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A FITTING TRIBUTE TO CHARLES ODIDI OKIDI THE FATHER OF ENVIRONMENTAL LAW

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BLAZING THE TRAIL

Professor Charles Okidi's Enduring
Legacy in the Development of
Environmental Law

Edited by

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CHAPTER 1

A Fitting Tribute to Charles Odidi Okidi: The Father of Environmental Law

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I. THE CONTEXT

Environmental law is a fairly new discipline of regulation and scholarship. At the international level, its evolution gained prominence following the 1972 United Nations Conference on the Human Environment held in Stockholm, Sweden. At the time that the United Nations General Assembly (UNGA) adopted the resolution to convene the Stockholm Conference, there was an assumption that the concept of the environment and the nature of environmental problems were universally understood.¹ It, however, soon emerged that there was no consensus on what the terms meant. Developing countries argued that the conception of the term focused on challenges facing developed countries without any contextual linkages to, and appreciation of issues in the developing world. This forced the UN Secretary General to convene a special group of experts in 1971, before the Stockholm Conference, to discuss the problem and try and generate consensus.² These events led to the development of the principle of sustainable development as the *raison d'être* of legal and policy developments in the environmental law.

Originally defined by the Brundtland Commission, in its report, *Our Common Future*,³ as 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs',⁴ sustainable development has become the key principle in environmental governance. Justice Weeramantry in the *Gabcikovo Nagymaros*⁵ case before the International Court of Justice cemented the place of sustainable development as an important principle with normative status. The United Nations General Assembly adopted the Sustainable Development Goals (SDGs)⁶ in 2015 as the blueprint for achieving a sustainable future. SDGs are a

1 CO Okidi, 'Reflections on Teaching and Research on Environmental Law in African Universities' (1988) 18 *Journal of Eastern African Research and Development* 128.

2 *ibid.* This was the Conference's Preparatory Committee, which came up with a draft Declaration.

3 Report of the World Commission on Environment and Development: *Our Common Future*, 4 August 1987 (A/42/427, Annex). < <http://www.un-documents.net/our-common-future.pdf> > accessed 27 January 2019.

4 *ibid.*, para 27.

5 [1997] ICJ Rep 88.

6 <<https://www.un.org/sustainabledevelopment/sustainable-development-goals/>> accessed 27 January 2019.

set of 17 Goals⁷ and 169 targets focused on ending poverty and ensuring sustainable development. At the time of adopting the SDGs, the members of the UNGA, “recognize (d) that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.”⁸ Consequently, they purposed to embark on developing the world sustainably and in an integrated manner, addressing the economic, social and environmental components of sustainable development. This entailed a commitment to “take the bold and transformative steps which are urgently needed to shift the world on to a sustainable and resilient path”⁹ carrying everybody in the journey towards sustainability and prosperity.

Despite the importance of sustainable development, legal clarity on its content and modalities for its achievement continue to be elusive. While policy makers discussed modalities for its implementation, culminating in the adoption of the SDGs; scholars and practitioners also researched, taught, debated and explored ways of ensuring that sustainable development became a reality globally. Significantly, Professor Charles Odidi Okidi has contributed immensely to the clarification of the legal content of sustainable development and its realization since his graduation with the degree of Doctor of Philosophy (PhD) from the Fletcher School of Law and Diplomacy in the United States. So ubiquitous has his work been globally that it has earned him the title *Father of Environmental Law*. That honour is evidenced by his numerous writings, the tasks he has undertaken, the scholars he has mentored, research projects he has led and laws he has developed and contributed to. In recognition of this, in 1984 he received the prestigious Elizabeth Haub Award in environmental land and diplomacy and was also honoured by the Attorney General of Brazil.

On 3rd December, 2018 the UN Secretary General issued a report titled “Gaps in international environmental law and environment-related instruments: towards a global pact for the environment.”¹⁰ The report contains an independent assessment of the principles and efforts to protect the environment and was prepared following a directive by the UN General Assembly in May 2018.¹¹ It assesses the progress made in the development of international environmental law and identifies areas that require action moving forward. On 10th December 2018 an international group of experts, issued a note on the Secretary Generals’ report.¹² The note is important for this publication for two reasons. First, the group that prepared the note comprised scholars and professionals, a demonstration of the role that they have played in the development of environmental law over the years. Secondly, Professor Okidi has been a key member of the academy that has influenced the

7 The various Sustainable Development Goals (SDGs) are: no poverty; zero hunger; good health and well-being; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation and infrastructure; reduced inequalities; sustainable cities and communities; responsible production and consumption; climate action; life below water; life on land; peace, justice and strong institutions; and partnerships for the goals.

