

# Comments from the Sabin Center Peer Reviewer Network to the ‘Study on the Impact of Climate Change on Human and Peoples’ Rights in Africa’

African Commission on Human and Peoples’ Rights (African Commission) through its Working Group on Extractive Industries, Environment and Human Rights in Africa (WGEI)

Sabin Center for Climate Change Law at Columbia Law School

Peer Review Network of Climate Litigation

November 30, 2023

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## **I. Introduction and Background**

To understand and address the impact of climate change on human rights in Africa, the African Commission on Human and Peoples' Rights (ACHPR) through its Working Group on Extractive Industries, Environment and Human Rights in Africa (WGEI), has prepared a draft study focusing on the climate-related provisions of the African Charter and the need for international cooperation (the Zero Draft of the Study on the Impact of Climate Change on Human and Peoples' Rights in Africa). This study examines the adverse consequences of observed and projected climate change on human rights. It also explores the obligations of African States and clarifies the role of the ACHPR in this context. In this context, in November 2023, the ACHPR requested comments on their report.

The Peer Review Network of Climate Litigation, an initiative by the Sabin Center for Climate Change Law at Columbia Law School, submits comments on the Zero Draft of the Study on the Impact of Climate Change on Human and Peoples' Rights in Africa. Established in December 2021, the Peer Review Network comprises global experts in climate change law and litigation, with over 130 volunteers spanning more than 80 jurisdictions under the guidance of Dr. Maria Antonia Tigre, Director of Global Climate Change Litigation at the Sabin Center. These comments were prepared by several rapporteurs of the Peer Review Network, under the guidance of Antoine De Spiegeleir and Maria José Alarcón, coordinators of the International and Regional Courts working group. While these comments represent the collective expertise of the Peer Review Network, they do not constitute the official stance of the Network or the Sabin Center but rather reflect the views of the individual authors.

The authors of these comments are Maria José Alarcón, Gitanjali Gill, Moumita Das Gupta, Masako Ichihara, Muhammed Tawfiq Ladan, Dina Lupin, Fernand Guevara Mekongo Mballa, Antoine De Spiegeleir, Maria Antonia Tigre, and Zunaida Moosa Wadiwala. These comments are submitted by Dr. Maria Antonia Tigre ([mb4913@columbia.edu](mailto:mb4913@columbia.edu)), and any communications related to this submission shall be directed to her.

Acknowledging the commendable breadth and depth of the Zero Draft, which uniquely intertwines the realms of human rights and climate change in Africa, the authors express appreciation for the initiative. In an effort to enhance the impact of this pivotal document, the authors offer constructive comments on the Zero Draft of the Study on the Impact of Climate Change on Human and Peoples' Rights in Africa.

## **II. Human Rights Implications of Climate Change & Vulnerable Groups**

The Zero Draft includes a clear overview of the heightened risks faced by women, children, Indigenous peoples, displaced persons, the elderly, and other vulnerable groups. Greater consideration could be given to the issue of intersectionality and how multiple sources of oppression and discrimination make these groups more and differently vulnerable to the impacts of climate change. For example, certain occupations, income classes, ethnic groups, and geographies impact the vulnerabilities of already vulnerable groups, highlighting the intersectional nature of vulnerability and underscoring that climate risks amplify existing inequities would enrich the Zero Draft and more accurately reflect the complexity and nuances that vulnerable groups face and that must be taken into account in policy responses. The draft study establishes a strong framing and rationale for examining vulnerability. Delving more deeply into the nuances would further strengthen this section.

## **III. Children**

Paragraphs 21 to 24 of the Zero Draft discuss children's vulnerability in the face of climate change. On August 22, 2023, the Committee on the Rights of the Child (CtRC) published its General Comment No. 26 "on children's rights and the environment, with a special focus on climate change."<sup>1</sup> This General Comment is not mentioned in the Zero Draft (this is unsurprising since the latter dates back to May 2023). However, reference to the General Comment would greatly enhance the discussion of children in the Zero Draft. It is suggested to add to paragraph 21 of the Zero Draft a sentence to this effect:

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<sup>1</sup> Committee on the Rights of the Child, General Comment No. 26 on Children's Rights and the Environment, with a Special Focus on Climate Change, CRC/C/GC/26.

