

THE RIGHT TO WATER IN AFRICA

SUBMISSION TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS' WORKING GROUP ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON THE DRAFT GUIDELINES ON THE RIGHT TO WATER IN AFRICA

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INTRODUCTION

Amnesty International welcomes and strongly supports the important initiative of the Working Group on Economic Social and Cultural Rights (Working Group) to draft Guidelines on the Right to Water in Africa (Draft Guidelines).

The draft that has been circulated for consultation promises to make an important contribution towards ensuring that governments respect, protect and fulfil the rights to water and sanitation for all in Africa. The Guidelines will also support States to develop and implement national laws, policies and strategies that guarantee the rights to water and sanitation and submit progress on implementation in their periodic reports to the African Commission on Human and Peoples' Rights (African Commission).

Amnesty International welcomes the opportunity to comment on the Draft Guidelines and hopes that the following submission helps the Working Group in finalising the document.

There are many positive elements in the Draft Guidelines, including the emphasis given to issues of participation, access to information and involvement of affected individuals and communities in decision making processes, combined with the need for human rights impact assessments when developing sustainable water management strategies. Amnesty International also strongly supports efforts by the Working Group, as reflected in the Draft Guidelines, to ensure that the right to water is made justiciable in national legislations of member states¹ and that victims of violations of these rights have access to effective remedies.

Amnesty International submits the following comments and recommendations with a view to further strengthen the Draft Guidelines, to ensure the full enjoyment of the rights to water and sanitation consistent with international normative developments and to guard against possible narrow interpretation of these rights.

¹ Several member states in Africa recognise the right to water in their national legislations. See 'The rights to water and sanitation in national law' <http://www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/>

OVERARCHING COMMENTS FOR THE DRAFT GUIDELINES

EXPLICIT RECOGNITION OF THE RIGHT TO SANITATION

Amnesty International recommends that the Draft Guidelines on the human right to water also explicitly include language and provisions on the human right to sanitation. The rights to water and sanitation, in addition to being distinct rights, are also interdependent and interrelated. Lack of access to safe sanitation can lead to the contamination of water sources thus undermining access to safe and clean water for domestic and personal use. The interdependence and interrelated nature of the rights to water and sanitation have also been previously recognized by the African Commission in the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.² The rights to water and sanitation are also essential for the realisation of a range of other rights including the rights to housing, health and to a life with dignity.

Amnesty International notes that the Draft Guidelines do not reference the UN Human Rights Council Resolution 33/10 (2016) and the UN General Assembly Resolution 70/169 (2015) in which these bodies recognised both the rights to water and to sanitation. Resolution 70/169 recognised: “that the **human right to safe drinking water** entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, and that the **human right to sanitation** entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity” (emphasis added).³

² See African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' paras 87-92

³ See UN General Assembly Resolution 70/169 (2015) para 2, A/RES/70/169

Amnesty International recommends the Draft Guidelines should reference these resolutions and, in accordance with the same, recognise sanitation as a distinct right. While the organisation appreciates that the Guidelines aim to focus on right to water, by failing to include the right to sanitation as a distinct right (even while it references many other related rights), the African Commission may be seen to be implying that sanitation is not a human right. This would not just be a regressive step given the international normative developments outlined above, but it would also be contrary to the position adopted by African member states that have recognized the right to sanitation as a distinct human right in those resolutions co-sponsored by several African member states and adopted by consensus at the UN Human Rights Council and the UN General Assembly.

Similarly, while the Draft Guidelines provide some guidance to States on issues of sanitation, this could be done with greater consistency, including by using the phrase “human rights to water and sanitation” in place of “the right to water” wherever applicable.

TERMINOLOGY

Amnesty International is concerned about the use of the term ‘vulnerable groups’ throughout the Draft Guidelines. The term ‘vulnerable groups’ represents an abstract concept of vulnerability instead of discrimination, which is explicitly prohibited under international human rights law and standards. The use of the term ‘vulnerable’ to define groups and individuals throughout the Draft Guidelines takes the focus away from the discrimination that underlies acts of commission and omission by states that leads to denial of the rights to water and sanitation. We therefore recommend that the term should be replaced with **‘groups suffering from discrimination’** and that groups, as appropriate, are referred to as **‘marginalized’, ‘discriminated against’, ‘groups suffering from discrimination’** or **‘groups targeted for discriminatory reasons’**. Such language reflects that the victims’ situation is the result of their treatment by others, which is explicitly prohibited under international human rights law, as opposed to any inherent personal or group weakness.

Amnesty International also recommends that in line with the African Charter on Human and Peoples’ Rights (African Charter) and the jurisprudence of the African Court on Human and Peoples’ Rights, the Draft Guidelines use the term ‘Indigenous peoples’ throughout, rather than Indigenous communities.

