

**QUESTIONNAIRE SUBMISSIONS FOR ENHANCING CLIMATE LEGISLATION, SUPPORT FOR CLIMATE CHANGE LITIGATION AND ADVANCEMENT OF THE PRINCIPLE OF INTERGENERATIONAL JUSTICE**

Prepared by SECTION27  
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## Enhancing Climate Change Legislation:

Can you provide examples of climate change legislation that incorporates human rights elements, or a reference to obligations relating to loss and damage?

1. South Africa is in the process of enacting climate change legislation. The protections envisioned in the current iteration of the [Climate Change Bill 2022](#) find their basis in section 24 of the Constitution of the Republic of South Africa, 1996. Section 24, which is part of the Bill of Rights in the Constitution, protects the right of everyone to an environment that is not harmful to their health or well-being and places an obligation on the State to enact legislation to safeguard the rights of present and future generations. Further, the Bill acknowledges the socio-economic impacts of the climate crisis on human societies, and section 3(f) of the Bill states that the interpretation and application of the Act must be guided by the principle that any decision making must consider:

*“...the special needs and circumstance of localities and people that are particularly vulnerable to the adverse effects of climate change, including vulnerable workers and groups such as women, especially poor and rural women, children, especially infants and child-headed families, the aged, the poor, the sick and the physically challenged.”*

2. Unfortunately, the Bill makes no reference to loss and damage. We submit that such an exclusion is a major oversight especially considering South Africa’s vulnerability to the impacts of climate change and current lack of preparedness. For instance, in recent history South Africa has had an onslaught of flooding events which resulted in loss of life, damage to property, and impacts on mental health with lasting consequences in the absence of access to mental health care services.<sup>1</sup> The governments’ current response to floods is to declare a “state of disaster” which enables it to utilise emergency financial reserves through the Disaster Management Act 57 of 2002 to respond to needs on the ground. However, the frequency of the extreme weather events has shown the inadequacy of such a reactionary response and the limited funds available to recover and adapt to such events. See response to Q3 for further discussion.
3. In addition to the Bill, South Africa has subordinate legislation that incorporates human rights

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<sup>1</sup> Mbalenhle Baduza (October 2021) “[Opinion: Climate emergency risks becoming a mental health emergency](#)” *Spotlight*.

elements. Section 2(4)(l) of the National Environmental Management Act 107 of 1998, provides that an organ of state must consider the social, economic, and environmental impacts of its activities including the disadvantages and benefits. It further states that the assessment and evaluation of the socio-economic and environmental impacts must inform the decisions made by state organs.

How do you think climate change legislation should frame a connection to human rights obligations?

4. It is important for climate legislation to include reference to human rights in the preamble. South Africa's Climate Change Bill 2022 has done this to some extent. It is also important for the application and interpretation of the legislation to be underpinned by constitutional values and principles. However, just as in the Paris Agreement, the Bill only includes a single reference to human rights in its preamble and principles section and none in its operative text. This is insufficient. A stronger commitment to human rights is necessary and would enhance the legitimacy of the climate change regime.
5. We submit that the operative text should:
  - a. Identify vulnerable sectors and groups and which socio-economic rights are specifically at risk.
  - b. Outline the obligations to protect, promote, respect, and fulfil human rights in any climate action for mitigation, adaptation (including loss and damage) and financing.
  - c. Clearly delineate roles and responsibilities of private and state actors.

How do you think climate change legislation should engage the concept of loss and damage?

6. Climate change legislation should clearly entrench mitigation, adaptation *and* loss and damage funding mechanisms to protect the socioeconomic rights of communities most vulnerable to climate change threats. This would enable and compel government departments to respond to loss and damage of public infrastructure. Currently, when schools or health care facilities are damaged by extreme weather events, the departments apply for funding in their ordinary course of business from the National Treasury to respond to this loss and damage. However, various governments across the world, including South Africa, have pursued a fiscal consolidation framework where spending on education and healthcare has seen cuts or received below inflation increases. Government departments have less funding and capacity to ensure that socioeconomic rights are protected in general, but especially in

the context of the climate crisis. Including a funding mechanism for loss and damage in climate legislation allows for preparation for the worst-case scenario and means to recovery when the worst happens, regardless of the fiscal framework.

#### *Loss and Damage to Basic Education*

7. In April 2022, floods caused by excessive rainfall in the South African province of KwaZulu Natal (KZN) damaged 356 schools. A year later, in April 2023, government reported that repairs had been completed at [only 148 schools](#) which means that close to 60% of the damaged schools remain damaged a year later. Moreover, in the Eastern Cape province, ten schools were damaged by floods, exacerbating an education crisis where [54% of contact teaching and learning time was lost](#) in the first half of 2020 due to COVID19 lockdown school closures in the province. It is also worth noting that these provinces were historically underfunded and underdeveloped during apartheid and have not received the kind of post-apartheid investment that was needed to allow them to develop sufficiently. School and other infrastructure in these provinces are therefore especially vulnerable to the impacts of climate change and resultant extreme weather events.
8. Despite the vulnerability of the education sector and the importance of its resilience, basic education was not included amongst the departments that are mandated to formulate a “Sector Adaptation Strategy and Plan” in the draft Climate Change Bill. This pushes the discretion to fund loss and damage caused by climate change to the National Treasury, meaning that the Department of Basic Education must apply for funding in the ordinary course to solve this crisis.
9. In a context of worsening budget cuts and fiscal conservatism, it is social spending areas that [experience the biggest cuts](#). We firmly advocate for Climate Change legislation to entrench climate responsive budgeting to ensure proactive and sufficient allocation of resources to mitigating against losses and damage caused by extreme weather to schools.