“21. As recently noted by the Committee on the Rights of the Child, a clean, healthy, and sustainable environment is both a human right itself and necessary for the full enjoyment of a broad range of children’s rights. Children are disproportionately affected [...].

It is also suggested to add the following remark at the end of paragraph 24 of the Zero Draft:

“24. [...]. Finally, new environmental challenges are likely to arise in the future. It is essential that States continuously review and when necessary, update measures adopted to alleviate children’s increased burden in the face of this evolving crisis. This is particularly important given the entitlement of future generations of children to the full realization of their human rights. To this effect, envisaged legislation, policies, regulations, and other decisions should be subjected to a thorough children’s rights impact assessment.

#### **IV. Women**

Women’s vulnerability is highlighted in paragraphs 17 to 20 of the Zero Draft. The authors suggest adding a reference to the Committee on the Elimination of Discrimination against Women’s General Recommendation no. 37 “on the gender-related dimensions of disaster risk reduction in the context of climate change,” which was adopted on March 13, 2018.<sup>2</sup> The suggested amendment is to replace the last paragraph touching on women’s rights with the following text:

“20. Disasters, in particular, exacerbate pre-existing inequalities and further increase women and girls’ disproportionate vulnerability in the face of climate change.<sup>3</sup> Recognizing this vulnerability is essential to realize women’s rights fully. As noted by the Committee on the Elimination of Discrimination against Women in 2018, it is imperative that states acknowledge women’s significant role in the field of disaster risk reduction, post-disaster management, and more broadly, climate change mitigation and adaptation.<sup>4</sup>”

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<sup>2</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 37 (2018) on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, CEDAW/C/GC/37.

<sup>3</sup> E.g., Eric Neumayer and Thomas Plümper, ‘The gendered nature of natural disasters: the impact of catastrophic events on the gender gap in life expectancy, 1981–2002’ (2007) 97 *Annals of the Association of American Geographers* 551.

<sup>4</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 37 (2018) on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, CEDAW/C/GC/37, para. 7.

## V. Gender-Diverse Groups

The Zero Draft makes no mention of climate change’s differentiated impacts on the gender-diverse and gender non-binary population.<sup>5</sup> Most climate change instruments, policies, and reports tend to overlook the impacts of climate change on LGBTQIA+ populations.<sup>6</sup> Binary and heteronormative approaches to gender have meant that most policy instruments focus primarily on women and, to a lesser extent, men. The unique risks and interests of transgender, non-binary, and gender non-conforming people are usually ignored. Despite the lack of attention, it is important to consider that gender-diverse populations face hardships, oppression, and discrimination in the aftermath of natural disasters. For example, LGBTQIA+ people are often denied social services, support, and opportunities to rebuild and recover, mainly because they are overlooked in policy formulation and disaster response, and heteronormative assumptions about families are the norm.<sup>7</sup> Moreover, LGBTQIA+ populations are at an increased risk of violence in the aftermath of natural disasters.<sup>8</sup>

Furthermore, these climate-related risks are also permeated by other intersecting categories, including race, class, religion, ethnicity, and age. In this context, an approach that (i) emphasizes multiple social locations and intra-group differences; (ii) explores these issues with a multi-scalar lens; and (iii) directly and critically identify and analyze not only powerful actors but systems and processes of power in these dynamics would help understand and evaluate climate-related risks and vulnerability/oppression.<sup>9</sup>

### a. People with Disabilities

The Zero Draft considers the vulnerability of people with disabilities in the face of climate change in paragraphs 38 to 42. These paragraphs cover five pertinent aspects concerning climate change and people with disabilities, including a vulnerability to the effects of climate change, the consequences of emergency situations for people with disabilities, and the challenges associated

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<sup>5</sup> The term gender diverse is used to include non-binary, transgender, and members of the LGBTQIA+ population.

<sup>6</sup> See, e.g., Dominey-Howes, D., Gorman-Murray, A., & McKinnon, S. 2014. Queering disasters: on the need to account for LGBTI experiences in natural disaster contexts. *Gender, Place & Culture*, 21(7), 905–918.

<sup>7</sup> Lupin, D. 2021. Exclusion, Objectification, Exploitation: Gender, Sexuality and Climate Change Information Services. In G. Pinheiro (ed.), *Short Discussion Series*. CSA&G and University of Pretoria.