COMMENTS ON SPECIFIC SECTIONS AND PARAGRAPHS OF THE DRAFT GUIDELINES

DEFINITIONS

Marginalised Groups – Amnesty International recommends that in addition to defining these groups “as groups, which are under- or unserved in water access”, the Draft Guidelines define these “as groups, which are under- or unserved in water *and sanitation* access”. Further Amnesty International recommends that the Draft Guidelines seek to quantify what is meant by ‘under-served’. According to the World Health Organisation a minimum of 50 litres of water per person per day is required to fulfil the most basic domestic and hygiene needs and this is a widely accepted benchmark⁴ Similarly, in the case of sanitation, un-served or under-served areas should be defined as those that do not have any, or have insufficient improved sanitation facilities such as a flush or pour-flush toilet/latrine to a piped sewer system, a septic tank or a pit latrine, ventilated improved pit latrine, pit latrine with slab or composting toilet.⁵

Personal and domestic uses (‘water for personal and domestic uses’) – For purposes of consistency with international human rights standards on the right to water, in particular General Comment 15 of the UN Committee on Economic, Social and Cultural Rights (CESCR) on the right to water, Amnesty International

⁴ G. Howard and J. Bartram, ‘Domestic Water Quantity, Service Level and Health’, WHO/SDE/WSH/03.02; World Health Organisation, 2003 p. 22; Also see ‘The Human Right to Water and Sanitation’, UN-Water Decade Programme on Advocacy and Communication and Water Supply and Sanitation Collaborative Council

http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf

⁵ See WHO, Water Sanitation Hygiene, Key Terms http://www.who.int/water_sanitation_health/monitoring/jmp2012/key_terms/en/

recommends that the definition of water for personal and domestic use should also include water for **food preparation**.⁶

Safe Sanitation – While the definition in the Draft Guidelines usefully focuses on treatment and disposal of human waste, to ensure that the definition is in line with international human rights standards, Amnesty International suggests that it also includes “*physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure and acceptable, and that provides privacy and ensures dignity*”. Amnesty International therefore recommends that the definition of Safe Sanitation in the Draft Guidelines reads as follows:

“Safe sanitation is sanitation that is physically accessible and affordable in all spheres of life, that is safe, hygienic, secure and acceptable, and that provides privacy and ensures dignity⁷, that effectively prevents human, animal and insect contact with excreta. Safe sanitation includes the treatment and disposal or reuse of excreta and associated wastewater. Sanitation does not stop simply with the use of latrines or toilets, but includes the safe disposal or reuse of faeces, urine and wastewater. Such a broad understanding is warranted, as sanitation concerns not only one’s own right to use a latrine or toilet, but also the rights of other people, in particular their right to health, on which there might be negative impacts

Vulnerable groups – See Amnesty International’s recommendation above to use instead ‘groups suffering from discrimination’ ‘groups that are discriminated against’.

Further, in addition to the groups mentioned in the definition, we recommend that the definition specifically mentions the following groups: **Indigenous peoples, people who are homeless, those living in informal settlements, lesbian, gay, bisexual, transgender and intersex (LGBTI) people, and people living with HIV and AIDS**. While recognising that the current list in the definition of vulnerable groups is indicative and not exhaustive, given that the above-mentioned groups are often subjected to discrimination and exclusion from access to essential services including water and sanitation, Amnesty International believes that it is important that they are mentioned in the list of groups that deserve special attention and protection.

PART 1: GENERAL PRINCIPLES

Guideline 1.4 – While Amnesty International welcomes the guidance that prohibits the use of access to water as a political tool, given the close link between water and sanitation, the organization recommends that “**and sanitation**” is added to the sentence. Further, considering the impact of economic sanctions on access to water and sanitation services, Amnesty International recommends adding that access to water (and sanitation) must not be used as a tool for economic pressure.⁸

Therefore, to strengthen access to water and sanitation for all, Amnesty International recommends that Guideline 1.4 reads as follows: “States shall refrain from using access to water **and sanitation** as an **instrument for political ~~tool~~ or economic pressure**”.

Guideline 1.5 – To further strengthen this guidance, Amnesty International suggests adding the phrase “**and guarantee access to individuals and communities who depend on it for their domestic and livelihood needs**”.

