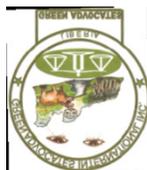


# The Road to Realizing Environmental Rights In Africa

Moving From Principles to Practice



Zimbabwe Environmental Law Association (ZELA)



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## Executive Summary

As communities face the ongoing impacts of climate change, environmental rights are critical tools for ensuring that African civil societies are not left out of the decisions that will transform the continent in the coming decades. Environmental rights are globally recognized human rights. They include both a substantive right to a clean, healthy, and sustainable environment and procedural rights found in Principle 10 of the Rio Declaration, and the UN Environment Programme (UNEP) Bali Guidelines to access information, public participation and access to justice related to the environment. Such rights ensure that local people, including those living in poverty, have a voice and play an active role in shaping their own future.

Over 35 countries in Africa recognize a right to a healthy environment in their national constitutions, and virtually all countries include environmental right provisions in their national environmental laws and policies. Yet, while there has been an increase in the legal recognition of environmental rights across the continent, implementation and enforcement has not been robust. Often, challenges stem from weak institutions and capacity, lack of political incentives, and insufficient public awareness about how to effectively make use of these rights.

To address these obstacles, the World Resources Institute (WRI) and The Access Initiative Africa, a civil society network focused on promoting environmental democracy, has begun the Environmental Rights in Africa Project. The purpose of this initiative is to investigate the feasibility and pathway options

for improving the recognition and effective implementation of environmental rights in Africa and support development of a roadmap for action.

Based on research in the Democratic Republic of the Congo (DRC), Ghana, Kenya, and South Africa, this report presents an initial evaluation and recommends preliminary steps to strengthen implementation of environmental rights across the continent. The research was conducted by WRI and Council for the Defense of the Environment through Legality and Traceability (CODELT), Green Advocates, Katiba Institute, and ZELA, members of the Access Initiative Africa, with the support of the UNEP. The authors hope the insights from this report will spur momentum to bring together key champions from government, civil society, and academia to identify concrete technical and political actions needed to accelerate the recognition and implementation of environmental rights across Africa.

## METHODOLOGY

WRI and African research partners utilized a comprehensive methodology and inclusive consultative process to evaluate environmental rights implementation. This included

- a high-level mapping of environmental rights agreements, laws, and court decisions across Africa;
- development of an analytical framework;
- case study analysis in the four research countries, based on interviews and focus group discussions; and
- a Strengths, Weaknesses, Opportunities, and Threats (SWOT) analysis of three scenarios to support environmental rights implementation.

WRI and partner experts then synthesized this information to identify common trends across the analytical framework elements and outlined recommendations on specific steps that strengthen and support implementation of environmental rights initiatives.

## FINDINGS

Despite the significantly different socio-political contexts, the barriers impeding environmental rights implementation tended to be remarkably similar across the four case study countries. Interviewees and discussion participants highlighted challenges from the extractive sector as particularly common place and problematic.

All study participants recognized that the implementation of environmental rights-based laws, regulations, and policies involves a wide range of governmental and non-governmental actors, and participants shared a common understanding of the roles and responsibilities around promulgation and implementation, as well as common themes and trends on capacity constraints and other barriers. Most of the actors interviewed—including government and private sector participants—believed that civil society should and already does have an essential role in holding government and other actors accountable for the compliance and enforcement of environmental rights. A summary of our findings on the enabling conditions, gaps in legal framework, and the challenges for specific stakeholders are presented in Tables ES-1 and ES-2.

TABLE ES-1

**Common Barriers Impeding Implementation of Environmental Rights****ENABLING CONDITIONS**

Weak political will among parliamentarians or ministry leaders to enforce environmental rights laws, regulations, and policies and programs

Political preference for economic or unsustainable infrastructure development over environmental protection

Lack of public awareness

Varied perceptions on the utility and practice of environmental rights, and disinterest or apathy if perceived as not directly relevant to daily life

Limited access to information related to environmental rights and limited access to the appropriate decision-making forums, especially at the local level

Lack of local community participation in decision-making processes, including the community's inability to access formal justice or remedial mechanisms and poor access to government information, especially in forms that could be easily understood by the general public

Corruption of political and government actors

Perceived lack of independence of the legislative branch, as elected officials are frequently seen as part of the executive branch (aligned by political parties)

Perception that environmental rights are imposed on the country under foreign influence, or not applied in an appropriate cultural context

**NEEDED LEGAL REFORMS**

Lack of coherence between sectoral policies and standardization of procedures for consulting local communities, and the need to harmonize texts across sector laws and policies

Weaknesses in legal frameworks limit the possibility for greater recognition, protection, and enforcement of environmental rights

Limited protections for environmental and land defenders, whistleblowers, and environmental public interest litigators, including protection from Strategic Lawsuits Against Public Participation (SLAPP) legislation

TABLE ES-2

**Challenges Facing Key Stakeholders in Environmental Rights**

<b>STAKEHOLDERS AND ROLES</b>	
<b>Government</b>	Lack of financial and human resources, including limited training, in the ministries and agencies responsible for implementing environmental rights policies
	An incomplete understanding of technical environmental rights issues or mechanisms, or misconceptions about the cause or impact of regulatory policies on environmental rights
	Lack of coordination among implementing agencies and unclear responsibilities and roles among ministries and between ministries and subnational agencies
	Limited capacity of subnational agencies
	Bad management practices and conflicts between ministries, departments, and agencies, ultimately hampering the performance of institutions
	Ineffective engagement with key stakeholders or officials unresponsive to community concerns
<b>Courts</b>	Lengthy, time-consuming, and laborious judicial processes, compounded by limited public understanding of how to use the court system
	A prohibitively costly process that limits the ability of many communities and individuals to access the system, or limited access to lawyers interested in or able to represent their interests
	Multiple hindrances for appeal, including a lack of public understanding around how the appeal process works
	Lack of funding and diminished capacity and technical expertise, particularly evident in poor judicial understanding of or experience with environmental rights and issues, including the application of criminal sanctions
	Limited access for those living in rural areas, given travel difficulties
<b>Civil Society</b>	Lack of coordination, especially between grassroots, community-based, and national level groups
	Insufficient funding
	Priorities frequently dependent upon donor funding, and therefore influenced by donor strategies and requirements
	Limited environmental rights research capabilities and the need for more structured partnerships with academic institutions/universities
	Poor quality or a lack of evidence-based advocacy approaches
<b>Private Sector</b>	Low involvement or active resistance among the sector to the implementation of environmental rights
	Engagement continues to focus on how they can reduce the impact of environmental rights on their business activities
<b>International Donors and Multilateral Institutions</b>	Difficulty in identifying clear impact of their actions, especially at the local level, despite the important role they play
	Efforts to fund and support implementation have given them greater influence on the institutions and authorities receiving funding, which were not always the institutions responsible for implementation of environmental rights.
	Policies and actions lack salience for those in control of implementation

## ENTRY POINTS TO STRENGTHEN IMPLEMENTATION

Despite the constitutional provisions and wide range of laws and policies that promote and recognize environmental rights, this research has revealed that a number of key and similar factors undermine the effectiveness of implementation across all four case studies. Strengthening the implementation of environmental rights will require political interest and support, ensuring the dedicated human and financial resources necessary to address identified barriers. Such efforts must include capacity building and training of key officials responsible for enforcement of environmental and environmental rights laws and policies. Efforts must also work towards improving specific policy frameworks, coordination around good governance, community strategies, and dedicated forums for building partnerships with key stakeholders. It is also critical to foster dialogue and bottom-up accountability to ensure impacted frontline communities have a voice. Research participants further pointed to possible pathways to raising awareness and fostering agreement on the best approach for scaling up implementation across the continent. These pathways offer a variety of potential steps forward:

- Devote more resources to public awareness of environmental rights and the formulation of better partnerships.
- Improve the skills and development of environmental impact assessment (EIA) processes.
- Hold government officials accountable through litigation and stronger use of ombudsman offices or human rights institutions.
- Establish stronger requirements for free, prior informed consent, anti-SLAPP legislation, and stronger protection for whistleblowers and human rights defenders.
- Develop new strategies for making environmental information more accessible to the public, such as the proactive online publication of government information and data.
- Better integrate courses related to the implementation of environmental rights in university curricula.
- Expand the use of paralegals to train communities on aspects of environmental rights implementation, including what to do if their environmental rights are violated and where to seek redress.
- Pursue the prosecution of environmental crimes before international criminal bodies to counter the lax approaches and the formation of more national and international environmental courts.
- Simplify procedures for access to justice, including the appeal process, frameworks for less expensive judicial remedies, and ongoing training of magistrates on environmental rights and related disputes.

## ASSESSMENT OF SCENARIOS

Interviewees and FGD participants were asked to provide input on the need for different types of support mechanisms, including:

- General guidance: Access to workshops, capacity building forums, collaborative learning networks, and written guidelines.
- Non-binding agreement: Voluntary-based declarations or stakeholder targeted initiatives.
- Binding agreement: Legally binding agreement through formal commitments.