<sup>8</sup> *Ibid.*

<sup>9</sup> Menton, M. et al., ‘Environmental justice and the SDGs: from synergies to gaps and contradictions’ *Sustainability Science* 15 (2020) 1621-1636

with data that is only scantily available. The Zero Draft further positions the lived experiences of people with disabilities and the expected worsening plight in the climate change context. Lastly, the Zero draft highlights the increased vulnerability risks for disabled women and children.

The authors suggest adding a reference and building on the points of (i) inequalities for people with disabilities being exacerbated due to being especially vulnerable to the adverse effects of climate change, (ii) the awareness of the disproportionality and the calls for inclusion of people with disabilities in climate negotiations and (iii) to include mention of current and pending climate litigation involving people with disabilities as actors.

The suggested amendments would be placed, first, at the end of paragraph 38 after the Zero Draft confirms that climate change exacerbates inequalities for People with Disabilities. It is important to highlight first that this element of people in vulnerable situations being disproportionately affected by climate change causes both inequalities and development challenges and secondly that this is more prevalent in the Global South.<sup>10</sup>

The second suggestion, to be placed at the end of paragraph 40, is to include the provisions of the Cancun Agreement<sup>11</sup> from the 2010 COP16, having identified people with disabilities as disproportionately affected by climate change and the inclusion of people with disabilities or their representatives as an essential component of climate justice. Negotiations at COP27 in 2022 reiterated the call for climate justice for people with disabilities.<sup>12</sup> Despite these calls, people with disabilities have largely been excluded from climate change negotiations. Challenges faced by people with disabilities include a lack of research and development with climate policies not catering to different reading formats such as braille, inaccessible websites, and the unavailability of sign language interpreters.<sup>13</sup>

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<sup>10</sup> Michael Burger & Maria Antonia Tigre, *Global Climate Litigation Report: 2023 Status Review* (Sabin Center for Climate Change Law, Columbia Law School & United Nations Environment Programme, 2023).  
[https://scholarship.law.columbia.edu/sabin\\_climate\\_change/202](https://scholarship.law.columbia.edu/sabin_climate_change/202) at p6.

<sup>11</sup> Nancy Marangu, “COP27 can be a reset on climate justice for people with disabilities” (Africa Renewal, 27 July 2022) <<https://www.un.org/africarenewal/magazine/july-2022/cop27-can-be-reset-climate-justice-people-disabilities>> accessed 30 November 2023

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

Next is to build on the aspect of disaggregated data by adding that in Africa, particularly, there is a dearth of structured guidelines and technologies to conduct a study of data on people with disabilities. The result is an inaccuracy in predicting how populations of people with disabilities are affected by climate change at country levels. Lastly, mention of a country that has conducted successful data collection and could potentially serve as a role model within this context is Kenya, where progress has been made in releasing data on percentages of People with Disabilities affected by climate change.<sup>14</sup>

The third suggestion is to include a discussion on global climate litigation involving people with disabilities at the end of para 42, by discussing that the increased risk of climate change for other vulnerable groups, such as women and children, has been met with climate litigation in many jurisdictions<sup>15</sup> with claims of human rights being exacerbated by the climate crisis. To date, globally, there is only one instance of climate litigation regarding people with disabilities, and this decision is currently pending within the jurisdiction of the European Court of Human Rights.<sup>16</sup> Recognizing and identifying that these types of vulnerabilities are becoming increasingly relied upon in human-rights-based climate litigation is crucial to this section of the Zero Draft.

### **III. Environmental democracy and rule of law**

Environmental democracy and the rule of law are pivotal in addressing the intersection of climate change and human rights.<sup>17</sup> These frameworks emphasize citizen participation, access to environmental information, and governmental accountability, ensuring that climate policies respect human rights.

Environmental democracy is rooted in Principle 10 of the Rio Declaration, which stipulates that “environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information

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<sup>14</sup> Ibid.

