

# Human Rights and the Environment

*13<sup>th</sup> Informal ASEM Seminar on Human Rights*



# Human Rights and the Environment

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# Acknowledgements

## **Ambassador ZHANG Yan**

Executive Director, Asia-Europe Foundation (ASEF)

The 13th Informal ASEM Seminar on Human Rights and the Environment provided a platform for ASEM members to discuss the important global issues relating to human rights and environment, both of which are equally important for the proper enjoyment and protection of each other. I hope that the knowledge and experience shared by the participants at the seminar in Copenhagen will reach a wider audience through the publication of this volume and will contribute to the overall strengthening of human rights and the environment dialogue. On behalf of the organisers, I would like to express my deepest appreciation to everybody who participated and contributed to the programme.

Our thanks should go first to the 137 governments and civil society representatives from across Asia and Europe who participated in the 13th Seminar. Without their willingness to share their experiences and recommendations, the dialogue and resultant findings laid out in this publication would not have been possible. It is our hope that connections made among the participants at the seminar will provide the basis for continued collaboration between the two regions.

Our sincere appreciation goes to the seminar hosts, the Ministry of Foreign Affairs of Denmark and the Danish Institute for Human Rights (DIHR) for their kind and generous hospitality. We would especially like to thank the Minister of Environment of Denmark, Ms. Ida Auken for delivering such an inspiring welcome address. We also thank Mr. Villy Søvndal, Minister of Foreign Affairs of Denmark, and Ambassador Uffe Wolffhechel from the Ministry of Foreign Affairs of Denmark for their utmost support to the seminar right from the beginning. Thanks goes to Ms. Anja Levysohn and Mr. Jakob Haugaard from the Ministry of Foreign Affairs of Denmark for their kind cooperation during this Seminar.

As the local Seminar host, the DIHR had an important role in contributing to the success of the Seminar – which was reflected in the well-planned side-event and panel that were organised by them. In particular, we would like to thank Ms. Charlotte Flindt-Pedersen, DIHR's International Director, and her colleagues in the international division, Ms. Charlotte Schwartz-Hansen, Mr. Mads Gottlieb and Ms. Lucy Murray for their diligent dedication to the Seminar preparations. We could not have organised this seminar without their coordination and generous assistance.

The presentations by our distinguished keynote speakers, Professor John Knox, Dr. Parvez Hassan and Dr. Poul Engberg-Pedersen provided insights into current developments of human rights and the environment global debate; by contextualising it in the context of Asia and Europe, they helped set the tone to the whole Seminar for which we are indebted.

We are also deeply grateful to the contributions of our two main seminar rapporteurs, Professor Ben Boer and Professor Alan Boyle who not only prepared a detailed and well-received Background Paper but also compiled the final Seminar Report for this publication. We appreciate and thank Dr. Ludwig Kramer and Mr. Mohammad Sajid Raihan who so well reported the discussions and proposals of their respective working groups for the final Seminar report.

The topic of human rights is sensitive and challenging, so we thank Ms. Ella Antonio, Mr. Edward Santow, Mr. Yves Lador, Ms. Magda Stoczkiewicz, and Ms. Ligia Noronha, who with their skilful facilitation, guided the discussions – we appreciate their efforts in balancing the diversity of opinion at the Seminar.

On behalf of Asia-Europe Foundation (ASEF), I would like to express our sincere gratitude to our partners in organising the seminar series, namely the Raoul Wallenberg Institute, the French Ministry of Foreign Affairs and International Development, and the Department of Foreign Affairs of the Philippines. The insight and advice from our partners, together with the valuable input of the members of our Steering Committee, helped ensure that the seminar programme was relevant and timely for all our participants and stakeholders.

Finally, we should also acknowledge the contribution from ASEF to the Seminar. ASEF has been the seminar secretariat since 2000 and I thank my colleagues in the Political and Economic Department, Mr. Thierry Schwarz, Ms. Ratna Mathai-Luke and Ms. Grace Foo who manage the secretariat activities. Their hard work saw the development of the Seminar from its early planning stages to the ultimate publication of this volume.

## **Ambassador ZHANG Yan**

Executive Director

Asia-Europe Foundation (ASEF)

# Preface

## Mr Thierry SCHWARZ

Director for the Political and Economic Department, Asia-Europe Foundation (ASEF)

The Asia-Europe Meeting (ASEM)<sup>1</sup> brings together 49 member states (29 European and 20 Asian countries), the ASEAN Secretariat (ASEAN), and the European Union (EU). The ASEM process aims at strengthening interaction and mutual understanding between the two regions and at promoting cooperation leading to sustainable economic and social development. It is an informal process of dialogue and cooperation among partners on all issues of common interest to Asia and Europe.

The biennial ASEM Summit meeting is held alternately in Asia and Europe and is the highest level of decision-making in the process, featuring the Heads of States or Heads of Governments, the President of the European Union, accompanying ministers and other stakeholders. A total of nine Summit meetings have been held in the cities of Bangkok (1996), London (1998), Seoul (2000), Copenhagen (2002), Hanoi (2004), Helsinki (2006), Beijing (2008), Brussels (2010) and Vientiane (2012).

At the first meeting of ASEM Foreign Ministers in Singapore in 1997, Sweden and France offered to organise informal seminars on human rights to be held within the ASEM framework. In 2011, the Philippines joined ASEF, Sweden and France as a co-organiser of the Seminar series.

The series employs the following formula:

- i. A balanced representation between civil society participants from Asia and Europe (invited by the organisers) and official representatives (nominated by the 51 ASEM members) in each Seminar;
- ii. Closed-door debates to allow free and direct exchanges of views;
- iii. A set of recommendations, elaborated collectively to be sent to the relevant institutions in ASEM countries as an informal contribution to the official Asia-Europe dialogue.

The experience of the first 12 seminars has proven the usefulness of the chosen formula: a climate of confidence and mutual understanding, in accordance with the ASEM spirit, has grown stronger throughout this process.

The 13th Informal ASEM Human Rights seminar on Human Rights and the Environment was attended by 137 participants representing 48 ASEM members – including delegates from international agencies working on environment and human rights, national authorities on environment, sustainable development bodies, diplomats, human rights activists and environmentalists, to discuss the complexities of human rights and environment protection, and to share their own knowledge and experiences on the topic.

### ***Human Rights and The Environment: An Overview Of This Volume***

This volume contains the proceedings of the Seminar. In addition to the official opening speech made on behalf of the host and the organisers, it includes the keynote speeches of Prof. John Knox (UN Independent Expert on Human Rights and the Environment), Dr. Parvez Hassan (Senior Advocate, Supreme Court of Pakistan and Senior Partner at Hassan and Hassan) and Dr. Poul Engberg-Pedersen (Deputy Director General/Managing Director, International Union for Conservation of Nature) who in presenting the Seminar topic, examined the implications of the convergence of human rights and the environment and introduced additional concepts such as ‘nature’s rights’ to the human rights and environmental protection debate.

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<sup>1</sup> *The Asia-Europe Foundation (ASEF) promotes understanding, strengthens relationships and facilitates cooperation among the people, institutions and organisations of Asia and Europe.*

*ASEF enhances dialogue, enables exchanges and encourages collaboration across the thematic areas of culture, economy, education, governance, public health and sustainable development.*

*ASEF is a not-for-profit intergovernmental organisation located in Singapore. Founded in 1997, it is the only institution of the Asia-Europe Meeting (ASEM).*

*Together with about 700 partner organisations ASEF has run more than 650 projects, mainly conferences, seminars and workshops. Over 17,000 Asians and Europeans have actively participated in its activities and it has reached much wider audiences through its networks, web-portals, publications, exhibitions and lectures.*

*For more information, please visit [www.asef.org](http://www.asef.org)*

The Background Paper was the primer that shaped the seminar discussions. It was prepared by Prof. Ben Boer (Professor at the Research Institute of Environmental Law, Wuhan University & Emeritus Professor of Environmental Law, University of Sydney) and Prof. Alan Boyle (Professor of Public International Law, University of Edinburgh).

The Seminar Report, co-written by Prof. Boer and Prof. Boyle, as well as the two other working group rapporteurs, Prof. Ludwig Kramer and Mr. Sajid Raihan, provides an overview of the key issues discussed at the seminar as well as delving deeper into the working group discussions, providing the key recommendations and challenges raised by the participants. The working groups addressed the following topics:

- i. The Interaction between Sustainable Development, Environment and Human Rights
- ii. Access to Information, Participatory Rights and Access to Justice
- iii. Actors, Institutions and Governance
- iv. Climate Change and Human Rights Implications

13 key messages were identified by the participants, including the need to give more prominence to a human-rights-based approach in environmental matters, especially in the international climate change negotiations and sustainable development discussions. Some of the following recommendations were included in the key messages that were sent to the ASEM governments:

- i. States should adopt a human rights-based approach to environmental protection as part of their national environmental regulatory framework;
- ii. In balancing development, human rights and environmental protection, governments should ensure that strategic impact assessments are undertaken for significant development projects so as to assess their long-term social, environmental and human rights impacts on both individuals and communities;
- iii. Environment impact assessment requirements should be legislated and based on Principle 10 of the *Rio Declaration* – namely, access to information, public participation and access to justice. Governments are recommended to implement the recommendations of UNEP on access to information and participation in decision-making in environmental matters.

The volume ends with the concluding remarks from one of the co-organising partners, Mr Frédéric Tiberghien, Representative of the French Ministry of Foreign Affairs and International Development, who in summarising the discussions reminded us to not only *think* sustainable but *act* sustainable.



# Opening Speech

**Ms. Ida AUKEN**

Minister of the Environment, Kingdom of Denmark

(Opening speech on behalf of the host country of the 13th Informal ASEM Seminar on Human Rights)

Ladies and gentlemen, distinguished guests, a very warm welcome to you who have travelled to Copenhagen. Even though the weather here may not be so warm, I hope it is something you will be used to and I hope you will enjoy your days in our country.

The topic of the conference is both extremely relevant and important, so I congratulate the organisers.

In 1956, something strange happened in the little Japanese town of Minamata. A perfectly healthy eight-year-old girl was suddenly having trouble walking and talking, and she started having spasms. Her sister experienced the same symptoms shortly after. Two weeks later, the local doctors had found six similar other cases and it appeared to be a local epidemic of an unknown disease in the central nervous system. The culprit was found after three years of investigation: a huge amount of Mercury was found in the main food source – fish and jelly fish – that was swimming around in the emission from a local chemical company. More than 1,700 people died and many more were left disabled.

The fight for human rights is about fighting for the right to a decent life for all. But what defines a decent life? Obviously, it is a life free from torture, slavery and degrading treatment, and to be respected as an equal fellow citizen with the rights to vote and to speak freely. But when we consider the people of Minamata in the above example, can we honestly say that they were able to live a decent life? I would say not. Article 25 of The Universal Declaration of Human Rights also states that, ‘Everyone has the right to a standard of living, adequate of health and well-being of themselves and their family’. When we fight for human rights, we therefore must also fight for clean and healthy environment: the right to be able to breathe freely, eat good and healthy food, and drink clean water.

The other day I received an image of a water pump saying: ‘If you think the economy is more important than the environment, try holding your breath while you count your money.’ This saying is another good perspective of how important the environment is for our wellbeing. To meet these huge challenges though, we need to think smart and in a holistic manner; we need to think sustainable. A decent life is free from air pollution – in China and some major cities, people lose 10 to 20 years of their lives just by breathing the air in the cities. Everyone deserves a life free of chemicals, polluted air and contaminated water.

Access to clean water is a great global concern. Water is a prerequisite for life; it is essential for food and energy production, and for simple daily hygiene. Right now, 780 million people around the world need access to an improved water supply, and many more people do not have access to safe drinking water. Furthermore, 2.5 billion people need access to improved sanitation. It is shocking to think that more people have access to a mobile phone than to a toilet.

The challenge is huge, but it will only get bigger. Global water use will increase by 20 per cent in the next 25 years and by 2035 demand will exceed supply by 40 per cent. Half of the world’s population will be living in areas with water stress when my son turns 18. For me, that is a pretty frightening perspective. We therefore have to improve access and management of water and sanitation so our future generations do not suffer.

Improving the environment is central to human development, it’s a pre-condition for health and it is essential to the success in the fight against poverty, hunger, child health and gender inequality. For example, women and girls spend 200 million hours per day collecting water. That takes time away from education, from earning money and from spending time with family and friends, or maybe even relaxing. I gave this concrete example because sustainable development really is an integrated approach. Social, environmental and economic sustainability should not be looked upon as pillars, but as a DNA – something that is completely intertwined with each other. Already we can see many projects around the world that really take the social, environmental and economic side into account and improve all three phases at the same time.

When I was in Kenya last year, I visited a small village where they have a system installed called Lifelink, which is a project initiative by the Danish company Grundfos. Lifelink is both a water solution and business model that ensures long-term environmental, financial and social stability. When one looks at it, it is just a well that pumps up ground water driven by PV, which is powered by solar panels. The environmental side of this is clear: there are no fossil fuels used to

pump up the water, and no water is lost along the way because you tap directly to the ground water. Another advantage is that the people don't have to carry their water for long distances.

The economic side of Lifelink is interesting because in the village, cell phones carried out the micro-payment system for the water. While the people have to pay a small amount for a litre of water, it is still a lower price than what the average person in Kenya pays for water. The men of the village have started buying water from their cell phones and selling it to other villages, so they have actually created a small economy for themselves by selling clean and decent quality water at a lower price than in other areas. As everybody can see the transfers made by their phone, there is little chance for corruption and a small-scale business is made.

The social side of this Lifelink project is particularly interesting. Firstly, the whole village has gathered around the well and decided that they want to ensure its continuance and have created a community based on the project. Secondly, it is interesting to observe how when a man's job becomes a woman's job, the jobs lose status – but what happens when you add technology to a woman's job? In this instance, the men found it empowering to collect the water and the women could take the time for themselves and their children, who now don't have to walk two miles each day to collect water before attending school.

The purpose of this example was to outline that solutions do exist and by adopting a holistic point of view, change is possible.

The Millennium Development Goals (MDGs) on water and sanitation has, in some respect, been relatively successful. More people than ever now have access to water and sanitation, so we should also comfort ourselves that political guidance matters but still persevere as there is still a long way to go. If we look at the Millennium Development Goals from the perspective of water, it is not only the social side that is important to uphold, but there is also the economic side relating to water efficiency, and the environmental side relating to water quality. If you give people access to poor water, it is not access to water; or if you lose half of the water you pump because the system is full of holes and is inefficient, then we can't provide as much water to the people. So again, we have to think about this in a holistic way and sustainable development goals could be the key to ensuring that this kind of thinking is properly integrated.

In fighting for basic human rights and the prerequisites for a decent life, we also need to pay considerable attention to the livelihoods of Indigenous people. Indigenous communities are increasingly vulnerable because of their close interaction with nature. It is their space that we are stealing when we cut down rainforests – the potential consequence is that we not only take away the food supply to local community, but we also destroy homes and livelihood. We therefore must protect Indigenous peoples' rights to their lands, territories and resources, and we must make sure that they are not being compromised in the overall domestic and international eagerness for our rapid development approaches.

To conclude, only 11 days ago, 140 countries signed a new global convention to reduce Mercury contamination, which was signed in Japan and named after Minamata. We do not want to see a disaster like that again and I think it is comforting that the global community can still come together and make agreements on such important areas to ensure a decent life for all. We therefore must ensure a healthy environment for all to succeed.

Thank you.

# Opening Speech

## **Ambassador Rosario G. MANALO**

Foreign Affairs Adviser, Department of Foreign Affairs, Republic of the Philippines  
(Opening speech on behalf of the organisers of the 13th Informal ASEM Seminar on Human Rights)

Honourable Ida Auken, Minister of the Environment, Kingdom of Denmark;

Mr. Karsten Warnecke, Deputy Executive Director, Asia-Europe Foundation (ASEF);

Our Keynote Speakers – Mr. John Knox, the United Nations (UN) Independent Expert on Human Rights and the Environment, Mr. Parvez Hassan of the Supreme Court of Pakistan, Mr. Poul Engberg-Pedersen of the International Union for Conservation of Nature (IUCN);

Distinguished representatives of the co-organisers of this informal seminar series – the French Ministry of Foreign Affairs, the Raoul Wallenberg Institute, and ASEF;

Excellencies, Ladies and Gentlemen;

First, allow me to express my appreciation to the Ministry of Foreign Affairs of the Kingdom of Denmark as well as the Danish Institute for Human Rights (DIHR) for hosting the 13th Informal ASEM Seminar on Human Rights. I wish to thank the Government of Denmark for the warm hospitality and excellent arrangements for the seminar.

On behalf of the co-organisers and The Philippine Government, I warmly welcome you all to the 13th Informal ASEM Seminar on Human Rights. The theme of this seminar – *Human Rights and the Environment* – resonates deeply for Filipinos like myself. The Philippines has been at the forefront of the promotion of human rights in our region. At the same time, it is no stranger to the devastating impacts that climate change can wreak on the welfare of its nationals and the environment.

I wish to commend the two main rapporteurs, Professors Allan Boyle and Ben Boer, for the background paper they provided to seminar participants, which clearly defines the issues and challenges bearing on the relationship between the two fields, as well as the divergence in the approaches and legal frameworks on these issues between Europe and Asia.

### ***The Link Between Human Rights and The Environment***

Human rights are inherent on the individual simply by virtue of being human. Human rights speak of the dignity and value of the person, and look to the preservation of the person's well-being.

On the other hand, the protection of the environment is indispensable to the enjoyment of many human rights. It is vital to the right to health, the right to water, the right to sanitation and the right to life itself, including an adequate standard of living. Environmental degradation, which causes disease, suffering and hardship, hinders the realisation of human rights. Thus, none of us would dispute that the objectives of protecting the environment and human rights are interlocking; both ultimately aim to improve the conditions of life on the planet.

International environmental law and human rights law have developed in separate paths. The different treaties and institutions dealing with each field have given rise to concerns on whether the link can move well beyond the realm of rhetoric and be operationalised at a meaningful level.

The existence of the right to environment and how it can be accommodated into the human rights theory with its emphasis on accountability and enforceability, extraterritorial responsibility for environmental harms, the role of private actors and many other questions continue to pervade the discourse on the relationship of human rights and the environment.

The four Working Group topics encapsulate the issues and current challenges confronting this relationship. With the insights gained from the discussion, we can hopefully pinpoint weaknesses in the current institutional architecture and identify areas where integrated policies and strategies will be most effective in mutually reinforcing protections in each field.

Let me share with you some of the thoughts that came to mind upon reading the Working Group topics.

### *The Interaction between Sustainable Development, Environment and Human Rights*

Protection of the environment and promotion of human rights share common interests and objectives, and are both indispensable to sustainable development.

Sustainable development places people at the centre of development while protecting the ecosystems on which life depends. Efforts to foster development are unsustainable if equity and the rule of law are not observed, that is, where there is rampant racial and sexual discrimination, and where freedom of information and speech and other human rights are curtailed.

In the same way, economic development cannot be pursued without environmental protection if it is to be responsive to the needs of the present as well as future generations. Each person depends on the ecosystem and the multitude of benefits that are derived from them, such as food, water, medicines, climate regulation, spiritual fulfilment and cultural expression. Harm done to the environment can have broad repercussions on the development and well-being of people – both those present and those yet unborn.

The Philippine Supreme Court had occasion to rule that the right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment, and that the exploration, development and utilisation of natural resources should be equitably accessible to the present as well as future generations.

This was with regard to a case calling for the cancellation of timber license agreements granted by the Department (Ministry) of Environment and Natural Resources to abate deforestation in accordance with the right to a balanced and healthy ecology found in our Constitution. It would be interesting to examine how human rights agreements and monitoring mechanisms usually found in them can be used to scrutinise the utilisation of natural resources and sustainability of development efforts.

### *Access to Information, Participatory Rights and Access to Justice*

Environmental protection is indispensable to the enjoyment of many human rights. Conversely, the exercise of certain human rights – the right of access to information, the right to participate in decision-making processes that affect the environment and the access to justice – has huge impacts on environmental protection and the effective enforcement of environmental laws.

These procedural rights, embodied in the 1998 Aarhus Convention, entitle individuals and private groups, who may potentially be affected by economic activity, the right to participate in decision-making. It helps balance the sometimes-competing interests of economic development and environmental protection.

Participatory rights, which give people a voice in how they are to be governed, also play a crucial role in conferring legitimacy to laws and policies, and thus enhancing compliance with them. The failure to protect and fulfill these procedural rights can contribute to environmental harm if the knowledge and cooperation of individuals and communities who can be a factor in environmental protection are not harnessed.

On access to justice, the International Covenant on Civil and Political Rights guarantees victims of human rights violations an effective remedy. The type of remedies and the means by which these can be secured in case of human rights violations related to environmental degradation is a matter that necessitates an exchange of ideas.

### *Actors, Institutions and Governance*

It is already a given that there is indeed a relationship between human rights and the environment. It is the implications of that relationship and the necessary responses to it at the international level that need to be examined.

Many existing institutions are tasked to address environmental protection; others are concerned mainly with human rights. There is no single international agreement that addresses human rights and environmental protection, nor is there a single agency doing so. This fractured governance can be an obstacle in the joint consideration of environment and human rights.

It becomes more complicated when one considers that human rights law is principally concerned with how a State treats its nationals and others within its territory and jurisdiction. The usual communications procedure in human rights treaties where citizens file a complaint that their government is not fulfilling its human rights obligations is tricky when environmental harms are caused in one place and the effects are felt in another. Add to this is the difficulty of prosecuting transnational private actors for human rights violations.

### *Climate Change and Human Rights Implications*

None of us, I am sure, doubt that climate change has negative impacts on the full enjoyment of human rights.

The notion that climate change has been induced by human activities has been accepted by all 194 countries, which ratified the United Nations Framework Convention on Climate Change (UNFCCC).

Several resolutions on human rights and climate change have been issued by the Human Rights Council in Geneva, stressing the adverse effects of climate change on the enjoyment of internationally protected human rights. These resolutions received overwhelming support from many countries – chief among them is the Philippines. Given these premises, human rights perspectives should inform discussions on how to address this global problem.

Mainstream climate change discourses, however, generally focus on the commitment of States, emissions reduction, economic costs and industrial consequences of addressing climate change, and seem to pay scant attention to human rights concerns. Notwithstanding the viable contributions to society and the economy of climate change adaptation and mitigation actions, it has to be remembered that an international climate change regime has tremendous implications on human rights and will determine access to basic goods. Using a human rights lens in climate policy-making is therefore crucial. It is important and necessary.

Actions to mitigate climate change – for instance whether to use food crops for biofuels or preservation of forests – affect food and water security, and the health and livelihoods of people. Adaptation policies also have a human rights dimension, as when populations are forcibly asked to relocate from disaster prone areas, it causes internal displacement. Nonetheless, there are many misgivings about the applicability of the human rights framework to climate change. Foremost is the question on assigning accountability, as harms caused by climate change cannot be apportioned with certainty. Thus, identifying the potential role that human rights law can play in climate change, other than providing compensation and redress, should be further explored.

I am certain that the discussion in each of the Working Groups will uncover a lot more perspectives and elucidate diverse approaches about the connection between human rights and the environment. The seminar will certainly increase our knowledge and widen our understanding of these two fields and their linkages. Hopefully, it will spur us to forge new paths and find novel solutions that benefit us all.

I thank you again for your participation and wish you a successful seminar.

# Keynote Speech

**Mr. John H. KNOX**

UN Independent Expert on Human Rights and the Environment

## **HUMAN RIGHTS AND THE ENVIRONMENT: CARRYING THE CONVERSATION FORWARD**

It is an honour to be here today to speak about the relationship of human rights and the environment. For the next three days, this seminar will carry forward a conversation that, in some ways, began more than 40 years ago.

In 1972, in Stockholm, at the very first international conference on the environment, countries recognised that environmental protection is of fundamental importance to human rights. The Stockholm Declaration states: ‘Both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.’

Since 1972, we have seen countless examples of ways that the failure to protect the environment interferes with human rights. When toxic substances are dumped in countries that have not accepted them and do not have adequate facilities to treat them, with the result that individuals living near the waste site become sick and even die, those individuals’ human rights to life and health have been abused. When hazardous waste sites are located in the communities of disfavoured minorities, or resources are extracted from the territory of indigenous peoples without their agreement, then their right to enjoy their property without discrimination has been infringed.

When governments around the world fail to restrict emissions of greenhouse gases, jeopardising the continued existence of vulnerable communities in the Arctic and in low-lying coastal areas, among others, they fail to protect many human rights, including rights to life, health, property, development, and self-determination.

When individuals cannot find out basic facts about the environmental risks of proposed projects in their communities, and are unable to participate in the decision-making procedures that determine whether to approve the projects, they are denied their rights to information and to participation. And when individuals try to speak out against proposed projects that would harm their local environment, but suffer threats and violence by those who would silence their voices, then their human rights to expression and association, as well as their rights to life and to physical integrity, have been violated.

All of these abuses may seem obvious. But the relationship between human rights and the environment is still less well-known than it should be. Too often, the conversation about human rights and the environment has fallen silent, as those concerned with human rights on the one hand, and those concerned with environmental protection on the other, address their topics in complete separation from one another.

One might ask, does this really matter? Why is it important to continue the dialogue between human rights and the environment? What does a human rights perspective add to environmental policy? More complete answers to these questions will emerge over the course of our discussions here this week. But let me put forward three preliminary answers. First, a human rights perspective demonstrates the fundamental importance of environmental protection to the dignity, equality, and freedom of human beings. Second, a human rights framework provides minimum substantive standards that environmental policies must strive to meet. And third, it sets out procedural tools that are necessary for environmental policies to be fair and effective.

On the first point, placing environmental protection in the context of human rights accurately reflects the fundamental importance of the environment to human dignity, equality, and freedom – the grounds of all human rights. In other words, it makes clear that protecting the environment is imperative – both morally and legally – in order to protect rights to life, health, property and, indeed, all other rights set out in the Universal Declaration of Human Rights. Moreover, a human rights perspective helps to draw attention to the grave effects of environmental harm on particular individuals and communities.

Many States have chosen to underscore the importance of environmental protection by adopting an explicit human right to a healthy environment. More than 90 States have adopted such a right in their national constitutions. They, and many others, have also joined together to incorporate the right in regional instruments. For example, the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, also known as the Aarhus Convention after the Danish city in which it was signed in 1998, states in its first article:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

The Aarhus Convention now has 46 parties in Europe and Central Asia, including almost every country from Portugal to Kazakhstan. Just last November, the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Human Rights Declaration, which states:

28. Every person has the right to an adequate standard of living for himself or herself and his or her

family including [...] f. The right to a safe, clean and sustainable environment.

By adopting this right at the constitutional or international level, countries have announced that they believe that the right to live in a satisfactory environment is of the same fundamental importance as other human rights.

The second advantage of a human rights approach to environmental protection is that human rights law sets minimum substantive standards. Even without adoption of an explicit new right to a healthy environment, it has become clear that existing human rights, such as rights to life, health, and property, can be infringed by environmental harm. As a result, States have obligations under human rights law with respect to such harm – duties to refrain from causing the harm themselves, and to protect against harm caused by others.

The precise contours of these duties have not always been clear, but they are rapidly becoming clearer. There is a growing body of human rights jurisprudence on the effect of environmental harm on existing rights. Much of it is being developed by domestic courts and by regional human rights bodies, including the European Court of Human Rights. In addition, human rights bodies at the United Nations, including special rapporteurs working under the Human Rights Council, as well as human rights treaty bodies such as the Committee on Economic, Social and Cultural Rights, have brought human rights standards to bear on particular environmental harms. They suggest that while States have discretion to decide how to protect the environment, they must endeavour to protect against environmental harms that cause grave or widespread infringements of basic rights, including rights to life, health, water, and food.

The third advantage of a human rights perspective is that it sets out procedural rights whose implementation is vital to environmental policy-making. In general, these are rights whose free exercise makes policies more transparent, better informed and more responsive. They include rights to freedom of expression and association, rights to receive information and participate in decision-making processes, and rights to legal remedies. When directed at environmental issues, the exercise of such rights results in policies that better reflect the concerns of those most concerned and, as a result, that better safeguard their rights to life and health, among others, from infringement through environmental harm. Here, too, the connection between such rights and environmental protection has been recognised by the international community, most famously in Principle 10 of the 1992 Rio Declaration, but also in the 1998 UNECE Aarhus Convention.

Last year, the United Nations Environmental Program (UNEP) took another step forward in this respect, by publishing *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*. And Latin American and Caribbean States are exploring the possibility of a regional agreement on such access rights.

Some human rights bodies have, in effect, closed the circle between the substantive rights, such as rights to life and health, which are most likely to suffer environmental harm, and the procedural rights whose implementation helps to ensure environmental protection. In order to safeguard the environment from the types of harm that violate the first set of rights, they have concluded that States should respect and ensure the second set of rights.

Making this connection between substantive rights and procedural duties can create a kind of virtuous circle: strong compliance with procedural duties produces a healthier environment, which in turn contributes to a higher degree of compliance with substantive rights, such as rights to life, health, property and privacy. The converse is also true. Failure to meet procedural obligations can result in a degraded environment that interferes with the full enjoyment of human rights. In short, human rights and the environment are not only interrelated, they are interdependent. A healthy environment is fundamentally important to the enjoyment of human rights, and the exercise of human rights is necessary for a healthy environment.

At the beginning of my talk, I said that human rights issues and environmental issues have too often been discussed in complete separation from one another. But, as this brief description shows, that is changing. Domestic courts have interpreted their constitutional rights to require governments to take specific steps to protect the environment. Regional human rights tribunals are developing an environmental human rights jurisprudence. And in March 2012, the United Nations Human Rights Council decided to create a new special mandate: an independent expert with a three-year term to study human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and to identify, promote and exchange views on best practices in that regard. I have the honour of having been appointed to fulfill that mandate in July 2012.

Since my appointment, I have held consultations in a number of different cities, including Geneva, Nairobi, Panama City, and Washington DC, on different aspects of the mandate. I made my first report to the Human Rights Council in March 2013. The report set out the issues and explained how I will try to address them. Over the last year, I have been seeking to map in detail the human rights obligations pertaining to the environment. I will present my conclusions to the Human Rights Council in March 2014. Some of those obligations are now firmly established, but many issues are still not well understood. Let me briefly highlight three:

First, how important is the adoption of an explicit right to a healthy environment? What does such a right add, if anything, to the scope of existing human rights, such as rights to life and health?

Second, what does the human rights perspective have to say about transboundary environmental harm? Much of international human rights law was developed to define the duties of a State toward those within its jurisdiction.

But many of the worst kinds of environmental harm are transboundary, or even global. What obligations does human rights law impose on States to protect those harmed by the extraterritorial consequences of actions taken within their borders?

Finally, how can different institutions work together to promote human rights in the context of environmental protection? How can global, regional, and national institutions

support one another? Moreover, much environmental harm comes from private actors, such as corporations. What responsibilities do they have to protect human rights from environmental harms?

I want to conclude by thanking you again for the opportunity to participate in this timely and important seminar. I look forward to our carrying forward together this vital conversation about human rights and the environment.



# Keynote Speech

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## **HUMAN RIGHTS AND THE ENVIRONMENT: A SOUTH ASIAN PERSPECTIVE\*\***

### **Introduction\*\*\***

Whether a human rights framework is appropriate for responding to environmental challenges associated with globalisation is a question that continues to engage policy makers, academics and the courts alike. Some find the individualism underlying human rights at odds with the collective concerns of environmental law<sup>2</sup> or find that in the divergence between intra-generational or inter-generational equity, there is no single core value underpinning human rights.<sup>3</sup> Others point to a halo effect: the argument that given the special place of civil and political rights in the pantheon of human rights, inclusion of environmental rights gives them a cultural legitimacy<sup>4</sup> they may otherwise lack.<sup>5</sup> Even the debate surrounding the environmental dimension of first-generation human rights is not determinative because the procedural rights of access to information and to become a party to legal proceedings are equally important as far as enforcement of rights is concerned.

When every passing decade shows mounting scientific evidence of environmental threat to our planet, undeniable rust of the international environmental treaty machinery and hugely varying shades in the effectiveness of national regimes means there is a lot to be said for having many tools at our disposal in the fight to stop environmental degradation. Inclusion of environmental concerns in mankind's age-old quest of advancing human rights therefore makes more sense than ever.

Historically, the advancement of human rights pre-dates the environmental movement by many centuries and both have – for the large part – evolved separately in response to specific threats to human liberty and the planet. However, the advent of the Universal Declaration of Human Rights after the end of the Second World War signalled a new era in which we see the plasticity of human rights emerge as a durable phenomenon. Attempts to read the basic corpus of human rights in an ecologically literate

manner has thus to be seen in the context of a historic continuum in which two separate streams have merged to put the dignity of man on a stronger footing.

### **Internationalisation of Human Rights**

The world's first charter of human rights is attributed to the Persian King, Cyrus the Great, whose armies conquered the city of Babylon in 539 BC. Instead of pillaging the town, the King announced a series of decrees on a baked cylinder, which had the effect of freeing the slaves, allowing the people to choose their religion and announcing racial equality. Today known as the Cyrus Cylinder, it is translated into all six official languages of the United Nations (UN), and its provisions are similar to the first four articles of the Universal Declaration of Human Rights.

The *Magna Carta* or 'Great Charter' marks the next important milestone in the struggle for human liberty. The long-suffering subjects of King John of England forced him to sign this document in the year 1215, which underpins the rule of constitutional law in the English speaking world today as it established the right of citizens to own property and to be free from excessive taxes. The *Magna Carta* was reinforced by Sir Edward Coke's Petition of Right in 1628, when the English Parliament, frustrated by the expenses of overseas wars, petitioned King Charles to recognise the principle that there could be no taxation without authority of parliament, no subject could be imprisoned without cause shown (origin of the right of *habeas corpus*), and martial law could not be used in times of peace.

What we now consider as inviolable basic rights, such as ownership of property, freedom from arbitrary arrest and imposition of taxes, supremacy of parliament took centuries to crystallise and today form the bedrock principles of rule of law and constitutional democracy. In time, the advancement of human rights moved beyond protection of ordinary persons and property to encompass freedom of speech and religion. These are amongst the prominent rights in the United States Constitution of 1787 (including

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\*\* A keynote address delivered at the 13th Informal ASEM Seminar on Human Rights, co-organised by the French Ministry of Foreign Affairs and International Development, the Raoul Wallenberg Institute (delegated by the Swedish Ministry of Foreign Affairs), the Philippine Department of Foreign Affairs and the Asia-Europe Foundation (ASEF) and hosted by the Danish Institute of Human Rights and the Danish Ministry of Foreign Affairs, on 21-23 October 2013 at Copenhagen, Denmark. The South Asian region comprises Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

\*\*\* The author, gratefully, acknowledges the support of Mr. Azim AZFAR in the preparation of this keynote address.

<sup>2</sup> GRIER, A 2010, Where Discourses Meet: Journal of Human Rights and the Environment, pg.1.

<sup>3</sup> FERRIS, L & WOODS, K 2013, Book Review 'Human Rights and Environmental Stability' in Journal of Human Rights and the Environment, pg. 101.

<sup>4</sup> GEARTY, C 2010, 'Do Human Rights help or hinder Environmental Protection?' in Journal of Human Rights and the Environment, pg.17.

<sup>5</sup> Whether there is any unique content in environmental rights is explored in SHELTON, D 2010, 'Developing Substantive Environmental Rights', in Journal of Human Rights and the Environment, pg. 91 and COLLINS, L 2013, 'Security of the Person, Peace of Mind: a Precautionary Approach to Environmental Uncertainty' in Journal of Human Rights and the Environment, pg. 92.

the Bill of Rights) and the French Declaration of the Rights of Man and Citizen two years later, both landmark documents in the history of Western Civilisation.

Many would argue that these rights are universal in nature and not the special province of a particular civilisation. It may have taken a few centuries, but the end of the Second World War saw the nations of the world gather together and pledge allegiance to the Universal Declaration of Human Rights with its ringing endorsement of the inherent rights of all humans 'as a common standard of achievement for all peoples and all nations'. It is important to appreciate that the struggle for human rights is incessant and no single landmark document can provide a lasting fence around the expression or exploration of these rights, or deal with the myriad problems that threaten the security or dignity of man.

Of the 58 States then members of the United Nations, the 48 nations<sup>6</sup> that voted to adopt the Universal Declaration of Human Rights on 10 December 1948 had no idea that they were initiating the first step to the internationalisation of the protection of human rights. The League Minority Treaties, the Mandate System, the doctrine of humanitarian intervention and the Red Cross Conventions for the treatment of wounded soldiers in combat had, earlier, prominently enabled human-rights based actions across state boundaries. But it was the United Nations Charter, and particularly its Articles 1, 55 and 56, that enabled, for the first time in 1945, a collective global commitment to the promotion and protection of human rights. Inspired by the leadership of Eleanor Roosevelt (USA), Rene Cassin (France) and Charles Malik (Lebanon), these visionaries, in three years laid the foundation, in 1948, in the Universal Declaration of Human Rights, for an edifice that has convincingly mainstreamed the agenda of human rights in global policies and practices.

The Universal Declaration set its own challenges. It was proclaimed as a resolution of the United Nations General Assembly, which meant that, as per Article 11 of the UN Charter, it was merely a recommendation and not binding on the member-States. This notwithstanding, the Universal Declaration soon acquired a life of its own. Its eloquence soon resonated in national constitutions, state practices and the jurisprudence of national courts. Yet, it took 18 years to transform the declaratory content of the Universal Declaration into hard and binding law in the adoption in 1966 of the (1) International Covenant on Civil and Political Rights, (2) International Covenant on Economic Social and Cultural Rights, and (3) the Optional Protocols (the International Human Rights Covenants). The International *Magna Carta*, many of us felt at that time, stood completed.

The glow of the Universal Declaration had, in the meantime, permeated to the regional levels. In Europe, the European Convention of Human Rights (the 'European Convention') was adopted in 1950 and set up the European

Commission of Human Rights (later abolished under Protocol 11) and the European Court of Human Rights to implement the new human rights regime in Europe. In the Americas, there was a parallel development. The 1969 American Convention of Human Rights looked to the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights to enforce human rights.

In about two decades since its adoption in 1948, the protection of human rights had transcended to a matter of legitimate 'international concern' and regional priority well beyond the defence of 'domestic jurisdiction' that transgressing states had traditionally invoked, before the UN Charter, to shield their human rights abuses. Humanity had come a long way in a shared concern for the dignity and well being of human beings.

South Asia had just emerged by the late 1940s from the yoke of colonialism and it had no significant impact on, or contribution to, the proclamation of the Universal Declaration in 1948. In the UN General Assembly, Pakistan, which had become independent about 16 months earlier in August 1947, took the floor to scope the Article on the freedom of religion to suggest that it inherently included the right to proselytise. Its Foreign Minister, Sir Zafrulla Khan, who was to later become the President of the UN General Assembly and the President of the International Court of Justice, was already a respected voice in the General Assembly at the time of its adoption of the Universal Declaration.

### **International Commitments To Protecting The Environment**

About 24 years after 1948, the international community witnessed another tumultuous event that was to stream a parallel development in the internationalisation of resource management. The United Nations Conference on the Human Environment held in 1972 in Stockholm, Sweden, was to become to environmental protection and sustainable development what the Universal Declaration is to the international protection of human rights. For the first time in human history, the collective global conscience was stirred to care for Planet Earth and to proclaim certain principles that have endured over the years to guide national policies and jurisprudence.

But, unlike the international developments in the protection of human rights leading to the Universal Declaration, the Stockholm Principles had a much broader participation. The Universal Declaration, preceding the Decolonisation Decade, was led by the developed world. The United Nations then comprised 58 nation-States and the footprint of the colonies was yet to blossom. The flower of independence bloomed in the 1960s and Stockholm included the new Afro-Asian States. From this perspective, the developments toward international efforts to protect the environment were not handicapped by the non-participation

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<sup>6</sup> Eight Socialist States abstained mostly on the ground that the Universal Declaration contained an Article on the right to own property and two States were absent.

of the emerging decolonised states. Thus while the beginnings of the human rights concerns in the UN Charter and the Universal Declaration are laid at the door of the victorious US and European Allies, the roots of the internationalisation of the protection of the environment are found in a more universal consensus between the developed and the developing countries. The Third World had arrived on the international stage to influence global policies.

And, it was a measure of the growth in the stature of South Asia that India's Prime Minister, Indira Gandhi, dominated attention and headlines at Stockholm by her campaign *Project Tiger*.

Stockholm had truly excited global interest and, a decade later in 1982, the UN General Assembly adopted the World Charter for Nature by a vote of 111 for, one against (USA) and 18 abstentions.

In the ten year cycle that now characterises global commitments to international conferencing on sustainable development, the United Nations Conference on Environment and Development (UNCED) met in Rio de Janeiro, Brazil, in 1992, to adopt the Rio Declaration on Environment and Development that authoritatively reinforced the Stockholm Principles and the World Charter for Nature. This spectacular Earth Summit represented a high watermark in international efforts to prioritise sustainable development. Agenda 21 of the Convention on Biological Diversity and the Statement of Principles for the Sustainable Management of Forests were the other landmark achievements of UNCED.

Rio 1992 provided an important opportunity for the leadership of South Asia. Pakistan, then the Chair of the Group of 77 (G77), well led the developing countries in the important North-South agenda before UNCED. With the support of China to G77 proposals, Pakistan spoke for a significant part of the global human population represented in Rio, a role that was much respected.

India at Stockholm, and Pakistan at Rio, had shown the stellar contribution of South Asia to the emerging international commitment to sustainable development. This high profile involvement of both these nations undoubtedly influenced the judicial activism in environmental matters in the jurisprudence of South Asia.

The momentum of Rio was next carried to the World Summit on Sustainable Development (WSSD) in Johannesburg, South Africa, in 2002. The WSSD prioritised Water, Energy, Health, Agriculture and Biodiversity and, for the first time, laid down time lines for the accomplishment of certain stated goals. But, for me, the most remarkable accomplishment in Johannesburg was the pioneering initiative of the United Nations Environment Programme

(UNEP) to organise a Global Judges Symposium on Sustainable Development and the Role of Law in recognition, apparently, of the role of the Judiciary in many jurisdictions – particularly South Asia as we will subsequently show – to promote environmental protection.

Rio+20 (2012) was the most recent Summit in the decennial calendar of sustainable development. And, once again, it acknowledged the growing role of the judiciary in issues of sustainable development in the holding of the World Congress on Justice, Law and Governance as a parallel event. Other notable developments have been the Earth Charter (2002) and the International Union for Conservation of Nature (IUCN) Draft International Covenant on Environment and Development (1995) in the drafting and launching, of both of which I had actively participated.

In my attendance of many of these milestone events starting with Rio 1992<sup>7</sup>, I developed a layman's guide to the respective positions and concerns of the developed and developing countries in the evolving global environmental agenda. To the developing countries, the important areas were: (1) Sovereignty over natural wealth and resources; (2) Right to development; (3) Eradication of poverty; (4) Consumption patterns of the North; (5) Capacity building; (6) Waste trade; (7) Reschedule/write off debts; (8) Transfer of resources; (9) Transfer of technology, and (10) Harmful activities of transnational corporations.

The developed countries, on the other hand, sought focus on population stabilisation, forests, intellectual property rights, and good governance.

The commonality of interest between the North and the South was, however, readily visible on the need for a global partnership and for empowering youth, women, and indigenous people.

From this potpourri dialogue, emerged durable principles and concepts such as sacred trust for future generations, inter-generational equity, intra-generational equity, polluter pays principle, principle of sustainable development, need for public participation, environmental impact assessment, principle of prevention, precautionary principle, principle of restitution/restoration of environment, principle of strict liability, public trust doctrine, and RRR (Reduce, Recycle, and Reuse) in waste management.

This emerging global environmental order has, to generalise, developed a corpus of soft law and principles for national and international behaviour, which have impacted on humanity and Planet Earth. There have been attempts to transform these soft law principles into binding treaty obligations of States. In addition to my active association

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<sup>7</sup> I have been privileged to attend Rio (1992), Rio+10 (2002), Johannesburg (2002), and Rio+20 (2012). Additionally, I was a part of the launch of the Earth Charter, The Hague (2000) and attended Earth Charter + 10 at The Hague (2010). Also, I attended several Prepcoms and other preparatory meetings for these major conferences. See, generally, HASSAN, P 2013, Changing Global Order: Role of Courts and Tribunals in Pakistan in Environmental Protection, presented at the New Delhi Dialogue on Role of Courts and Tribunals in the Changing Global Order, organised by the Jawaharlal Nehru University, at New Delhi, India, on 15 March 2013

with the drafting and launch of the Earth Charter<sup>8</sup>, I was privileged to lead, as Chairman, the IUCN Commission on Environmental Law from 1990-1996, which was the most significant of such attempts in the launch in the UN General Assembly in 1995, of the Draft International Covenant on Environment and Development.<sup>9</sup> With Wolfgang Burhenne, my predecessor-Chair, and Nick Robinson, my successor-Chair, we in the IUCN Commission of Environmental Law, sought to fast track the development of 'hard' international environmental law. The internationalisation of the protection of human rights had provided some guidelines. It took 16 years to transform the declaratory content of the Universal Declaration in 1948 into binding commitments under the 1966 International Human Rights Covenants. We tried to progress the soft laws content of the Stockholm Principles on Human Environment (1972), World Charter for Nature (1982), Rio Declaration on Environment and Development (1992) and the Johannesburg Declaration on Sustainable Development (2002) into a binding framework treaty on environment and development. But the IUCN Draft Covenant still remains a draft almost two decades later.

This is not to say that there was no progress on the ground. Stockholm, Rio and Johannesburg each inspired, mostly in the developed world, national initiatives, policies and legislation that were, sometimes, effectively mainstreamed through judicial interventions.

However, the developing countries of South Asia were slow to assimilate the issues of sustainable development in their policies and legislation. But it is a measure of the vision of the judiciaries in these countries that they did not wait for national or international hard law to provide protection against environmental degradation. This region was fortunate in the pioneering formulations of fundamental rights around the right to life including a right to the environment by Justice P.N. Bhagwati in India. They soon resonated in Pakistan through an equally visionary Justice Saleem Akhtar<sup>10</sup>. Similar developments of judicial activism took place in Sri Lanka and Bangladesh. And, the region was all set to see its courts and the judiciary as the major facilitators, in implementation, of the changing global environmental order.

It is clear from the above narrative, that totally independent of the progress of human rights since 1948, the environment and development have, since 1972, also been effectively mainstreamed in the global priorities.

## Ownership Of Human Rights In South Asia

The catalogue of human rights proclaimed as 'universal' by the UN in 1948 were readily owned by South Asia at the highest level of a Constitutional commitment. In fact, the Constitutions of India, Pakistan, Sri Lanka and Bangladesh, all of which post-date the Universal Declaration, elevated these to 'fundamental rights' for the enjoyment and protection of which every person could directly approach the superior High Courts – and in some exceptional cases involving 'public interest' – even the highest Supreme Courts of the country. This was a unique incorporation of human rights in the basic law of the land and, through the writ jurisdiction, the superior courts of South Asia have championed the rights-based dignity of the human being.

In fact, responding to poverty levels in the region, the judiciary in South Asia supported and championed public interest litigation. This meant that the superior courts bypassed technical hurdles of *locus standi* and standing to sue to extend relief, in some cases on its own motion *suo moto*, to the down-trodden and marginalised sections of society. This was as good as things could get for enforcing human rights across class and resource barriers.

The ground was broken in the early 1980s in India when Justice P.N. Bhagwati and a group of like-minded judges recognised the need for public interest litigation in a developing nation with weak institutions and myriad socio-economic problems. As Justice Bhagwati wrote in *S.P. Gupta vs. Union of India*,<sup>11</sup> a restrictive approach to standing was inimical to the process of national reconstruction in India where "law is being increasingly used as a device of organised social action for the purpose of bringing about socio-economic change".<sup>12</sup> It was observed that in past cases, the Indian courts had departed from the strict rule of *locus standi* "where there has been a violation of the constitutional or legal rights of persons who by reason of their socially or economically disadvantaged position are unable to approach the court for judicial redress".<sup>13</sup> The *Gupta* case laid the foundation for moulding the rules of civil procedure for maintaining petitions in which the most vulnerable sections of society approach the court for effective redress:

It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right

<sup>8</sup> The Earth Charter has also influenced the development of "soft law". See, generally, HASSAN, P 2000, *Earth Charter: The Journey from the Hague*, & HASSAN, P 2002, *Pakistan Law Journal (Magazine)*, pg. 1-4; and HASSAN, P, *Earth Charter: An Ethical Lodestar and Moral Force*, in P. Corcoran, VILELA, M. and ROERINK, A. (eds.) 2005, *The Earth Charter in Action: Toward a Sustainable World*, pp. 29-31, KIT Publishers, Amsterdam.

<sup>9</sup> See HASSAN, P 1993, 'Toward an International Covenant on Environment and Development' in *American Society of International Law Proceedings*, pp. 513-522; and HASSAN, P, 'The IUCN Draft International Covenant on Environment and Development: Background and Prospects', in KISS, A and BURHENNE-GUILMIN, F (eds) 1994, *A Law For The Environment: Essays in Honour of Wolfgang E. Burhenne*, IUCN, pp. 39-42.

<sup>10</sup> I acknowledged the visionary role of Justices Bhagwati and Saleem Akhtar in South Asia at the *UNEP Global Judges Symposium, Johannesburg, (2002)*; see HASSAN, P 2003, 'Judicial Activism Toward Sustainable Development in South Asia' in *Pakistan Law Journal (Magazine)*, pp. 39-41.

<sup>11</sup> AIR 1982 SC 149.

<sup>12</sup> *Id.* at 191.

<sup>13</sup> *Id.* at 188. The court referred to *Sunil Batra v Delhi Administration AIR 1980 SC 1579* and *Sr. Upendra Baxi v State of UP (1984) Scale 1137* as examples of the trend to relax standing where legal injury had occurred to indigent or otherwise weak and oppressed persons.

or any burden is imposed in contravention of any constitutional or legal provision or without authority of law [...] and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ [...]<sup>14</sup>

The spirit behind public interest litigation was to not let the rigidities of law prevent relief for the most vulnerable<sup>15</sup>. Many of the cases related to entrenched maladies such as bonded labour<sup>16</sup> and custodial deaths.<sup>17</sup>

Owing to a common history, the decisions of Indian courts have what legal doctrine deems 'persuasive' value in other South Asian jurisdictions including Pakistan, where the plant of public interest litigation was to be transplanted next in a welcoming soil. The first genuine public interest case in Pakistan was a human rights case involving bonded labourers. Much like the sequence of event in the earlier Indian judgment, *Morcha v. Union of India*<sup>18</sup>, the Supreme Court of Pakistan invoked jurisdiction on the basis of a telegram sent by a group of brick kiln bonded labourers and their families.<sup>19</sup>

As Justice Tasadduq Jilani, now a member of the Pakistani Supreme Court (and next in line to become Chief Justice), wrote in *State v. M.D. WASA*<sup>20</sup>:

The rationale behind public interest litigation in developing countries like Pakistan and India is the social and educational backwardness of its people, the dwarfed development of law of tort, lack of developed institutions to attend to the matters of public concern, the general inefficiency and corruption at various levels. In such a socio-economic and

political milieu, the non-intervention by Court in complaints of matters of public concern will amount to an abdication of judicial authority.

Public interest litigation has been applied successfully to a broad spectrum of social ills from discriminatory laws and regulations affecting women and children to the humiliating treatment of prisoners.<sup>21</sup> These cases arose from three major sources: letters written to the Chief Justice of the superior courts of Pakistan; newspaper reports (which become the basis of *suo motu* actions by the courts); and cases filed by petitioners that raised questions of human rights.<sup>22</sup> The dilemma of how to enforce fundamental rights in a backdrop of illiteracy and ignorance was answered by a group of like-minded judges by recognising the virtue of a "massification of society, where citizens were increasingly drawn together on the basis of rights and justice".<sup>23</sup>

In effect, the incorporation of fundamental rights as justiciable rights in the Constitutions of India, Pakistan, Sri Lanka and Bangladesh, combined with an over-zealous and activist judiciary in these countries, has ensured an effective juridical framework for the protection of human rights in South Asia.

