming further entrenched in international climate law. On this basis, the author argues that Global Goal 13 induces compliance on an international climate change level and the two instruments may be considered to work interdependently towards addressing the concern of climate change. This is further evident based on the Global Conference on Strengthening Synergies between the Paris Agreement and the 2030 Agenda in Copenhagen that provided only through the exploitation of synergies and co-benefits can both the objectives of the Agenda and proper implementation of the Paris Agreement can both these instruments yield a successful outcome.<sup>444</sup>

Moving from the position that Global Goal 13 does indeed have normative influence on the international climate change regime, an analyseGlobal Goal 13 normative influence on national law and policy is conducted.South Africa is used as an example andthe normative effect Global Goal 13 has on the South African climate change law and policy is analysed. As the leitmotiv of environmental law,theconcept of sustainable development is engrained in its constitutional mandate through section 24.<sup>445</sup> This section provides the environmental right with express recognition of sustainable development. This is furthered through the enactment of NEMA, which provides the South African definition of sustainable development to mean the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations. Sustainable development is further enhanced through various principles contained in NEMA, most notably the polluter pays, the risk aversion approach to polluting activities and the Environmental Impact Assessment.

In addition to this, the author discussed South Africa's contribution towards the global climate negotiation and notes the leading role the state takes as a developing country in contributing its fair share towards the mitigation of GHG emissions. Upon analysis of climate change policy papers and the recently enacted Climate Change Bill, it becomes apparent that South Africa can be regarded as an actor towards

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Law, Theory and Implementation' (2018) 94. Also see Andresen S (2015) 'International Climate Negotiations: Top-down, Bottom-up or a Combination of Both?' *International Spectator* 50(1) 15-30.

<sup>444</sup> Global Conference on Strengthening Synergies between the Paris Agreement and The 2030 Agenda for Sustainable Development: Maximizing Co-Benefits by Linking Implementation across SDGs and Climate Action' *UN City Copenhagen 1-3 April 2019 Outcome Summary*.

<sup>445</sup>Chapter 5 at 5.2.

addressing climate change concerns and its impact on a national and international level. Various provisions in the Climate Change Bill provide indications of the states willingness to adhere and be normatively influenced by the international climate change regime, most notably in its preamble and guiding principles. Furthermore, its mitigation and adaptation strategies are akin to the targets laid out in Global Goal 13. With South Africa being a party to the Paris Agreement along with its continued legislative and policy action taken in respect of attaining the same objective, the author argues that Global Goal 13 induces compliance to national environmental law and policy in South Africa. Chapter 5 supports the initial position held by the author that the SDGs are grounded in law, with supporting assessment and monitoring mechanisms as well as legally binding agreements for its attainment. In keeping with the hypothesis provided in the introductory chapter, the author asserts that the SDGs indeed have normative impact on not only international law, but on the legislative and other measures of South Africa.<sup>446</sup>

This dissertation has provided an analysis of the next milestone of the sustainable development agenda, the SDGs. This was done in order to assess the legal implication of Global Goal 13 on the international climate change regime, with emphasis placed on South Africa. The impacts of climate change are felt throughout various areas of not only human life, but non human life as well. The SDGs are herald as a list of goals that encapsulate the three facets of sustainable development namely economic growth, social development and environmental protection. The SDGs, much like the concept it is derived from, has inherent flaws. The linkages between Global Goal 13 and international instruments such as the Paris Agreement, monitoring and assessment mechanisms such as the UNFCCC and IPCC support the view that it does have normative impact far beyond political nature. Global Goal 13 has the potential to strengthen climate change principles such as CBDRRC and furthermore reinforce global partnership in relation to taking climate action. In relation to a country, as indicated with the example of South Africa, SDG 13 has linkages to the development of the sustainable development agenda and adherence to global climate change commitments. Global Goal 13 therefore, in the estimation of the author, provides normative influence on international and national climate change laws by insisting on taking urgent action to combat climate change and its impacts.

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<sup>446</sup>Chapter 5 at 5.8.

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