Overall, virtually all participants were supportive of additional training and workshops around environmental rights and felt it would help progress. Additionally, most civil society participants in all four countries endorsed a regional or continent-

wide legally binding agreement as the best path forward for improving the implementation of environmental rights. This option was perceived as the only enforceable way to create change and hold government and private actors accountable. This option was also endorsed by several elected officials, ministry representatives, academic, and Human Rights Commission advisory body interviewees interviewed. However, the few private sector interviewees did not think a binding agreement would be effective, while other participants recognized a number of concerns in this approach, including

- the risk that this option would be seen as a violation of the sovereignty of the State;
- there are already many treaties and agreements not being enforced;
- compliance and enforcement will require effective and appropriate sanctions; and
- the high cost of this option (particularly noted by government officials and private sector interviews).

A voluntary agreement was seen as best approach by most government and a few private sector actors, as this option can provide direction and inspiration. However, stakeholders also recognized that given the lack of political will to enforce such an agreement, it would be difficult to ensure compliance.

## RECOMMENDATIONS

There is a clear need for a broader analysis, beyond the four countries covered by this research, to capture the regional and socio-political context of environmental rights across such a diverse and dynamic continent. Civil society actors believe a legally binding agreement is the best approach for strengthening environmental rights, and the fact that some government and parliamentary stakeholders interviewed for this research are open or supportive to this idea is a welcome and hopeful insight.

This synthesized analysis suggests a number of recommendations and steps that could be taken in the short term to strengthen implementation of existing environmental rights provisions and catalyze broader dialogue and agreement on a path forward for broader, more ambitious commitments. Those steps are as follows:

**Create targeted, Africa-centered public awareness campaigns and dialogues.** To address the limited public awareness and understanding of environmental rights, as well as the concerns that they are still seen as an outside, imposed concept, advocates and supporting institutions must devote more resources to public awareness campaigns.

**Expand training for government and judicial officials.** Given the widespread agreement on the need for more in-depth training to improve the capacity of both government officials and magistrates responsible for enforcing environmental rights, a more robust training program is clearly needed and would not be opposed by most stakeholders.

**Leverage domestic legislation's recognition of international environmental law.** The first way to spur discourse on the formulation and adoption of an environmental rights treaty in Africa may lie in engendering uptake and cultivating interest among technocrats and political actors by leveraging existing legislation, which already provides for domestication of international environmental treaties.

**Formulate new laws and policies to protect environmental defenders and whistleblowers.** Given the urgency surrounding the continued threats, harassment, and death of environmental and land defenders and whistleblowers, stronger protection and new laws, including anti-SLAPP legislation, are much-needed. These protections cannot wait several years for an agreement to be ratified—they must begin now.

**Outline concrete pathways to strengthen political will.** To address the lack of political will impeding

environmental rights implementation, advocates need to shift incentives for political leaders towards a sustained commitment for environmental rights objectives. One approach is to develop concrete messaging and engagement strategies that outline how environmental rights are essential for linking sustainable development and economic opportunity.

**Cultivate learning opportunities between African countries, regional bodies, and signatories of the Aarhus and Escazu agreements.** Representatives previously engaged in the Aarhus and Escazu agreements could provide valuable insights to interested African institutions and stakeholders. Formal and informal opportunities for shared learning and discussion should be cultivated and funded by multilateral donors, civil society organizations, and government bodies to help define a feasible context for an African-focused regional or continent-wide agreement.

**Secure sustained funding for additional research and creation of a forum to discuss a formal agreement.** This report identifies research gaps, especially around the need to evaluate the implementation of

environmental rights in more countries, how rights could be strengthened at the regional or continental scales, and a deeper and more comprehensive understanding of the viewpoints of other stakeholders. Given the diversity of views identified in this analysis, new research could provide insights on what is politically feasible and help bridge the diverse opinions of civil society, government, and the private sector. African universities could play an important role in building this evidence base and could share findings with new audiences and help convince government and other political stakeholders to take necessary action.

Research could be conducted in complement with the development of an official multi-stakeholder forum for dialogue on an African agreement. This approach could expand interest and provide a mechanism for informing stakeholders and turning data into action.

**Foster champions and new leaders.** Support and cultivate investment in civil society and government officials interested in and willing to consider stronger environmental rights mechanisms and agreements.

# Introduction

Sustainable natural resource governance and management has the potential to transform African resource-rich countries. Yet, Africa sits at a crossroads. Africa's natural resources—including 30 percent of the world's mineral reserves, 65 percent of the world's arable land, and 10 percent of the world's fresh water—have helped bolster the continent's prosperity and serve as a foundation for employment, food security, and development. Despite significant accomplishments, however, Africa's poverty and shared prosperity challenges remain daunting. The Brooking's Foresight Africa 2021 report estimated that the COVID-19 pandemic shrank the continent's gross domestic product (GDP) by 3 to 5.4 percent and increased the number of people living in extreme poverty by 40 million. According to the World Bank, Africa could be home to 90 percent of the world's poor by 2030. As of 2015, in Sub-Saharan Africa, only 24 percent of the population had access to safe drinking water, while only 28 percent had basic sanitation facilities that are were not shared with other households. Climate change will only worsen these challenges: global warming of 2°C would put over 50 percent of the continent's population at risk of undernourishment and spur a decrease in GDP by up to 30 percent by 2050.

At the same time, the closing of civic space and violence against civil society organizations (CSOs), the media, and environmental and land defenders create real barriers for progress. The [CIVICUS Monitor](#), an online tool that monitors the state of civic space in countries across the world, shows that in 2020, of 49 Africa countries where data was collected, 6 were rated as closed, 21 as repressed, and 14 as obstructed. [Global Witness](#) documented 18 killings of land and environmental defenders in Africa in their most recent 2020 report: 15 in the Democratic Republic of Congo (DRC), 2 in South Africa, and 1 in Uganda. In addition, the Business and Human Rights Tracker recorded [over 61 human rights violation allegations](#) against local communities, workers, or the environment, all of which were perpetrated by mining companies associated with transition minerals across the continent, [mostly related to copper and/or cobalt operations](#).

Overcoming these challenges and achieving sustainable and resilient development requires effective national systems able and willing to provide safeguards for people and the planet. Environmental rights can help spur this vision by providing a framework for environmental and climate justice, protection of rights, and participatory and inclusive decision-making in which the benefits and costs of using natural resources are equitably distributed in ways that consider poverty, deprivation, and discrimination.

Over 35 countries in Africa recognize a right to a healthy environment in their national constitutions and have committed to the implementation of the Sustainable Development Goals (SDGs). These environmental rights are also recognized in the African Charter on Human and Peoples' Rights (ACHPRs) and the Revised African Convention on the Conservation of Nature and Natural Resources of 2003, which acts as the main environmental framework convention for African Union (AU) Member States. In the continent's blueprint and master plan, [Agenda 2063, Goal 11](#) recognizes the need for “democratic values, practices,

## What Are Environmental Rights?

Environmental rights are human rights related to natural resources. They include substantive rights such as the right to clean air and access to safe water, adequate sanitation, and a healthy environment. The right to information, participation in and access to justice, and nondiscrimination are also critical environmental rights, commonly referred to as procedural rights. Environmental rights are recognized in a number of international human rights treaties, constitutions, national laws, and legal precedents. They are often considered “enabling rights” because many other human rights, such as the right to life, require certain environmental conditions or inputs for their enjoyment. They are also essential to environmental rule of law.

Adapted from the UN Environment Programme (UNEP)'s Environmental Rule Of Law: First Global Report.

universal principles of human rights, justice and the rule of law [to be] entrenched.” In October 2021, the UN Human Rights Council [adopted a resolution recognizing the human right to a healthy environment](#). This resolution, adopted by 43 countries<sup>1</sup>—including 13 African countries—recognizes the right to a safe, clean, healthy, and sustainable environment and encourages States to adopt policies for the enjoyment of that right. This includes respect to biodiversity and ecosystems and invites the General Assembly to consider the matter.

If properly implemented, environmental rights provide local populations, including those living in poverty or otherwise marginalized, a voice and active role in shaping their own future and decisions that will transform Africa in the coming decades. Yet, many African governments face significant challenges to implementing rights-based environmental laws and mechanisms. African civil society leaders have outlined needed, stronger social and environmental safeguards to protect frontline grassroots, land, environmental and human rights defenders. The 2019 Ibrahim Index of African Governance (IIAG) documented issues of transparency, anti-corruption, and accountability as some areas where the continent is performing poorly. The Environmental Democracy Index (2015), championed by the World Resources Institute (WRI) and The Access Initiative (TAI), reported that most national laws in Africa were only “fair” in meeting international standards for transparency, participation, and accountability, as defined by Principle 10 in the UNEP Bali guidelines. This is because many national laws have varying standards with substantial exemptions. Most critically, there is an acute lack of the strong institutions necessary to ensure the robust enforcement and implementation of environmental laws.

