

**THE RIGHT TO
ENVIRONMENT,
CLIMATE CHANGE,
AND HUMAN RIGHTS**





The Right to
Environment, Climate Change,
and Human Rights

2022 - 2023

Acronyms and Abbreviations

°C	Degrees Celsius
AR6	Sixth Assessment Report
Bill	Climate Change Bill [B9 – 2022]
CbDR	Common but differentiated responsibilities
CO ₂	Carbon Dioxide
Commission	South African Human Rights Commission
Constitution	Constitution of the Republic of South Africa, 1996
CoP	Conference of Parties
DEA	Department of Environmental Affairs
DFFE	Department of Forestry, Fisheries and the Environment
DMRE	Department of Mineral Resources and Energy
DWS	Department of Water and Sanitation
EIA	Environmental Impact Assessment
GHGs	Greenhouse Gases
HRBA	Human Rights-Based Approach
HRC	Human Rights Council
INCD	Intended Nationally Determined Contribution
IPCC	Intergovernmental Panel on Climate Change
IRP	Integrated Resource Plan
KZN	KwaZulu-Natal
MPRDA	Mineral Resources Petroleum Development Act, 28 Of 2002
MtCO ₂ e	Metric tons of carbon dioxide equivalent
NAP	National Action Plan
NDC	Nationally determined contribution
NDP	National Development Plan
NEMA	National Environmental Management Act, 107 of 1998
NHRI	National Human Rights Institution
OES	One Environmental System
OHCHR	Office of the High Commissioner for Human Rights
PC	Portfolio Committee on Environment, Forestry and Fisheries
PCC	Presidential Climate Commission
Rio Declaration	Rio Declaration on Environment and Development, 1992
SAHRC Act	South African Human Rights Commission Act, 40 of 2013
SDGs	Sustainable Development Goals
Stockholm Declaration	United Nations Conference on the Human Environment, 1972
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change

Table of Contents

1.	INTRODUCTION	6
2.	BACKGROUND TO THE RESEARCH BRIEF	7
2.1.	The Mandate of the South African Human Rights Commission	7
2.2.	Aim and Objectives	7
2.3.	Methodology	8
2.4.	Parameters and Limitations	8
3.	BACKGROUND AND CONTEXT	9
3.1.	Climate Change	9
3.2.	Climate Change and Human Rights	11
4.	INTERNATIONAL, REGIONAL AND DOMESTIC LEGAL FRAMEWORKS	14
4.1.	International and Regional Instruments	14
4.1.1.	The Beginning of International Environmental Recognition	14
4.1.2.	The United Nations Framework Convention on Climate Change	15
4.1.3.	Conference of Parties	16
4.1.4.	Sustainable Development Goals	17
4.1.5.	Agenda 2063 and Climate Change Strategy	18
4.1.6.	Human Rights Council	18
4.2.	Domestic Legislative Framework and Commitments	19
4.2.1.	The Constitution	19
4.2.2.	The National Environmental Management Act	19
4.2.3.	National Climate Change Response Strategy White Paper	19
4.2.4.	Other Relevant Legislation	20
4.2.5.	The National Development Plan	20
4.2.6.	Earthlife Africa v Minister of Environmental Affairs and Others	21
5.	WORK UNDERTAKEN BY THE COMMISSION ON CLIMATE CHANGE	22
5.1.	Section 184(3) Process	22
5.2.	Mining Report and Section 11 Committee	23
5.3.	Climate Change Bill	24
5.4.	Floods in KwaZulu-Natal and the Eastern Cape	24
5.5.	Local Government Conference	25
6.	ADDITIONAL FINDINGS AND ANALYSIS	26
7.	CONCLUSION	28
8.	ADVISORY RECOMMENDATIONS	28



1. Introduction

The right to a healthy environment is fundamental to the enjoyment of all human rights and is closely linked with the right to health, wellbeing, and dignity. The enjoyment of these human rights, as well as other economic, social, cultural, and civil rights, can only be fulfilled under conditions of a sound environment.¹ As such, “human rights and the environment are inherently interlinked, as the life and the personal integrity of each human being depends on protecting the environment as the resource base for all life.”²

Climate change is a long-term shift in weather patterns in a region – through natural or human-induced actions. The latter, which is a result of *inter alia* global overreliance on fossil fuels for energy production, deforestation, and other types of environmental destruction, is often a consequence of poor environmental management and planning. There is consensus across the globe that the threat of climate change is very real, and that the effects are already being felt in many areas in different parts of the world. According to the United Nations Environment Programme (UNEP), “anthropogenic climate change is the largest, most pervasive threat to the natural environment and human rights of our time.”³

As with many human rights crises, it will be the poorest people, mostly from the poorest countries of the world, that will be affected the most, with experts predicting that sub-Saharan Africa will be severely affected.⁴ Climate change will exacerbate existing poverty and inequality and have severe impacts on other human rights, such as the right to food, water, healthcare, dignity, self-determination and more.⁵

This research brief (Brief) presents an overview of the state of the right to environment, specifically in relation to climate change, using existing literature and data from multiple sources to corroborate the findings presented. There will be a focus on the effects of climate change on sub-Saharan-Africa and South Africa. The brief presents an overview of the link between human rights and climate change, followed by a synopsis of relevant climate change-related legislation at national, regional, and international levels. This brief includes an appraisal of previous work undertaken by the South African Human Rights Commission (Commission) and recommendations made thereof. This brief was drafted to provide an overview of the climate change crisis – at a global and local level and illustrate the need for urgent attention to reduce emissions by States, and South Africa in particular.

As a National Human Rights Institution (NHRI), the Commission is in a unique position to promote the discourse around climate change and human rights and lobby the State to act more urgently and decisively on climate change issues, particularly in the human rights space. This research brief concludes with suggestions on the way forward for dealing with climate change for both the Commission and the State.

1 V Vukasovic ‘Human rights and environmental issues’ in CG Weeramantry (eds) *‘Human rights and scientific and technological development’* (1990): <http://www.unu.edu/unupress/unupbooks/uu06he/uu06he0i.htm>.

2 F. X. Perez, *Key Questions Concerning the Human Rights and Environment Debate: An Introduction in United Nations Environment Programme, Human Rights and Environment: Proceedings of a Geneva Environment Network Roundtable*, (2004), 4, 4.

3 UNEP ‘Climate Change and Human Rights’ (2015): https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rights?sequence=2&isAllowed=1.

4 M Robinson ‘Climate Justice: A Man-Made Problem with a Feminist Solution’ (2018) pp 162.

5 UNEP (note 4 above).

2. Background to the Research Brief

2.1. The Mandate of the South African Human Rights Commission

The Commission is an institution that supports constitutional democracy and derives its mandate primarily from Chapter 9 of the Constitution of the Republic of South Africa⁶ and the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act). According to Section 184(1) of the Constitution, the Commission must promote respect for human rights and a culture of human rights; promote the protection, development, and attainment of human rights; monitor and assess the observance of human rights in the Republic. Furthermore, the Commission has the powers to *inter alia* carry out research, and to educate.

Section 184(3) of the Constitution states that: Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

To this end, the Commission collects information on the realisation of socio-economic rights through direct engagement with state departments (i.e., questionnaires, interviews, meetings) and other data collection processes, such as stakeholder engagements, Section 11 committee meetings⁷, reviews of complaints received by the Commission, desktop research, and treaty body reports and monitoring.

The information received by the Commission is used in myriad ways, including as assessment of progression or retrogression in the realisation of human rights and cases of violations of rights.

Section 13(1)(a) of the SAHRC Act allows the Commission to make recommendations to organs of state and “undertake such studies for reporting on or relating to human rights as it considers advisable in the performance of its functions or to further the objects of the Commission.”⁸

In *lieu* of the above obligations, the Commission found it pertinent to focus on a specific socio-economic right (and sub-right) for the 2022-2023 financial year, given various events, including extensive flooding in KwaZulu-Natal in April 2022 and the publication of the Climate Change Bill (both discussed later).

2.2. Aim and Objectives

The aim of this research brief is to provide a comprehensive overview of the state of the right to environment in South Africa, specifically in relation to climate change and human rights - including a background on climate change, a legislative framework, an appraisal of existing work and recommendations of the Commission, and a summary of relevant or related complaints received by the Commission.

The specific objectives of the research brief are:

- a) To provide an overview of the right to a safe and healthy environment, specifically in relation to climate change, using international, regional, domestic law, and relevant case law, the current state of realisation of the National Development Plan, the Sustainable Development Goals, and other relevant socio-economic indicators;
- b) To detail complaints on the right to environment received by the Commission in terms of the Commission’s protection mandate that directly or indirectly deals with climate change; and
- c) To reflect on the work undertaken on climate change by the Commission, including associated recommendations made.