### **Judiciary-Led Fusion Of Human Rights And Environment In South Asia**

From the participation of Pakistan's Sir Zafrulla Khan in the adoption of the Universal Declaration in 1948 to the popularity of the *Project Tiger* campaign of India's Indira Gandhi at Stockholm in 1972 to Pakistan's prominent leadership at Rio in 1992, South Asia has effectively participated in the development of two of the most important international agendas over the last six decades. But both human rights and the environment progressed, internationally, in separate and almost flow-alone streams. They

<sup>14</sup> See *S.P. GUPTA*, *supra* note 10, at 188.

<sup>15</sup> *MENSKI et al. note that there are four ways in which public interest litigation differs from traditional adversarial litigation: "First the court may be approached in a flexible way for the petition to be filed, for example the court may accept a letter as a writ petition rather than insisting that the normal procedure be followed. Second, locus standi is usually expanded and construed in its widest possible meaning to include any bona fide petitioner rather than just a narrowly defined category of 'aggrieved person'. Third, proceedings conducted by the court are inquisitorial rather than adversarial, and they tend to be discretionary, incorporating any elements of informal procedure, which the judge considers appropriate to follow. Finally, the nature of remedies awarded is different from what we see in 'normal' constitutional petitions, with long-term aims including enforcement under the supervision of the courts taken into consideration. The aim of the exercise is to achieve better justice, so much is clear." See Werner MENSKI, Ahmad RAFAY ALAM and Mehreen RAZA KASURI, Public Interest Litigation in Pakistan (Pakistan Law House, Karachi, 2000), pg. 65*

<sup>16</sup> *Bandhua Mukti Morcha vs. Union of India*, AIR 1984 Supreme Court 802

<sup>17</sup> *D.K Basu v. State of West Bengal* AIR 1997 SC 610

<sup>18</sup> *supra* note 14.

<sup>19</sup> *Darshan Masih vs. State*, PLD 1990 SC 513

<sup>20</sup> 2000 CLC 471 [Lahore].

<sup>21</sup> Since all these cases are not reported it is convenient to mention the examples given by Dr. Nasim Hasan Shah, a former Chief Justice of the Supreme Court of Pakistan. In an article published in the Pakistan Law Digest, Dr. Shah states that the courts of Pakistan have used public interest litigation to do away with "(1) malpractices in our educational system; (2) afford protection to women of any origin (Pakistan or Foreign) subjected to any sex related offences and to stop the menace of obnoxious calls to them; (3) protect the property rights of female heirs/owners by issuance of directions to the Attorney-General to take steps to amend the relevant existing law or to cause fresh legislation to be initiated for securing their rights; (4) prevent exploitation of the children by restraining the authorities from taking them to public places for reception of dignitaries. It has also ruled that children shall not be forced to undertake any such work which under the law has only to be done by the labour force; (5) suspended all restrictions imposed against Nurses working in Military Hospitals and Air Hostesses of Pakistan International Airlines to getting married while in service; (6) stayed public hangings as being contrary to the Constitutional provisions guaranteeing dignity of man; (7) issued guidelines for controlling the traffic muddle in Karachi; (8) checked the practice of extortion of money by Railway staff from the passengers traveling in the Samjhota Express (train running between Pakistan and India) and appointed a Commission of Advocates and Human Rights activists to monitor the situation; (9) directed the Federal and Provincial Governments to stop making appointment against the retirement rules, a practice which was violative of fundamental right of equal opportunity for all citizens to enter upon a profession; and (10) issued guidelines to be observed by the authorities to check environmental pollution caused by fumes of motor vehicles, deforestation, open sewerages, dumping of nuclear waste etc. ", see SHAH, NH 1993, 'Public Interest Litigation as a Means of Social Justice' PLD Journal Section 31, pg. 63.

<sup>22</sup> *Id.* at 32-33.

<sup>23</sup> HASSAN, P & RAFAY ALAM, A 2012, Public Trust Doctrine and Environmental Issues before the Supreme Court of Pakistan, PLJ Magazine, pg 45.

were, however, destined to converge as they both centred on human dignity and human welfare.

It is again remarkable that this fusion was pioneeringly led by an activist judiciary in South Asia. The background and narrative follows:<sup>24</sup>

### **India**

On the domestic front in South Asia, environmental rights forked in two directions: as part of a framework legislation to be enforced by the executive branch, and being framed as fundamental rights in constitutions whose ultimate guardians are the courts. The former model is marked by specialised executive authorities that create and administer environmental policies. A critical tool in the hands of these agencies is the Environmental Impact Assessment (EIA), which allows harm to environmental resources to be assessed and minimised. Complementing the role of these authorities are technical organisations responsible for setting standards and norms, and judicial tribunals responsible for dealing with related offences.

The centralisation of planning and enforcement promised by the framework model was widely welcomed as a critical advancement. Wilson et al. have argued that framework legislation represents a very coherent model for top down and co-coordinated environmental planning:

The emergence of integrated and ecosystem oriented legal regimes has been an essential first step, permitting a holistic view of the ecosystem, of the inter-relationships and interactions within it, and of the linkages in environmental stresses. This has been achieved through the framework environmental legislation technique, which provides a broad and flexible framework for addressing environmental issues and for responding to changes in socioeconomic and ecological parameters. It has also provided a basis and a reference point for the coordination and rationalisation of previously fragmented, disjointed and overlapping sectoral legal regimes. Although the framework legislation typology will require further refinement over the coming years to ensure that it fulfills expectations, it represents one of the most critical developments in environmental management in developing countries in the two decades since Stockholm<sup>25</sup>.

We now have the benefit of hindsight as framework legislation has been around for many years and I will draw

upon the example of South Asia<sup>26</sup> as typical of jurisdictions where robust regulatory and institutional models have not fared well as far as implementation is concerned. On paper, the region boasts an impressive array of environmental protection laws, federal agencies tasked with enforcement of standards and regulatory instruments. Mention may be made of the Environment Protection Act 1997 (Pakistan), the Environment Protection Act 1986 (India), the Environment Conservation Act 1995 (Bangladesh), and the National Environmental Protection Act 1988 (Sri Lanka).

As I have written on other occasions:

But it requires more than writing laws and signing treaties to promote sustainable development. A provision in law about environmental impact assessment is of no use if the country does not have the professional and technical ability to conduct and evaluate such assessments. Setting environmental quality standards for industrial emissions and effluents can make a difference only if the EPA's have the laboratories and equipment and technical administrators to police such standards. A strong cadre of environmental lawyers is needed to draft national laws for implementing international conventions and otherwise to enforce environmental protection laws<sup>27</sup>.

Commentators have cautioned that the passage of laws and set up of institutional mechanism can in fact be a step backward if they result in complacency:

Indeed apart from establishing appropriate legal and institutional frameworks, the effective implementation of environmental legislation remains one of the most daunting challenges for developing countries. For in the final analysis, ineffective law may be worse than no law at all. It gives the impression that something is being done whereas the existing legal arrangements are contributing little in terms of practical environmental management.<sup>28</sup>

The amended Constitution of India 1950, directs the State 'to endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'. However, the South Asian region is perhaps the best example of constitutionalism applied to environmental law. Owing to the work of visionary judges, public interest litigation in South Asia has become intertwined with the environmental movement in the region. Lalanath De Silva offers the following explanation for this nexus:

<sup>24</sup> See, generally, RAZZAQUE, J 2004, Public Interest Environmental Litigation in India, Pakistan and Bangladesh, *Kluwer*, and HASSAN, P & AZFAR, A 2004, 'Securing Environmental Rights through Public Interest Litigation in South Asia', in 22.3 *Virginia Environmental Law Journal*, pp. 216-236.

<sup>25</sup> WILSON, P, OGOLLA, B, BRANES, R & KURUKULASURIVA, L 'Emerging Trends in National Environmental Legislation in Developing Countries' in CRAIG, DG, ROBINSON, NA & KOH, KL, Capacity Building for Environmental Law in the Asian and Pacific Region, pp. 175,185-186.

<sup>26</sup> A comparative survey of environmental law in the SAARC region and a proposal for regionalizing environmental management in the SAARC Region is found in HASSAN, P 2012, 'Environmental Jurisprudence from Pakistan: Some Lessons for the SAARC Region', in *Corporate Law Decisions, Journal*, pp. 24-49.

<sup>27</sup> HASSAN, P 2001, 'Environment and Sustainable Development: A Third World Perspective', in 31 *Environmental Policy and Law*, 36, pg. 40.

<sup>28</sup> See WILSON, supra note 24, pg 186.

The origin of environmentalism in the developed world was always related to recreation and aesthetics. Environmental activism in South Asia is always about survival. In this context, issues such as involuntary displacement and resettlement, provision of basic human needs of water and sanitation, become central to environmental law.<sup>29</sup>

The environmental movement in India was one of the biggest beneficiaries of the public interest litigation culture. This sentiment is echoed by Zafar Nomani, who notes:

Out of the commitment to deep ecological values, environmentalism and eco-centrism, the Indian courts have held that the creation of a reliable and effective rights-based approach would not only help to ensure the sustenance and survival of indigenous and marginalised communities, but also the well being of cosmic future generations [...] Essentially being a subaltern phenomenon, a wide spectrum of social and individual groups such as lawyers, environmentalists, action groups, forest dwellers, citizens fora, tribal societies, consumer centers, feminist groups and voluntary organisations have thrown open their grievance before the higher courts [...] Emboldened by this judicial liberalism, India's robust environmental movement in an adversarial atmosphere of repressive policing and bureaucratic red tape has ushered in a third generation of human rights culture.<sup>30</sup>

An embedded constitutional right to protect the environment and superior courts willing to explore these rights to their logical conclusion has given India a mature case law on the public trust doctrine,<sup>31</sup> the precautionary principle and polluter pays principle<sup>32</sup>, inter-generational equity<sup>33</sup> and incorporation of international treaties in domestic law.<sup>34</sup> Importantly, environmental rights were read into human rights as early as in the 1980s in India.

## Pakistan

With a robust foundation of public interest litigation in Pakistan, bridging the doctrine to environmental causes posed its own difficulties initially. Part of the challenge was that the Constitution of Pakistan 1973, was drafted too soon after Stockholm to take cognizance of environmental rights. The only reference to the environment is in a schedule to the Constitution that says that 'ecology' can be something that can be legislated on both by the provinces

as well as by the Federation, which today has been amended to solely empower the provinces in a nod to devolution. There are no directives of state policy or of fundamental rights concerning the environment.

A group of petitioners who wanted to challenge the construction of a high voltage grid station in a residential area in the Pakistani capital, Islamabad, approached the Supreme Court of Pakistan in 1994 to obtain relief. The residents were apprehensive of the public health effects of electro-magnetic radiation posed by the proposed grid station and also worried about threats to the city's much prized green-belt regulations. As counsel, I argued the case on the basis of a 'right to life' (and right to dignity) in the 1973 Constitution and in doing so I drew on the extensive environment-related case law in India on the constitutionally-protected 'right to life' as embracing a 'quality' of life. This argument resonated with the bench, which embraced a wider connotation to the 'right of life':

The word life has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities or facilities, which a person in a free country is entitled to enjoy with dignity, legally and constitutionally.<sup>35</sup>

The receptivity of the Court to the precautionary principle covered in Principle 15 of the Rio Declaration on Environment and Development 1992, was another significant advance. In its order, the Supreme Court gave significant relief to the petitioners by staying at the construction of the grid station until further studies were done to establish the nature and extent of the threat posed by electro-magnetic radiation emitted by the grid station. Drawing on the experiences of the Indian courts, the Supreme Court set up a commission of experts to study the technical dimensions and to submit a report in this respect.

As Akhund and Qureshi note:

*Shehla Zia vs. WAPDA* case sets out two of the most critical foundations of environmental law in Pakistan. First, by virtue of the broad meaning of the word 'life' as contained in Article 9 of the Constitution, together with the requirement for dignity of man contained in Article 14, the fundamental right to an unpolluted environment has been established.

<sup>29</sup> DE SILVA, L 1999, Environmental Law Development in South Asia, 4(3) *Asia Pacific Journal of Environmental Law* 243, pg. 249.

<sup>30</sup> MAHFOOZ NOMANI, Z 2000, The Human Right to Environment in India: Legal Precepts and Judicial Doctrines in Critical Perspective, (2000) 5 (2) *Asia Pacific Journal of Environmental Law* 113, pp. 114-115

<sup>31</sup> M. C. Mehta v. Kamal Nath (1997) 1 SCC (Supreme Court Cases) 388.

<sup>32</sup> Vellore Citizens Welfare Forum v. Union of India (1996) 5 SCC (Supreme Court Cases) 647.

<sup>33</sup> Rural Litigation and Entitlement Kendra v. State of U.P. (1987) Supp. SCC 487 (India). An earlier judgment in this matter was AIR 1985 SC 652.

<sup>34</sup> People United for a Better Living in Calcutta v. State of West Bengal 1993 AIR (Cal) 215.

<sup>35</sup> Shehla Zia v WAPDA, PLD 1994 Supreme Court 693, at 712.

Secondly, the case established the application of the precautionary principle where there is a hazard to such rights.<sup>36</sup>

Today, the case is routinely cited in Pakistan to allow standing to petitioners and to apply the 'right to life' and precautionary principle to slow or stop projects threatening environmental harm before adequate assessments are completed and the voice of affected constituents is heard. Apart from petitions brought by civic organisations, both the Supreme Court and High Court have taken *suo motu* notice of environmental threats and the involvement of the superior judiciary in a controversial project is often enough to deprive it of political clout. The legacies of Justice Bhagwati in India and Saleem Akhtar in Pakistan have ensured that both countries have endured 'green benches' interpreting fundamental rights in an ecologically literate manner.

The downside of litigation is that it is time-consuming and expensive, and even litigants who emerge successful often discover that they have attained a Pyrrhic victory; after all the time, acrimony and expense, the spoils of victory are few. Therefore, in another promising development, the courts in Pakistan routinely appoint commissions with technical members as well as civic society and many times a mediated outcome is made possible where everyone benefits.<sup>37</sup> In my home city of Lahore, intractable issues such as air quality<sup>38</sup>, solid waste disposal<sup>39</sup> and widening of heritage roads<sup>40</sup> have yielded to this approach. The critical role of the courts on using fundamental rights as a bulwark against commercial encroachment on the environment is likely to continue as the recent 18th Amendment to the Pakistan Constitution makes environment a provincial subject. In contrast to their Federal forebears, the provincial EPA's are in a much weaker position to implement framework legislation.

### **Sri Lanka**

Although Sri Lanka's 1978 Constitution provides for a series of fundamental rights, it asserts in its Directive Principles of State Policy that the State shall protect, preserve and improve the environment for the benefit of the community, the same are not justiciable. This has not stopped the Sri Lankan courts from giving recognition to these

principles by reading them in the light of international law. As Shyami Fernando Puvimanasinghe points out:

The Sri Lankan Constitution does not provide for the right to life, and its chapter on fundamental rights deals mainly with civil and political rights, with limited protection of social, economic and cultural rights. Given these limitations, broad interpretations of the Directive Principles by the judiciary can truly advance social justice.<sup>41</sup>

The landmark judgment in the field is *Bulankulama v. The Secretary, Ministry of Industrial Development*,<sup>42</sup> which brought the issues of sustainable development, inter-generational equity and fate of vulnerable populations to the forefront. This case arose out of a joint venture between the Government of Sri Lanka and the local subsidiary of a multi-national for the aggressive development of a phosphate mine that would have displaced around twelve thousand people and depleted the mineral deposits in thirty years instead of perhaps a millennium at the previous rates of extraction. Just as the Pakistan Supreme Court had not allowed promulgation of domestic law to undermine the State's international environmental commitments, the Sri Lankan Supreme Court stated:

Undoubtedly, the State has the right to exploit its own resources pursuant, however, to its own environmental and development policies. Rational planning constitutes an essential tool for recognising any conflict between the needs of development and the need to protect and improve the environment (Principle 14, Stockholm Declaration). Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature (Principle 1, Rio De Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4, Rio De Janeiro Declaration).

In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio

<sup>36</sup> AKHUND, N & QURESHI, Z 1998, You Can Make a Difference- A Lawyer's Reference to Environmental Public Interest Cases in Pakistan, *IUCN, Karachi*, pg. 13. Shehla Zia, has attracted a great deal of national and international comment. OKIDI in particular notes how the case reinforces the need for lawyers to draw on international scholarship in presenting their cases: "This fact enjoys clear testimony in the opinion of the Supreme Court of Pakistan in *Shehla Zia v. WAPDA*, where the profuse citation of scholarly literature confirms the readiness of the national courts to draw on research results from various countries to support their decision. But it underscores one additional point, namely that the quality and wide acceptability of court decisions may also reflect the quality of the pleadings and professional literacy of the counsel for the plaintiff. The easiest task for the courts is to follow precedents. However, it is the compelling quality and arguments in a pleadings that may leave a court with no option but to set new precedents. In the above case, the counsel for the plaintiff assisted in the progressive development of 'environmental law'", BOER, B, KOH, KL, OKIDI, CO & Robinson, NA 1999, Training the Trainers Program, *Asia Pacific Journal of Environmental Law* 175, pg. 181. For detailed background information to the *Shehla Zia* case, supra, see SIDDIQUE, O, 'Public Interest Litigation in the Wake of *Shehla Zia* versus WAPDA: The Cast Story', in *Public Interest Litigation: Shehla Zia versus WAPDA (SDPI)* pg. 7. See also HASSAN, P 2005, 'Shehla Zia vs. WAPDA: Ten Years Later' in *All Pakistan Legal Decisions, Journal*, pg. 48. See also HASSAN, P 2002, 'From Rio 1992 to Johannesburg 2002: A Case Study of Implementing Sustainable Development in Pakistan' in *Singapore Journal of International & Comparative Law* pp. 683-722

<sup>37</sup> As I noted recently, "the basic approach that was followed was to recommend to the court how commissions, in other countries have helped provide science/technology-based solutions which lie outside the scope of the Courts. Apart from providing the court expert guidance, the other limb of this approach was to highlight the importance of a non-adversarial, public-private partnership model for handling the most intractable civic problems". HASSAN, P & RAFAY ALAM, A 2011, *Role of Commissions in Public Interest Environmental Litigation in Pakistan*, *PLD Journal*, pg. 84

<sup>38</sup> *City District Government v Muhammad Yousaf I.C.A No. 798/2002* filed before the *Lahore High Court*.

<sup>39</sup> *Syed Mansoor Ali Shah v Government of Punjab Writ Petition No. 6927* filed before the *Lahore High Court*.

<sup>40</sup> *Cutting of Trees for Canal Widening Project, 2011 SCMR 1743*.

<sup>41</sup> PUVIMANASINGHE, SF 2009, *Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest*, *Sustainable Development Law & Policy*, 41-49 pg. 44.

<sup>42</sup> 3 Sri L.R 243 (2 June 2000).



De Janeiro Declarations are not legally binding in the way in which and Act of our Parliament would be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.<sup>43</sup>

Bulankulama laid a strong foundation for public interest litigation and just one NGO – the Environmental Foundation Limited – is said to have handled over three hundred cases dealing with environmental matters.<sup>44</sup> Puvimanasinghe writes that:

PIL has also become a common feature in cases concerning development, environment, and human rights, which have closely linked jurisprudence in Sri Lanka. These cases usually involve executive or administrative action and, frequently, business activities. When major administrative decisions concern the natural resources of the country and other important issues of public interest, there is little room for the community at large to question these decisions, to be informed about their implications, and to ensure accountable and good governance. Decisions are sometimes made behind closed doors and a culture of disclosure is not common in public affairs. In this context, PIL serves as a legal tool to raise issues of social accountability in decision-making by the government and industry.<sup>45</sup>

In *Weerasekera et al. v. Keangnam Enterprises Limited*<sup>46</sup>, a mining operation that had acquired an environmental license was alleged to be causing a public nuisance owing to the noise level of the operation. Although the lower court held that the license was an adequate defence, the Court of Appeal overturned the decision on the grounds that obtaining the environmental license was not a shield to legal injury.

The Sri Lankan judiciary has made innovative use of procedural rights as well, reading a right to information (missing in the 1978 Constitution) as part of the right to freedom of expression. *Environmental Foundation Limited v. Urban Development Authority (2005)* concerned a clandestine agreement between the Government agency and private developers for turning Galle Face Green, a seaside promenade in Colombo, which had the status of a national heritage site into a leisure complex. The Supreme Court found the contract violative of the petitioner's right to information as well as the right to equality, and though

this case concerns conservation of historic properties, the reasoning can easily apply to environmental cases as well.

## **Bangladesh**

Much like Pakistan, the Constitution of Bangladesh does not expressly provide for environmental rights, but the Bangladeshi courts have also embraced these rights within the constitutional right to life. In *Dr. Mohiuddin Farooque v. Bangladesh and Others*,<sup>47</sup> the Supreme Court of Bangladesh stated in its consensus judgment that:

Article 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water and sanitation, without which life can hardly be enjoyed. An act or omission contrary thereto will be violative of the said right to life.<sup>48</sup>

In this case, the writ petition was filed under Article 102 (1) and (2) of the Bangladesh Constitution by one of the country's leading environment NGOs, the Bangladesh Environmental Lawyers Association, in connection with irregularities regarding the country's Flood Action Plan. The objection as to standing was dismissed by the Appellate Division of the Supreme Court of Bangladesh:

Any person aggrieved' within the meaning of the Article 102 of the Bangladesh Constitution is not confined to individual affected persons only but it extends to the people in general, as a collective and consolidated personality, if an applicant bona fide espouses a public cause in the public interest he acquires the competency to claim hearing from the court [...] being a public sector subject, flood control and control of river and channel flows is a matter of public concern.<sup>49</sup>

As in India and Pakistan, relaxation of standing and favourable rulings on the constitutional right to life permitted a boon of human rights and environmental petitions. In a public interest litigation concerning air and noise pollution, the Dhaka High Court ordered the Government to convert petrol and diesel engines in government-owned vehicles to gas-fueled engines; the same order also calls for the withdrawal of hydraulic horns in buses and trucks by 28 April 2002.<sup>50</sup> Another far reaching decision of the Dhaka High Court has called for the withdrawal of two-stroke engine vehicles from Dhaka city by December 2003, the cancellation of licenses for nine-year-old three-wheelers, the provision of adequate number of Compressed Natural Gas (CNG) stations, and the establishment of a system for issuing fitness certificates for cars through computer checks.<sup>51</sup>

<sup>43</sup> <http://www.elaw.org/node/6722> at 10.

<sup>44</sup> Puvimanasinghe, *supra* note 40, pg. 48.

<sup>45</sup> Puvimanasinghe, *supra* note 40, pg.45.

<sup>46</sup> *CA (PCH).Apn No. 40/2004 (dd. 2009.06.08)*

<sup>47</sup> (1997) 17 BLD.

<sup>48</sup> (1997), 49 DLR 1.

<sup>49</sup> *Id.*, at para 49.

<sup>50</sup> *KAMALUDDIN, S 2002*, BD Judiciary Showing Increasing Assertiveness, *DAWN*.

<sup>51</sup> *Id.*

As in the case of Sri Lanka, the Bangladesh Environmental Lawyers Association (BELA) has been the driving force behind public interest litigation. In *Bangladesh Environmental Lawyers Association v. Secretary, Ministry of Environment and Forests*<sup>52</sup>, the Supreme Court of Bangladesh was petitioned to stop the diversion of a forest area and rich ecosystem in Sonadia Island from being diverted for commercial purposes. The ship-breaking industry, long used to operating without environmental considerations, became the focus of another BELA assault when the Supreme Court ordered the closing of ship breaking yards that were operating without safeguards (*Bangladesh Environmental Lawyers Association v Secretary, Ministry of Shipping*).<sup>53</sup>

### Regional Linkages Through Principles Of Treaty Interpretation

At the international level, the convergence of human rights and the environment was influenced by different considerations.

One, the UN and regional human rights bodies took to enforcing environmental rights as such rights have, since 1972, been included in the national legal systems through constitutional or legislative provisions. The human rights bodies, in such circumstances, addressed issues relating to environmental degradation in violation of the guaranteed rights in the agreements over which they have jurisdiction. This is facilitated by some mandates in the human rights treaties. The European Convention, for example, provides that nothing in the Convention shall be construed as limiting or derogating from any of the human rights that may be ensured under the laws of any Contracting State or under any agreement to which it is a Party (Article 53). To similar effect is Article 29 of the American Convention, which recognises the ‘rights recognised by domestic laws and other agreements’ as well as ‘other rights or guarantees that are inherent in the human personality’.

Second, the Vienna Convention on the Law of Treaties, 1969 (the ‘Vienna Convention’), has provided a more durable basis for twinning human rights and environmental matters. Its Articles 31 and 32 lay down the general principles for treaty interpretation. Beyond the good faith duty to interpret treaties in accordance with their ordinary meaning in the context of the whole agreement and its objects and purposes, Article 31 requires the taking into account of:

- i. Any subsequent agreement between the parties regarding the application of its provisions;
- ii. Any subsequent practice that establishes an agreement of the parties regarding its interpretation, and
- iii. Any relevant rules of international law applicable in relation between the parties.

Article 32 enables recourse to supplementary means of interpretation either to confirm a meaning in cases where it would otherwise be ambiguous, obscene or manifestly absurd or unreasonable.

Shelton notes:

The broad interpretive mandates of regional bodies have led to the practice of finding and applying the most favourable rule to individuals appearing before the courts and commissions. In addition, human rights tribunals have developed various canons of interpretation that reinforce these mandates and the [Vienna Convention on Law of Treaties] rules of treaty interpretation, allowing them to make broad use of environmental laws, principles and standards.<sup>54</sup>

Jurisprudence under both the European Convention and the American Convention soon began to factor environmental rights in dealing with human rights issues under the respective Convention generally on the basis of the guidelines of the Vienna Convention. This result was also followed under the African Charter of Human and People’s Rights 1984 (the ‘African Charter’). A few examples highlight the emerging nexus.

#### European Convention

In *Fadayeva v Russia*,<sup>55</sup> the plaintiff lived near the largest iron smelter in the Russian Federation and claimed that toxic emissions had adversely affected her health, placing reliance on Article 8 of the Convention, which protects a person’s private and family life:

- i. Everyone has the right to respect for his private and family life, his home and his correspondence;
- ii. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Government responded that the extent of the pollution was not extreme enough to set up an Article 8 claim. Finding that Article 8 applied, the Court agreed that there could be no arguable claim under Article 8 if what the detriment complained of was negligible in comparison to environmental hazards to be inherent in modern cities, but held that the assessment of the minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects.

<sup>52</sup> [www.elaw.org/node/2452](http://www.elaw.org/node/2452) (Write Petition to Bangl. S.C Oct. 10, 2003)

<sup>53</sup> BANGL. SC 2009, available at [www.elaw.org/node/3747](http://www.elaw.org/node/3747)

<sup>54</sup> SHELTON, supra note 4, at 93

<sup>55</sup> No 55723/000 (judgment of 9 June 2005) 2005/IV Eur Ct H R 255 (2005)

On the facts, the Court held that respondent state had failed to strike a fair balance between the interests of the community and the applicant's right to respect for her home and her private life. Both non-pecuniary damages and costs of litigation were awarded to the plaintiff. Though Article 8 is framed in terms of the right to privacy, that has not stopped the European Court from adopting a purposive interpretation and reading into the right to a healthy environment not only in this case but many other instances.

### ***American Convention***

The experience under the American Convention has been well summed up:

At the international level in the western hemisphere, the inter-American Commission and Court have articulated the right to an environment at a quality that permits the enjoyment of all guaranteed human rights, despite a lack of reference to the environment in nearly all inter-American normative instruments [...] The Commission's general approach to environmental protection has been to recognise that a basic level of environmental health is not linked to a single human right but is required by the very nature and purpose of human rights law.<sup>56</sup>

The Commission's *Report on the Situation of Human Rights in Ecuador (1997)* states:

The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle, which underlies the fundamental protection of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local population, are inconsistent with the right to be respected as a human being.<sup>57</sup>

Shelton notes that "neither the Inter-American Commission nor the Court adheres to a static or 'originalist' interpretation of the texts", taking the view that human rights instruments must be interpreted and applied by taking into account 'developments in the field of international human rights law since those instruments were first composed and with due regard to other relevant rules of international law applicable to Member States against which complaints of human rights violations are properly lodged'.<sup>58</sup> The author notes that this dynamic approach of taking cognisance

of changing conditions is the hall-mark of the European Court, which has stated that it is of "critical importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".<sup>59</sup>

The above developments will be further reinforced in the 1988 Additional Protocol to the American Convention, which provides that 'everyone shall have the right to live in a healthy environment and to have access to basic public services'.

### ***African Charter***

Although the European Convention (1950) and the American Convention (1969) enabled a backdoor nexus of human rights and the environment, the approach of the African Charter, of a more recent vintage of 1984, is direct. It provides clearly that "all peoples shall have the right to a general satisfactory environment favourable to their development (Article 24). The difference between the pre-Stockholm European and American Conventions and the 1984 African Charter and the 1988 Additional Protocol to the American Convention show how the international developments on sustainable development since 1972 have impacted on treating human rights and environmental issues together. This approach is indicative of the future.

The work of the African Commission on Human and Peoples Rights (the 'African Commission') well lives up to the mandate of the African Charter. In May 2002, the African Commission acted on a Communication, which alleged that the "oil consortium [with the connivance of the military government of Nigeria] has exploited oil reserves in Ogoni land with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards". The Communication went on to note that

The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.<sup>60</sup>

The Communication accused the Government of Nigeria of withholding vital information about the project<sup>61</sup> from the affected community and using its security offices for 'ruthless operations' including destructing Ogoni villages and homes.

<sup>56</sup> See SHELTON, supra note 4, at 104.

<sup>57</sup> *Inter-Am Comm HR, Report on the Situation of Human Rights in Ecuador, OAS Doc OEA/Ser/L/V/II.96, Doc 10 Rev 1, 24 April 1997, at 92.*

<sup>58</sup> See SHELTON, supra note 4, at 93.

<sup>59</sup> *Christine Goodwin v The United Kingdom [GC], (App no 28957/95) (Judgment of 11 July 2002) (2002) EHRR 18, para 74.*

<sup>60</sup> *Ref. ACHPR/COMM/AO44/1, at 3.*

<sup>61</sup> See also SERAC v Nigeria, (27 May 2002) *Comm 155/96, Case No ACHPR/COMM/A044/1* where the Court took an expansive view of Governmental obligations 'to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'. Apart from environmental impact studies and independent scientific monitoring, these measures included the duty to provide information and allow the public an opportunity to participate in decision-making.

In its ruling, the African Commission took cognisance of the fact that the Federal Republic of Nigeria has incorporated the African Charter into its domestic law and the Complainants' allegation that the Nigerian Government violated the right to health and the right to clean environment as recognised under Articles 16 and 24 of the African Charter. The African Commission also read a right to housing and shelter though the same was not explicitly mentioned in the African Charter:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.<sup>62</sup>

## Looking Ahead

Although not a part of the original vision for human rights in 1948, nor a part of the environment agenda led in Stockholm in 1972, the UN, which sponsored both the streams, has over recent years seen the desirability of synthesising the human rights and the environment issues for a better achievement of both the goals. This is the way it should be and it is likely that both will increasingly share a common platform in the future.

Both international and regional initiatives tell a story where human rights and the environment streams are coming together for the greater good of mankind. The United Nations Committee on Economic, Social, and Cultural Rights adopted a General Comment in 2002 on the right to water, referring to Article 11 of the International Covenant on Economic, Social, and Cultural Rights. The General Comment states:

The human right to drinking water is fundamental for life and health. Sufficient and safe drinking water is a precondition for the realisation of all human rights.<sup>63</sup>

International Treaties and Covenants are often criticised for being mere statements of intent, but it cannot be denied

that the commitments made at the world stage create an atmosphere where regional and national initiatives are catalysed. In the same year as the General Comment on the right to water, the European Commission charged eight EU Member States with violating water quality directives (France, Greece, Germany, Ireland, Luxembourg, Belgium, Spain, and the United Kingdom).<sup>64</sup> The Earth Justice's Issue Paper notes that the "European Commission's increased regulation of water quality standards demonstrates the commitment to the newly recognised human right to clean water".<sup>65</sup>

More recently, in 2010, the United Nations General Assembly has recognised the right to water,<sup>66</sup> and the Human Rights Council has appointed an independent expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment.<sup>67</sup> This evolution of human rights is welcome as currently the Constitution of South Africa explicitly recognises a right to water as such<sup>68</sup> and the right to water assumes greater importance in the context of the affect of climate change on vulnerable populations. As Laura Westra notes:

It has been further argued that climate change threatens human rights, and that water damage related to climate change threatens the cultural rights and the very existence of indigenous populations living far beyond the limits of the consumer imagination. Climate change, it has been argued, is, in short, a form of intra- and inter-generational justice. Future negotiations regarding climate change protocols and water law instruments should therefore be placed within a human rights framework, and climate change and human rights need to be understood in the light of a close examination of their intimate interconnection.<sup>69</sup>

It is not just in the creation of new socio-economic rights, such as the right to water, that the boundaries of human rights are being pushed outwards. Collins has recently argued that where there is evidence of a significant threat to human health, coupled with scientific uncertainty regarding the existence, mechanism or scope of the risk involved, the security of the person of exposed individuals is violated. The case she draws on is that in October 2010, members of the Aamjiwnaang community filed suit in Ontario alleging that the decision to allow Suncor Energy Products, to increase production by 24 per cent at their sulphur recovery plant violated their right to security of the person under the Canadian Charter of Rights and Freedoms.

<sup>62</sup> *Supra* note 59, at 12-13.

<sup>63</sup> The sufficiency, safety, affordability, and accessibility to water are defined in the Comment and it further describes a state's legal responsibility in fulfilling the right. The human right to water embraces the notion that sufficient, affordable, physically accessible, safe, and acceptable water will be available for personal and domestic use.

<sup>64</sup> The case against France, the European Court of Justice (ECJ) ruled that France had not met the 50 mg/L limit for nitrates in surface waters.

<sup>65</sup> Earth Justice Issue Paper, Human Rights and the Environment, Materials for the Fifty-Ninth Session of the United Nations Commission on Human Rights, Geneva, 17 March-25 April 2003. The OECD now recognises the link between human rights and the environment and contains an environmental ranking of its members.

<sup>66</sup> GA Resolution 64/292 of 28 July 2010.

<sup>67</sup> A/HRC/19/L.8/Rev.1 and Collins *supra* note 4, at 92.

<sup>68</sup> Section 27 of the Constitution of the Republic of South Africa, 1996.

<sup>69</sup> WESTRA, L 2010, Climate Change and the Human Right to Water, *Journal of Human Rights and the Environment*, pg.188.

Collins argues that, “human rights are unitary and interdependent; if the precautionary principle does form part of a customary international right to environment, then this understanding of environmental rights should inform states’ interpretation of the right to security of the person”.<sup>70</sup> This is part of an effort to ensure that there is unique content to environmental human rights beyond the support provided in domestic constitutions and customary international law to the concept of a human right to environmental quality.

The efforts of the South Asian judiciary to protect the environment are salutary but leaving the environmental movement in the hands of national courts is not a global prescription. Firstly, the basic job of the courts is to interpret laws in the resolution of conflicts and implementation requires the cooperation and capacity of other agencies. Secondly, political, institutional and cultural differences make judicial redress ineffective in many jurisdictions for various reasons. This calls for the regionalisation of initiatives to reinforce international conventions and paper over weaknesses in national regimes.

As I wrote elsewhere:

Protection of human rights in the world was improved by the internationalisation of these concerns through the Universal Declaration of Human Rights (1948) and the International Covenant of Civil and Political Rights and on Economic, Social and Cultural Rights (1966). These pioneering initiatives at the international level were facilitated by regional support and the establishment of the European Commission/Court of Human Rights, the inter-American Commission/Court of Human Rights and similar initiatives in Africa.<sup>71</sup>

Clearly, much progress has been made since July 1994 when Ms. Fatma Zohra Ksentini, Special Rapporteur on Human Rights and the Environment for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, issued her Final Report to the Sub-Commission. The Final Report, including the 1994 Draft Declaration of Principles on Human Rights and the Environment, noted that environmental damage has direct effects on the enjoyment of a series of human rights and that human rights violations in turn may damage the environment.<sup>72</sup> The world’s appetite for energy and goods is always growing bigger and unrestrained commerce that arises to fulfil it continually threatens the planet’s delicate eco-system.

When logging companies invade what is left of close-canopy tropical rain forests in Liberia or lowland rain forests in Indonesia, they do not just threaten biodiversity hot spots but displace indigenous people who have depended for centuries on nature for their livelihoods, shelter, medicine and folklore. Hydroelectric dams provide much-needed

energy at an economically lower cost but cause massive displacement of communities and encroach on their right to shelter. When mining companies carry out open-pit mining near human habitation or planes fly low over residential neighbourhoods on their landing routes, it is at the cost of the right to shelter in one case and the right to privacy and inviolability of the home in the other.

A rights-based approach to environmental rights, as championed by national courts under their respective constitutions or regional tribunals under human rights conventions, is a critical tool in the struggle to find the right balance between economic growth and the health of the planet and its marginalised communities.

## Recommendations

The Asia-Europe Foundation (ASEF), a principal sponsor of the 13th Informal ASEM Seminar on Human Rights, has been an important architect of Asian-European cooperation in many important economic and social sectors. It needs to use this credibility to further forge ahead the common ground that has emerged so eloquently in the pursuit of human rights and sustainable development in these two continents. Some suggestions for a blueprint for its future activities:

- i. Support of regional and sub-regional approaches in Asia in human rights as has successfully advanced the emerging human rights-environment nexus in Europe, inter-Americas and Africa.
- ii. Support for intra-regional initiatives such as between the ASEAN and the South Asian Association for Regional Cooperation (SAARC) countries so that both benefit from each others’ experiences on the basis of a South-South dialogue.
- iii. Support for inter-regional initiatives and cooperation between Asia and Europe to maximise the sharing, for example, of the jurisprudence of the European Convention with the robust activist jurisprudence from Asia, particularly South Asia.
- iv. Inter-regional cooperation could include technical support, transfer of resources and technology and capacity building of particularly the Environmental Protection Agencies in Asia. The hope for a global partnership between the South and the North was held out in Stockholm, Rio, and Johannesburg but did not develop too much disappointment in the developing world. This global agenda can be led and played out between Asia and Europe.
- v. A prioritisation of good governance as the core need of the Asian continent to include public participation,

<sup>70</sup> See Collins, *supra* note 4, pg. 93.

<sup>71</sup> See HASSAN *supra* note 25, pg. 47.

<sup>72</sup> E/CN.4/Sub.2/1994/9. Amongst other measures, Ms. KSENTINI recommended that the human rights component of environmental rights be forthright made a part of the work of human rights bodies.

transparency, and accountability would be necessary for an effective commitment of ASEF. The organisation could start a dialogue on military expenditure in the context of the imperatives for greater budgetary allocations for social sectors of health and education and general welfare of the masses.

vi. The undertaking of an analysis of the impact on human rights and the environment of the US drone attacks in Asia, which undoubtedly has global implications. If respect for human rights is about sovereignty of peoples

as nation states, ASEF should consider an in-depth evaluation of the growing US unilateralism.

vii. The need to involve the judiciary, prosecutors and lawyers to leverage, in the future, the huge successes in the important jurisprudence that has well anchored progress so far in Asia and Europe. Johannesburg (2002) and Rio+20 successfully involved the judiciaries in recognition of their growing role in the protection of human rights and the environment.

# Keynote Speech

**Mr. Poul ENGBERG-PEDERSEN**

Deputy Director General/Managing Director, International Union for Conservation of Nature

## **CLIMATE AND CONSERVATION WITH JUSTICE: PEOPLE, PLANET AND POWER**

When I thought about the title of this speech, I thought I would put ‘power’ in it as a key word because we are actually talking about real issues when we talk about issues of empowerment, issues of the environment and issues of human rights.

These are the issues that I would like to talk about today, but I am going to start off today with a positive spin because we can actually do something about these issues if we focus on wide space development and if we focus on solutions.

I am not a lawyer so you will soon recognise that I am speaking about a different perspective on the environment.

### **How Has The Way We Address The Issue Of The Environment Development Over The Decades?**

In the 1970s, we started to recognise that communities have rights in terms of conservation.

In the 1980s, we focused on sustainable development. The IUCN has coined the idea of sustainable development with three crucial elements: social, economic and environment. Still today we are trying to work with sustainable development.

In 1991, just before the Rio Summit, we had *Caring For the Earth, A Strategy for Sustainable Living*, which states that “each human individual has a responsibility to respect the rights of others”, but also “every life form warrants respect independently of its worth to people”.

The 1990s also saw the Aarhus Convention where there became an increased recognition and enforcement of procedural rights, including information, participation, and environmental justice.

In the 2000s, human rights identified links between poverty, climate change and the environment, and we are now talking about the rights-based approach to development and conservation. This also concerns gender equality, indigenous peoples rights, tenure and resource access rights, and the rights to water.

These are concepts and challenges that are really about power, which is why ‘power’ was included in the title of my speech. Also because we are talking about conflicts, consensus and how to deal with these real struggles around the world.

### **Linking Human Rights And The Environment By A Legal Measure**

In an attempt to link human rights and the environment by a legal measure, the IUCN drafted an International

Covenant on Environment and Development in the 1990s, which consolidates principles and rules of international environmental law and development, and reflects the IUCN policies. It is therefore an authoritative reference for the IUCN and policy-makers globally.

There are strong articles in the Covenant, including Article 1, which states that “environmental conservation [is...] an indispensable foundation for sustainable development”. It is particularly important that we all recognise that it really is all about sustainable development, no matter what background we come from.

Another recognition in the Draft Covenant is the procedural rights that we also see in the Aarhus Convention: the right to access environmental information; the right of all citizens to participate effectively during the decision-making processes; the right of indigenous peoples, local communities and vulnerable or marginalised persons to be involved in relevant environmental decision-making at all levels; and the right of effective access to administrative and judicial procedures, including for redress and remedies.

One other Article that is a starting point in the conversation, but also poses as a challenge for us, is Article 2 of the Draft Covenant, which states that “nature as a whole and all life forms warrant respect and are to be safeguarded”.

### **Questions That Need To Be Considered On Rights, Environment, Human Wellbeing And Development**

*What can ‘a safe, clean, healthy and sustainable environment’ do to support the full enjoyment of human rights?*

For example, ecosystem goods and services underpin the rights to human wellbeing, such as food and water; and natural ecosystems address hazards to human wellbeing, such as climate change. We call these ‘nature-based’ solutions to sustainable development, including climate change adaptation and mitigation.

Lets not only talk about how nature is suffering or how biodiversity loss is increasing, but lets also talk about the fact that nature can offer some of the solutions to some of the global challenges that we have. For example, if you base your climate change litigation on saving the rainforest, this is a nature-based solution.

*How can a human rights-based approach guide environmental decisions so that they ensure both effectiveness and equity?*

“Conservation with justice”: social and gender equity, human wellbeing, aspiration of everyone to live in dignity and cultural identity; and the tenure security of rural

people is key for good environmental management and also for their rights to food, water, health, etc.

It goes both ways; when we are actually talking from the development point and from the conservation point of view, we recognise that many of the poorest peoples are very dependent on natural resources so we not only want to fulfil their rights, but we also want to use them as “managers of biodiversity conservation”.

### **Respecting Rights: A Defensive Approach**

If we look at the relationship between rights and conservation, we need to first have a defensive approach. Conservation must respect human rights in all circumstances and must never lead, imply or justify human rights violations. In terms of substantive rights, this defensive approach covers the entire spectrum – from the right to life to all social, political, economic, cultural, and environmental rights.

It is then also important to consider climate change as an important theme of this conference, whereby we need a rights-based safeguard system that addresses risks of resettlement, climate change impact and the loss of livelihood resources. This is a real challenge where we need those of us working with conservation or development to learn from those who have a rights-based or law background. We need to find a way to implement that into our work to deal with all the vital changes that are needed in the world as a consequence of natural disasters, etc.

### **Fulfilling Rights: A Proactive Approach**

In the more proactive approach of fulfilling rights, we need to identify specific rights that are supported by conservation of ecosystems and their goods and services, which are needed for the right to an adequate standard of living. For example, the rights to water, food, health and development. We need more nature-based solutions to food, nutrition and water security, disaster risk reduction, and rights-based conservation and development programmes. It's not rocket science; it is possible to go out there and work with nature and people, and then link rights to sustainable development.

Incorporating the rights of indigenous peoples over their lands, territories and resources is essential for valuing and conserving nature for livelihood security. We are not necessarily advocating a campaigning approach to this, but rather an enabling one with capacity building, awareness raising, empowerment, conflict resolution, fair negotiation, informed participation, etc.

### **Climate Change And Gender Action Plans**

One example of this is between climate change and gender action plans. We, at the IUCN, have been working towards this with non-profits. The rights-based approach is needed to address the effects of climate change. The human rights and gender-based approach to climate change ensures that the laws and policies adopted at a national level fully respect the rights of women to equal treatment, reinforces the

obligations for fair and equitable distribution of benefits, and ensures women's participation in decision-making.

Since 2010, we have worked with a number of governments to help them realise their commitments to women's human rights and the environment through Climate Change and Gender Action Plans (ccGAPs), which include national policies on gender and climate change, and roadmaps for specific actions.

### **Exploring The Concepts Of 'Nature Rights'**

Is it necessary now for us to go forward exploring the concept of 'nature's rights?' The IUCN has launched 'a process that considers the Rights of Nature as a fundamental element' for all actions of the IUCN. There are some problems with this, however, because such frameworks are usually human constructs for only issues between humans. There are also ethical issues: 'do we want everything in nature to have the right to be safeguarded?'

Biodiversity loss and climate change are two factors that may have already made the world cross beyond planetary boundaries of sustainability. So perhaps we have to recognise the concept 'nature's rights'.

We can take this discussion of environmental rights into an issue of the governance of nature's use. We don't think we can govern nature, but we do think we can govern its use. The IUCN is designing a *Natural Resource Governance Framework*, which aims to come up with principles and tools that will help everybody make sure that the governance of nature is done in a more ethically and equitable manner. The indicators we use are both equity and effectiveness that assess the state of government or natural resources in different decision contexts and identify concrete approaches and measures for gradual improvements. If you want to deal with the issue of human rights and the environment at the same time, governance is in fact one of the ways that you can do it.

The conclusions and challenges, therefore, are:

- Rights-based conservation is needed for sustainable development, including climate change adaptation and mitigation;
- Effective and equitable governance of nature's use is needed for sustainability, including protection against natural disasters;
- Nature-based solutions can meet parts of global challenges, including climate change, food, nutrition and water security;
- The existing international regulatory framework falls short vis-à-vis planetary boundaries, particularly on implementation;
- It is, therefore, all about *people, planet and power*.

Thank you.



# Seminar Report

## INTRODUCTION

A clean and healthy environment is important for the full enjoyment of human rights. With increasing environmental degradation and climate change, the inter-connections between sustainable development, human rights and environmental protection have raised new questions – some of which were addressed at the 13th Informal ASEM Seminar on Human Rights, titled ‘*Human Rights and the Environment*’.

The Informal ASEM Seminar on Human Rights series is organised by the Asia-Europe Foundation (ASEF), the Raoul Wallenberg Institute (as delegated by the Swedish Ministry for Foreign Affairs), the French Ministry of Foreign Affairs and the Philippine Department of Foreign Affairs. The 13th Seminar was hosted by the Danish Ministry of Foreign Affairs and the Danish Institute for Human Rights (DIHR). It brought together 137 participants including official government representatives and civil society experts, representing 48 of the 51 ASEM partners to discuss the challenges presented by environmental degradation on the promotion and protection of human rights. Additional side events at the Seminar included an event on Climate Change and Indigenous People and a special panel on Environment, Human Rights and the Role of Private Actors.

There was overall agreement that the human rights aspects of environmental protection should be strengthened and that a human rights-based approach should be made more prominent in the international climate change, sustainable development and biodiversity conservation discussions. A right to sustainable development has already been identified in both international human rights and environmental declarations. It was felt that greater prominence and recognition needs to be given to environmental protection as a core economic and social value in 21st century United Nations policy. All relevant stakeholders, especially civil society, need to be better engaged in international policy development on these issues. The transboundary impacts of environmental degradation continue to pose significant challenges in both regions. In the absence of new agreements on how to address these issues, existing mechanisms should continue to be used to resolve transboundary environmental degradation.

Market mechanisms that address environmental protection can only be consistently effective if backed by adequate regulatory frameworks and strong national legislation. Legislative frameworks should include rewarding effective implementation and compliance. Participation goes

beyond consultation; it means that an environmental or natural resources administration enters into a dialogue with the public concerned, before a particular decision is reached. In this regard, capacity-building and environment and human rights education is needed not only at the ‘official level’ but for the general population as well, so that all elements of society can participate in discussions on environmental degradation, climate change and their human rights implications. There is a need to identify vulnerable groups in both Asia and Europe. However, vulnerable groups should not be characterised as victims but rather as actors to be engaged in environmental decision-making. Indigenous populations and people living close to the land require special consideration in ensuring their access to information and informed consent in administrative decisions.

The procedural rights of access to information, public participation in decision-making and access to justice are key to the effective engagement of the public in environmental matters. Subject to the specific situation of each country, provision should be made to guarantee effective access to justice. The ideal situation of making such provisions legally binding may take time. Pending such measures, soft law approaches should be applied as a first step. For example, even if the Aarhus Convention cannot be fully replicated quickly in Asia or signed and ratified by every country, the procedural rights provided for in the Convention can be legislated for and implemented in different regions and adapted to domestic requirements.<sup>1</sup>

The Seminar convened four working groups for direct and in-depth discussion on the relationship between human rights and the environment. They focused on the *interaction between sustainable development, environment and human rights; access to information, participatory rights and access to justice; actors, institutions and governance; and climate change and human rights implications*. Detailed reports of the individual working group discussions can be found in the following sections.

## **Working Group 1: The Interaction Between Sustainable Development, Environment And Human Rights**

### ***Sustainable Development***

In its discussion on the concept of sustainable development, there was general agreement in the Group that the concept entails three basic premises: all States aim at achieving economic development, economic development has to be achieved while avoiding environmental degradation, and

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<sup>1</sup> More detailed information about the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters can be found in Working Group 2: Access to Information, Participatory Rights and Access to Justice) of this report.

there must be a social benefit from such development. This can be obtained through a balance between policies aiming at the promotion of economic growth, environmental protection and promotion of human rights.

There were two opposing examples of government action dealing with this balance between economic development, human rights and environment. The first was a negative example presented by the *Ogoniland Case*.<sup>2</sup> In that case, the economic advantages of oil exploration had not been felt by the local population. Instead, they only experienced the disadvantages of the lack of regulation and control of the activity that destroyed the environment and deeply affected their lives. As such, the Nigerian Government had failed its duties to protect human rights. The contrary example was provided by the *Hatton Case*.<sup>3</sup> The noise pollution of Heathrow Airport at night was considered a necessary evil of an activity that was both fundamental for local economy and benefited the general population. In addition, the government had acted to minimise the effects of noise in the neighbourhood of the airport. By doing so, it had achieved to strike a balance between economic development and environmental protection.

The conclusions of this first discussion achieved a wide consensus. These were:

- i. Governments have a pivotal role in achieving a balance between economic development and the protection of the environment and human rights;
- ii. Such a balance is not only possible but also necessary;
- iii. One way of achieving such balance is through the involvement and participation of the public concerned in the decision-making procedure of those projects with potential impacts on the environment and human rights.

### ***Causes and Origins of Unsustainable Development***

The Group generally agreed that, despite the valuable efforts from many States, international organisations and different agents in civil society, the present economic development is, in most cases, unsustainable. Different causes and different agents contribute to this. In order to propose solutions, the group found it necessary to analyse failures.