#### *Loss and Damage to Health Care*

10. In our [submissions](#) on South Africa’s Climate Change Bill, we welcomed the inclusion of the health care sector as a department mandated to formulate a Sector Adaptation Strategy and Plan. However, the health care loss and damage in South Africa has been grossly underfunded. Last year, floods destroyed [84 health facilities](#) in KZN and [12 in the Eastern Cape](#). Neither

health departments received additional funds from Treasury to repair the damage, and in the case of the department of health KZN, an estimated R200 million was re-prioritised from other health priorities. Worse still, the Department of Health did not apply for infrastructure support from National Treasury to fix these damaged facilities.

11. Without robust legislation to ensure that health facilities are equipped with the resources to mitigate climate change loss and damage, allocation of resources is left to the discretion of government departments which may fail to respond appropriately especially in the face of competing priorities. The failure to invest in health infrastructure that is resilient enough to withstand severe weather events due to climate change will mean that the country will have to continue to rely on disaster relief or the re-prioritising of dedicated funds to cater for loss and damage. This is costly, unsustainable and does little to mitigate against the predicted damaging onslaught of the climate crisis on human health, infrastructure, and systems.

### **Supporting Climate Change Litigation:**

#### How are human rights considerations being incorporated into climate change litigation?

12. From the outset we acknowledge that South Africa has not yet had its climate change obligations challenged in a court. The *#CancelCoal* case, discussed below, will be the first such litigation. The jurisprudence on environmental law, including the realisation of the right to an environment that is not harmful to one's health and wellbeing, has been criticised as lacking in the analysis of the intersectionality of human rights.<sup>2</sup> In other words, cases based on section 24 of the Constitution have been largely an exercise in adjudicating conflicts about the functioning of socio-ecological systems; the distribution of environmental benefits and burdens; and concerns about public participation in environmental decision making. Judges have declined to venture into the impact of environmental degradation on climate change and consequently on the socio-economic rights of people. Environmental law jurisprudence largely centres around the procedural aspects of environmental decision-making or administrative action and tends to decentre the impact of environmental change on society and compartmentalise the issues related to section 24 as though they are unrelated to other socio-economic rights.

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<sup>2</sup> M Murcott (2022) "[Transformative Environmental Constitutionalism](#)" 90–92.

13. In November 2021, environmental and climate justice activists [launched](#) litigation against the State. The case was prompted by the State's release of a plan that indicates its intention to build new coal fired power plants. The case is dubbed *#CancelCoal*. The applicants base their challenge on international climate change instruments to which South Africa is a party as well as fundamental rights, bearing in mind that all constitutional rights are interlinked and mutually reinforcing. They rely on the protection of environmental and children's rights; the right to life, dignity and freedom and security of a person; the right to food, water, and health care; and the right to equality and administrative justice.
14. Representing the Vaal Environmental Justice Alliance as *amicus curiae*, SECTION27 intends to take the human rights considerations raised by the litigation even further by drawing the court's attention to the State's obligations under international human rights law and treaty bodies and their interaction with the climate change regime. We intend to submit that South Africa has the international human rights law obligations to respect, protect and promote human rights in the context of climate change. For instance, the Committee of Economic and Social and Cultural Rights has affirmed the following obligations:
- a. That countries are in breach of their legal obligations when they fail to prevent foreseeable harm caused by climate change on human rights or fail to mobilise the maximum available resources to do so.
  - b. States should adopt measures to adapt to the negative consequences of climate change, and integrate such measures within existing social, environmental, and budgetary policies at a national level.
  - c. Complying with human rights obligations in the context of climate change is a duty on both State and non-State actors.
15. SECTION27 further intends to rely on other treaty bodies such as [Committee on the Elimination of Discrimination Against Women](#), which has also released a General Comment on centring vulnerability of groups when making decisions in relation to climate action. In other words, States have 'heightened obligations' to take effective measures to respect, protect and fulfil the rights of vulnerable groups. In our application, we rely on first-hand accounts of women living in a high priority area (declared to be such due to unreasonably levels of air pollution caused in part by coal fired power plants) called the Vaal, on how they are affected by the sources of both air pollution and climate change. With this intervention, SECTION27

aims to emphasise the interconnection between socio-economic rights and climate change, brought about by environmental degradation. We will be highlighting the disproportionate impact of climate change on women, which exacerbates the pre-existing inequalities in our society.