To address these obstacles, WRI has begun the Environmental Rights in Africa Project, in partnership with a wide range of environmental rights experts leading activities in specific African regions. The purpose of this initiative is to investigate the feasibility and pathway options for improving the recognition and effective implementation of environmental rights in Africa. The specific objectives are as follows:

- Evaluate different African environmental rights agreements, frameworks, court decisions, and legislation, and identify approaches that could spur stronger implementation.
- Catalyze an inclusive process for faster adoption and implementation of environmental rights and environmental rule of law in Africa that aligns with

the achievement of the SDGs and Africa’s Agenda 2063.

- Create a roadmap for realization based on input around actors, entry points, barriers, and needed actions, including legal reform.

This report presents an initial evaluation and recommends preliminary steps needed to strengthen the implementation of environmental rights based on research in four African countries: the Democratic Republic of the Congo (DRC), Ghana, Kenya, and South Africa. The research was conducted by Elizabeth Moses, Environmental Rights Associate at WRI with African partners and the support of the UN Environment Programme (UNEP). These partners included

- Dr. Dan Ngabirano, Lecturer with the Environmental Law Department, Makerere University School of Law (Uganda);
- Dr. Tuma Murombo, Professor of Environmental Law at Wits University and former Director of the Mandela Institute of Law, on behalf of the Zimbabwe Environmental Law Association (ZELA) (South Africa);
- Emily Kinama, Research and Litigation Associate, Katiba Institute (Kenya);
- Augustin Mpoyi, Moise Mbaya, and André Hilaire, Conseil pour la Défense Environnementale par la Légalité et la Tracabilité (CODELT) (DRC);
- Alfred Lahai Gbabi Brownel Sr., Lead Campaigner at Green Advocates International and Visiting Human Rights Fellow, Yale Law School (Ghana); and
- Augustine Niber, Executive Director, Center for Public Interest Law associating with Green Advocates International (Ghana).

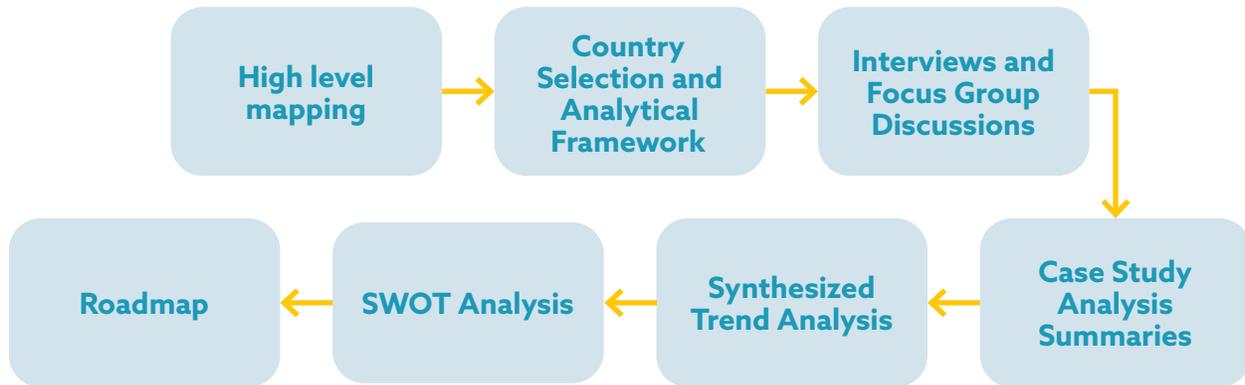
The authors hope the insights from this report will spur momentum to bring together key champions from government, civil society, and academia to identify concrete technical and political actions needed to accelerate the recognition and implementation of environmental rights across Africa.

# Methodology

A comprehensive methodology and inclusive consultative process was utilized to evaluate environmental rights implementation. An overview is summarized in Figure 1.

First, Dr. Ngabirano conducted a high-level mapping of environmental rights initiatives in Africa based on a review of important agreements, legislations, policies, development programs, plans, and/or court cases with a strong environmental rights component at the continental, regional, country, and sectoral and levels. Progress was benchmarked against the UN Framework Principles on Human Rights and the Environment (2018). This analysis and partner recommendations were used to create an analytical framework to evaluate implementation drivers, barriers, and opportunities. The framework is presented in Appendix A.

FIGURE 1

**Research Methodology****Findings of the High-Level Mapping**

The high-level mapping documented that 35 out of 55 African countries now recognize and protect the right to a safe, healthy, and sustainable environment as part of their constitutional frameworks. Additionally, 17 African constitutions contain broader provisions on environmental health and conservation. Only six African countries do not make reference to the environment in their respective constitutions.

Environmental protection laws exist in more than 40 African countries, irrespective of whether or not those countries specifically protect the right to a clean and healthy environment in their national constitutions. Attention to environmental protection is also visible at the regional level as an obligation for States, such as in treaties establishing the East African Community (EAC), the Southern African Development Community (SADC), and the Economic Community of West African States (ECOWAS).

African environmental laws and policies have been influenced by both colonial and global forces, and in some cases are a direct result of cross-fertilization between indigenous African environmental norms and global standards. In this regard, for each of the selected countries, particular attention should be paid to the extent to which their specific laws and policies have been influenced by existing regional and international environmental standards such as those contained in Principle 10 of the Rio Declaration, the Bali Guidelines, and most recently the Escazu Agreement.

Specific African environmental right enablers, dynamics, initiatives, and approaches were selected for a case study analysis in the DRC, Ghana, Kenya, and South Africa as a result of this mapping and partner discussion. Additional criteria based on existing governance data was used in the final selection. The

criteria profile of the final case study countries is provided in Table 1. In addition to ensuring regional variety, each country selected has a wide range of environmental and natural resource laws and regulations and judicial approaches that take into account and enshrine various environmental rights.

TABLE 1  
Case Study Country Environmental Rights

Country	DRC	Ghana	Kenya	South Africa
<b>Right to a healthy environment recognized in the national constitution, international treaty, and national legislation</b>	Yes/Yes/ Yes	Yes/Yes/ No	Yes/Yes/ Yes	Yes/Yes/ Yes
<b>Existence of a Right to Information (RTI) law</b>	Yes	Yes	Yes	Yes
<b>Existence of public participation in environmental laws</b>	Yes	No	Yes	Yes
<b>Existence of Environmental Impact Assessment (EIA) provisions in standalone or other legal instruments</b>	Yes	Yes	Yes	Yes
<b>Existence of community land tenure (fully addressed or significant progress in laws)</b>	No	Yes	Yes	Yes
<b>Citizen suits allowed in constitution and/or environmental laws</b>	No	Yes	Yes	Yes
<b>Existence of specialized environmental courts and/or tribunals</b>	No	No	Yes	No
<b>Ibrahim Index of African Governance (IIAG) 2019, total governance score and rank</b>	31.7/49	64.3/8	58.5/14	65.8/6
<b>Rule of Law Index (ranging from 0 to 1, where 1 is strongest)</b>	0.34	0.57	0.45	0.59
<b>Corruption Perception Index (2019) (from 0 to 100, where 0 is highly corrupt and 100 is very clean)</b>	18	41	28	44
<b>World Bank Governance Indicators (2019) Voice and Accountability (-2.5 to +2.5), where higher values correspond to better governance</b>	-1.37	0.58	-0.29	0.67

Source: Compiled by authors.

To carry out the case studies, partners identified and conducted interviews with government, elected officials, private sector and multilateral representatives, and academic stakeholders and held focus group discussions (FGD) with key civil society representatives.<sup>2</sup> These key civil society participants were selected based on their understanding, expertise, or application of environmental rights in their work. Partners then used the information gathered, as well as their own expertise, to write a summary that characterized the state of environmental rights in each case study country, along with the key challenges and feasibility of different pathway options for improving recognition and implementation. WRI and partner experts then synthesized this information to identify common trends across the analytical framework elements: critical enabling environment, actors and roles, and barriers and needed actions and/or legal reform. This trend analysis is outlined in Section 3 of this report.

To create the roadmap, three scenarios to support environmental rights implementation were outlined based on the potential impact of different degrees of support. They included:

- **General guidance** provided through workshops, capacity building forums, collaborative learning networks, and written guidelines;
- **Non-binding agreements** through voluntary-based declarations and stakeholder-targeted initiatives; and
- **Legally binding agreements** through formal commitments or instruments.

The high-level mapping and case study analysis findings were then used to conduct a Strengths, Weaknesses, Opportunities, and Threats (SWOT) analysis to evaluate these scenarios and outline recommendations on specific steps that strengthen and support implementation of environmental rights initiatives.

## CHAPTER THREE

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# Synthesized Trend Analysis

Despite the significantly different socio-political contexts, the barriers impeding environmental rights implementation trended quite similarly across the four case study countries. Participants highlighted environmental right challenges in the extractive sector as particularly common and problematic.

## CRITICAL ENABLING CONDITIONS

Interview and FGD participants highlighted a number of enabling environment barriers impeding progress, including a lack of political will, weak public engagement, judicial system challenges, and corruption. Perceptions that the international community was imposing the concept of environmental rights on African countries was also mentioned as a challenge.