On the part of many governments, there is a failure to regulate environmental nuisances. Even when such regulation exists, it is often insufficiently strong. In many cases there are also failures in the enforcement of the law providing environmental standards. This lack of regulation or enforcement leads to environmental degradation and human rights violations.

It was also considered that some businesses fail to comply with national laws on environmental protection or human

rights. This lack of compliance is especially visible in large, even in multinational corporations. However, it is also common to small local businesses.

One other frequent cause for unsustainable development is the failure of accountability mechanisms when dealing with environmental degradation. This means that the costs to the environment from this degradation are not internalised, and thus often ignored, by the polluting agents.

Another cause for the present unsustainability is the often exclusion of civil society from participation in decision-making that concerns legislation and projects that can have an impact on the environment. The local and broader population, NGOs and academic experts could bring a positive input that is presently not taken into account sufficiently, or at all.

The main conclusions of this discussion were:

- i. States need to address failures to regulate and enforce environmental standards;
- ii. Businesses need to take positive action to prevent environmental harm;
- iii. The ‘polluter pays’ principle should be incorporated into regulation so as to internalise environmental costs of economic activity civil society should be invited to participate in decision-making of legislation and projects that can affect the environment.

### ***Human Rights as a Tool to Protect the Environment***

The discussion then focused on the possibility of human rights being an instrument in the protection of the environment. The main question was how human rights mechanisms could prevent environmental degradation.

It was generally accepted by the Group that environmental degradation could have serious impacts on human rights. The Group discussed the rights to life, health, private life, property and other rights that could be affected by environmental degradation. It concluded that in these cases, human rights mechanisms can be extremely useful in pursuing environmental protection. These can be pursued through the rights of access to information, participation in decision-making procedures and access to justice.

However, the human rights regime cannot address environmental degradation on its own. The use of human rights for environmental concerns does not refer to legal environmental standards and their enforcement. Even if in certain cases human rights regimes can pursue environmental objectives, these do not replace domestic and international standard-setting.

<sup>2</sup> *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001).*

<sup>3</sup> *Hatton and Others v. the United Kingdom, European Court of Human Rights, Application no. 36022/97.*

The Group concluded:

- i. The ‘greening’ of human rights is beneficial to the environment. As such, legislators and judiciary should adopt an environmental perspective on human rights;
- ii. States should be encouraged to take steps to better environmental domestic legislation and to negotiate stricter international environmental standards.

### ***Is There a Need for a Right to The Environment? If So, What Would the Content of Such a Right Be?***

There was less consensus among the Group on the need and possible content of a ‘right to the environment’.

A part of the Group considered that there were already substantive human rights that were recognised as being affected by environmental degradation, including the right to life, health, private and family life and culture. There are also procedural rights that aim at securing these rights, such as the right of access to justice and the right of participation in the decision-making. The adoption of environmental standards in a rule of law scenario will allow individuals to use these procedures to secure their substantive human rights.

Another part of the Group considered that as sometimes environmental and human rights standards are not adopted or implemented effectively, the establishment of a right to a clean and healthy environment may help the judiciary to secure the ‘sustainability’ of projects while promoting the right to environment. Procedural rights also might not be sufficient to address their environmental concerns. In some cases, judges already use ‘soft law’ norms of international law to this end. Besides, it can be used in the decision-making procedure to balance with other economic and social rights. Finally, it can also be used to challenge the policies of some States to treat environmental information as ‘State secrets’.

The Group agreed that many constitutions have incorporated a right to the environment. This happened in the constitutions of some Asian countries<sup>4</sup> and in many constitutions in Europe.<sup>5</sup> In this sense, the promotion of such a right in international law would be following constitutional precedents.

When dealing with a right to the environment, it was noted that some courts in South Asia have recognised such a right. They have thereby ensured that inaction from the state is compensated by judicial action. This is not normally the case in Europe where there is generally sound environmental legislation. In this context, even if governments fail to implement and enforce this legislation, courts can make orders to do so. The Group concluded that these

differences prevented a consensus on the need to adopt a universal right to the environment.

The Group was later divided in two and a sub-group considered what this ‘right to the environment’ might mean. There was a general agreement within this sub-group that this right could contain four different aspects:

- i. Right to enjoy the environment;
- ii. Right to reject environmental degradation;
- iii. Right of access to environmental information;
- iv. Right to participation in the decision-making procedures of projects, plans and laws that may affect the environment and the livelihood of the population and access to remedies.

The overall conclusions of the discussion on this topic were:

- i. There was a general consensus that the right to the environment is included in many constitutions in Europe and Asia;
- ii. In relation to this right, the present situation in Europe and Asia is generally different:
  - a. In Europe, existing environmental standards can be defended and enforced through the use of procedural rights, which eventually might lead to the ‘greening’ of substantive rights;
  - b. In Asia, the right to a healthy environment can serve to compensate for the lack of environmental standards, provide a balance with economic rights and ensure the transparency of environmental information;
- iii. This right could be constituted by a right to the enjoyment of the environment as well as rights of access to environmental information and justice.

### ***The Importance of Education in the Promotion of Sustainable Development***

The discussion also turned to the importance of education in the promotion of environmental protection and protection of human rights. It was suggested that the differences in the European and Asian approaches owed a lot to different perceptions of the importance of the environment and human rights. It was generally accepted by the Group that there could not be one universal model of education serving the different countries in Europe and Asia, from the Atlantic to the Pacific.

<sup>4</sup> See, for example art. 48A of the Indian Constitution and 28H of the Indonesian Constitution.

<sup>5</sup> See, for example, the 2004 Charter of the Environment of the French Constitution, art. 110b of the Norwegian, art. 45 of the Spanish and art. 66 of the Portuguese Constitution.

Education has a fundamental role in the promotion of environmental and human rights standards. Governments should promote awareness of these issues in different sectors of the society, such as the judiciary, lawyers, students, academia and politicians. Such awareness should have in mind:

- i. Separation and interdependence between the different powers of the State: legislature, executive and judiciary;
- ii. Dissemination of environmental and human rights information to the general population;
- iii. Existence of vulnerable groups such as Indigenous communities, local populations, women and children and their specific needs;
- iv. Social and environmental awareness of the business sector;
- v. Compliance with the law and mechanisms for law enforcement.

One suggested approach to education was to consider not only humans but also the interests for nature itself. People should be understood not as existing outside of nature but in a symbiotic relationship with it. It should be understood that harm to nature always affects humans and vice versa. People are to be perceived as an integral part of the global ecosystem.

Another approach is to consider the relationship between the different agents influencing, and being influenced, by environmental degradation. The Group considered that education and awareness should be directed at different particular groups with the following purposes:

- i. Individuals are to be understood not only as the victims, but also as the cause of environmental degradation. Awareness for a more environmentally friendly behaviour in all areas of human activity is fundamental in achieving a truly sustainable development;
- ii. Nature creates many business opportunities for the corporate sector. Such opportunities will be wasted by environmental degradation. Corporate profits and nature should not be understood as opposed to each other, but as potential allies;
- iii. Politicians and the judiciary should have in mind long-term objectives of policies and law. There should be awareness of humanity's role as 'steward of the planet.' The present generation must have in mind the interests of future generations;
- iv. Academia should study solutions for environmental and human rights problems. It also has a fundamental role in the research and promotion of sustainable

solutions for present concerns. The role of academics is always important in giving credibility to a policy of protection of the environment and human rights. This is particularly important in developing countries;

- v. Different organs of the State, such as parliaments, governments, courts and municipalities, together with NGOs and other social, economic, religious and cultural groups representing different interests of civil society have a fundamental role in the education of all sectors of society for environmental and human rights issues.

### ***The Boundaries of Planet Earth and Sustainable Development***

The Group also discussed the concept of boundaries of planet earth. These boundaries are the natural limits of the planet in its own regeneration. There was a general consensus in that not only the regeneration of the planet is limited (therefore the expression 'boundaries') but, furthermore, the present level of environmental degradation already goes beyond these limits. There was also a consensus that with the present level of technological advance, mankind could refrain from degrading the environment as much as it is doing at the moment. Such effort could allow the planet to regenerate.

The Group considered that development that does not permit the natural regeneration of planet earth is not sustainable, and that States and the private sector should bear in mind the conclusions on green economy of the UN Rio+20 Conference. The Group also praised the work of the United Nations Environment Programme (UNEP) on promoting the concept of the green economy.<sup>6</sup>

In addition to examining ideas around the green economy, the Group considered the principle of Common But Differentiated Responsibilities. It was accepted that all States have the responsibility to protect the nature, not only in their own territory but also global environmental goods. This common responsibility also means that States with more economic and intellectual resources should also invest more in research of the limits of regeneration of the planet and on environmentally sound technologies.

In summary, the Group generally agreed that:

- i. The capacity of regeneration of the planet has been surpassed by human activity;
- ii. States and the private sector should incorporate green economic thinking for all development activities;
- iii. All States should increase their investment and efforts in reducing human-based environmental degradation, particularly those States with greater economic and intellectual resources to do so.

<sup>6</sup> See: <http://www.unep.org/greeneconomy/>

### ***Sustainable Development and the Relationship Between the Developed and Developing Worlds***

The Group concluded that developed States have greater means to promote sustainable development. However, environmental degradation does not stop at borders and it also affects the world's commons, such as climate, the ozone layer and the high seas. As such, the isolated responses of developed countries, even if very important, would not be sufficient to stop global environmental degradation.

The Group felt that developing countries would, in most cases, welcome assistance with capacity-building from developed countries. In this sense, sharing technologies to replace carbon-based energy sources and polluting practices would be an important step. At the same time, the knowledge and experience of procedures of decision-making that aim to address environmental degradation can also be shared. There was less agreement on the idea that an Aarhus-type agreement could become universal. Some participants saw its adoption by developing countries as very important, whereas others considered that some countries might not be ready for it and such an instrument and the concepts behind it would need to adapt to those realities.

In conclusion:

- i. The Group urged developed and developing countries to enter into meaningful negotiations towards an exchange of knowledge and experience to address the problem of environmental degradation;
- ii. The Group urged Asian States to study the possibility of adopting an Aarhus-style agreement adapted to the regional realities.

### ***Foreign Trade, Investment and Sustainable Development***

One idea that was present during the entire debate was that developing countries might experience difficulties in enforcing environmental and human rights standards on transnational companies investing or doing trade in their territories. It was proposed that the States where these companies are incorporated should consider measures that promote transnational protection of human rights and the environment.

It was suggested that capital-exporting States might feel reluctant to do this individually, given that their companies would be at a comparative disadvantage compared to companies from other similar States. This could be solved through a multilateral treaty signed between capital-exporting countries. Such a treaty might approach the problem with different solutions. One solution would be to grant access to justice in the country of incorporation. Another would be to make public the reports of the national companies operating in developing countries.

The Group recommended that:

- i. Multinational corporations be called on to promote a sustainable behaviour in their activity;

- ii. Investor States should seek to agree on the forms of action for companies incorporated within their jurisdictions.

### ***Working Group 2: Access To Information, Participatory Rights And Access To Justice***

#### ***1998 Aarhus Convention***

In order to start the discussion, an introduction on the rationale of the Aarhus Convention was given. This Convention had been negotiated under the United Nations Economic Commission for Europe (UNECE), was signed in 1998 in Aarhus (Denmark), entered into force in 2001 and so far has been ratified by 46 European States as well as the European Union itself. It deals with access to information, public participation in decision-making and access to justice in environmental matters.

It is based on the consideration that in modern States, public authorities take numerous decisions that affect the environment, such as the granting of permits, the planning and executing of infrastructure projects, the monitoring of emissions into air, water and soil, the management of waste and the collection and processing of data on the environment. It was recognised that public authorities do not own the environment, as it belongs to everybody. While for public authorities, decisions affecting the environment might often be a purely technical question, for the environment itself and the population concerned, the details of the administrative decision might be of considerable importance. Hence the concept underlying the Aarhus Convention is that the public should have a right to participate in the elaboration of the administrative decision on projects, plans and programs that concern it.

In order to be able to reasonably participate in the consideration of such projects, plans and programs, the public concerned must have access to the information on the environment, which is in the hands of the public authorities. The final decision on the project lies with the administration. Should there be a divergence between the opinion of the public concerned and the public authorities, the public should have the right to appeal to a court of justice, as the arbiter between different opinions and interests. The Aarhus Convention also grants rights to environmental organisations, in order to ensure that the environment is appropriately represented.

The Aarhus Convention enshrined, in the context of environmental matters, the right of access to information, the right of public participation in decision-making and the right of access to justice as fundamental procedural rights. These rights constitute the connection point to the human rights discussion at the international level.

#### ***Access to Environmental Information***

The Group, after a lively discussion, agreed that openness, transparency and access to environmental information needs to be improved in environmental matters – both in Europe and Asia. It was of the opinion that a global

agreement like the Aarhus Convention might be desirable, but that the prospect of reaching such an agreement in the foreseeable future is unlikely. Further, the execution of a regional agreement, for example in the Asian region, would not be easy because, with the exception of the Association of Southeast Asian Nations (ASEAN) Human Rights Commission, which was established in 2010, no regional organisation exists to act as a driving force.

The Group acknowledged that public international law instruments on human rights already contain some provisions on information and participation rights, which can also extend to environmental issues. However, these provisions are not always easily applicable to everyday concerns of individual citizens or of environmental organisations on matters such as land use, pollution control, permitting of economic activities or waste management. Also, these provisions are often laid down in soft law instruments. The Group was of the opinion that discussions on the inter-relationship between human rights and environmental concerns at international, regional and national levels should be continued and deepened. The goal should be to integrate the existing mechanisms of international human rights law as they may apply to the environment.

There was a general consensus in the Group that public authorities should, on their own initiative, make information on the environment publicly available, especially as cheap and modern technologies exist. Such information should include research studies, data on the state of the environment, documents received during permit procedures, environmental impact assessments and cost-benefit analyses, as well as data on the monitoring of water and air, products and waste, noise and radiation, biodiversity, nature conservation and land use, and on emissions, discharges and other releases into the environment. The objective of making such information publicly available is to enable the public to be meaningfully involved in environmental protection, as this is in its own interest to do so. Public authorities should recognise that they hold environmental information in the public interest, not in their own interest and therefore public authorities should share environmental information to the greatest possible extent.

Environmental information conveyed to the public – on request or at the administration's own initiative – should be usable and useful. As a matter of principle, information should be made available in the language of the public concerned, an issue that is of particular importance for the rights of Indigenous populations. For a variety of communities, it is important to make such information available in a variety of formats, noting that Internet access may not always be the most appropriate way of conveying material to disadvantaged groups. Flexible solutions need to be found in order to share the public authorities' knowledge with the public concerned.

As the Aarhus Convention may also be adhered to by any country, this might be a way forward, in view of diverging opinions in Asia about the usefulness of having a specific

Aarhus-type Convention for Asia. With regard to the elaboration of a regional convention in Asia, it must be remembered that the strength and the mandate of institutions is rather different in Europe and Asia. As a first step, States' domestic legislation on access to information, public participation in decision-making and access to justice in environmental matters should be reviewed and improved. Environmental degradation continues in Europe, in Asia and at global level, and the planetary challenges – climate change, loss of biodiversity, resource management, eradication of poverty etc. – are likely to increase in the decades to come. Therefore, people should learn to protect their environment and join in the discussions on projects plans and programs that affect it.

While it is always delicate to transfer legal instruments and institutions from one region to the other, Asian countries could examine the positive and less positive experience of European countries. A working group with Asian and European participants could be set up – for example under the auspices of the Asia-Europe Foundation (ASEF) – to explore ways and means of making available the experience of European countries and institutions with the Aarhus Convention and its establishment of procedural fundamental rights.

### ***Participation in Environmental Decision-Making***

With regard to public participation in environmental decision-making, the Group accepted that a participation process by itself could not substitute for or rival legislative parliamentary procedures, as parliaments are the elected representatives of the population.

The Group clarified the difference between consultation and participation, as follows:

- i. *Consultation* is a unilateral process, where citizens and environmental groups are given the opportunity to comment on a specific or general proposed activity;
- ii. *Participation*, in contrast, is bi-lateral and gives more overt protection to the rights and interests of those involved: the administration identifies the public concerned, makes available to that public the necessary information and documentation, accepts submissions, opinions and alternative proposals, takes these comments into consideration and, once the decision is taken, explains the option chosen and the reasons for this choice.

The new element, which the Aarhus Convention brought to the discussion on environmental policy decisions, is that the administration is now obliged to listen to the public and can be sanctioned if it omits to do so.

Participation should be based on effective binding of legal rules. It should start early in the decision-making procedure, when all options are open, and it should be fair. Effective and fair participation increases the acceptability of projects and may accelerate the overall decision-making procedure.

As participation is a relatively new concept, capacity building for civil society stakeholders, such as environmental organisations and officials at municipal, provincial and national level is important for the promotion of democratic elements in administrative decision-making. A mechanism should be set up to collect, compare and make publicly available best practices in participation procedures. Such a mechanism should ensure a continuous exchange of information on such practices. Again, an Asia-Europe mechanism of this kind could be of mutual benefit.

Particular attention is to be given to the participation of Indigenous communities, as their specific cultural, social, environmental and economic situation is not always fully recognised by law. Participation by Indigenous groups in the making of decisions affecting them should take place early, be organised in good faith, respect their consensus-building methods and be effective. The fact that Indigenous communities often enough do not have documents, material titles or other evidence to tangibly prove their rights should be taken into consideration. Decisions on projects, plans and programs should be based on the principle of free, prior and informed consent. The monitoring of projects, plans and programs should, as much as possible, be in the hands of Indigenous populations.

Sanctions for non-compliance with the requirement of public participation should be proportionate, contain a deterrent element and be effective. One possible sanction is the annulment of the administrative decision. The public concerned should have the possibility to appeal to a court of justice or another independent and impartial body – at the very least, to challenge deficiencies in the participation process. There should also be opportunities to challenge the merits of an administrative decision before an independent and impartial body vested with the power to make a *de novo* decision.

The Aarhus Convention's compliance mechanism is a useful instrument, as it is a means to make national authorities respect participation provisions in practice by exercising some pressure on them. All States that have ratified the Aarhus Convention accept – though sometimes reluctantly – the authority of the Aarhus Convention Compliance Committee and its recommendations.

### ***Access to Justice in Environmental Matters***

With regard to access to justice in environmental matters, the Group felt that there should be, according to the specific situation of each country, binding legal provisions on access to courts. Pending such measures, soft law approaches that facilitate access to justice, such as guidelines or recommendations, might be applied as a first step, though the second step should not be 'forgotten'.

It was noted that in 2010, UNEP adopted 'Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters', which might inspire national

legislators. Until now, however, this soft law approach appears to have had limited influence on national legislation.

Rules in relation to standing in environmental matters should be liberal, open and be available to both individual citizens and environmental and community organisations. Civil society should have the possibility to seek to protect the environment when public authorities do not fulfill this task – for policy reasons, lack of human or financial resources, lack of data or for other grounds. Court and other appellate tribunal procedures should be fair, effective and expeditious. In view of the fact that court procedures often take time, injunctive relief should be available. In addition, regional and international complaints bodies should also be accessible for disputes regarding environmental decisions.

Particular attention should be given to the requirement of avoiding expensive costs for individual applicants and environmental organisations, as litigation in environmental matters is normally initiated in the general interest and not in favour of personal or vested interests. Effective systems of legal aid and pro-bono lawyers should be made available to citizens and environmental organisations.

Environmental organisations and human rights defenders that involve themselves in environmental decision-making should be given particular protection against persecution or intimidation. National Human Rights Institutions should be given responsibility for this issue.

There are many existing legal provisions that make litigation in the interest of the environment particularly difficult. Such provisions concern, in particular, the burden of proof, the causation link, the corporate veil, the proof of the existence and the dimensions of damage to the environment, the calculation of damages, measures to ensure complete and sustained restoration of the impaired environment, and effective sanctions in criminal, administrative and civil law for the breach of environmental protection provisions. In this regard, more effort should be made to examine the specificities of litigation to protect the environment and to develop creative solutions.

### ***Capacity Building of Actors on Environmental Issues***

The lack of full and complete application of the letter and the spirit of existing environmental legislation is the greatest challenge for lawyers in all countries and regions. The Group therefore strongly favoured extensive capacity building and training of judges, prosecutors, attorneys and other persons. Judgments on environmental issues should be systematically collected and be made publicly available.

Unlike other policy sectors – agriculture (farmers), fisheries (fishers), competition (competitors), trade and industry (producers and traders) etc – the environment has no social group behind it that actively participates in shaping, elaborating, amending and applying the legal provisions affecting the sector. For this reason, public authorities need to

make specific efforts in protecting the environment against vested interest pressures. Civil society stakeholders should be entitled and enabled to contribute to this task as they are affected by environmental impairment. Better access to environmental information, improved participation in decision-making and reasonable provisions on access to the courts can improve the protection, preservation and improvement of the environment, for the benefit of the present and of future generations.

### **Working Group 3: Actors, Institutions And Governance**

#### ***Initial Questions***

##### *Defining vulnerable groups*

The Group initially asked the question: *Whose interests are we protecting?* It was felt that there was a need to identify and define vulnerable groups in terms of the links between human rights and environment impacts. It was stated that the vulnerable groups identified, whether they be those impacted by the effects of climate change or other environmental changes, should not be characterised so much as victims but as actors to be engaged in decision-making about their future.

For local and national environmental issues, human rights concerns of specific groups were easily identified. Examples included pollution, deforestation and the impact of building and operating hydro dams.

For global environmental issues, human rights concerns are more generalised, but still affect some groups more than others. The main concerns expressed were:

- i. Climate change, where particularly vulnerable groups included Arctic peoples, island peoples, and poorer communities without adequate resources to adapt to rapid change;
- ii. Biodiversity depletion, where vulnerable groups identified included forest peoples and fishing communities.

Some of these issues are revisited more specifically below.

##### *Human rights, environment protection and transitional justice*

A further question raised in the initial discussion was that of transitional justice – a concept from human rights law that could be imported into the realm of environmental law. This was said to arise in circumstances where the environment of landowners or managers has been severely impacted by the policies of former authoritarian regimes in some countries in both Asia and Europe, whereby large scale mining and forestry activities were carried out without adequate or any environmental impact assessment or other participation by local people. This included situations where a large proportion of traditionally occupied land was classified as forest areas and later

regarded by the authorities as State forest areas, without any recognition of the fact that they were customary or traditionally-occupied lands.

The issuing of forestry, plantation and mining licenses over these lands resulted in major land disputes, which prevented the implementation of sustainable natural resources management principles. These situations have caused serious environmental problems with some victims continuing to suffer many years later. The point was made that the concept of transitional justice in human rights breaches can be borrowed by environmental law systems to address ecosystem restoration as well as to provide some restitution for victims by recognising their environmental rights.

##### *Potential conflicts between human rights and environment protection*

A further question was whether human rights and environment protection could conflict with each other. There was agreement that such conflicts do occur, and the issue was how to resolve these conflicts. Examples included:

- i. The need for economic development, which may result in pollution and other environmental degradation, while needing also to protect human health;
- ii. Traditional ‘slash and burn’ agriculture in the context of diminishing land resources and the consequent need to promote a transition to sustainable farming.

##### ***Human Rights and Conservation Conflicts in the Indigenous Context***

A specific focus was on the issue of governments causing or forcing people off their traditional lands in order to declare them as protected areas with the purpose of conserving biodiversity. A counter proposition to this was the need to embrace traditional ecological knowledge to manage inhabited protected areas, thus promoting continued occupation and maintaining the traditional links with those areas. Reference was made to the importance of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Articles 28 and 29 in resolving human rights and conservation conflicts:

- i. *Article 28:* Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent:
- ii. *Article 29:* Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for Indigenous peoples for such conservation and protection, without discrimination.



## ***Human Rights and Development Conflicts: Hydro Dams***

The group engaged in a comprehensive discussion on hydro-electricity dams, focusing on the needs of vulnerable communities, forced displacement, and the need for greater participation in decision-making, including through adequate and legally enforceable environmental impact assessment processes. A further issue identified was that of the application of transboundary human rights and environment protection considerations in the context of international rivers in both Asia and Europe.

The Group identified both positive and negative effects of hydro dams in terms of drawing the links between environmental impacts of hydro development and their effects on a range of human rights.

The positive effects included:

- i. Reducing reliance on fossil fuels;
- ii. Benefiting navigation;
- iii. Assisting flood control.

The negative effects included:

- i. Reducing food security;
- ii. Diminishing fish populations, particularly because of inability of fish to migrate upstream or downstream past the dams;
- iii. Flooding valuable agricultural lands;
- iv. Destruction of natural and cultural heritage, including cultural landscapes and ancient buildings and structures;
- v. Destroying habitats of endangered species.

## ***Environmental Impact Assessment, Governance and Human Rights***

The Group generally agreed that broadly conceived environmental impact assessments can address many development, human rights and environment protection issues. The discussion included a focus on:

- i. The use of strategic impact assessment, which involves long term broad-scale, often cumulative and transboundary, impact assessment that takes into account the environmental, human rights and social concerns of any particular development. Examples of hydro dams on major international rivers in Europe and Asia were mentioned;
- ii. Social impact assessment: this includes where development activity affects communities and specific groups within communities' terms of social and cultural rights to life;

- iii. Human rights impact assessment was discussed as a specific aspect of social impact assessment, asking the question of how a particular development activity affects the specific human rights of relevant individuals and communities, including livelihood, privacy, family, shelter etc.

Results of broader environmental impact assessment processes were identified to include the redesign of development to reduce the environmental and human impact (e.g. in the context of dams: 'run of the river' low dams rather than high wall dams, and variation in the operation of dam flood gates to achieve fish migration and regeneration).

This discussion concluded with the point that there was a need for more systemic thinking, in order to take into account environment protection and human rights concerns of *all* stakeholders. Some of the Group also urged taking into account intrinsic environmental rights, recognising the inherent value of the environment and the right of the environment itself to exist. Reference was made to concepts found, for example, in the Bolivian and Ecuadorian Constitutions, where the rights of Mother Nature or *Pachamama* are recognised.

## ***Addressing Multi-Stakeholder Concerns***

The Group discussed the broad issue of how best to involve the public in environmental decisions that affect them, particularly in terms of development activity that might impact on their human rights. It was agreed that a legislatively-based and adequately implemented environmental impact assessment was a basic and vital requirement to address multi-stakeholder concerns. Further, Principle 10 of the Rio Declaration, delivered directly through the adoption of the Aarhus Convention or legislative or other mechanisms that replicated the Aarhus provisions was another important avenue (i.e. access to information, public participation, and access to justice).

While there was general agreement concerning the adoption of the basic procedural elements of information and public participation of the Aarhus Convention in the Asian region, it was also recognised that institutional backing and capacity building was required to make these procedural elements a reality. Merely setting up a legal framework would not guarantee implementation.

Discussion then centred on how best to promote Aarhus elements, with the following options being explored:

- i. Adoption of the Aarhus Convention itself by individual countries?
- ii. In an Asian region-wide instrument?
- iii. In Asian sub-regions?
- iv. Adoption through legislation or policy at national level?

The Group took no particular position on any of these options.

## ***The Need for an International Authority Within the UN System on Environmental Issues***

The need for an international governance body with substantial power was addressed within the context of human rights concerns. One question was whether the UNEP should be this body; some argued that there was no need for a new institution, but for a transformed institution. It was noted that with regard to the UNEP, this transformation was already taking place, with the move to the UNEP Council now having universal membership (rather than a smaller number of countries being members at any one time) and the establishment of the UN Environmental Assembly from June 2014.

Reference was made to the Rio+20 Outcome Document: *The Future We Want*, paragraph 88, which addresses human rights concerns, although not directly:

[...] strengthening and upgrading UNEP in the following manner:

- i. Establish universal membership in the Governing Council of UNEP, as well as other measures to strengthen its governance as well as its responsiveness and accountability to Member States;
- ii. Have secure, stable, adequate and increased financial resources from the regular budget of the UN and voluntary contributions to fulfil its mandate;
- iii. Enhance UNEP's voice and ability to fulfil its coordination mandate within the UN system by strengthening UNEP engagement in key UN coordination bodies and empowering UNEP to lead efforts to formulate UN system-wide strategies on the environment;
- iv. Promote a strong science-policy interface, building on existing international instruments, assessments, panels and information networks, including the Global Environmental Outlook, as one of the processes aimed at bringing together information and assessment to support informed decision-making;
- v. Disseminate and share evidence-based environmental information and raise public awareness on critical, as well as emerging, environmental issues;
- vi. Provide capacity building to countries as well as support and facilitate access to technology;
- vii. Progressively consolidate headquarters functions in Nairobi, as well as strengthen its regional presence, in order to assist countries, upon request, in the implementation of their national environmental policies, collaborating closely with other relevant entities of the UN system;

- viii. *Ensure the active participation of all relevant stakeholders drawing on best practices and models from relevant multilateral institutions and exploring new mechanisms to promote transparency and the effective engagement of civil society.* (emphasis added)

## ***Market Mechanisms, Human Rights and Environment Protection***

This topic was discussed in a small group format. The two most important questions raised were:

- i. Can market mechanisms address both environment protection and human rights concerns?
- ii. Are voluntary Corporate Social Responsibility (CSR) codes adequate to address environment protection and human rights concerns?

There was some agreement that market mechanisms can only be consistently effective if backed by adequate regulatory frameworks. The concept of 'social licensing' was also discussed. This is defined as follows:

The social license is the level of acceptance or approval continually granted to an organisation's operations or project by the local community and other stakeholders. It varies between stakeholders and across time through four levels from lowest to highest: withdrawal, acceptance, approval and psychological identification.

It was noted that the social licensing concept was quite well developed in the Asian and Australian region.

## ***Concluding Points***

The overall conclusions drawn from the Group's discussion were:

- i. Identifying vulnerable communities and groups was seen to be a central issue;
- ii. Environmental impact processes should be broadened to include human rights issues and impacts;
- iii. Adoption of accessing information and participation procedures in Asia is a vital part of addressing environment protection in context of human rights;
- iv. The concept of social licensing for corporations should be further developed;
- v. There was recognition that much more work is required to reinforce links between human rights and environment protection to promote further integration of these two fields;
- vi. A coherent international approach (encouraged for example by the Asia-Europe Foundation) would assist in this process.

## **Working Group 4: Climate Change And Human Rights Implications**

### ***The Link Between Climate Change and Human Rights***

There is now a growing consensus on the usefulness of the human rights-based approach to address climate concerns. There also exists a significant gap in common understanding on climate change-human rights linkages. Both the climate change and the human rights community are still trying to figure out the implications of combining the two issues.

There is a common agreement that climate change hampers a healthy enjoyment of human rights, but it is often a less discussed issue as the science of climate change still tends to dominate the discussions of climate change. The link between climate change and human rights implications is already recognised and incorporated in international agreements, e.g. the Cancun Agreement. However, the challenge that still remains is *how do we operationalise that?*

Existing human rights mechanisms are yet to widen their capacity to deal with global human rights violations – either by the States or existing market mechanisms, e.g. multinational corporations. Particular challenges facing human rights when approaching climate change is that the majority of victims are future generations to come; and due to the cross border impact of climate change, it is quite difficult to connect ‘victims’ with ‘perpetrators’. Furthermore, every violation does not fall under State obligations and the transboundary aspects of the violations are also a challenge. Similarly, lack of information and evidence also pose challenges to effectively address violations.

Confusion remains on whether the integration of two issues will solve the problem. Ensuring human rights is a State responsibility. Human rights implications arising from climate impacts are a State responsibility too. But it becomes complicated when a State does not feel itself responsible for the consequences, or falls short of its capacities, resources or institutions to deal with it. There are misunderstandings and conflicts between developed and developing States, and between climate change and human rights communities, which compounds the difficulty of this discussion. The human rights approach has its own standards and procedures, but it should not remain as a barrier to a meaningful integration. The Group determined that regular discussions and meetings need to be facilitated between different interest groups in order to remove the current obstacles.

### ***Climate Change-Induced Displacement***

One of the most complicated issues in this context is of forced migration or ‘climate refugees’. As yet, there is no specific and agreed definition of a ‘climate refugee’.

The Group felt that a separate definition might promote potential discrimination. There was consensus to go with a soft law approach, such as providing specific guidelines or social and economic criteria when describing a climate refugee.

Climate change, however, is of course not a stand-alone cause for migration. There are other factors for migration as well as State failure to protect its people from displacement.

There is a dire need to develop effective strategies to ensure that people who are forced to migrate because of climate change have the capacity and instruments to make informed choices and decisions with regard to their migration.

On the other hand, the receiving/host countries also require precautionary mechanisms to deal with the unwanted consequences of climate change-related migration. Judges, human rights and environmental lawyers, policy makers, bureaucrats and the general public should be educated to deal with the side effects linked to forced migration. States may require capacity-building through technical and logistical assistance and funding for longer term planning and operationalisation of climate change-related migration.

Climate change projections, in this regard, can be used to either help people adapt to the situation or to prepare them for planned migration. There is scope for regional and sub-regional sharing of best practices, discussions and cooperation on migration issues. Regional cooperation in disaster management is a good example of such inter-State cooperation. However, there are also limits to this because different regions have different contexts and capabilities. The scope of such cooperation, therefore, may extend beyond the region in order to achieve a cohesive and comprehensive framework on forced migration.

There is a clear need to have international and regional level discussions on how to manage environmentally displaced people. The overall costs of climate change migration at the regional and international level must be analysed, and existing and new mechanisms should be explored to share the costs. Existing mechanisms at the international level include Article 1 of the International Covenant on Economic, Social and Cultural Rights, which states ‘all peoples have the right of self-determination.’ By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. Ongoing United Nations Framework Convention on Climate Change (UNFCCC) discussions on the ‘loss and damage associated with climate change impacts,’<sup>7</sup> seem to provide some space to address the issue, but the extent of those mechanisms need to be explored further.

States should continue the discussion of climate change-related migration at the UN Human Rights Council and ensure that it is considered in the preparation of the

<sup>7</sup> [http://unfccc.int/adaptation/workstreams/loss\\_and\\_damage/items/6056.php](http://unfccc.int/adaptation/workstreams/loss_and_damage/items/6056.php)

Sustainable Development Goals (SDG) discussions and decisions. A special rapporteur or representative to provide legal solutions on how to manage environmentally displaced people could be appointed; or conversely, this role could be assigned to the existing special rapporteurs. The engagement of the affected communities in these discussions and decisions is also required.

### ***Indigenous Populations and Climate Change Adaptation***

Indigenous populations are adversely affected by climatic hazards and impacts all over the world. Their direct dependence on natural resources and forests are hugely disrupted by climate change. Climate change exacerbates their existing vulnerabilities, as they are already marginalised in terms of political participation and decision-making. State and civil societies should have effective processes and mechanisms in place to empower Indigenous populations so that they can enjoy procedural rights. The Arctic Council<sup>8</sup> is a good example of an organisation that facilitates the inclusion of Indigenous groups in scientific and policy decision-making. State and civil society should also provide Indigenous populations with space at the national and international level so that they can communicate their problems or propose potential solutions that are context-specific and respectful of their culture, traditions and diversity. Platforms like ASEF could organise a pre-Conference of Parties (pre-COP) conference on Indigenous groups.

Climate change requires quick adaptation, however institutional barriers can make it difficult for Indigenous populations to adapt quickly. States should ensure that all projects, plans and programs affecting Indigenous populations and their territories should have their free and prior informed consent, and they should be able to monitor the implementation of such projects. Governments should follow the ‘principle of consensus’<sup>9</sup> in making decisions, rather than simply following the majority. Climate change projections can help to understand how, and in what manner, the climate impacts will pressure Indigenous communities to migrate and may provide communities sufficient time to plan their migration as groups while protecting their culture and heritage.

States should empower Indigenous populations so that they can better enjoy procedural rights. Particular attention should be given to the participation requirements of Indigenous populations who may face additional barriers to participation and justice. When defining policy, decision makers need to address the specific contexts of that particular community – respecting their culture, tradition and diversity – whether shifting livelihoods, migrating to new areas or ensuring property rights.

### ***Education, Innovation and Environmental Protection***

Education can play a vital role in bridging the distance between the climate change and human rights communities. People working at the same or different levels are not equally knowledgeable on climate change and human rights issues; nor are they equipped to participate in the debate on climate change-human rights implications. The general public, besides officials, should also have a basic understanding on the relationship between the two subjects. Educating law students can be a good way to help human rights scholars to take climate change into account. The *World Program for Human Rights Education*<sup>10</sup> has been successful and has shown good results. The experiences of such a program could therefore be utilised and expanded. Educating activists is also essential, so that they can develop the capacity to handle issues arising from conflicts related to environmental rights.

Economic development seems always to override human rights considerations. Educating people on climate change and related human rights implications can promote peoples’ respect towards human rights and may promote an alternative to ‘business as usual’ approach without compromising economic development.

The Group felt that a more balanced approach towards innovation, development, environmental protection and traditional practices should be taken. States should put precautionary legal measures into place and should oblige public authorities to ensure such a balance. Legislative measures are also needed to prevent people from carrying out experiments (e.g. geo-engineering or using food sources such as corn or sugar to produce energy), and to assess the possible implications of these experimentations. The UNEP tool ‘Environmental Technology Assessment’,<sup>11</sup> for example, can be an appropriate prevention mechanism for such experiments.

Legislative frameworks, on the other hand, must include reward mechanisms to encourage innovation. Courts need to play a larger role in ensuring environmental compliance and government efforts need to be rewarded to promote compliance. Furthermore, States could provide tax benefits to climate friendly innovations, or could impose higher taxes on the polluters. A carbon emissions tax, for example, is helping a number of European countries to reduce their carbon emissions. Nevertheless, States need to consider the transboundary consequences while formulating legislative measures. The international community can also play a role in formulating legislation setting standards, promoting innovative approaches and encouraging cooperation. At the State level, laws must be adequately implemented and enforced – focusing on protecting the traditional way of life and diversity, while

<sup>8</sup> <http://www.arctic-council.org/index.php/en/resources/news-and-press/news-archive/828-scientific-cooperation-making-a-good-thing-even-better>

<sup>9</sup> Youth Sourcebook on Sustainable Development. Winnipeg: IISD, 1995. Online. <http://iisd.ca/youth/ysbk111.htm>.

<sup>10</sup> <http://www.ohchr.org/EN/Issues/Education/Training/Pages/Programme.aspx>

<sup>11</sup> <http://kiam.customer.netspace.net.au/Cp799/UNEP/UNEP2-3.htm>

also ensuring sustainable and environmentally-friendly development.

Innovations, however, do not only mean technological and scientific innovation; there can be social or behavioural innovation as well. For example, modifying old practices or using old practices in newer contexts, such as consensus based decision-making by the Sami<sup>12</sup> Communities. States should take into account the risks and benefits of different stakeholders while making development decisions at local, national and international levels. Realisation and implementation of procedural rights can be instrumental in this regard in promoting the integration of human rights considerations in climate change with the protection of biodiversity or traditional practices.

Climate change is a crosscutting issue and has transboundary consequences, but currently there is no appropriate human rights framework that addresses transboundary rights violations. This issue needs to be explored further to ensure enhanced cooperation between nations to address such transboundary issues.

## Conclusions

The conclusions and recommendations of the four Working Groups can be condensed into 13 key messages:

- i. States should adopt a human rights-based approach to environmental protection as part of their national environmental regulatory framework.
- ii. The need for economic development is a driving force for many countries. In balancing development, human rights and environmental protection, Governments should ensure that strategic impact assessments are undertaken for significant development projects so as to assess the long-term social, environmental and human rights impacts of a development on both individuals and communities. Environment impact assessment requirements should be legislated and based on Principle 10 of the *Rio Declaration* – namely, access to information, public participation and access to justice.
- iii. Extensive training on human rights responsibilities and environment protection should be provided for judges, lawyers, public prosecutors, civil servants and other policy makers who are involved in the application and adjudication of all environmental laws and regulatory instruments, as appropriate in both the European and Asian regions.
- iv. States should attempt to address existing legal barriers that make access to justice difficult for individual litigants and environmental organisations in environmental matters. Effective systems of legal aid and pro-bono legal assistance should be made available where possible to citizens and organisations.
- v. Governments should establish mechanisms to promote capacity-building and human rights education for citizens, environmental organisations and public authorities with regard to public participation in environmental decision-making procedures. They should also provide easy access to all relevant documents, including environment impact statements and related studies. The public should have the opportunity to make submissions and comments on projects before administrative decisions are taken.
- vi. The effects of climate change often require quick adaptation. However, it is recognised that institutional barriers can make it difficult for some Indigenous and other local communities to adapt quickly. States should ensure that all projects and programs affecting Indigenous and local communities and their lands have their free, prior and informed consent and the capacity for them to monitor the implementation of such projects.
- vii. States should empower Indigenous and other relevant local communities so that they can exercise procedural rights. Particular attention should be given to the participation requirements of Indigenous populations, which may face additional barriers to participation and justice. When defining policy, decision makers need to address the specific context of that particular community – respecting their culture, traditions and diversity – whether changing livelihoods, migrating to new areas or maintaining property rights.
- viii. Access to information, participation in environmental decision-making and access to judicial process are vital to addressing environment protection in the context of human rights. Access to information should be open, cost-free, effective and provided without discrimination. Governments are recommended to implement the recommendations of UNEP on access to information and participation in decision-making in environmental matters (*Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*):
  - a. In the absence of enabling provisions, existing mechanisms of international law on access to information should be integrated into national environmental law and be made fully operational and effective.
  - b. Countries should consider whether regional agreements should be drafted to introduce binding provisions on access to information, participation in decision-making and access to justice in environmental matters.
  - c. In Asia, this could be done by adapting the basic procedural elements of information and public

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<sup>12</sup> [http://en.wikipedia.org/wiki/Sami\\_people](http://en.wikipedia.org/wiki/Sami_people)

participation of the Aarhus Convention at the regional level through each regional environmental organisation in South Asia, ASEAN and North East Asia, with institutional backing and capacity building to encourage domestic level adoption. In ASEAN, the newly established Human Rights Commission could pursue such an initiative on the basis of Article 28(f) of the 2012 ASEAN Human Rights Declaration, which focuses on environmental rights.

- ix. States should give more prominence to human rights perspectives in international environmental issues, especially in the negotiation of the post-Kyoto Protocol climate change regime and the drafting of the Sustainable Development Goals (SDGs). Human rights organisations should participate more actively in this process alongside environmental and governmental actors.
- x. The United Nations Environment Programme (UNEP) should remain the key authority within the UN system on environmental issues and ensure that it keeps up with environmental challenges and the increasingly close link to human rights in the 21st century. In keeping with the Rio+20 Outcome Document: *The Future We Want*, governments should

support the ongoing process of strengthening and upgrading of UNEP.

- xi. States should encourage UNEP to ensure the active participation of relevant stakeholders in the UN system “drawing on best practices and models from relevant multilateral institutions and exploring new mechanisms to promote transparency and the effective engagement of civil society” (*The Future We Want*). Other UN agencies such as the UN Human Rights Council and the United Nations Development Programme (UNDP) should also be key partners in this discussion.
- xii. There is an urgent need to promote international and regional level discussion on how to manage environmentally displaced people. The overall social, cultural and economic costs of climate change migration at the regional and international level need to be analysed, and existing and new mechanisms explored to manage the burden of those costs.
- xiii. States should continue the discussion of climate change-related migration in the UN Human Rights Council and ensure that it is placed at the highest possible level in the international SDG discussions and decisions.

# Background Paper

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*In the last two decades, the relationship of human rights and the environment has received much attention. Some fundamental aspects of that relationship are now firmly established, but many issues are still not well understood. Clarification of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment is necessary in order for States and others to better understand what those obligations require and ensure that they are fully met, at every level from the local to the global.<sup>1</sup>*

## INTRODUCTION: KEY CONCEPTS

The purpose of this Background Paper is to give an overview of the topic of human rights and the environment, and to explore the interaction between these two fields. It seeks to provide some common foundations for discussion. A number of crosscutting issues are identified. A fundamental set of questions concerns the relationship between human rights concepts and the need to protect and conserve the environment at international, regional and national levels.

By their nature, the two areas of human rights and environmental protection lend themselves to legal analysis. However, although many of the issues raised in this paper are presented from a legal perspective, the authors have taken into account the fact that seminar participants come from a broad range of disciplinary backgrounds. Clearly, a number of approaches can be taken to the interaction between human rights and the environment, for example from the point of view of ecology, political science, international relations, economics and sociology. Seminar participants are thus encouraged to discuss the issues raised from a broad interdisciplinary perspective, but to take into account the legal frameworks.

The paper addresses the four themes of the seminar in some detail. Examples are drawn from the European and Asian regions. The four themes are:

Working Group 1: The Interaction between Sustainable Development, Environment and Human Rights

Working Group 2: Access to Information, Participatory Rights and Access to Justice

Working Group 3: Actors, Institutions and Governance

Working Group 4: Climate Change and Human Rights Implications

One of the functions of the seminar is to provide an opportunity for participants to gain a greater appreciation and deeper understanding of the differences as well as the similarities between the two regions of Asia and Europe in human rights law and environmental law. While neither the European Union (EU) countries nor countries in the Asian region are by any means uniform in the development of human rights and environmental protection at a national level, there is a good deal more coherence in terms of a regional approach in Europe compared with Asia. In relation to human rights, this is in part because of the establishment of the European Court of Human Rights. In Asia, apart from the Inter-Governmental Commission on Human Rights established by the Association of South-east Asian Nations (ASEAN) in 2009, no such regional structures exist.

In the environmental realm, there is a reasonable amount of consistency in the development of environmental law across the European Union, because of the directives and regulations issued by the European Parliament and the oversight of the European Commission. In Asia, while there are sub-regional structures in place that deal with environmental issues, there is little capacity at present for region-wide or sub-region-wide environmental law-making, with the exception of the ASEAN member states, as noted further below. Differing social, cultural, political and economic circumstances in the European and Asian regions are the drivers of these distinctions. In particular, there are significant differences in both the understanding and the application of the rule of law in the European and Asian regions. Within individual countries in both regions, there are of course significant variations in the implementation of the rule of law as well.

### ***Links between Human Rights and Environmental Protection***

The starting point for associating human rights with environmental issues dates back to the 1970s, with the

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<sup>1</sup> KNOX, J, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/22/43

preparation of the Stockholm Declaration on the Human Environment.<sup>2</sup> Principle 1 of the Declaration states:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.<sup>3</sup>

This grand statement might have provided the basis for subsequent elaboration of a human right to environmental quality,<sup>4</sup> but it was not repeated in the 1992 Rio Declaration, which makes human beings the ‘central concern of sustainable development’ and refers only to their being ‘entitled to a healthy and productive life in harmony with nature.’<sup>5</sup> As Dinah Shelton noted at the time, the Rio Declaration’s failure to give greater emphasis to human rights was indicative of uncertainty and debate about the proper place of human rights law in the development of international environmental law.<sup>6</sup> 21 years later there is still room for debate.

The explicit linking of environmental issues to human rights protection can thus be seen largely as a 21st Century development.<sup>7</sup> The United Nations (UN) Secretary-General’s 2005 report on the relationship between human rights and the environment in the context of sustainable development concluded that ‘since the World Summit on Sustainable Development (2002), there has been growing recognition of the connection between environmental protection and human rights.’<sup>8</sup>

The momentum to link these two fields has grown stronger in the past decade, with an increasing focus on the effects of climate change on individuals, communities and countries. For example, the 2007 Malé Declaration on

the *Human Dimension of Global Climate Change* stated that ‘climate change has clear and immediate implications for the full enjoyment of human rights’, and called on the United Nations to treat this as a matter of urgency.<sup>9</sup> The Rio+20 Conference represents the most recent recognition that climate change is a crosscutting issue that undermines the abilities of many countries, especially developing countries, to achieve sustainable development.

While there has been an understandable focus on human rights and the effects of climate change, in recent times the human rights dimensions of the depletion of global biodiversity,<sup>10</sup> transboundary pollution<sup>11</sup> and large scale, human-caused land degradation and its sub-set of desertification<sup>12</sup> has begun to emerge. Each of these areas has been closely studied in their climate change and environmental degradation context, but they also deserve separate consideration with regard to their human rights implications.

Although most international human rights treaties do not make a specific reference to the environment, healthy environmental conditions are regarded as one of the necessary prerequisites for the enjoyment of human rights – especially the rights to life<sup>13</sup> and health.<sup>14</sup> Other rights, such as the right to adequate food, water and housing, are also dependent on healthy environmental conditions. It can be noted that the final outcome document of the Rio+20 Summit reaffirmed respect for all human rights, particularly the rights to health, food and safe drinking water.<sup>15</sup>

### ***Sustainable Development Goals***

Many consider that one of the most important achievements of Rio+20 was the agreement on a process to set global

<sup>2</sup> Declaration of the United Nations Conference on the Human Environment, Stockholm 5- 16 June 1972, accessible at <http://www.unep.org/Documents.Multilingual/Default.Print.asp?documentid=97&articleid=1503>

<sup>3</sup> Indeed, such a right was spelled out in the Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development adopted by the World Commission on Environment and Development Experts Group On Environmental Law, appended to the Brundtland Report Our Common Future, Oxford 1987: “1. All human beings have the fundamental right to an environment adequate for their health and well being.”

<sup>4</sup> Sohn argues that Principle 1 of the 1972 Stockholm Declaration creates an individual human right of this kind; see SOHN, L 1973, ‘The Stockholm Declaration on the Human Environment’, 14 Harv. ILJ, pp.451-5.

<sup>5</sup> Principle 1, Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, I, (New York, 1992), UN Doc.A/CONF.151/26/Rev.1.

<sup>6</sup> SHELTON, D 1992, ‘What Happened in Rio to Human Rights?’, 3 YbIEL 75, 82 ff.

<sup>7</sup> A number of landmark cases in the European Court of Human Rights, the African Court of Human and Peoples Rights and the Inter-American Court of Human Rights in the past 15 years have brought the interplay between environment and human rights to international focus. A number of these are briefly canvassed in this paper.

<sup>8</sup> United Nations Secretary General (2005), Human rights and the environment as part of sustainable development – Report of the Secretary-General, E/CN.4/2005/96, 19 January 2005, available at <http://daccess-ods.un.org/TMP/8738202.45265961.html>. The 2002 Johannesburg Declaration on Sustainable Development was adopted at the 2002 World Summit on Sustainable Development. But academics had of course seen the obvious link rather earlier: see in particular the papers collected in Boyle and Anderson (eds) Human Rights Approaches to Environmental Protection (Oxford, 1996).

<sup>9</sup> 2007 Malé Declaration on the Human Dimension of Global Climate Change, adopted on 14 November 2007, Malé, accessible at [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf)

<sup>10</sup> For example, GREIBER, T, et al, Conservation with Justice: A Rights-based Approach, IUCN Environmental Policy and Law Paper No. 71: ‘Failure to conserve natural resources and biodiversity can undermine human rights – e.g., by destroying resources and ecosystem services on which many people, especially indigenous and local communities, depend. However, nature conservation can also support the respect for and fulfilment of human rights – e.g., by securing the sustainable availability of critical natural resources and ecosystem services (at 5).

<sup>11</sup> BOYLE, AE, ‘Human Rights and the Environment: Where Next?’ in The European Journal of International Law Vol. 23 no. 3, 614 at 633.

<sup>12</sup> Human Rights and Desertification, Exploring the complementarity of international human rights law and the United Nations Convention to Combat Desertification UNCCD, Issue Paper No. 1, 2008.

<sup>13</sup> The right to life is protected in several international documents including Article 3 of the Universal Declaration of Human Rights (UDHR); Article 6(1) of the International Covenant of Civil and Political Rights (ICCPR); Article 6 of the Convention on the Rights of the Child (CRC)

<sup>14</sup> See Article 25(1) of the Universal Declaration of Human Rights; Article 12(1) of the International Covenant of Economic, Social and Cultural Rights (ICESCR); Article 24 of the Convention on the Rights of the Child; and Article 12 of the Convention on the Elimination of Discrimination Against Women (CEDAW).