16. In addition, SECTION27 will focus its intervention on the health impacts of climate change, air pollution and the inability of the South African healthcare system to meet the health demands of the victims of climate change and environmental degradation.

What do you think are the major barriers to initiating climate change litigation?

17. Low levels of climate literacy in South Africa make it difficult for people who are most vulnerable to and most affected by climate change to draw the connection between their rights violations and climate change. Save for communities which have community-based environmental rights organisations, the rights violations experienced are seldom framed as being caused by climate change. Secondly, in (legally) establishing a rights violation as being a consequence of climate change, the lived experiences of people are often insufficient. Scientific expert opinion is often necessary to give weight to the claim. In areas where scientific environmental research is not readily available, obtaining expert evidence can be an expensive exercise. Third, while there are a number of public interest law organisations in South Africa that conduct socio-economic rights litigation on a *pro bono* basis on behalf of individuals, communities and organisations, the resources of these organisations are limited and the demands on their time and expertise are many. Without further investment in public interest law organisations, climate change litigation will not be possible. This raises questions of access to courts and justice.

18. Finally, the targeting of environmental justice activists and organisations is of great concern. Fikile Ntshangase, an environmental activist in KwaZulu Natal, was assassinated in 2020. Furthermore, environmental activists from the Centre for Environmental Rights were targeted in a case brought by mining companies (a strategic litigation against public participation (SLAPP) suit). The activists were protected by the Constitutional Court in this matter.<sup>3</sup>

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<sup>3</sup> *Mineral Sands Resources Propriety Limited and Another v Christine Reddell and Others* 2023 (2) SA 68 (CC) (14 November 2022)

Is the judiciary in your country well equipped to understand the connection between human rights and climate change?

19. The judiciary has significant experience in adjudicating over human rights litigation and some early experience in the connection between human rights and climate change. The country's first climate change case, underpinned by a human rights based approach, is the [Thabametsi judicial review](#) of 2017. The applicants sought for section 24 of the Constitution to be protected, and for that provision to be read with section 39(2) of the Constitution to promote the purport, spirit, and objects of the Bill of Rights. The landmark judgment found that *"climate change impacts are indeed relevant factors that must be considered"* as part of an environmental impact assessment. Human rights-based litigation delayed regulatory approvals, delaying the flow of funds and the start of construction and not only of the Thabametsi project. Out of the 13 coal power plants that were planned none has been built yet. The 'death' of Thabametsi coal power plant takes 557 MW (initially planned and authorised for 1200 MW in 2 phases) out of the coal pipeline, thereby saving 136,1 million tonnes of carbon dioxide equivalent GHG emissions.
  
20. The judgment has set an immeasurable precedent for climate justice work based in human rights litigation. The court in the Thabametsi case made the point that a climate impact assessment had to consider more than just GHG emissions. It had to consider the impacts on human rights. This led to a 2020 a provincial High Court [judgment](#) that found that developments could not be authorised by the State without considering the climate impacts on water availability impacts on farming and livelihoods in the area in question.

**Advancement of the principle of intergenerational justice**

What examples do you have of how intergenerational justice, as it applies to climate change and human rights, has been incorporated into international law, national constitutions or domestic law?

21. Section 24(b) of the Constitution states that everyone has the right to have the environment protected, for the benefit of present and future generation, through reasonable legislative and other measures that:
  - i. prevent pollution and ecological degradation;



- ii. promote conservation; and
- iii. secure ecologically sustainable development use of natural resources while promoting justifiable economic and social development.

22. The provision for intergenerational protection and justice is also encapsulated in subordinate legislation such as the National Environmental Management: Air Quality Act, 2004.

Can you share some good practices that allow youth to be represented in courts and to have their views and concerns properly expressed in the judicial process?

23. There are many good practices that have been seen around the world, as the youth are mobilised around the issue of climate change and the obligations of State Parties. Most importantly, young people are speaking for themselves. See the following cases:

- a. #CancelCoal (2022), where one the application is a youth-led grassroots movement called [African Climate Alliance](#).
- b. [Future Generations](#) (2018), where the plaintiffs were 25 children and young adults aged between 7 – 25 made an application against Colombian government for failing to reduce deforestation of the Amazon, consequently exacerbating climate change and its impacts.
- c. [Decision by the CRC](#) (2021), where authors from around the world, all under the age of 18 years, filed a complaint against their States for failing to prevent and mitigate the consequences of climate change and thereby affecting their realisation of their human rights.

## **Conclusion**

In the South African context, we are seeing some progress towards climate change legislation which recognises the connection between human rights and climate justice. There have also been few but significant developments from our courts recognising and affirming this link. With that said, much remains to be done in strengthening our climate legislation's commitment to human rights. Even more work needs to be done as it relates to loss and damage. We hope that this submission is useful to your office in understanding what the legal developments in South Africa have been as they relate to climate change and human rights.