### Political will

In all four countries, interviewees and FGD participants believed the lack of political will of parliamentarians or ministry leaders to enforce environmental rights laws, regulations, and policies and programs is one of the most important underlining drivers of poor implementation. This includes both civil society and private sector actors interviewed and FGD participants. Even government official interviewees—including parliamentarians and officials who sit on natural resource-related committees, heads from departments or Ministries of Environment or other natural resources institutions, and human rights institutions—acknowledged that political will for environmental rights is often not publicly apparent or is overshadowed by staff turnover or more visible socio-economic priorities.

Civil society participants overwhelmingly expressed pessimism in the face of parliamentarian and politician preference for economic or unsustainable infrastructure development over environmental protection. This focus on development was compounded by the need to promote economic recovery or growth, especially in light of the social and economic impacts of the COVID-19 pandemic. The perceived lack of independence in the legislative branch, including the view of it as an arm of the executive or an extension of political party interests, was also mentioned as a problem in all four countries. All participants felt that this weak political will helped explain the lack of clear, decisive leadership at all levels in government

and the existence of poorly resourced government agencies. A lack of staff capacity to effectively support implementation and enforcement of environmental rights policies was also mentioned as a consequence of this problem.

### Weak public understanding or limited access to information

The lack of public awareness or understanding of the meaning of environmental rights, in both normative standards and practice, was another key barrier recognized by the majority of participants in all the four countries. While likely not uniform across all procedural and substantive rights, varied perceptions on the utility of environmental rights, as well as disinterest or apathy if those rights were perceived as not directly relevant to daily life, was another common trend. While many civil society FGD participants had a clear understanding of environmental rights based on their work experiences, most felt there was the lack of knowledge for the citizenry, local communities, and regulators on the link between environmental rights and the attainment of other fundamental human rights and freedoms.

These barriers are compounded by low levels of access to information related to environmental rights and limited access to the appropriate decision-making forums, especially at the local level. Participants from the DRC pointed out that not all areas of the country had ready access to the internet, or even electricity. In Ghana, participants reported that poor people cannot access complex environmental information and face a language barrier, as information is in English and not readily available in the accessible formats or local dialects. Participants from Kenya and Ghana also mentioned a lack of understanding of the need and opportunity to participate in policy decisions, together with the added barrier of public meetings being held in inaccessible places or the location of the public meeting being misrepresented. More broadly, participants noted the limited distribution of information to the public and local communities.

## Access to courts

Participants also mentioned the lack of participation of local communities in decision-making processes, including their inability to access formal justice or remedial mechanisms and poor access to government information, especially in forms easily understood by the general public. Interviewees and FGD participants stated that without adequate financial resources or access to public interest or environmental legal support, access to court systems was an especially serious challenge to environmental rights implementation. In South Africa, for instance, participants felt that this created an added barrier, given the weak enforcement of environmental laws. In these cases, civil society and communities must approach the courts to participate in decision- or policymaking or to access environmental information, despite constitutions and legislation that mandates these avenues as public rights. In Ghana, participants felt that there were few incentives for lawyers to pursue environmental rights, which thereby overwhelmed the already-constrained sector, creating added delays in obtaining justice.

## Corruption

While many participants recognized that broader challenges around poverty and low levels of economic development impact the implementation of environmental rights, they felt that these issues were exasperated by corruption in all four countries. For example, civil society participants in South Africa gave examples of officials who ignored evidence of water and air pollution by mining companies and expressed the opinion that some officials and politicians in government departments face a conflict of interests due to connected transactions with certain mining companies. In Kenya, civil society FGD participants noted the discriminative policies and colonial mindset of government agencies towards local communities, including curtailing fundamental rights to assembly and expression, scare tactics, and attacks. A member of parliament in Ghana further recognized that the Whistleblower Act 720 of 2006 is largely ineffective

because many people will not report acts of crime and corruption for fear of being exposed to backlash, or that the incentive for being a whistleblower is inadequate relative to the associated risks.

## Environmental rights as an external requirement

Finally, participants in all four countries mentioned that, despite some progress, environmental rights still feels like a concept that had been imposed on their country as a foreign practice without concerted mechanisms for implementation, or that environmental rights were not being applied in an appropriate socio-cultural context. This impression of the “classist and exclusionary nature” of environmental rights was referenced in relation to marginalized communities such as traditional forest gatherers, subsistence small scale fallow farmers, artisanal fisher folks, and small scale miners. FGDs in Ghana and South Africa noted that environmental rights, in some cases, had been referred to as a tool of the wealthy, tied to the perception that environmental protection requirements appear to be totally disconnected from customary practices. Participants in the DRC felt that the importance of environmental rights was dictated by funding from international donors and had not been incorporated into local or national laws or customs.

## NEEDED LEGAL REFORM

All study participants identified critical gaps in laws, regulations, policies, and other needed reforms that were impacting the implementation of current environmental rights initiatives. It is clear that environmental rights provisions are present in a wide variety of sector laws and strategic sector planning documents. This variety is likely a driver of the previously mentioned unclear understanding of what environmental rights actually are and why they are so critical to sustainable development and environmental management. Sectors where environmental rights provisions were identified in the initial scoping and case study analysis are provided in Table 2 to illustrate the range and scope of relevant laws in each country.

TABLE 2

### A Selection of Laws with Environmental Rights Provisions in the Sample Case Studies

DRC	Ghana	Kenya	South Africa
Fundamental Principles of Environmental Protection (Loi 11-009)	Environment Protection Agency Act, 1994 (Act 490)	Environment Management and Coordination Act No. 8 of 1999 (revised 2015) and its regulations	National Environment Management Act 107 of 1998.
Law No 14/003 of 11 February 2014 on Nature Conservation	National Environment Policy, 2012	National Adaptation Plan 2015-2030	National Environment Management: Air Quality Act 39 of 2004
Environmental Protection Law 2011	National Climate Change Policy, 2013	Wildlife Conservation and Management Act No. 47 of 2013	National Environment Management: Waste Act 59 of 2008
Law No. 18/001 of 9 March 2018 amending and supplementing Law No. 007/2002 of 11 July 2002 on the Mining Code	Right to Information Act, 2019 No. 989	Forest Conservation and Management Act No. 34 of 2016	National Environmental Management Act: Integrated Coastal Management Act 24 of 2008
		Energy Act No. 1 of , of 2019	National Environmental Management: Biodiversity Act 10 of 2004
		Fisheries Management and Coordination Act (FMDA) No. 35 of 2016	National Environmental Management: Protected Areas, 2003 (No. 57 of 2003)
		Climate Change Act, No. 11 of 2016	National Water Act 36 of 1999
		Mining Act No. 12 of 2016	Mineral and Petroleum Resources Development Act 28 of 2002
		Petroleum Act No. 2 of 2019	

*Note:* Others documented in South Africa include the Restitution of Land Rights Act 22 of 1994; Minimum Information Security Standards (MISS) National Achieves of South Africa Act; Protection of Information Act 2 of 2000; Public Service Regulations on the MISS, 2000; and Fuel Retailers Association of Southern Africa v. Director General Environmental Management CCT 67/06 [2007] ZACC 13.

*Source:* Compiled by authors.

Overall, this analysis would benefit from a more comprehensive and systematic country level investigation of the laws and provisions with environmental rights provisions, which was beyond the scope of this project. Nevertheless, three of the most common themes identified in all four countries are as follows:

- The lack of coherence between sectoral policies or standardization of procedures for consulting local communities, and the need for the harmonization of texts across sector laws and policies.
- The need to strengthen the legal framework to promote greater recognition, protection, and enforcement of environmental rights.
- The need for stronger protections for environmental and land defenders, whistleblowers, and environmental public interest litigators, including anti-Strategic Lawsuits Against Public Participation (SLAPP) legislation.

Given the plurality of laws, poor policy coherence was seen as a major obstacle for implementation. Participants mentioned laws with conflicting or misaligned provisions, laws that were relevant to multiple sectors or ministries but did not utilize a multi-disciplinary governance approach, and even laws that go against environmental laws or have a mandate in conflict with environmental rights. For example, in South Africa, participants felt that the Department of Energy and Mineral Resources—whose primary mandate is to promote the sustainable extraction of mineral and petroleum resources—retains a louder voice in the environmental regulation of extractive activities. This imbalance contributes to the ineffective implementation of environmental regulations under the Department of Forestry, Fisheries and Environmental Affairs, including the real-world impact of the One Environmental System, a system designed to streamline the licensing processes for mining, environmental authorizations, and water use. Ghanaian and South African participants also

mentioned conflicting provisions between mining laws and land policies regarding mining in protected areas. In Kenya, most interviews, with the exception of county governments, noted that different sectoral laws clash in implementation, such as the differences in penalties in the Wildlife Conservation and Management Act of 2013 (WCMA) and the Forest Conservation and Management Act of 2016 (FCMA), the former having stronger penalties than the latter.