8 UNGA, ‘Transforming our World: The 2030 Agenda for Sustainable Development’ A/RES/70/1. <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E> accessed 27 January 2019.

9 *ibid.*

10 UNGA, ‘Gaps in international environmental law and environment-related instruments: towards a global pact for the environment’ (30 November 2018) <<https://wedocs.unep.org/bitstream/handle/20.500.11822/27070/SGGaps.pdf?sequence=3&isAllowed=y>> accessed 27 January 2019.

11 *ibid.*

12 <https://www.iucn.org/sites/dev/files/noteforungenvllawrptdec2018_final.pdf> accessed 27 January 2019.

development of environmental law. Not surprisingly, the scholars dedicated the note to persons that have contributed immensely to the development of environmental law and this included Professor Charles Okidi.¹³ The World Commission of Environmental Law, the International Council of Environmental Law and the International Group of Experts coordinated the development of the note for the PACT. Professor Okidi played key roles in both the IUCN and International Council of Environmental Law. He was instrumental in the establishment of the IUCN Academy of Environmental Law (IUCNAEL) and served as a regional vice-chair of IUCN for 15 years.

On 30th November 2018, Professor Okidi retired from the University of Nairobi having served for over 30 years in various capacities. At the valedictory event organized in his honour, his work on capacity building at the University of Nairobi, in Kenya, the African continent and globally was celebrated. It is in the spirit of honouring his work that the editors of this book conceptualized this *festschrift/liber amicorum* (book of friends) to celebrate a great scholar, mentor, patriot and friend. His contribution to the academy and to national, regional and international environmental governance initiatives is a legacy of footprints indelibly etched in the sands of time. The *festschrift/liber amicorum* was initially conceptualized as a 23-chapter book highlighting developments in environmental scholarship and anticipating its future. The idea was to combine a review of the past with a projection into the future so as to demonstrate how Prof. Okidi's scholarship has been engaged in and contributed to environmental governance. It was also to weave in Prof. Okidi's engagements with the themes chosen.

When the call for contributions was made to some of Professor Okidi's colleagues and former students/mentees, the result was overwhelming. As opposed to 23 chapters, the final publication is a total of 27 chapters from scholars from around the world. The chapters explore themes around environmental law that are both germane to sustainable development and have formed part of Okidi's scholarship over the years. Almost all the authors refer to the contribution of Okidi's works in their topic. Several authors also acknowledge the influence that Okidi has had in their scholarship, work and life generally. In sum, the chapters are a testimony to Professor Okidi's legacy as the father of environmental law, not just in Africa but globally.

II. THE FESTSCHRIFT

The first part of the *liber amicorum* deals with the life and work of Professor Charles Odidi Okidi, in whose honour the volume is produced. It comprises three chapters. The first chapter is this introductory chapter by the editors, Patricia Kameri-Mbote and Collins Odote. The Chapter contextualizes the entire *festschrift*, demonstrating in the process, that Professor Okidi's work has had a life-long and impressive influence in the development of environmental law not just in Kenya but also across the entire world. That influence has sought to bridge the gap between development and environment, by demonstrating through scholarship that protecting the environment does not compromise development nor is it inimical to efforts to eradicate poverty. Okidi himself wrote about this relationship thus:

¹³ *ibid.*

At a dinner in New York a few years ago, a group of lawyers were surprised by my explanation of environmental law teaching and research in Africa and the role of the United Nations Environment Programme (UNEP) in promoting institutional developments in this field. As environmental lawyers themselves, they shared the once-popular assumption that African countries were hostile to environmental law because it was inconsistent with their ambitions for development; an assumption originating in the atmosphere preceding the 1972 Stockholm Conference on the Human Environment.¹⁴

As the quotation above demonstrates, Okidi's life was dedicated to demonstrating that sustainable development is a path worth pursuing. Chapter two of the book titled "Reflections on mentorship for environmental law research, scholarship and policy: Telling my own story" is written by Professor Okidi himself. It traces his life and contribution to environmental law through research, scholarship, teaching and mentorship. Documenting experiences from his early primary school education, secondary school and PhD studies, the chapter demonstrates Okidi's thirst for knowledge, commitment to its pursuit and focus on excellence. Following completion of his university education in the United States of America, Okidi purposed to return to Kenya to contribute to teaching, research and generation of knowledge in environmental law and policy. This task would see him rise to University Professor, establish unique programmes at universities and engage in local, national, regional and international capacity building initiatives. Chapter 3 by Nick Robinson and Jamie Benidickson on "Establishing the Legal Groundwork for Environmental Rights in Sustainable Development: The Pioneering Work of Charles Okidi" further underscores Okidi's role in the development of environmental law. Although they refer to him as the father of environmental law in Africa, they demonstrate that his work is part of the contributions of a cohort of global environmental scholars and jurists, engaged since the 1970s, in the development of environmental law as a specialized field of law. They discuss his influential role within the IUCN, particularly highlighting his role in promoting and popularizing judicial education. In this regard, Okidi chaired the first IUCN's Law Commission's specialized group on the role of judicial education whose deliberations eventually led to the establishment of a Global Judicial Institute on the Environment for continued education of judges on environmental matters. Their chapter, which concludes the introductory section, urges the United Nations General Assembly to adopt a Global PACT on the Environment. It is worth noting that discussions on the PACT have significantly progressed as we go to press.