<sup>15</sup> The Outcomes Document of Rio+20, The Future We Want, can be found at [http://www.uncsd2012.org/content/documents/774futurewewant\\_english.pdf](http://www.uncsd2012.org/content/documents/774futurewewant_english.pdf). Rio+20 was the first time that the right to safe drinking water and sanitation was reaffirmed by states at a major UN meeting; see para 8. However, human rights groups like Amnesty International, Human Rights Watch and the Centre of International Environmental Law have pointed out that Rio+20 fell short of fully integrating human rights and environmental protection. <http://www.amnesty.org/en/news/rio20-outcome-document-undermined-human-rights-opponents-2012-06-22>



Sustainable Development Goals (SDGs), which will focus on priority areas for sustainable development and cover both developed and developing countries. SDGs aim to address economic, social and environmental dimensions of sustainable development through the overarching framework of poverty eradication with enhanced environmental considerations. In principle, they address the challenges of the UN's Millennium Development Goals (MDGs) and build on this experience in order to provide the foundation for a green economy. It is expected that the process of integration of the MDGs with the post 2015-development framework will result in formulations, which will focus on sustainable development for the betterment of human well-being.<sup>16</sup>

The mandate of the UN Expert on Human Rights and the Environment makes reference to a "safe, clean, healthy and sustainable environment",<sup>17</sup> while the 2012 ASEAN Human Rights Declaration includes a provision on "protection and sustainability of the environment".<sup>18</sup> In both cases, some understanding of sustainable development goals and what is meant by sustainable development is essential to interpreting and applying either phrase. Whether it is appropriate to see a sustainable environment in human rights terms remains at present a matter for debate rather than settled law, but at the very least public participation in decision-making has obvious instrumental value in promoting such an environment.

The SDGs are further discussed in the context of the specific themes of the seminar.

### ***The Development of Human Rights Instruments and Multilateral Environmental Agreements***

In many ways, the development of human rights instruments and international and national law on environmental conservation and protection have occurred in parallel in the past 60 years.

On the human rights side, we see the 1948 Universal Declaration on Human Rights (UDHR), the 1966 International Covenant on Economic Social and Cultural Rights (ICESCR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and its two optional protocols, which are collectively known as the International Bill of Rights.<sup>19</sup>

At a regional level we have the 1950 European Convention on Human Rights (ECHR), the 1968 American Convention on

Human Rights (AmCHR), the 1986 African Convention on Human and Peoples' Rights (AfCHPR), the 2008 (revised) Arab Charter on Human Rights<sup>20</sup> and, in 2012, the ASEAN Human Rights Declaration.<sup>21</sup> At a national level, many jurisdictions have addressed human rights questions either in their constitutions, in specific legislation, or both. Among these human rights treaties, only the 1981 African Charter proclaims environmental rights in broadly qualitative terms. It protects both the right of peoples to the 'best attainable standard of health'<sup>22</sup> and their right to 'a general satisfactory environment favourable to their development.'<sup>23</sup>

On the environmental side, general awareness of environmental issues grew from the 1960s onwards, with the first globally applicable international conventions or Multilateral Environmental Agreements (MEAs) being agreed in the 1970s and 1980s. These include the 1971 Ramsar Convention on Wetlands, the 1972 World Heritage Convention, the 1973 Convention on International Trade in Endangered Species, the 1979 Convention on Migratory Species, the 1982 UN Convention on the Law of the Sea and the 1989 Basel Convention Control of Transport of Hazardous Wastes. In the past two decades, the most important and familiar MEAs are the 1992 Framework Convention on Climate Change, the 1992 Convention on Biological Diversity and the 1994 Convention to Combat Desertification. Protocols, guidelines and annexes have been added to these conventions to promote their implementation at national and regional level.<sup>24</sup> While attempts have been made at outlining criteria for measurement of effectiveness of MEAs, there are currently no overarching, commonly-agreed upon criteria for such measurement,<sup>25</sup> or for the measurement of implementing environmental legislation at a domestic level. Clearly, in order to promote implementation of environmental law at international and national level, at least some general criteria for effectiveness should be developed.<sup>26</sup>

There are important differences, and some similarities, between human rights treaties and most MEAs. First, while the former create rights for individuals exercisable against States, the latter normally create rights and obligations only for States.<sup>27</sup> Individuals cannot directly invoke them, although NGOs often play a significant role in their negotiation and subsequent implementation and evolution. Second, while MEAs are usually focused on protecting the global environment (climate change or the marine environment), or on transboundary problems

<sup>16</sup> *Ibid.*, paras. 245-251.

<sup>17</sup> UNHRC resolution 19/L.8/Rev.1, *Human Rights and the Environment*, 20 March 2012.

<sup>18</sup> ASEAN Human Rights Declaration 2012, <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>, Para. 36.

<sup>19</sup> Office of the High Commissioner for Human Rights Fact Sheet No.2 (Rev.1), *The International Bill of Human Rights*, at [www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf](http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf)

<sup>20</sup> See [http://www.acihl.org/res/Arab\\_Charter\\_on\\_Human\\_Rights\\_2004.pdf](http://www.acihl.org/res/Arab_Charter_on_Human_Rights_2004.pdf).

<sup>21</sup> See note 19, above.

<sup>22</sup> Article 16.

<sup>23</sup> Article 24.

<sup>24</sup> One of the most significant and controversial protocols is the 1997 Kyoto Protocol to Framework Convention on Climate Change, which commits developed country Parties to setting internationally binding emission reduction targets. The protocol, or its replacement, is currently being renegotiated; see Warsaw Climate Change Conference November 2013 [http://unfccc.int/meetings/warsaw\\_nov\\_2013/meeting/7649.php](http://unfccc.int/meetings/warsaw_nov_2013/meeting/7649.php)

<sup>25</sup> See CHAMBERS, *WB 2008*, Interlinkages and the Effectiveness of Multilateral Environmental Agreements, *United Nations University Press*.

<sup>26</sup> The International Union for Conservation of Nature (IUCN) has initiated a project to develop such criteria, entitled the *Natural Resources Governance Framework*, which includes an element intended to evaluate the legal aspects of natural resources governance; see [http://www.iucn.org/knowledge/focus/ipbes\\_focus/iucn\\_natural\\_resource\\_governance\\_framework/](http://www.iucn.org/knowledge/focus/ipbes_focus/iucn_natural_resource_governance_framework/)

<sup>27</sup> There are exceptions, notably the 1998 Aarhus Convention on Access to Justice, Access to Information, and Public Participation in Environmental Decision-making.

(transport of hazardous waste or air and river pollution), human rights law has a largely internal, domestic focus. One consequence is that the role of human rights law (if any) in transboundary or global environmental problems remains unsettled. Third, a key similarity is that both in general international environmental law and in human rights law, the State retains primary responsibility for controlling and regulating environmental impacts generated by business and industry.<sup>28</sup> In both cases, it must exercise due diligence to regulate environmental nuisances and to enforce the law. The reason for emphasising the role of States in both contexts is that, formally, international human rights treaties and environmental protection obligations in international law apply only to States, not to companies (although companies do enjoy the protection of human rights law).

### ***Environmental Law Principles and Human Rights***

The past 40 years or so have seen the development of a range of environmental law principles that have been incorporated directly or indirectly both in international environmental instruments as well as national and sub-national legislation.<sup>29</sup>

- i. The principles of equal access to information, public participation and access to justice in environmental matters;
- ii. The principle of preventive action;
- iii. The principle of cooperation;
- iv. The principle of sustainable development;
- v. The precautionary principle;
- vi. The polluter pays principle;
- vii. The principle of common but differentiated responsibility;
- viii. The principle of inter-generational and intra-generational equity;
- ix. The principle of non-discrimination;
- x. The principle of environmental impact assessment;
- xi. The principle of non-regression in environmental law.

Some of these principles can be linked directly to environmental rights, most notably access to information,

public participation and access to justice in environmental matters. These have translated directly into human rights law, via Principle 10 of the Rio Declaration on Environment and Development, the 1998 Aarhus Convention, and the jurisprudence of human rights courts and treaty bodies. They are broadly supportive of the idea of a human right to a safe, clean, healthy and sustainable environment. The others remain more relevant to an understanding of international or national environmental law in general than to the application of human rights approaches to environmental protection.

### ***The Role of Soft Law in Environmental Regulation***

The role of ‘soft law’ is an important element in the development of environmental law. As noted by Birnie, Boyle and Redgwell:

Soft law is by its nature the articulation of a ‘norm’ in a non-binding written form [...] Its great advantage over ‘hard law’ is that, as occasion demands, it can enable states to take on commitments that otherwise they would not, because they are non-binding, or to formulate them in a more precise and restrictive form that could not at that point be agreed in treaty form.<sup>30</sup>

Among other things, non-binding declarations or resolutions adopted by States or intergovernmental organisations may be evidence of existing international law (e.g. Articles 10-34 of the ASEAN Human Rights Declaration<sup>31</sup>), or they may acquire binding legal character as elements of a treaty-based regulatory regime, or constitute a subsequent agreement between the parties regarding the interpretation of a treaty or the application of its provisions.<sup>32</sup> Thus the effect of some non-binding soft law instruments may not be fundamentally different from those multilateral treaties that serve much the same law-making purposes. Both treaties and soft law instruments can become vehicles for focusing consensus on rules and principles, and for mobilising a consistent, general response on the part of states. The various declarations and documents arising out of international conferences, such as the 1972 Stockholm Conference and the 1992 Rio Conference, have the legal status of soft law but in reality they now represent something close to codification of the fundamental elements of international environmental law. These instruments have guided the development of environmental law both internationally and at the national level in developed and developing countries. In the realm of human rights law, the Universal Declaration on Human Rights has performed a

<sup>28</sup> UNHRC, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Annex: ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’*, UN Doc. A/HRC/17/31, 21 March 2011; *Fadeyeva v Russia* [2007] 45 EHRR 10, para. 89; *Öneryıldız v Turkey* [2005] 41 EHRR 20, para. 89.

<sup>29</sup> *Derived from the 1992 Rio Declaration on Environment and Development. SANDS, P & PEEL, J et al. 2012, Principles of International Environmental Law, 3rd ed. pg. 187; see further DE SADELEER, N 2002, Environmental Principles.*

<sup>30</sup> BIRNIE, P, BOYLE, AE, REDGWELL, C 2007, *International Law and the Environment, 3rd Edn. 2009 Oxford*, at 35; see also Alan Boyle and Christine Chinkin, *The Making of International Law, Oxford*, pp. 201-214.

<sup>31</sup> *Those articles set out the internationally accepted civil, political economic, social and cultural rights.*

<sup>32</sup> 1969 Vienna Convention on the Law of Treaties, Article 31.

similar function, while in the Asian region, a comparable process may be under way with the introduction of the non-binding ASEAN Human Rights Declaration of 2012, discussed further below.

### ***Effectiveness of Human Rights Institutions: The Paris Principles***

With regard to the effectiveness of national human rights instruments and bodies, regard should be had to the so-called *Paris Principles*.<sup>33</sup> These are guidelines generated at a 1991 UN meeting in Paris, ‘which brought together representatives of national human rights institutions from all parts of the globe to define the core attributes that all new or existing institutions should possess’.<sup>34</sup>

The Principles include six main criteria:

- i. A clearly defined and broadly-based mandate predicated on universal human rights;
- ii. Autonomy from government;
- iii. Independence guaranteed by legislation or the constitution;
- iv. Pluralism, including membership that broadly reflects their society;
- v. Adequate resources;
- vi. Adequate powers of investigation.

*The Paris Principles* are significant because they set out the benchmarks that all National Human Rights Institutions (NHRIs) should meet before they can obtain accreditation from the International Coordinating Committee (ICC).<sup>35</sup> While recognising that States have the prerogative to set up their NHRIs in accordance with their own structure and needs, the Principles require that even though NHRIs work mainly at the national level, they also have to ‘cooperate with the United Nations and any other organisation in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights’.<sup>36</sup> In so doing, they encourage the incorporation and application of international human rights standards into domestic practice.

With the growth in number of national human rights institutions around the world, *The Paris Principles* will be of continuing and increasing relevance.

### ***The Relationship Between Human Rights and Environment***

In examining the relationship between the fields of human rights and environment, a primary question is: Why should environmental protection be treated as a human rights issue? There are several possible answers:

- i. A human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the environment in general.
- ii. A human rights focus may serve to secure higher standards of environmental quality, based on the obligation of States to take measures to control pollution affecting health and private life.
- iii. The link between human rights and environment helps promote the rule of law in environmental matters: governments become directly accountable for their failure to enforce the law and control environmental nuisances, including those caused by corporations.
- iv. Human rights considerations can facilitate public participation in environmental decision-making, access to justice, and access to information.
- v. A human rights approach can more emphatically embrace elements of the public interest in protection of the environment as a human right.

The 2011 Office of the High Commissioner on Human Rights (OHCHR) *Report on Human Rights and the Environment* notes that ‘[H]uman rights obligations and commitments have the potential to inform and strengthen international, regional and national policymaking in the area of environmental protection and promoting policy coherence, legitimacy and sustainable outcomes.’<sup>37</sup> Three theoretical approaches to the relationship between human rights and the environment are identified.<sup>38</sup> The first sees the environment as a ‘precondition to the enjoyment of human rights.’ The second views human rights as ‘tools to address environmental issues, both procedurally and substantively.’ The third integrates human rights and protection of the environment under the concept of sustainable development. At the same time, there are limits to how far human rights law can be used to achieve environmental outcomes.

It is also questionable how far, if at all, human rights law applies to transboundary or global environmental harm, even if that harm impacts on the life, health, private life or prop-

<sup>33</sup> *Principles Relating to the Status of National Institutions (The Paris Principles)*. General Assembly Resolution 48/134, UN Doc A/RES/48/134 (20 December 1993), available at <http://www.un.org/documents/ga/res/48/a48r134.htm>

<sup>34</sup> *Asia Pacific Forum*, available at <http://www.asiapacificforum.net/members/international-standards>

<sup>35</sup> <http://www.ohchr.org/en/countries/nhri/pages/nhrmain.aspx>

<sup>36</sup> *Paris Principle 3(e)*.

<sup>37</sup> OHCHR, Analytical study on the relationship between human rights and the environment UN Doc. A/HRC/19/34, 16 December 2011, para.2. [Hereafter ‘OHCHR 2011 Report.’]

<sup>38</sup> *Ibid*, paras. 6-9.

erty of individuals or communities. The extra-territorial application of human rights law is not itself novel, but it has normally arisen in the context of occupied territory or cross-border activities by state agents.<sup>39</sup> The Inter-American Commission on Human Rights (IACHR) has followed the International Court of Justice's (ICJ) fairly broad interpretation of 'jurisdiction' in its reading of Article 1 of the American Convention,<sup>40</sup> and in cases concerning the American Declaration of Human Rights.<sup>41</sup> The case law on Article 1 of the European Convention is more cautiously worded, and extra-territorial application is ostensibly exceptional,<sup>42</sup> but it has nevertheless been applied in cases involving foreign arrests, military operations abroad, and occupation of foreign territory.<sup>43</sup> In *Al-Skeini*, the European Court reiterated that '[T]he Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.'<sup>44</sup> The ratio of this and similar cases is that where a state exercises control over territory or persons abroad, human rights obligations will follow.

While none of these cases is focused on environmental issues, they do give some indication of the way international courts have approached the extra-territorial application of all the main human rights treaties. To what extent a State must respect the human rights of persons in other countries thus becomes an important question once we start to ask whether we can view matters such as climate change, large-scale depletion of biodiversity, land degradation and transboundary air and water pollution in human rights terms. At the very least, a State that fails to control harmful activities within its own territory, and that cause or risk causing foreseeable environmental harm extraterritorially, is more likely to violate the human rights of those affected if it does not permit them equal access to environmental information and participation in Environmental Impact Assessment (EIA) permitting procedures, or if it denies

access to adequate and effective remedies within its own legal system.<sup>45</sup> Moreover, in keeping with the principle of non-discrimination, the environmental impact of activities in one country on the right to life, private life or property in other countries should be taken into account and given due weight in the decision-making process.<sup>46</sup>

It is likely that in the near future we shall see further conceptual development of the area of human rights and the environment. A clear manifestation of this at the international level is the appointment in 2012 of the United Nations Independent Expert on Human Rights and the Environment. The preliminary report gives some clear indications of the way forward:

The recognition of the close relationship between human rights and the environment has principally taken two forms: (a) adoption of an explicit new right to an environment characterised in terms such as healthy, safe, satisfactory or sustainable; and (b) heightened attention to the relationship to the environment of already recognised rights, such as rights to life and health.<sup>47</sup>

### ***Various Approaches to Environmental Protection and their Implications for Human Rights***

Environmental rights do not fit neatly into any single category or 'generation' of human rights. Existing civil and political rights can provide a basis for giving affected individuals access to environmental information, judicial remedies and political processes.<sup>48</sup> On this view, their role is one of empowerment, facilitating participation in environmental decision-making, and compelling governments to meet minimum standards of protection for life, private life and property from environmental harm. This approach is essentially anthropocentric (human-centred) insofar as it focuses on the harmful impact on individual people, rather than on the environment itself: it amounts

<sup>39</sup> See *MERON, T* 1995, 'Extraterritoriality of Human Rights' 89 AJIL 78; *SCHEININ, M*, 2004, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in *COOMANS, F & KAMMINGA, M* 2004, (eds) *Extraterritorial Application of Human Rights Treaties (Antwerp, Intersentia)* 73; *CERNA, C* 2006, 'Out of Bounds? The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law' (*WP No 6, Center for Human Rights and Global Justice*); *LOUCAIDES, L* 2006, 'Determining the Extra-territorial effect of the European Convention: Facts, Jurisprudence and the Bankovic Case' in *European Human Rights LR* 391; *WILDE, R* 2005, 'The "Legal Space" or "Espace Juridique" of the ECHR: Is it Relevant to Extraterritorial State Action?' in *European Human Rights LR* 115; *GONDEK, M* 2005, 'Extraterritorial Application of the ECHR: Territorial Focus in an Age of Globalisation' in 52 *Neths ILR* 349; *KING, H*, 2009, 'The Extraterritorial Human Rights Obligations of States', in 9 *Human Rights Law Review* 521; *MILANOVIĆ, M* 2011, *Extraterritorial Application of Human Rights Treaties (OUP)*.

<sup>40</sup> *Ecuador v. Colombia (Admissibility)* [2010] IACHR Report No. 112/10, paras. 89-100.

<sup>41</sup> *Alejandro, Costa, de la Pena y Morales v. Republica de Cuba* [1999] IACHR Report No. 86/99, para.23; *Coard v. United States* [1999] IACHR Report 109/99, para. 37.

<sup>42</sup> See *Bankovic v Belgium and Ors* [2001] ECtHR 333, paras. 59-82 where the court found that aerial bombardment did not bring the applicants within the jurisdiction or control of the respondent states.

<sup>43</sup> See *Al-Skeini v. United Kingdom* [2011] ECtHR, paras. 130-42; *Öcalan v. Turkey* [2005] 41 EHRR 985, para. 91; *Ilascu v. Moldova and Russia* [2005] 40 EHRR 46, paras. 310-19, 376-94; *Issa et al. v Turkey* [2004] 41 EHRR 567, para. 71; *Cyprus v. Turkey* [2002] 35 EHRR 30, para. 78.

<sup>44</sup> *Al-Skeini v. United Kingdom* [2011] ECtHR, para.136.

<sup>45</sup> See ILC, *Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*, Report of the ILC 2006, GAOR A/61/10, paras. 51-67. Principle 6(1) sets out the core obligation: 'States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.' See also Articles 3(9) and 9(4) of the 1998 Aarhus Convention.

<sup>46</sup> In transboundary environmental impact assessments, these matters certainly have to be addressed, pursuant to the 1991 Espoo Convention on EIA in a Transboundary Context, Article 3(8), which concerns provision of information to the affected public, the opportunity to comment and object and the communication of comments and objections to the relevant State party.

<sup>47</sup> *KNOX* note 1, above, at 5.

<sup>48</sup> See *McGOLDRICK, D* 1994, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (Oxford)*; *NOWAK, M* 1993, *UN Covenant on Civil and Political Rights: a Commentary, (Kehl)*; *JOSPEH, S, SCHULTZ, J & CASTAN, M* 2005, *The International Covenant on Civil and Political Rights (2nd edn, Oxford)*. However, treatment of environmental rights is generally absent from these works; one exception in the Australasian region is *CANTLEY-SMITH, R* 2012, 'A Human Right to a Healthy Environment', in *GERBER, P & CASTAN, M. (eds)*, *Contemporary Perspectives on Human Rights Law in Australia*.

to a ‘greening’ of human rights law, rather than a law of environmental rights. As Knox describes the work of the human rights bodies in this regard, they have been ‘directed primarily at the relationship of the environment with already recognised human rights. In other words, they have concentrated not on proclaiming a new right to a healthy environment, but rather on what might be called ‘greening’ human rights – that is, examining and highlighting the relationship of existing human rights to the environment.’<sup>49</sup>

Another possibility is to treat a decent, healthy or sound environment as an economic or social right, comparable to those whose progressive attainment is promoted by the 1966 UN Covenant on Economic, Social and Cultural Rights.<sup>50</sup> This approach comes closer to seeing the environment as a good in its own right. It would privilege environmental quality, giving it a comparable status to other economic and social rights such as development, and priority over non-rights-based objectives. Like other economic and social rights, it would be programmatic and, in most cases, enforceable only through relatively weak international supervisory mechanisms.

The environment is sometimes also included in so-called ‘third generation’ rights. Not all human rights lawyers favour the recognition of third generation rights, arguing that they devalue the concept of human rights and divert attention from the need to implement existing civil, political, economic and social rights fully.<sup>51</sup> The concept hardly features in modern discourse on human rights, and in general it adds little to an understanding of the nature of environmental rights to locate them within ‘generations’ of rights.

The ICCPR, ICESCR, ECHR, AmCHR do not, in general, serve to protect the environment as such. They are relevant to environmental problems insofar as existing rights – usually the rights to life, private life, health, water, and property – are infringed by environmental nuisances. The ‘environmental’ case law of human rights courts and treaty bodies does however reflect the phenomena we talked of above, namely the ‘greening’ of existing human rights, a process that is not only taking place in Europe, but extends across the IACHR, the ACHPR and the ICCPR regimes.

Some of the main human rights treaties do include specific environmental provisions,<sup>52</sup> often phrased in relatively narrow terms focused on human health.<sup>53</sup> Others, including the ECHR and the ICCPR, do not include reference to the environment. Among human rights treaties, only the 1981 African Charter on Human and Peoples’ Rights proclaims environmental rights in broadly qualitative terms. It protects both the right of peoples to the ‘best attainable standard of health’<sup>54</sup> and their right to ‘a general satisfactory environment favourable to their development.’<sup>55</sup> In the *Ogoni land* case, the African Commission on Human and Peoples Rights concluded that ‘an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecological equilibria is harmful to physical and moral health’.<sup>56</sup> In the ASEAN region, we see an explicit recognition of an environmental right incorporated in the newly agreed 2012 ASEAN Declaration of Human Rights.<sup>57</sup>

The only other treaty to make specific provision for environmental rights is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The Aarhus Convention represents an important extension of environmental rights, but also of the corpus of human rights law. However, its focus is strictly procedural in content, limited to access to information, public participation in environmental decision-making and access to justice.<sup>58</sup> Procedural rights are, however, the most important environmental addition to human rights law since the 1992 Rio Declaration on Environment and Development. The Aarhus Convention is also important because, unlike the European Convention on Human Rights or the ICCPR, it gives particular emphasis to the pursuit of the public interest through the activism of Non-Governmental Organisations (NGOs) in environmental matters.<sup>59</sup>

### *The ‘Right to a Healthy Environment’*

There have been many attempts at defining what constitutes a satisfactory, sustainable or ecologically sound environment. Any definition is bound to suffer from uncertainty. Indeterminacy is an important reason, it is often argued, for not rushing to embrace new rights without considering their

<sup>49</sup> KNOX note 1, above at 6-7.

<sup>50</sup> See M. Craven, *The International Covenant on Economic, Social, and Cultural Rights* (Oxford, 1995); EIDE, A, KRAUSE, C & ROSAS, A 2001, *Economic, Social and Cultural Rights* (Dordrecht, 2001); DENNIS, MJ & STEWART, DP 2004, 98 AJIL, 462.

<sup>51</sup> ALSTON, P 1984, ‘Conjuring up New Human Rights: A Proposal for Quality Control’ in 78 AJIL 607; Brownlie, in CRAWFORD, J 1988, (ed) *The Rights of Peoples* (Oxford, 1988) 1.

<sup>52</sup> The most important is Article 24, 1981 AfCHPR, on which see Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, AfCHPR, Communication 155/96 (2002), paras. 52-53 [‘SERAC v. Nigeria – the Ogoniland Case’].

<sup>53</sup> E.g. Article 12 of the 1966 ICESCR; 1961 European Social Charter, Article 11; 1988 Additional Protocol to the AmCHR, Article 11; 1989 Convention on the Rights of the Child, Article 24(2)(c). See R. Churchill in BOYLE, AE & ANDERSON, MR 1996, (eds), *Human Rights Approaches to Environmental Protection* (Oxford), Ch.5.

<sup>54</sup> Article 16.

<sup>55</sup> Article 24.

<sup>56</sup> Para. 51, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 155/96 (2001). See K.S.A. Ebeku, *The right to a satisfactory environment and the African Commission* (2003) 3 African Human Rights Law Journal 149 at 163; J.C. Nwobike, *The African Commission on Human and Peoples’ Rights and the Demystification of Second and Third Generation Rights under the African Charter* (2005) 1 African Journal of Legal Studies 129 at 139.

<sup>57</sup> Article 28(f) of the 2012 ASEAN Declaration of Human Rights provides for a ‘right to safe, clean and sustainable environment’. The Declaration is dealt with further below.

<sup>58</sup> Section 2(4).

<sup>59</sup> Articles 4(1)(a) 6 and 9.

implications.<sup>60</sup> Moreover, there is little international consensus on the correct terminology. Even the UN Sub-Commission, which reported in 1994, could not make up its mind, referring variously to the right to a ‘healthy and flourishing environment’ or to a ‘satisfactory environment’ in its report and to the right to a ‘secure, healthy and ecologically sound environment’ in the draft principles. Other formulations are equally diverse. Principle 1 of the Stockholm Declaration talks of an ‘environment of a quality that permits a life of dignity and well-being’, while Article 24 of the African Charter refers to a ‘general satisfactory environment favourable to their development. The 2012 ASEAN Declaration on Human Rights talks of a ‘safe, clean and sustainable environment’. The Independent Expert on Human Rights and the Environment is focused on ‘the enjoyment of a safe, clean, healthy and sustainable environment’.<sup>61</sup>

The narrowest approach involves a focus on human health. United Nations General Assembly (UNGA) Resolution 45/94 (1990) declared that ‘all individuals are entitled to live in an environment adequate for their health and well-being.’ A link between health and the environment is found in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which refers to the right to improvement of ‘environmental and industrial hygiene’. Article 12, with its focus on health and ‘environmental hygiene,’ is relevant to the human impacts of toxic wastes, chemicals and pesticides.<sup>62</sup> According to General Comment No.14, Article 12 also includes ‘the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.’<sup>63</sup> Together with Article 11, Article 12 provides the basis for the committee’s articulation of the right to water in General Comment No. 15,<sup>64</sup> which emphasises that states

are required to ensure an adequate and accessible supply of water for drinking, sanitation and nutrition<sup>65</sup>.

A number of other treaties and instruments also include the link between human health and the environment.<sup>66</sup> In most cases, this is a collective right, guaranteed by government action, but with no provision for individual enforcement. A similar approach is found in many of the national constitutions, which refer to a right to a healthy or decent environment.<sup>67</sup> It is difficult to see what this adds over and above the case law on environmental impacts on the right to life.<sup>68</sup> What is needed here is a broader focus on environmental quality, which could be balanced more directly against economic and developmental priorities.<sup>69</sup> Those definitions, which refer more broadly to a ‘satisfactory’ or ‘sustainable’ environment, are evidently envisaging something more than a focus on human health – a focus that extends to the health or quality of the environment *per se*, independently of harmful impacts on individual humans. Thus any discussion of a right to a healthy environment inevitably goes beyond the limited concern for human health found in Article 12 of the ICESCR.

Despite their evolutionary character, human rights treaties (with the exception of the African Convention) still do not guarantee a right to a satisfactory or sustainable environment – if that concept is understood in qualitative terms unrelated to impacts on the rights of specific humans.<sup>70</sup> There is no such right in European human rights law. As the Council of Europe (CoE) Manual points out, ‘Neither the Convention nor the Charter are designed to provide a general protection of the environment as such and do not expressly guarantee a right to a sound, quiet and healthy environment.’<sup>71</sup> As the European Court of Human Rights (ECtHR) re-iterated in *Kyrtatos*, ‘neither Article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment

<sup>60</sup> ALSTON, note 54, above; HANDL, G, ‘Human Rights and Protection of the Environment: A Mildly “Revisionist” View’ in TRINDADE, AC, (ed.) Human Rights, Sustainable Development and the Environment.

<sup>61</sup> Note 1, above.

<sup>62</sup> See the various reports of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, including the Statement by the Special Rapporteur of the UN HRC on the Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, at the Basel Convention, COP 9, 23-27 June, 2008; UN HRC, Report of the Special Rapporteur, Mission to the United Republic of Tanzania, UN Doc. A/HRC/9/22/Add.2, 18 August 2008; UN HRC, Report of the Rapporteur, Mission to Cote d’Ivoire (4 to 8 August 2008) and the Netherlands (26 to 28 November 2008), UN Doc. A/HRC/12/26/Add. 2, 3 September 2009.

<sup>63</sup> UNCESCR, General Comment No.14: The Right to the Highest Attainable Standard of Health (2000). On this basis Ecuador alleged in the Aerial Spraying case that transborder spraying of toxic herbicides by Colombia is contrary to Articles 11 and 12, and the comparable provisions of the IACHR. The case was settled without a hearing in 2013.

<sup>64</sup> UNCESCR, General Comment No. 15: The Right to Water, UN Doc.E/C.12/2002/11 (2003); WHO, The Right to Water (Geneva, 2003); McCaffrey, S 1992, 5 Georgetown IELR 1; BENVENISTI, E 1996, 90 AJIL at 406ff; TULLY, S 2003, 14 YbIEL101; FITZMAURICE, M 2007, 18 Fordham ELR, 537.

<sup>65</sup> Para. 2: “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements”.

<sup>66</sup> 1981 African Charter on Human and Peoples’ Rights, Article 16; 1988 Additional Protocol to the Inter-American Convention on Human Rights, Article 11; 1989 European Charter on Environment and Health; WCED Legal Principles, Article 1; 1989 Convention on the Rights of the Child, Article 24(2)(c); 1961 European Social Charter, Article 11, on which see Trindade, in Brown Weiss (ed.) Environmental Change and International Law, 281-284 and references there cited. For fuller discussion of other treaty provisions, see Churchill, in Boyle and Anderson (eds.) Human Rights Approaches to Environmental Protection (Oxford, 1996) Ch 5. On health as the focus for environmental rights see P.M. Dupuy in R.J. Dupuy (ed.) The Right to Health as a Human Right (Alphen aan den Rijn, 1979) 340; Toebe, The Right to Health as a Human Right in International Law (Oxford, 1999).

<sup>67</sup> See further below.

<sup>68</sup> See for example the ECHR case law: López Ostra, Guerra, Fadeyeva, Oneryidiz etc.

<sup>69</sup> See WILLIS, FM 1996-97, ‘Economic Development, Environmental Protection and the Right to Health’, 9, in Geo.Int.Env.L.R 195.

<sup>70</sup> Article 11 of the 1988 San Jose Protocol to the American Declaration on Human Rights includes the provisions ‘1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment. The 2012 ASEAN Declaration contains a right to a safe, clean and sustainable environment, in the context of ‘guarantees’ of other human rights. However, as noted further below, the Declaration, still in its infancy, has little in the way of institutional implementation mechanisms.

<sup>71</sup> Manual on Human Rights and the Environment, Council of Europe 2012, 7: See also *Kyrtatos v Greece* [2003] ECHR 242, para 52.

as such [...]'.<sup>72</sup> This case involved the illegal draining of a wetland. The European Court could find no violation of the applicants' right to private life or enjoyment of property arising out of the destruction of the area in question. Although they lived nearby, the Court held that the applicants' rights were not affected. They were not entitled to live in any particular environment, or to have the surrounding environment indefinitely preserved. The applicants succeeded only insofar as the State's non-enforcement of a court judgment violated their Convention rights.

The Inter-American Commission on Human Rights (IACHR) has similarly rejected as inadmissible a claim on behalf of all the citizens of Panama to protect a nature reserve from development.<sup>73</sup> Nor does the practice of the UN Human Rights Committee differ. In a case about genetically modified crops, it held that 'no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant'.<sup>74</sup> Put simply, the United Nations Human Rights Council (UNHRC) is saying that only individuals whose own human rights have been violated may bring a complaint to the Committee. The 'citizens of Panama' – or a *fortiori*, a NGO acting on their behalf – have no standing to complain about harm to the environment.

Only the 1981 African Charter on Human and Peoples' Rights proclaims environmental rights in broadly qualitative terms. It protects both the right of peoples to the 'best attainable standard of health' (Article 16) and their right to 'a general satisfactory environment favourable to their development' (Article 24). In the *Ogoniland* case, the African Commission on Human and Peoples Rights held, inter alia, that Article 24 of the Charter imposes an obligation on the State to take reasonable measures 'to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources'.<sup>75</sup> Specific actions required of States in fulfilment of Articles 16 and 24 include 'ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.<sup>76</sup>

The Commission's final order in *Ogoniland* is also the most far-reaching of any environmental rights case. It calls for a 'comprehensive clean-up of lands and rivers damaged

by oil operations,' the preparation of environmental and social impact assessments, and provision of information on health and environmental risks and 'meaningful access to regulatory and decision-making bodies'.<sup>77</sup> As Shelton observes, 'The result offers a blueprint for merging environmental protection, economic development, and guarantees of human rights'.<sup>78</sup>

*Ogoniland* is a remarkable decision, which goes further than any previous human rights case in the substantive environmental obligations it places on states. No other treaty contains anything directly comparable, although several decisions of the Inter-American Commission and Court of Human Rights have interpreted the rights to life, health and property to afford protection from environmental destruction and unsustainable development and they go some way towards achieving the same outcome as Article 24 of the African Convention.<sup>79</sup>

What constitutes a satisfactory or sustainable environment is necessarily a value judgment, on which reasonable people will differ, and may be influenced by cultural, social, political and religious differences. Policy choices abound in this context: what weight should be given to natural resource exploitation over nature protection, to industrial development over air and water quality, to land-use development over conservation of forests and wetlands, to energy consumption over the risks of climate change, and so on? These choices may result in wide diversities of policy and interpretation, as different governments and international organisations pursue their own priorities and make their own value judgments, moderated only to some extent by international agreements on such matters as climate change and conservation of biological diversity.

Clearly there can be different views on the extent to which the environment – or human rights – should be protected from development. Courts are not necessarily well placed to make this judgement. The Council of Europe Manual makes the point very cogently: 'National authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. Therefore in reaching its judgments, the Court affords the national authorities in principle a wide discretion'.<sup>80</sup> In *Hatton* the European Court of Human Rights took the same view of its role: 'The national authorities have direct democratic legitimacy and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions'.<sup>81</sup> Moreover, neither environmental protection nor human rights necessarily trump

<sup>72</sup> *Kyrtatos v. Greece* [2003] ECtHR 242, para. 52.

<sup>73</sup> *Metropolitan Nature Reserve v. Panama* [2003] IACHR Case 11.533, para. 34.

<sup>74</sup> *Brun v. France* (2006) ICCPR Communication No. 1453/2006, para.6.3.

<sup>75</sup> *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, ACHPR, No 155/96 (2002) paras 52-53 [*SERAC v. Nigeria*]. See SHELTON 2002, 96 AJIL, 937; COOMANS, F 2003, 52 ICLQ, 749.

<sup>76</sup> Para 54.

<sup>77</sup> Para 69.

<sup>78</sup> SHELTON, D 2002, 'Decision Regarding Case 155/96', 96 AJIL 937, 942.

<sup>79</sup> See *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001) IACHR Ser. C, No. 20; *Maya Indigenous Community of the Toledo District v. Belize*, Case 12/053, Report No. 40/04, Inter-Am. CHR, OEA/Ser.L/V/II.122 Doc. 5 rev 1 at 727 (2004); *Yanomani Indians v. Brazil*, Decision 7615, Inter-Am. CHR, Inter-American YB on Hum.Rts. 264 (1985) See infra, section 2(3).

<sup>80</sup> 2012 Council of Europe Report, note 74, above, at 31.

<sup>81</sup> *Hatton and Others v. the United Kingdom* [2003] ECtHR (Grand Chamber), paras. 97-104.

the right to economic development, desirable as that might be. In *Hatton v the United Kingdom*, the approach taken by Grand Chamber of the European Court of Human Rights affords considerably greater deference towards government economic policy than at first instance, and leaves little room for the Court to substitute its own view. On this basis, decisions about where the public interest lies are mainly for politicians, not for courts, saved in the most extreme cases where judicial review is easy to justify. That conclusion is not inconsistent with the *Ogoniland* case, where the problems were undoubtedly of a more extreme kind.

But *Ogoniland* shows that the right to a satisfactory or sustainable environment can be useful at the extremes, which is why the debate becomes relevant to issues such as the effects of climate change, alarming rates of biodiversity depletion, serious transboundary pollution and land degradation. There will always be a struggle between economic interests and individual or group rights in such cases, and any judgment is inevitably subjective.

### ***Impacts on Indigenous and Local Communities of Environmental Degradation***

Indigenous and local communities that tend to depend more directly on the sustainable use of their natural resources than most other segments of the human population tend, for that reason, also to be the most impacted by environmental degradation, whether from the effects of climate change, deforestation or other depletions of biodiversity. Those impacts can be direct impositions on their capacity to sustain livelihoods as well as well as maintaining their cultures and intangible heritage.

A small number of environmental cases in the European and Inter-American contexts have concerned interference with the rights of indigenous peoples or other minorities to enjoy their own culture under Article 27 of the ICCPR. For example, in *Ilmari Lansman et al. v Finland*, UNHRC held that ‘measures whose impact amount to a denial of the right will not be compatible with the obligations under Article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.’<sup>82</sup> The Committee concluded that Finland had taken adequate measures to minimise the impact of stone quarrying on reindeer herding.

In somewhat similar circumstances, the Inter-American Commission and Court of Human Rights have relied instead on a broad reading of the right to property in order to afford indigenous peoples’ protection from environmental destruction and unsustainable development, and they go some way towards achieving the same outcome as Article

27 of the ICCPR or Article 24 of the African Convention. In the *Maya Indigenous Community of Toledo* case,<sup>83</sup> the IACHR accepted that logging concessions threatened long-term and irreversible damage to the natural environment on which the petitioners’ system of subsistence agriculture depended. Citing *Ogoniland*, the IACHR concluded that there had been violations of the petitioners’ right to property in their ancestral lands. Its final order required Belize to repair the environmental damage and to take measures to demarcate and protect their land in consultation with the community. The Commission’s decision notes the importance of economic development but reiterates that ‘development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.’<sup>84</sup>

Despite the different rights at issue in these cases, they all show a similar willingness to use whatever treaty provisions are available in order to protect the natural environment – in effect the habitat – of vulnerable indigenous peoples confronted by serious interference with their traditional livelihood and surroundings. Clearly, governments have a responsibility to protect the rights of everyone within their jurisdiction for harmful impacts affecting individual rights.

### ***Interaction between Trade, Investment, Environment and Human Rights***

Foreign trade and investment have been widely used as tools for economic development. This is especially so in developing countries that lack the human capital, expertise and technology that can be made available to them by investment and trade from their developed-country counterparts. However, the relationship between development on the one side and the environment and human rights on the other has not always been a harmonious one. As the 1972 Declaration of the United Nations Conference on the Human Environment (known as the Stockholm Declaration) states:

Man has constantly to sum up experience and go on discovering, inventing, creating and advancing. In our time, man’s capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment.<sup>85</sup>

Pursuant to this, the Declaration calls on States, for example, to safeguard earth’s natural resources, to maintain, or even restore or improve, renewable resources and to have

<sup>82</sup> (1996) ICCPR No. 511/1992, paras 9.4. See also *Ominayak and Lubicon Lake Band v Canada* (1990) ICCPR No. 167/1984, para 32.2; *Apirana Mahuika et al v New Zealand* (2000) ICCPR No. 547/1993.

<sup>83</sup> *Maya Indigenous Community of the Toledo District v Belize*, Case 12/053, Report No. 40/04, Inter-Am. CHR, OEA/Ser.L/V/II.122 Doc. 5 rev 1 at 727 (2004). See also *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) LACHR Ser. C, No. 20. Several other claims have been held admissible: *Yakye Axa Indigenous Community of the Enxet-Lengua people v Paraguay*, Case 12.313, Report No. 2/02, Inter-Am. C.H.R., Doc. 5 rev 1 at 387 (2002); *The Kichwa Peoples of the Sarayaku community and its members v Ecuador*, Case 167/03, Report No. 62/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev 1 at 308 (2004)

<sup>84</sup> Para 150. The decision is based on the 1948 American Declaration of the Rights of Man, not on the 1969 Inter-American Convention.

<sup>85</sup> Par. 3 of the initial proclamation.



nature conservation in mind in their economic planning.<sup>86</sup> However, at the same time, it recognises the need for economic development to the betterment of quality of human life.<sup>87</sup> The need to reconcile economic development, environment and human rights was further strengthened 20 years later at the 1992 Rio de Janeiro conference. Here the principle of sustainable development was developed in order to entitle human beings to ‘a healthy and productive life in harmony with nature.’<sup>88</sup> Principle 12 of the Rio Declaration emphasised the importance of ‘a supportive and open economic system that would lead to economic growth and sustainable development’ and the undesirability of restrictions on international trade ‘disguised’ as measures for environmental protection. The point here, and it is inherent in the concept of sustainable development, is the need for mutual supportiveness between trade, investment and environmental protection.<sup>89</sup> The principle of mutual supportiveness between environmental protection and economic development has been described as ‘the key concept to describe the relationship of WTO and environmental law’.<sup>90</sup> There is ‘no overarching reason for not extending it to international economic law as a whole, including investment law.’<sup>91</sup>

This principle developed further with the 2002 Monterrey Consensus.<sup>92</sup> The States represented there considered it necessary to mobilise international resources through foreign direct investment and international trade to achieve the faster development of developing countries. Foreign direct investment and international trade were regarded as complements to national efforts in the promotion of development goals.<sup>93</sup> In that same year, the World Summit on Sustainable Development (WSSD) took place in Johannesburg to reconsider the topic of sustainable development.<sup>94</sup> In its final report, the WSSD records that States considered that ‘poverty eradication, changing consumption and production patterns and protecting and managing the natural resource base for economic and social development are overarching objectives of, and essential requirements for, sustainable development’.<sup>95</sup>

Another decade later, the Rio+20 Conference of 2012 developed this principle through the prism of a ‘green economy’.<sup>96</sup> In the outcome document of the Conference, *The Future We Want*, States were called on to promote investment in specific areas in order to achieve a good balance

between economy, environment and human rights. Investment is considered necessary in areas as diverse as cleaner energies, eco-tourism, economic and social infrastructure and productive capacities, and scientific and technological innovation.<sup>97</sup> Trade is also considered a necessary aspect of this balance. Trade may allow private resources to flow better and facilitate the transfer of environmentally sound technologies between countries.<sup>98</sup> The Rio+20 Conference considered foreign trade and investment as tools to achieve not only economic development but also the sound protection of the environment and of better living conditions for individuals, which in turn will better ensure human rights. As such, rather than opposing concepts, development and environmental and human rights protection became allies. As Viñuales has argued in relation to the Rio +20 Summit:

The concept of a green economy goes beyond the traditional understanding of sustainable development. States are no longer urged to respect the environment while doing ‘as well’ in economic terms; they are now urged to build their economic models on environmental considerations in order to do ‘better’ in economic terms. Being ‘green’ is no longer presented as a matter of responsibility, but as one of profitability and competitiveness in the economy of the future.<sup>99</sup>

The same is true for human rights protection. Governments of developing countries are increasingly appealing to corporate foreign investors to provide services in areas in which States assume positive obligations in the promotion of human rights. This is the case, for example, with the provision of water, sewerage and energy. Without access to these basic services, human rights are seriously compromised.<sup>100</sup> In a broader sense of foreign investment, it is also possible to consider investments made without profitable aims. This is not so new and is done by NGOs and churches in services, such as education and health in developing countries.

Reflecting this development of international law, foreign trade and investment treaties have increasingly incorporated clauses dealing respectively with the environment and human rights protection. The EU has been a leading actor in this regard.<sup>101</sup> In fact, for a long time now, the EU has included environmental clauses in all its Free Trade Agreements with

<sup>86</sup> Principles 2, 3 and 4 of the Stockholm Declaration.

<sup>87</sup> Principles 8 and 9 of the Stockholm Declaration.

<sup>88</sup> Principle 8 of the Rio Declaration.

<sup>89</sup> PAVONI, R., ‘Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal’, in DUPUY, PM, FRANCONI, F & PETERSMANN, HP 2009, (eds) *Human Rights in International Investment Law and Arbitration (OUP)*, pp. 525-556.

<sup>90</sup> *Ibid.*, p.530.

<sup>91</sup> *Ibid.*, p.530.

<sup>92</sup> *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002, published by the United Nations in 2003.*

<sup>93</sup> *The advantages of foreign direct investment are explained in principles 20 to 26 and the advantages of international trade as ‘engines for development’ in principles 26 to 38.*

<sup>94</sup> *World Summit on Sustainable Development, meeting in Johannesburg, South Africa, from 26 August to 4 September 2002.*

<sup>95</sup> *Report of the World Summit on Sustainable Development, A/CONF.199/20, published by the United Nations in 2002.*

<sup>96</sup> *See Outcome Document of the Rio + 20 Summit, The Future We Want, at <http://www.un.org/en/sustainablefuture/>*

<sup>97</sup> Paras. 127, 131, 149 and 154 respectively.

<sup>98</sup> Paras. 260 and 271 respectively.

<sup>99</sup> In VIÑUALES, JE 2012, *Foreign Investment and the Environment in International Law, (Cambridge)*, p.13.

<sup>100</sup> *On the right to water, see for example, UNCESCR General Comment No. 15: The Right to Water, UN Doc. E/C.12/2002/11 (2003).*

<sup>101</sup> *See G.-M. Duran and E. Morgera, Environmental integration in the EU’s external relations: beyond multilateral dimensions, (Oxford: Hart, 2012).*

third countries, such as Korea, Central America, Colombia and Peru, or in its Bilateral Association Agreements, such as with Chile and South Africa. Other economic regional actors such as the North American Free Trade Agreement (NAFTA), MERCOSUR/MERCOSUL and ASEAN have started to follow this trend. This integration of investment, trade, environmental and human rights regimes is thus developing quite quickly in international law.<sup>102</sup>

However, despite the conduct of United Nations conferences and statements of principles and concepts, the link between sustainable development and the achievement of a decent environment remains elusive in many parts of the world, including many countries in Asia.<sup>103</sup>

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*This introduction has set out some of the history and concepts of human rights and environmental protection, the links between them and some definitional issues. It has also looked briefly at specific sectors where the intersections lie between human rights and environment. We now turn to consider the four specific topics of the seminar, which will be dealt with in the Working Groups.*

## **Working Group 1: The Interaction Between Sustainable Development, Environment And Human Rights**

### ***Sustainable Development, Environment and Human Rights***

Since its initial formulation, the concept or principle of sustainable development has encapsulated aspects of human rights, making the link between environment protection on the one hand and the meeting of basic human needs on the other.

Despite the fact that Principle 1 of the 1992 Rio Declaration on Environment and Development places human beings 'at the centre of concerns for sustainable development' and that [T]hey are entitled to a healthy and productive life in harmony with nature, there is no explicit proclamation of a 'right to sustainable development' as such in the Declaration – nor is there a right to its mirror image, a 'right to decent environment'.<sup>104</sup> While Principle 3 endorses the 'right to development', this amorphous concept embraces not just the promotion of economic development by States, but also the social and cultural aspects of human development

found in the 1966 UN Covenant on Economic, Social and Cultural Rights.<sup>105</sup> Similarly, the 1986 UN Declaration on the Right to Development places on States a duty 'to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population [...]'.<sup>106</sup> The Millennium Development Goals (MDGs) adopted by the UN General Assembly reiterate and expand these commitments.<sup>107</sup> Goal 7 is focused on ensuring environmental sustainability, and sets out four targets:

- i. Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources.
- ii. Reduce biodiversity loss, achieving, by 2010, a significant reduction in the rate of loss.
- iii. Halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation.
- iv. Achieve, by 2020, a significant improvement in the lives of at least 100 million slum dwellers.<sup>108</sup>

Acknowledging that the environment is also part of this equation, the Rio Declaration (Principle 3) and the 1993 Vienna Declaration on Human Rights (Para.11) emphasise that '[T]he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.' The Rio Declaration also affirms both the sovereign right of States to exploit their own resources 'pursuant to their own environmental and developmental policies' and their responsibility 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction' (Principle 2). Principle 2 is neither an absolute prohibition on transboundary environmental damage, nor does it confer on States absolute freedom to exploit natural resources.<sup>109</sup> Principle 4 spells out the obvious point that sustainable development requires integration of economic development and environmental protection.

These principles are also recognised and reinforced in the *IUCN Draft International Covenant on Environment and Development*, which provides in its Preamble that 'respect for human rights and fundamental freedoms, including non-discriminatory access to basic services, is essential to

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<sup>102</sup> See, *inter alia*, VIÑUALES, note 104; above, RUGGIE, J 2007, Business and Human Rights: the Evolving International Agenda, *Harvard Working Paper* 31.

<sup>103</sup> GIORGETTA, S 2002, 'The Right to a Healthy Environment, Human Rights and Sustainable Development' in *International environmental agreements: politics, law and economics*, pg. 173

<sup>104</sup> See BOYLE, AE 2007, 'Human Rights or Environmental Rights? A Reassessment' in 18 *Fordham EnvLR*, pp. 471-511

<sup>105</sup> See generally ANDREASSEN, BA & MARKS, SP 2006, (eds), *Development as a Human Right* (Cambridge, Mass).

<sup>106</sup> Declaration on the Right to Development, UNGA Res. 41/128 (1986), Article 2(3).

<sup>107</sup> The Millennium Development Goals are set out in UNGA Res. 55/2, 8 September 2000.

<sup>108</sup> Some of these targets are said to have been met or close to being met. They include halving the number of people living in extreme poverty, a marked increase in the proportion of people with access to safe drinking water, and the reduction of hunger. However, the 2013 Millennium Development Goals Report also states: 'Environmental sustainability is under severe threat, demanding a new level of global cooperation. The growth in global emissions of carbon dioxide (CO2) is accelerating, and emissions today are more than 46 per cent higher than their 1990 level. Forests continue to be lost at an alarming rate. Overexploitation of marine fish stocks is resulting in diminished yields. More of the earth's land and marine areas are under protection, but birds, mammals and other species are heading for extinction at an ever faster rate, with declines in both populations and distribution.' Millennium Development Goals Report 2013 (<http://www.un.org/millenniumgoals/reports.shtml> at 4)

<sup>109</sup> 1996 ILC Report, Working Group on International Liability, GAOR A/51/10, Annex I, at 264-5; R. LeFebvre, *Transboundary Environmental Interference* (The Hague, 1996), 23-25.

the achievement of sustainable development<sup>110</sup> and in Article 4: ‘Peace, development, environmental conservation and respect for human rights and fundamental freedoms are indivisible, interrelated and interdependent, and constitute the foundation of a sustainable world.’<sup>111</sup> The commentary on the Draft Covenant’s Article 4 elaborates:

Development and environmental protection depend upon respect for human rights, in particular rights of information, political participation, and due process. [...] In turn, full and effective exercise of human rights cannot be achieved without development and a sound environment because some of the most fundamental rights, e.g. the rights to life and health, are jeopardised when basic needs, such as sufficient food and water, cannot be provided.<sup>112</sup>

As a concept, however, sustainable development owes as much to human rights law as to the sovereignty of states. Article 1 of the 1966 UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights proclaims the right of all peoples to pursue economic development, and to dispose freely of their natural wealth and resources. At the same time, regional human rights treaties and declarations in Africa, Latin America and Southeast Asia also recognise a right – to some degree – of environmental protection, and so does the case law of the European Court of Human Rights.<sup>113</sup> The essential point of each of these examples is that, while recognising that the right to pursue economic development is an attribute of a State’s sovereignty over its own natural resources and territory, it cannot lawfully be exercised without regard for the potential detrimental impact on human rights or the environment of other states or areas beyond national jurisdiction. Equally, neither environmental protection nor human rights necessarily trump the right to economic development.