Weak protection of environmental rights in the laws, including minimal sanctions against violations of environmental rights, was also noted. In Ghana, participants reported that they see no clear sanctions being applied against violations of environmental rights. In Kenya, some criminal fines in the environment sector are still very low and communities seem not to be involved in the formulation and implementation stages of law development, so participants suggested a bottom-up approach in developing the laws and policies. In South Africa, study participants bemoaned the fact that even if the national legislation implementing environmental rights is world-class, it is poorly enforced in practice. South African participants also reported that the legal framework for defining mining waste and its management remains problematic. In the DRC, participants felt provisions to Law No. 11/009 of 9 July 2011 on Fundamental Principles Relating To The Protection Of The Environment were not being enforced, and noted that Law No. 14/003 of 11 February 2014 on the Law on Nature Conservation still doesn't have all the needed implementing measures.

Finally, key regulatory gaps around the need to strengthen protections for environmental and land defenders and indigenous communities were highlighted in all four countries. In the DRC, for example, the absence of an Environmental and Social Impact Assessment (ESIA) was mentioned, as were outdated customs depriving women of environmental rights. Participants also noted that the lack of effective protection of environmental rights defenders and the

impunity that often surrounds violence was connected to the larger challenge of accretion of land and land grabbing practices. In South Africa, participants identified the need for protecting environmental public interest litigators through appropriate anti-SLAPP legislation. They also mentioned the need for greater protection of whistleblowers and human rights defenders who may be responsible for highlighting violations of environmental rights by corporations. In Kenya, FGD participants also recognized that despite improvements, there remained an urgent need to protect and ensure the rights of environmental defenders, indigenous communities, and vulnerable people.

## ACTORS AND ROLES

All study participants recognized that the implementation of environmental rights-based laws, regulations, and policies involves a wide range of governmental and non-governmental actors. The interviews and FGDs revealed a common understanding of the roles and responsibilities around promulgation and implementation, as well as common themes and trends on capacity constraints and other barriers.

In both FGDs and civil society driven stakeholder mapping exercises, most civil society participants ranked government officials, ministries, and corporate representatives as the stakeholders with a high degree of influence but low degree of interest in implementing environmental rights. International donors, when ranked, were considered to have both a high degree of interest and influence in the issue. Universally, civil society groups ranked themselves as having a high degree of interest but were split on their level of influence, with groups from the DRC and Kenya believing they have a both a high interest and a high degree of influence, while groups from Ghana and South Africa believed they had a low degree of influence. Local community members were considered to have a low degree of influence in all four countries.

## Government officials

All participants across all four case study countries, including government officials, recognized that multiple and intersecting governmental institutional and regulatory capacity constraints impede the implementation of environmental rights. These constraints include

- the lack of human and financial resources in the ministries and agencies responsible for implementing environmental rights policies, including low levels of training;
- an incomplete understanding of the technical environmental rights issues or mechanisms or misconceptions about the cause or impact of regulatory policies on environmental rights; and
- the lack of coordination among implementing agencies and unclear responsibilities and roles among ministries and between ministries and subnational agencies.

Most participants mentioned the lack of clear roles and responsibilities between ministries and subnational agencies, and noted that the capacity of subnational agencies was especially poor. In the DRC, for example, challenges with coordination were a result of the exclusive management of all environmental aspects by the Ministry of the Environment alone, despite the transversality of environmental issues which should justify the involvement of other sectoral ministries. This was compounded by numerous ministerial reshuffles, which led to the ineffectiveness of government action. This challenge mirrored discussions held in South Africa, where participants highlighted problems with integrated strategic planning and intergovernmental cooperative governance, and in Ghana, where participants mentioned vague responsibilities between the regulatory authorities often resulting in duplication of mandates and functions.

Participants in all four countries believed that bad management practices and conflicts between ministries, departments, and agencies hamper the performance of institutions. For example, in Kenya, participants reported that a conflicting relationship between the National Environment Management Authority (NEMA) and other lead agencies, in terms of responsibilities, impacts the development of regulations. In Ghana, participants highlighted that battles about jurisdiction and siloed decision-making enabled conflict, as did a lack of sound personnel management practices such as timely and fair performance reviews, adequate pay, and evaluation or evaluative mechanisms (measures, targets, or frameworks). Another barrier noted was the lack of dedicated capacity building processes, as well as the poor quality of the staffing, especially in context of new and emerging environmental sector issues. This included no reliable mechanism for the collection and utilization of environmental data and information in decision-making. All of these obstacles lead to the ineffective implementation of law and policy.

Another important government implementation barrier mentioned by participants in all four countries was ineffective government engagement with key stakeholders, including an unresponsive attitude to civil society and community concerns as well as inadequate enforcement or the disregard for violations of environmental rights. This includes resistance in using participatory approaches that ensure meaningful consultation with local communities on draft application texts. Civil society FGD participants in the DRC, for example, felt that public participation requirements were seen as a separate, foreign concept, not connected to the lawmaking process. In Kenya, participants felt that poor enforcement was also impacted by national government actors who were resistant to changing their work habits and culture. Many have a “*mkubwa ni mkubwa*” mentality, loosely translated as “the influential person is the influential person”—subordinates follow what their leaders say

because they are not interested in making any changes. In South Africa, the government environmental management inspectors lack sufficient resources to designate enough officers to counter violation of environmental laws and rights across the country.

## Courts

Overall, courts and tribunals were seen as a critical justice mechanism in all four countries by all stakeholders, especially by civil society participants who felt that the judiciary had a high degree of influence in the implementation of environmental rights. This influence spans sound precedents in upholding environmental rights and provides public interest and civil society actors a forum through which they can have an impactful role on enforcement.

However, despite providing examples of cases where enforcement and precedent were addressed, participants identified a number of common barriers that limited implementation and constrain the use of the court system as an accountability mechanism. These included barriers included the following:

- Lengthy and time-consuming judicial processes that are often laborious and frustrating, compounded by limited public understanding of how to use the systems.
- A prohibitively costly process that limits the ability of many communities and individuals to access the system, or limited access to lawyers interested in or able to represent their interests.
- Multiple hindrances for appeal, including the lack of public understanding on how the appeal process works.
- Diminished capacity and lack of funding and technical expertise, including poor judicial understanding of or experience with environmental rights and environmental issues, as in the application of criminal sanctions.

- Geographical and traveling obstacles for people living in rural areas, especially when magistrate capacity issues compounded the time it takes for the cases to be resolved.

In general, participants discussed the limitation of using the court system as the singular enforcement approach because it is fundamentally a reactive mechanism. Because cases are brought after a perceived violation, the remedies do not always ensure remediation of actual damage suffered by the victims or the environment. The cases often also have unique facts or factors limiting their relevance to other socio-economic rights.

Kenya has a specialized green court, the National Environmental Tribunal (NET), mandated to hear any disputes regarding the exercise of power by NEMA. Civil society participants suggested that there was a perceived bias within NET decisions towards development and commerce, and cases being lost because the courts favor these interests over the “vague” environmental benefits. Because of a high case load and backlog of cases, participants also felt that NET had stricter requirements for agreeing to consider a case than a normal court. Participants further reported an unclear understanding of the relationships between different courts and when and how to use them, including for appeal to the specialized court. Most interviewees also noted that judicial orders were not being followed, such as in the land rights case of the Ogiek indigenous community: even after going to the African Commission and the African Court on Human and Peoples’ Rights, the implementation of those decisions continues to be challenged.

Participants in all four countries further mentioned a lack of judicial personnel with environmental background knowledge. DRC participants felt that the country’s courts and tribunals often dealt only with civil and criminal cases under ordinary law. Environmental jurisprudence is almost nonexistent simply because magistrates, without mastery on the

related issues, prefer to close cases without further action, thus sacrificing victims who are waiting for compensation. Similarly, participants in Ghana reported judges’ lack of awareness or appreciation of environmental rights and felt there had only been a few instances where the courts made orders against regulatory agencies and offenders of environmental rights, arising from citizen’s actions.

### Civil society

Most of the actors interviewed, including government and private sector participants, believe that civil society should and already does have an essential role in holding government and other actors accountable for the compliance and enforcement of environmental rights by

- creating awareness and engaging in advocacy campaigns;
- participating in decision-making processes to improve environmental laws and policies;
- supporting individuals or communities whose environmental rights are at risk of being affected,
- providing technical and expert support in environmental matters and support training and capacity building initiatives; and
- acting as a pressure group in keeping government accountable, including by bringing cases to court.

Yet, participants in all four countries also acknowledged barriers that are impacting the ability of civil society groups to effectively advocate for stronger implementation. These include

- lack of coordination, especially between grassroots, community-based, and national groups;
- insufficient funding;
- having their priorities dependent upon donor funding and therefore influenced by donor strategies and requirements;

- limited environmental rights research capabilities and the need for more structured partnerships with academic institutions and universities; and
- poor quality or a lack of evidence-based advocacy approaches.

In Ghana, participants felt that while their efforts were effective in ensuring the implementation of the limited environmental rights provisions, civil society was not very effective in ensuring a broader, more radical change in the recognition, protection, and enforcement of environmental rights. In South Africa, it was noted that the wide range of CSOs have different advocacy priorities and levels of influence. Although each focuses on important work, the effectiveness of these COS efforts is sometimes eroded or masked by the diversity of goals and approaches.