III. CAPACITY BUILDING INITIATIVES

As a pioneer in the field of environmental law and policy, Okidi set out to expand knowledge and interest in the area. He dedicated his professional life to teaching and training and opted to teach at the university level in Kenya as opposed to pursuing a career in the private sector, despite having received offers of employment upon completion of his studies. His capacity building initiatives went beyond formal teaching at the University to creating awareness and interest in key sectors of

¹⁴ Charles Odidi Okidi, 'Capacity building in environmental law in African universities' in Jamie Benidickson, *Environmental Law and Sustainability after Rio* (Edward Elgar Publishing, 2011) 31-46, 31.

society that he considered critical for sustainable management of the environment. Consequently, he designed and undertook capacity building initiatives for the private sector, lawyers and judges amongst other groups. These capacity building initiatives are documented in the second part of the Book. Elizabeth Mrema's article titled "Away from Traditional Project Management: Lessons from the Programme for the Development of Environmental Law and Institutions in Africa (PADELIA)" revolves around the Programme for the development of environmental law and institutions in Africa, a programme designed and implemented by UNEP in furtherance of Agenda 21 after the United Nations Conference on Environment and Development (UNCED). While Okidi was not involved in conceptualizing the project, he became synonymous with it. Okidi inbuilt measures to ensure that capacity was built as part of the project implementation. As Mrema notes, this included, the use of nationals as experts and consultants in all the assignments that were undertaken in the countries where the project operated. Thus, "(t) hrough his tireless and painstaking approach, Prof. Okidi seized every opportunity to continuously and meticulously coach and mentor the national experts identifying problems requiring legal intervention." He avoided and refused the use of 'fly in fly out consultants' arguing that this was neither sustainable nor beneficial to the countries and development of institutions and local capacity. This is an approach that has been sustained and can be emulated in other projects to ensure that endogenous capacity is built.

This theme is carried forward by Patricia Kameri-Mbote in Chapter Five titled, "Building an Army of Environmental Law scholars: Professor Charles Odidi Okidi's Legacy" which discusses Okidi's efforts to expand the number of those teaching environmental law in African Universities. He did this by both interesting many scholars to pursue post-graduate studies in environmental law and dedicatedly championing and leading the formation of the Association of Environmental Law Lecturers in African Universities (ASSELLAU). Okidi's work in establishing ASSELLAU has led to the continued expansion of the teaching of environmental law, increased environmental law lecturers, publication of scholarly works on environmental law by African scholars and the mainstreaming of environmental law in University curricula. In Chapter Six, Jackton Ojwang, a Judge of Kenya's Supreme Court, a Professor of Law and former colleague of Okidi at the University of Nairobi, demonstrates the efforts of Okidi's capacity building efforts on the Judiciary in his chapter titled "Sustainable Development: A Sampling of Contributions by Kenya's Superior Courts in Africa." The Chapter reviews case law from Kenya's courts after the promulgation of the 2010 Constitution and uses this to demonstrate that the Judiciary has played an important role in actualizing the principle of sustainable development. The author argues, that in doing so, Courts have relied on the theoretical scholarship of experts like Professor Okidi.

In Chapter Seve, Kenneth Kakuru, a strong environmental advocate and currently Judge of the Court of Appeal in Uganda focuses on "The Legal and Institutional Framework for Environmental Management in Uganda." Although the chapter discusses key legislations and institutions for the management of the environment in Uganda, the author uses his experience working originally as the founder of an Environmental Non-governmental Organization, Greenwatch, and later serving as a Court of Appeal Judge. He met Professor Okidi in the former capacity where Greenwatch re-

ceived resources to conduct judicial training on environmental law. They carried out the inaugural training of judges in environmental law in Uganda in 2001. As Kakuru notes, Judges in Uganda, like in the rest of the region, preferred to be trained by people qualified to be judges, and Okidi fitted this bill and led the training. This opened the way for more such trainings and contributed to the growth of environmental jurisprudence in Uganda, which influenced developments in other countries in the region.