The United Nations Human Rights Council (UNHRC) Resolution 2005/60 recognised the link between human rights, environmental protection and sustainable development. Among other things, it ‘[e]ncourages all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development, in particular Principle 10, in order to contribute, inter alia, to effective access to judicial and administrative proceedings, including redress and remedy.’ Implementation of Rio Principle 10 is the most significant element here because, consistent with the Aarhus Convention, it acknowledges the importance of public participation in environmental decision-making, access to information, and access to justice. These three elements are the procedural building blocks to achieving

substantive human rights, and are indeed the basis for the Aarhus Convention.

### ***Defining Sustainable Development***

With the adoption of the Rio instruments in 1992, sustainable development became, and has so far remained, the leading concept of international environmental policy. *The Brundtland Report* characterised sustainable development as a process that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs.’<sup>114</sup> The IUCN has defined it as the improvement of the quality of human life, while living within the carrying capacity of supporting ecosystems.<sup>115</sup>

It was not until the 2002 World Summit on Sustainable Development that anything approaching a definition of the concept was attempted by the UN. Three ‘interdependent and mutually reinforcing pillars of sustainable development’ were identified in the Johannesburg Declaration – economic development, social development and environmental protection.<sup>116</sup> In substance, as this formulation indicates, sustainable development is seen to entail a compromise between environmental protection, human rights and economic growth. One question that arises here is whether the three ‘interdependent and mutually reinforcing pillars’ are *in fact* ‘mutually reinforcing’. Some would urge that the economic development paradigm remains dominant in most countries, which means that this will generally trump social development and environmental protection. As Robinson has argued:

These pillars are not equal; the volume of law promoting development has been the driving force in government decision-making for centuries, while much of the law related to social welfare dates only from the late 19th century, and then mainly for developed countries. The law relating to environmental protection, on a global basis, is still weak; it is only one generation old. The economic agenda dominates decision-making and is a tall pillar [...] The social sector remains modest in comparison with the economic development pillar. The third pillar is the shortest; the ecological dimension is simply reduced to the utilitarian goal of ‘environmental protection’. The resources for environmental protection are inadequate. [...] These unequal pillars cannot support a level roof. If they are regarded as the three legs of a stool, they are so lopsided as to be useless. The very symbol of three such pillars at best merely stated policy exploration, and does not exist in practice

<sup>110</sup> Draft International Covenant on Environment and Development, *Second Edition, 2010 Environmental Law and Policy Paper no 31 Rev. 3, 2010*, available at [http://www.iucn.org/about/work/programmes/environmental\\_law/elp\\_resources/elp\\_res\\_publications/?uPubsID=4197](http://www.iucn.org/about/work/programmes/environmental_law/elp_resources/elp_res_publications/?uPubsID=4197)

<sup>111</sup> *Ibid.*, Article 4.

<sup>112</sup> *Ibid.*, at 42-43.

<sup>113</sup> See below.

<sup>114</sup> WCED, *Our Common Future* at 43. Compare the more expansive definition of sustainable development developed by the FAO Committee on Fisheries in 1991: ‘the management and conservation of the natural resource base, and the orientation of technological and institutional change in such a manner as to ensure the attainment and continued satisfaction of human needs for present and future generations. Such development conserves land, water, plant genetic resources, is environmentally non-degrading, technologically appropriate, economically viable and socially acceptable.’

<sup>115</sup> IUCN *Caring for the Earth, 1991*.

<sup>116</sup> UN, Report of the WSSD, *UN Doc. A/CONF.199/20 (2002), Resolution 1, para 5*.

anywhere. Reciting the policy mantra of these three pillars reflects the limited and shallow understanding of the policymakers.<sup>117</sup>

With the completion of the Rio+20 outcome document, *The Future We Want*, sustainable development has acquired further importance from the point of view of setting goals for sustainable development in various environmental sectors.<sup>118</sup> The Sustainable Development Goals (SDGs) will likely subsume the MDGs established by the United Nations in 2000.<sup>119</sup> One question is whether human rights relating to the environment will be explicitly and comprehensively included within the relevant SDGs. As the Office of the High Commissioner for Human Rights (OHCHR) in a pre-Rio+20 background note stated:

If Rio+20 must learn one thing from the MDGs when it considers Sustainable Development Goals, it is that policies geared to fulfilling human rights, particularly economic, social and cultural rights also contribute to the achievement of development goals. Accountability should be seen as a policy outcome and a prerequisite for the achievement of the goals to be agreed upon.<sup>120</sup>

### ***Environment and Human Rights in Europe***

The European Convention on Human Rights, adopted in 1950, says nothing about the environment. It is, however, a 'living instrument', pursuant to which changing social values can be reflected in the jurisprudence. The European Court of Human Rights has consistently held that 'the Convention [...] must be interpreted in the light of present-day conditions.'<sup>121</sup> With regard to environmental rights, this is exactly what the Court has done. So extensive is its growing environmental jurisprudence that proposals for the adoption of an environmental protocol have not been pursued.<sup>122</sup> Instead, a *Manual on Human Rights and the Environment* adopted by the Council of Europe in 2005 and revised in 2012 recapitulates the Court's decisions on this subject and sets out some general principles.<sup>123</sup>

The Manual points out that '[N]either the Convention nor the [European Social] Charter are designed to provide a general protection of the environment as such and do not expressly guarantee a right to a sound, quiet and healthy environment.'<sup>124</sup> Nevertheless, various articles indirectly have an impact on claims relating to the environment, most notably the right to life (Article 2), the right to respect for private and family life (Article 8), the right to peaceful enjoyment of possessions and property (Protocol 1, Article 1), and the right to a fair hearing (Article 6). The Manual makes several points of general importance concerning the Convention's implications for environmental protection:

First, the human rights protected by the Convention may be directly affected by adverse environmental factors. For instance, toxic smells from a factory or rubbish tip might have a negative impact on the health of individuals. Public authorities may be obliged to take measures to ensure that human rights are not seriously affected by adverse environmental factors.

Second, adverse environmental factors may give rise to certain procedural rights for the individual concerned. The European Court of Human Rights has established that public authorities must observe certain requirements as regards to information and communication, as well as participation in decision-making processes and access to justice in environmental cases.

Third, the protection of the environment may also be a legitimate aim justifying interference with certain individual human rights. For example, the ECtHR has established that the right to peaceful enjoyment of one's possessions may be restricted if this is considered necessary for the protection of the environment.<sup>125</sup>

The Court has recognised that national authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. Therefore in reaching its judgments, the Court affords the national

<sup>117</sup> For example, see ROBINSON, N, 'Reflecting on Rio: environmental law in the coming decades', in BENEDICKSON, J, BOER, B, BENJAMIN, A & MORROW, K 2011, (eds), *Environmental Law and Sustainability after Rio*, Edward Elgar, pp. 14-15.

<sup>118</sup> *The Future We Want*, note 101, above, para. 8: 'We also reaffirm the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food, the rule of law, gender equality and women's empowerment and the overall commitment to just and democratic societies for development.'

<sup>119</sup> Millennium Development Goals <http://www.un.org/millenniumgoals/>

<sup>120</sup> 'If Rio+20 is to deliver, accountability must be at its heart.' Background Note: Human Rights Essential Role for Sustainable Development, available at <http://www.ohchr.org/Documents/HRBodies/SP/BNSustainableDevelopment.pdf>. The latest IUCN Policy on Conservation and Human Rights for Sustainable Development, agreed on in 2012 should also be noted in this context: WCC-2012-Res-099-IUCN Policy on Conservation and Human Rights for Sustainable Development, available at [http://www.iucn.org/about/work/programmes/global\\_policy/gpu\\_resources/gpu\\_res\\_rec/](http://www.iucn.org/about/work/programmes/global_policy/gpu_resources/gpu_res_rec/). Background Note: Human Rights Essential Role for Sustainable Development available at [www.ohchr.org/Documents/HRBodies/SP/BNSustainableDevelopment.pdf](http://www.ohchr.org/Documents/HRBodies/SP/BNSustainableDevelopment.pdf)

<sup>121</sup> *Soering v UK* (1989) 11 EHRR 439, at para. 102. See e.g. *Ocalan v Turkey* (2003) 37 EHRR 10: 'capital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment, which is no longer acceptable under Article 2.' The Inter-American Court of Human Rights takes the same approach to interpretation of the San Jose Convention: see Advisory Opinion on the Right to Information on Consular Assistance (1999) IACHR Series A, No. 16, paras. 114-5; Advisory Opinion on the Interpretation of the American Declaration on the Rights and Duties of Man (1989) IACHR Series A, No. 10, para. 43; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001), IACHR Ser. C, No. 20, paras. 146-148.

<sup>122</sup> See Council of Europe: Committee of Experts for the Development of Human Rights, Final Activity Report on Human Rights and the Environment, DH-DEV(2005)006rev; *Strasbourg*, 10 November 2005), 2-3 [Hereafter 'Council of Europe Report'].

<sup>123</sup> See the Manual on Human Rights and the Environment, second edition, (Council of Europe: 2012) Report, Appendix II, 143 – 147; see also LOUCAIDES, L 2005, Environmental Protection through the Jurisprudence of the European Convention on Human Rights, 75 BYIL, pp. 249-267; DESGAGNÉ, R 1995, Integrating Environmental Values into the ECHR, 89 AJIL 263. For a recent review of other international developments see SHELTON, D 2002, 'Human Rights and the Environment: Jurisprudence of Human Rights Bodies', Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, Background Paper No.2 (Geneva).

<sup>124</sup> *Ibid.*, 7.

<sup>125</sup> *Ibid.* 7

authorities in principle a wide discretion [...] – in the language of the Court a wide ‘margin of appreciation’ – in their decision-making in this sphere.<sup>126</sup>

There is no doubt that European human rights law recognises that states have a responsibility to protect people from environmental harm caused by activities of the state itself, or those of business and industry. Cases such as *Guerra*, *López Ostra*, *Öneryildiz*, *Taskin* and *Fadeyeva* show how the right to private life, or the right to life, can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose information.<sup>127</sup> It is irrelevant that the state does not own or operate the plant or industry in question. As the ECtHR said in *Fadeyeva*, the State’s responsibility in environmental cases ‘may arise from a failure to regulate private industry’.<sup>128</sup> The State thus has a duty ‘to take reasonable and appropriate measures’ to secure rights under human rights conventions.<sup>129</sup>

In the *Tatar Case*, the Court considered that states have a positive obligation to adopt all reasonable measures to protect the right of individuals to private and family life. Four elements were identified:

- i. Regulation of potentially harmful activities – in effect an obligation of prevention;
- ii. Decision-making procedures that allow states to strike a fair balance between different interests;
- iii. A right to be informed of the danger posed by potentially harmful activities;
- iv. A right to appeal from decisions or omissions that may harm the environment and, consequently, the rights of the individuals.<sup>130</sup>

The right to life is also relevant: In *Öneryildiz*, the ECtHR emphasised that ‘[t]he positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails, above all, a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.’<sup>131</sup> The Court held that this obligation covered the licensing, setting up, operation, security and supervision of dangerous activities, and required all those concerned to take ‘practical measures to ensure the effective protection

of citizens whose lives might be endangered by the inherent risks.’<sup>132</sup>

These practical measures include law enforcement. It is a characteristic feature of *Guerra*, *López Ostra*, *Taskin* and *Fadeyeva* that the industrial activities in question were either operating illegally or in violation of environmental laws and emissions standards. In *López Ostra* and *Taskin*, the national courts had ordered the closure of the facility in question, but their decisions had been ignored or overruled by the political authorities. In effect, there is in these cases a right to have the law enforced and the judgments of national courts upheld: ‘The Court would emphasise that the administrative authorities form one element of a State subject to the rule of law, and that their interests coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose.’<sup>133</sup>

In cases before the European Court of Human Rights, States have been allowed a wide margin of appreciation to pursue environmental objectives provided they maintain a fair balance between the general interests of the community and the protection of the individual’s fundamental rights.<sup>134</sup> Particularly in cases involving alleged interference by the State with peaceful enjoyment of possessions and property, the Court has consistently taken the view that environmental protection is a legitimate objective of public policy. It has refused to give undue pre-eminence to property rights, despite their supposedly protected status under the first Protocol to the European Human Rights Convention. Regulation in the public interest is not inconsistent with the terms of the protocol, provided it is authorised by law and proportionate to a legitimate aim, such as environmental protection.<sup>135</sup> On this basis, the Court has in several cases upheld restrictions on property development.<sup>136</sup>

A similarly wide discretion has enabled European states to pursue economic development, provided the rights of individuals to private and family life or protection of possessions and property are sufficiently balanced against economic benefits for the community as a whole. Thus, in *Hatton v. the United Kingdom*,<sup>137</sup> additional night flights at Heathrow Airport did not violate the right to private and family life because adequate measures had been taken to

<sup>126</sup> *Ibid.* 31.

<sup>127</sup> *López Ostra v. Spain* (1994) 20 EHRR 277; *Guerra v. Italy* (1998) 26 EHRR 357; *Fadeyeva v. Russia* [2005] ECHR 376; *Öneryildiz v. Turkey* [2004] ECHR 657; *Taskin v. Turkey* [2004] ECHR 50.

<sup>128</sup> [2007] 45 EHRR 10, para. 89.

<sup>129</sup> *Ibid.*

<sup>130</sup> See para. 88 of *Tatar v. Romania* (App no 67021/01 judgment of 27 January 2009). The court later recalls that Romania is a party to the Aarhus Convention and recognises the rights of access to information, participation and access to justice, in par. 118.

<sup>131</sup> [2005] 41 EHRR 20, para. 89.

<sup>132</sup> *Ibid.*, para. 90.

<sup>133</sup> *Taskin*, paras. 124-5. The Inter-American Court of Human Rights has taken the same view pursuant to Article 25 of the Inter-American Convention: see *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), Ser. C, No. 201, at paras.106-114.

<sup>134</sup> *Fredin v. Sweden* (1991) ECHR Sers. A/192.

<sup>135</sup> *Fredin v. Sweden* (1991) ECHR Sers. A/192, paras. 41-51. See also *Apirana Mahuika et al v. New Zealand* (2000) ICCPR Communication No. 547/1992, in which the UNHRC upheld the State’s right to conserve and manage natural resources in the interests of future generations provided this did not amount to a denial of the applicant’s rights.

<sup>136</sup> *Pine Valley Developments Ltd v. Ireland* (1991) ECHR Sers. A/222, paras. 57-9; *Katsoulis v. Greece* (2004) ECHR; *Mateos e Silva Ltd v. Portugal* [1997] 24 EHRR 573.

<sup>137</sup> See *Hatton v. UK* [2003] ECHR (Grand Chamber).

sound-proof homes, to regulate and limit the frequency of flights and to assess the environmental impact. In the court's view, the State would be failing in its duty to those affected if it did not regulate or mitigate environmental nuisances or environmental risk caused by such development projects,<sup>138</sup> but it is required to do so only to the extent necessary to protect life, health, enjoyment of property and family life from disproportionate interference.

At the same time, the balance of interests to be maintained in such cases is not only a substantive one, but also has important procedural dimensions. Thus in *Taskin v. Turkey*, a case about the licensing of a mine, the Court held that 'whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests of the individual as safeguarded by Article 8.'<sup>139</sup> This passage and the Court's emphasis on taking into account the views of affected individuals strongly suggests that, at least for some decisions, participation in the decision-making process by those affected will be essential for compliance with Article 8 of the European Convention on Human Rights.<sup>140</sup>

The most significant feature of *Taskin* is that it envisages an informed process. The Court put the matter like this: 'Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities that might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake [...]'<sup>141</sup> The words 'environmental impact assessment' are not used, but in many cases that is exactly what will be necessary to give effect to the evaluation process envisaged here. This is a far-reaching conclusion, but once again, it reflects the provisions of the Aarhus Convention. Article 6 also does not specify what kind of procedure is required, but it has detailed provisions on the information to be made available, including:

- i. A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
- ii. A description of the significant effects of the proposed activity on the environment;

- iii. A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
- iv. A non-technical summary of the above;
- v. An outline of the main alternatives studied by the applicant.<sup>142</sup>

As a brief comparison with Annex II of the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context shows, these are all matters normally included in an EIA.<sup>143</sup>

Not all 'environmental' rights in Europe are found in the ECHR. The most obvious addition to the relevant instruments is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted by the UN Economic Commission for Europe.<sup>144</sup>

### *Environment and Human Rights in Asia*

For the purposes of this paper, Asia can be described in terms of the regional organisations to which the individual countries belong, as follows:<sup>145</sup>

- i. South Asia comprises the countries of the South Asian Association for Regional Cooperation (SAARC): Afghanistan, Bhutan, India, Sri Lanka, Nepal, Bangladesh, Pakistan, and the Maldives.
- ii. Northeast Asia comprises China, Japan, North Korea and South Korea.
- iii. Southeast Asia includes the ten countries of the Association of Southeast Asian Nations (ASEAN): Brunei Darussalam, Myanmar, Cambodia, Indonesia, the Laos PDR, Malaysia, Thailand, the Philippines, Singapore and Vietnam, together with Timor-Leste (which has not yet joined ASEAN).

The population of the Asian region is the fastest growing of all of the world's regions. It is also home to an extraordinary variety of species of flora and fauna.<sup>146</sup> However, growing populations in most Asian countries are also placing significant pressures on the land, water, biodiversity and other natural resources of the region. The trend is exacerbated by a phenomenal increase in consumer demand and the

<sup>138</sup> See also Öneriyıldız, para. 107; Taskin, paras. 116-7.

<sup>139</sup> Taskin, at para. 118.

<sup>140</sup> Note that under Article 6 of the Aarhus Convention, participatory rights are available only to 'the public concerned', defined in Article 2(5) as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

<sup>141</sup> Taskin, para. 119.

<sup>142</sup> Aarhus Convention, Article 6(6).

<sup>143</sup> Annex II of the Espoo Convention additionally includes an indication of predictive methods, underlying assumptions, relevant data, gaps in knowledge and uncertainties, as well as an outline of monitoring plans. The full text of the Espoo Convention can be found at <http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/conventiontextenglish.pdf>

<sup>144</sup> See UNECE, The Aarhus Convention-An Implementation Guide (New York, 2000).

<sup>145</sup> This list includes more Asian countries than are part of the Asia-Europe Foundation at present. For an overview of the regional environmental law and policy issues in Asia and the Pacific, see BOER, B, RAMSAY, R & ROTHWELL, D 1997, International Environmental Law in the Asia Pacific (Kluwer). It is noted that Australia and New Zealand are ASEP members, but they are not specifically focused on in this background paper.

<sup>146</sup> FOX, JM 2000, 'How Blaming 'Slash and Burn' Farmers is Deforesting Mainland Southeast Asia', 47(Asia Pacific) East West Centre

continuing sprawl of cities, especially by migration from rural to urban locations. These conditions make it increasingly difficult to attain any kind of balance between the three pillars of economic development, social and cultural development and protection of the environment.

With the exception of the ASEAN Human Rights Declaration (discussed below) there are currently no regional instruments on human rights in existence in Asia. Given the fragility of the various regional organisations in South Asia and Northeast Asia, together with the difficult state of international relations between several of the countries and the uneven social and economic development in these sub-regions, this is hardly surprising. It can, however, be noted that the Office of the High Commissioner for Human Rights (OHCHR) has a regional office in Bangkok for Southeast Asia and two further stand-alone offices in the region (Nepal in South Asia, and Cambodia in Southeast Asia).<sup>147</sup>

While Principle 1 of the Rio Declaration states ‘[h]uman beings are at the centre of concerns for sustainable development’, and are ‘[...] entitled to a healthy and productive life in harmony with nature’,<sup>148</sup> the vast disparities between the rich and the poor means that the reality for millions of disadvantaged people in the Asian region is one of a daily struggle to survive.<sup>149</sup>

In contrast to Europe, Asia does not have a region-wide approach to environmental matters. However, its sub-regions of Northeast Asia,<sup>150</sup> South Asia<sup>151</sup> and Southeast Asia (ASEAN)<sup>152</sup> each have their own environmental programs. However, ASEAN is the only sub-region to have its own environmental treaty, entitled the ASEAN Agreement on the Conservation of Nature and Natural Resources. Unfortunately, while having been concluded in 1985, the agreement has not been able to attract a sufficient number of ratifications for it to come into effect. Nevertheless, it has been an influential factor in promoting environmental law and management in the region. Although it does not include any specific reference to human rights, a preambular paragraph of the ASEAN Agreement points to the connection between conservation and socio-economic development:

Conscious also that the interrelationship between conservation and socio-economic development implies both that conservation is necessary to ensure sustainability of development, and that socio-economic development is necessary for the achievement of conservation on a lasting basis.

## *Examples of Environmental Problems and Human Rights in Asia and Europe*

While environmental legislation is continuing to develop in many Asian jurisdictions, and the field of human rights is gaining more focus, there continue to be many instances of environmental degradation and breaches of basic human rights caused by unsustainable development practices. This section sets out three examples, on land degradation, haze pollution and dam construction, which raise human rights and environmental issues. One or more of these examples could be used as a basis for discussion of the interaction between environmental regulation and human rights in the seminar.

### *Land degradation*

Land and soil degradation affects all regions of the world. In both Europe and Asia, it is associated with the unregulated or under-regulated use of agricultural pesticides and fertilisers, land contamination by the escape of toxic chemicals from industrial sites, reducing the production capacity of agricultural land through loss of soil fertility<sup>153</sup> and resulting in serious effects on human health. Just as importantly, inappropriate agricultural practices result in widespread soil erosion. In combination, these all pose threats to human food security.

Land degradation is defined as ‘Reduction or loss of the biological or economic productivity and complexity of rainfed cropland, irrigated cropland, or range, pasture, forest and woodlands resulting from land uses or from a process or combination of processes, including processes arising from human activities and habitation patterns, such as: (i) soil erosion caused by wind and/or water; (ii) deterioration of the physical, chemical and biological or economic properties of soil; and (iii) long-term loss of natural vegetation.’<sup>154</sup> Some 20 per cent of the world’s land is considered degraded. Analysts identify various hotspots including Africa (south of the equator), Southeast Asia and China.<sup>155</sup> Land degradation and desertification is considered to be a much greater threat in drylands than in lands that are not considered dry.<sup>156</sup>

The United Nations Special Rapporteur on the Right to Food has indicated that worldwide, the number of people suffering from hunger has increased to an estimated 854 million. It is estimated that half of these people live in marginal, dry and degraded lands. They depend on their survival on lands that are inherently poor and becoming

<sup>147</sup> See Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/Countries/Pages/WorkInField.aspx>

<sup>148</sup> See Rio Declaration on Environment and Development 1992

<sup>149</sup> While the United Nations Development Programme states that the Millennium Development Goal target on halving extreme poverty between 1990 and 2010 has been met, it notes that 1.2 billion people still live in extreme poverty; see [http://www.undp.org/content/undp/en/home/mdgoverview/mdg\\_goals/mdg1/](http://www.undp.org/content/undp/en/home/mdgoverview/mdg_goals/mdg1/).

<sup>150</sup> The Northeast Asian Sub-regional Programme for Environmental Cooperation comprises China, Democratic People’s Republic of Korea (DPRK), Japan, Mongolia, Republic of Korea (ROK) and the Russian Federation; it holds regular meetings of senior officials, sponsors research and conduct capacity <http://www.neaspec.org/>

<sup>151</sup> The South Asian Association for Regional Cooperation (SAARC) is headquartered in Kathmandu. It hosts the South Asian Co-operative Environment Programme, which holds regular consultations, sponsors research and conducts capacity building; see <http://www.sacep.org/>

<sup>152</sup> The ASEAN Secretariat is based in Jakarta; see <http://www.aseansec.org/>. It has a specific focus on environmental issues in the region; and it has a well-developed institutional framework for environmental Corporation: the ASEAN Senior Officials on the Environment meet regularly.

<sup>153</sup> *Ibid*

<sup>154</sup> United Nations Convention to Combat Desertification art. 1.

<sup>155</sup> Zero Net Land Degradation: A Sustainable Development Goal for Rio+20, UNCCD Policy Brief 2012.

<sup>156</sup> *Ibid* p. 16.

less fertile and less productive because of repeated droughts, climate change and unsustainable land use.<sup>157</sup> This is an issue that affects a number of Asian countries, such as China<sup>158</sup> and India.<sup>159</sup>

Practices that result in land degradation and desertification are clearly unsustainable, and many instances can be cited which indicate breaches of basic human rights.<sup>160</sup> Land degradation and its subset of desertification raise many human rights issues. The Secretariat of the United Nations Convention to Combat Desertification (UNCCD) recommends that States, 'in accordance with their domestic legal and policy framework, [to] include provisions in the domestic law, possibly including Constitutional legislative review that facilitates the progressive realisation of human rights such as the right to life, food and water in the context of the concept of DLDD [Desertification, Land Degradation and Drought].'<sup>161</sup>

In contrasting Europe and Asia with regard to drylands, a report on global drylands points out that there are numerous dryland areas in Europe, particularly around the Mediterranean and Central Asia,<sup>162</sup> but Asia has the greatest concentration of dryland degradation.<sup>163</sup>

The 1994 Desertification Convention specifically refers to the link between desertification, sustainable development, and in particular that to the social problems of poverty, food security, and those arising from demographic dynamics. Annex 2 of the Convention, which concerns regional implementation, recognises the particular conditions of the Asian region. It provides that in carrying out their obligations, Parties consider particular conditions including 'the significant impact of conditions in the world economy and social problems such as poverty, poor health and nutrition, lack of food security, migration, displaced persons and demographic dynamics.'<sup>164</sup>

While each of these issues raises human rights matters, the particular issue of migration and displaced persons has garnered the attention of a number of analysts. These people are sometimes referred to by the benign term of 'environmental migrants'. In reality, the problems of environmentally displaced persons are similar to refugees as defined under

the 1951 Refugee Convention, which, it should be noted, does not address this category of persons displaced by environmental conditions. These considerations are also relevant to people displaced by the effects of climate change. While the UN's Refugee Agency, the United Nations High Commissioner for Refugees (UNHCR), is a specialised body dealing with refugees and transboundary displaced people, it does not address environmentally displaced people; however, in the future it may play such a role.<sup>165</sup>

The Rio+20 outcome document, *The Future We Want*, recognises that urgent action is required reverse land degradation and commits to striving 'to achieve a land-degradation-neutral world in the context of sustainable development.' The UNCCD Policy Brief urges that the achievement of land degradation neutrality be the subject of one of the emerging Sustainable Development Goals, with a target date of 2030.<sup>166</sup>

### *Transboundary air pollution*

Another example of environmental disasters that some experts characterise as resulting in human rights violations is that of transboundary air pollution.

### **Asia**

Land clearing activities, particularly for conversion to palm oil plantations by large companies, has been occurring in Indonesia for over two decades. It is evident that this method has created a severe problem. Each year instances of transboundary 'haze' pollution are repeated in Sumatra and Borneo. In an attempt to address this issue, the ASEAN Agreement on Transboundary Haze Pollution was concluded in 2002. The objective of the Agreement is:

To prevent and monitor transboundary haze pollution as a result of land and/or forest fires, which should be mitigated through consistent national efforts and intensified regional and international cooperation. This should be pursued in the overall context of sustainable development and in accordance with the provisions of this Agreement.

<sup>157</sup> ZIEGLER, J 2008, *United Nations Special Rapporteur on the Right to Food, introductory message to Human Rights and Desertification*, Exploring the complementarity of international human rights law and the United Nations Convention to Combat Desertification UNCCD, Issue Paper No. 1.

<sup>158</sup> QUN, D & HANNAM, J 2001, Law, Policy and dryland ecosystems in the People's Republic of China, IUCN Environmental Law Centre and Asian Development Bank, Environmental Policy and Law Paper No. 80.

<sup>159</sup> *Global Drylands: A UN system-wide response*, Environment Management Group of the United Nations, available at <http://www.unemg.org/index.php/global-drylands-a-united-nations-system-wide-response>

<sup>160</sup> See JHA, R 2005, Alleviating Environmental Degradation in the Asia-Pacific Region: International Co-operation and the Role of Issue-Linkage, Australian National University, Department of Economics, Research School of Pacific and Asian Studies.

<sup>161</sup> Note 164 above, at 28.

<sup>162</sup> *United Nations Environment Management Group, Global Drylands: A UN system-wide response*, 2011 at 22.

<sup>163</sup> *Ibid.*, at 33.

<sup>164</sup> *Convention to Combat Desertification 1994, Annex 2, Article 2(d)*

<sup>165</sup> When speaking about transboundary displacement due to climate change, at the 2011 Nansen Conference on Climate Change and Displacement, the UN High Commissioner for Refugees, António Guterres noted that even though UNHCR has not embraced the terminology of 'climate refugees', '[...] a more viable approach would be to at least develop a global guiding framework for situations of cross-border displacement resulting from climate change and natural disasters [and] UNHCR stands ready to support states in the development of such a framework, which could take the form of temporary or interim protection arrangements. We could assist in the identification of scenarios in which such arrangements would be activated. And we could help to develop procedures and standards of treatment for affected populations', Statement by António GUTERRES, United Nations High Commissioner for Refugees, Nansen Conference on Climate Change and Displacement, Oslo, Norway, 6 June 2011. Available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=home&skip=30&cid=49aea93a4c&scid=49aea93a2f&comid=42b2f01a4>

<sup>166</sup> UNCCD Policy Brief 2012, note 160, above at 12, see also Draft EU Submission to the UN General Assembly Open Working Group on Sustainable Development Goals (SDGs): desertification and land degradation.



While the Agreement does not refer to the human rights aspects of forest fires, it does mention the effects on human health. 'Haze pollution' is defined as 'smoke resulting from land and/or forest fire, which causes deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment' (Article 1(6)).

Nine ASEAN countries signed and ratified the agreement (Malaysia, Singapore, Brunei Darussalam, Myanmar, Viet Nam, Thailand, the Lao PDR, Cambodia and the Philippines) and it entered into force in November 2003. Indonesia has not yet ratified the agreement.<sup>167</sup> The burning of forests continues to occur on an annual basis on the island of Sumatra, severely affecting the neighbouring countries of Malaysia, Thailand and Singapore, causing heavy losses in terms of economic, moral and health impacts. This situation could be considered a violation of the ASEAN Human Rights Declaration (see below), which includes the right to health and the right to a safe, clean and sustainable environment, articulated in Article 28 of the Declaration.

One question is whether the violation of these rights can be resolved under the provisions of international environmental law or through human rights law. In the case of forest fires in Southeast Asia, with the non-ratification of the Haze Agreement by Indonesia, the question is whether action in the International Court of Justice (ICJ) could be pursued. The Malaysian Bar Association has suggested such action.<sup>168</sup> Recently, Singaporean officials have also considered the possibility of taking action against two Indonesian forest companies situated in Singapore.<sup>169</sup> However, the reality may be that the situation may eventually only be resolved by negotiation and regionally based cooperative activities to reduce the incidence of the forest fires and their effects.<sup>170</sup>

## Europe

In contrast to Asia, the regulation of transboundary air pollution<sup>171</sup> in Europe has been addressed regionally in various ways since the 1970s.<sup>172</sup> The primary instrument is the 1979 Convention on Long-Range Transboundary Air Pollution, which now has 51 parties, including most

European countries, as well as the United States and Canada. The Convention has spawned a number of Protocols to deal with specific airborne pollutants; for example, sulphur emissions, nitrogen oxides and volatile organic compounds.<sup>173</sup> In addition, there is a Protocol to the Aarhus Convention on Access to Information, Public Participation and Access to Justice, which established the Pollutant Release and Transfer Register. The Protocol requires parties to adopt provisions to ensure access to information regarding releases of water and air pollution from industrial facilities.

## Dam construction

The increased construction of dams post-World War Two has raised a range of significant environmental and human rights issues. The environmental issues include decreases in biodiversity, reduction of land available for agriculture and other human uses, and loss of cultural heritage. The human rights issues include loss of traditional livelihoods, food security problems from reduction of available agricultural lands and loss of fish production, as well as the displacement of hundreds of thousands of people. The rate of construction has slowed down, especially in North America and Europe, while in Asia, the planning and construction of dams has proceeded apace in some countries and regions.

## Asia

In a number of Asian countries, the construction of dams on major rivers for the purposes of electricity generation, irrigation and, in some cases, the facilitation of navigation, have resulted in the displacement of large numbers of people from their traditional lands. In some countries, this has occurred without adequate compensation to the people affected, and with devastating effects on livelihoods for farmers and fishers.<sup>174</sup> Various studies have now been carried out concerning these effects, although not many specifically examine human rights issues.<sup>175</sup> The issues of land expropriation practices, human displacement and resettlement, whereby river-dependent communities are deprived of their natural resource livelihood base, are recognised in some environmental impact assessment reports.<sup>176</sup> However, the human rights aspects of dam construction are generally not well taken into account

<sup>167</sup> See 'Govt wants haze agreement ratified' Jakarta Post January 22, 2011, <http://www.thejakartapost.com/news/2011/01/22/govt-wants-haze-agreement-ratified.html> and, 'Why Indonesia must ratify the ASEAN haze pollution treaty' <http://www.thejakartapost.com/news/2013/07/14/why-indonesia-must-ratify-asean-haze-pollution-treaty.html>

<sup>168</sup> See 'Haze problem: Bilateral pressure on Indonesia works best' Singapore Angle, <http://www.singaporeangle.com/2006/10/haze-problem-bilateral-pressure-on.html>

<sup>169</sup> 'Singapore officials consider legal action against forest fire companies over the heaviest smog to ever cover the city' The Independent, 15 September 2013, available at <http://www.independent.co.uk/news/world/asia/singapore-officials-consider-legal-action-against-forest-fire-companies-over-the-heaviest-smog-to-ever-cover-the-city-8669486.html>

<sup>170</sup> On liability issues, Alan Khee-Jin TAN (1999). *Forest Fires of Indonesia: State Responsibility and International Liability*. International and Comparative Law Quarterly, 48, pp 826-855

<sup>171</sup> See generally in relation to transboundary pollution, Günter HANDL, 'Transboundary Impacts' Ch 22, Daniel BODANSKY, Jutta BRUNNEE and Ellen HEY, The Oxford Book of International Environmental Law, Oxford 2007

<sup>172</sup> See HUNTER, D, SALZMAN, J & ZAELEKE, D 2011., The European Approach: The Convention on Long-range Transboundary Air Pollution, Foundation Press, pp. 525-531.

<sup>173</sup> See further, 22nd Annual Report 2013: Convention on Long-range Transboundary Air Pollution. International Cooperative Programme on Integrated Monitoring of Air Pollution Effects on Ecosystems, available at <https://helda.helsinki.fi/handle/10138/40129>

<sup>174</sup> For effect of dam construction on food security in Southeast Asia see 'Proposed Southeast Asian Dams Endanger Food Security' <http://www.rwlwater.com/proposed-south-east-asian-dams-endanger-food-security/>

<sup>175</sup> But see NORDLING 2005, Environment and Human Rights in the Mekong Region, Forum Syd, Cambodia, and International Rivers, 'The Human Impact of Dams', <http://www.internationalrivers.org/human-impacts-of-dams>

<sup>176</sup> See for example, Strategic Environmental Assessment of Hydropower on the Mekong Mainstream, Final Report, International Centre for Environmental Management 2010.

by relevant government and private sector interests. On the other hand, some NGOs do recognise these connections and are very active in their advocacy.<sup>177</sup> Examples of these issues arise in non-peninsular Malaysia, with the construction of the Bakun Dam,<sup>178</sup> the Yangtze Three Gorges Dam Project in Hubei Province, China,<sup>179</sup> the cascade of dams on the Mekong (Lancang) River in Yunnan Province, China, and dams on the tributaries and, in the longer term, on the mainstream of the lower Mekong River.<sup>180</sup>

## Europe

Although the rate of dam construction in Europe has slowed down considerably in the past few decades, there has been a major controversy over the construction of a system of locks on the Danube River, which was the subject of a 1977 treaty between Hungary and the then Czechoslovakia. The system was intended to be operated jointly by the parties. Its purpose was generation of hydroelectricity, improved navigation and flood protection.<sup>181</sup> The matter was eventually brought to the International Court of Justice, known as the *Gabčíkovo–Nagymaros Case* or the Danube Dam Case.<sup>182</sup> In the context of this paper, the most important opinion in the case was that of Vice President Weeramantry. He characterised sustainable development as a principle of reconciliation in the context of conflicting human rights. He argued that the human right to development attracts ‘the overwhelming support of the international community’,<sup>183</sup> but also found that a human right to protection of the environment was a ‘vital part’ of the human rights discourse. He considered that:

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments. While, therefore, all peoples have the right to initiate

development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment.<sup>184</sup>

The *Gabčíkovo–Nagymaros Case* is thus very significant in terms of drawing close links between human rights and environmental protection.<sup>185</sup> It continues to have lasting effect in cases at national level in arguments to support the existence of environmental rights.<sup>186</sup>

## *Should a Right to a Satisfactory, Sustainable or Ecologically Sound Environmental Right Exist?*

Given the increasing recognition of the links between human rights and environmental issues, should we then go the whole way and create a right to a satisfactory, sustainable or ecologically sound environment in international human rights law? There are obvious problems of definition and anthropocentricity, well-rehearsed in the literature.<sup>187</sup> But there are also deeper issues of legal architecture to be resolved. At the substantive level, a satisfactory or sustainable environment should not be confused with the procedural innovations of the Aarhus Convention, or with the case law on the right to life, health or private life. To do so would make it little more than a portmanteau or vehicle for the greening of existing civil and political rights. The ample jurisprudence shows clearly that this is unnecessary and misconceived. To be meaningful, a right to a satisfactory or sustainable environment has to address the environment as a public good, in which form it bears little resemblance to the accepted catalogue of civil and political rights – a catalogue, which for good reasons, there is great reluctance to expand.<sup>188</sup> The arguments against include the fear that existing rights may be devalued, and the rather more plausible view that we should concentrate on enforcing existing rights, not on adding new ones. There is also the point that what constitutes a satisfactory, sustainable or ecologically sound environment is too uncertain, and is not inherent in the human condition. Indeterminacy is an important reason; it is often argued, for not rushing to embrace new rights without considering their implications.<sup>189</sup>

<sup>177</sup> See for example: ‘Local and international groups including human rights and environmental NGOs have been working together to use various means in an attempt to ensure that these mega-dam projects do not go forward unless they have taken into account and properly addressed the social and environmental costs of the dams.’ *Earth Rights International ‘Environmental rights as human rights in the Lower Mekong Basin’* <http://www.earthrights.org/blog/environmental-rights-human-rights-lower-mekong-basin>

<sup>178</sup> RAMAN, M 1997, ‘The 1996 Malaysian High Court Decision concerning the Bakun hydro-electric dam project’ 2(1) in *Asia Pacific Journal of Environmental Law*, pp. 93–97.

<sup>179</sup> International Centre for Environmental Management, *Strategic Environmental Assessment of Hydropower on the Mekong Mainstream, Final Report 2010*.

<sup>180</sup> See International Centre for Environmental Management, *ibid.*, and JOHNS, F, SAUL, B, HIRSCH, P, STEPHENS, T & BOER, B 2010, ‘Law and the Mekong River Basin: A Social-Legal Research Agenda on the Role of Hard and Soft Law in Regulating Transboundary Water Resources’ 11 in *Melbourne Journal of International Law*, pp. 154–174.

<sup>181</sup> *Judgment*, 25.

<sup>182</sup> *Gabčíkovo–Nagymaros Project (Hungary v Slovakia) (Judgment) [1997] ICJ Rep. 7, 17–18; for discussion see BOYLE, A 1997, ‘The Gabčíkovo–Nagymaros Case: New Law In Old Bottles’ 8, in Yearbook Of International Environmental Law, pg. 14.*

<sup>183</sup> *Judgment* at 91.

<sup>184</sup> *Ibid.*, at 91–92.

<sup>185</sup> See additionally WEERAMANTRY, C 1998, ‘Environmental Law Symposium. Weeramantry’s view is given further credence by noting that sustainable development is never used as a standard to determine that states have acted unsustainably. Foreword’, 22 *Melbourne University Law Review* 503, pp. 504–505

<sup>186</sup> See for example, *United States cases: Flores and Others v Southern Peru Copper Corporation (2002) 253 F. Supp 2d 510, 520; Sarei and Others v Rio Tinto Plc (2002) 221 F. Supp 2d 1116, 1157.*

<sup>187</sup> See e.g. HANDL, G, in TRINDADE, AC, 1992, (ed), *Human Rights, Sustainable Development and the Environment (San José)*, pg.117; *id.*, in EIDE, A, KRAUSE, C & ROSAS, A 2001, *Economic, Social and Cultural Rights (Dordrecht)*, pp. 303–28; BOYLE, AE & ANDERSON, M (eds), *Human Rights Approaches, Chs. 2–4. Contrast SHELTON, D 1991, ‘Human Rights, Environmental Rights and the Right to the Environment’*, in 28 *Stanford JIL*, pg. 103.

<sup>188</sup> See ALSTON, P, note 54, above.

<sup>189</sup> *Ibid.*, and also HANDL, G 1992, ‘Human Rights and Protection of the Environment: A Mildly Revisionist View’ in *Trindade (ed) Human Rights, Sustainable Development and the Environment*.

Such right, it has been suggested,<sup>190</sup> is best envisaged not as a civil and political right, but within the context of economic, cultural and social rights, where to some extent it already finds expression through the right to water, food, and environmental hygiene.

The UN Committee on Economic, Social and Cultural Rights has adopted various General Comments relevant to the environment and sustainable development, notably General Comments 14 and 15, which interpret Articles 11 and 12 of the ICESCR to include access to sufficient, safe, and affordable water for domestic uses and sanitation.<sup>191</sup> They also cover the prevention and reduction of exposure to harmful substances, including radiation and chemicals, or other detrimental environmental conditions that directly or indirectly impact upon human health. These are useful and important interpretations that have also had some impact on related areas of international law, including Article 10 of the 1997 UN Watercourses Convention, which gives priority to ‘vital human needs’ when allocating scarce water resources.<sup>192</sup> On this view, existing economic and social rights help guarantee some of the indispensable attributes of a decent environment. What more would the explicit recognition of a right to a decent environment add?

Arguably, it would add what is currently lacking from the corpus of UN economic, cultural and social rights, namely a broader and more explicit focus on environmental quality, which could be balanced directly against the covenant’s economic and developmental priorities. Article 1 of the ICESCR reiterates the right of peoples to ‘freely pursue their economic, social and cultural development’ and to ‘freely dispose of their natural wealth and resources [...]’, but other than ‘the improvement of all aspects of environmental and industrial hygiene’ (Article 12), the Covenant makes no specific reference to protection of the environment. Despite the efforts of the treaty organs to invest the Covenant with greater environmental relevance, it still falls short of recognising a satisfactory or sustainable environment as a significant public interest. Lacking the status of a right means that the environment can be trumped by those values that have that status, including economic development and natural resource exploitation.<sup>193</sup> This is an omission that needs to be addressed if the environment – as a public good – is to receive the weight it deserves in the balance of economic, social and cultural rights. That could be one way of using human rights law to address the impact of the greenhouse gas emitting activities that are causing climate

change and adversely affecting the global environment, as well as lending more force to addressing degradation of ecosystems.<sup>194</sup>

The key question therefore is what values we think a covenant on economic and social rights should recognise in the modern world. Is the environment – or the global environment – a sufficiently important public good to merit economic and social rights status comparable to economic development? The answer endorsed repeatedly by the UN over the past 40 years is obviously yes: at Stockholm in 1972, at Rio in 1992 and at Johannesburg in 2002, and the Rio+20 Conference in 2012, the consensus of States has favoured sustainable development as the leading concept of international environmental policy. Although ‘sustainable development’ is used throughout the Rio Declaration, it was not until the 2002 World Summit on Sustainable Development that anything approaching a definition of the concept could be attempted by the UN. As noted above, three ‘interdependent and mutually reinforcing pillars of sustainable development’ were identified in the Johannesburg Declaration – economic development, social development and environmental protection.<sup>195</sup> This formulation seems tailor-made for a reformulation of the rights guaranteed in the ICESCR.

The challenge posed by sustainable development is to ensure that environmental protection is fully integrated into economic policy. Acknowledging that the environment is part of this equation, the 1992 Rio Declaration (Principle 3) and the 1993 Vienna Declaration on Human Rights (para. 11) both emphasise that ‘[T]he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.’ The ICJ has repeatedly referred to ‘the need to reconcile economic development with protection of the environment [which] is aptly expressed in the concept of sustainable development’.<sup>196</sup> In the *Pulp Mills Case*, the Court again noted the ‘interconnectedness between equitable and reasonable utilisation of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.’<sup>197</sup>

The essential point of these examples is that, while recognising that the right to pursue economic development is an attribute of a State’s sovereignty over its own natural resources and territory, it cannot lawfully be exercised without regard for the detrimental impact on the environment or on human rights.

<sup>190</sup> BOYLE, AE, note 11, above.

<sup>191</sup> UNCESCR, General Comment No. 14: *The Right to the Highest Attainable Standard of Health*, UN Doc.E/C.12/2000/4 (2000); General Comment No. 15: *The Right to Water*, UN Doc.E/C.12/2002/11 (2003). The ICJ has held that ‘great weight’ should be attributed to interpretations adopted by independent treaty supervisory bodies: see Diallo Case (Guinea v. DRC) 2010 ICJ Reports, paras. 66–67.

<sup>192</sup> See Rept. of the 6th Committee Working Group, GAOR A/51/869 (1997).

<sup>193</sup> MERRILLS, J, ‘Environmental Rights’, in BODANSKY, D, BRUNNEE, J & HEY, E 2008, (eds.), Oxford Handbook of International Environmental Law (Oxford), pg. 666.

<sup>194</sup> The Millennium Ecosystem Assessment Ecosystems and Human Well-Being: Synthesis recorded that some 60 per cent (15 out of 24) of the ecosystem services are being degraded or used unsustainably, including fresh water, capture fisheries, air and water purification, and the regulation of regional and local climate, natural hazards, and pests, (2005: Island Press, Washington, DC).

<sup>195</sup> UN, Report of the WSSD, UN Doc. A/CONF.199/20 (2002), Resolution 1, para 5.

<sup>196</sup> Gabcikovo Nagymaros Dam Case (1997) ICJ Reports 7, at para. 140. See also Iron Rhine Case [2005] PCA, and HIGGINS, R, ‘Natural Resources in the Case Law of the International Court’, in BOYLE, AE & FREESTONE, D 1999, (eds), International Law and Sustainable Development (Oxford), Ch. 5.

<sup>197</sup> Pulp Mills on the River Uruguay Case, ICJ Reports 2010, para. 177 (emphasis added).

## Constitutional Provisions on Environmental Rights

Many countries have incorporated some form of recognition of environmental rights in their national constitutions in recent years, as recorded in a number of studies.<sup>198</sup> The majority of them are found in developing countries, with some exceptions.<sup>199</sup> The following sets out some examples from both Asia and Europe.

### Asia

Several Asian states have included explicit provisions regarding the right to a healthy environment – either in their constitutions or in legislation, or both. Some examples are set out here.

Section 16 of Article II of the 1987 Constitution of the Republic of the Philippines<sup>200</sup> provides: ‘The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature. This provision was relied on in the ground-breaking case of *Minors Oposa v Factoran*,<sup>201</sup> a case concerning the granting of timber licences over more land than what was available to log. The Supreme Court of the Philippines found that the plaintiffs had ‘a clear and constitutional right to a balanced and healthful ecology and [were] entitled to protection by the State in its capacity as *parens patriae*’.<sup>202</sup>

Indonesia’s Constitution provides in Article 28H (1), ‘Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care.’ In addition, Article 65 of the Law on Environmental Protection and Management<sup>203</sup> draws a clear link between a healthy environment and human rights, as well as referring to related procedural rights. It also contains a provision, albeit inadequately expressed, concerning the right to object to the operations of business or activities that have the potential to affect the environment:

- i. Everybody shall be entitled to proper and healthy environment as part of human rights;

- ii. Everybody shall be entitled to environmental education, access to information access to participation and access to justice in fulfilling the right to a proper and healthy environment;
- iii. Everybody shall reserve a right to submit recommendations and/or objections against businesses and/or activities predicted to affect the environment.<sup>204</sup>

While Malaysia has no explicit provision concerning environmental rights, it can be implied from Article 5 of the Federal Constitution of Malaysia, as found in several cases in the Malaysian courts. Article 5 reads: ‘No person shall be deprived of his life or personal liberty save in accordance with law.’<sup>205</sup> For example in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan*,<sup>206</sup> *Gopal Sri Ram JCA* stated ‘[...] the expression ‘life’ appearing in art (5) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are [the] right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution-free environment.’<sup>207</sup>

Other States, such as Pakistan and India, while not having a specific environmental right embedded in their constitutions, nevertheless have seen the use of human rights norms, such as the constitutional right to life, as a basis for legal actions to achieve environmental outcomes.

An early case was *M.C. Mehta and Anor. v. Union of India & Ors.*<sup>208</sup> This was an action for compensation related to pollution affecting a large number of people. It was based on the right to life under Article 21 of the Indian Constitution. These and other important cases brought by Advocate M.C. Mehta have established that the constitutional right to life under the Indian Constitution extends to the right to a clean and healthy environment.<sup>209</sup>

Pakistan has also seen some significant public interest environmental cases, the most important one being *Shehla Zia v WAPDA*,<sup>210</sup> which concerned the proposed building of an electric grid station near a residential area. The

<sup>198</sup> See for example BOYD, DR, 2012, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, And The Environment* (UBC Press); MAY, J & DALY, E 2011, *New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, *IUCN Academy of Environmental Law e-Journal*, available at <http://www.iucnael.org/en/e-journal/previous-issues/157-issue-20111.html>; JEFFORDS, C, *Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions*, *University of Connecticut, Working Paper 16*, pg. 20.

<sup>199</sup> In addition to the EU Charter of Fundamental Rights, States which have specific constitutional provisions include: Brazil, Articles 170 and 225; Chile, Articles 19 and 20; China, Articles 9 and 26; Cuba, Article 27; Ecuador, Article 19; France, Article 10, Greece, Article 24; Guatemala, Article 93; Guyana, Article 36; Honduras, Article 145; Hungary, Articles 18 and 70; India, Article 48A; Iran, Article 50; Mozambique, Article 11; Namibia, Article 95; The Netherlands, Article 21; Nicaragua, Article 60; Papua New Guinea, Article 4; Paraguay, Article 93; Peru, Article 123; Portugal, Article 66; Russian Federation, Article 42; South Africa, Section 24; South Korea, Article 35; Spain, Article 45; Thailand, Article 65; Turkey, Article 56; Yemen, Article 16.

<sup>200</sup> 1987 Constitution of the Republic of the Philippines

<sup>201</sup> *Oposa v Factoran*, Philippines Supreme Court G.R. No. 101083 July 30, 1993

<sup>202</sup> *Oposa v Factoran*, note 206, above.