In Kenya, participants reported the commercialization of civil society engagement in some cases, meaning that some community-based organizations (CBOs) refuse to be part of a process unless a monetary per diem is allocated to them. This creates a gap when the government has no budgeted finances and therefore cannot adequately involve them, while at the same time the civil society groups have limited funding to facilitate participation or CSO-driven participation is regarded with suspicion by governments.

### **Private sector**

Unfortunately, only a small handful of private sector actors agreed to be interviewed as part of this research. Overall, research participants felt that the private sector had either low involvement or actively resisted the implementation of environmental rights. The general perception was that their engagement continues to focus on how can they reduce the impact of environmental rights on their business activities. In practice, this means that corporate sustainability

initiatives are primarily used to improve the corporate image and that communities are often met with resistance or obstruction by companies, including around access to information and public participation, as well as limited compliance with environmental management requirements. In Kenya, however, the consensus from the FDGs and interviews held that the private sector was important in the Kenyan economy, and based on their corporate social responsibility initiatives, companies have improved their performance in recent years. These activities included education and restoration initiatives, but it is unclear to what degree these activities have helped enhance respect for environmental rights.

In South Africa, participants reported that companies typically command better expertise and overwhelm departmental and regulatory officials. When legally required to consult with communities, they usually do so as a formal, “tick-the-box” exercise. Instead of meaningful consultation, some companies—and in some cases, government officials—merely inform communities of proposed projects. By the time communities are engaged, approvals have already been granted, and there is sometimes no disclosure of how proposed activities will impact a community’s environmental and other social and economic rights. South African participants also felt that SLAPP suits were increasingly being used to bring frivolous and vexatious litigation, such as defamation, against environmental activists with the objective of silencing them.

### **International donors and multilateral institutions**

International, continental, and regional institutions influence implementation of environmental rights. For example, both the United Nations Economic Commission for Europe and the Economic Commission

for Latin America and the Caribbean (ECLAC) have played critical roles as regional conveners for the passage of the Aarhus Convention and the Escazu Agreement, respectively.

In Africa, 54 out of 55 countries are signatories to the African Charter on Human and Peoples' Rights (ACHPR). The obligations of States in this regard have been upheld by the African Commission on Human and Peoples' Rights, a treaty body responsible for the interpretation and enforcement of the provisions of the Charter. The decisions of the Commission have affirmed the right to a clean and healthy environment and provide remedies where the right has been violated. At the regional level, in addition to the EAC, SADC, and ECOWA treaties previously mentioned, an explicit recognition and protection of the right to a clean and healthy environment exists in the Maghreb Charter for Environmental Protection and Sustainable Development. The African Union's continental human rights court, the African Court on Human and Peoples' Rights, the ECOWAS Court of Justice (ECCJ), and the East African Court of Justice (EACJ) also provide important regional forums for environmental rights. The [UN Special Rapporteur](#) on the Situation of Human Rights Defenders has further recommended that the Economic Commission for Africa (ECA) develop "a legally binding instrument on access to information, public participation, and justice in environmental matters, including measures to protect environmental human rights defenders."

Overall, participants felt that the actual impact of such institutions' actions was not always clear, despite their important role to play in the implementation of environmental rights especially, given the urgency of climate change as a human rights issue and the need for international and regional solutions. Some

participants felt that some multilateral donor efforts to fund and support implementation gave them greater influence on the institutions and authorities of the countries receiving funding. Others felt that the policies and actions of international organizations and multilateral institutions such as the African Union and SADC, as well as regional representatives, did not clearly impact those that have implementation control.

In Ghana, for example, participants noted that even though Ghana has signed on to some important international instruments that guarantee environmental rights, the main challenge has been that these international laws and directives have not been ratified by Parliament and thus are not domesticated into the country's laws and regulations. This has created a controversy over whether or how they become justiciable in this jurisdiction.

In Kenya, participants felt that international and regional bodies like the African Union are very crucial in providing a peer pressure mechanism for implementing environmentally sound policies and practices, but are rarely heard or have influence at the local level. In terms of donors, however, they noted that there have been many who have worked with several state agencies and the private sector and have enabled important initiatives to be carried out. Such donors included the World Bank, International Finance Corporation (IFC), the Government of France, the Swedish government through the Swedish Environmental Protection Agency, the Danish International Development Agency (DANIDA), and the United States Agency for International Development (USAID).

## CHAPTER FOUR

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# Entry Points to Strengthen Implementation

Despite the constitutional provisions and wide range of laws and policies that promote and recognize environmental rights, this research has revealed that a number of key and similar factors undermine the effectiveness of implementation. These drivers point to multiple possible approaches that could be used to raise awareness and foster agreement on the best path for scaling up implementation across the African continent.

## PROPOSED SOLUTIONS TO IMPLEMENTATION BARRIERS

Strengthening the implementation of environmental rights will require political interest and support, including the time and dedicated human and financial resources to address identified barriers. This support must include capacity building and training of key officials responsible for enforcement of environmental and environmental rights laws and policies. Specific policy frameworks must be improved, together with broader good governance coordination and community strategies and dedicated forums for building partnerships with key stakeholders. Fostering dialogue and bottom-up accountability to ensure impacted frontline communities have a voice is also critical.

Participants provided additional suggestions through the FGDs and interviews. In Kenya, in addition to devoting more resources to public awareness of environmental rights, participants centered many of their proposed solution ideas on the role of NEMA, including the formulation of better partnerships, improving the skills and development of EIA processes, and holding government officials accountable through litigation and stronger use of the country's ombudsman office. In South Africa, many if not all stakeholders agreed that there are opportunities to refine the legislation and room to tighten administration and implementation of statutes, including stronger requirements for free, prior informed consent, anti-SLAPP legislation, and stronger protection of whistleblowers and human rights defenders. They also suggested creating new strategies for making environmental information more accessible to the public, such as the proactive online publication of applications for permits and authorizations and monitoring government data. In the DRC, FGDs mentioned a provision for sanctions against administrative officials, along with integration of courses related to the implementation of environmental rights in university curricula, inclusion of the implementation of environmental rights in media broadcasts, and mass education programs on environmental rights. Ghanaian

participants highlighted the need to internalize the “polluter pays” principle in their environmental laws and to provide training and resources to government officials to support the development of stronger environmental rights provision in the laws. They also would like to see citizens have the formal right to a clean and healthy environment and better citizen's participation in and training in preparation for decision-making on projects that are likely to have impacts on the environment.

In South Africa, a more detailed analysis noted that, without a doubt, the constitution of South Africa includes procedural rights that can help promote access to environmental information, public participation, and access to justice. However, it appears that the environmental rights in the Bill of Rights Section 24 are not adequate to stand alone without the accompanying environmental procedural rights, even though these are found in the NEMA and other administrative legislation. Relying only on the broader constitutional provisions and legislation on access to information that are applied across the Bill of Rights may fail to convey the message and need for public officials to treat environmental procedural rights as important. This may partly explain why the stakeholder assessment revealed that access to information legislation, while well-intended, has in practice created more problems for the public: existing access to information legislation creates too many formalities and has provided more room for exceptions and defenses to public demands for environmental information. When communities seek information from various stakeholders—especially government officials and companies—that information is often withheld under vague exceptions.

Participants in all four countries also suggested targeted solutions that strengthen judicial processes. These include

- expanding the use of paralegals to train the communities on aspects of environmental rights implementation, including what to do when environmental rights are violated and where to seek redress;

- simplification of procedures for access to justice, including the appeal process;
- prosecution of environmental crimes before international criminal bodies to counter the lax approaches and the formation of more national and international environmental courts; and
- ongoing training of magistrates on environmental rights and related disputes and frameworks for less expensive judicial remedies.

## ASSESSMENT OF SCENARIOS

Given the complex and overlapping obstacles impeding the realization of environmental rights, a range of approaches will likely be needed to improve implementation and address the enabling conditions, needed legal reforms, and roles and capacity of key stakeholders. As noted above, interviewees and FGD participants were asked to provide input on the need for different types of support mechanisms, including

- **access to workshops, capacity building forums, collaborative learning networks, and written guidelines;**
- **voluntary-based declarations or stakeholder-targeted initiatives; and**
- **legally binding agreements through formal commitments.**

Overall, virtually all participants were supportive of additional training and workshops around environmental rights and felt it would help progress. In addition, most civil society participants in all four countries endorsed a regional or continent-wide legally binding agreement as the best path forward for improving the implementation of environmental rights, as this option was the only enforceable way to create change and hold government and private actors accountable.

However, the other stakeholders offered a more varied and nuanced opinion. Academic and Human Rights Commission advisory body interviewees in Kenya and South Africa recognized the benefits of both a voluntary and binding agreement approach. A voluntary agreement can be held as inspirational, and as such, easily taken up, whereas a binding agreement is designed to promote accountability and hold stakeholders liable in case of a contravention. However, these interviewees were skeptical about the enforcement even of binding agreements. In the DRC, one of the government official interviewees supported a voluntary agreement over a binding agreement, noting that it was the responsibility of the State to sanction offenders and “a binding text at the international level would be perceived as a violation of the sovereignty of the State.” However, the second government official and the parliamentary interviewees in the DRC supported both options. In these cases, both agreed that a voluntary agreement was an essential tool that could work if implemented, but because of poor implementation, “developing or ratifying binding texts remains a necessity to facilitate the implementation of environmental rights.”

