Human Rights and the Environment

13th Informal ASEM Seminar on Human Rights

Background Paper

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## CONTENTS

### I. Introduction: key concepts

- Links between human rights and environmental protection .................................................. 4
- Sustainable Development Goals .......................................................................................... 5
- The development of human rights instruments and multilateral environmental agreements ................................................................. 7
- Environmental law principles and human rights ................................................................. 7
- The role of soft law in environmental regulation ................................................................. 9
- Effectiveness of human rights institutions: The Paris Principles ........................................... 10
- The relationship between human rights and environment .................................................... 11
- Various approaches to environmental protection and their implications for human rights ........................................................................................................ 13
- The ‘right to a healthy environment’ .................................................................................... 15
- Impacts on Indigenous and Local Communities of Environmental Degradation .............. 19
- Interaction between trade, investment, environment and human rights ......................... 20

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

- Sustainable development, environment and human rights ................................................. 22
- Defining Sustainable Development ..................................................................................... 24
- Environment and human rights in Europe ......................................................................... 26
- Examples of environmental problems and human rights in Asia and Europe ............... 31
- Should a right to a satisfactory, sustainable or ecologically sound environmental right exist? ........................................................................................................ 36
- Constitutional provisions on environmental rights ............................................................. 39
- Asia ...................................................................................................................................... 39
- Europe ................................................................................................................................. 41

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

- Access to information and additional processes ................................................................. 42
- Human rights and the Aarhus Convention ......................................................................... 43
- Should Asia develop an Aarhus type convention? ................................................................. 45
- Environmental Impact Assessment ....................................................................................... 45
- Asia ...................................................................................................................................... 45
- Europe ................................................................................................................................. 47
- The growth of green courts and tribunals ........................................................................... 48

### IV. Working Group 3: Actors, Institutions, Market Mechanisms and Governance

- Main Actors and Instruments in International Law on Environment and Human Rights ........................................................................................................ 50
- Main regional institutions and instruments in Asia ............................................................. 51
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The rule of law, development, environment and human rights in Asia</td>
<td>54</td>
</tr>
<tr>
<td>Regional actors in Asia</td>
<td>56</td>
</tr>
<tr>
<td>Regional actors in Europe</td>
<td>57</td>
</tr>
<tr>
<td>Need for capacity building for all actors</td>
<td>59</td>
</tr>
<tr>
<td>The role of the private sector and corporate social responsibility</td>
<td>59</td>
</tr>
<tr>
<td>Market Mechanisms</td>
<td>61</td>
</tr>
<tr>
<td>V. Working Group 4: Climate Change and Human Rights Implications</td>
<td>61</td>
</tr>
<tr>
<td>Interactions between climate change and human rights regimes</td>
<td>61</td>
</tr>
<tr>
<td>Should climate change be addressed under human rights regimes?</td>
<td>63</td>
</tr>
<tr>
<td>The idea of common but differentiated responsibilities</td>
<td>65</td>
</tr>
<tr>
<td>Common but differentiated responsibilities in Asia</td>
<td>66</td>
</tr>
<tr>
<td>Impacts on Indigenous and local communities of climate change</td>
<td>67</td>
</tr>
<tr>
<td>Climate Change, Ecosystems and the Right to Culture</td>
<td>68</td>
</tr>
<tr>
<td>Climate Change and Future Generations</td>
<td>69</td>
</tr>
<tr>
<td>VI. Some conclusions</td>
<td>69</td>
</tr>
<tr>
<td>Annex 1: Acronyms</td>
<td>71</td>
</tr>
<tr>
<td>Annex 2: Bibliography</td>
<td>73</td>
</tr>
</tbody>
</table>
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.¹

I. 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 Southeast 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 preparation of the Stockholm Declaration on the Human Environment. 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.

This grand statement might have provided the basis for subsequent elaboration of a human right to environmental quality, 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.’ 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. Twenty-one 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. The United Nations (UN) Secretary-General’s 2005

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3 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.”

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


7 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
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’. 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. 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, transboundary pollution and large scale, human-caused land degradation and its sub-set of desertification 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 and health. 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

the interplay between environment and human rights to international focus. A number of these are briefly canvassed in this paper.