We therefore suggest that 1.5 reads as follows: “States shall protect water resources, including springs, streams and lakes that are of cultural significance to the local and traditional communities or to the country

⁶ Committee on Economic, Social and Cultural Rights, General Comment 15, The Right to Water, UN Doc. E/C.12/2002/11, 20 January 2003 para 12 (a)

⁷ Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, UN Doc A/HRC/12/24, 1 July 2009 para. 63

⁸ Committee on Economic, Social and Cultural Rights, General Comment 8 The relationship between economic sanctions and respect for economic, social and cultural rights, UN Doc E/C.12/1997/8, 12 December 1997 para 3

at large, and guarantee access to individuals and communities who depend on it for their domestic, cultural and livelihood needs”.

Guideline 3.3 – Amnesty International welcomes the inclusion of the general principles of non-retrogression in Guideline 3. To further strengthen these provisions, Amnesty International recommends the following amendment to Guideline 3.3 (vii):

(vii) Protective of the **non-derogable**⁹ minimum core content and of economic, social and cultural rights, based on transparency and genuine participation of affected groups **including the right to free, prior and informed consent of affected indigenous peoples where appropriate**, in examining the proposed measures and alternatives.

PART 2: A RIGHTS-BASED APPROACH TO WATER MANAGEMENT

PARAGRAPH 6 PARTICIPATION

Amnesty International welcomes the emphasis in the Draft Guidelines on participation of communities and individuals at key stages in water resource management and in water, sanitation and hygiene policies and plans at the local level in a democratic and inclusive manner.

Guideline 6.2 – This Guideline provides important guidance on facilitating meaningful participation. In order to bolster this aspect and to ensure consistency with international human rights standards, Amnesty International recommends the following amendment:

6.2. States shall identify, acknowledge and remove barriers to participation as defined under Guideline 6.1 and ensure the meaningful participation of, **including the free, prior and informed consent of Indigenous peoples where appropriate, vulnerable groups that are discriminated against** and marginalised groups, especially those mentioned under Part 4.

Guideline 6.3 – To further strengthen participation of individuals and communities, especially those who are marginalized and belong to groups that are discriminated against, Amnesty International suggests amending Guideline 6.3 to call on States to not only make these groups aware of their “ability to participate” but to also facilitate their participation by ensuring that mechanisms for participation are accessible and function in a manner that is non-discriminatory.

Amnesty International therefore proposes that Guideline 6.3 is amended as follows:

States shall ensure that individuals and groups, including those belonging to groups that are discriminated against ~~vulnerable~~ and marginalized groups, are aware of their ability to participate. **States shall take steps to encourage and facilitate the participation of those belonging to these groups and ensure that the mechanisms for participation are accessible to all and function in a non-discriminatory manner.**

COMMUNITY-BASED WATER MANAGEMENT

While Amnesty International welcomes the encouragement of community-based water management in Guidelines 6.4 to 6.7, the organization wishes to highlight that the obligation to ensure that water resources are managed in a way that realizes the right to water and sanitation for all, lies with State actors at all levels and not with communities. This obligation applies to States even if communities manage water resources

⁹ See Committee on Economic, Social and Cultural Rights, General Comment 15, The Right to Water, UN Doc. E/C.12/2002/11, 20 January 2003, para 40

themselves, as communities must be supported by the State when they are unable to secure the rights to water and sanitation for themselves. Further, States should not abdicate their responsibilities when a community excludes or otherwise discriminates against some of its members. Amnesty International therefore suggests the following amendment to Guideline 6.4

All levels of government States including local authorities and communities have a joint responsibility for ensuring the realization of the right to water and sanitation of all, and water resources management. To achieve this, States will seek and facilitate the participation of communities to design and implement plans and strategies for water resource management.

Furthermore, to strengthen community-based water management Amnesty International recommends that Guideline 6.5 and 6.7 are amended as follows:

6.5. States shall take steps to ensure that local government authorities and other governance entities not part of central government, **as well as decision-making structures of traditional communities** are empowered and sufficiently supported to manage water services in their own areas, and under their authority so as to facilitate universal access to water in sufficient quantity, quality and continuity, and at an affordable and equitable price.

6.7. States shall **consult and cooperate** ~~engage~~ with Indigenous populations in order to support them in protecting, developing and adapting their ~~address and adapt or support the protection and development of~~ traditional water management systems for their ancestral lands.

PART 3: SUFFICIENT, SAFE, ACCEPTABLE, PHYSICALLY ACCESSIBLE AND AFFORDABLE WATER FOR PERSONAL, DOMESTIC, AND AGRICULTURAL USES

GENERAL PROVISIONS

Reiterating Amnesty International's overarching recommendation that the Guidelines explicitly recognize the right to sanitation as a right that is distinct and yet interrelated to the right to water, Amnesty International recommends the following amendment to Guideline 10.1

Guideline 10.1 - States shall set up independent monitoring and accountability mechanisms, including ensuring that the rights to water **and sanitation is are** justiciable.