⁶ Constitution of the Republic of South Africa, 1996.

⁷ See section 11 of the South African Human Rights Commission Act, 40 of 2013 on Committees of Commission.

⁸ SAHRC Act 13(1).

2.3. Methodology

As discussed previously, the Constitution mandates the Commission to monitor the realisation of economic and social rights. Using this Constitutional prerogative as a benchmark, together with the moral imperative of advancing socio-economic rights in the country, the economic and social rights unit of the Commission developed this research brief for the 2022-2023 financial year, using a multi-pronged methodology.

The methodology for this research brief consisted of the following:

- a) A literature review of the link between the right to environment and human rights, including the indivisibility, interdependence, and interrelatedness of rights;
- b) A legislative framework review, including an appraisal of international, regional, and domestic legislative frameworks (including targets and gaps in legislation);
- c) A review of existing work on climate change undertaken by the Commission, and the status of recommendations from those reports;
- d) Data collection on relevant statistics relating to the state of environment in South Africa, including on indicators or targets such as those indicated in national and international agreements and plans; and
- e) An analysis of environmental-related complaints received by the Commission in the preceding five years.

The above information is analysed according to thematic areas and presented under the background and findings sections. Recommendations are made to the relevant actors, stemming from the findings. The envisaged outcome of this research brief is to provide an updated review of the state of the right to environment in the country and provide recommendations on how the realisation thereof, can be improved.

2.4. Parameters and Limitations

This report speaks to climate change in relation to socio-economic rights and the Commission's Section 184(3) mandate. It does not deal with issues of equality and civil and political rights (i.e., human rights defenders). Although these issues are equally pertinent, they fall outside the scope of this brief. Additionally, due to time constraints, this brief will not, at this stage, look at funding mechanisms for mitigation, adaptation, loss, and recovery. Finally, this brief was intended to analyse relevant complaints received by the Commission on climate change and the right to environment – related to climate change. However, insufficient information was gathered.



3. Background and Context

“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.”⁹

The warming of the earth’s surface to such a degree will have catastrophic consequences for the natural environment, and human and non-human animal life on earth. According to the United Nations Framework Convention on Climate Change (UNFCCC), adverse effects of climate change can be defined as:

Changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.¹³

Countless studies and reports, including the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), have detailed the devastating impacts that climate change will have on the natural environment, ecosystems, the lives of millions of people and the infrastructure on which people depend.¹⁴ This includes impacts on water, food, land, human settlements, self-determination and, ultimately, life. Clearly, climate change is an economic, social, and environmental justice issue and, therefore, a human rights issue.

3.1. Climate Change

Climate changes refer to “long-term shifts in temperatures and weather patterns.”¹⁰ These climate shifts can be naturogenic – due to natural causes, or anthropogenic, which is human-induced. For the purposes of this brief, climate change refers to climate shifts that are directly or indirectly caused by human activity. Human activities lead to an increase in greenhouse gases (GHGs), including carbon dioxide (CO₂), in the atmosphere. The abundance of such GHGs prevents “infrared or heat radiation [from escaping back into space]. It is estimated that the increase in carbon dioxide will lead to an equilibrium earth warming of between 2°C¹¹ and 4°C.”¹² This will lead to a rise in sea levels and a change in weather patterns across the globe – leading to extreme weather events, increased rainfall in some areas and severe droughts in other areas, amongst other impacts.

In its submission to the 21st Conference of the Parties to the UNFCCC, the Office of the High Commissioner for Human Rights (OHCHR) details the many human rights-related impacts that climate change will result in, including *inter alia* the right to life, dignity, self-determination, development, food, health, water and sanitation and various other socio-economic rights.¹⁵ Additionally, the right to have the environment protected for future generations, as enshrined in the Constitution and other international agreements, will be greatly compromised.

9 Paris Agreement, C.N.92.2016.TREATIES-XXVII.7.d of 17 March 2016.

10 <https://www.un.org/en/climatechange/what-is-climate-change>.

11 Have tried to limit to 1.5°C.

12 M vd Bank & J Karsten ‘Climate Change and South Africa: A Critical Analysis of the *Earthlife Africa Johannesburg and Another v the Minister of Energy and Others* 65662/16 (2017) Case and the Drive for Concrete Climate Practices’ (2020) *Air, Soil and Water Research* 13 1.

13 United Nations ‘*United Nations Framework Convention on Climate Change*’ (1992) 7.

14 IPCC ‘*Climate Change 2014: Impacts, Adaptation, and Vulnerability, Contribution of the Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*’ (2014): <https://www.ipcc.ch/report/ar5/wg2/>.

15 OHCHR ‘*Submission to the 21st Conference of Parties to the United Nations Framework Convention on Climate Change*’ (2015): <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf>.

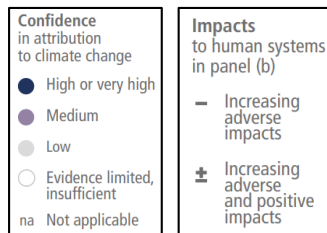
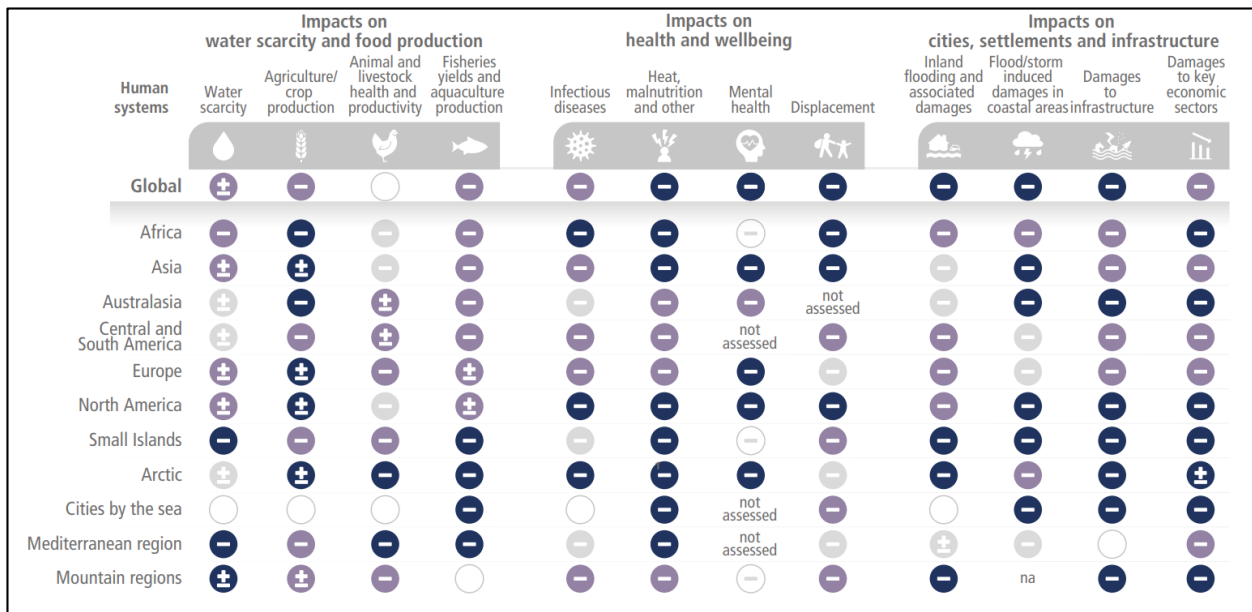


Figure 1: Observed Impacts on Human Systems, per Continent or Region

As indicated above, human health and wellbeing is dependent on the health of ecosystems, the health of their species and the timing of natural climate shifts (such as seasons). The IPCC has reported that climate change has already had a high, or very high, impact on terrestrial, freshwater, and ocean ecosystems in Africa and on species in terrestrial and ocean systems (there is limited evidence for freshwater systems).¹⁶

Figure 1 illustrates the observed impacts of climate change on human systems by continent or region. In terms of water scarcity and food production in Africa, climate change has impacted agricultural production, fisheries and aquaculture negatively to a high or very high extent; and water scarcity, negatively to a medium extent. However, it is known that rainfall patterns have changed in Africa, particularly in sub-Saharan Africa. In addition to flooding and droughts that are already being experienced, the State of the Climate in Africa 2021 report indicated that high water stress is estimated to affect about 250 million people in Africa and is expected to displace up to 700 million people by 2030.¹⁷

Relating to health and wellbeing, Africa will experience negative impacts that are high to very high in severity with regard to infectious diseases, heat, malnutrition, and displacement. Regarding impacts to cities, settlements, and infrastructure – Africa will experience medium impacts related to inland flooding and associated damages; floods, storms and damage to coastal areas; and damages to infrastructure, while there will be a high to very high impact on key economic sectors.¹⁸ Again, it is important to note that at a regional level, sub-Saharan Africa has experienced excessive rainfall in some areas – resulting in flooding, infrastructure damage and the loss of life, while other areas experienced a decrease in rainfall, which led to periods of drought, resulting in a loss of agricultural production, the loss of livestock and more.