10 For example, T. Greiber 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).


13 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)

14 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).
Rio+20 Summit reaffirmed respect for all human rights, particularly the rights to health, food and safe drinking water.\textsuperscript{15}

**Sustainable Development Goals**

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 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.\textsuperscript{17}

The mandate of the UN Expert on Human Rights and the Environment makes reference to a “safe, clean, healthy and sustainable environment”,\textsuperscript{18} while the 2012 ASEAN Human Rights Declaration includes a provision on “protection and sustainability of the environment”.\textsuperscript{19} 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.\textsuperscript{20}

\textsuperscript{15} The Outcomes Document of Rio+20 *The Future We Want* can be found at http://www.unsd2012.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

\textsuperscript{17} Ibid., paras. 245-251.


\textsuperscript{20} Office of the High Commissioner for Human Rights Fact Sheet No.2 (Rev.1), The International Bill
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 and, in 2012, the ASEAN Human Rights Declaration. 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’ and their right to ‘a general satisfactory environment favourable to their development.

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. 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, 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.

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. 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 (transport of hazardous waste or air and river pollution), human rights law has a

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22 See note 19, above.
23 Article 16.
24 Article 24.
25 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
27 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/
28 There are exceptions, notably the 1998 Arhus Convention on Access to Justice, Access to Information, and Public Participation in Environmental Decision-making.
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. In both cases, it must exercise due diligence to regulate environmental nuisances and to enforce the law. The reason for emphasizing 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.

The principles of equal access to information, public participation and access to justice in environmental matters
The principle of preventive action
The principle of cooperation
The principle of sustainable development
The precautionary principle
The polluter pays principle
The principle of common but differentiated responsibility
The principle of intergenerational and intra-generational equity
The principle of non-discrimination
The principle of environmental impact assessment
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 1992 Arhus Convention, and the jurisprudence of human rights courts and treaty bodies. They are broadly supportive 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.  

Among other things, non-binding declarations or resolutions adopted by states or intergovernmental organizations may be evidence of existing international law (e.g. Articles 10-34 of the ASEAN Human Rights Declaration), 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. 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 mobilizing 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 similar function, while in the Asian region, a comparable process may be under way with 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’. 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’.  

The Principles include six main criteria:

1. A clearly defined and broadly-based mandate predicated on universal human rights
2. Autonomy from government
3. Independence guaranteed by legislation or the constitution
4. Pluralism, including membership that broadly reflects their society
5. Adequate resources
6. Adequate powers of investigation

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32 Those articles set out the internationally accepted civil, political, economic, social and cultural rights.


35 Asia Pacific Forum, available at http://www.asiapacificforum.net/members/international-standards
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. 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’. 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:

- 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.
- 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.
- 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.
- Human rights considerations can facilitate public participation in environmental decision-making, access to justice, and access to information.
- 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.’ Three theoretical approaches to the relationship between human rights and the environment are identified. 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

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38 Paris Principle 3(e).
40 Ibid, paras. 6-9.
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 property 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. The 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 and in cases concerning the American Declaration of Human Rights. The case law on Article 1 of the European Convention is more cautiously worded, and extra-territorial application is ostensibly exceptional, but it has nevertheless been applied in cases involving foreign arrests, military operations abroad, and occupation of foreign territory. 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.” 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 which 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. Moreover, in keeping

42 Ecuador v. Colombia (Admissibility) [2010] IACHR Report No.112/10, paras. 89-100.
44 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.
47 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
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.\textsuperscript{48}

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 characterized in terms such as healthy, safe, satisfactory or sustainable; and (b) heightened attention to the relationship to the environment of already recognized rights, such as rights to life and health.\textsuperscript{49}

\textit{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.\textsuperscript{50} 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 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 recognized 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.’\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{48} 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.
\item \textsuperscript{52} Knox note 1, above at 6-7.
\end{itemize}
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. 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. 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, often phrased in relatively narrow terms focused on human health. 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’ and their right to ‘a general satisfactory environment favourable to their development’. In the Ogoniland 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 ecologic equilibria is harmful to physical and moral health’. In the ASEAN region, we see an explicit recognition of an environmental right incorporated in the newly agreed 2012 ASEAN Declaration of Human Rights.

55 The most important is Article 24, 1981 ACHPR, on which see Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, ACHPR, Communication 155/96 (2002), paras. 52-53 [‘SERAC v. Nigeria – the Ogoniland Case’].
57 Article 16.
58 Article 24.
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. 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.

**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 implications. 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’.