Guideline 11.1 Since water and sanitation are closely linked, interrelated and interdependent, Amnesty International urges that the Draft Guidelines include core components of the right to sanitation alongside the guidance on the components of the right to water. In particular Amnesty International recommends that Guideline 11.1 also includes that the human right to sanitation entitles everyone to sufficient, physically accessible, hygienically and technically safe, affordable, culturally acceptable and that which respects the privacy and dignity of the individual.¹⁰ Further elaboration of these concepts in the context of the right to sanitation can be found in the July 2015 report of the UN Special Rapporteur on the Human Right to Water and Sanitation.¹¹

¹⁰ See 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation' 27 July 2015 A/70/203 paras 5-13 at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/203

¹¹ Ibid

MINIMUM AMOUNT OF WATER

Guideline 12.2 – Amnesty International expresses its strong support for guidance to States calling on them to ensure that everyone has access to the minimum quantity of water that is sufficient and safe for personal and domestic use, including preventing disease. Footnote 26 for Guideline 12.2 quotes the World Health Organization (WHO) as stating that 20 litres per capita per day is the absolute minimum. As currently written, it appears to imply that 20 litres per capita per day could meet a State’s obligations.

We would advise against characterising this figure as the minimum, as it may imply that this is what States should aim for. Rather, as recognised in footnote 31, WHO specifies that where people access only 20 litres a day, there is a high public health risk from poor hygiene; whereas the risk is low when the amount is 50-100 litres per day.¹² This point has also been noted by the UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation who recognizes 20 litres per capita per day as a minimum quantity required to realize minimum essential levels of the right, but as there remain significant health concerns for this quantity of water provision, and that for the full realisation of the right, States should provide at least 50 - 100 litres per capita per day.¹³ Amnesty International therefore recommends that the Draft Guidelines explicitly call on States to ensure that everyone has access to at least 50-100 litres of water per capita per day.

RAINWATER HARVESTING

Guideline 12.6 – Since many urban areas in several countries in Africa lack access to sufficient supplies of safe water, Amnesty International recommends that the Draft Guidelines include the need for States to support urban communities to also harvest rain water.

We therefore suggest that Guideline 12.6 to read as follows:

“States shall promote rainwater harvesting carefully so as to support **both urban and** rural communities that currently lack sufficient supplies of safe water, while protecting the needs of the wider environment. They shall invest in catchment tanks either below or above ground where rainwater can be collected.

PHYSICAL ACCESSIBILITY

Guideline 13.1 – Amnesty International calls for the Guidelines to state explicitly, as stated in CESCR General Comment 15 (para.12, c, i), that water “must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace.” The current draft uses the formulation ‘reasonable distance’ and therefore, considered together with footnote 31, implies that a State could possibly aim for access to be within 100 metres (a distance within which it is normally feasible to collect 20 litres per person per day), with access in or near the home (allowing collection of 50-100 litres) to be an ideal target to realise progressively. It would be preferable to specify that the right to water requires access in or the immediate vicinity of the household (and the other relevant institutions mentioned). If this revision is made, the guideline and footnote 31 would be clearer in treating access to water within 100 metres as the ‘minimum core obligation’ rather than as the content of the obligation itself. We recommend that Guideline 13.1 reads as follows:

States shall ensure safe physical access to water facilities or services that provide sufficient, safe and regular water; have an adequate number of water outlets to avoid prohibitive waiting times; and **are within or in the immediate vicinity at a reasonable distance of from** the household; educational

¹² G. Howard and J. Bartram, Domestic Water Quantity, Service Level and Health, (World Health Organisation, 2003), 22, cited in World Health Organization, Guidelines for drinking-water quality, 4th edition (2017), p. 84.

¹³ See Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, ‘Frequently Asked Questions’ http://sr-watersanitation.ohchr.org/en/rightstowater_5.html

institutions; workplaces; market places; health institutions; prisons and other places of detention; refugee camps and any other public institution or public service.

Further, we note that the Guidelines use the term 'improved sources of water' (e.g. Guideline 13.3) which may not be understandable to those readers who are not water and sanitation professionals. We recommend that the Guidelines define the terms or preferably use the term '**sources of water likely to be safe.**' *quality and acceptability*

Guideline 15.1 – For purposes of consistency with international human rights standards on the rights to water and sanitation, Amnesty International recommends that the Draft Guidelines further expand on Guideline 15.1 to include that States must prevent the pollution of water supply by agriculture, industry and wastewater. Water provided for domestic and personal use in homes and public spaces must be of an acceptable colour, odour and taste.¹⁴

We recommend that Guideline 15.1 reads as follows:

Everyone has the right to safe water for personal, domestic, and agricultural uses. States must prevent the pollution of water supply by agriculture, industry and wastewater. Water provided for domestic and personal use in homes and public spaces must be of an acceptable colour, odour and taste.