<sup>15</sup> For example, Climate Change Litigation Databases, “Sacchi, et al. v. Argentina, et al.” <<https://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/>> and “KlimaSeniorinnen v. Switzerland (ECtHR)” <<https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/>> accessed 30 November 2023

<sup>16</sup> Ibid, “Müllner v. Austria” <<https://climatecasechart.com/non-us-case/mex-m-v-austria/>> accessed 30 November 2023

<sup>17</sup> United Nations Environment Programme (2023). Environmental Rule of Law: Tracking Progress and Charting Future Directions. Nairobi. <https://doi.org/10.59117/20.500.11822/43943>.



concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”<sup>18</sup>

Environmental democracy is at the core of the latest United Nations Special Rapporteur on human rights and the environment’s call for inputs on the procedural or participatory elements, “Promoting environmental democracy: procedural elements of the human right to a clean, healthy and sustainable environment.”<sup>19</sup> In this context, recent studies highlight the importance and progress of the environmental rule of law, which is closely tied to environmental democracy.<sup>20</sup>

The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.<sup>21</sup> It requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>22</sup>

A good practice is observed in the Escazú Agreement. It requires Each Party to establish conditions that are favorable to public participation in environmental decision-making processes and that are adapted to the social, economic, cultural, geographical, and gender characteristics of the public.<sup>23</sup> When the primary language of the directly affected public is different from the official languages, the public authority shall ensure that means are provided to facilitate their understanding and

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<sup>18</sup> Rio Declaration on Environment and Development, Jun. 13, 1992 (31 ILM 87) , Principle 6.

<sup>19</sup> Special Rapporteur on human rights and the environment, “Promoting Environmental Democracy: Procedural elements of the human right to a clean, healthy and sustainable environment” (United Nations Office of the High Commissioner, 2 October 2023) <<https://www.ohchr.org/en/calls-for-input/2023/promoting-environmental-democracy-procedural-elements-human-right-clean>> accessed 30 November 2023

<sup>20</sup> United Nations Environment Programme (2023). Environmental Rule of Law: Tracking Progress and Charting Future Directions.< <https://wedocs.unep.org/20.500.11822/43943>> accessed 30 November 2023.

<sup>21</sup> United Nations General Assembly, Delivering justice: programme of action to strengthen the rule of law at the national and international levels, *A/66/749*, 2012, para. 2

<sup>22</sup> Ibid.

<sup>23</sup> Escazú Agreement (n 37), Article 7 (10).

participation.<sup>24</sup> Furthermore, each Party shall promote regard for local knowledge, dialogue, and interaction of different views and knowledge, where appropriate;<sup>25</sup> and the public authorities shall make efforts to identify and support persons or groups in vulnerable situations in order to engage them in an active, timely and effective manner in participation mechanisms.<sup>26,27</sup>

The rule of law is specifically addressed in the 2012 Declaration of the High-level meeting of the General Assembly on the rule of law at the national and international levels.<sup>28</sup> It states that “collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law, as it is the foundation of friendly and equitable relations between States and the basis on which fair and just societies are built”.<sup>29</sup> In this regard, the rule of law is associated with the sustainable development goal (SDG) no. 16, which promotes peaceful and inclusive societies for sustainable development, provides access to justice for all, and builds effective, accountable, and inclusive institutions at all levels.<sup>30</sup> In this respect, the rule of law and governance play an essential role in promoting peaceful, just, and inclusive societies as well as sustainable development.

References to environmental democracy and the rule of law are dispersed throughout the Zero Draft. Specific mentions include paragraph 30, addressing the rights of Indigenous people, particularly women and children, and their need for free, prior, and informed consent (FPIC). The right to information and opinion expression is discussed in paragraphs 93 through 101, highlighting various aspects such as climate activism in Africa, individual rights, the 2019

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<sup>24</sup> *ibid*, Article 7 (11).

<sup>25</sup> *ibid*, Article 7 (13).

<sup>26</sup> *ibid*, Article 7 (14).

<sup>27</sup> See also, Etemire, U. (2023). Public Voices and Environmental Decisions: The Escazú Agreement in Comparative Perspective. *Transnational Environmental Law*, 12(1), 175-199

<sup>28</sup> United Nations General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/RES/67/1, September 24, 2012..

<sup>29</sup> *ibid*.