¹⁶ Ibid 10.

¹⁷ World Meteorological Organisation 'State of the Climate in Africa 2021' (2022) 32: https://library.wmo.int/doc_num.php?explnum_id=11304.

¹⁸ IPCC (note 17 above).

A special report by the IPCC on global warming by 1.5°C indicated that “[a]reas in the south-western region, especially in South Africa and parts of Namibia and Botswana, are expected to experience the largest increases in temperature.”¹⁹ Moreover, a decrease in rainfall will be noted over the Limpopo basin and the Western Cape, while an increase in rainfall is projected over central and western South Africa – which will impact infrastructure, basic service delivery and human life.²⁰

Terrestrial ecosystems will be threatened by just a 1.5°C increase, including wetlands, forests and the fynbos – with drier winters and increased fires being experienced. According to the Centre for Environmental Rights, agriculture and farming will be impacted by climate change, particularly the maize crop and livestock industry – due to temperature increases and drought.²¹ It must be noted most agricultural outputs in South Africa will be affected. The availability of freshwater, in an already water scarce country, will also decrease.

Two of the major proposed solutions to climate change are mitigation and adaptation. Mitigation refers to a reduction in the causes of climate changes to decrease the impact of climate change and limit the rate of global warming. This can be done by decreasing harmful emissions being released into the atmosphere and increasing the number of “sinks” (areas that absorb harmful emissions such as forests).²² At present, signatories to the UNFCCC have committed to programmes to mitigate climate change with the aim to have a local and global impact, and to report on such measures to the UNFCCC.

It is clear now that certain impacts of climate change are unavoidable, even under a best-case scenario. Adaptation aims to assist countries and communities to deal with the inevitable impacts of climate change through strong, consistent national policies, innovative and effective international agreements and the effective implementation of policies and agreements.²³ Adaptation includes ensuring that communities – particularly vulnerable and marginalised communities – are more resilient to climate change. Similar to mitigation plans, signatories to the UNFCCC must present their adaptation plans to the Conference of Parties (CoP).

3.2. Climate change and Human Rights

Despite the real threat to natural environment and the indirect threat to human life, the right to environment is not often addressed as a socio-economic right and takes a backseat to more tangible rights such as the right to water, healthcare, and education. Pepper and Hobbs argue that “framing environmental protection through the lens of human rights necessarily shapes law and policymakers’ understanding of the environment and its relationship with and to humanity,” and this has the potential to increase the understanding of the significance of the environment and, therefore, the impact of environmental violations.²⁴

Climate change is, at its basis, a human rights issue. It is clear from the impacts detailed above that the changing climate will have a phenomenal impact on human life. However, the link between climate change and poverty and inequality is much more complex. Climate change was caused by developed nations, but it is developing nations and smaller (sometimes isolated) communities who will suffer the most from the impacts. Mary Robinson, the former President of Ireland, and a climate activist, stated in her book *Climate Justice* that:

19 IPCC ‘Global Warming of 1.5°C’ (2019): https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_HR.pdf 197.

20 Ibid.

21 Centre for Environmental Rights ‘Climate impacts in southern Africa during the 21st Century’ (2021).

22 <https://unfccc.int/topics/introduction-to-mitigation>.

23 <https://unfccc.int/news/adaptation-and-the-convention>.

24 R Pepper & H Hobbs ‘The Environment is All Rights: Human Rights, Constitutional Rights and Environmental Rights’ *Melbourne University Law Review* (2020) 44(2).



“ The rising sea levels produced by the melting glaciers I had observed rather passively, were the cause of water surges thousands of miles away in the low-lying islands of the Pacific and Indian Oceans that wiped out entire villages and livelihoods.

I began to understand the climate change was more than just the sudden violence of a hurricane or flood; gradually changing weather patterns and rising sea levels were slowly and steadily causing greater food shortages, pollution, and poverty, putting decades of development advances at risk.

This injustice – that those who had done least to cause the problem were carrying the greatest burden – made clear that to advocate for the rights of the most vulnerable to food, safe water, health, education, and shelter would have no effect without out paying attention to our worlds changing climate.²⁵ ”

Robinson, noted the impacts that were caused in one part of the world, impacting areas of the world that has contributed very little, or not at all, to climate change. In addition, she noted the regression that climate change would cause to development advances that were made previously, including the exacerbation of poverty and inequality in areas where both phenomena were rife. Related to this, the World Bank found that:

Climate change will compound existing poverty. Its adverse impacts will be most striking in the developing nations because of their geographical and climatic conditions, their high dependence on natural resources, and their limited capacity to adapt to a changing climate. Within these countries, the poorest, who have the least resources and the least capacity to adapt, are the most vulnerable.²⁶

In addition, any moves to limit fossil fuels and other climate change-causing industries from operating in developing countries, will impact growth in such countries, while developed nations were allowed to grow unchecked. Moreover, the phasing out of fossil fuels and related activities, will impact on employment in developing countries. In South Africa, for example, coal power stations provide thousands of jobs and accounts for approximately 84% of South Africa’s energy production.²⁷ It is, therefore, important to ensure that climate change efforts are sustainable, and follow a human rights-based approach to climate change mitigation and adaptation and a just transition.

Essential to mitigating and adapting to climate change is a *Just Transition* to ensure that the process of transitioning away from fossil fuels and “greening” the economy, is done as inclusively as possible. This will ensure *inter alia* that sustainable, decent jobs are created, poverty alleviation efforts are not compromised, and inequality does not widen. According to the Presidential Climate Commission, “[a] well-managed “Just Energy Transition” can be a strong driver for new jobs, better jobs, social justice, and poverty eradication.”²⁸

25 Robinson (note 5 above) 4.

26 The World Bank ‘*Poverty and Climate Change: Reducing the Vulnerability of the Poor through Adaptation*’ (2003) 1.

27 L Omarjee ‘SA still heavily reliant on coal for electricity – report’ News24 (5 April 2022).

28 <https://www.climatecommission.org.za/just-energy-transition>.

According to Perrez,²⁹ environmental destruction can result in discrimination and racism. This is particularly true in South Africa, where people who are black and poor will feel the impacts of environmental degradation, most severely. Poor people often live in areas where environmental problems pose a real threat to human health. Conversely, it is the most impoverished communities in the country that are subject to developments and activities, such as mining, that lead to environmental and associated violations.³⁰

It is, therefore, essential that the State accelerates mitigation and adaptation efforts for such communities to ensure that they are resilient to the oncoming onslaught and that existing vulnerabilities are not exacerbated.



²⁹ Ibid.

³⁰ The World Bank et al 'Poverty and climate change: reducing the vulnerability of the poor through adaptation' (2012): <https://documents1.worldbank.org/curated/en/534871468155709473/pdf/521760WP0pover1e0Box35554B01PUBLIC1.pdf> .

4. International, Regional and Domestic Legal Frameworks

“Environmental rule of law is key to addressing the full range of environmental challenges, including climate change, biodiversity loss, water scarcity, air and water pollution, and soil degradation. It imbues environmental objectives with the essentials of rule of law and underpins the reform of environmental law and governance.”³¹

4.1. International and Regional Instruments

The international and domestic focus on the environment and environmental law has grown drastically since the seventies, following the 1972 United Nations Conference on the Human Environment that brought the global environment into the public consciousness, leading to the establishment of the United Nations Environment Programme.³²

While international law has yet to be established via customary law or an international treaty body on the right to a clean, healthy, and sustainable environment, the United Nations Human Rights Council adopted a resolution recognising the right to a clean, healthy and sustainable environment as an essential human right on 8 October 2021.³³ Additionally, myriad treaty

bodies have enshrined procedural rights (such as the right to access to information and the right to participation), including in the Universal Declaration for Human Rights. Such procedural rights have been used effectively in South Africa to argue cases with an environmental component.³⁴

4.1.1. The Beginning of International Environmental Recognition

In 1972, the United Nations Conference on the Human Environment in Stockholm, was the first to advocate for the right to environment as a central human right. Participants at the conference adopted the Stockholm Declaration and Action Plan for the Human Environment (Stockholm Declaration).³⁵ This was followed, in 1992, by the United Nations Conference on Environment and Development (also known as the Earth Summit or Rio Summit³⁶), which highlighted the impact of socio-economic activities on the natural environment and the need for “sustainable development”³⁷. The Earth Summit culminated in a plan of action for sustainable development via three major agreements, including Agenda 21, the Rio Declaration on Environment and Development (Rio Declaration), and the Statement of Forest Principles.