PROTECTION OF WATER RESOURCES

Guideline 15.2 –To ensure that in their attempts to preserve and protect water resources including traditional sources of water, States should not undermine the rights of local communities, Amnesty International recommends that Guideline 15.2 includes the requirement to consult with and involve local communities and particularly individuals belonging to groups that are traditionally discriminated against in planning and implementation measures. Amnesty International therefore suggests that 15.2 is amended as follows:

States shall protect the quality of national and international water resources and the entire riverine ecosystem, from watersheds to oceans. They shall also ensure the protection and maintenance of traditional sources of water, including reservoirs, springs and rivers, and promote safe sanitation and hygiene practices. **This shall be done in consultation with affected communities with special attention given to the participation of individuals belonging to groups that are discriminated against**

DISEASE PREVENTION AND MONITORING

In the context of preventing diseases and in order to strengthen the sanitation component of the Guidelines, Amnesty International recommends that Guideline 15.8 is amended as follows:

Guideline 15.8 - States shall ensure that everyone has the right to have **physical and affordable** access to adequate and safe sanitation that is conducive to the protection of public health and the environment. Sanitation comprises at least, a clean toilet or latrine, **within or in the immediate vicinity of each household; educational institution; workplace; market place and shopping area; health institution; prison and other place of detention; refugee camp and any other public institution or public service**, together with collection, disposal and treatment of human excreta, wastewater, solid waste and storm water removal and hygiene education.

¹⁴ See 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation' 27 July 2015 A/70/203 paras 17 and 19 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/203 See A/70/203

PART 4: VULNERABLE GROUPS

This section contains important guidance for states to address individual, institutional and structural inequalities that result in certain groups being denied access to water and sanitation. However, as noted in the overarching comments above, Amnesty International is concerned that the use of 'vulnerable' to define groups and individuals throughout the Draft Guidelines takes the focus away from the discrimination that underlies acts of commission and omission that deny access to water and sanitation.

Amnesty International strongly recommends that the Draft Guidelines include language that calls on States to respect, protect and fulfil the rights to water and sanitation of all individuals in particular those who belong to groups that are marginalised or discriminated against and prioritise their access to water and sanitation. In its current version, the Draft Guidelines mention only some of these groups in some guidelines. Amnesty International is concerned that the naming of some groups may lead to others being excluded. For example, Guideline 18 calls on States to extend safe water services to rural and deprived urban areas, taking into account the needs of women and children. It however, leaves out several other marginalised groups such as persons living with disabilities. We therefore recommend that the Draft Guidelines, where applicable, use all-encompassing terms such as marginalised groups or groups that are discriminated against in order to ensure that no category of people that requires special protection and positive measures to guarantee their rights to water and sanitation, is left out.

Amnesty International welcomes the efforts made in the Draft Guidelines to draw attention to specific groups that are discriminated against including persons living in rural areas and refugees and migrants. We recommend that in view of the systemic discrimination faced by Indigenous peoples, a separate guideline on this category of persons and their rights to water and sanitation is included in Part 4.

Amnesty International also recommends the following specific amendments:

Guideline 16.3 - States shall ensure that water management complies with the principle of non-discrimination within and among riparian populations, and take into account the needs **including cultural, spiritual and religious needs, of persons belonging to groups that are discriminated against vulnerable** and marginalized persons.

Guideline 16.5 - States shall ensure that vulnerable and marginalized groups are consulted and actively participate in water service design, **including obtaining their free, prior and informed consent where appropriate**, in order to ensure that such facilities are adapted to their needs.

Guideline 17 –Amnesty International supports the inclusion of Guideline 17 on ensuring that persons living in informal settlements are guaranteed their rights to water and sanitation. To further strengthen the principle that no one should be denied the rights to water and sanitation because of their housing and land tenure status, and to better protect the rights of people are homeless, Amnesty International recommends the following amendment to Guideline 17:

Guideline 17. Persons who are homeless and persons living in informal settlements

Guideline 17.1. No one shall be denied access to water **and sanitation** because of their housing or land status, **including those who are homeless**. Informal human settlements shall be upgraded through the provision of water services and through assistance with the construction of their own water **and sanitation** facilities.

In the case of persons deprived of liberty, Amnesty International, welcomes the guidance to States to ensure that detained persons have access to sufficient, safe and acceptable water. Detention facilities also often lack adequate and safe sanitation facilities and detainees are often forced to use buckets in their cells as toilets. Amnesty International therefore recommends the following amendments to Guideline 19.1:

Guideline 19.1. States shall ensure that imprisoned and detained persons have access to sufficient, safe and acceptable water **and sanitation facilities**. Sufficient water should be provided daily, together with sufficient soap and clothes detergent to ensure personal hygiene, clean bedding and clothes.