<sup>30</sup> See for example Paul F. Herman Jr and Gregory F Treverton, (2009), *The political consequences of climate change, survival*, 51:2, 137-148, DOI: 10.180/00396330902860876; Tama A. Carleton and Solomon M Hsiang, “Social and economic impacts of climate”, *Science*, New-York, N.Y. ,353(6304), 2016; Jean Didier Boukongou, “L’accord de Paris sur les changements climatiques: vers une intensification de la coopération internationale pour l’action climatique”, *Cahier Africain des droits de l’Homme*, n°13, Décembre 2016, pp13-26; Stanislas Nzitoukoulou, *La problématique de la protection des migrants climatiques en droit international / The issue of protection climate migrants in international law*, Thesis defended at the Academy of Peace and Human Rights in Central Africa, Catholic University of Central Africa, 2020; CH Trisos et al “Africa” in : *Climate change 2022: impacts , adaptation and vulnerability Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, HO Pörtner et al (eds).

Declaration of Principles on freedom of expression and access to information in Africa,<sup>31</sup> and the state responses to climate activism. The document also touches upon the implications for agriculturally dependent and politically marginalized groups in paragraph 115. Additionally, environmental democracy and the rule of law are linked to climate response measures and protection rights, evident in paragraphs 127, 130, and 131, which discuss issues like land expropriation and displacement due to Reducing emissions from Deforestation and forest degradation (REDD+) and Bioenergy and Carbon capture with storage (BECCS) projects. The role of environmental democracy and the rule of law in climate finance is further examined in paragraphs 134 and 135, focusing on the inclusivity of climate finance projects and their impact on local communities' rights, including concerns about forced evictions and housing rights violations due to biofuel production projects.

While the current draft integrates the themes of environmental democracy and the rule of law throughout its text, there may be an opportunity to enhance clarity and focus. By gathering these references into a single, dedicated section, it could provide a more cohesive overview of their significance in the context of climate change. This could also be an effective way to connect these themes with the broader subject of protecting environmental and human rights defenders.

#### **IV. Protection of Environmental and Human Rights Defenders**

The Zero Draft includes some references to environmental and human rights defenders (EHRD) throughout the text. Particularly, paragraph 153 of the Zero Draft mentions environmental defenders and climate activists when discussing the principle of participation and the obligation of African States to safeguard equitable participation of those most affected. Furthermore, EHRD are also brought up when addressing access to justice (para. 156), freedom of expression and access to information (para. 158), right to association and assembly (para. 101), and brutal repression from financed projects (para. 136 on climate finance).

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<sup>31</sup> The Declaration of Principles of Freedom of Expression and Access to Information in Africa (the Declaration) was adopted by the African Commission on Human and Peoples' Rights (the African Commission) at its 65th Ordinary Session which was held from 21 October to 10 November 2019.

According to the latest Global Witness Report, data collection is a significant challenge in Africa and Asia, which may lead to severe underreporting of attacks on EHRD.<sup>32</sup> Still, for example, data shows that around 200 park rangers have been killed at Virunga National Park through the years.<sup>33</sup> This indicates special attention should be placed on EHRD. In this regard, lessons can be learned from the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

The Escazú Agreement explicitly mandates the protection of EHRD.<sup>34</sup> Article 9 sets forth three directives: (i) States shall guarantee a safe and enabling environment so EHRD can be free from threats and insecurity; (ii) States shall take adequate and effective measures to recognize, promote and protect EHRD's rights (which includes access to justice and information); and (iii) States shall take appropriate, effective and timely measures to prevent and punish attacks, threats and intimidations against EHRD.<sup>35</sup> Providing a clear framework to ensure the protection of EHRD gives legitimacy to their work and guarantees effective measures will be implemented by States. It is suggested to dedicate a particular section of the Zero Draft to EHRD, which outlines mandates and directives specifically directed towards addressing the protection of EHRD in Africa, with a special emphasis on combatting underreporting and the challenges in data collection.

Similarly, Decision VII/9 of the Meeting of the Parties to the Aarhus Convention (2021) established a rapid response mechanism for the protection of environmental defenders, in the form of an independent Special Rapporteur,<sup>36</sup> as the first international mechanism specifically created to safeguard environmental defenders within a legally binding framework. Pursuant to this

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<sup>32</sup> Global Witness (2023) Standing Firm: the land and environmental defenders on the frontlines of the climate crisis, <<https://www.globalwitness.org/en/campaigns/environmental-activists/land-and-environmental-defenders-annual-report-archive/>> accessed 30 November 2023

<sup>33</sup> Ibid at 33.