Agenda 21 is a practical guide to ensure sustainable development, particularly at a national and local level.³⁸ The Rio Declaration, adopted by 178 member states, consists of 27 principles, which, at the very basis, notes the “recognition of the indivisibility of the fate of humankind from that of the Earth,” and the need for integrated, sustainable development in an international framework.³⁹

31 UNEP ‘Environmental Rule of Law: First Global Report’ (2019): 9 <https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report#:~:text=The%20UN%20Environment%20report%20found,widespread%20species%20and%20habitat%20loss.>

32 Ibid.

33 UNHRC ‘Right to healthy environment’ (2022): <https://www.ohchr.org/en/statements-and-speeches/2022/04/right-healthy-environment#:~:text=Human%20Rights%20Council%20resolution%2048,at%20the%20UN%20General%20Assembly.>

34 See for example *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (30 November 2010).

35 UN General Assembly, United Nations Conference on the Human Environment (15 December 1972).

36 Named after the city in which the conference was hosted.

37 Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs – i.e., the inclusion of economic, social, and environmental considerations in development.

38 Later reaffirmed and concretised further at the World Summit on Sustainable Development held in Johannesburg in 2002.

39 Stakeholder Forum for a Sustainable Future ‘Review of the Implementation of Agenda 21 and the Rio Principles’ (2021) 1: https://sustainabledevelopment.un.org/content/documents/641Synthesis_report_Web.pdf.

The Forest Principles pertain to the sustainable management of forests worldwide.

The outcomes of the Rio Summit are important to set principles and guidelines for the management of the natural environment and for the theoretical and practical implementation of sustainable development. However, the Rio Summit also led to further international instruments dealing with sector-specific environmental issues such as the 1994 Convention to Combat Desertification and the legally-binding instruments – the UNFCCC and the Convention on Biological Diversity.

From a South African perspective to this point, Steyn states that the country's position in the global environmental movement between 1972 and 1992 was dubious at best. Due to the government's domestic policy of apartheid, South Africa was isolated in the international political arena, which impacted negatively on the country's involvement in global environmentalism.⁴⁰

4.1.2. The United Nations Framework Convention on Climate Change

The UNFCCC, promulgated in 1992, was a landmark climate change agreement that set out a legal framework and principles for climate change through the stabilisation of GHG emissions to limit the impact of human-related activities on climate stability, for present and future generations.⁴¹ At the outset, the UNFCCC acknowledges its concern that “human activities have been substantially increasing the atmospheric concentrations of [GHGs], that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind.”⁴² Importantly, it also notes the historical context of climate change, with the largest share of historical and current emissions having originated in developed countries.

The UNFCCC is a comprehensive framework, including detailed provisions on *inter alia* mechanisms for funding, institutional arrangements, technology, research and education and training. There are

specific provisions worth mentioning here. Article 3 of the UNFCCC, under Principles, provides for equity and the concept of common but differentiated responsibilities (CbDR). The concept of CbDR was enshrined as Principle 7 of the Rio Declaration, which states that:

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

As such, it was expected that developed nations would “take the lead in combating climate change and the adverse effects thereof.”⁴³ However, article 3 further requires States Parties to take “*precautionary measures* to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects,” which was clearly not adequate for dealing with the urgency and magnanimity of the climate crisis.

Under article 4 of the UNFCCC (Commitments), States Parties are required to:

- i. Provide national inventories of GHG emissions to the Conference of Parties.
- ii. Formulate, implement, and publish mitigation plans and measures to facilitate adaptation.
- iii. Promote and cooperate in the development of technology to control GHG emissions (including sharing such technologies) across all sectors.
- iv. Promote sustainable management of the environment and conservation.
- v. Cooperate in preparing for adaptation to the impacts of climate change.
- vi. Develop integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas affected by drought and desertification, as well as floods, particularly in Africa.

40 MS Steyn 'Environmentalism in South Africa 1972-1992: A Historical Perspective' (1998): file:///C:/Users/yramkissoon/Downloads/SteynMS.pdf 240.

41 South Africa acceded to this Convention in 1997 and chaired the Conference of Parties 17 in 2011.

42 United Nations (note 14) 2.

43 Ibid 9.

- vii. Consider the impact of climate change on relevant social, economic, and environmental policies and formulate tools to minimise such impacts on, amongst others, the economy, health, the environment.
- viii. Promote and cooperate in scientific relevant research.
- ix. Exchange or share relevant information.
- x. Promote and cooperate in education and training and public awareness on climate change.

Importantly, the UNFCCC provides for funding from developed countries to developing countries – in keeping with the theme of CbDR. Specifically, article 4.8. states that:

“ In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on, [amongst others,] countries with low-lying coastal areas; countries with arid and semi-arid areas, countries with areas prone to natural disasters; countries with areas liable to drought and desertification; countries with areas of high urban atmospheric pollution; countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products.”⁴⁴ ”

In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on, [amongst others,] countries with low-lying coastal areas; countries with arid and semi-arid areas, countries with areas prone to natural disasters; countries with areas liable to drought and desertification; countries with areas of high urban atmospheric pollution; countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products.⁴⁵

Further provisions are made for funding for technology and considerations for funding mechanisms and modalities.

It is important to note that the UNFCCC, as named, was designed to operate as a framework convention, where initial acknowledgement of climate change was met with limited or no obligations. However, with the development of research and information, more specific and stringent requirements would be imposed upon State Parties.

4.1.3. Conference of Parties

The first Conference of Parties, constituted of signatories to the UNFCCC was held in Berlin in 1995. Here it was agreed that developing nations (Annex 1 countries) would commit to curbing emissions, while commitments from developing nations (Annex II countries) would come later.⁴⁵ Following a meeting of State Parties in Japan, in 1997, the Kyoto Protocol⁴⁶ was ratified as a commitment to the principles and commitments contained in the UNFCCC. However, it was an unambitious agreement, with Annex I countries required to reduce their emissions by 5% below 1990 levels and no commitments required for Annex II countries, including heavy polluters like

44 Ibid 15.

45 J Kyper, H Schroeder & B-O Linnér 'The Evolution of the UNFCCC' (2018) Annual Review of Environment and Resources 43.

46 Kyoto Protocol (2005).

China and India. Additionally, the United States failed to ratify the Kyoto Protocol and later withdrew its signature.⁴⁷ South Africa ratified the Kyoto Protocol in 2002.

Arguably, the most significant development regarding the UNFCCC was the Paris Agreement.⁴⁸ Signed by 198 countries on 12 December 2015, the more ambitious Paris Agreement aimed to limit global warming to well below 2 degrees Celsius (°C) and preferably below 1.5°C (compared to pre-industrial levels), in addition to myriad commitments of the UNFCCC. The ultimate aim of the Paris Agreement is to reach global net-zero emissions, where the amount of GHGs emitted will be equal to the amount of GHGs removed from the atmosphere, by 2050. South Africa along with other developing and high-risk countries have argued that a restricting global warming to 2°C will not be sufficient to prevent dangerous climate change from occurring – as evidenced by reports on the impact of climate change at just 1.5°C. This led to the publication of the IPCC report on global warming at 1.5°C, which is referenced above.⁴⁹

The Paris Agreement sets national emissions targets known as a Nationally Determined Contributions (NDC). NDCs are essential to limit global warming to targets mentioned above. The Paris Agreement requires States Parties to “prepare, communicate and maintain successive [NDCs] that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”⁵⁰ It is expected that through the development of, and adherence to, an NDC a country’s emission levels will peak as soon as possible and start to decline soon afterwards, bearing in mind that the peak period for developing countries will be much later, given their development and poverty alleviation commitments.⁵¹ NDCs should include reporting on additional indicators such as adaptation, mitigation and financing plans for reporting to the CoP.