<sup>203</sup> Law No. 32 of 2009.

<sup>204</sup> *The Republic of Indonesia, Law on Environmental Protection and Management* (2009)

<sup>205</sup> See RAHMAN, HA 2010, ‘Human Rights to Environment in Malaysia’ 1(1) in *Health and the Environment Journal* 59, pg. 61–63.

<sup>206</sup> *Seng v Suruhanjaya Perkhidmatan Pendidikan*, *Malayan Law Journal* 1996.

<sup>207</sup> As quoted in RAHMAN, note 210, above.

<sup>208</sup> 1986-987 AIR 1086, 1987 SCR (1) 819;

<sup>209</sup> See further [http://mcmef.org/environment\\_jurisprudence.html](http://mcmef.org/environment_jurisprudence.html).

<sup>210</sup> PLD 1994 SC 693,

Supreme Court applied the precautionary principle and interpreted Article 9 of the Constitution of Pakistan, which provided that no person shall be deprived of life or liberty save in accordance with law. The court explained that ‘Life includes all such amenities and facilities, which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. A person is entitled to protection of law from being exposed to hazards of electromagnetic fields or any other such hazards that may be due to installation and construction of any grid station, any factory, power station or such like installations.’

Hassan, lead advocate for the plaintiff, commented subsequently:

What happened in *Shehla Zia v WAPDA* was not a result that we could normally have had in a country where there was a lot of environmental legislation. The Supreme Court came out with very positive results, it knocked down the hurdles of right to sue, entertained the application, and accepted the petition and thus made a monumental judgment. What the lawmakers and the executive leadership of the country could not do over the course of several decades, the judiciary was able to start with a single decision.<sup>211</sup>

## Europe

In Europe, a number of jurisdictions have adopted explicit provisions concerning the environment in their constitutions. Some provisions are rather limited in scope. For example, Article 21 of the Dutch Constitution states, ‘It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.’ This does not appear to provide directly for any enforceable right on the part of individuals or communities, but merely a responsibility on government, which could be broadly or narrowly interpreted. As states, ‘‘Article 21 states that a duty to care for the environment rests with all authorities. This provision, therefore, is regarded as a socio-economic right, not as a classical individual right. As a consequence, courts are reluctant to test government decisions against Article 21. Until now, the constitutional right to environmental protection has had a rather ‘soft’ legal status.’’<sup>212</sup> As he notes, the Netherlands does not have a constitutional court, and thus this provision has not been directly litigated.

A recent instructive example is a constitutional amendment in France, which included a Charter of the Environment containing 10 articles in its constitutional law<sup>213</sup> in 2005. The first two articles provide for both individual rights as well as duties:

*Article 1:* Everyone has the right to live in a stable environment, which respects health.

*Article 2:* All persons have a duty to take part in the preservation and the improvement of the environment.

In introducing the Charter, the French Minister for Ecology and Sustainable Planning and Development stated:<sup>214</sup>

This Charter was a historical stage in the awareness of environmental matters and sustainable development in France. The text, which is aimed at the generations of today and of tomorrow, acknowledges the basic principles of an ecology that focuses on the future of mankind, with rights and accompanying duties.

It sets the right to live in a balanced environment that shows due respect for health at the same level of importance as the human rights of 1789 and the welfare rights of 1946.

It means that sustainable development preoccupations now run right to the heart of French law, economy and social life. The Charter for the environment:

- i. Innovates in setting up the notion of the duty, for every individual and all public authorities, to contribute to preserving the environment;
- ii. Reinforces the notion of ecological responsibility; and
- iii. Establishes the precautionary principle to protect against risks without jeopardising innovation.

## Working Group 2: Access To Information, Participatory Rights And Access To Justice

### *Access to Information and Additional Processes*

The development of environmental law on an international and national basis has seen the increasing acceptance of the need to involve the public at all levels of environmental decision-making. The philosophy behind public participation relates to the idea that those affected by decisions concerning governmental and/or private sector development activities should have the right to influence those decisions.

In many jurisdictions, this philosophy has been translated into legislative requirements. These include freedom of information in relation to potential development activities; the right to participate in spatial planning; the right to make submissions pursuant to Environmental Impact Assessment (EIA) processes; the right to appeal decisions concerning the merits of development activity, and to request

<sup>211</sup> HASSAN, P, ‘Environmental Rights as Part of Fundamental Human Rights: the Leadership of the Judiciary in Pakistan’ in BENJAMIN, AH 2003, (ed.), Law, Water and the Web of Life: A Tribute to Parvez Hassan, pp. 199-214, available at <https://www.elaw.org/node/6443>

<sup>212</sup> VERSCHUUREN, J. ‘The Dutch Crisis and Recovery Act: economic recovery and legal crisis?’ Potchefstroom Electronic Law Journal at <http://www.saflii.org/za/journals/PER/2010/37.html>

<sup>213</sup> Constitutional Law No 2005-205, Official Gazette No. 0051 of 2 March 2005, p. 3697.

<sup>214</sup> [http://www.capefrance.com/sig/ecology\\_1.html](http://www.capefrance.com/sig/ecology_1.html)

judicial review as to the legality of governmental administrative decisions. Some countries have also established formal public environmental inquiry procedures in order to solicit both written and oral submissions from individuals and communities on significant development proposals. In some jurisdictions, systems of legal assistance or 'legal aid' have been established in order to support individuals, NGOs and community groups in challenging environmental decisions in court and tribunals.

These systems have encouraged what is now known as 'public interest environmental litigation'. Such litigation is, by definition, not linked to the private interests of the individuals bringing the action, but is brought, as the name implies, in the interests of the public. The public can be variously defined as a community, a class of persons; or in major development activities, representing a much broader human constituency, as well the environment itself.<sup>215</sup> The environmental public interest can be seen to service the conceptual basis to equitably achieve economic, ecological, social and cultural sustainability for both present and future generations.

A wide variety of public interest environmental law organisations have been established in the past 30 years to represent communities and groups through the medium of public interest litigation.<sup>216</sup> These approaches are in line with widely accepted principles embraced by, for example, the 1998 Aarhus Convention on Access to Information, Public participation and Access to Justice in Environmental Matters.

### ***Human Rights and the Aarhus Convention***

The Aarhus Convention is considered to be the most advanced international agreement in establishing standards for public participation in environmental matters. It provides that the public must be informed at an early stage in decision-making, and also details the minimum standards of information that are to be made available in different participatory procedures.<sup>217</sup> It also obliges parties to ensure access to justice in environmental matters.<sup>218</sup> Reflecting international norms built up over the past 30 years, its preamble explicitly links human rights and the environment. It recognises 'that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.' It further recognises 'that every person has the right to live in an

environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'.

As Kofi Annan, former Secretary-General of the UN, observed: '[A]lthough regional in scope, the significance of the Aarhus Convention is global [...] [I]t is the most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations.' In his view, the Convention has the 'potential to serve as a global framework for strengthening citizens' environmental rights.'<sup>219</sup> Despite this sentiment, the possibility of extending the Aarhus Convention to Asian countries is currently fairly remote.

The preamble to the Convention not only recalls Principle 1 of the 1972 Stockholm Declaration on the Human Environment and recognises that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself', but it also asserts that 'every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.'

The focus of the Aarhus Convention is strictly procedural in content, limited to:

- i. Public participation in environmental decision-making;
- ii. Access to justice;
- iii. Access to environmental information held by public authorities.

The Convention draws inspiration from Principle 10 of the 1992 Rio Declaration on Environment and Development, which gives explicit support in mandatory language to the same category of procedural rights.<sup>220</sup> Aarhus is also significant insofar as Article 9 reinforces the obligation of public authorities to enforce existing law. Under Article 9(3), applicants entitled to participate in decision-making have the right to seek administrative or judicial review of the legality of the resulting decision. A general failure to enforce environmental law will also violate Article 9(3).<sup>221</sup> Article 9(4) requires that adequate, fair and effective

<sup>215</sup> In Ecuador and Bolivia, constitutional changes have introduced the idea granting all nature equal rights to humans, legally recognising the earth deity known as 'Pachamama': See for example: 'Bolivia enshrines natural world's rights with equal status for Mother Earth' <http://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>

<sup>216</sup> In the Asian region, these include the Consumers Association of Penang, Malaysia, <http://consumer.org.my/>, the Indonesian Centre for Environmental Law <http://www.iceel.or.id/>, WALHI (Wahana Lingkungan Hidup Indonesia) <http://www.walhi.or.id/v3/> and EnLAW Thailand, see <http://elawspotlight.wordpress.com/2011/06/10/enlaw-thailand-speaks-out-for-rural-farmers/>

<sup>217</sup> For specific articles on public participation, see Articles 6-8, 1998 Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters. For access to information, see Articles 4-5 of the same Convention, available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

<sup>218</sup> Article 9, 1998 Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters.

<sup>219</sup> UNECE 'Environmental rights not a luxury – Aarhus Convention enters into force' <http://www.unece.org/press/pr2001/01env15e.html>

<sup>220</sup> Principle 10 provides: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'

<sup>221</sup> Gatina, Gatin, Konyushkova – Findings and Recommendation with regard to compliance by Kazakhstan, Compliance Committee, UNECE/MP.PP/C.1/2006/4/Add.1 (2006) paras 30-1.

remedies be provided. This reflects the decisions in *López Ostra* and *Guerra* under Article 8 of the ECHR.<sup>222</sup>

The three essential elements of the Aarhus Convention have all been incorporated into European human rights law through the jurisprudence of the ECtHR.<sup>223</sup> The Convention thus represents an important extension of European environmental rights and of the corpus of human rights law. Participation in the decision-making process by those likely to be affected by environmental nuisances will thus be essential for compliance with Article 8 of the ECHR and Article 6 of the Aarhus Convention.<sup>224</sup> Thus in *Grimkovskaya*, the Court considered that there is a positive obligation of states to give to the public a ‘meaningful opportunity to contribute to the related decision-making processes’. This opportunity should also include the possibility of challenging the decision-makers before an independent authority. These positive obligations allow states to find a fair balance between economic progress and the human rights. The Court refers to the Aarhus Convention in its decision and adopts its norms to interpret obligations of the states.<sup>225</sup> The obligation breached in this case was once again, as in previous cases noted above, the positive obligation to protect private and family life.

More recently, the Court considered in *Di Sarno* that states have the positive obligation to adopt procedures that allow the public to be informed about the seriousness of environmental situations. This will allow the public to evaluate the danger it is exposed to. The Court quotes Article 5 of the Aarhus Convention.<sup>226</sup> Here we can see the very close correspondence between the Court’s case law and the 1998 Convention.

Another regional court that has often applied the provisions of the Aarhus Convention is Court of Justice of the European Union. Recently the Court found that a narrow interpretation of an administrative act by secondary legislation of the Union could contravene the purpose of Aarhus. As a consequence, such legislation is illegal and any decision pursuant to it is annulled.<sup>227</sup>

### ***Should Asia develop an Aarhus Type Convention?***

The Aarhus Convention remains, primarily, a European instrument. However, countries outside the United Nations Economic Commission for Europe may become parties,<sup>228</sup> and that process is now being actively encouraged.<sup>229</sup> Nevertheless, while some countries may be keen to accede to

Aarhus,<sup>230</sup> it is unlikely that many Asian countries would do so in the short term. The barriers to adopting such an instrument in the various Asian sub-regions include cultural and political considerations. However, in ASEAN, given the progress on various environmental fronts, as well as the development of the ASEAN Charter and the ASEAN Human Rights Declaration, the development of a further regional instrument that reflects elements of the Aarhus Convention is conceivable. It ought in any case to be pointed out that the civil and political rights provisions of the ASEAN Human Rights Declaration already include the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law (Article 5) and the right to seek, receive and impart information (Article 23). While these rights are not specifically linked to Article 28(f), which grants the right to a safe, clean and sustainable environment, a combination of these provisions may in the future form the basis for legal actions which reflect the provisions of the Aarhus Convention.

### ***Environmental Impact Assessment***

The process of Environmental Impact Assessment (EIA) in many countries is seen as a planning tool before the development commences to identify and predict the environmental impacts of development activities, resulting in an Environmental Impact Statement (EIS).<sup>231</sup> Many jurisdictions have detailed legislative provisions for EIA, requiring both technical and policy aspects to be addressed. Consistent with procedural human rights, a normal requirement is the opportunity for public input from the earliest time that a development is proposed, with compulsory consideration by government authorities of all public submissions on the EIS. In a wide range of jurisdictions, there is provision for administrative and judicial review of EISs. Where the process is seen to be inadequate, the EIS can be declared invalid by an administrative appeal or by a court or tribunal.

### **Asia**

The attitudes towards, and implementation of, EIA in developing countries is often different from that in developed countries. While in developing countries, EIA is mostly used as a mechanism to justify particular projects and developments for a certain period of time, in developed countries EIA has been seen as a broader tool to achieve a wider goal in the promotion of development that is sustainable.<sup>232</sup>

<sup>222</sup> *López Ostra v. Spain* [1994] 20 EHRR 277; *Guerra v. Italy* [1998] 26 EHRR 357.

<sup>223</sup> *Taskin v. Turkey* [2006] 42 EHRR 50; *Tatar v. Romania* [2009] ECtHR; *Öneriyildiz v Turkey* [2005] 41 EHRR 20; *López Ostra v. Spain* [1994] 20 EHRR 277; *Guerra v. Italy* [1998] 26 EHRR 357.

<sup>224</sup> *Taskin*, at para. 118. See also *Tatar v. Romania* [2009] ECtHR, para. 88.

<sup>225</sup> See para. 72 of *Grimkovskaya v. Ukraine* (App no. 38182/03, judgment of 21 July 2011).

<sup>226</sup> See para. 107 of *Di Sarno and others v Italy* (Application n. 30765/08, judgment of 10 January 2012).

<sup>227</sup> See *Vereniging Milieudéfensie and Stichting Stop Luchtverontreiniging Utrecht v European Commission* (Case T-396/0914) and *Stichting Natuur en Milieu and another v European Commission* (Case T-338/08), decisions of the General Court of 14 June 2012.

<sup>228</sup> Article 19(2) provides: ‘[a]ny other State that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties’.

<sup>229</sup> [http://www.unecce.org/press/pr2011/11env\\_p32e.html](http://www.unecce.org/press/pr2011/11env_p32e.html)

<sup>230</sup> For example, *Mongolia* has enquired about membership; see note 234, above.

<sup>231</sup> GLASSON, J, THERIVEL, R & CHADWICK, A 1999, Introduction to environmental impact assessment, (UCL Press, London).

<sup>232</sup> WOOD, C 2003, EIA in Developing Countries: an Overview (Paper presented at the *New Directions in Impact Assessment for Development: Methods and Practice*, Manchester, United Kingdom) pp. 4-5, available at <http://www.sed.man.ac.uk/research/iarc/edais/pdf/Wood.pdf>

John Boyle<sup>233</sup> points out some of the major differences in the characteristics of EIA processes as developed in Western countries compared with other countries:

- i. Democratic principles reflected in Western EIA;
- ii. Politicians and governments are accountable to the public;
- iii. Political and business elites do not have an unfettered right to do as they please;
- iv. Government bureaucratic and decision-making processes must be open and responsive to public concerns;
- v. Resources considered a nation's common heritage – air, water, health, forests, wildlife, and landscape beauty – cannot be unilaterally appropriated for private purposes;
- vi. Individuals and communities affected by projects have an inherent right to information, to question the need for and design of projects, and to participate in the planning and decision-making process.<sup>234</sup>

One important reason why EIA in developing countries is less successful compared with that in developed countries is because in most developing countries, EIA has been introduced as part of an economic agreement or economic consideration by other external parties,<sup>235</sup> rather than being an inherent part of environmental decision-making processes. That situation is now changing, with a number of jurisdictions in Asia having introduced relatively robust EIA requirements.

However, in some Asian countries, lack of political support and political will on the part of governments and decision makers to seriously implement EIA as a strong preventive system to conserve the environment should be generally understood as reflecting the fact that other ministries and agencies exercise much stronger and powerful political and funding capacity than that of environmental ministry and agencies, especially governmental sectors concerned with development and economic affairs.<sup>236</sup> Further, in many Asian countries, implementation of EIA is

strongly influenced by cultural norms that are still adhered to by the local communities.<sup>237</sup>

In addition, lack of information exchange among related agencies and departments, lack of public/community involvement, and access to information can contribute to the ineffective implementation of EIA in many Asian countries,<sup>238</sup> in addition to overcoming technical and financial issues.<sup>239</sup> In some countries, EIA implementation and practice are weak because the mechanism is seen more as a formality rather than an accurate and stringent process to promote sustainable development.<sup>240</sup>

The same problems causing the inadequate implementation of EIA in other Asian jurisdictions have also occurred in China over the last two decades. Notwithstanding the fact that China enacted a new EIA law in 2003, in practice its implementation is still considered weak.<sup>241</sup> Both technical and political factors still play pivotal role, which means that implementation is not always in line with the existing legislation.<sup>242</sup>

In the case of Singapore, the country has not adopted international EIA standards in its national environmental legislation. It has been argued that since the size of the entire country is relatively small, the full practice of EIA is unnecessary.<sup>243</sup> It is also claimed that Singapore – in any case – always considers environmental matters in every project and development, which makes the country one of the cleanest and greenest countries in Asia.<sup>244</sup> On the other hand, some related national agencies and stakeholders have argued that the implementation of EIA will help Singapore to reduce the existing negative impact of its development processes.<sup>245</sup>

Likewise in Pakistan, EIA was stipulated in the Pakistan Environmental Protection Act 1997. However, due to the lack of administrative capacity of the authorities, inadequate transparency, and other technical hindrances, the implementation of the legislation remains weak.<sup>246</sup>

Inadequate technical and financial support, as well as lack of political will from government decision makers can be deemed as the common factors that need to be addressed in the region in order to effectively implement EIA and promote sustainable development.

<sup>233</sup> BOYLE, J 1996, 'Cultural Influences on Implementing Environmental Impact Assessment: Insights From Thailand, Indonesia, and Malaysia', 18 *Environmental Impact Assessment Review* 95

<sup>234</sup> *Ibid.*, at 104.

<sup>235</sup> BRIFFETT, C 1990, 'EIA in Southeast Asia: Fact and Fiction?', 49 *Geo Journal* 333

<sup>236</sup> Briffet, note 219 above.

<sup>237</sup> *Ibid.*

<sup>238</sup> BOYLE, note 238, above.

<sup>239</sup> BRIFFETT, note 240, above.

<sup>240</sup> For example, in Indonesia, EIA implementation and practice provide an example where this mechanism seems to be considered as more as a formality rather than an accurate and stringent process to promote environment protection and sustainable development.

<sup>241</sup> Lixin Gu, 'Institutional Challenges for EIA Implementation in China: A Case study of development versus environmental protection' (2005) 36(1) *Environmental Management* 125.

<sup>242</sup> *Ibid.*

<sup>243</sup> BRIFFETT, C & MACKEE, J 2002, *Environmental Assessment in Singapore: An Enigma Wrapped up in a mystery!*, 20(2) *Impact Assessment and Project Appraisal* 113.

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> NADEEM, O & HAMEED, R 2008, Evaluation of EIA system in Pakistan, 28 *Environmental Impact Assessment Review*, 562.



## Europe

In Europe, the EIA process is well developed. In 1985, the EU approved a directive on EIA<sup>247</sup> that makes the process compulsory for a wide variety of projects. These may be public or private projects and they have in common the fact that they are 'likely to have significant effects on the environment.'<sup>248</sup> The EIA Directive gives the right to information, participation and opinion to the public, as well as to domestic authorities and even to authorities of neighbouring states likely to be affected.

At the transboundary level, the United Nations Economic Commission for Europe (UNECE)<sup>249</sup> promoted the Convention on Environmental Impact Assessment in a Transboundary Context (known as 'the Espoo Convention').<sup>250</sup> Parties to this Convention undertake to subject 'activities that are likely to cause significant adverse transboundary impact' to an EIA that counts with the participation of the interested public and institutions across the border.<sup>251</sup> The Espoo Convention specifies in detail the type of information that an EIA should contain, including a description of the activity and its likely impact, mitigation measures and practical alternatives, and any uncertainties in the available knowledge.<sup>252</sup> Espoo requires an EIA to be carried out for planned 'activities' or 'projects'. These terms embrace the licensing or approval of industrial, energy and transport undertakings, *inter alia*,<sup>253</sup> but would not cover government plans or policies of a more general kind, for example, whether to use nuclear energy. However, at the domestic level 'strategic environmental assessment' of this broader kind is being developed in some of the more advanced jurisdictions.<sup>254</sup> Article 2(7) of the Espoo Convention provides for parties to 'endeavour' to apply EIA to 'policies, plans and programmes', but more importantly a 2003 Protocol on Strategic Environmental Assessment (SEA) has significantly broadened the obligations of States parties in this respect.<sup>255</sup> Unlike the Convention, the Protocol is not limited to transboundary effects, and it also requires parties to promote SEA in international

organisations and 'decision-making processes' (presumably treaty conferences).<sup>256</sup> It applies in full only to 'plans and programmes';<sup>257</sup> 'policies and legislation' are covered to a more limited extent.<sup>258</sup> The Protocol's strong provision on public participation will represent a considerable expansion of environmental democracy in many states and international organisations if fully implemented.<sup>259</sup>

The ECtHR has already considered on numerous occasions<sup>260</sup> that activities that are likely to cause environmental harm should be subjected to judicial scrutiny when 'their interests or their comments have not been given sufficient weight in the decision-making process'.<sup>261</sup> This means that the Court considers that an Environmental Impact Assessment is necessary to balance difference interests and rights at stakes. This balance is essential to the protection of human rights that can be affected by environmental degradation.

## *The Growth of Green Courts and Tribunals*

A feature of the institutional development of environmental law and an indication of growing awareness of the importance of environmental law around the world has been the growth of specialist environmental courts and 'green benches' of regular courts.<sup>262</sup> It is informally estimated that there are over 400 of such bodies on a global basis.<sup>263</sup> By the establishment of these courts and tribunals, the role of the judiciary in implementing and enforcing environmental law seems to have been strengthened. This phenomenon is observed in both the European and Asian regions. The growth in the number of these bodies can be seen as an offshoot of the promotion of public participation in environmental matters pursuant to Principle 10 of the Rio Declaration on Environment and Development as well as the influence of the Aarhus Convention.

In Asia, we see the establishment of specialist environmental courts in a number of jurisdictions, including the Philippines, Thailand, Malaysia, Pakistan, India and

<sup>247</sup> This directive has been already modified three times, which lead to the publication of EU Directive 2011/92/EU of the European Parliament and of the Council (EIA Directive) of 13 December 2011 codifying all the norms related to EIA.

<sup>248</sup> Art 2.1 of the Directive.

<sup>249</sup> United Nations Economic Commission for Europe, which includes all the countries in Europe as well as some countries in Central Asia and North America.

<sup>250</sup> Espoo EIA Convention, done at Espoo in 1991: see [http://www.unece.org/env/eia/about/eia\\_text.html](http://www.unece.org/env/eia/about/eia_text.html). Even though most states in Europe are parties to this convention there are some exceptions such as Iceland, Russia and Turkey.

<sup>251</sup> See Article 2.

<sup>252</sup> UNEP EIA Principles, Principle 4; 1991 Convention on Transboundary EIA, Article 4(1) and Appendix II.

<sup>253</sup> See the activities listed in the 1991 Convention on Transboundary EIA, Annex 1.

<sup>254</sup> *In R. (ex parte Greenpeace Ltd) v Secretary of State for Trade and Industry [2007] EWHC 311 the UK's plans for nuclear power were successfully challenged. See generally SADLER & VEERHEEM 1996, Strategic Environmental Assessment: Status, Challenges and Future Directions (Netherlands Ministry of Housing and Environment); THERIVEL & PARTIDARIO 1996, The Practice of Strategic Environmental Assessment (London); THERIVEL, WILSON et al 1992, Strategic Environmental Assessment (London).*

<sup>255</sup> Protocol on Strategic Environmental Assessment, signed in Kyiv in 2003; entered into force on 11 July 2010; see [http://www.unece.org/env/eia/about/sea\\_text.html](http://www.unece.org/env/eia/about/sea_text.html).

<sup>256</sup> Articles 3(5) and 4.

<sup>257</sup> See Article 4.

<sup>258</sup> See Article 13.

<sup>259</sup> See Article 8.

<sup>260</sup> *In Hatton and others v. UK, Taskin and others v Turkey, Giacomelli v. Italy 59909/00 (2006.11.2) and, more recently, Hardy and Maile v. UK, (App. no. 31965/07, judgment of 14 February 2012).*

<sup>261</sup> See para. 221 of Hardy and Maile v. UK.

<sup>262</sup> PRING G & PRING C 2009, Greening Justice: Creating and Improving Environmental Courts and Tribunals (*The Access Initiative*) 1; see also ROBINSON, NA 2012, 'Ensuring Access to Justice Through Environmental Courts' in 29 Pace Environmental Law Review, pp. 363,381;

<sup>263</sup> See also PRESTON, BJ 2013, Characteristics of successful environmental courts and tribunals, paper to the Eco Forum Global Annual Conference Guiyang 2013: The 3rd Environmental Justice Seminar 19-21 July 2013, Guiyang, Guizhou, China (unpublished, forthcoming).

China<sup>264</sup> and they continue to be the subject of a good deal of discussion.<sup>265</sup> India has perhaps the most developed specialised body in Asia with the establishment of the National Green Tribunal in 2010,<sup>266</sup> which has already decided a range of significant cases.<sup>267</sup>

In addition, as noted in the text concerning Working Group 3 below, the Asian Development Bank has established an Asian Judges Network on the Environment, and continues to encourage dialogue and promote capacity building among environmental judges in Asia.

While these specialist courts do not have any particular brief to pursue human rights arising out of environmental matters, the very fact of their existence already conforms to the achievement of procedural rights addressed under the Aarhus Convention. Further, there is little doubt that some of the Asian environmental courts and green benches will continue to depend on human rights embedded in constitutions, such as the right to life, in order to promote environmental outcomes.

### **Working Group 3: Actors, Institutions, Market Mechanisms And Governance**

#### ***Main Actors and Instruments in International Law on Environment and Human Rights***

##### *International organisations*

The United Nations High Commissioner for Human Rights, as the highest international human rights body, plays a pivotal role in coordinating and managing other related bodies regarding human rights protection underneath.<sup>268</sup> At the regional level, prominent human rights actors/promoters are the European Court of Human Rights, the African Commission on Human and People Rights and the Inter-American Commission on Human Rights.<sup>269</sup> In 2009, we saw the introduction of the ASEAN Intergovernmental Commission on Human Rights.

The United Nations promotes the mainstreaming and integration of human rights into all of its activities.<sup>270</sup> Its human rights-based approach to programming can thus be seen in the activities of various UN bodies, including UNESCO,<sup>271</sup> the International Labour Organisation (ILO) and its Convention 169,<sup>272</sup> the World Health Organisation (WHO),<sup>273</sup> the United Nations Development Programme (UNDP),<sup>274</sup> the United Nations Environment Programme (UNEP), the Food and Agricultural Organisation and UNICEF, the United Nations Children's Fund.

The UN has also established several processes for examining human rights in particular contexts. In 2007, it appointed a Special Representative on Business and Human Rights, which touched briefly on the question of human rights and the environment.<sup>275</sup> However, the Report<sup>276</sup> of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment takes this issue further.<sup>277</sup>

##### ***Non-Governmental Organisations***

Non-Governmental Organisations (NGOs) also play a significant role in promoting the implementation of international human rights regimes and systems. As Burdekin notes, 'any regional UN's Refugee Agency, the United Nations' High Commissioner for Refugees (UNHCR) or sub-regional human rights mechanism that wants to be effective and credible must also develop a *modus operandi* for working in cooperation with national institutions and civil society'.<sup>278</sup>

International NGOs have been working closely with international human rights bodies under the UN and other agencies to encourage, monitor and steer the process of human rights protection all over the world. For example, Human Rights Watch began in 1978 with the founding of its European and Central Asia divisions.<sup>279</sup> Its latest *World Report* sets out a range of environment and human rights issues affecting countries around the world. It argues:

<sup>264</sup> In China, over 140 of such courts have been established as part of the ordinary court system since 2007; however there are many inconsistencies in the operation of these courts and in the procedural rules that are followed. Nevertheless, a good deal of research is being carried out on these courts, and in due course their existence in operation should be regularised; See ZHANG, M & ZHANG, B 2012, 'Specialised Environmental Courts in China: Status Quo, Challenges and Responses' Journal of Energy & Natural Resources Law, Vol 30 No 3.

<sup>265</sup> See for example, a recent 'The Amritsar Dialogue Statement on Green Courts and Tribunals' <http://www.jnu.ac.in/SIS/AmritsarDialogueStatement.pdf>

<sup>266</sup> National Environmental Tribunal Act 2010; see further, 'India's New National Green Tribunal' Environmental Law Alliance Worldwide <http://elawspotlight.wordpress.com/2011/12/28/indias-new-national-green-tribunal/>

<sup>267</sup> For a list of National Green Tribunal judgments see <http://greentribunal.in/judgment.php>

<sup>268</sup> DOMMEN, C 1998, 'Claiming Environmental Rights: Some Possibilities Offered by The United Nations Human Rights Mechanisms' in 11(1) The Georgetown International Environmental Law Review 1

<sup>269</sup> *Ibid.*

<sup>270</sup> See Human Rights-Based Approach to Programming, available at <http://www.unesco.org/new/en/social-and-human-sciences/themes/human-rights-based-approach/>

<sup>271</sup> <http://www.unesco.org/new/en/social-and-human-sciences/themes/human-rights-based-approach/>

<sup>272</sup> See ILO Convention 169, which deals specifically with the rights of indigenous and tribal peoples <http://www.ilo.org/indigenous/Conventions/no169/lang-en/index.htm>

<sup>273</sup> Focusing on the right to health: see Factsheet N°323 November 2012 <http://www.who.int/mediacentre/factsheets/fs323/en/index.html>

<sup>274</sup> Mainstreaming Human Rights in Development Policies and Programming: UNDP Experiences [http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/human\\_rights/mainstreaming-human-rights.html](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/human_rights/mainstreaming-human-rights.html)

<sup>275</sup> RUGGIE, J, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples> <http://www.business-humanrights.org/SpecialRepPortal/Home>

<sup>276</sup> See KNOX Report, note 1, above.

<sup>277</sup> See below.

<sup>278</sup> BURDEKIN, B 2011, Keynote Speech, 11<sup>th</sup> Informal ASEM Seminar on Human Rights, 'National and Regional Human Rights Mechanisms', 23-25 November 2011, Czech Republic.

<sup>279</sup> See Human Rights Watch, <http://www.hrw.org/>

Unfortunately, in practice, governments and international agencies do not often enough analyse environmental issues through the prism of human rights or address them together in laws or institutions. But they should, and they should do so without fear that doing so will compromise efforts to achieve sustainability and environmental protection. Indeed, rather than undermine these important goals, a human rights perspective brings an important and complementary principle to the fore – namely that governments must be accountable for their actions. And it provides advocacy tools for those affected by environmental degradation to carve out space to be heard, meaningfully participate in public debate on environmental problems and, where necessary, use independent courts to achieve accountability and redress.<sup>280</sup>

There are also many NGOs that, while primarily focused on the environment, recognise that human rights issues are very close to many of their concerns. For example, the International Union for Conservation of Nature (IUCN) includes human rights issues within its four yearly Resolutions and Recommendations on a wide range of matters on nature conservation, and specifically on the rights of indigenous and local communities.<sup>281</sup>

### ***Main Regional Institutions and Instruments in Asia***

#### *ASEAN Intergovernmental Commission on Human Rights*

Article 14 of the 2008 ASEAN Charter states: ‘In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body’. The Commission was duly established in 2009, with detailed Terms of Reference adopted by the ASEAN Foreign Ministers Meeting in 2009. Ten members, one from each ASEAN State, were appointed. The Commission was tasked (in summary):

- i. To develop strategies for the promotion and protection of human rights and fundamental freedoms;
- ii. To develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights;
- iii. To enhance public awareness of human rights among the peoples of ASEAN

- iv. To promote capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN Member States;
- v. To encourage ASEAN Member States to consider acceding to and ratifying international human rights instruments;
- vi. To promote the full implementation of ASEAN instruments related to human rights;

The drafting the ASEAN Human Rights Declaration clearly has been the Commission’s most significant task so far. However, it can be noted that the Commission does not have any particular implementation or enforcement powers, and that decision-making is to be based on consultation and consensus ‘in accordance with Article 20 of the ASEAN Charter’.<sup>282</sup> It has been the subject of some civil society comment.<sup>283</sup>

#### *ASEAN Human Rights Declaration*

The ASEAN Human Rights Declaration,<sup>284</sup> adopted by the heads of the ten ASEAN member countries in 2012, is considered as a landmark in the development of human rights protection for the citizens of these countries. Article 28 includes reference to many of the rights recognised in other regions such as Europe, Africa and Latin America as being the basis for using human rights to achieve broader environmental aims. It reads:

Every person has the right to an adequate standard of living for himself or herself and his or her family including:

- a. The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food;
- b. The right to clothing;
- c. The right to adequate and affordable housing;
- d. The right to medical care and necessary social services;
- e. The right to safe drinking water and sanitation;
- f. The right to a safe, clean and sustainable environment.

Article 28(f) can be compared with the formulation put forward by John Knox, Independent Expert on the Environment,

<sup>280</sup> KIPPENBERG J & COHEN, J 2013, ‘Lives in the Balance: The Human Cost of Environmental Neglect’, in Human Rights Watch World Report 2013, pp.41-50. <http://www.hrw.org/world-report/2013>

<sup>281</sup> Resolutions and Recommendations World Conservation Congress Jeju, Republic of Korea 6–15 September 2012, available at [http://www.iucn.org/about/work/programmes/global\\_policy/gpu\\_resources/gpu\\_res\\_recs/](http://www.iucn.org/about/work/programmes/global_policy/gpu_resources/gpu_res_recs/); see also Greiber et. al. note 10, above.

<sup>282</sup> Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights, available at <http://www.asean.org/communities/asean-political-security-community/category/asean-intergovernmental-commission-on-human-rights-aichr>

<sup>283</sup> For example: Asian Forum for Human Rights and Development, Still Window-Dressing: A Performance Report on the Third Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2011-2012, <http://www.forum-asia.org/?p=16296>

<sup>284</sup> ASEAN, ‘ASEAN Human Rights Declaration’ (2012) <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration>

regarding the right to ‘enjoyment of a safe, clean, healthy and sustainable environment’.<sup>285</sup> Article 28(f) should be read in conjunction with Articles 35, 36 and 37 of the Declaration, which focus on the right to development, and incorporate some of the language of the Rio Declaration:

*Article 35:* The right to development is an inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. While development facilitates and is necessary for the enjoyment of all human rights, the lack of development may not be invoked to justify the violations of internationally recognised human rights.

*Article 36:* ASEAN Member States should adopt meaningful people-oriented and gender-responsive development programmes aimed at poverty alleviation, the creation of conditions including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis, and the progressive narrowing of the development gap within ASEAN.

*Article 37:* ASEAN Member States recognise that the implementation of the right to development requires effective development policies at the national level as well as equitable economic relations, international cooperation and a favourable international economic environment. ASEAN Member States should mainstream the multidimensional aspects of the right to development into the relevant areas of ASEAN community building and beyond, and shall work with the international community to promote equitable and sustainable development, fair trade practices and effective international cooperation.

We can note in particular that Article 35 provides that the right to development ‘is an inalienable human right by virtue of which every human person’ by both present, as well as future generations, and that this provision elaborates the implementation of the concept or principle of sustainable development. The statement in the last sentence that the ‘lack of development may not be invoked to justify the violations of internationally recognised human rights’ has some potential to be used to protect citizens environmental rights, but is yet to be tested.

While these Articles of the Declaration give some hope that environment rights might not only be recognised but also implemented and enforced, the Declaration contains no specific implementing provisions. Article 39 merely states that the ‘promotion and protection of human rights and fundamental freedoms’ will be achieved through, ‘inter alia, cooperation with one another as well as with relevant national, regional and international institutions/organisations, in accordance with the ASEAN Charter.’ The mandate and functions of the ASEAN Intergovernmental Commission on Human Rights<sup>286</sup> at this early stage remain at the level of advice, encouragement, consultation and the development of common approaches on the promotion and protection of human rights in the region.

While it is possible that national courts in ASEAN could entertain actions based on the Declaration, it is unlikely that such actions would be brought at this stage of development of the Declaration’s implementation. This situation can be contrasted with the development of human rights jurisprudence in the European courts, where various fundamental human rights have been used as a basis for legal actions to achieve environmental outcomes, as noted elsewhere in this paper. Renshaw comments on the Declaration:

The ASEAN Human Rights Declaration (‘the Declaration’) is not the unequivocal endorsement of universal human rights that civil society organisations had hoped for. Yet, neither is it an affirmation of cultural relativism, the supremacy of state sovereignty, or the principle of non-interference. In most respects, the drafters achieved their aim, which was to ensure that the Declaration met the standards of the Universal Declaration of Human Rights, and also contained an ‘added value’ for Southeast Asia.<sup>287</sup>

Despite any criticisms regarding the effectiveness of the formulations contained in the Declaration, adoption is clearly a positive step for the Southeast Asian countries in beginning to address the political, social, economic or cultural rights of citizens, and the further development of democracy in the region, even though the Declaration is not a legally binding document.<sup>288</sup> As recorded by one analyst:

The ASEAN [Human Rights] Declaration is just an initial step for establishing a human rights mechanism in Southeast Asia. Like the Bangkok Declaration in 1967 that established ASEAN, it was not until 2007 when the ASEAN Charter was adopted, that ASEAN developed an international legal personality with its rights and obligations under international law.

<sup>285</sup> See note 1, above.

<sup>286</sup> See above.

<sup>287</sup> RENSHAW, CS 2013, The ASEAN Human Rights Declaration – Cause for celebration?, <<http://asiapacific.anu.edu.au/regarding-rights/2013/01/25/the-asean-human-rights-declaration-cause-for-celebration/>>

<sup>288</sup> GERBER, P 2012, ASEAN Human Rights Declaration: a step forward or a slide backwards?, <<http://theconversation.com/asean-human-rights-declaration-a-step-forward-or-a-slide-backwards-10895>>. While it might be argued that the ASEAN Declaration is a rather late inclusion in the various legal and policy instruments produced by ASEAN, it has certainly come at a crucial stage of political and economic development in the ASEAN countries. Reasons that might be put forward for this delay include the reluctance of some members to formulate clear human rights standards to be covered in the Declaration, including channels for redress in the event of a breach. In addition, the region’s use of the non-intervention principle, sometimes characterised as the ‘ASEAN Way’ may have played a part; see KOH, KL & ROBINSON, NA, ‘Regional Environmental Governance: Examining the Association of Southeast Asian Nations (ASEAN) Model’ in Global Environmental Governance, available at [environment.research.yale.edu/documents/downloads/h-n/koh.pdf](http://environment.research.yale.edu/documents/downloads/h-n/koh.pdf), see also FOLLESDAL, A 2013, The Human Rights Declaration of the Association of Southeast Asian Nations: A Principle of Subsidiarity to the rescue?, *PluriCourts Research Paper No. 13-07*.

Therefore, ASEAN should aim to develop a binding human rights document while, at the same time, playing a harmonising role amid the political development gap between ASEAN member states so that the relevant human rights provisions can be enforced effectively in the region.<sup>289</sup>

However, we also need to bear in mind that while the Declaration includes a clear provision on the right to a safe, clean and healthy environment (Article 28 (f)),<sup>290</sup> environmental violations continue to remain unaddressed. Deforestation, for example, has resulted in an increased concentration of surface water runoff and led to flooding and destabilised slopes, which then caused devastating landslides in Indonesia, Malaysia and the Philippines. As noted above, forest fires continue to be a recurring annual environmental disaster in Indonesia, also impacting on the health, economy and livelihoods in the neighbouring countries of Malaysia and Singapore.

### ***The Rule of Law, Development, Environment and Human Rights in Asia***

A characteristic of the legal regimes of many Asian countries is that the rule of law, as understood in most Western countries, is often interpreted in a different manner. The combination of a range of prevailing political regimes and legal cultures, together with the practical difficulties of implementation and enforcement of environmental regimes, results in the economic development paradigm continuing to be a dominant element in many Asian countries. However, in some countries, there has been some movement at an institutional level in recent years to address this imbalance. For example, in Southeast Asia, with the ASEAN Charter<sup>291</sup> entering into force in 2008, there is now a more explicit acceptance of the rule of law and the role of human rights concepts, at least on paper. Articles 1 and 2 of the Charter note the purposes of ASEAN, some of which are relevant to the present analysis and include significant statements concerning human rights, the rule of law and sustainable development:

Article 1 states that the purposes of ASEAN are:

7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN; [...]

9. To promote sustainable development so as to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples.

Article 2 reiterates these provisions in a range of principles pursuant to which ASEAN and its member states will act, including:

(h) Adherence to the rule of law, good governance, the principles of democracy and constitutional government;

(i) Respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice [...]

The ASEAN Charter can be characterised as something of a game-changer in the context of legal developments in the region. It invests ASEAN with a permanent legal personality and thus provides a solid legal and institutional foundation for ASEAN decision-making. It commits ASEAN Member States to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms. It also resolves to ensure sustainable development for the benefit of present and future generations, and places the well-being, livelihood and welfare of ASEAN peoples at the centre of the ASEAN community-building process. It commits to intensifying community building through enhanced regional cooperation and integration, in particular by establishing an ASEAN Community comprising the ASEAN Political Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community.

Importantly, Article 5(2) provides that member states shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter and to comply with all obligations of membership. However, in considering the question of enforcement of the provisions of the Charter, it can be seen to suffer from the same weaknesses as some of the previous ASEAN declarations and statements,<sup>292</sup> namely the lack of legal and institutional mechanisms for implementation and enforcement. This is manifested in Article 20, which states that as a basic principle, decision-making shall be based on consultation and consensus, and where it cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.

In relation to environmental issues, the Charter lists the ASEAN Ministerial Meeting on the Environment (AMME) and the ASEAN Senior Officials on the Environment (ASOEN), under the auspices of the Socio-Cultural Community. A range of working groups operate relating to environmental matters, including nature conservation and biodiversity, marine and coastal environment, multilateral environmental agreements, environmentally sustainable cities, water resources management, disaster management and the Haze Technical Task Force.

<sup>289</sup> EBERHARD, R 2012, *The ASEAN approach to Human rights*, The Jakarta Post, December 6, 2012; <http://www.thejakartapost.com/news/2012/12/06/the-asean-approach-human-rights.html>

<sup>290</sup> ASEAN, 'ASEAN Human Rights Declaration' (2012).

<sup>291</sup> ASEAN Charter 2008 <http://www.asean.org/archive/publications/ASEAN-Charter.pdf>; see also BOER, BW, 'Environmental Law in Southeast Asia' in HIRSCH, P, (ed), Routledge Handbook on the Southeast Asian Environment, (forthcoming).

<sup>292</sup> For example, the 2007 ASEAN Declaration on Sustainability: <http://www.asean.org/news/item/asean-declaration-on-environmental-sustainability>

While the ASEAN Charter manifests some strong steps forward concerning transboundary and national environmental management in the region, the lack of mandatory wording and the weak provisions on implementation and enforcement mean that the potential of the Charter as a basis for the development of stronger and more consistent environmental legal regulation at a regional level and more robust environmental law regimes at a national level remains elusive. With such weaknesses, strong support for recognition of environmental rights across the ASEAN region cannot be expected.

More generally, it cannot be said that the principles and concepts developed in the ASEAN Charter are generally accepted by all governments and courts across the region. However, there are some significant exceptions relating to environmental matters. We see that in the South Asian region, environmental legislation has been enacted in a number of countries, but generally not well implemented. Nevertheless, the judiciary in several countries has taken some bold steps in encouraging and accepting public interest litigation in environmental matters, and making judicial orders that go some way to filling the institutional gaps in legislative implementation and enforcement. Bangladesh, India, Pakistan and Sri Lanka, for example, have seen a series of significant environmental cases being decided by their Supreme Courts over the past two decades, some of which have incorporated international environmental law principles.<sup>293</sup> A number of jurisdictions have also introduced environmental courts or green benches of their regular courts.<sup>294</sup>

### **Regional Actors in Asia**

The Asia Pacific Forum (APF) of National Human Rights Institutions has 15 full members and six associate members so far.<sup>295</sup> Membership is comprised of those countries that comply with the Paris Principles on the status of National Human Rights Institutions (NHRIs). The Forum is a regional organisation that supports the establishment and strengthening of NHRIs in the Asia Pacific.<sup>296</sup> The main purpose of the APF is to support all the member states to comply with the Paris Principles.<sup>297</sup>

Another human rights player in Asia is The Asian Forum for Human Rights and Development (FORUM-ASIA). This consists of independent national human rights organisations from

several Asian countries. The Forum was established to share information and to communicate regarding developments and progress related to human rights protection in Asia.<sup>298</sup>

### **Regional Actors in Europe**

A range of regional institutions have an important role to play in the areas of environment and human rights in the European context. One of these institutions, the United Nations Economic Commission for Europe (UNECE) was established in 1947 by the Economic and Social Council of the United Nations. It comprises the countries of Europe and North America and aims at promoting economic and social integration of the countries in the region through dialogue and cooperation. In the area of transboundary environmental cooperation, UNECE promoted the Convention on Long-range Transboundary Air Pollution,<sup>299</sup> the Convention on Environmental Impact Assessment in a Transboundary Context,<sup>300</sup> the Convention on the Protection and Use of Transboundary Watercourses and International Lakes,<sup>301</sup> the Convention on the Transboundary Effects of Industrial Accidents<sup>302</sup> and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.<sup>303</sup>

In the field of human rights, democracy and rule of law, it is the Council of Europe (CoE) that has played a fundamental role in the region. Perhaps its most relevant achievement in this context has been the promotion of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights (ECHR)). The role of the Convention has been particularly important given its interpretation as a 'living instrument' by the European Court of Human Rights. This means that the Court has developed its interpretation over time according to the changes in the European societies. The CoE promoted the introduction of a treaty to complement the European Convention, which resulted in the adoption of the European Social Charter. The Charter, adopted in 1961, is intended to guarantee social and economic rights. The Charter is interpreted and applied by the European Committee of Social Rights.

Another important regional organisation working in the fields of environment and human rights is the Organisation for Security and Cooperation in Europe (OSCE). The main purpose of OSCE was initially to serve as a dialogue

<sup>293</sup> See *Environmental Law Alliance Worldwide (ELAW) Judicial Decisions on Environment in South Asia* available at <https://www.elaw.org/node/6615>

<sup>294</sup> See further below.

<sup>295</sup> Current full members are Afghanistan, Australia, India, Indonesia, Jordan, Korea, New Zealand, Malaysia, Mongolia, Nepal, Palestine, the Philippines, Thailand, Timor Leste and Qatar. Associate members are Bangladesh, Maldives, Maldives, Oman, Samoa, Sri Lanka <http://www.asiapacificforum.net/members>; see also Asia Pacific Forum, 'Asia Pacific Forum Advancing Human Rights in Our Region' (2011-2012) <[www.aidissues.gov.au/aidissues/humanrights/documents/asia-pacific-forum-annualreport-2011-12.pdf](http://www.aidissues.gov.au/aidissues/humanrights/documents/asia-pacific-forum-annualreport-2011-12.pdf)>.

<sup>296</sup> See EVANS, C 2004, Human Rights Commissions and Religious Conflict in the Asia-Pacific Region, *The International and Comparative Law Quarterly*, Vol. 53, No. 3 (July 2004), pp. 713-729

<sup>297</sup> See above.

<sup>298</sup> AFHRD, Asian Forum for Human Rights and Development (<[www.forum-asia.org](http://www.forum-asia.org)>

<sup>299</sup> CLRAP, done at Geneva in 1979, downloaded from [http://www.unece.org/env/lrtap/lrtap\\_h1.html](http://www.unece.org/env/lrtap/lrtap_h1.html), last visited on the 13.01.2013. All states in Europe are parties as well as some Central-Asian and North-American states. The European Union is also a party to this convention.

<sup>300</sup> Espoo EIA Convention, done at Espoo in 1991, downloaded from [http://www.unece.org/env/eia/about/eia\\_text.html](http://www.unece.org/env/eia/about/eia_text.html), last visited on the 13.01.2013. Even though most states in Europe are parties to this convention there are some exceptions such as Iceland, Russia and Turkey.

<sup>301</sup> CTWIL, done at Helsinki in 1992, downloaded from <http://www.unece.org/env/water/text/text.html>, last visited on the 13.01.2013. Most of the countries of Europe are party to this convention.

<sup>302</sup> CTEIA, done at Helsinki in 1992, downloaded from <http://www.unece.org/env/teia/about.html>, last visited on the 13.01.2013.

<sup>303</sup> Aarhus Convention, done at Aarhus in 1998, downloaded from <http://www.unece.org/env/pp/treatytext.html>, last visited on the 13.01.2013

area for peace between democratic and socialist states in Europe. With the end of the ideological division of Europe, this dialogue arena institutionalised and expanded its scope. It has launched projects to help the states achieve better environmental protection through an Economic and Environmental Forum. OSCE has had the same role in the field of human rights, through its Office for Democratic Institutions and Human Rights.

The best known of European regional institutions, though, is the European Union (EU). The EU first aimed at instituting a free trade area and later developed into a single market. Its economic scope thus expanded to areas, such as the environment, to avoid a race to the bottom of the Member States. Gradually, the environment gained importance as the subject of regional policy to be integrated in all other policies of the EU.<sup>304</sup> Human rights have also developed in a similar fashion. From a mere reference in the principles of the EU,<sup>305</sup> these became protected by the Charter of Fundamental Rights of the European Union. The Treaty of Lisbon also allowed for the Union to join the ECHR and, with that, submit its action to the scrutiny of the ECtHR.<sup>306</sup>

Although not exclusively European, the Organisation for Economic Cooperation and Development (OECD) merits attention in this context because of its significant contribution to the development of environmental law within Europe over the past 40 years. International support for transboundary EIA originated in a series of OECD recommendations, which relied in particular on the principle of non-discrimination.<sup>307</sup> As defined by the OECD, non-discrimination entails giving equivalent treatment to the domestic and transboundary effects of polluting or environmentally harmful activities.<sup>308</sup> One example of such a requirement is found in Article 2 of the 1974 Nordic Convention on Protection of the Environment, which obliges parties to equate domestic and transboundary nuisances when considering the permissibility of environmentally harmful activities. The principle need not be limited to transboundary pollution, however in OECD recommendations and decisions, it has also been applied to export of hazardous wastes and products, export of dangerous installations, and development aid.<sup>309</sup> Although now covered by the Aarhus Convention, it was OECD instruments that first elaborated the principle of non-discriminatory access to justice, information and public participation in environmental matters.<sup>310</sup>

The OECD also developed the ‘polluter-pays’ principle as an economic policy for allocating the costs of pollution or environmental damage borne by public authorities. As defined in a series of recommendations starting in the 1970s,<sup>311</sup> the principle entailed that the polluter should bear the expense of carrying out measures decided by public authorities to ensure that the environment is in an ‘acceptable state’ and that ‘the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and or in consumption’. The purpose of OECD policy and recommendations on the subject was thus to internalise the economic costs of pollution control, clean up and protection measures, and to ensure that governments did not distort international trade and investment by subsidising these environmental costs. The OECD is less active as an environmental standard-setter today, but its success derives mainly from the broader economic development context in which its environmental work has always been located, and from the willingness of its members to share good practice and learn from each other.