In Ghana, one of the government officials and the parliamentary interviewees also supported a binding agreement. While the government official recognized that voluntary agreements will likely not be enforced, the member of parliament noted that “having a legally binding agreement through formal commitments or an instrument similar to the Escazu Agreement would be the best strategy because, although Ghana has signed the 2030 Sustainable Development Agenda and the African Charter on Human and Peoples’ Rights and Environmental Rights Standards, it is not likely Ghana would fully meet these outcomes because implementation of local policies have political undertones which hinder outcomes.”

Overall, the few private sector interviewees did not think a binding agreement would be effective. In

the DRC, neither type of agreement was considered effective because there is no mechanism for monitoring implementation, while in South Africa, both private sector interviewees felt a binding agreement would detract from enabling companies' ability to understand the moral value of upholding some of these rights. In this case, they reasoned that implementation challenges are really an issue of maturity, rather than of being compliance-driven. One further mentioned that a binding agreement would inhibit the ability of large companies to bring along the rest of the sector when they voluntarily agree to take action.

## SWOT Analysis

Ultimately, the best approach for African countries must be dependent upon what is practical, feasible, and politically effective. Based on this synthesized analysis, three general approaches—or a combination of those three—can be considered, including general guidance and training, voluntary agreements, and legally binding agreements for either a region or for the entire African continent. Tables 3, 4, and 5 present a SWOT analysis of these approaches to bring together functional elements and identify the most appropriate ways of limiting the effects of negative elements and maximizing the potential effects of positive ones.

TABLE 3  
**SWOT Analysis of General Guidance Scenario**

<b>SWOT: General Guidance</b>	
<b>INTERNAL DRIVERS OF INFLUENCE</b>	<b>EXTERNAL DRIVERS OF INFLUENCE</b>
<b>Strengthens</b>	Creates framework for learning and dialogue across diverse set of government, civil society, and private sector stakeholders across different regulatory levels (national, provincial, and local)
	Provides a mechanism for getting resources and deepening knowledge to people, especially local community representatives who lack technical understanding of environmental rights
	Can be done in complement with a non-binding or binding agreement
<b>Weaknesses</b>	Addresses incomplete understanding of technical issues around environmental rights and the need for more training of government agencies and magistrates and judges, including misconceptions about the cause or impact of policy on environmental rights
	Success is predicated on inclusion of local actors directly impacted by use of national resources
<b>Threats</b>	Risks becoming more of a meeting place instead of a capacity building and training program
	Previous initiatives have been limited in influencing and bringing about the expected changes
<b>Opportunities</b>	Expands the number of people aware of environmental issues, environmental rights laws, and the importance of environmental protection and preservation
	Collaborative networks for communities, activists, CSOs, and regulatory authorities could provide greater enforcement of environmental rights
	Strengthens ability and impact of civil society to influence and disseminate its positions
<b>Threats</b>	Could mitigate low level of coordination among implementing agencies
	Exchange of ideas could promote ownership of the problem

TABLE 4

**SWOT Analysis of Voluntary Agreement Scenario**

<b>SWOT: Non-Binding Agreement</b>			
<b>INTERNAL DRIVERS OF INFLUENCE</b>	<b>EXTERNAL DRIVERS OF INFLUENCE</b>		
<b>Strengths</b>	Provides guidelines, standards, and mechanisms that can be incorporated into country frameworks	<b>Opportunities</b>	Can be a powerful and inspirational motivation to take action
	Allows countries to improve environmental rights at their own pace based on their socio-political context and the state of their legal framework		Strengthens awareness of environmental rights
	Can include good practices not appropriate under a mandatory binding instrument		May be easier to negotiate, which may leave room for needed flexibility, and which may eventually lead to strong binding commitments
<b>Weaknesses</b>	Difficult to adapt or align a locally workable plan for implementation with international objectives and strategies	<b>Threats</b>	May bolster political will to subject governments to soft law instruments
	Does not address weak institutional governance or limited human and financial resources of government or court actors to implement environmental rights		Still dependent upon political will to enforce environmental rights
	Does not guarantee rights; there is generally little or no possibility of recourse to challenge poor application		Potential to be perceived as imposing international will on countries

TABLE 5

**SWOT Analysis of Binding Agreement Scenario**

<b>SWOT: Binding Agreement</b>			
<b>INTERNAL DRIVERS OF INFLUENCE</b>	<b>EXTERNAL DRIVERS OF INFLUENCE</b>		
<b>Strengthens</b>	Enforceable and more accountable if it includes compliance mechanisms that allow citizens to bring actions against the government for its failure to enforce	<b>Opportunities</b>	Can strengthen the protection of environmental and land defenders, whistleblowers, and public participation
	Generally taken more seriously and is less likely to be ignored; likely be of higher priority for government agencies		Can strengthen the legal framework and address needed policy coherence and legal reforms
	Does not exclude the pursuit of other options and could be done in complement with capacity building and training with relevant international and regional organizations		Could improve the balance of power between members of the public and government institutions
	Provides effective mechanisms for the prosecution of environmental crimes before international criminal bodies to counter the lax approaches often observed at the country level in Africa		Strengthens public awareness of environmental rights and legal and institutional framework
<b>Weaknesses</b>	Requires effective and appropriate sanctions to ensure accountability	<b>Threats</b>	Could be perceived as a violation of the sovereignty of the State
	Takes a significant amount of time— often years—to formulate and ratify		In many countries, lack of support by government and parliamentarian representatives and the private sector
	If entered into under negotiating pressure by a State without the capacity or public support for enforcement, is not likely to be an effective or appropriate commitment		Perception of unclear and uneven international enforcement for developing countries versus developed countries
	Need to amend existing national legislation, policies, and strategies may burden existing actors, given the lack of implementation of the existing environmental rights legal framework		Lack of political will to improve balance of power between members of the public and the institutions of government
	Significant financial implications for capacity building and implementation, especially given the overstretched budgets of environment ministries		Lack of compliance could jeopardize credibility
Countries often have separate departments to address regional, international, and multilateral agreements, adding to the overlapping and complexity of implementation	Low probability of on-the-ground implementation without capacity building and political support for enforcement		

# Conclusions and Recommendations: A Roadmap Forward

With aid from the mapping of environmental laws, this analysis has collected a wide range of insights and differences of opinion on why environmental rights have not been recognized or effectively implemented in four African countries. It offers the best solutions to address these intersecting and complex challenges. The SWOT analysis of the different approaches highlights the complex set of political, logistical, administrative, and technical issues that must be balanced to create a clear path forward.

There is a clear need for broader analysis to capture the regional and socio-political context of environmental rights across such a diverse and dynamic continent, made up of 55 unique countries. Further research on countries with different juridical traditions and francophone countries is especially needed. Researchers were also not able to interview any multilateral, African Union-based, or regional governmental or judicial bodies or institutions, limiting the scope of insight on the need for or interest in a regional or continent-wide agreement. More systemic analysis of environmental rights provisions and gaps in country laws, including needed legal reforms, is warranted.

Civil society actors overwhelmingly believed a legally binding agreement would be the best approach for strengthening environmental rights, and the fact that some government and parliamentary stakeholders interviewed for this research were open to or supportive of this idea is a welcome and hopeful insight. Yet, most of the proposed solutions provided by research participants did not directly address the corruption or weak political will challenges identified, especially in the short term. Instead, suggested approaches focused on bottom-up strategies targeting communities and the public, which in turn may feed into political will and strengthen citizens' ability to hold their government accountable.

Across the world, different multilateral organizations and governments have used a wide range of approaches for strengthening the implementation of environmental rights. These approaches have included formal binding agreements like the Aarhus Convention and Escazu Agreement, global guidelines for the development of national legislation such as the Bali Guidelines adopted by the UNEP Governing Council, and international principles such as the Framework Principles on Human Rights and the Environment. But environmental right advocates should remember that it took years for these agreements and approaches to be finalized or ratified. The effort to ratify the Aarhus

Convention took 10 years from negotiation to adoption in June 1998, and it took four years of negotiation 26 years after the adoption of the Rio Declaration on the Environment and Development for the Escazu Agreement to be ratified. These frameworks and approaches offer valuable lessons for African countries and regions to understand the benefits and challenges and document that the path to an agreement is neither short nor easy.

Nevertheless, this synthesized analysis offers a number of recommendations and steps that could be taken in the short term to strengthen implementation of existing environmental rights provisions and catalyze widespread dialogue and agreement on a path forward for broader and more ambitious commitments.