In March 2021, South Africa’s Department of Forestry, Fisheries and the Environment (DFFE) released its updated NDC. According to the State, South Africa’s updated mitigation targets represent a significant progression from the first NDC, which was submitted in 2015.⁵² The country commits to a fixed target of 398-510 metric tons of carbon dioxide equivalent (MtCO₂e) by 2025, and 350-420 MtCO₂e by 2030 for greenhouse gas emissions levels, compared to targets of 398 and 614 MtCO₂e between 2025 and 2030 indicated in the first NDC.⁵³ An assessment of these rates is discussed later in this document.

In 2022, the CoP culminated in what was considered a breakthrough agreement – to provide loss and damage funding for vulnerable countries that have been hard-hit by the effects of climate change.

4.1.4. Sustainable Development Goals

The 2030 Agenda (or post-2015 agenda) was adopted by over 150 countries in 2015. This is a global effort to give effect to the right to development and to end poverty and hunger, protect the planet, ensure peace and prosperity for all peoples and revitalise global partnerships.⁵⁴ This agenda was presented in a document entitled ‘Transforming our world: the 2030 Agenda for Sustainable Development’, which sets out a broad vision and plan of action to decrease poverty and inequality and protect the planet, articulated through what was termed the Sustainable Development Goals (SDGs).⁵⁵

Sustainable Development Goal 13 deals with climate action, with the objective to take urgent action in combating climate change and its impacts. Goal 13 has five targets, which must be achieved by 2030. These targets are to strengthen resilience and adaptive capacity to climate related disasters; integrate climate change measures into policies and planning; enhance education and training to build knowledge and capacity on mitigation,

47 L Maizland ‘Global Climate Agreements: Successes and Failures’ (2022) Reviewing America: <https://www.cfr.org/backgrounder/paris-global-climate-change-agreements#:~:text=The%20Kyoto%20Protocol%20required%20only,countries%20to%20set%20emissions%20targets>.

48 Paris Agreement (2015).

49 IPCC (note 21 above).

50 Ibid 3.

51 <https://unfccc.int/ndc-information/nationally-determined-contributions-ndcs>.

52 https://www.dffe.gov.za/mediarelease/creecy_indc2021draftlaunch_climatechangecop26.

53 Ibid.

54 Y Ramkissoon ‘Right to Development Critique of the Sustainable Development Goals’ in CC Ngang & SD Kamga (eds) *Insights into Policies and Practices on the Right to Development* (2020) 353

55 UN General Assembly ‘Transforming our world: The 2030 Agenda for Sustainable Development’ (2015) A/RES/70/1 2.

adaptation early warning systems; implement the UNFCCC; promote mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and, include focusing on women, youth and local and marginalised communities.⁵⁶

SDG 7 aims to “ensure access to affordable, reliable, sustainable and modern energy for all,” with targets that require universal access to affordable, reliable and modern energy sources for all; by 2030 to increase the share of renewable energy and rate of improvement in energy efficiency; enhance international cooperation to access clean energy research and technology, including to renewable energy and cleaner fossil fuel technology, and promote investment thereof; expand infrastructure and technology for the provision of modern and sustainable energy in particular for least developed countries.

Also pertinent to climate change are goals one (end poverty in all forms everywhere), two (zero hunger), 11 (sustainable cities and communities), 12 (responsible consumption and production), 14 (life below water), and 15 (life on land). It is important to note that the SDGs go further than other previous agreements and goals to ensure a systemic approach to developmental problems. Therefore, all 17 SDGs are intrinsically linked and should be achieved concurrently, and with equal commitment, to ensure the optimal realisation of all the individual rights and the composite right to development.

4.1.5. Agenda 2063 and Climate Change Strategy

According to the African Union, Agenda 2063 is “Africa’s blueprint and master plan for transforming Africa into the global powerhouse of the future.”⁵⁷ Agenda 2063 is a plan of action for achieving development goals in Africa, such as progress, self-determination, inclusive and sustainable economic growth, and unity, with a uniquely African focus – for example on Pan-Africanism and an African Renaissance.

⁵⁶ <https://sdgs.un.org/goals/goal13>.

⁵⁷ <https://au.int/en/agenda2063/overview>.

⁵⁸ African Union ‘African Union Climate Change and Resilience Development Strategy and Action Plan (2022-2032)’ (2022): https://au.int/sites/default/files/documents/42276-doc-CC_Strategy_and_Action_Plan_2022-2032_23_06_22_ENGLISH-compressed.pdf

⁵⁹ A/HRC/50/L.10/Rev.1

Linked to Agenda 2063 is the African Union Climate Change and Resilient Development Strategy and Action Plan (2022-2032), which aims to build climate-resilient communities, ecosystems, and economies in Africa.⁵⁸ This links to its specific objectives of building the adaptive capacity of communities; transitioning to low carbon economies; enhancing capacity to mobilise resources and access to the development of technology; and enhance the inclusion, alignment, cooperation, and ownership of climate strategies, policies, programmes, and plans across all spheres of government and stakeholder groupings in Africa – commitments which are very much in line with the Paris Agreement commitments.

4.1.6. Human Rights Council

In July 2022, the Human Rights Council adopted a resolution on human rights and climate change without a vote urging States that have not yet ratified the Paris Agreement to do so.⁵⁹ The HRC requested that States adopt a comprehensive, integrated, gender-responsive, age-inclusive and disability-inclusive approach to climate change adaptation and mitigation policies. Additionally, the HRC decided to incorporate into its programme of work for its 53rd session a panel discussion focusing on the adverse impact of climate change on the full realisation of the right to food for all people, and into its annual programme of work, at a minimum, a panel discussion to discuss different specific themes on the adverse impacts of climate change on human rights.

To this end, the HRC requested that the United Nations High Commissioner for Human Rights, submit reports to the HRC on the impact of climate change on the full realisation of the right to food and requests the Secretary-General and Special Rapporteur on the promotion and protection of human rights in the context of climate change, to highlight the adverse impacts of climate change on the full realisation of the right to food in its work and reports.

4.2. Domestic Legislative Framework and Commitments

4.2.1. The Constitution

The right to a healthy environment is enshrined in the South African Constitution and various pieces of national legislation, which seek to give effect to the provisions in the Constitution (discussed later). Despite a strong legislative framework for environmental protection, for current and future generations, that is in place, compliance with environmental regulation is poor, as evidenced by the complaints received by the Commission, and the violations that environmental civil society organisations, and communities in South Africa deal with regularly.⁶⁰

Section 24 of the Constitution states that everyone has the right:

- a) to an environment that is not harmful to their health or well-being; and
- b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
 - i) prevent pollution and ecological degradation;
 - ii) promote conservation; and
 - iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

4.2.2. The National Environmental Management Act

The National Environment Management Act, 107 of 1998 (NEMA) was promulgated to give effect to Section 24 of the Constitution and to provide for co-operative governance and co-ordination in the management and protection of the natural environment. The NEMA, importantly, makes provision for the use of environmental impact

assessments (EIAs) as a tool for environmental management and sustainable development. According to the Rio Convention, an EIA is a tool to be utilised for planned activities that may have significant impacts on the natural environment.⁶¹ Using the information from an EIA, the relevant State department must decide if a particular activity or development can or cannot go ahead and, if it is allowed to go ahead, under what conditions.

As such, the NEMA can have a direct and indirect impact on climate change. Indirectly, the use of EIAs enables the consideration of sustainable development and could in the future consider provisions for a just transition – and, therefore, impact positively or negatively on climate change. According to Van der Bank and Karsten, a wide interpretation of Section 24(O) of the NEMA needs to include the reflection of climate change in the environmental authorisation of an activity. However, despite the need to include climate change assessments in environmental impact assessments, many planners and regulators fail to address the impact of climate change adequately in future planning.⁶²

4.2.3. National Climate Change Response Strategy White Paper

The 2011 National Climate Change Response Strategy White Paper is a vision for South Africa's response to climate change and the "long-term, just transition to a climate-resilient and lower-carbon economy and society."⁶³ It provides an outline for the principles on which the country's climate change response strategy is built, including equity, the polluter pays principle,⁶⁴ informed participation and a focus on vulnerable people. It also provides blueprint for adaptation and mitigation measures, job creation in a low-carbon economy (a just transition), the mainstreaming of these strategies, resource mobilisation and monitoring and evaluation. With the development of a Climate Change Bill (discussed later), this white paper will no longer be as significant – although many principles can and should be incorporated into the Climate Change Bill.

60 See for example SAHRC Poverty Trends Reports and www.cer.org.za.

61 Rio Declaration on Environment and Development (1992).

62 Van der Bank & Karsten (note 13 above).

63 National Climate Change Response Strategy White Paper (2011) 5.

64 The 'polluter pays' principle is the commonly accepted practice that those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment.