Nick Oguge's Chapter Eight on "Consolidating Scholarship and Research in Sustainable Development: The Centre for Advanced Studies in Environmental Law and Policy (CASELAP)" concludes the section. It discusses the establishment and contributions of the Centre of Advanced Studies in Environmental Law and Policy (CASELAP). Professor Okidi conceptualized and established CASELAP as a multidisciplinary and post-graduate center at the University of Nairobi to undertake teaching and research on environmental law and policy and served as its founding Director. Oguge traces the history of CASELAP's establishment, discusses the key programmes it offers, its outputs to date and the link of its work to SDGs to demonstrate its place as a center of excellence.

IV. ENVIRONMENTAL GOVERNANCE

Environmental Governance, the interactions between political issues and processes and the management of the environment,¹⁵ formed a key theme in Okidi's teaching and scholarship. In 2008 he co-edited a leading publication on *Environmental Governance in Kenya: Implementing the Framework Law*.¹⁶ This *festschrift* picks up this theme and discusses it through five contributions. Parvez Hassan, who served with Professor Okidi in the steering committee of the IUCN between 1990-1996, starts the discussion on environmental governance in his Chapter Nine "Good Environmental Governance and Judicial Commissions in Pakistan". The Chapter reviews the performance of commissions appointed by superior courts in Pakistan to investigate certain matters relating to the protection of the environment. Despite the fact that the Constitution of Pakistan does not have an article on the right to environment, the courts have, starting from the celebrated case of *Sheila Zia vs Wapda*¹⁷ held that the right to life includes the right to a clean and healthy environment. They have subsequently adopted the use of commissions as innovative tools for mediating environmental disputes. Parvez has led several of these Commissions and discusses their utility in environmental governance based on his experience.

In Chapter Ten, Collins Odote focuses on "Environmental Jurisprudence and Sustainable Development in Kenya: A Theoretical Foundation". He discusses environmental jurisprudence as a science, the role of law in ensuring sustainability and the innovations of the 2010 Kenyan Constitution to promote environmental jurisprudence. Chapter Eleven by Robert Kibugi is titled "Governing Climate Change for Sustainable Development: Legal, Institutional and Policy Perspectives in Kenya". Based

15 J Mugabe & GW Tumushabe, 'Environmental Governance: Conceptual and Emerging issues' in HWO Okoth-Ogendo & GW Tumushabe, *Governing the Environment: Political Change and Natural Resources Management in Eastern Africa* (Nairobi: Acts Press, 1999) 11-38.

16 CO Okidi, P Kameri-Mbote & Migai Akech (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers Ltd: Nairobi, 2008).

17 PLD 1994 Supreme Court 693.

on international developments in climate change governance, the chapter focuses on legal, policy and institutional arrangements for climate change governance. Kibugi concludes that in responding to the challenges of climate change, Kenya has adopted the methodology of mainstreaming climate change action across various sectors and in an iterative manner. He argues that these efforts would be better supported by the appointment of the Climate Change Council.

Robert Wabunoha lauds the contributions of Professor Okidi in developing an environmental legal regime for Africa in Chapter Twelve titled, “Environmental Law of Africa.” Chapter Thirteen on “Measuring the Effectivity of Environmental Law through Legal Indicators in the Context of Francophone Africa” is a joint contribution by Michael Prieur and Mohamed Ali Mekouar. They use the term effectivity to mean real and concrete effects. The chapter is therefore about measuring law in action, leading to what the authors call “unity of law and fact.” The basis of the paper is the resolution of 1st International Symposium on Environmental Law in Africa, held in Abidjan in 2013 as reiterated in the second symposium in 2016, in Rabat in Morocco on the development of indicators. The indicators were drafted in 2017 and are intended to make it possible to statistically and mathematically measure the implementation of environmental law at all levels.