<sup>34</sup> Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), Article 9 <<https://repositorio.cepal.org/server/api/core/bitstreams/7e888972-80c1-48ba-9d92-7712d6e6f1ab/content>> accessed 30 November 2023

<sup>35</sup> Urzola, N (2021) Colombia's reluctance to ratify the Escazú Agreement leaves environmental and human rights defenders unprotected, GNHRE, <<https://gnhre.org/?p=14165>> accessed 30 November 2023

<sup>36</sup> Economic Commission for Europe, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Seventh Session, Geneva 18-20 October 2021 ECE/MP.PP/2021/2/Add.1, Decision VII/9, [https://unece.org/sites/default/files/2022-01/Aarhus\\_MoP7\\_Decision\\_on\\_RRM\\_E.pdf](https://unece.org/sites/default/files/2022-01/Aarhus_MoP7_Decision_on_RRM_E.pdf)

decision, in June 2022, the Meeting of the Parties elected its first Special Rapporteur on Environmental Defenders under the Aarhus Convention.<sup>37</sup> The Special Rapporteur's mandate includes taking measures to protect any person who may experience or is at imminent threat of penalization, persecution, or harassment by any State body or institution, as a result of exercising their rights under the Aarhus Convention. Among the Special Rapporteur's tools for resolving complaints and protecting environmental defenders are: (i) issuing immediate and ongoing protection measures, (ii) using diplomatic channels, (iii) issuing public statements, or (iv) bringing the matter before other relevant human rights bodies and heads of State. The Special Rapporteur is also in charge of raising awareness of the rights of environmental defenders under the Aarhus Convention and of cooperating with other human rights bodies and organizations. It is suggested to include a similar mechanism in the Zero Draft.

## V. Intragenerational and intergenerational equity

Intragenerational equity, on the one hand, is concerned with equity between people of the same generation and aims to assure justice among human beings that are alive today, as reflected in Principle 6 of the Rio Declaration, mandating particular priority for the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable.<sup>38</sup> Intergenerational equity refers that every generation holds the Earth in common with members of the present generation and with other generations, past and future.<sup>39</sup>

Those two notions are central to the arraignment of sustainable development<sup>40</sup>, to the extent that many conventions and treaties connote relevant articles, including the following examples:

- Article 3(1) of the United Nations Framework Convention on Climate Change (1992):<sup>41</sup>  
“The Parties should protect the climate system for the benefit of present and future

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<sup>37</sup> Special Rapporteur on Environmental Defenders under the Aarhus Convention, <<https://unece.org/env/pp/aarhus-convention/special-rapporteur>> accessed 30 November 2023

<sup>38</sup> D. Shelton (2008). Oxford Handbook of International Environmental Law, chapter 1 - Equity

<sup>39</sup> Edith Brown Weiss, “Intergenerational Equity” (The Max Planck Encyclopedias of International Law, 2021) <<https://opil-ouplaw-com.peacepalace.idm.oclc.org/display/10.1093/law:epil/9780199231690/law-9780199231690-e1421?rsk=QvzJku&result=1&prd=OPIL>> accessed 30 November 2023

<sup>40</sup> Principles and concepts of international environmental law, Part 1. InforMEA, available at: <<https://globalpact.informea.org/sites/default/files/documents/Book%20%E2%80%93%20Principles%20and%20concepts%20of%20international%20environmental%20law%20%28Part%201%29.pdf>> accessed 30 November 2023

<sup>41</sup> UNFCCC, 1992: United Nations Framework Convention On Climate Change. United Nations, FCCC/INFORMAL/84 GE.05-62220 (E) 200705, Secretariat of the United Nations Framework Convention on Climate Change, Bonn, Germany, 24 pp.

generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities (The following omitted)”.

- Principle 6 of Rio Declaration (1992):<sup>42</sup> “The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.”
- The last preambular paragraph of the 1992 Convention on Biological Diversity (1992):<sup>43</sup> “Determined to conserve and sustainably use biological diversity for the benefit of present and future generations”
- Article 5(c) of United Nations Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992):<sup>44</sup> “Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs”.
- The eleventh paragraph of Preamble of Paris Agreement (2015):<sup>45</sup> “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity”.