4.2.4. Other Relevant Legislation

- The Carbon Tax Act, 15 of 2019, imposes a tax on CO₂ emissions, equivalent to GHG emissions.
- The National Energy Act, 34 of 2008 seeks to guarantee the accessibility of diverse energy resources to the economy by supporting economic growth and poverty alleviation in the country. Furthermore, the National Energy Act provides for energy planning, increased generation, and consumption of renewable sources of energy, contingency energy supplies, energy feedstock and carriers, and energy infrastructure. The Act further establishes the South African National Energy Development Institute, responsible for promoting efficient generation and consumption of energy and energy research.
- The National Environment Management Biodiversity Act, 10 of 2004, provides for the conservation of biodiversity in South Africa – particularly for species and ecosystems, the sustainable use of indigenous biological resources, and the regulation of exports of biological resources from South Africa, for purposes of bioprospecting.
- The Mineral Resources Petroleum Development Act, 28 of 2002 (MPRDA) makes provision for the equitable access to, and sustainable development of, the nation's mineral and petroleum resources. It also provides authorisation to the Department of Mineral Resources and Energy (DMRE) to grant (or refuse) mining and prospecting licences. While the MPRDA requires a substantive process of public engagement prior to awarding a licence, this is not always adhered to. Additionally, as discussed below, the DMRE has often failed to regulate mining activities in line with relevant legislation and policy.
- The Promotion of Access to Information Act, 2 of 2000 gives effect to the constitutional right to access information. This Act is essential for the procedural environmental right to

information to ensure access to documents relating to environmental decision-making, particularly those that should be in the public domain, but are not.

- The National Disaster Management Act, 57 of 2000 was promulgated to coordinate efforts for the prevention or reduction of risks and disasters and the response efforts in the event of a disaster, including post- event recovery.
- The National Framework for Sustainable Development in South Africa was developed to outline South Africa's national vision for sustainable development and the strategic interventions towards the achievement of sustainable development.

4.2.5. The National Development Plan

The National Development Plan, 2030 (NDP) is a plan of action to secure a future for South Africans, as envisaged in the Constitution. The main aims of the NDP are to eliminate poverty and reduce inequality by 2030. According to the plan, South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society.⁶⁵

Included in the NDP is the end goal of an environmentally sustainable society and expanded low-carbon economy, with reduced emissions. According to the DFFE, the mapping of how to achieve this goal requires the following assessments – transition costs, the role of energy efficiency, the optimal mix of energy, building resilient communities and economic sectors, dealing with extreme weather events, and maximising job creation.⁶⁶

While these lofty goals are clear and concise, the NDP is not clear on how this will be achieved. It is hoped that the Climate Change Bill will respond to these needs of a just transition.

⁶⁵ NDP (2030).

⁶⁶ https://www.dffe.gov.za/sites/default/files/docs/justtransitiontoalowcarbon_telenoadiologue.pdf.

4.2.6. Earthlife Africa v Minister of Environmental Affairs and Others⁶⁷

In 2017, the North Gauteng High Court found that the Department of Environmental Affairs gave permission to Thabametsi Power Company to build a new privately-owned, coal-fired power station in South Africa, without due consideration to the climate change impacts that the development would have.

The construction of a new coal-fired power station requires, amongst other things, an environmental authorisation to be granted by the relevant decision-makers in the Department of Environmental Affairs (DEA).⁶⁸ The competent authority (in this case the Chief Director of the DEA), granted Thabametsi an environmental authorisation for the proposed power station on 25 February 2015. Earthlife Africa appealed against the granting of authorisation to the Minister of the DEA (Minister), who upheld the decision to grant authorisation. Although the Minister agreed that an assessment was required, she upheld the authorisation, subject to the completion of the assessment.

Earthlife Africa argued that it was “unlawful, irrational and unreasonable for the Chief Director and the Minister to grant the environmental authorisation in the absence of a proper climate change impact assessment and hence that the decision should be set aside in terms of Section 8 of the Promotion of Administrative Justice Act.”⁶⁹ Earthlife African also claimed that there was “material non-compliance with the mandatory preconditions of Section 240(1) of NEMA, which requires the consideration of all relevant factors in reaching a decision on environmental authorisation, including the climate change impact of the proposed coal-fired station.”⁷⁰ However, the DEA argued that there was no provision that stipulates that a climate change assessment must be conducted before the granting of an environmental authorisation in South Africa’s domestic legislation, regulations or policies and that Earthlife Africa’s interpretation of the legislation was unsustainable.

Rejecting the DEA’s argument that there is no specific provision in for a climate change assessment, the Court stated that:

The absence of express provision in the statute requiring a climate change impact assessment does not entail that there is no legal duty to consider climate change as a relevant consideration and does not answer the interpretative question of whether such a duty exists in administrative law. Allowing for the respondents’ argument that no empowering provision in NEMA or the Regulations explicitly prescribes a mandatory procedure or condition to conduct a formal climate change assessment, the climate change impacts are undoubtedly a relevant consideration as contemplated by section 240 of NEMA for the reasons already discussed.⁷¹

The Court also referred to South Africa’s NDC, which was submitted under the Paris Agreement, as further evidence that a climate impact assessment was needed.

Regarding the Minister’s decision to dismiss Earthlife Africa’s appeal of the authorisation, the Court found that the Minister agreed that a climate change impact assessment was needed but that the Minister may have misunderstood her legal authority and that there was a material error of law in her decision and could have set aside the environmental authorisation and sent the matter back to the DEA for a fresh decision. The Court also rejected the argument that climate impacts do not need to be considered if coal is part of an adopted Integrated Resource Plan (IRP) as there was no evidence that the IRP gave due consideration to climate change.

This was a landmark climate change case, where the decision has significant implications for the State’s climate change commitments and the global effort against climate change impacts. It also means that EIAs must consider climate change impacts in the decision-making process.

67 Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017)

68 Now the Department of Forestry, Fisheries and Environment.

69 Earthlife (note 68 above) 4.

70 Ibid 5.

71 Ibid


5. Work undertaken by the Commission on Climate Change

The Commission undertakes various promotion, protection, and monitoring activities in relation to human rights, including the right to environment. As stated previously, this includes, amongst other activities, research, complaints handling, education, training and advocacy, stakeholder engagements and engagements with parliamentary processes and international treaty bodies. Some of the notable activities undertaken by the Commission in the last decade are detailed below.

5.1. Section 184(3) Process

Section 184(3) process enables the Commission to collect information on socio-economic rights from the State organs and on the realisation of the right in various ways. In the past, environmental rights in Section 184(3) reports produced by the Commission, dealt primarily with mining-related issues, which stems from the complaints received by provinces on mining-related rights violations and recommendations from previous reports. In addition, the Commission sat on the then Department of Environmental Affairs' National Committee for Climate Change, which informed the position of the State and policy of climate change in the last 15 years.

The last Section 184(3) report to deal with environmental rights was published in 2013, using information gathered from a questionnaire, which was sent to the DEA from the Commission. In relation to climate change, the DEA was asked about the implementation of the Climate Change Response Strategy.⁷² The report found that:



“ The response from the DEA [was] not sufficient in terms of providing the Commission with information regarding meaningful and measurable actions that have been taken. It is well known that climate change will impact most on vulnerable communities whose contribution to the phenomenon is negligible. The effects are already being felt particularly for small-scale and subsistence farmers. As such, it is crucial for the DEA to take immediate steps to assist communities in building the necessary resilience to climate change, especially in rural communities. It is the duty of the DEA to ensure that these steps are taken as such resilience augurs well for mitigation and adaptation objectives for these vulnerable communities and the country. It is unacceptable that, more than one year since the country committed itself to the fight against climate change, no physical evidence can be seen as to how the DEA is implementing its various related strategies as promised. Without action, these strategies are meaningless.⁷³ **”**

⁷² National Climate Change Response Strategy White Paper (2011).

⁷³ South African Human Rights Commission 'Section 184(3) Report 2012-2013' (2013) 31.

The response from the DEA [was] not sufficient in terms of providing the Commission with information regarding meaningful and measurable actions that have been taken. It is well known that climate change will impact most on vulnerable communities whose contribution to the phenomenon is negligible. The effects are already being felt particularly for small-scale and subsistence farmers. As such, it is crucial for the DEA to take immediate steps to assist communities in building the necessary resilience to climate change, especially in rural communities. It is the duty of the DEA to ensure that these steps are taken as such resilience augurs well for mitigation and adaptation objectives for these vulnerable communities and the country. It is unacceptable that, more than one year since the country committed itself to the fight against climate change, no physical evidence can be seen as to how the DEA is implementing its various related strategies as promised. Without action, these strategies are meaningless.