### *Need for Capacity Building for all Actors*

In many of the world’s regions, for the achievement of human rights in the context of environmental protection and conservation, there is a common need to address the lack of capacity of governmental institutions and the private sector to adequately carry out their functions and responsibilities. In the area of environmental law, the United Nations Environment Programme has promoted capacity building of environmental judges for some years, conducting intensive training programs and publishing a number of guides. The Asian Development Bank (ADB) has established an Asian Judges Network on the Environment (AJNE) that promotes regular meetings and capacity building in the region.<sup>312</sup> Nevertheless, with the growth of specialised courts and green benches in Asia, the need for training and capacity building is even stronger. As stated by Hassan in a recent paper:

With a satisfactory constitutional and legal framework for environmental management in place in almost all the countries of the Asia Pacific Region, the need today is to strengthen the capacity for implementing such framework. The judiciaries of South Asia have led in a dynamic and activist interpretation of particularly the right to life to include a right to a clean and healthy

<sup>304</sup> In the Treaty of the European Union, as amended by the Treaty of Lisbon, this is recognised in article 11.

<sup>305</sup> Article 2 of the Treaty of the European Union.

<sup>306</sup> Article 6.2 of the Treaty of the European Union.

<sup>307</sup> OECD Council Recommendations C(74) 224 (1974) para 6; C(77) 28 (1977) paras 8-10; C(78) 77 (1978); C(79) 116 (1979) collected in OECD and the Environment (Paris, 1986). Reliance on non-discrimination as a basis for transboundary EIA in North America is reviewed by KNOX, 96 AJIL (2002) 291. However, this article’s view of the relationship between EIA and Stockholm Principle 21 should be treated with caution.

<sup>308</sup> OECD Council Recommendations C (74) 224 (1974); C (77) 28 (1977); C (78) 77 (1978); C (79) 116 (1979), collected in OECD and the Environment (Paris, 1986)

<sup>309</sup> SMETS, H 2000, Rev.Eur.Droit de l’Env. 1, pp. 20-7.

<sup>310</sup> OECD Council Recommendations C74(224); C(76) 55; C(77) 28, in OECD, OECD and the Environment (Paris, 1986). See generally McCaffrey 1975, 1 EPL 1; SMETS, H 1982, 9 EPL, 110; WILLHEIM 1976, 7 AYIL, 174.

<sup>311</sup> OECD, Recommendations C(72) 128 (1972); C(74) 223 (1974) reprinted in OECD, OECD and the Environment, (Paris, 1986) and C(89) 88 (1988) reprinted in 28 ILM (1989) 1320. See generally OECD, The Polluter Pays Principle, OCDE/GD(92)81 (1992); SMETS, H 1993, 97 RGDIP, 339; Ibid., in CAMPIGLIO, L, PINESCHI, L, SINISCALCO, D, & TREVES, T 1994, (eds) The Environment After Rio (London) pg. 131; DE SADELEER, N 2002, Environmental Principles: From Political Slogans to Legal Rules (Oxford), pp. 21-59.

<sup>312</sup> Law and Policy Reform Brief No. 1 June 2012, Environmental Governance and the Courts in Asia, An Asian Judges Network on the Environment <http://www.adb.org/publications/environmental-governance-and-courts-asia-asian-judges-network-environment>

environment. This salutary trend needs to be reinforced by building the capacity of subordinate judges, prosecutors and the Environmental Protection Agencies.<sup>313</sup>

### ***The Role of the Private Sector and Corporate Social Responsibility***

In the past two decades, the role of the private sector in both environmental protection and human rights issues has been identified as an important debate in both fields. This was partly stimulated by the 1992 Rio Conference on Environment and Development in 1992. Agenda 21 included the statement ‘Business and industry, including transnational corporations, should recognise environmental management as among the highest corporate priorities and as a key determinant to sustainable development’.<sup>314</sup> It is encapsulated to an extent by Principle 4 of the Rio Declaration: ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’.

In the past few years, the UN has paid more attention to the question of business and human rights, with the appointment of a Special Representative on the issue of human rights and transnational corporations and other business enterprises.

The 2012 Knox report<sup>315</sup> includes a specific section on human rights obligations and private actors. It states:

49. Another set of issues concerns the application of human rights obligations to environmental harm caused by non-State actors, including businesses. In a review of the scope and pattern of more than 300 alleged corporate-related human rights abuses, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises found in a report (A/HRC/8/5/Add.2, para. 27) that ‘nearly a third of cases alleged environmental harms that had corresponding impacts on human rights [...] In these cases, various forms of pollution, contamination, and degradation translated into alleged impacts on a number of rights, including on the right to health, the right to life, rights to adequate food and housing, minority rights to culture, and the right to benefit from scientific progress’. The report noted that the environmental concerns were raised with respect to all business sectors, including heavy manufacturing, pharmaceutical and chemical companies, and retail and consumer products.

The World Business Council for Sustainable Development (WBCSD), a body that has continued to influence

the environmental policy agenda since the 1990s, has also been a prime mover in the development of the concept of Corporate Social Responsibility (CSR). It posits:

The starting point for the WBCSD’s work is based on the fundamental belief that a coherent Corporate Social Responsibility (CSR) strategy, based on sound ethics and core values, offers clear business benefits. Sustainable development rests on three fundamental pillars: economic growth, ecological balance, and social progress. As an engine for social progress, CSR helps companies live up to their responsibilities as global citizens and local neighbours in a fast-changing world. And acting in a socially responsible manner is more than just an ethical duty for a company, but is something that actually has a bottom line pay-off.<sup>316</sup>

One of the issues with the implementation of Corporate Social Responsibility is that it is a voluntary mechanism, with the result that environmental concerns and their links with human rights issues arising from corporate activities are not subject to adequate accountability on the part of companies.<sup>317</sup> This is illustrated, for example, by the development of *ISO 26000 – Social Responsibility* by the International Standards Organisation,<sup>318</sup> which provides guidance rather than particular requirements, as is common with other ISO standards such as *ISO 12000-Environmental Management*. Nevertheless, voluntary codes that make the corporate sector more accountable in both environmental protection and human rights, which can be regarded as ‘soft law’, can and should be the basis for future development of legally enforceable standards and mechanisms.

### ***Market Mechanisms***

The use of market-based approaches and, in particular, economic instruments for environmental protection, has gained increasing currency over the past few decades. The idea behind the use of economic instruments is to influence human behaviour through the market rather than through direct legal regulation. By placing a price on activities that degrade the environment, industry is encouraged to put in place mechanisms to reduce all kinds of pollution that may affect the quality of life and therefore the environmentally-related human rights of communities and individuals.

Economic instruments include a wide range of techniques, including carbon emission trading programs, load-based licensing, cap-and-trade techniques and negotiable permits, as well as tax incentives and disincentives. As Anton and Shelton<sup>319</sup> note, the popularity of market-based approaches was in part caused by a reaction to ‘dense regulatory networks that were deemed inefficient and a drain on competitiveness

<sup>313</sup> . HASSAN, P 2013, Rule of Law and Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in Pakistan; *Paper to First Asia Pacific International Colloquium on Environmental Rule of Law organized by the United Nations Environmental Programme (UNEP), and held in Kuala Lumpur, Malaysia, on 11-12 December 2013.*

<sup>314</sup> Agenda 21 1992, para. 30.3.

<sup>315</sup> See Note 1, above.

<sup>316</sup> World Business Council for Sustainable Development <http://www.wbcd.org/work-program/business-role/previous-work/corporate-social-responsibility.aspx>

<sup>317</sup> See generally, MORGERA, E 2009, Corporate Accountability in International Environmental Law (Oxford: Oxford University Press) and MORGERA, E 2012, From Corporate Social Responsibility to Accountability Mechanisms: The Role of the Convention on Biological Diversity, *Edinburgh School of Law Research Paper No. 2012/06*

<sup>318</sup> International Standards Organisation available at <http://www.iso.org/iso/home/standards/iso26000.htm>

<sup>319</sup> ANTON, DK & SHELTON, DH 2011, Environment Protection and Human Rights, Cambridge.



and investment'. However, they point out that economic instruments nevertheless 'largely remain within the regulatory framework because they require laws and institutions to oversee the operation. Purely market-based approaches, such as voluntary agreements, have been criticised as inequitable, ineffective, and unable to truly account for harm to public goods like air, water and other parts of the commons. They do not – and perhaps cannot – serve to protect long-term interests like future generations.'<sup>320</sup>

## Working Group 4: Climate Change And Human Rights Implications

### Interactions Between Climate Change and Human Rights Regimes

As noted in the introduction, there has been an increasing focus on human rights and climate change in recent years. The United Nations Human Rights Council has, in three separate resolutions (7/23, 10/4, and 18/22), noted the threat of climate change to individuals and communities, and its implications on the enjoyment of human rights.<sup>321</sup> In 2009, the Office of the UN High Commissioner for Human Rights (OHCHR) became the first international human rights body to examine the

relationship between climate change and human rights, concluding in its report that climate change threatened the enjoyment of a broad array of human rights. Moreover, human rights law placed duties on States concerning climate change, including an obligation of international cooperation.<sup>322</sup>

Although the 1992 Rio Declaration on Environment and Development did recognise the link between human rights and the environment at the 1992 Rio Earth Summit, a human rights approach to climate change concerns had – until recently – been absent from the international negotiations – the two issues being considered separate, belonging to different regimes.

As noted in the introduction, the Rio+20 Conference on Environment and Development is the most recent international meeting to acknowledge that climate change is a crosscutting issue. It undermines the ability of all countries, especially developing countries, to achieve sustainable development.

The following table encapsulates some of the interconnections between environmental degradation arising from the effects of climate and human rights violations:

Climate Impact	Human Impact	Rights Implicated
<b>Sea Level Rise</b> <ul style="list-style-type: none"> <li>Flooding</li> <li>Sea Surges</li> <li>Erosion</li> <li>Salination of land and water</li> </ul>	<ul style="list-style-type: none"> <li>Loss of land</li> <li>Drowning, injury</li> <li>Lack of clean water, disease</li> <li>Damage to coastal infrastructure, homes, and property</li> <li>Loss of agricultural lands</li> <li>Threat to tourism, lost beaches</li> </ul>	<ul style="list-style-type: none"> <li>Self-determination [ICCPR; ICESCR, 1]</li> <li>Life [ICCPR, 6]</li> <li>Health [ICESCR, 12]</li> <li>Water [CEDAW, 14; ICRC 24]</li> <li>Means of subsistence [ICESCR, 1]</li> <li>Standard of living [ICESCR, 12]</li> <li>Adequate housing [ICESCR, 12]</li> <li>Culture [ICCPR, 27]</li> <li>Property [UDHR, 17]</li> </ul>
<b>Temperature Increase</b> <ul style="list-style-type: none"> <li>Change in disease vectors</li> <li>Coral bleaching</li> <li>Impact on Fisheries</li> </ul>	<ul style="list-style-type: none"> <li>Spread of disease</li> <li>Changes in traditional fishing livelihood and commercial fishing</li> <li>Threat to tourism, lost coral and fish diversity</li> </ul>	<ul style="list-style-type: none"> <li>Life [ICCPR, 6]</li> <li>Health [ICESCR, 12]</li> <li>Means of subsistence [ICESCR, 1]</li> <li>Adequate standard of living [ICESCR, 12]</li> </ul>
<b>Extreme Weather Events</b> <ul style="list-style-type: none"> <li>Higher intensity storms</li> <li>Sea Surges</li> </ul>	<ul style="list-style-type: none"> <li>Dislocation of populations</li> <li>Contamination of water supply</li> <li>Damage to infrastructure: delays in medical treatment, food crisis</li> <li>Psychological distress</li> <li>Increased transmission of disease</li> <li>Damage to agricultural lands</li> <li>Disruption of educational services</li> <li>Damage to tourism sector</li> <li>Massive property damage</li> </ul>	<ul style="list-style-type: none"> <li>Life [ICCPR, 6]</li> <li>Health [ICESCR, 12]</li> <li>Water [CEDAW, 14; ICRC 24]</li> <li>Means of subsistence [ICESCR, 1]</li> <li>Adequate standard of living [ICESCR, 12]</li> <li>Adaquate and secure housing [ICESCR, 12]</li> <li>Education [ICESCR, 13]</li> <li>Property [UDHR, 17]</li> </ul>
<b>Changes in Precipitation</b> <ul style="list-style-type: none"> <li>Change in disease vectors</li> <li>Erosion</li> </ul>	<ul style="list-style-type: none"> <li>Outbreak of disease</li> <li>Depletion of agricultural soils</li> </ul>	<ul style="list-style-type: none"> <li>Life [ICCPR, 6]</li> <li>Health [ICESCR, 12]</li> <li>Means of subsistence [ICESCR, 1]</li> </ul>

Source: LIMON, M 2009, *Human Rights and Climate Change: Constructing a Case for Political Action*, Harvard Environmental Law Review (Vol. 33), pp. 439-476.

<sup>320</sup> *Ibid.*, at 53.

<sup>321</sup> Human Rights Council Resolution 7/23. *Human rights and climate change*, 28 March 2008, accessible at [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_23.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf) and; Human Rights Council Resolution 10/4. *Human rights and climate change*, accessible at [http://www2.ohchr.org/%2Fenglish/%2Fissues/%2Fclimatechange/%2Fdocs/%2Fresolution10\\_4.doc&ei=LKDZT6aiCsXWrQf5xOjdBw&usq=AFQjCNGjaNcm8qjmiZkmqRY82v0rukKqPg](http://www2.ohchr.org/%2Fenglish/%2Fissues/%2Fclimatechange/%2Fdocs/%2Fresolution10_4.doc&ei=LKDZT6aiCsXWrQf5xOjdBw&usq=AFQjCNGjaNcm8qjmiZkmqRY82v0rukKqPg)

<sup>322</sup> OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc. A/HRC/10/61, 15 January 2009

In addition to the direct effects of climate change noted in the table, the issue of displaced persons raises further human rights issues. They can be divided into cross-border displacement and internal displacement.

Internal displacement has been recently addressed by the development of the 'Peninsula Principles.'<sup>323</sup> They are intended to:

- i. Provide a comprehensive normative framework, based on principles of international law, human rights obligations and good practice, within which the rights of climate displaced persons can be addressed;
- ii. Address climate displacement within a State and not cross-border climate displacement; and
- iii. Set out protection and assistance principles, consistent with the *Guiding Principles on Internal Displacement*, to be applied to climate-displaced persons.

The Principles contain the following definitions:

- i. 'Climate displacement' means the movement of people within a State due to the effects of climate change, including sudden and slow-onset environmental events and processes, occurring either alone or in combination with other factors.
- ii. 'Climate displaced persons' means individuals, households or communities who are facing or experiencing climate displacement.

### ***Should Climate Change Be Addressed Under Human Rights Regimes?***

Climate change is a global problem. It cannot easily be addressed by the simple process of invoking human rights law. It affects too many States and much of humanity. Its causes, and those responsible, are too numerous and too widely spread to respond usefully to individual human rights claims. The response of human rights law – if it is to have one – needs to be in global terms, treating the global environment and climate as the common concern of humanity. In that context, focusing on the issue within the corpus and institutional structures of economic, social and cultural rights makes sense. The policies of individual States on energy use, reduction of greenhouse gas emissions, land use and deforestation could then be scrutinised and balanced against the evidence of their global impact on human rights. This is not a panacea for deadlock in the United Nations Framework Convention on Climate

Change (UNFCCC) negotiations, but it would give the rights of humanity as a whole a voice that, at present, is scarcely heard. Whether the UNHRC wishes to travel down this road is another question, which is for politicians rather than lawyers to answer, but that is where it must go if it wishes to do more than posture on climate change.

Having been recognised as a 'common concern' of humanity since the late 1980s,<sup>324</sup> climate change is an issue in respect of which all states have legitimate concerns. The UNHRC is therefore right to take an interest in the matter.<sup>325</sup> Would human rights law help us to address climate change or ensure justice for those most affected? Certainly the connection has been noted.<sup>326</sup> In 2009 the UNHRC adopted Resolution 10/4 on Human Rights and Climate Change:

*'Noting that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.'*

Two observations in the 2009 OHCHR report are worth highlighting. First, '[w]hile climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense.'<sup>327</sup> Secondly, '[...] human rights litigation is not well-suited to promote precautionary measures based on risk assessments, unless such risks pose an imminent threat to the human rights of specific individuals. Yet, by drawing attention to the broader human rights implications of climate change risks, the human rights perspective, in line with the precautionary principle, emphasises the need to avoid unnecessary delay in taking action to contain the threat of global warming.'<sup>328</sup> On the view set out here, a human rights perspective on climate change essentially serves to reinforce political pressure coming from the more vulnerable developing States. Its utility is rhetorical rather than juridical.

It is easy to see that all governments have a responsibility to protect their own citizens from pollution that affects the right to life, private life or property.<sup>329</sup> But this essentially domestic, internally focused perspective does not address the larger global issue of preventing climate change – it

<sup>323</sup> *Displacement Solutions, 'The Peninsula Principles on Climate Displacement within States', 18 August 2013, available at <http://displacementsolutions.org/global-experts-finalise-peninsula-principles-to-protect-rights-of-displaced-people-within-states/>*

<sup>324</sup> See UNGA Resolution 43/53 on Global Climate Change (1988); 1992 Convention on Climate Change, Preamble.

<sup>325</sup> UNHRC resolution 10/4 (2009) on Human Rights and Climate Change.

<sup>326</sup> See generally HUMPHREYS, S 2009, (ed.), Human Rights and Climate Change (Cambridge, Cambridge University Press).

<sup>327</sup> OHCHR 2009 Report, para. 70.

<sup>328</sup> *Ibid*, para. 91.

<sup>329</sup> The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, ACHPR, Communication 155/96 (2002), paras. 52-53; López Ostra v. Spain (1994) 20 EHRR 277; Guerra v. Italy (1998) 26 EHRR 357; Fadeyeva v. Russia [2005] ECHR 376; Öneriyildiz v. Turkey [2004] ECHR 657; Taskin v. Turkey [2004] ECHR, paras. 113-9; Tatar v. Romania [2009] ECHR, para 88.

merely assists with amelioration of harm to particular individuals and communities within a State's own borders. However, in the climate change context where the impacts are global, the key question is whether greenhouse gas (GHG) emitting States also have a legal responsibility to protect people in *other* States from the harmful impacts of those emissions on the global climate. Human rights treaties generally require a State party to secure the relevant rights and freedoms for everyone within its own territory or subject to its jurisdiction.<sup>330</sup> The question whether these treaties can have extra-territorial application is, for that reason, a difficult one.

There are some precedents in favour of extra-territorial application, but mainly where a State exercises some kind of control over the relevant territory or persons within them.<sup>331</sup> The obvious problem in applying human rights law to climate change is that the States principally responsible for GHG emissions do not have jurisdiction or control over territory or inhabitants beyond their own borders, however seriously affected they may be.

Moreover, the multiplicity of causes and States contributing to the problem makes it difficult to show any direct connection to the victims. The inhabitants of sinking islands in the Pacific region may justifiably complain of human rights violations, but *who* is responsible? Those States like the United Kingdom, US and Germany whose historic emissions have unforeseeably caused the problem? China and India whose current emissions have foreseeably made matters worse? The US or Canada, which have failed to agree on or to take adequate measures to limit further emissions or to stabilise global temperatures at 1990 levels? Or the governments of the Association of Small Island States, which may have conceded far too much when ratifying the Kyoto Protocol or in subsequent climate negotiations?

It is much harder to frame such a problem in terms of jurisdiction or control over persons or territory as required by the human rights case law. It is also harder to contend that any of the major GHG emitters have failed to strike the right balance between their own state's economic development and the right to life or private life in other states when they have either complied with, or are exempt from, greenhouse gas emission reduction targets established by Kyoto and agreed by the international community as a whole.<sup>332</sup> Inadequately controlled transboundary pollution is clearly a breach of general international law,<sup>333</sup> and may also be a breach of human rights law. However, given the terms of the Kyoto Protocol and subsequent commitments, it is far from clear that inadequately-controlled climate change violates any treaty obligations or general international law.<sup>334</sup>

In those circumstances, the argument that it nevertheless violates existing human rights law is far harder to make. If it wants to take climate change seriously, then the UNHRC must find a better way of giving human rights concerns greater weight within the UNFCCC negotiating process. Arguably, that can best be achieved by using the ICESCR and the notion of a right to a decent environment to pressurise governments into cooperating in order to mitigate the global impact of climate change on human rights.<sup>335</sup>

### ***The Idea of Common But Differentiated Responsibilities***

With regard to global environmental problems, the concept of 'Common But Differentiated Responsibility' (CBDR) has helped to mediate North-South disagreements by recognising their different contributions to generating environmental problems and their different capacities for resolving them. The UN General Assembly has also been careful to formulate the 'right to development' in terms of requiring respect for international law on friendly relations and cooperation, as well as sustainable development. Moreover, the emphasis placed on sovereignty over natural resources and freedom to pursue policies of economic growth must be seen in its proper context. UN resolutions, the Stockholm and Rio Declarations, and other international instruments have consistently recognised that although States have permanent sovereignty over their natural resources and the right to determine their own environmental and developmental policies, they are not free to disregard protection of the environment of common spaces or of other States. Nevertheless, developmental priorities remain a major obstacle to stronger environmental regulation for developing and developed economies alike.

The concept of CBDR has been of greatest relevance in the context of climate change. As conceived in the UNFCCC, and replicated by the Kyoto Protocol, CBDR has relieved developing States of any obligation to constrain greenhouse gas emissions, however significant they may become. The rapidly rising CO<sub>2</sub> emissions generated by non-Annex I countries, which include China and India, are thus currently unregulated by Kyoto (although that may change post-2015). At the same time, the globalisation of industrial output brought about by the World Trade Organisation (WTO) free trade regime, which has, in effect, outsourced production from developed States covered by Kyoto's emissions reduction targets to developing States that have no such obligation. Changing this element of the trade bargain would also entail challenging the principle of CBDR, which is one of the cornerstones of the UNFCCC and Kyoto Protocol. Thus, a key issue in the climate

<sup>330</sup> 1950 *European Convention on Human Rights, Article 1*; 1966 *UN Covenant on Civil and Political Rights, Article 2*.

<sup>331</sup> See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, para. 109*; *Al-Skeini v. United Kingdom [2011] ECtHR, para. 136*; *Ecuador v. Colombia (Admissibility) [2010] IACHR Report No. 112/10, paras. 89-100*; *Cyprus v Turkey [2001] ECHR No. 25781/94*; *Loizidou v Turkey (Preliminary Objections) [1995] ECHR Ser. A/310, para. 87*; *Loizidou v Turkey (Merits) [1996-VI] ECHR, para. 52*. *Contrast Bankovic v Belgium [2001] ECHR No. 52207/99*.

<sup>332</sup> *Greenhouse gas emission reduction targets under Kyoto apply only to Annex I developed state parties, not to developing countries, including China, India and Brazil. Compare 1997 Kyoto Protocol, Articles 2 – 9, which apply to annex I parties, and Article 10, which applies to all parties.*

<sup>333</sup> *Pulp Mills Case, 2010 ICJ Reports, paras. 101, 187.*

<sup>334</sup> *Above, Section 2.*

<sup>335</sup> *KNOX, J 2009, 'Climate Change and Human Rights Law' in Virginia JIL 2; Boyle, Note 174, above*

negotiations remains whether to preserve the architecture of historic responsibility agreed at Kyoto, or to start again with a new set of basic assumptions about who must take responsibility for reducing greenhouse gas emissions in the future.

If climate change is to be tackled successfully then not just the US, but also the industrialised developing States – especially China, India and Brazil – have to be brought into the GHG emissions and carbon management control regime. Even with US participation, the developed economies cannot by themselves do all that would be necessary to contain the global temperature rise to 2°C Celsius. The developing economies will have to carry some of the burden. From this perspective, Common But Differentiated Responsibility – as represented in the Kyoto Protocol – is not a viable basis for addressing climate and its effects.

The 2009 Copenhagen Accord, adopted as a Conference of the Parties (COP) decision at Cancun, made important changes to the UNFCCC/Kyoto regime.<sup>336</sup> First, there is now a clear target: reducing global greenhouse gas emissions so as to hold the increase in global average temperature below 2°C Celsius above pre-industrial levels.<sup>337</sup> Second, while the principle of Common But Differentiated Responsibility has not been repudiated, the terms of the engagement between developed and developing economies have been subtly and significantly changed. Developed States have undertaken to make additional reductions in GHG emissions by the amount indicated by them as part of the Copenhagen Accord.<sup>338</sup> But the more important departure from Kyoto is that developing State parties, including China, have for the first time accepted a commitment to reduce their own emissions by taking ‘nationally appropriate mitigation actions.’ This is less precise than the commitments made by UNFCCC Annex I parties, but it is more than non-Annex I parties are required to do by Kyoto. To that extent, Common But Differentiated Responsibility no longer means no emissions reductions by developing States: it means a commitment to different levels of reduction at different speeds.<sup>339</sup> As Rajamani explains, ‘symmetry rather than differentiation is intended to be the central organising principle of the future climate regime.’<sup>340</sup>

### ***Common But Differentiated Responsibilities in Asia***

In the third meeting of East Asian Countries in Singapore, which was attended by all ASEAN countries, as well as China, Japan, India, South Korea, Australia and New Zealand in 2007, all participating countries agreed to continue to respect and uphold the principle of ‘Common But Differentiated Responsibility’ as the basis in addressing the problems of climate change in Asia, and agreed that greater responsibility should be borne by the developed countries.<sup>341</sup>

For the Southeast Asian region, the right to development is stipulated in Article 35 to Article 37 of the ASEAN Declaration of Human Rights, as noted previously. The provisions regarding the right to development in the Declaration also provide guidelines regarding the obligation of the State to always uphold the principle of sustainable development, with due regard to the balance of the interests of the present generation and the generations to come.

However, in accepting climate change, biodiversity loss and major pollution events as regional and global problems, much stronger commitment and closer cooperation between developed countries and developing countries is required, given that in the future, it is predicted that more greenhouse gases will be emitted from developing countries, and that biodiversity loss is set to continue. Hence, based on the principle of CBDR, cooperation and more substantial efforts by all countries, developed and developing, are required.<sup>342</sup>

### ***Impacts on Indigenous and Local Communities of Climate Change***

In the introduction, we briefly discussed the impacts of various kinds of environmental degradation on Indigenous and local communities, particularly on livelihoods and culture. Here we focus more specifically on the issue of the impacts of climate change.

Recent estimates indicate that there are some 350–400 million Indigenous people in the world, and that two-thirds of them live in Asia.<sup>343</sup> The effects of climate change on Indigenous and local communities are generally regarded

<sup>336</sup> See RAJAMANI, L 2009, Addressing the Post-Kyoto Stress Disorder, 58, ICLQ 803; MORGAN, ‘The emerging post-Cancun climate regime’, in BRUNEE, J, DOELLE, M & RAJAMANI, L 2012, (eds), Promoting Compliance in an Evolving Climate Regime (Cambridge), pg. 17.

<sup>337</sup> Copenhagen Accord Para. 2: ‘We agree that deep cuts in global emissions are required according to science, and as documented by the IPCC Fourth Assessment Report with a view to reduce global emissions so as to hold the increase in global temperature below 2 degrees Celsius, and take action to meet this objective consistent with science and on the basis of equity.’

<sup>338</sup> Among the more important but heavily conditional GHG emissions reduction ‘commitments’ are the following: Australia: 5 per cent unconditionally or 25 per cent by 2020 if further agreement; Belarus: 5–10 per cent if access to technology etc; Canada: 17 per cent aligned with US if legislation enacted; EU: 20 per cent unconditionally or 30 per cent conditionally; Japan: 25 per cent if comprehensive agreement; Russia: No specific target – range of reductions ‘will depend on’ various conditions; Ukraine: 20 per cent, if agreement among Annex I parties; USA: ‘In the range of’ 17 per cent against a base year of 2005, subject to legislation (which has not been passed).

<sup>339</sup> Commitments include: China: 40–50 per cent per unit of GDP by 2020, and an increase in forests and non-fossil fuels; Brazil: 36–38 per cent by 2020 through reduced deforestation, new farming practices, energy efficiency and alternative fuels; India: 20–25 per cent voluntary reduction by 2020 (base year 2005); South Africa: 34 per cent reduction by 2020 and 42 per cent by 2025, depending on financial support/technology transfer etc and the conclusion of a binding agreement.

<sup>340</sup> RAJAMANI, L, ‘The Durban Platform for Enhanced Action and the Future of the Climate Regime,’ (2012) 61 ICLQ 501, at 502.

<sup>341</sup> Singapore Declaration on Climate Change, Energy and the Environment, 2007 [http://www.dfat.gov.au/asean/eas/singapore\\_declaration.html](http://www.dfat.gov.au/asean/eas/singapore_declaration.html)

<sup>342</sup> J. Brömmelhörster, ‘The Economics of Climate Change in South East Asia: A Regional Review’ <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR004/ADB.pdf> 2009.

<sup>343</sup> Asia Indigenous Peoples Pact, Indigenous People and Climate Change Adaptation in Asia’ available at <http://ccmin.aippnet.org/ourpublications/article/1064/Adaptation%20and%20Indigenous%20Peoples.pdf> at 2.

as more severe than on other segments of populations.<sup>344</sup> In particular, many are more susceptible to the impacts of climate change because they live in, or in close proximity to, disaster-prone areas:

In general, most of the Indigenous peoples inhabit marginal and fragile ecosystems, such as tropical and temperate forest zones, low-lying coastlines, high mountainous areas, flood plains and riverbanks.

These areas are some of those most threatened from increased climatic uncertainties and unpredictability of extreme events and slow onset climatic events like cyclones, hailstorms, desertification, sea level rise, floods and prolonged droughts. These events are occurring more often and with increasing intensity, severely impacting the lives of Indigenous peoples since their livelihood systems are directly dependent on these ecosystems. Further, the economy, social organisation, identity, and cultural and spiritual values of the Indigenous peoples are closely linked to their biological diversity. Therefore, climatic uncertainties can cause specific effects such as demographic changes, loss of livelihoods and food security; land and natural resource degradation; water shortages, health problems, loss of traditional knowledge, housing, forest and natural resource management; and human rights etc.<sup>345</sup>

Many local communities, in all parts of Asia, are directly dependent on agriculture and farming. They have survived at a subsistence level by relying on their crops for hundreds, if not thousands, of years. Because of their lack of ability to adapt quickly, the effects of climate change can directly affect their livelihoods.<sup>346</sup> Changes in harvest seasons, drought, tropical storms and floods have reduced their capacity to remain dependent on traditional agriculture.

Indigenous and local people who live in coastal regions, especially for those who live in archipelagos and are dependent on fishing or other marine creatures, climate change will also destroy their infrastructure and often their culture. In coastal communities, their way of life will disappear altogether due to rising sea levels.<sup>347</sup> The rising sea temperature also affects their fish catches, and directly raises issues of food security.

## ***Climate Change, Ecosystems and the Right to Culture***

Under the UNFCCC, climate change is considered a common concern of humankind because it 'may adversely affect natural ecosystems and humankind.' This recognition of the possible effects of climate change on ecosystems and on people is also valid for any other kind of environmental degradation; indeed, climate is often linked to other forms of degradation, especially relating to depletion of biodiversity. Such degradation also has adverse effects on the culture of Indigenous and local communities. In fact, ecosystems are often regarded as an integral part of many human cultures.<sup>348</sup>

The United Nations General Assembly, for example, has recognised the right of Indigenous peoples to the protection of the environment in their territories, as well as the right to be consulted on proposed projects that may pose a threat to their environment.<sup>349</sup> But if Indigenous cultures generally appear to be threatened by climate change and other environmental harm, the same may be said for all other peoples. For example, cultural rights are protected in the European transboundary environmental conventions. The Espoo Convention considers the impact of environment degradation on 'historical monuments or other physical structures'<sup>350</sup> and the Water Convention includes transboundary impacts on 'cultural heritage or socio-economic conditions'.<sup>351</sup> Similarly, the Industrial Accidents Convention considers the adverse effects of pollution on 'material assets and cultural heritage, including historical monuments.'<sup>352</sup>

## ***Climate Change and Future Generations***

The idea of rights of future generations has been debated in doctrinal scholarship for some years. Some consider that even if it is impossible to predict the future, a principle of justice may require the present generation not to pass a ruined earth upon future generations.<sup>353</sup> Others think that it is not possible to identify future generations and predict the exact consequences of our present actions. As such, a cause-effect relationship cannot be established between our actions and the living conditions of future generations.<sup>354</sup>

This has not prevented international law from developing the idea of rights of future generations, even if in non-legally binding documents.<sup>355</sup> The Stockholm Declaration

<sup>344</sup> J. Salick and A. Byg, 'Indigenous people and climate change' (Tyndal Centre Publication, 2007)

<sup>345</sup> See note 353. above.

<sup>346</sup> SALIK and BYG, note 353, above.

<sup>347</sup> Ibid.

<sup>348</sup> For example, this idea is implicit in the incorporation of Mother Earth in the Ecuadorian and Bolivian constitutions; see note 220 above.

<sup>349</sup> See Articles 29 and 32 UNGA Res. 61/295, Declaration on the Rights of Indigenous Peoples.

<sup>350</sup> Article 1 (vii) Espoo Convention on Environmental Impact Assessment in a Transboundary Context.

<sup>351</sup> Article 1.2 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

<sup>352</sup> See Article 1(iv) Convention on the Transboundary Effects of Industrial Accidents as amended 2008.

<sup>353</sup> BROWN WEISS, E 1989, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity, *Transnational Publishers*; see also NICKEL, J & MAGRAW, D in BESON, S & TASIOLAS, J 2010, (ed.). In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity, *Oxford*.

<sup>354</sup> CRISP in BESON, S & TASIOLAS, J 2010, (ed.). *The Philosophy of International Law, Oxford*.

<sup>355</sup> These instruments are nevertheless considered soft law.

considers that present generations have a duty to preserve the environment and its resources for future generations.<sup>356</sup> The Rio Declaration considers the right to development in relation to future generations and their needs in an equitable approach.<sup>357</sup> The UNFCCC considers that ‘the action of states should protect the climate system for the benefit of present and future generations of humankind.’<sup>358</sup> In the Rio+20 Final Report, the rights of future generations and the co-related obligations of present obligations are significantly developed.<sup>359</sup>

This interest in future generations is also a concern of UNECE’s conventions. The Water Convention considers the need of water for future generations.<sup>360</sup> The 1992 Convention on the Transboundary Effects of Industrial Accidents considers in its preamble the importance of protecting human beings from industrial accidents for present and future generations.<sup>361</sup>

### Some Conclusions

- i. Human rights law is well developed in Europe, less so in Asia. However, in 2009 an ASEAN Intergovernmental Commission on Human Rights was established, and in 2012, ASEAN adopted a Human Rights Declaration, which affirms the existing corpus of human rights law established by the Universal Declaration of Human Rights.
- ii. Human rights approaches to environmental protection are well established in the constitutional jurisprudence of a number of common law countries in Asia, most notably India, Pakistan and Bangladesh. There is no comparable jurisprudence in Europe at the national level.
- iii. Although the ECHR makes no reference to ‘the environment’, this has not stopped the ECtHR developing an extensive environmental jurisprudence based mainly on the right to private life (Article 8), and less often, on the right to life (Article 2). Other relevant rights include the right of access to justice (Article 6).
- iv. The ‘greening’ of human rights law is not only a European phenomenon, but extends across the IACHR,

AfCHPR, and ICCPR.<sup>362</sup> There is evidence of convergence in the environmental case law and a cross-fertilisation of ideas between the different human rights systems.<sup>363</sup>

- v. The jurisprudence developed by the European Court of Human Rights and by constitutional courts in Asia will be a valuable source for the further development of human rights approaches to environmental protection. This experience will be particularly valuable for the implementation of the 2012 ASEAN Human Rights Declaration.
- vi. The growth of specialised environmental or ‘green’ courts in Asia may see an increase in the use of constitutional human rights provisions and improved implementation of environmental legislation. There is no comparable development in Europe.

Human rights law does not – at present – guarantee a healthy, satisfactory or sustainable environment independently of any adverse impact on other human rights. The development of such a right, and the form which it might take, merits further consideration. There is a case for reconsidering the environment as a value to be included among the economic and social rights listed in the 1966 International Covenant of Economic, Social and Cultural Rights.

- vii. The convergence of human rights law and environmental law is clearly emerging as a phenomenon, through the ‘greening’ of human rights institutions and instruments. However, that convergence can never be complete, given that the two fields do not always serve the same interests or constituencies. What is clear however is that, without more coordinated and conscious effort on the part of regional organisations, national governments, together with their human rights bodies and environment departments, closer integration will continue to depend on the initiatives of courageous litigants, acceptance of cases and innovative arguments by the courts and the determination of non-government organisations to effect change.

<sup>356</sup> See principles 1 and 2 of the 1972 Declaration of the United Nations Conference on the Human Environment.

<sup>357</sup> See Principle 3 of the 1992 Rio Declaration on Environment and Development.

<sup>358</sup> See Article 3 of UNFCCC.

<sup>359</sup> In fact, such rights and obligations appear in ten different places. These are mentioned in points 1, 13, 39, 50, 86, 108, 158, 191, 197 and 230 of the Report of the United Nations Conference on Sustainable Development, Rio de Janeiro, 2012.

<sup>360</sup> Article 2.5(c) of the Water Convention reads that ‘water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs.’

<sup>361</sup> See first paragraph of the Industrial Accidents Convention where, ‘Mindful of the special importance, in the interest of present and future generations, of protecting human beings and the environment against the effects of industrial accidents’, the Convention recognises ‘the importance and urgency of preventing serious adverse effects of industrial accidents on human beings and the environment, and of promoting all measures that stimulate the rational, economic and efficient use of preventive, preparedness and response measures to enable environmentally sound and sustainable economic development’ Full text can be found at [http://www.unep.org/fileadmin/DAM/env/documents/2013/TEIA/1321013\\_ENG\\_Web\\_New\\_ENG.pdf](http://www.unep.org/fileadmin/DAM/env/documents/2013/TEIA/1321013_ENG_Web_New_ENG.pdf)

<sup>362</sup> For example, Judge HIGGINS has drawn attention to the way human rights courts ‘work consciously to co-ordinate their approaches.’ See HIGGINS, R 2006, A Babel of Judicial Voices?, 55 ICLQ 791, 798. See also Diallo Case (Guinea v. Democratic Republic of Congo) 2010 ICJ Reports, paras. 64-68.

<sup>363</sup> See Judge TRINDADE in Caesar v Trinidad and Tobago (2005) IACHR Ser. C, No.123, paras. 6-12: ‘The converging case-law to this effect has generated the common understanding, in the regional (European and inter-American) systems of human rights protection [...]’ (para. 7).

# Closing Speech

## Mr. Frederic TIBERGHEN

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Excellencies and distinguished participants, ladies and gentlemen.

We have worked together during these three days and we have achieved a great deal as participants to this seminar. We have discussed the main issues regarding the environment and human rights, and identified directions or practical measures to promote and protect human rights in the environment field, which will be conveyed to the next ASEM summit leaders. I will not recall all of them as they have been presented by our four Rapporteurs during the last Plenary.

The aim of the seminar series is to encourage frank and real dialogue between Europe and Asia and, with no doubt, we have had a rich and fruitful exchange of views on an emerging topic. So we can congratulate each other for the results we have achieved together.

### A Summary Of Our Common Findings

All of us, in Asia and Europe, have serious environmental and human rights problems: we have mentioned agriculture, mining, dams, haze and air pollution, waste management, bio-diversity impoverishment, climate change, and rights of indigenous people. The solution relies on better governance, which we have defined as:

- i. Political will from long-term minded and sustainable development orientated members of governments;
- ii. Effective hard law from parliaments;
- iii. Market mechanisms to influence private actors’ behaviours;
- iv. Enlightened judges and supreme courts ready to give an active interpretation of the law and implementing effective and deterrent sanctions when environmental law is violated;
- v. Co-conceived environmental policies with the participation of an empowered public and thanks to the building of its capabilities;
- vi. Proactive Non-Governmental Organisations (NGOs); and
- vii. A transformed United Nations Environment Program (UNEP).

We aspire also to a new Covenant affirming the rights to Commons and a rights-based governance of earth, natural wealth and resources. We have designed a perfect world, which is not the one in which we are presently living. So, what can we do to accelerate the venue of that new world? To answer, I propose to delve a little bit more on the main challenging and unresolved general questions we raised during the seminar and to give you a better understanding of what is ahead of us.

### Is There A Right To A Safe, Sound, Clean Or Healthy Environment, Even If Its Definition Is Not Yet Clear?

Few international treaties made reference to such a right until the 1970s. This is not surprising since it was only in the 1960s when people began to voice their concerns over the environment. The post-war declarations and conventions on human rights (1948 and 1966) do not mention it; nor does the Rome treaty (1957) of the European Union (EU). For the same reason, there is nothing in the European Convention on Human Rights (ECHR) (1950) but the court later relied on Article 2 (right to life), Article 6 (fair trial) and Article 8 (right to private and family life) to ecologise the ECHR (*Tatar c/ Roumanie*, 27th January 2009) on the use of chemical products in mining (*Oneryildiz c/Turquie*, 30th November 2004) according to M Bothe<sup>1</sup>. Even the EU Fundamental rights charter of 2000 does not recognise such a right (Article 7).

Specialists agree to identify the Aarhus Convention of 1998 to be the first to link the environment and fundamental rights, and to recognise, on an international basis, an autonomous right to a sound environment through the implementation of the Public Participation principle. Specialists also think it encapsulates an international custom<sup>2</sup> and it is the reason why it is open to signature on a universal basis.

A possible reason for the silence of all these post-war declarations or treaties is that the right to a healthy environment has no substance or no precise content in itself, but is implicitly included in, or necessarily derived from, other rights such as the right to life, to health, to adequate food, to water or to housing.

\* In 2014, France’s Ministry of Foreign Affairs has been re-named as the Ministry of Foreign Affairs and International Development.

<sup>1</sup> *KISS, MA 1998*, Les droits de l’homme et le droit de l’environnement, p 112.

<sup>2</sup> *The European Court of human rights refers to the Aarhus Convention since its Demir & Baykara decision*, 12 November 2008, n° 34503/97. As EU is a party to the Aarhus convention, things are simpler: it is also part of the EU legal order.

Nevertheless, more and more regional declarations and treaties make reference to this right.<sup>3</sup> For example, the ‘right to a safe, clean and sustainable environment’ is clearly underlined in the recent Association of Southeast Asian Networks (ASEAN) Human Rights Declaration (Article 28, f). It is also included in the 1981 African Charter (Article 24) and the Inter-American Democratic Charter (Article 11.1 of the 1988 San Salvador protocol).

According to the concept note and to the background paper, “Given the increasing recognition of the negative environmental impact on the enjoyment of human Rights [...] it is estimated that 70 per cent of national constitutions all over the world make explicit references to environmental rights and/or responsibilities”. In other words, even in the absence or in the silence of international conventions, most States of the world have enshrined that right in their constitution because of the negative impacts of human activities on the environment and of possible threats they represent to human rights. The inclusion of the right to a healthy environment in the range of fundamental rights provides the citizens with a constitutional protection of that right.

We can assume, at that stage, that the right to a sound environment relies on two legs but, at the moment, more on domestic law than on international law, which is still underdeveloped due to its young age. In that respect, the absence of clear international recognition of such a right as an autonomous right is not as dramatic as it is a derived right from other well established international human rights and it is proclaimed internally by constitutions. The importance is to get the recognition of that right, either on an international basis or on a domestic basis.

### **Why Are International And Domestic Law Complementary And Not In Opposition?**

Domestic law puts some flesh on the bones of the abstract right to a healthy environment, which acts as a frame. For example, there is no shared international definition of the content of an environmental impact assessment (EIA). Domestic law is probably best suited to define such content, according to the subsidiary principle. Some of the environmental rights are contingent and must be adapted to the social context. Here at stake are the sharing of benefits, the conflict-solving between antagonist groups, and the notion of climate justice – topics that are all left to politics and to political arbitration.

It is more and more difficult to reach an agreement on a new international convention. I have registered the feeling that while an Aarhus Convention may be desirable in Asia, it is unrealistic at the moment. The negotiation on the future of the Kyoto protocol has also been postponed due to the differences of interests between countries. In that vacuum situation, regional treaties make sense as they promote a common playing field in a continent or a region and lay down general principles of law, which organise the convergence of domestic laws.

### **If There Is A Right To A Healthy Environment, Who Are The Creditors And The Debtors Of Such A Right?**

As creditors, we have identified the individuals, the vulnerable groups and indigenous communities. We talked very little about the debtors. They include States within their territory or national public authorities and local authorities, but the list is probably much larger. Principle 22 of the Rio Declaration also mentions the populations and local communities. For instance, while the French Constitutional Environment Charter of 2005 proclaims in its Article 1 that ‘everybody has a right to live in a balanced and healthy environment’<sup>4</sup>, it immediately adds in Article 2 that ‘everybody has the duty to take part in protecting and in improving the environment.’<sup>5</sup>

Our Constitutional Court considers that environmental obligations and duties apply to the State and to the public authorities, but also beyond them to each person in society and every living being: each person is obliged to care about the damages to environment, which could derive from his or her activities. This is another formulation of the prevention principle. German philosopher, H. Jonas, outlined in his 1971 book *The Principle of Responsibility*, which lays down the philosophical ground of sustainable development and of CSR in Europe, that ‘environment protection is not only a Government business.’ And we have agreed on that.

In my view, we find – in this duty for everybody to care about the environment – the ground for the Public Participation Principle (Principle 10 of the Rio Declaration) and for the association of the stakeholders in all environmental matters. We stressed that the role of education and the raising of public awareness on environmental matters is justified.

<sup>3</sup> On the role of regional agreements, we can easily bridge with the conclusions of our 11th series, which stressed that these agreements are useful to harmonise around minimum standards and have positive effects: improving of domestic law through the imposition of higher standards; serving as leverage to better protect human rights in all the participating states and to prevent human rights violations; contributing to peace building and preventing conflicts between neighbouring states; introducing a form of emulation between states in the region; solving transborder issues which are always very difficult to solve; bring extra scrutiny to domestic affairs. It is an added value in enquiries to have a foreigner looking at your records and making enquiries when you are in violation of human rights; act as a bridge between national and international instruments; are a backup for the individuals whose rights have been violated. These can go first to the national institution, and if they fail to be successful then there is the opportunity to approach the regional organisation. Regional frameworks also provide a platform for dialogue between states and civil society. For the description of the positive interactions between EU and the Council of Europe (CoE) in the environment field, see MALLJEAN-DUBOIS, S & MABILE, S 2007, in *Droit communautaire et droit du Conseil de l'Europe, Actions et interactions normatives pour la protection de l'environnement*, in *Pour un droit commun de l'environnement, Mélanges en l'honneur de Michel Prieur*, p 779-800. Dalloz.

<sup>4</sup> French Constitutional Environment Charter, 2005, complete reference can be found in the 13th Informal ASEM Seminar's Background Paper, pg.39.

<sup>5</sup> Aarhus Convention Preamble



## **What Are The Specialties Of A Right To A Safe Or Healthy Environment Or To What Extend Does Environmental Law Raise New Problems To Human Rights Law?**

During the Opening Plenary, Parvez Hassan talked about the internationalisation of human rights and the environment, suggesting a convergence between the two. How much of that supposed convergence is a reality, and what is the extent of the dialogue between human rights and the environment? Eight features characterise this dialogue.

### ***What is the nature of the right to a healthy environment? Is it a procedural right and/or a substantial right, and of which kind?***

We noticed that environmental law focuses a lot on procedural rights and has designed many specific procedures that go much further than a simple consultation. We talked of a participatory right, i.e. a right to access to environmental information (including alarms & vigilances); assess the impact of projects or decisions on environment; collect public opinions (specifically on projects, plans and programs) or organise a public debate on these; participate in the decision-making process and definitely before any decision is taken (the co-decision). A right to participation so broadly defined is clearly connected to the freedom of expression, association and assembly.

The Aarhus Convention (1998) is the only international treaty entirely dedicated to access to information, public participation to the decision-making process and to access to justice. We considered that public access to environmental information is key in order to improve the public participation to the debate and to decision-making.

In that respect, our 12th Informal ASEM Seminar on 'Human Rights and Information and Communication Technology' insisted on the electronic fora and participatory democracy, which is made possible through them. And access to information and participation to the decision-making process in the environment field is one of the best examples of the possibilities, and of the empowerment, they offer. It is therefore no surprise if the doctrine talks about 'environmental or ecological democracy' about the public participation right. In that sense, the Public Participation principle is clearly linked with the civil and political rights of the 1966 IPCPR, and the right to a sound environment belongs to the political rights because it is a right recognised to each individual or citizen. And as soon as we talk about political rights, the main debate shifts towards voting right and on the modalities of such participation, for example on which projects? When? Who is the public, the general public or the concerned one, or the sphere of interest?

The right to a sound environment is also a substantial right. It implies a healthy access to certain goods: food, water, air and atmosphere, and housing. In that sense, the right to a sound environment is clearly linked with the economic, social and cultural rights of the 1966 IPESC. The right to a sound environment belongs to the social rights because

it is a programmatic right recognised, beyond minimum standards, to each individual or citizen, according to the level of development of the State and to its means.

The right to a sound environment is thus a *Janus* right with two faces, which is not very frequent in human rights. Everybody faces the risk of only looking at one and of omitting or underestimating the importance of the other. John Knox talked about a virtuous circle between the two. Here, again the right to a healthy environment relies on two legs. And we stressed the particular importance of access to information and of participation for the indigenous peoples and vulnerable groups.

### ***What is the content of such a right?***

The objects targeted by environmental law are large and difficult to capture materially. They encompass:

- i. Natural environment, such as air, water, noise or radiations;
- ii. Specific vulnerable areas, such as mountains, natural reserves, the coast and the sea;
- iii. Humid zones defined by the 1971 Ramsar Convention that need to be protected, such as fauna and flora, animals habitat, and endangered species;
- iv. Human activities, such as hunting or fishing, and
- v. The use of hazardous materials, such as asbestos, mercury or chemical products, or of technological substances such GMO.

The first phase of environmental law and of international treaties reflects this sectorial approach through the lens of human protection.

Environmental law is, in that respect, an empirical and emotional law. It has frequently been forged to answer to crises or disasters – natural or technological – and in case a public interest, had to be protected. The Environment Minister of Denmark focused her speech on the Minamata case in Japan. We all have in mind scandals that occurred in our respective countries and which caused leaps forward in health or environment protection. The crisis is, according to the Greek, both the moment of truth and the moment when a deadlock situation can be resolved.

In that respect also, it is a recent (second half of the 20th Century) and a fast evolving law, which progresses through stratifications under the influence of science and of technology and is still under construction, with soft law often preceding hard law. The right to a safe environment is, in a way, contingent in space and in time as all social rights are mainly depending on scientific findings or knowledge. This is not the case for human rights in general, which are universal, absolute, everlasting and indispensable.

Part of these objectives fall out of the scope of the territory of each State. Our background paper insists on the

frequent extraterritorial effect in environmental matters, which is also rather problematic in terms of human rights.

If States have to take into account the consequences of their decisions on the neighbouring States,<sup>6</sup> the traditional situation encountered in human rights is a violation inside the boundaries of a sovereign State or of a foreign controlled territory. In environmental matters, the cross-border or extra-territorial effect is frequent (pollution of air and of water). And one of the Working Group 1 conclusions is that the transboundary effect of environmental damages have to be reflected more precisely in human rights law – let's think for example about climate change consequences presented by Working Group 4.

The need for dialogue and cooperation between States and for international agreements to protect the earth's ecosystem is thus recognised in Principle 24 of the 1972 Stockholm Declaration after Principle 21, which recognises States right to own and use resources according to their environmental Policy, and in Principle 27 of the Rio Declaration. The Rio Summit, which goes further, stresses the duty of States to cooperate in many of its Principles (Principles 3, 7, 9, 12, 14, 18, 19, 27; in that list, Principle 7 mentions common but differentiated responsibilities of States). The Vienna Convention (1985) on the ozone layer protection also identifies an international responsibility on that topic.

The second phase of environmental international law reflects the impact of globalisation and this emerging international accountability of States in ecological matters, which translates into the Rio Frameworks Agreements, such as Atmospheric Pollution in 1979, CFC in 1985, Climate and Biodiversity in 1992.