The Zero Draft recognizes the importance of intergenerational equity, as demonstrated in paragraphs 96 (in the section on the Right to Receive Information and Express Opinions), 109, and 112 (in the section on the Right to Freely Dispose of Wealth and Natural Resources). However, only the eleventh preamble of the Paris Agreement is mentioned in paragraph 124, Chapter 4 (Climate Response Measures and Protection of Rights).

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<sup>42</sup> *supra*, n.22

<sup>43</sup> United Nations Environment Programme, 1992. *Convention on biological diversity, June 1992*. <<https://wedocs.unep.org/20.500.11822/8340>> accessed 30 November 2023

<sup>44</sup> United Nations Economic Commission for Europe, 1992. *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, <<https://unece.org/fileadmin/DAM/env/water/pdf/watercon.pdf>> accessed 30 November 2023

<sup>45</sup> Conference of the Parties, Adoption of the Paris Agreement, Dec. 12, 2015 U.N. Doc. FCCC/CP/2015/L.9/Rev/1

Indeed, the full text of the cited Paris Agreement touches on the obligations of parties to address the reality of disproportionate global impacts of climate change. From this point of view, the reference to this article can be evaluated as a sufficient confirmation of the legal basis of the draft, along with the purpose of this draft. However, Africa is a region with one of the highest rates of future population growth in the world by 2.42% per year for the past 30 years.<sup>46</sup> Ensuring intergenerational equity, in particular, is an important matter when considering human rights related to climate change. From this point of view, reference to other international instruments on biodiversity and water management could also be included.

## **VI. State Responsibility for the Breach of Human Rights Violations**

The Zero Draft fails to address the consequences of States for the breaches of their international legal obligations concerning human rights and climate change. In this regard, it is imperative to determine the consequences for States when they breach their international obligations. Notably, without identifying the consequences of the breach, compliance and accountability are diminished. For these reasons, we propose that the report add an additional section at the end of the report where general principles of State responsibility are identified to hold States accountable for their breaches of international law.

### **a. The Role of the African Human Rights System in Addressing State Responsibility for Climate Change and Human Rights Violations in Africa**

The ACHPR and the African Court on Human and Peoples' Rights are central to the African human rights system's efforts in addressing State responsibilities related to climate change's impact on human rights. These institutions play a pivotal role in monitoring and enforcing State compliance with the African Charter, specifically in the context of environmental degradation and

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<sup>46</sup> African Development Bank Group, available at: <<https://www.afdb.org/en/knowledge/publications/tracking-africa%E2%80%99s-progress-in-figures/human-development>> accessed 30 November 2023. See also "Population growth rate" provided by The World Factbook, available at: <<https://www.cia.gov/the-world-factbook/field/population-growth-rate/country-comparison/>>.

climate change.<sup>47</sup> This involves reviewing State reports and providing recommendations on enhancing human and peoples' rights protection amidst environmental challenges. Additionally, individuals or groups affected by climate change can file complaints with these bodies, alleging human rights violations due to State environmental policies or actions. The ACHPR and the African Court issue decisions and judgments in these cases, clarifying the extent of State responsibilities and obligations regarding climate change.<sup>48</sup>

Furthermore, the ACHPR and the African Court also offer guidance to African States on implementing legal and policy reforms. These reforms aim to align with human rights obligations in the context of climate change, including adopting measures for climate change mitigation and adaptation while ensuring the protection of human and peoples' rights.

### **b. General Principles of State Responsibility Concerning Climate Change**

The State's breach of its human rights obligations related to climate change is determined by the general rules of customary international law on State responsibility. State responsibility is a fundamental aspect of international law that arises from the legal personality of every State under international law and their role as the primary bearers of international obligations.<sup>49</sup> State responsibility is not limited to obligations owed by States to other States, but obligations also arise from other sources of law such as *erga omnes* obligations owed to the international community as a whole,<sup>50</sup> general principles of law and customary international law.<sup>51</sup>

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<sup>47</sup> See e.g., <https://achpr.au.int/en/news/press-releases/2022-11-06/african-commission-human-rights-policy-measures-towards-climate#:~:text=Against%20the%20background%20of%20recent,rights%20challenges%20of%20our%20time> See also, Sanchez, M. (2023). The African Court on Human and Peoples' Rights: Forging a jurisdictional frontier in post-colonial human rights. *International Journal of Law in Context*, 19(3), 352-366. doi:10.1017/S1744552323000046