5.2. Mining Report and Section 11 Committee

In response to numerous complaints on human rights violations and a failure by the DMRE to enforce existing legislation to hold mining companies and others accountable for such violations, the Commission conducted a *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa* in 2016. Many mines are emitters of GHGs and have contributed to South Africa's harmful emission levels.⁷⁴ The report that emanated from the national hearing found that, in addition to being direct or indirect contributors to climate change, mining activities disproportionately benefited mining companies, while mining communities continued to experience poverty and systemic inequality.⁷⁵

The report also made various recommendations to the DMRE on *inter alia* environmental management and mining authorisations, which has the potential to manage climate change impacts in the country and streamline the emissions-accounting and management of GHG emissions. The Commission found that “discrepant approaches in the application of environmental management laws and limited oversight of environmental management across multiple sectors were a cause for concern.”⁷⁶ The Commission accordingly found that the DMRE⁷⁷, was not the appropriate authority for granting and enforcing environmental authorisations with respect to mining.

In a colloquium on this issue (i.e., a one environmental system – OES) held in 2018, where the Portfolio Committee on Environment, Forestry and Fisheries (PC) was briefed on the subject matter by the relevant state departments and stakeholders, the Chairperson of the PC began the colloquium by stating that:

The aim of the colloquium was first to get information about the OES before beginning to critique. From the presentations and the subsequent discussion, it was glaringly obvious that the three key Departments – the DEA, the DMRE and the Department of Water and Sanitation (DWS) – were beginning to have less commitment towards the OES. This was evidenced by the no-show of the DWS, which had a crucial role to play. Even in the presentation of DEA, the institutional mechanism that had been set up to support this OES was shown to be not functioning very well.⁷⁸

To monitor the implementation of all recommendations and other systemic issues in mining, the Commission constituted a Section 11 Committee on Mining in 2018, and reconstituted it in 2022.⁷⁹ In relation

74 ‘Mining faces an historic reckoning; the time is now for leaders with courage to step up’ *Centre for Environmental Rights* (13 January 2021): <https://cer.org.za/news/mining-faces-an-historic-reckoning-the-time-is-now-for-leaders-with-courage-to-step-up-2>.

75 South African Human Rights Commission ‘*National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa*’ (2016): <https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf>.

76 <https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf>.

77 Previously Department of Mineral Resources.

78 <https://pmg.org.za/committee-meeting/27570/>.

79 Section 11 of the SAHRC Act, 40 of 2014, under Committees of the Commission states that: The Commission may establish one or more committees consisting of one or more commissioners designated by the Commission and one or more other persons, if any, whom the Commission may appoint for that purpose and for the period determined by it for the purposes of advising the Commission, or make recommendations to it, in respect of the matter for which the committee has been established.

to climate change, this committee will monitor developments on the enforcement of regulations on mining to minimise impacts and human rights violations on mining communities and engage with the State to request that the competent authority for the granting of mining and prospecting licences be moved from the DMRE to the DFFE.

5.3. Climate Change Bill

In 2022, the PC published the Climate Change Bill [B9 – 2022] (Bill) for public comment. The Commission welcomed the Bill to expedite the domestication and realisation of international climate change obligations. In relation to procedural issues of the Bill, the Commission encouraged the PC to extensively workshop the Bill with all members of society, particularly vulnerable communities and then to ensure the speedy promulgation of the Bill, to deal urgently with mitigation, adaptation, and the human rights implications of climate change. Once the Bill comes into force, the relevant departments must ensure widespread education and training on provisions of the Bill, specifically for vulnerable and marginalised people and communities.

On substantive provisions of the Bill, the Commission found that while the Bill is a positive first step in the promulgation of legislation on climate change, more stringent GHG emission-reduction targets and penalties for violators were required. It is accepted that South Africa is a developing country and that strict emissions reductions will affect growth and development. However, South Africa is one of the highest GHG emitters in the world and the cost of not reducing emissions cannot be fully accounted for at this point in the country.⁸⁰

At a systemic level, the Commission believes that there is lack of synergy between environmental and other related legislation, which has far-reaching implications for the environment and human rights

in South Africa. The Commission recognises that amendments to the NEMA and the MPRDA, and the development of the so-called OES in 2014, were aimed at streamlining the mining applications process and ensuring collaboration between the relevant departments.

However, grave challenges persist in the OES, as evidenced by the myriad mining-related complaints received by the Commission and civil society organisations on systemic human rights violations in mining areas and to mining communities. Likewise, the vast array of legislation associated with the NEMA, other environmental-related legislation, and the fragmentation of environmental administration with various other state departments and within different spheres of government, are confusing, and sometimes conflicting, leading to poor regulation and compliance. Based on its submission on the Bill, the Commission was of the view that the Bill should clearly articulate how it will operate in relation to the NEMA, given that both Acts will be significant environmental legislation.

5.4. Floods in KwaZulu-Natal and the Eastern Cape

In April 2022, the east coast of South Africa experienced excessive rainfall over a short period of time on more than one occasion, which resulted in flooding in some coastal parts of its KwaZulu-Natal (KZN) and Eastern Cape provinces. The floods had devastating impacts on basic services and resulted in the death of at least 450 people. The disaster led to the destruction of at least 4 000 homes, the displacement of at least 40 000 people and the loss of critical infrastructure.⁸¹ The damage was estimated at R25 billion, excluding the estimated R7 billion in damage to businesses and to private property, which was not accounted for.⁸²

80 A Sguazzin 'South Africa Says Emissions to Fall from 2025, Finance Talks' *Bloomberg News* (22 September 2022).

81 'KZN flood disaster: "Water was quickly rising, and I saw that my house would fall"' *Daily Maverick* (24 May 2022).

82 L Buthelezi 'Recent KZN floods are 'by far' the largest natural catastrophe in Santam's history' *News24* (01 June 2022).

Following the floods, the Commission assembled a task team to monitor affected areas and facilities that accommodated displaced people in KZN. Results from this monitoring indicated the following recurring and persistent issues pertaining to relief efforts:

- a) A lack of access to water and sanitation at flood sites and displacement centres. Those that did have water and sanitation facilities, had inadequate facilities to meet the requirements of the number of people that the centres were accommodating. There was a lack of bathing facilities, basic toiletries, blankets, and clothing.
- b) Residents at displacement centres were completely dependent on donations from private individuals or entities for the provision of food. In many cases there was a lack of access to feeding formula for babies.
- c) There was a lack of access to chronic medication.
- d) There was a lack of privacy for families and no security measures in place for people, including children.
- e) Most of the people accommodated in shelters were children, who had lost critical documentation.
- f) There was little or no support from ward councillors or other State officials in shelters or damaged areas.

It is clear from the monitoring of the Commission that relief efforts in KZN were inadequate to deal with such emergencies and disasters. Given the scale of the expected impact of climate change, particularly in sub-Saharan Africa – especially coastal regions – the State must revisit its State of Disaster policies, deal with gaps in the policy and then ensure that disaster responses are effectively implemented. A failure to do so will result in the further loss of lives, a violation of the rights of the displaced and further exacerbation of poverty and inequality.

Importantly, a *Report of the Ad Hoc Joint Committee on Flood Disaster Relief and Recovery*, supported many of the Commission's findings.⁸³ The report detailed the confusion that occurred around the funding allocated to relief efforts and that the funding was inadequate. The report further stated that:

While the declaration of a national state of disaster was supposed to facilitate the release of the resources required to respond effectively to the disaster and to enable better disaster response coordination, many presenters stressed that none of these objectives were satisfactorily achieved. The affected municipalities and provinces still need to comply with stringent conditions and requirements before disaster relief funding can be released. There has also been a strong call for the affected state organs to reprioritise their funds to deal with the aftermath of the disaster.⁸⁴

5.5. Local Government Conference

In response to the myriad service delivery challenges experience by local government (including those mentioned above), the Commission hosted a *National Conference on Local Government Accountability, Service Delivery and Human Rights* in September 2022. The conference aimed to address systemic failures at a local government level, including the existing and future challenges faced by that local government with regards to climate change.

Presentations to the conference highlighted the impact that climate change will have on countries, particularly at a local government level and the fact that the floods in KZN and the Eastern Cape showed that local government is not equipped to deal with the impacts of climate change. Following on from this conference, the Commission will engage further with state departments and the Climate Change Bill in monitoring the local response to climate change impacts and disasters.