The concept of 'worldwide environmental public goods' (i.e. the inmost depths of seas and oceans; the outer space), of common property or heritage of mankind, of common concern of mankind (1992 international convention on biodiversity), and of solidarity (1987 Brundtland report) reflect this new trend. The need for dialogue and cooperation between stakeholders is legally traduced in the need for international cooperation between States or in a domestic procedural rule because of a shared responsibility.

Modern times rediscover an old part of the Greek philosophy: mankind and nature are linked forever. The FD Roosevelt memorial in Washington bears the following inscription: "Man and nature work hand-in-hand. The throwing out of balance and the resources of nature throws out of balance also the lives of men."

### ***Is the right to a sound environment only a subjective right of the individuals?***

It is definitely a right of the individuals, as for all the human rights, but it is also much more than that.

The next generations are also the creditors of the right (Article 37 of the EU Charter of Fundamental Rights; Principle 3 of the Rio Declaration), which is a concept that is often ignored by human rights treaties. This right to a sound environment is now considered to be much larger than a mere individual right. It is also a collective right of communities and of humans globally. Other species – endangered species notably – are also recognised rights, initially insofar as they were useful to mankind, but more and more for themselves. The Biodiversity Convention, which we insufficiently touched on, relies on that approach. The aim of environmental law is, on top of that, to preserve the planet itself, which becomes, in a way and as such, an object of protection that is independent from humans. Ecology can be regarded in that respect as a resurgence or as an avatar of natural religions or of an earth idolatry cult.

Poul Engberg-Pedersen invited us to explore the concept of 'nature's rights'. Who will take care of the health of nature or of the environment in the absence of such a right? To bring a remedy to the unlimited exploitation of natural resources by mankind or to implement the recommendations proposed by Working Groups 1, 2 and 4. Such a step is probably inevitable. For example, would it be easier to compensate for biodiversity loss or for climate change effects? This was a question raised by Working Group 2 and unsatisfactorily solved until today.

### ***Is there room for a risk approach in human rights?***

The answer is clearly no. In human rights, a zero risk approach prevails. No violation is tolerated from States. In refugee law, the risk of persecution is part of the definition and is used for the determination of the refugee status. Every individual exposed to a reasonable or likely risk is entitled to avail from the quality of refuge. This issue was addressed in Working Group 4.

Things are quite different in environmental law, where externalities play a central role and where the risk approach – disproportioned between the likelihood of the risk and the importance of damages – is fruitful and very common. I also refer to the famous Ulrich Beck book, *Risikogesellschaft* (1986). If the tolerance towards risks is declining, insurers have a bright future. But the question of sharing the risks becomes central in our contemporary society as one of the differences between major and minor risks, or between suffered risk and agreed risk. The prevention and precaution principles are a clear consequence of the increasing public aversion to risks and helps in defining the responsibility of States and of all stakeholders.

The Public Participation principle is also useful here: it helps measuring the level of risk acceptance of topic-per-topic in a given society, as that level differs from one another. But as in human rights matters, a demand for a zero risk society is emerging in environment law that we cannot ignore.

<sup>6</sup> Gabcikovo-Nagymaros affair, *CIJ*, 25 September 1997; see also Article 3 of the 1992 Biodiversity Convention.

The right to a sound environment, conceived in terms of a rights-based approach for the individuals, secretly includes a demand for a zero environmental risk. In that respect, the convergence between human rights and environmental law seems clear.

***To what extent are specific principles that regulate environmental law relevant for a human rights approach?***

Environmental law has developed certain principles. Some of them are now considered as ‘general principles of law’ in environmental law or in constitutional law.

The EU has recognised five general principles in environmental law:<sup>7</sup>

- i. The prevention and precaution principles;
- ii. The integration principle (between ecological constraints and economical legislation);
- iii. Principle 3 of the Rio Declaration;
- iv. The ‘polluters pays’ principle (Principle 16 of the Rio Declaration), which is a general Principle of European law<sup>8</sup>; and
- v. The elimination of pollutions at the root.

France also recognises four general principles in environmental law:<sup>9</sup>

- i. The ‘polluter pays’ principle (Principle 16 of the Rio Declaration);
- ii. The specifics of an ecological taxation in order to amend public behaviour (small taxation base and high rate and, at the end, the disappearance of the taxation base) – derived from the polluter pays principle;
- iii. The enlarged responsibility of the producer towards waste management (recycling at the end of the life cycle of the product and eco conception); and
- iv. The prevention principle and correction of pollutions at the root (in case there is scientific evidence of causality).

Other principles include the precaution principle (in case there is no scientific evidence or proof; Principle 15 of the Rio Declaration; mentioned in the 1992 framework climate convention); and access to information and public participation of the public (Principle 19 of the Rio 1992 declaration; principle 22 for indigenous people and local communities). All of these previous mentioned principles rely on reliable and accessible information for the public to be effective.

The right to a sound environment thus depends on the way these principles are implemented and on the balance that States strike between legislation and prevention or precaution measures, which is a balance that is hardly found in pure human rights law.

These principles play an essential role: they frame the domestic environmental legislation and any citizen can avail of them in a court.

***What are the best tools to protect the environment and to implement the right to a sound environment?***

We have said that hard law is necessary but insufficient. The doctrine identifies four categories of relevant tools:

- i. Laws and regulations (e.g. the maximum rejection of pollution) according to Principle 11 of the Rio Declaration;
- ii. Incentive tools (e.g. taxes on polluting activities, subsidies, emission rights and trading schemes according to Principle 16 of the Rio Declaration);
- iii. Contracts and voluntary programs beyond minimum standards; and
- iv. Education and information.

These different tools have a demonstrated efficiency in different situations, and are often combined in order to obtain a full implementation of the right to a sound environment. Because environment protection is primarily a matter of behaviours change, and hard law is insufficient to provoke behaviours change, we concluded that information and education are key for the public and are market instruments for the economical players.

*Are there lessons to be learnt from international human rights agreements and existing human rights monitoring mechanisms (such as those that investigate violations and respond to individual and group concerns) that are applicable to a rights-based approach of environmental protection?*

Some of us underlined the opportunities offered by the reporting or investigation mechanisms, or by the accountability mechanisms in human rights, and by the international or national monitoring institutions – even if these mechanisms only apply to States and do not have a direct effect on environment protection.

Our discussions concluded also on the opportunities for interlinking a human rights-based approach to environmental protection and climate change discussions. We definitely need mechanisms to address the environmental human rights violations, and this can be either a national or international institution or judiciary. Each system has

<sup>7</sup> Article 174 to 176 of the EUFT

<sup>8</sup> TPICE, 26th November 2002, *Artogodan GmbH c/Commission*, T-74/00, Rec p 4945;

<sup>9</sup> Article L110-1 of the environment code

its advantages and its drawbacks, and we cannot say that one is better than the other. Perhaps they can be complementary.

*The interconnectedness between human rights and environment protection is also very clear in one of our strongest recommendations: the elaboration of new sustainable development goals (SDGs).*

The desirable incorporation of human and environmental protection goals in the frame of the post-2015 SDG provides the best proof of a closer linkage between human rights and environment protection under the auspices of sustainable development.

To summarise my remark, I want to stress that environmental law has raised a lot of new questions and of new approaches ignored by human rights law, and has enlarged the traditional human rights approach in terms of protected rights and of rights holders.

### **Shared Responsibility Of States And Of Civil Society Stakeholders**

The implication of States in environment can be regarded as the newest development of the Providential State, which started in social matters in the first half of the 20th Century. And the linkage between economic, social and environmental pillars of development under the Sustainable Development concept can be regarded as the contemporary version of the Providential State, which has to deliver a global performance integrating the three pillars as well as the human rights pillar.

This new concept invites us to combine the right to a sound environment with other rights, such as the right to development or the right to minimum social goods. It is the role of political organs to combine these rights and, by doing that, they benefit of ‘a wide discretion’ – according to the ECHR.

Consequently, environmental law is a balanced law: a law of balances and provisional unbalances. Constitutional law has to combine different objectives of equal legal value, which is generally not the case in human rights law whereby the combination question is raised with limitations to fundamental rights in order to achieve other equivalent goals. It also explains the pre-eminence of domestic law in environment protection whereby solving the conflicts between divergent interests and concurring objectives or principles is a State or social matter. But, according to one of our common conclusions, States are no longer alone or isolated in the implementation of the right to a safe environment.

Article 14 of the Preamble of the Universal Declaration of Human Rights clearly states that human rights implementation relies on all organs of society. It is a striking recent development where we insist more and more on the role of other organs of society, such as corporations and NGOs

– especially in the environmental field. We also talked about the eminent responsibilities of our educational systems in early inoculating the desirable reflexes to our young people because they don’t change their behaviours after graduating (e.g. the education leverage among the four tools we identified) and about the responsibilities of each citizen in his private and public life (e.g. responsible consumption, waste recycling, responsible savings and investment).

Civil society is not always an ally. Some civil society groups oppose the implementation of human rights and of environmental law. We have mentioned, for instance, some international corporations. We must be aware of these realities. Nevertheless, there is a strong demand for States to engage with civil society, and this is definitely a positive conclusion of our meeting. Due to its ever-growing importance, we will dedicate our next ASEM human rights seminar to that topic: the role of civil society in implementing human rights in business. The special panel organised by the Danish Institute for Human Rights was an appetiser of what’s to come.

States have, nevertheless as usual in human rights, specific and positive obligations: evaluate the risks and adopt the measures available to protect the citizen’s right to a safe and healthy environment. And if they fail or refrain from regulating/monitoring industrial or agricultural pollution, their liability is involved. On an international basis, it is the same if they violate international environmental obligations.

### **Is The Environmental Glass Half-Full Or Half-Empty?**

The question was raised in the Opening Plenary and in the events organised by the Danish Institute for Human Rights. Different views have been expressed:

- i. Pessimistic views (e.g. the environment is still degrading, biodiversity is dangerously reduced, and the warming of the planet is going to reach irreversible thresholds); and
- ii. Optimistic views (e.g. the work of scientists, activists and NGOs, the general public being more and more engaged, and some corporations already implementing Corporate Social Responsibility programs).

Beyond that remark, the true question is: why is change so slow in environmental matters? If you share the idea that environmental protection is mainly about change in behaviours, all of us can understand that changes do not occur spontaneously. Factors that explain why there is a common feeling that the glass is half-empty include the reluctance to change, the vested interests in societies, the lack of courage of politicians whose first preoccupation is to be re-elected, the retention of information by the powers in place, and the weakness of international institutions in the environment.

But environment law is becoming more and more of an emergency law surrounding climate change, disappearance of species and Coral Sea reefs, for example. The fear of irreversibility or of impending dangers demands quick answers. And here, we again find that we need environmental catastrophes or disasters to provoke change in our behaviour. The prophets of doom, the millenarists and annunciators of the end of the world are useful: their role is to awake us with fears in order to lead us to changes in behaviours we would otherwise accept at the last minute, or too late.

To move forward, we also need environmental activists in the political sphere and in civil society (e.g. NGOs, corporations, lawyers, judges, teachers, journalists). Ida Auken, the Danish Minister for Environment, suggested that we should *think* sustainable. I would add that we must – from now on – *act* sustainable. And that we go back to our respective countries with a more determined mindset to act sustainable, thanks to our exchange of views and recommendations put forward throughout this seminar.

### **What Can The Asia-Europe Foundation (ASEF) Do In The Near Future?**

There are three possible follow-ups from our seminar that are under way:

- i. ASEF is working on the future SDGs. A conference will be held in Seoul at the beginning of November;
- ii. ASEF has also been commissioned by the EU to work on a possible extension or replication of an Aarhus-type Convention on access to information, public participation and access to justice in the ASEAN region;
- iii. ASEF is also considering a workshop on the linkage between human rights and climate change in 2015 before the COP on the Kyoto Protocol, which will take place in Paris.

Thank you ladies and gentlemen for your hard work and contribution.

# Annex 1

## Acronyms

ACHPR	African Convention on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ASEAN	Association of Southeast Asian Nations
CBDR	Common But Differentiated Responsibility
COP	Conference of the Parties
CoE	Council of Europe
DLDD	Desertification, Land Degradation and Drought
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EHRR	European Human Rights Reports
EU	European Union
IACHR	The Inter-American Commission on Human Rights
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IUCN	International Union for Conservation of Nature
MERCOSUR/MERCOSUL	Mercado Común del Sur/ Mercado Comum do Sul
MDG	Millennium Development Goals
MEA	Multilateral Environmental Agreement
<i>NAFTA</i>	<i>North American Free Trade Agreement</i>
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner on Human Rights
OSCE	Organisation for Security and Cooperation in Europe
SIA	Strategic Impact Assessment
SDG	Sustainable Development Goal
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCCD	United Nations Convention to Combat Desertification
UNECE	United Nations Economic Commission for Europe
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
WBCSD	World Business Council for Sustainable Development
WSSD	World Summit on Sustainable Development

## Annex 2

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# Annex 3

## Seminar Program

<b>13th Informal ASEM Seminar on Human Rights 'Human Rights and the Environment'</b> 21 - 23 October 2013 Copenhagen, Denmark	
Day 1 – Monday, 21 October 2013	
<b>Venue: Moltkes Palace</b>	
09:00 - 12:30	<b><i>Climate Change and Indigenous Peoples</i></b> (Side Event organised by the Danish Institute for Human Rights)
14:00 - 16:00	<b>Registration of participants</b> <i>Venue: Foyer, Moltkes Palace</i>
<b>Official Welcome</b> <i>Venue: Grand Hall</i>	
16:00 - 16:20	<b>Chair</b> <b>Karsten WARNECKE</b> , <i>Deputy Executive Director, Asia-Europe Foundation</i>
	<b>Opening Speech on Behalf of the Host, Kingdom of Denmark</b> <b>Ida AUKEN</b> , <i>Minister of the Environment, Ministry of the Environment, Denmark</i>
	<b>Opening Speech on Behalf of the Organisers</b> <b>Rosario MANALO</b> , <i>Foreign Affairs Advisor, Department of Foreign Affairs, Republic of the Philippines</i>
<b>Opening Plenary</b>	
16:20 - 17:05	<b>Chair</b> <b>Rolf RING</b> , <i>Deputy Director, Raoul Wallenberg Institute</i>
	<b>Keynote Address</b>
	<b>John KNOX</b> , <i>UN Independent Expert on Human Rights and the Environment</i>
	<b>Parvez HASSAN</b> , <i>Senior Partner, Hassan and Hassan; Senior Advocate, Supreme Court of Pakistan</i>
	<b>Poul ENGBERG-PEDERSEN</b> , <i>Deputy Director General/Managing Director, International Union for Conservation of Nature</i>
17:05 - 18:05	<b>Presentation of Background Paper by Main Rapporteurs (20 min)</b>
	<b>Alan BOYLE</b> , <i>Professor of Public International Law, University of Edinburgh</i>
	<b>Ben BOER</b> , <i>Professor, Research Institute of Environmental Law, Wuhan University &amp; Emeritus Professor of Environmental Law, University of Sydney</i>
<b>Open Plenary Discussion (40 min)</b>	
18:05 - 19:30	<b>Welcome Dinner hosted by the Danish Ministry of Foreign Affairs</b> <i>Welcome remarks by Uffe WOLFFHECHEL, Human Rights Ambassador, Danish Ministry of Foreign Affairs</i>

Day 2 – Tuesday, 22 October 2013	
<b>Venue: Moltkes Palace</b>	
08:00 - 09:00	<b>Registration of Participants (continued)</b> <i>Venue: Moltkes Palace</i>
<b>Simultaneous Working Groups</b>	
09:00 - 11:00	<p><b>Working Group 1: The Interaction between Sustainable Development, Environment and Human Rights</b>  <u>Chair:</u> Ella ANTONIO (Earth Council Asia-Pacific)  <u>Rapporteur:</u> Alan BOYLE (University of Edinburgh)</p> <p><b>Working Group 2: Access to Information, Participatory Rights and Access to Justice</b>  <u>Chair:</u> Edward SANTOW (Public Interest Advocacy Centre)  <u>Rapporteur:</u> Ludwig KRAMER (The European Union Aarhus Centre)</p> <p><b>Working Group 3: Actors, Institutions and Governance</b>  <u>Chair:</u> Yves LADOR (Earth Justice)  <u>Rapporteur:</u> Ben BOER (Wuhan University; University of Sydney)</p> <p><b>Working Group 4: Climate Change and Human Rights Implications</b>  <u>Chair:</u> Magda STOCZKIEWICZ (Friends of Earth Europe)  <u>Rapporteur:</u> Sajid RAIHAN (ActionAid)</p>
11:00 - 11:15	<b>Coffee Break</b>
11:15 - 13:00	<b>Workshops continued</b>
13:00 - 14:00	<b>Lunch</b>
14:00 - 15:30	<b>Workshops continued</b>
15:30 - 16:00	<b>Coffee Break</b>
16:00 - 18:00	<b>Workshops continued and wrap-up</b>
18:00 - 19:30	<b>Working Group de-brief for Rapporteurs / Free time for Participants</b>
19:30 - 21:00	<b>Official Seminar Dinner</b> <i>Remarks by Charlotte FLINDT-PEDERSEN, Deputy Director, the Danish Institute for Human Rights</i>
Day 3 – Wednesday, 23 October 2013	
<b>Venue: Moltkes Palace</b>	
<b>Closing Plenary</b> <i>Venue: Grand Hall</i>	
09:30 - 11:00	<p><b>Rapporteurs' Summary on Each Workshop</b>  <i>Chair: Ligia NORONHA, Director (Resources, Regulation &amp; Global Security) and Executive Director (Research Coordination), The Energy and Resources Institute (TERI)</i></p> <p><b>Working Group 1: The Interaction between Sustainable Development, Environment and Human Rights</b>  Presentation – Alan BOYLE</p> <p><b>Working Group 2: Access to Information, Participatory Rights and Access to Justice</b>  Presentation – Ludwig KRAMER</p> <p><b>Working Group 3: Actors, Institutions and Governance</b>  Presentation – Ben BOER</p> <p><b>Working Group 4: Climate Change and Human Rights Implications</b>  Presentation – Sajid RAIHAN</p>

11.00 - 11.15	<b>Coffee Break</b>	
11:15 - 12:00	<b>Q&amp;A Discussion (45 min)</b>	
12:00 - 13:30	<b>Lunch</b> reception hosted by the <i>Ministry of Foreign Affairs, Kingdom of Denmark</i>	
13:30 - 15:30	<p><b>Human Rights, the Environment and Private Actors</b> (Special Panel organised by the Danish Institute for Human Rights)</p> <p>Panellists:  <b>Malin STAVLIND</b>, <i>Vice President Business Ethics &amp; Social Responsibility, Vestas Wind Systems</i></p> <p><b>Allan LERBERG JØRGENSEN</b>, <i>Head of Human Rights and Business Department, Danish Institute for Human Rights</i></p> <p><b>Jacob FJALLAND</b>, <i>Manager, Mekong Programme and Low Carbon Development, WWF Denmark</i></p> <p><b>Ulrika ÅKESSON</b>, <i>Deputy Head of Section, Senior Programme Manager (Environment and Climate Change), Embassy of Sweden, Thailand</i></p>	
15:30 - 16:00	<p><b>Closing Plenary Continued: Concluding Remarks</b></p> <p><b>Frédéric TIBERGHIE</b>, <i>Technical Coordinator &amp; Representative of the Ministry of Foreign and European Affairs, France, &amp; State Counsellor – Conseil d’Etat</i></p>	
Day 4 –Thursday, 24 October 2013		
09:00 - 12:00	Cultural Visit for Participants ( <b>Optional</b> )	09:00 – 14:00 OHCHR Consultation <i>Organised by the United Nations Office for Human Rights</i> <b>(by Invitation only)</b>



# Annex 4

## Concept Note & Working Group Questions

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations<sup>1</sup>

Although the starting point for associating human rights to environmental issues is considered by most to date back to the 1970s,<sup>2</sup> the explicit linking of environmental issues to human rights protection is a 21st Century development.<sup>3</sup> The United Nations (UN) Secretary General's 2005 report on the Relationship between Human Rights and the Environment concluded that 'since the World Summit on Sustainable Development (2002), there has been growing recognition of the connection between environmental protection and human rights.'<sup>4</sup>

Since then, the momentum has grown stronger – the 2007 Malé Declaration on the Human Dimension of Global Climate Change, which stated that 'climate change has clear and immediate implications for the full enjoyment of human rights', and called on the United Nations to treat this as a matter of urgency.<sup>5</sup> The United Nations Human Rights Council (UNHRC) has, in three separate resolutions (7/23, 10/4, and 18/22), noted the threat of climate change to individuals and communities, and its implications on the enjoyment of human rights.<sup>6</sup> And in 2009, the Office of the UN High Commissioner for Human Rights (OHCHR) became the first international human rights body to examine the relationship between climate change and human rights, concluding in its report that climate change threatened the enjoyment of a broad array of human rights. Moreover,

human rights law placed duties on States concerning climate change; including an obligation of international cooperation.<sup>7</sup>

Although the 1992 Rio Declaration on Environment and Development did recognise the link between human rights and environment at the 1992 Rio Earth Summit, a human rights approach to climate change concerns had, until recently, been absent from the international negotiations – the two issues being considered separate and belonging to different regimes.

Human rights concerns are also increasingly integrated into the mainstream of climate change texts as recently referenced in the Cancun Agreements, which make several references to human rights. Noting Resolution 10/4, the preamble of the Cancun LCA Outcome document,<sup>8</sup> which was adopted at the United Nations Framework Convention on Climate Change (UNFCCC) 16th Session of the Conference of the Parties (or COP16) in 2010, emphasises that 'Parties should, in all climate change-related actions, fully respect human rights.'<sup>9</sup> The Cancun LCA Outcome is considered to be the first statement from the international climate change negotiations to recognise the climate change impacts on human rights.<sup>10</sup> The 2012 Rio+20 Earth Summit is the most recent international meeting to acknowledge that climate change is a crosscutting issue, which undermines the abilities of all countries – especially developing countries – to achieve sustainable development. The final outcome document of the Rio+20 Summit also reaffirmed the importance of human rights, particularly the rights to health, food and safe drinking water.<sup>11</sup>

<sup>1</sup> (Principle 1, Declaration of the United Nations Conference on the Human Environment, Stockholm 5- 16 June 1972)

<sup>2</sup> Declaration of the United Nations Conference on the Human Environment, Stockholm 5- 16 June 1972, accessible at <http://www.unep.org/Documents.Multilingual/Default.Print.asp?documentid=97&articleid=1503>

<sup>3</sup> The 2005 Inuit petition of the violation of their human rights at the Inter-American Commission on Human Rights against the United States for its failure to curb its greenhouse gas emissions, is considered by many to be the landmark case that brought the interplay between environment and human rights to international focus.

<sup>4</sup> United Nations Secretary General (2005), Human rights and the environment as part of sustainable development, Report of the Secretary General, E/CN.4/2005/96, 19 January 2005. The 2002 Johannesburg Declaration on Sustainable Development was adopted at the 2002 World Summit on Sustainable Development.

<sup>5</sup> 2007 Malé Declaration on the Human Dimension of Global Climate Change, adopted on 14 November 2007, Malé. Accessible at [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf)

<sup>6</sup> Human Rights Council Resolution 7/23. Human rights and climate change, 28 March 2008, accessible at [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_23.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf) and; Human Rights Council Resolution 10/4. Human rights and climate change, accessible at [http://www2.ohchr.org/%2Fenglish/%2Fissues/%2Fclimatechange/%2Fdocs/%2Fresolution10\\_4.doc&ei=LKDZT6aiCsXWrQF5xOjdBw&usg=AFQjCNGjaNcm8qjmiZkmqRY82v0rukKqPg](http://www2.ohchr.org/%2Fenglish/%2Fissues/%2Fclimatechange/%2Fdocs/%2Fresolution10_4.doc&ei=LKDZT6aiCsXWrQF5xOjdBw&usg=AFQjCNGjaNcm8qjmiZkmqRY82v0rukKqPg)

<sup>7</sup> OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, UN Doc. A/HRC/10/61, Jan. 15, 2009

<sup>8</sup> See paragraph 7 of the Preamble of the 'Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', (Cancun LCA Outcome) adopted by the Conference of the parties to the UNFCCC, 16th Session, 4 December 2010, available at [http://unfccc.int/files/meetings/cop\\_16/application/pdf/cop16\\_lca.pdf](http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf)

<sup>9</sup> Paragraph 8, Cancun LCA Outcome, 2010

<sup>10</sup> Center for International Environmental Law, Analysis of Human Rights Language in the Cancun Agreements ((UNFCCC 16TH Session of the Conference of Parties), 14th March 2011

<sup>11</sup> Rio+20 was the first time that the right to safe drinking water and sanitation was reaffirmed by states at a major UN meeting. However, human rights groups like Amnesty International, Human Rights Watch and the Centre of International Environmental Law have pointed out that Rio+20 fell short of fully integrating human rights and environmental protection. <http://www.amnesty.org/en/news/rio20-outcome-document-undermined-human-rights-opponents-2012-06-22> The Outcomes of Rio+20 can be found at [http://www.uncsd2012.org/content/documents/774futurewewant\\_english.pdf](http://www.uncsd2012.org/content/documents/774futurewewant_english.pdf).

While most international human rights treaties do not make a specific reference to the environment, healthy environmental conditions is regarded as one of the necessary prerequisites for the enjoyment of human rights – especially the rights to life<sup>12</sup> and health.<sup>13</sup> Other rights such as the right to adequate food, water and housing are also dependent on healthy environmental conditions. The following table encapsulates some of the interconnections between environmental degradation and human rights violation:

While only the 1981 African Charter on Human and Peoples’ Rights makes an explicit reference to ‘a general satisfactory environment favourable to their development,’<sup>14</sup> regional human rights bodies have been more active in linking human rights to environmental issues. The European, Inter-American and African human rights institutions have, in response to individual and collective

complaints, developed jurisprudence on the linkages between environmental degradation and human rights.<sup>15</sup> The ‘right to a safe, clean and sustainable environment’ is also clearly underlined in the new Association of Southeast Asian Nations (ASEAN) Human Rights Declaration.<sup>16</sup>

Using a human rights-based approach to the climate change debate has been useful because it directly shifts attention from States to individuals – especially vulnerable groups – who are affected by climate change and whose voices are seldom heard at the international level. Resolution 10/4 recognises the fact that ‘the effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations, owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability.’<sup>17</sup> Indigenous communities are particularly vulnerable because, although provided

Climate Impact	Human Impact	Rights Implicated
<b>Sea Level Rise</b> <ul style="list-style-type: none"> <li>• Flooding</li> <li>• Sea Surges</li> <li>• Erosion</li> <li>• Salination of land and water</li> </ul>	<ul style="list-style-type: none"> <li>• Loss of land</li> <li>• Drowning, injury</li> <li>• Lack of clean water, disease</li> <li>• Damage to coastal infrastructure, homes, and property</li> <li>• Loss of agricultural lands</li> <li>• Threat to tourism, lost beaches</li> </ul>	<ul style="list-style-type: none"> <li>• Self-determination [ICCPR; ICESCR, 1]</li> <li>• Life [ICCPR, 6]</li> <li>• Health [ICESCR, 12]</li> <li>• Water [CEDAW, 14; ICRC 24]</li> <li>• Means of subsistence [ICESCR, 1]</li> <li>• Standard of living [ICESCR, 12]</li> <li>• Adequate housing [ICESCR, 12]</li> <li>• Culture [ICCPR, 27]</li> <li>• Property [UDHR, 17]</li> </ul>
<b>Temperature Increase</b> <ul style="list-style-type: none"> <li>• Change in disease vectors</li> <li>• Coral bleaching</li> <li>• Impact on Fisheries</li> </ul>	<ul style="list-style-type: none"> <li>• Spread of disease</li> <li>• Changes in traditional fishing livelihood and commercial fishing</li> <li>• Threat to tourism, lost coral and fish diversity</li> </ul>	<ul style="list-style-type: none"> <li>• Life [ICCPR, 6]</li> <li>• Health [ICESCR, 12]</li> <li>• Means of subsistence [ICESCR, 1]</li> <li>• Adequate standard of living [ICESCR, 12]</li> </ul>
<b>Extreme Weather Events</b> <ul style="list-style-type: none"> <li>• Higher intensity storms</li> <li>• Sea Surges</li> </ul>	<ul style="list-style-type: none"> <li>• Dislocation of populations</li> <li>• Contamination of water supply</li> <li>• Damage to infrastructure: delays in medical treatment, food crisis</li> <li>• Psychological distress</li> <li>• Increased transmission of disease</li> <li>• Damage to agricultural lands</li> <li>• Disruption of educational services</li> <li>• Damage to tourism sector</li> <li>• Massive property damage</li> </ul>	<ul style="list-style-type: none"> <li>• Life [ICCPR, 6]</li> <li>• Health [ICESCR, 12]</li> <li>• Water [CEDAW, 14; ICRC 24]</li> <li>• Means of subsistence [ICESCR, 1]</li> <li>• Adequate standard of living [ICESCR, 12]</li> <li>• Adequate and secure housing [ICESCR, 12]</li> <li>• Education [ICESCR, 13]</li> <li>• Property [UDHR, 17]</li> </ul>
<b>Changes in Precipitation</b> <ul style="list-style-type: none"> <li>• Change in disease vectors</li> <li>• Erosion</li> </ul>	<ul style="list-style-type: none"> <li>• Outbreak of disease</li> <li>• Depletion of agricultural soils</li> </ul>	<ul style="list-style-type: none"> <li>• Life [ICCPR, 6]</li> <li>• Health [ICESCR, 12]</li> <li>• Means of subsistence [ICESCR, 1]</li> </ul>

Source: LIMON, M 2009, *Human Rights and Climate Change: Constructing a Case for Political Action*, Harvard Environmental Law Review, (Vol. 33), p 439-476

<sup>12</sup> The Right to Life is protected in several international documents including Article 3 of the Universal Declaration of Human Rights (UDHR); Article 6(1) of the International Covenant of Civil and Political Rights (ICCPR); Article 6 of the Convention on the Rights of the Child (CRC)

<sup>13</sup> See Article 25(1) of the Universal Declaration of Human Rights; Article 12(1) of the International Covenant of Economic, Social and Cultural Rights (ICESCR) ; Article 24 of the Convention on the Rights of the Child; and Article 12 of the Convention on the Elimination of Discrimination Against Women (CEDAW).

<sup>14</sup> Article 24, 1981 African (Banjul) Charter on Human and Peoples’ Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, accessible at [http://www.africa-union.org/official\\_documents/treaties\\_%20conventions\\_%20protocols/banjul%20charter.pdf](http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf)

<sup>15</sup> Human Rights Council 2011, Analytical Study on the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights, Human Rights Council Nineteenth Session, A/HRC/19/34 – 16 December 2011. For case law in the European Court of Human Rights on the violation of individual rights caused by environmental violations, please refer to <http://www.righttoenvironment.org/default.asp?pid=91>

<sup>16</sup> ASEAN Human Rights Declaration (AHRD), adopted on 18 November 2012, article 28, f. Accessible at <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>. Although the AHRD is not legally binding; as per the Phnom Penh Statement, the AHRD is to be implemented in accordance to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Program of Action, and other international human rights instruments to which ASEAN Member States are parties.

<sup>17</sup> Resolution 10/4. Human Rights and Climate Change, adopted at the Tenth Session of the Human Rights Council, can be accessed at [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_10\\_4.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf). For more information, please refer to ‘and Vulnerability’, assessment by Working Group II of the Intergovernmental Panel on Climate Change, 2007

protection in international law,<sup>18</sup> they have suffered most the consequence of economic development (for example, the Dongria Kondh<sup>19</sup>) and climate change (for example, the Inuit<sup>20</sup>) – not only in loss of habitat, but also in the violation of their cultural rights to preserve their heritage.

Many consider that one of the most important achievements of Rio+20 was the agreement on a process to set global Sustainable Development Goals (SDGs), which will focus on priority areas for sustainable development and cover both developed and developing countries. SDGs aim to address economic, social and environmental dimensions of sustainable development through the overarching frame of poverty eradication with enhanced environmental considerations. In principle, they address the challenges of the UN's Millennium Development Goals (MDGs) and build on this experience in order to provide the foundation for a green economy. Discussions have already begun to integrate the SDGs with the post 2015-development framework to come up with 'global development goals', which will focus on sustainable development for the betterment of human well-being.

Understanding that 'vulnerability due to geography is often compounded by a low capacity to adapt,<sup>21</sup> the disproportionate impact of climate change on developing countries is receiving greater interest, particularly so in the Asia-Pacific region. It is estimated that 'the human drama of climate change will largely be played out in Asia, where over 60 per cent of the world's population, around 4 billion people, live'.<sup>22</sup> Article 3 of the UNFCCC guides that:

Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof. The specific needs and special circumstances of

developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.<sup>23, 24</sup>

Given the increasing recognition of the negative environmental impact on the enjoyment of human rights, an interest in declaring environmental rights at the international level has been raised. It is estimated that 70 per cent of national constitutions all over the world make explicit references to environmental rights and/or responsibilities.<sup>25</sup>

The 3rd Informal ASEM Seminar on Human Rights held in 2000<sup>26</sup> also broached 'the right to a healthy environment' as part of its wider discussions and recognised valuable questions on the nature of this right. Environmental rights would certainly serve to narrow the gap between human rights policy and environmental policy, but environmental rights also raise important questions: Who are the right-holders? Should it be an individual or collective right? Who can be held accountable? Can this right be limited to a right to life or health or is it necessary to define a new 'generation of rights'? How can such a right be described and to what purpose would it serve?

One of the great values of applying a human rights-based approach to climate change policy is because of the 'emphasis they place on accountability mechanisms [...] And to procedural rights such as access to information and access to decision-making, which are critical to the evolution of effective, legitimate, and sustainable policy responses.'<sup>27</sup> While participatory and procedural rights in environmental matters are referred to in many international and regional declarations,<sup>28</sup> these are usually worded in general terms – there is little reference on neither how to operationalise nor promote public participation; nor are there minimum standards or processes on how to provide for public access to information.

<sup>18</sup> See the 2007 United Nations Declaration on the Rights of Indigenous Peoples; also the 1989 ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries. The Commission of Human Rights also appointed a Special Rapporteur on the Rights of Indigenous Peoples.

<sup>19</sup> In 2010, the Dongria Kondh won a landmark case against a mining company, preventing a mining project on their ancestral lands, please see <http://www.guardian.co.uk/business/2010/aug/24/vedanta-mining-industry-india>

<sup>20</sup> The Inuit tribe face extinction of their traditional way of life due to global warming, please see [http://articles.cnn.com/2009-04-24/tech/climate.change.eskimos\\_1\\_climate-change-indigenous-communities-eskimos?\\_s=PM:TECH](http://articles.cnn.com/2009-04-24/tech/climate.change.eskimos_1_climate-change-indigenous-communities-eskimos?_s=PM:TECH)

<sup>21</sup> UN Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 January 2009, A/HRC/10/61, available at: <http://www.unhcr.org/refworld/docid/498811532.html> [accessed 14 June 2012], p 30

<sup>22</sup> Working Group on Climate Change (2007), Up in Smoke – Asia and the Pacific, p. 3. Available at: <http://www.iied.org/pubs/pdfs/10020IIED.pdf>

<sup>23</sup> Principles 1 and 2 of Article 3 of the United Nations Framework Convention on Climate Change, available at [http://unfccc.int/essential\\_background/convention/background/items/1355.php](http://unfccc.int/essential_background/convention/background/items/1355.php)

<sup>24</sup> While details on the Common But Differentiated Responsibilities (CBDR) principle still remain under negotiation, COP18 (Qatar 2012) 'addressed a key concern of developing countries by agreeing to establish institutional arrangements, such as an international mechanism, to address loss and damage associated with the impacts of climate change in particularly vulnerable developing countries. The arrangements will be established at the UN climate change conference to be held at the end of 2013 in Warsaw' ([http://ec.europa.eu/clima/events/0062/index\\_en.htm](http://ec.europa.eu/clima/events/0062/index_en.htm))

<sup>25</sup> Report of the United Nations High Commissioner for Human Rights, Analytical study on the relationship between human rights and the environment, A/HRC/19/34, 16 December 2011, presented at the Human Rights Council 19th session.

<sup>26</sup> The 3rd Informal ASEM Seminar on Human Rights took place on 19-20 June 2000, Paris, France. The complete papers and discussions on 'Is There a Right to a Healthy Environment?' can be found in 'The 3rd Informal ASEM Seminar on Human Rights', An ASEF Monograph, 2000

<sup>27</sup> LIMON, M 2009, Human Rights and Climate Change: Constructing a Case for Political Action, *Harvard Environmental Law Review*, Vol. 33, p 439-476

<sup>28</sup> At the Rio+20 Summit in 2012, the final outcome document noted that '[...] public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development'. Other examples include the 1992 Rio Declaration on Environment and Development; the 1992 UN Framework Convention on Climate Change; the 1994 UN Convention to Combat Desertification; also the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources (not yet in force) contains provisions with regard to environmental matters, for public participation and access to information.

A notable exception is the 1998 Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (the Aarhus Convention) which is considered to be the most advanced environmental agreement in providing minimum standards for public participation – for example, the Aarhus Convention states that the public must be informed at an early stage in decision-making, and also details the minimum standard of information that is to be made available in different participatory procedures.<sup>29</sup> It goes further by obliging parties to ensure access to justice in environmental matters.<sup>30</sup>

Although open for international signature, the Aarhus Convention remains, primarily, a European instrument. Standard setting for environmental participatory rights needs to be improved, especially with regard to access to information and justice.

The implementation of procedural and participatory rights becomes complicated in the context of environmental issues, given the extraterritorial dimension of the matter. The extraterritorial obligations of States can be difficult to determine<sup>31</sup> so that the balance between national-level obligations (protecting citizens from environmental damage and ensuring societal dialogue in decision-making processes for official environmental policy) and international-level obligations (State failure or neglect to regulate/monitor industrial pollution can indirectly cause environmental degradation beyond its own territory, e.g. marine dumping) needs to be examined.<sup>32</sup>

When it comes to private actors (e.g. multinational corporations), determining transnational liability is even more complex. Many corporations operate out of multiple countries, outsourcing production, working through affiliates and subsidiary companies. Compliance with strict environmental laws in one country does not mean equal regulation in another country. Since corporations are not generally recognised as being subject to international law, it has been often debated if international human rights obligations are legally binding on them.<sup>33</sup> There is growing work on Corporate Social Responsibility in regional fora (such as the European Commission<sup>34</sup> and the ASEAN Intergovernmental Commission on Human Rights) and also at the United Nations through the guiding principles on business and human rights.

Even when climate change related mitigation and adaptation policies are enacted, the rights of individuals still need to be monitored. Quite often there can be contesting demands. International mitigation policies such as Reduced Emissions from Deforestation and Degradation (REDD) and the Kyoto Protocol's Clean Development Mechanism (CDM) may require the displacement of local communities, thereby conflicting with cultural rights.<sup>35</sup>

Securing public support – via public participation, access to information and freedom of expression – for such policies becomes important because ‘when citizens are not well informed, or are disabled from participating in public discussion, this will affect not only the quality of decisions but also their implementation [...] Agreement between state and citizens is especially important if policies involve sacrifice, the allocation of scarce resources, or government interference in the day-to-day dealings of ordinary people.’<sup>36</sup> While adaptation and mitigation policies do offer an opportunity to redress past and prevent future violations, States and other international actors in both the human rights and climate change regimes need to consider the implications of their policies on human rights and how best to translate global policies into on-the-ground activities.

The 13th Informal Human Rights Seminar will be looking at key aspects of environmental protection and human rights, especially with regards to ASEM. The four themes identified for this Seminar below could constitute the basis for the Working Groups (WG):

- i. WG1 – The Interaction between Sustainable Development, Environment and Human Rights
- ii. WG2 – Access to Information, Participatory Rights and Access to Justice
- iii. WG3 – Actors, Institutions and Governance
- iv. WG4 – Climate Change and Human Rights Implications

### Crosscutting Questions

- i. What types of legislation or prevention/precaution measures are recommended for balancing scientific innovations with the protection of traditional practices, e.g. the debates on genetically modified crops?

<sup>29</sup> For specific articles on public participation, see Articles 6-8, 1998 Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters. For access to information, see Articles 4-5 of the same Convention, accessible at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

<sup>30</sup> Article 9, 1998 Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters.

<sup>31</sup> The International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples' Rights, and the American Declaration of the Rights and Duties of Man contain no provisions specifying jurisdictional limitations on State's obligations. While others such as International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights do specify limitations but formulate them differently.

<sup>32</sup> The Maastricht principles on extraterritorial obligations of States in the area of economic, social and cultural rights that were adopted in September 2011 is a reflection of the growing interest in the transboundary obligations of States in the area of economic, social and cultural rights.

<sup>33</sup> For more details, refer to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, 21 March 2011, accessible at [http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf)

<sup>34</sup> [http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm)

<sup>35</sup> In 2010, Parties to the UNFCCC agreed to promote and support safeguards for REDD+ activities including consistency with international obligations; respect for the rights of indigenous peoples and local communities; full and effective participation of stakeholders; good governance systems; and avoided damage to biodiversity and ecosystems. Parties also agreed to develop a system of information sharing on how safeguards are being implemented.

<sup>36</sup> International Council on Human Rights Policy 2008, Climate Change and Human Rights: A Rough Guide, pg. 54

- ii. What are the obligations of public authorities when an issue becomes a decision between development necessity and scientific knowledge (respective roles of prevention and precaution principle)?
- iii. What is the role of human rights education (what, how and to whom) in ensuring transparency in environment related policies?
- iv. What special concerns/considerations need to be made for vulnerable populations, such as indigenous peoples and other minority groups, in all aspects of the debate on human rights and the environment?

### **Wg1: The Interaction Between Sustainable Development, Environment And Human Rights**

- i. While it is acknowledged that environmental degradation has an impact on human rights, what has been the impact of human rights on environmental protection?
- ii. Are there any lessons to be learnt from international human rights agreements and existing human rights monitoring mechanisms (like those that investigate violations and respond to individual and group concerns) that are applicable to environmental protection?
- iii. Given the impact of environmental degradation on human rights, how much of environmental protection efforts can be associated with specific rights, such as ‘right to health’, ‘right to safe and clean drinking water’, ‘right to food’ and ‘right to housing’ (amongst others)?
- iv. Is there a specific ‘right to a healthy environment’ that can be distinct from pre-existing rights, such as health? What are its implications on the ‘right to development’ and on environmental policy and law (air, water, natural zones, flora and fauna, risks and pollution prevention such as waste management etc)?
  - a) How would this right (‘right to a healthy environment’) be described and protected? What monitoring mechanisms would ensure compliance? More importantly, what would be the obligations/duties of the authorities in this regard?
  - b) What is the implication of the ‘right to a healthy environment’ on other pre-existing rights, such as ‘right to food or water’, ‘right to housing’ or ‘right to a safe work environment’? What about its interactions with minority and cultural rights?
- v. What is the implication of the idea of ‘sustainable development’ and the concept of ‘worldwide environmental public goods’ (and of universal access to these goods) across all matters of environmental decisions, and its consequences for the management of these resources?
- vi. What implications do the new proposed Sustainable Development Goals (SDGs) have on the human rights

regime at the international, regional and national levels? To what extent do they incorporate a rights-based approach? How can human rights organisations be better involved in the articulation of the Global Development Goals (which incorporate the SDGs)?

### **Wg2: Access To Information, Participatory Rights And Access To Justice**

- i. Since the Aarhus Convention is not applicable globally, what efforts are, or can be, made at the international, regional and national level to ensure access to information and participation?
- ii. With regard to participation, how can public authorities aid citizens to have their say on proposed environmental legislation or projects before they are passed or launched (public enquiries; impact studies etc)? What provisions need to be made for indigenous and minority groups who may not have easy access to such participatory measures?
- iii. What are the mechanisms for access to justice already in place or can be put in place, e.g., the roles of environmental and human rights NGOs? How does this translate into legal obligation with respect to violations and restitutions, for example?
- iv. How do (and which) courts determine environmental responsibility, damage and compensation/reparation? On what basis of expertise do they (courts and judges) evaluate environmental damage and what types of compensation measures are admissible?

### **Wg3: Actors, Institutions And Governance**

- i. What is the balance between national, regional and international responsibilities (and burden-sharing) in environmental protection? How is reporting and monitoring organised?
- ii. Is there a need for an international authority within the UN system – to regulate and provide directive – in all aspects of environment issues? How can this be achieved?
- iii. Since environmental protection is a multi-stakeholder concern, how can the participation of public authorities, private institutions and all other stakeholders be achieved? How are duties and levels of responsibilities differentiated between these stakeholders?
- iv. What are the roles and responsibilities of private companies and public authorities with regard to human rights and environmental protection, e.g. disposal of nuclear waste? How can monitoring and regulation of private actors operating across different jurisdictions be enforced?
- v. To what extent can market mechanisms be used to protect the environment from the existing practices, e.g. the European Union’s Emission Trading Scheme; the

‘polluter pays principle’? Which approach has proven to be more efficient and effective in implementation, especially in the long run?

#### **Wg4: Climate Change And Human Rights Implications**

- i. Given how many countries (especially developing countries) have to respond to the adverse effects of climate change at the local and national levels, what are the implications for regional and international cooperation (institutions and resources) for both human rights and climate change concerns?
- ii. How can human rights be made a major consideration or even put to the forefront of negotiation agendas for climate change treaties and discussions?
- iii. How can the impact of environmental damage on human life and quality of life (e.g. migration and ‘climate refugees’) be determined/evaluated? Are there regional or national variations in the approach towards environmental protection?
- iv. What are the challenges (and opportunities) for interlinking a human rights approach to environmental protection and climate change discussions?
- v. What about climate justice and the imperative to fulfil the objectives of the United Nations Framework Convention on Climate Change (UNFCCC), particularly with regard to the principle of common but differentiated responsibilities?
- vi. Given the high costs of climate change adaptation and mitigation that countries have to bear for, what will be the implications on the priorities (and funding) for the realisation of human rights in these countries?
- vii. The rights of indigenous people to stewardship of ancestral lands have often been eroded by public development projects and private enterprises. What can be done to improve monitoring and protection of this cultural heritage and traditional biodiversity? How can a balance be achieved between respect for cultural and minority rights, development requirements and ecological conservation efforts?

# Annex 5

## Participants List

ASEM countries that participated in the seminar:

Australia, Austria, Bangladesh, Belgium, Bulgaria, Cambodia, China, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Italy, Japan, Korea, the Lao PDR, Latvia, Luxembourg, Malaysia, Malta, Mongolia, Myanmar, the Netherlands, New Zealand, Norway, Pakistan, the Philippines, Poland, Portugal, Romania, the Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, the United Kingdom, Viet Nam, the ASEAN and the European Union.

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# Annex 6

## About The Co-Organisers



The **Asia-Europe Foundation (ASEF)** promotes understanding, strengthens relationships and facilitates cooperation among the people, institutions and organisations of Asia and Europe.

ASEF enhances dialogue, enables exchanges and encourages collaboration across the thematic areas of culture, economy, education, governance, public health and sustainable development.

ASEF is a not-for-profit intergovernmental organisation located in Singapore. Founded in 1997, it is the only institution of the Asia-Europe Meeting (ASEM).

Together with about 700 partner organisations ASEF has run more than 650 projects, mainly conferences, seminars and workshops. Over 17,000 Asians and Europeans have actively participated in its activities and it has reached much wider audiences through its networks, web-portals, publications, exhibitions and lectures.

For more information, please visit [www.asef.org](http://www.asef.org)



### **French Ministry of Foreign Affairs and International Development**

For more information, please visit our website: <http://www.diplomatie.gouv.fr/en/>



The **Raoul Wallenberg Institute** of Human Rights and Humanitarian Law is an independent academic institution dedicated to the promotion of human rights through research, training and education. Established in 1984 at the Faculty of Law at Lund University, Sweden, the institute is currently involved in organising in Lund two Masters Programs and an interdisciplinary human rights programme at the undergraduate level. Host of one of the largest human rights libraries in the Nordic countries and engaged in various research and publication activities, the Raoul Wallenberg Institute provides researchers and students with a conducive study environment. The Institute maintains extensive relationships with academic human rights institutions worldwide. For more information, please visit our website: [www.rwi.lu.se](http://www.rwi.lu.se)



### **Philippine Department of Foreign Affairs**

The Department of Foreign Affairs is responsible for the coordination and execution of the foreign policies of the Republic of the Philippines and the conduct of its foreign relations and performs such other functions as may be assigned to it by law or by the President relating to the conduct of foreign relations. [www.dfa.gov.ph](http://www.dfa.gov.ph)

# Annex 7

## About The Hosts

MINISTRY OF FOREIGN  
AFFAIRS OF DENMARK



The **Danish Foreign Service** comprises the Ministry in Copenhagen and a global network of Embassies, Consulates-General and Trade Commissions. The network of diplomatic missions abroad is the backbone of the Ministry of Foreign Affairs and provides the basis for enabling the Ministry to safeguard and promote Denmark's international interests.

In Denmark the Ministry of Foreign Affairs is organized according to the following main areas of activity: Foreign and Security Policy, European Policy and EU Coordination, Development Policy, Global Cooperation, Export and Investment Promotion and Trade Policy. In addition there are departments handling Consular Services, i.e. provision of assistance to Danes in distress abroad, Public Diplomacy and Communication, Protocol and Resources.

For more information, please visit [www.um.dk](http://www.um.dk)

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THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS

**The Danish Institute for Human Rights** is Denmark's National Human Rights Institution (NHRI). The institute was established by a parliamentary decision in 1987.

The Danish Institute for Human Rights protects and promotes human rights both in Denmark and internationally. We aim at setting standards and engendering change.

For more information, please visit [www.humanrights.dk](http://www.humanrights.dk)

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21-23 October 2013  
Copenhagen, Denmark  
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## Asia-Europe Meeting

The aim of the Informal ASEM Seminar on Human Rights is to promote mutual understanding and co-operation between Europe and Asia in the area of political dialogue, particularly on human rights issues.

Previous seminar topics include:

- *Access to Justice; Regional and National Particularities in the Administration of Justice; Monitoring the Administration of Justice* (1997, Sweden)
- *Differences in Asian and European Values; Rights to Education; Rights of Minorities* (1999, China)
- *Freedom of Expression and Right to Information; Humanitarian Intervention and the Sovereignty of States; Is there a Right to a Healthy Environment?* (2000, France)
- *Freedom of Conscience and Religion; Democratisation, Conflict Resolution and Human Rights; Rights and Obligations in the Promotion of Social Welfare* (2001, Indonesia)
- *Economic Relations; Rights of Multinational Companies and Foreign Direct Investments* (2003, Sweden)
- *International Migrations; Protection of Migrants, Migration Control and Management* (2004, China)
- *Human Rights and Ethnic, Linguistic and Religious Minorities* (2006, Hungary)
- *Human Rights and Freedom of Expression* (2007, Cambodia)
- *Human Rights in Criminal Justice Systems* (2009, France)
- *Human Rights and Gender Equality* (2010, Philippines)
- *National and Regional Human Rights Mechanisms* (2011, The Czech Republic)
- *Human Rights and Information and Communication Technologies* (2012, Republic of Korea)
- *Human Rights and the Environment* (2013, Kingdom of Denmark)

The Seminar series is co-organised by the Asia-Europe Foundation (ASEF), the Raoul Wallenberg Institute (delegated by the Swedish Ministry of Foreign Affairs), the French Ministry of Foreign Affairs and International Development and the Department of Foreign Affairs of the Philippines. ASEF has been the secretariat of the Seminar since 2000.

Supervision of the seminar is entrusted to a Steering Committee, composed of the Seminar's four co-organisers as well as representatives of the ministries of Foreign Affairs of China and Indonesia as well as the European Commission.

**The Informal ASEM Seminar on Human Rights series is a partnership between:**



**RAOUL  
WALLENBERG  
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