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 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. According to General Comment No.14, Article 12 also includes ‘the requirement

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60 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.

61 Section 2(4).

62 Articles 4(1)(a) 6 and 9.


64 Note 1, above.

65 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
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. Together with Article 11, Article 12 provides the basis for the committee's articulation of the right to water in General Comment No. 15, which emphasises that states are required to ensure an adequate and accessible supply of water for drinking, sanitation and nutrition.

A number of other treaties and instruments also include the link between human health and the environment. 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. It is difficult to see what this adds over and above the case law on environmental impacts on the right to life. What is needed here is a broader focus on environmental quality which could be balanced more directly against economic and developmental priorities. 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 which 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. There is no such right in European human rights law. As the Council of Europe

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66 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.


68 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”


70 See further below.

71 See for example the ECHR case law: López Ostra, Guerra, Fadeyeva, Oneryidiz etc.


73 Article 11 of the 1988 San Jose Protocol to the American Declaration on Human Rights includes the
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.’

As the European Court of Human Rights (ECtHR) reiterated in Kyratos, ‘neither Article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such….’ 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. 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.’

Put simply, the 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 an 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.’ 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.’

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

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.

77 Metropolitan Nature Reserve v. Panama [2003] IACHR Case 11.533, para. 34.
80 Para 54.
provision of information on health and environmental risks and ‘meaningful access to regulatory and decision-making bodies.’ As Shelton observes, ‘The result offers a blueprint for merging environmental protection, economic development, and guarantees of human rights.’

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 do some way towards achieving the same outcome as Article 24 of the African Convention.

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 judgment. 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’. In Hatton the European Court of Human Rights took the same view of its role: “The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.” Moreover, neither environmental protection nor human rights necessarily trump the right to economic development, desirable as that might be. In Hatton v 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, save 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

81 Para 69.
84 2012 Council of Europe Report, note 74, above, at 31.
85 Hatton and Others v. the United Kingdom [2003] ECHR (Grand Chamber), paras. 97-104.
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 which 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* the 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.’ 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, 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

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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.\textsuperscript{89}

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.\textsuperscript{90}

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 nature conservation in mind in their economic planning.\textsuperscript{91} However, at the same time, it recognises the need for economic development to the betterment of quality of human life.\textsuperscript{92} The need to reconcile economic development, environment and human rights was further strengthened twenty 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.’\textsuperscript{93} 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.\textsuperscript{94} The principle of mutual supportiveness between environmental protection and economic development has been described as “the key concept to describe the relationship of

\textsuperscript{89} Para 150. The decision is based on the 1948 American Declaration of the Rights of Man, not on the 1969 Inter-American Convention.
\textsuperscript{90} Par. 3 of the initial proclamation.
\textsuperscript{91} Principles 2, 3 and 4 of the Stockholm Declaration.
\textsuperscript{92} Principles 8 and 9 of the Stockholm Declaration.
\textsuperscript{93} Principle 8 of the Rio Declaration.
WTO and environmental law.\footnote{Ibid, p.530.} There is ‘no overarching reason for not extending it to international economic law as a whole, including investment law.’\footnote{Ibid, p.530.}

This principle developed further with the 2002 Monterrey Consensus.\footnote{Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002, published by the United Nations in 2003.} 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.\footnote{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.} In that same year, the World Summit on Sustainable Development (WSSD) took place in Johannesburg to reconsider the topic of sustainable development.\footnote{World Summit on Sustainable Development, meeting in Johannesburg, South Africa, from 26 August to 4 September 2002.} 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’.\footnote{Report of the World Summit on Sustainable Development, A/CONF.199/20, published by the United Nations in 2002.}

Another decade later, the Rio+20 Conference of 2012 developed this principle through the prism of a ‘green economy’.\footnote{See Outcome Document of the Rio + 20 Summit, The Future We Want, at http://www.un.org/en/sustainablefuture/} 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.\footnote{Paras. 127, 131, 149 and 154 respectively.} 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.\footnote{Paras. 260 and 271 respectively.} 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.\footnote{In J.E. Viñuales, Foreign Investment and the Environment in International Law, (Cambridge, 2012), p.13.}

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. 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. In fact, for a long time now, the EU has included environmental clauses in all its Free Trade Agreements with 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.

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.

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 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.