⁸³ Parliament of the Republic of South Africa 'Report of the Ad Hoc Joint Committee on Flood Disaster Relief and Recovery' (2022): <https://static.pmg.org.za/221117adhocfloodsreport.pdf>.

⁸⁴ Ibid 2.

6. Additional Findings and Analysis

It is extremely difficult to find updates reports on Agenda 21 regarding the implementation and reporting on international instruments related to environment and climate change. The indications are that the targets of this agreement were superseded by the SDGs and UNFCCC commitments. Additionally, many NDP commitments are being met by international commitments as well.

In South Africa's country report on the SDGs in 2019, it was indicated that South Africa has one of the most advanced research, observation and climate modelling programmes on the African continent and well-developed policies and frameworks to respond to climate change in the country.⁸⁵ Therefore, the SDG target (13.2) of integrating climate change measures into policies and planning has been somewhat addressed. This goal in its entirety will be further addressed with the promulgation of the Climate Change Bill – if specific concerns in that Bill are addressed.

For example, on target 13.3 – building knowledge and capacity to meet climate change – the Bill falls short on engagement and education and training on climate change. In its submission to the PC on the Bill, the Commission stated that:

While the principles of the Bill speak to “the enhancement of public awareness of climate change causes and impacts and the promotion of participation and action at all levels” it provides no specifics on how education and awareness at ‘all levels,’ particularly of communities, will be conducted.⁸⁶

On target 13.1 – strengthening resilience and adaptive capacity to climate related disasters – it is

clear from the State's response to the flooding on the eastern coast of South Africa, that there is a lack of resilience in most communities, particularly the most vulnerable ones, and that disaster management and response requires urgent coordination and strengthening.

On the implementation of the UNFCCC, South Africa has been active in its reporting and technical commitments. To meet its mitigation, and emissions targets, the DFFE has revised its NDC in 2021 to redefine its peak, plateau, and decline trajectory (by 2030). However, the Climate Change Bill remains vague on penalties and offsets and independent studies have shown that it is just the lower limit of the revised 2021 NDC target that is close to being compatible with a 1.5°C and that the upper level barely meets the 2°C target increase.⁸⁷ While it is understood that South Africa's NDC is based on fair distribution conditions, including the fact that South Africa is a developing country, South Africa is also one of the top fifteen GHG emitters in the world⁸⁸ and “on the global warming scale, an increase of 2°C of the global average temperature will translate to 4°C for South Africa.”⁸⁹ Therefore, even a 1.5°C increase in the global temperature will be calamitous for South Africa. If these targets are to remain, South Africa must enforce them stringently.

On adaptation, South Africa is developing a National Climate Change Adaptation Strategy and Plan to be integrated into all relevant sector plans, and upon which its UNFCCC National Adaptation Plan (NAP) will be based.⁹⁰ “The adaptation component of South Africa's Intended Nationally Determined Contribution (INDC) will address adaptation through six goals, underpinned by key elements of adaptation planning, costing of adaptation investment requirements, equity, and means of implementation.”⁹¹

85 Statistics South Africa ‘Sustainable Development Goals Country Report 2019 – South Africa’ (2019): http://www.statssa.gov.za/MDG/SDGs_Country_Report_2019_South_Africa.pdf.

86 South African Human Rights Commission ‘Submission to the Portfolio Committee on Environment, Forestry and Fisheries Climate Change Bill [B9 – 2022]’ (2022) 5.

87 See for example <https://climateactiontracker.org/countries/south-africa/> and <https://cer.org.za/wp-content/uploads/2021/05/NDC-vs-fair-share-memo-v04-corrected-version.pdf>.

88 <https://www.climate-transparency.org/wp-content/uploads/2021/10/CT2021SouthAfrica.pdf>.

89 <https://www.ndcequitytracker.org/south-africa>.

90 DFFE ‘South Africa's Intended Nationally Determined Contribution (INDC)’ (2021): <https://unfccc.int/sites/default/files/NDC/2022-06/South%20Africa.pdf>.

91 Ibid 3.

The goals include (between 2020 and 2030) to:

- i) Develop an NAP, with adaptation pathways towards a just transition.
- ii) Consider climate considerations in national, sub-national and sector development and policy frameworks.
- iii) Build institutional capacity for climate change response planning.
- iv) Develop an early warning system for key sectors, particularly vulnerable sectors, and geographic areas.
- v) Develop a vulnerability assessment and adaptation needs framework by 2020 to support the continuous presentation of adaptation needs.
- vi) Communicate adaptation strategies and investments for education and awareness and international recognition.

The South African Cabinet assented to the formation of the Presidential Climate Commission (PCC) and appointed 22 Commissioners to the PCC in December 2020. The aim of the PCC is to “oversee and facilitate a just and equitable transition towards a low-emissions and climate-resilient economy.”⁹² The PCC is chaired by the President and consists of various working groups that are coordinated by a Commissioner to achieve the commitments to the UNFCCC, including reporting, innovation and recommendations on mitigation, adaptation, a just transition and more. The establishment of the PCC has been a positive development in climate change in South Africa – particularly given the diverse and multidisciplinary representation on the PCC.

Importantly, the PCC developed a Framework for a Just Transition in South Africa.⁹³ The framework explains that part of addressing climate change includes dealing with current challenges and planning for future ones, with a particular focus on vulnerable groups, especially rural communities, the poor, women, the youth, and children.⁹⁴ Additionally, with emissions-reduction targets in place, a transformational shift and refocus of all sectors of the economy will be required. This significant document provides a framework and guidelines for a just transition in South Africa – defining the various forms of transitional justice, providing guidance to at-risk sectors, identifying key policy areas and governance structures for transition.

In the assessment of various instruments, legislation, and the implementation thereof by the State, the clear and explicit articulation of a human rights-based approach (HRBA) to dealing with climate change is absent. According to the OHCHR:

Under a human rights-based approach, the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law. This helps promote the sustainability of development work, empowering people themselves – especially the most marginalised – to participate in policy formulation and hold accountable those who have a duty to act.⁹⁵

To achieve this the State must ensure that the principles of non-discrimination, engagement, access to information, transparency, accountability, and other basic human rights doctrines are at the centre of all strategies to address climate change. This will ensure that such strategies are sustainable and do, indeed, leave no one behind.

⁹² <https://www.climatecommission.org.za/about>.

⁹³ Presidential Climate Commission ‘A Framework for a Just Transition in South Africa’ (2022): <https://pcccommissionflow.imgix.net/uploads/images/A-Just-Transition-Framework-for-South-Africa-2022.pdf>.

⁹⁴ Ibid 3.

⁹⁵ OHCHR ‘Frequently asked questions on a human rights-based approach to development cooperation’ (2006) 15 <http://www.ohchr.org/documents/publications/faqs.pdf>.

7. Conclusion

South African has advanced legal frameworks for the mitigation and adaptation to climate change and to deal with the impacts of climate change – including disasters. However, in the implementation of legislation and policy has not been effective with regards to adaptation, resilience and disaster management. Mitigation strategies were clearly articulated – particularly on the commitments to the reduction of emissions. However, these commitments do not seem to be ambitious enough and there is lack of clarity on how emissions targets will be enforced and what consequences will be put in place for violations of stipulated targets.

The State must aim for more ambitious targets. Additionally, climate change targets must be mainstreamed into all state department plans and programmes, and into the work of different sectors in the country. This must be accompanied by capacitation and resource provision, particularly at local government, which will be the sphere of government hardest hit by climate change.

It is clear that climate change will have an irrevocable and devastating impact on Southern Africa and the need for an NRBA for the implementation of all climate-related strategies is essential. This will define the success or failure of the State to deal with the most pressing human rights crisis of our time.

8. Advisory Recommendations

- The Commission must engage further with the Departments of Forestry, Fisheries and the Environment, and Mineral Resources and Energy via questionnaires and interviews to fill in the gaps in information identified in this research brief.
- The Commission should further prioritise climate change as an area of focus in its monitoring and promotion work.
- The DFFE must ensure that future EIAs consider climate change-related impacts.
- The Commission, State and other partners must work expediently towards a potential National Action Plan or Treaty Body on business and human rights, to provide additional tools for the accountability of business in the face of systemic violations.
- The State must consider the myriad comments from the public and other bodies to the Climate Change Bill, incorporate these accordingly, and expedite the finalisation of the Bill.





27 Stiemens Street,
Braamfontein, 2017

 +27 11 877 3600

 www.sahrc.org.za

 info@sahrc.org.za

 @SAHRCommission

 SA Human Rights Commission