Keeping in mind the vulnerability of children in schools to health risks from unsafe sanitation, Amnesty International proposes the following amendment to Guideline 20.1

Guideline 20.1 - States shall ensure that appropriate water facilities, **access to suitable hygiene products including soap**, and separate sanitation facilities for girls and boys are available in schools

PART 5: SUSTAINABLE WATER MANAGEMENT

SUSTAINABILITY AND INTEGRATED STRATEGIES

Considering that climate change is among the major threats to the enjoyment of the right to water of present and future generations, Amnesty International recommends that the following is added to the strategies listed under 25.2: **implementing effective human rights-consistent climate change mitigation and adaptation measures in order to reduce the impacts of climate change on the right to water and sanitation**

Amnesty International also recommends the amending Guideline 25.2 (iv) as follows:

(iv) assessing the impacts of actions that may impinge upon water availability and natural ecosystem watersheds **such climate change, desertification and increased soil salinity, deforestation and loss of biodiversity**; reducing water wastage in its distribution

HUMAN RIGHTS IMPACT ASSESSMENTS

Amnesty International welcomes the guidance to States to conduct human rights impact assessments prior to any activity that is likely to impact water sources. To further strengthen this guidance, Amnesty International recommends that the Draft Guidelines provide that States not only assess the impact on the right to water but also on the right to sanitation.

In addition, Amnesty International recommends that the guidelines explicitly mention States' obligations to take precautionary measures against harms to the right to water on the basis that the "lack of full scientific certainty should not be used to justify postponing effective and proportionate measures" to prevent such harms,¹⁵ in accordance with principle 15 of the Rio Declaration on Environment and Development. The requirement to address such potential risks to human rights has been reflected in the jurisprudence of both national and international courts, including a number of decisions of the European Court of Human Rights,¹⁶ and, most recently, in an [advisory opinion](#) of the Inter-American Court for Human Rights.¹⁷

Amnesty International also recommends the following addition to Guideline 26.2 (v) on human rights impact assessments:

26.2 States shall ensure that the human rights impact assessment conducted:

(v) includes impact on **the customary, spiritual, religious and cultural rights of Indigenous peoples and other traditional communities**, customary people's rights and community existence including livelihoods, local governance structures and culture

¹⁵ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/34/49, 19 January 2017, paragraph 33 (c).

¹⁶ Lopez Ostra V. Spain (1994), Guerra V. Italy (1998), Öneriyildiz V. Turkey (2005), Taskin V. Turkey (2006), Fadeyeva V. Russia (2007), Budayeva V. Russia (2008), and Tatar V. Romania (2009)

¹⁷ Interamerican Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23., available at (in Spanish only) http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf

EMERGENCY SITUATIONS

Amnesty International welcomes the recognition given to the rights to water and sanitation in emergency situations. As individuals and communities that belong to marginalised groups or groups that are discriminated against, are often disproportionately impacted in emergency situations, Amnesty International recommends the following amendment to Guideline 27.1

Guideline 27.1 - States shall adopt an effective response plan to ensure that people have access to minimum amounts of safe water and basic sanitation **without discrimination** following an emergency situation such as a natural disaster or armed conflict, and to facilitate the provision of aid to **marginalised persons or persons who are discriminated against** vulnerable and affected persons where necessary.

CLIMATE CHANGE

Guideline 28.1 - Amnesty International supports the inclusion of climate change as an area that needs to be viewed from a human rights lens in the Draft Guidelines. However, the Guidelines does not recognise States' obligations under human rights law to take steps to reduce climate change in order to protect human rights. In its current state, the Draft Guidelines imply that these obligations arise only under climate agreements.¹⁸ UN human rights treaty bodies have recognised States obligations to reduce greenhouse gas emissions as a matter of human rights law. For example, the Committee on the Elimination of Discrimination against Women has recommended that states should “take effective steps to equitably manage shared natural resources, particularly water, and limit carbon emissions, fossil fuel usage, deforestation, near-surface permafrost degradation, soil degradation and transboundary pollution, including dumping of toxic waste, and all other environmental, technological and biological hazards and risks that contribute to climate change and disasters which tend to have disproportionate effects on women and girls”.¹⁹ In addition, several UN Treaty Bodies have included in their Concluding Observations recommendations aimed at reducing greenhouse emissions and stepping up the production of renewable energy.²⁰

We therefore recommend that Guideline 28.1 be reworded as follows:

States must **take all steps within their power to reduce the greenhouse gas emissions and to assist affected people adapt to climate change in order to meet, in a coherent and mutually reinforcing manner, ensure that the implementation of obligations in the framework of climate agreements and are coherent with the implementation of obligations in terms of international human rights treaties.**

To guarantee the human rights to water and sanitation, Amnesty International further recommends that Draft Guideline 28.1 includes a requirement by States to take all necessary steps to put in place regulations and incentives to move towards a low-carbon economy as quickly as possible. We also recommend that the Guidelines includes a requirement that States ensure that National Adaptation Plans do not infringe on human rights and give due consideration to the impacts of climate change on human rights, including on the rights to water and sanitation. We also recommend that States are required to guarantee the participation of affected communities and individuals, especially individuals belonging to groups that are discriminated against, in the formulation and implementation of National Adaptation Plans and other measures.

Both climate change mitigation and adaptation measures have the potential to negatively impact human rights, and the rights to water and sanitation in particular, if human rights considerations are not sufficiently taken into account. Therefore, Amnesty International recommends strengthening Guidelines 28.1(ii), 28.1(iv) and 28.1(vi) as follows:

¹⁸ Guideline 28.1 States must ensure that the implementation of obligations in the framework of climate agreements are coherent with the implementation of obligations in terms of international human rights treaties by, among others

¹⁹ Committee on the Elimination of Discrimination against Women, General Recommendation Nr 37 on Gender-related dimensions of disaster risk-reduction in the context of climate change, CEDAW/C/GC/37, 7 February 2018, paragraph 46(a).

²⁰ For a compilation of UN Treaty Bodies' concluding observations in relation to climate change see CIEL and GIESCR, States Human Rights Obligations in the Context of Climate Change, 2018, available at <https://www.ciel.org/reports/states-human-rights-obligations-context-climate-change/>

Guideline 28.1 (ii) - Ensuring that climate **mitigation and** adaptation measures do not interfere with the enjoyment of the rights to water **and sanitation**;

Guideline 28.1 (iv) - Ensuring that third parties implementing climate **mitigation and** adaptation measures do not interfere with the enjoyment of the rights to water **and sanitation**;

Guideline 28.1 (v) - Raising awareness about the impact of climate change on the **rights to water and sanitation availability, including water availability** and chemical and biological contamination; and

Guideline 28.1 (vi). Integrating human rights impact assessments into climate change mitigation and adaptation actions

PART 6: INTERNATIONAL COOPERATION

Amnesty International is concerned that Draft Guidelines 29 to 32 seek to import international customary law into African human rights standards rather than drawing on relevant human rights obligations. Amnesty International recommends that the Draft Guidelines rather refer specifically to these human rights obligations, while providing guidance to States on how to realise these obligations when implementing their obligations under customary international law. Customary law on transboundary watercourses deals with questions that are broader than human rights specifically. It is notable that human rights law does not include a formal requirement that water resources are equitably allocated amongst the population of the country. States are required to ensure access to water for all to meet the requirements set out relevant human rights, but beyond meeting these requirements, it would be difficult to say that States are required to equitably allocate the remaining resources under human rights law.

For example, once States have ensured that transboundary watercourses are shared in a way that meets the respective human rights needs of their populations, it is not clear why the way in which remaining water resources are allocated (whether equitably and reasonably or not) directly affects human rights. It would be preferable to apply human rights standards, and their corresponding mechanisms, to address situations in which there is a clear impact on rights of people.

Conflating human rights and customary law could have negative consequences. It is due to this conflation that a small number of countries,²¹ have claimed at the UN General Assembly, Human Rights Council, and at other forums, that the right to water should apply only within national boundaries in order to avoid a situation in which State lose control over their share of transboundary watercourses.

Amnesty International therefore recommends the deletion of Guidelines 29.1, 30.1 and 32.1, which seek to incorporate customary law provisions into the Guidelines, while retaining Guidelines 29.2, 30.2, 31.3 and 32.3-5 which provide guidance on how States should implement human rights obligations as they implement their customary law obligations. Furthermore, Amnesty International recommends amending the Preamble to the Guidelines as follows:

Recalling further the customary principles of international water law, including the principles of reasonable and equitable use of shared water resources, no-harm, and cooperation as the basis for a sustainable management of (addition:) **transboundary water resources and the protection and promotion of the human right to water of riparian populations**;

Guidelines 31.1 and 31.2 should be revised to refer only to harm to the right to water of people in other countries, rather than to harm to other States. This is because a human rights treaty should focus only on impact on rights of people (for example, pollution of a shared watercourse) rather than broader questions of

²¹ This position was taken by Kyrgyzstan at the 72nd Session of the General Assembly and at the 33rd session of the Human Rights Council. African States that supported its amendments to the relevant water and sanitation resolution at the General Assembly to limit the right to water to within national territories were Angola, Algeria, Djibouti, Kenya and Morocco.

inter-State resource distribution (for example, whether or not a State may be causing harm to industries dependent on a specified volume of water from a shared watercourse in other States).