**Create targeted, Africa-centered public awareness campaigns and dialogues.** To address the poor awareness and understanding of environmental rights, as well as the concerns that they are still seen as an outside, imposed concept, advocates and supporting institutions must devote more resources to public awareness campaigns. These campaigns can explain in local dialects through popular radio, television, or social media forums how environmental rights can help address other issues Africans care about the most—including information about their right to clean water, health and food, rights to life, or freedom of association and freedom from discrimination. These campaigns are an opportunity for supporters to strengthen CSOs, which were identified as having an important role to play and as the biggest non-state actor in all four countries. Alignment between environmental rights and the anti-corruption agenda and organizations may also help strengthen the understanding and support of environmental rights and expand those advocating for stronger enforcement.

**Expand training for government and judicial officials.** Given the widespread agreement on the need for more in-depth training to improve the capacity of both government officials and magistrates responsible for

enforcing environmental rights, a more robust training program is clearly needed and would not be opposed by most stakeholders. However, as most participants also recognized that the lack of capacity is also indirectly a result of weak political will, outside organizations or regional or multilateral institutions would likely need to provide funding and coordinate programs tailored to individual country or regional environmental rights frameworks. Organizations and institutions like the Environmental Law Institute, UNEP, and academic universities already offer these types of trainings. Many regional courts, such as the ECOWAS Court of Justice (ECCJ) and the East African Court of Justice (EACJ), have been at the forefront of environmental rights and could prove to be a valuable resource.

**Leverage domestic legislation’s recognition of international environmental law.** The first way to trigger discourse on formulation and adoption of an environmental rights treaty in Africa may lie in engendering uptake and cultivating interest amongst technocrats and political actors by leveraging existing legislation that already provides for the domestication of international environmental treaties. Many African countries contain environmental rights provisions in their constitutions and laws that provide for domestication of international treaties, or negotiation and signing of international agreements. As any future environmental agreement in Africa should require State parties to adopt legislative, regulatory, and administrative measures at the domestic level to guarantee the implementation of environmental rights, individual countries could begin to determine now what new or strengthened laws are needed to implement current international treaties and agreements and help create momentum towards a new agreement.

Given the urgency and political focus on the climate emergency and the need to address the aftermath of the COVID-19 pandemic, this effort could also focus on ensuring environmental procedural rights are more strategically and explicitly connected to substantive rights, including the Paris Agreement and the SDGs.

**Formulate new laws and policies to protect environmental defenders and whistleblowers.**

Stronger protection and new laws including anti-SLAPP legislation, are necessary, given the urgency surrounding the continued threats, harassment, and death of environmental and land defenders and whistleblowers. While CSOs can continue to advocate, ultimately government must pass new legislation to protect those at the forefront of defending the environmental rights in communities. These protections cannot wait several years for an agreement to be ratified—they must begin now.

In addition, many of the African researchers outlined specific legal reform and judicial recommendations that are essential for their specific country. While not all are highlighted in this report, they provide critical insights into the key steps that can be taken at the country level, alongside a broader effort to build support for a regional agreement.

**Outline concrete pathways to strengthen political will.**

To address the lack of political will impeding environmental rights implementation, advocates need to shift incentives for political leaders towards a sustained commitment for environmental rights objectives. One approach is to develop concrete messaging and engagement strategies that outline how environmental rights are essential for linking

sustainable development and economic opportunity. CSOs, for example, can incorporate communication strategies that showcase how environmental rights can catalyze progress. Donors can fund new research to help build the evidence base, while Human Rights Commissions and regional body champions can be leveraged to help build political momentum. Continental and multilateral bodies can use their political influence, convening power, and financial support to help persuade government representatives to engage and highlight the connection between sustainable development and economic prosperity. Development and international financial institutions can include environmental rights in partnership strategies and mainstream it into environmental protection funding programs. International attention on the resolution recognizing the right to a safe, clean, healthy, and sustainable environment, as well as adapting to changes in the political landscape coming out of both the Biodiversity and Climate Conference of Parties, can also help build momentum.

**Cultivate learning opportunities between African countries, regional bodies, and signatories of the Aarhus and Escazu agreements.** Representatives from the Aarhus Convention played an important advisory role in the development and signing of the Escazu Agreement, and organizations from both could provide valuable insights to interested African institutions and stakeholders. Formal and informal opportunities for shared learning and discussion should be cultivated and funded by multilateral donors, CSOs, and government bodies to help define a feasible context for an African-focused regional or continent-wide agreement. Given the current political resistance to enforcing environmental rights, this type of learning opportunity will also likely be feasible and not opposed by elected officials or private sector actors.

**Secure sustained funding for additional research and creation of a forum to discuss a formal agreement.**

This report identified research gaps, especially around the need to evaluate environmental rights implementation in more countries, how rights could be strengthened at the regional or continental scale, and a deeper and more comprehensive understanding of the viewpoints of other stakeholders, especially regional and African Union institutions. Given the diversity of views identified in this analysis, this new research could provide new insights on what is politically feasible and help bridge the differing opinions of civil society, government, and the private sector. African universities could play an important role in building this evidence base and could share findings with new audiences and help convince government and other political stakeholders to take needed action.

Research could be conducted in complement with the development of an official multi-stakeholder forum for dialogue on an African agreement. This approach could expand interest and provide a mechanism for turning data into action and informing stakeholders. This could be particularly focused government officials (who must ultimately sign on to any agreement) and on what a feasible framework could encompass, but in a low political-pressure environment. Leveraging UNEP or an African body as independent facilitator, with support from the Office of the High Commissioner for Human Rights (OHCHR), could help galvanize sufficient political support and identify the steps needed for launching negotiations on an environmental rights convention. Simply starting such a process could elevate the issue on the political agenda. As officials begin to think and talk about access issues, new understanding could develop as they enter into a dialogue with civil society representatives in a new way. CSOs, in turn, could strengthen networking and

refine their positions. Momentum could also encourage donor organizations to increase funding for related activities.

**Foster champions and new leaders.** A few of the government champions of the Escazu Agreement started as civil society advocates who researched environmental rights in their home countries. It is important to support and cultivate investments in civil society and government officials interested and willing to consider stronger environmental rights mechanisms and agreements. These organizations and individuals could be provided opportunities to expand their networks or receive funding to participate in public forums or research opportunities. As what will be politically feasible may depend upon the specific circumstances in African regions, regional representatives who often share common political, cultural, and linguistic ties could work together to reach consensus.

In 1972, the United Nations Conference on the Environment in Stockholm ended with a historical declaration: the first one to place the environment at the forefront of international concerns and link economic growth, pollution, and the well-being of people around the world. Yet, despite the prolific growth of environmental laws, institutions, and recognition of environmental rights since that time, failure to fully implement and enforce environmental agreements and laws remains one of Africa's biggest challenges in addressing climate change, protecting wildlife and land, and providing clean water. Passage of the Escazu Agreement, along with the UN's new resolution recognizing access to a healthy and sustainable environment as a universal right, provides signals progress and offers another opportunity for hope—a new chance to galvanize support and translate environmental rights principles into practice. Strengthening environmental rights in Africa can speed protection of the natural world while carving out a pathway that protects people's lives and livelihoods and builds economic prosperity for all Africans.

# Appendix A. Framework for Evaluating Existing State of Environmental Rights

- Focus will primarily be on procedural rights, but intersections with substantive rights will be noted, such as cases where substantive right initiatives include procedural rights elements.
- Summary based on existing reports and evaluations—no new research.

## **Critical Enabling Conditions**

- Political interest and support, including necessary level of convening power
- Level of existing country, sector, or regional leadership or momentum
- Resources such as
- Ease of fundraising
- Amount needed to fund, implement, and enforce
- State of civic space and post-pandemic impacts on enforcement
- Function of State and courts; enforcement of judgement of courts and other accountability mechanisms

## **Actors and Roles**

- List of relevant government, private sector, civil society, and multilateral and international donors and institutions needed
- Roles and Responsibilities
- Resources can contribute
- Required focal point
- Views on governmental institutional capacity constraints to address implementation challenges
- Level of needed capacity building of civil society and other key actors;

## **Barriers and Needed Actions and/or Legal Reform**

- Gaps and need for strengthened legal and policy frameworks
- Peer learning and capacity building barriers
- Opportunity to create new tools or methods
- Improved coordination and communication mechanisms across actors
- New or strengthened forums on ongoing policy discussions around sustainable development that could be influenced by this effort
- Gaps/strengthen policy frameworks
- Gender, youth, and other social barriers

## ENDNOTES

- .1 Countries voting in favor of the resolution include Argentina, Armenia, Austria, Bahamas, Bahrain, Bangladesh, Bolivia, Brazil, Bulgaria, Burkina Faso, Cameroon, Cote d'Ivoire, Cuba, Czech Republic, Denmark, Eritrea, Fiji, France, Gabon, Germany, Indonesia, Italy, Libya, Malawi, Marshall Islands, Mauritania, Mexico, Namibia, Nepal, Netherlands, Pakistan, Philippines, Poland, Republic of Korea, Senegal, Somalia, Sudan, Togo, Ukraine, United Kingdom, Uruguay, Uzbekistan, and Venezuela.
2. To allow for a frank assessment, researchers ensured anonymity for all participants. For that reason, this report does not include a list of participants.