<sup>48</sup> See, e.g. Ademola Oluborode Jegede, 'Framing Climate Litigation in Individual Communications of the African Human Rights System: Claw-Backs and Substantive Divergences' (2023) *Journal of Human Rights Practice*, huad018 <https://doi.org/10.1093/jhuman/huad018> accessed 29 November 2023. See also, Yusra Suedi and Marie Fall, 'Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls: Practice Note: GNHRE Climate Litigation in Global South Project' (2023) *Journal of Human Rights Practice*, huad024 <https://doi.org/10.1093/jhuman/huad024> accessed 29 November 2023.

<sup>49</sup> James Crawford, "State Responsibility" (September 2006) in Anne Peters (2021–) and Professor Rüdiger Wolfrum (2004–2020), *Max Planck Encyclopedia of Public International Law* (online edn), para. 1.

<sup>50</sup> *Ibid.* para. 12.

<sup>51</sup> Art. 12 ARSIWA Articles



The International Law Commission (ILC) approved the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) in 2001, which established three primary principles related to this matter: (i) every internationally wrongful act a State commits triggers State responsibility,<sup>52</sup> (ii) an act becomes internationally wrongful when a State's action or omission breaches its international obligations and is directly attributable to that State<sup>53</sup> and (iii) international law determines an act's wrongful nature, irrespective of its lawful characterization under domestic law.<sup>54</sup>

Likewise, the underlying concepts of State responsibility are attribution, breach, excuses, and consequences.<sup>55</sup> Therefore, there are three identifiable components for a State to be held responsible for a wrongful act: (i) the State must have a legal obligation under international law, (ii) the State must violate that international obligation, and (iii) the act must result in harm or loss to another State or the international community as a whole.<sup>56</sup> In essence, an internationally wrongful act is the non-conformity of a State with the conduct it was supposed to adopt for it to be in compliance with international law- typically known as a breach of an international obligation.<sup>57</sup> In the following paragraphs, we briefly explain the elements of State responsibility considering the unique aspects of climate change.

### **c. State Responsibility and Issues of Causation in the Context of Climate Change and Human Rights**

State responsibility in the context of climate change and human rights presents complex issues of causation.<sup>58</sup> It requires showing how a State's specific actions, or lack thereof, directly lead to environmental changes. This is made more difficult because climate change is a global issue – events that occur in one country can affect the global climate system, making it hard to pinpoint exactly who or what caused severe harm leading to climate change and the violation of human

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<sup>52</sup> Article 1 ARWISA. See also, See also, James Crawford, “State Responsibility” (n 61) para. 17

<sup>53</sup> Article 2 ARWISA. See also, See also, James Crawford, “State Responsibility” (n 61)

<sup>54</sup> Article 3 ARWISA. See also, See also, James Crawford, “State Responsibility”(n 61)

<sup>55</sup> James Crawford, “State Responsibility” (n 61)

<sup>56</sup> However, please note that this third element is discussable, and no harm is necessary in order for state responsibility to crystallize.

<sup>57</sup> Art. 12 ARSIWA Articles

<sup>58</sup> Alice Venn, Rendering International Human Rights Law Fit for Purpose on Climate Change, *Human Rights Law Review*, Volume 23, Issue 1, March 2023, ngac034, <<https://doi.org/10.1093/hrlr/ngac034>> accessed 30 November 2023

rights thereafter.<sup>59</sup> Also, while climate attribution science is improving, scientifically and legally proving that certain climate changes or events are directly caused by a specific State's actions is not always straightforward. This is important in today's legal world, where protecting human rights is increasingly linked with environmental and climate issues. It raises the question of how to hold States accountable for their role in global climate change and its impact on human rights.<sup>60</sup> We believe this is an issue that needs to be addressed in the Zero draft.

## **VII. Conclusion**

The authors hope these comments are helpful in framing a revised draft of the Study and look forward to continuing to engage with the ACHPR in this process. We remain committed to furthering the study of climate change and human rights and remain at your disposal should further revisions be needed.

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<sup>59</sup> Ibid.

<sup>60</sup> "Understanding Human Rights and Climate Change" Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change- COP 21.