V. INTERNATIONAL ENVIRONMENTAL LAW, LAW OF THE SEA AND WATER LAW

International law was largely the fodder of Professor Okidi’s scholarship. His PhD thesis was on the law of the sea and his work contributed to the development of the UNEP Regional Seas programme. He continued to pursue this area of scholarship and related themes such as water. To celebrate this, Section IV of the book contains contributions dealing with international environmental law, the law of the sea and water law. Chapter Fourteen by Iwona Rummel-Bulska is titled “International Environmental Law”. It canvasses the development, content and import of different international law instruments and UNEP’s contribution to the development of international law. Francis Situma explores the theme on the law of the sea in Chapter Fifteen titled “Kenya and the Law of the Sea: Implementing International Norms”. He summarizes Kenya’s international obligations relating to the law of the sea and also assesses the legislative and administrative measures the country has taken in efforts to comply with the international obligations. His conclusion is that Kenya’s action lacks clarity and has several gaps. Chapter Sixteen by Musili Wambua on “Unbundling the Public Interest Component in International Maritime Law” makes a case for the recognition of the public interest element of maritime law over and above the traditional view of maritime law as a private interest concern only. The chapter sketches the public aspect of maritime undertakings using the sinking of the Titanic in 1912; the 1967 Torrey Canyon oil spill; the hijacking of the MV Achille Lauro in the Mediterranean Sea and the role of international institutions in these events. Chapter Seventeen by Oliver Ruppel and Barbara Varekamp continues the exploration of international environmental law matters and is titled “International and African Legal Protection Mechanisms Against Illegal Wildlife Trade”. Chapter Eighteen by Bondi Ogolla, “Multilateral Climate Change Diplomacy from Copenhagen to Paris: Process and Procedure

Matter” is the last chapter in this section. It assesses how parties to international climate change negotiations use procedural and process issues to advance their interests and influence the shape of climate change law.

The last theme under this section is water, canvassed by Stephen McCaffrey, Albert Mumma and Phillipe Cullet. McCaffrey, in Chapter Nineteen, under the topic ‘Planetary Stewardship of the Hydrologic Cycle” discusses the uneven distribution of water across the world and the need for redress so as to ensure equitable distribution. He argues for the adoption of what he calls a “planetary trust” to guarantee populations that have scarcity, adequate quantities of water. The challenge of water availability and supply to meet the demands of the population has led to reforms in the water sector in Kenya. The highlights of these reforms include the adoption of the Water Act in 2002 and the consequential institutions, and the subsequent reforms in 2016 to align the laws and institutional arrangement to the 2010 Kenyan Constitution. Albert Mumma assesses the impact of these reforms in Chapter Twenty titled “Kenya’s Water Law: A Thirty Year Reform Process”. Phillipe Cullet concludes the discussion on water in Chapter Twenty-one on “Water Law and Development: Comparative Perspectives”. He argues that despite the progress made in the development of the principle of sustainable development, and the work of scholars like Okidi to integrate environmental law concerns in scholarship on water law, water is still treated by many countries as an economic good.

VI. SELECTED THEMES IN ENVIRONMENTAL LAW AND POLICY

The last part of the book contains selected themes on diverse aspects of environmental law and policy. The first theme is that of mining and minerals development, an area that has gained prominence in scholarship following the discovery of extractives across the continent. This issue is addressed in three chapters. Chapter Twenty-two by Emmanuel Kasimbazi is on “Mining Law and Sustainable Development: Lessons from selected cases in Africa”. It discusses key issues in the sustainable governance of the mining sector, which must be included in a law to govern the mining sector. These elements are drawn from a review of the experience and frameworks of selected countries in the African continent. Richard Mulwa in Chapter Twenty-three titled, “You are what you eat: Kenya’s probable economic outcomes in light of mineral discoveries”, takes an economic approach to the issue of sustainable management of the extractive sector so as to avoid the resource curse. The chapter argues for improved governance and institutional reforms and innovative measures to ensure sustainability. Bulska and Hilda Mutwiri in Chapter Twenty-four also discuss issues related to minerals. Their chapter “Sustainable Mining Practices in Kenya: A Case Study of Titanium Mining in Kwale” draws lessons from a case study of a specific mining venture in a specific location in Kenya.

Chapter Twenty-five by Kariuki Muigua focuses on “Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice”. He argues that extraction of natural resources engenders conflicts, highlighting the need to design and implement appropriate tools to ensure effective management of conflicts to guarantee, peace, justice and sustainability. In a

world, which is increasingly adopting technology in its processes, the place of science, technology and innovation in environmental governance takes an ever-important role in different fields of scholarship. John Mugabe explores this theme in Chapter Twenty-six titled, “Governing Science, Technology and Innovation in Africa: Charles Okidi’s Intellectual Endowment”.

Finally, Robert Wabunoha’s chapter on “Sustainable Governance of Mountains” completes the chapter contributions making proposals for comprehensive and sustainable frameworks for the governance of mountains. The chapter reverts to Okidi’s lasting legacy of scholarship through the author’s testimony that Okidi, reading the chapter, would urge him to pursue doctoral studies. This is correct and remains a true testimony to Professor Okidi’s legacy as a mentor, institution builder and environmental law scholar per excellence. This is the legacy that this Festschrift celebrates and immortalises.