Guideline 32.6 should be amended to make clear that it refers to international assistance to assist other States to develop rainwater collection mechanisms. By referring to “international cooperation agreements that enable them to assist States with low levels of rainfall with supply of water”, it may give the impression that it requires States to transfer water from within their borders to other countries. Such an obligation would be difficult to sustain in light of Article 21 of the African Charter which specifies that all peoples shall freely dispose of their wealth and natural resources and that this right shall be exercised in the exclusive interest of the people. Furthermore, a State could normally not transfer water that does not naturally flow to another country unless it incurs significant costs to construct infrastructure to transport water to the other country, which would be very unlikely to be an effective form of international assistance, in comparison to assisting the other State to improve water storage and resource management of water sources that are already within its borders.

PART 7: ACCOUNTABILITY AND REMEDIES

ACCOUNTABILITY MECHANISMS

Guideline 33.1 - Amnesty International welcomes the guidance provided to States in this section as it gives greater meaning to the realisation of the rights to water and sanitation. In order to achieve justiciability for the human rights to water and sanitation as recommended in Guideline 10 and Guideline 37.2, Amnesty International proposes the inclusion of guidance to States to introduce and implement national level legislation on the rights to water and sanitation. We therefore recommend that Guideline 33.1 is amended as follows:

33.1. States shall adopt **national legislation** and a national policy **guaranteeing the rights to** water and sanitation, with clear responsibilities for implementing agencies and timeframes for implementing measures necessary to safeguarding the right, particularly for vulnerable and marginalised groups.

ACCESS TO REMEDIES

Access to effective remedies is key to guaranteeing the human rights to water and sanitation. For purposes of consistency with international human rights standards, Amnesty International suggests that the Draft Guidelines call on States to ensure that all victims of violations of the rights to water and sanitation have access to effective remedies including adequate reparation, restitution, compensation, satisfaction or guarantees of non-repetition.

Guideline 37.1 (i) – Given that forced evictions are unlawful according to international law and must never be carried out or condoned, and that international human rights standards require that no one is left homeless as a result of an eviction, Amnesty International recommends that Guideline 37.1 (i) be amended to ensure that no one is deprived of their rights to water and sanitation as a result of an eviction. We therefore suggest that Guideline 37.1(i) reads as follows:

37.1. States shall explicitly prohibit the following practices:

(i). exclusion from access to water and sanitation **due to evictions or homelessness;**

Guideline 37.2 – In line with Amnesty International’s overarching recommendation that the Guidelines explicitly recognize the right to sanitation as a right that is distinct and yet interrelated to the right to water, Amnesty International recommends the following amendment to Guideline 37.2

THE RIGHT TO WATER IN AFRICA

SUBMISSION TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS’ WORKING GROUP ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON THE DRAFT GUIDELINES ON THE RIGHT TO WATER IN AFRICA

Guideline 37.2. States shall guarantee the justiciability of the rights to water **and sanitation** as defined in these guidelines.

PART 8: IMPLEMENTATION

Amnesty International welcomes the emphasis given to implementation measures and reviews in the Draft Guidelines. To further strengthen these, we recommend that Guideline 39.5 is amended as follows:

Guideline 39.5 - States shall define clear objectives, set targets and time frames for their achievement, and define indicators and benchmarks for each attribute of the right, **in a manner that complies with international and regional human rights law and standards**. The strategy shall also establish institutional responsibility in the implementation process; identify resources available to attain the objectives, targets and goals; allocate resources appropriately according to institutional responsibility; and establish accountability mechanisms to ensure the implementation of the strategy.

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THE RIGHT TO WATER IN AFRICA

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Amnesty International welcomes and strongly supports the important initiative of the Working Group on Economic Social and Cultural Rights (Working Group) to draft Guidelines on the Right to Water in Africa (Draft Guidelines).

The draft that has been circulated for consultation promises to make an important contribution towards ensuring that governments respect, protect and fulfil the rights to water and sanitation for all in Africa. The Guidelines will also support States to develop and implement national laws, policies and strategies that guarantee the rights to water and sanitation and submit progress on implementation in their periodic reports to the African Commission on Human and Peoples' Rights (African Commission).

Amnesty International welcomes the opportunity to comment on the Draft Guidelines and hopes that the following submission helps the Working Group in finalising the document.