II. 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 ‘are at the centre of concerns for sustainable development’

105 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).
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.\textsuperscript{109} 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.\textsuperscript{110} 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.…’\textsuperscript{111} The Millennium Development Goals (MDGs) adopted by the UN General Assembly reiterate and expand these commitments.\textsuperscript{112} Goal 7 is focused on ensuring environmental sustainability, and sets out four targets:

- Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources
- Reduce biodiversity loss, achieving, by 2010, a significant reduction in the rate of loss
- Halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation
- Achieve, by 2020, a significant improvement in the lives of at least 100 million slum dwellers.\textsuperscript{113}

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.\textsuperscript{114} 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 \textit{IUCN Draft International Covenant on Environment and Development}, which provides in its Preamble that ‘respect for human rights

\textsuperscript{110} See generally B.A. Andreassen and S.P. Marks (eds), \textit{Development as a Human Right} (Cambridge, Mass., 2006).
\textsuperscript{111} Declaration on the Right to Development, UNGA Res. 41/128 (1986), Article 2(3).
\textsuperscript{112} The Millennium Development Goals are set out in UNGA Res. 55/2, 8 September 2000.
\textsuperscript{113} 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 \textit{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.’ \textit{Millennium Development Goals Report 2013} (http://www.un.org/millenniumgoals/reports.shtml at 4)
and fundamental freedoms, including non-discriminatory access to basic services, is essential to the achievement of sustainable development\textsuperscript{115} 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.’\textsuperscript{116} 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.\textsuperscript{117}

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.\textsuperscript{118} 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.

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.’\textsuperscript{119} The IUCN


\textsuperscript{116} Ibid., Article 4.

\textsuperscript{117} Ibid., at 42-43.

\textsuperscript{118} See below.

\textsuperscript{119} WCED, *Our Common Future*, at 43. Compare the more expansive definition of sustainable
has defined it as the improvement of the quality of human life, while living within the carrying capacity of supporting ecosystems.

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. 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. ...[T]he 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 anywhere. Reciting the policy mantra of these three pillars reflects the limited and shallow understanding of the policymakers.

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. The Sustainable Development Goals (SDGs) will likely subsume the MDGs established by the United Nations in 2000. 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 in a pre-Rio+20 background note stated:

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.’

120 IUCN Caring for the Earth, 1991.
123 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.’
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.

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.’ 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. 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.

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.’ 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:

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126 Soering v UK (1989) 11 EHRR 439, at para. 102. See e.g. Öcalan 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 Article2.’ 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.


129 Ibid., 7.
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 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.  

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 authorities in principle a wide discretion... in the language of the Court a wide ‘margin of appreciation’ – in their decision-making in this sphere.

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, Öneriyildiz, 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. 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’. The state thus has a duty ‘to take reasonable and appropriate measures’ to secure rights under human rights conventions.

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:

1. Regulation of potentially harmful activities – in effect an obligation of prevention.
2. Decision-making procedures that allow states to strike a fair balance between different interests.
3. A right to be informed of the danger posed by potentially harmful activities.
4. A right to appeal from decisions or omissions that may harm the environment and, consequently, the rights of the individuals.

The right to life is also relevant: In Öneriyildiz, the ECtHR emphasised that ‘[t]he positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails

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Ibid. 7  
Ibid. 31.  
[2007] 45 EHRR 10, para. 89.  
Ibid.  
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 recognizes the rights of access to information, participation and access to justice, in par. 118.
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.\textsuperscript{136} 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.’\textsuperscript{137}

These practical measures include law enforcement. It is a characteristic feature of \textit{Guerra, López Ostra, Taskin} and \textit{Fadeyeva} that the industrial activities in question were either operating illegally or in violation of environmental laws and emissions standards. In \textit{López Ostra} and \textit{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.’\textsuperscript{138}

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.\textsuperscript{139} 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.\textsuperscript{140} On this basis the Court has in several cases upheld restrictions on property development.\textsuperscript{141}

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 \textit{Hatton v. United Kingdom},\textsuperscript{142} additional night flights at Heathrow Airport did not violate the right to private and family life because adequate measures had been taken to 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.

\textsuperscript{136} [2005] 41 EHRR 20, para. 89.
\textsuperscript{137} Ibid., para. 90
\textsuperscript{138} \textit{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 \textit{Mayagna (Sumo) Awas Tingni Community v Nicaragua} (2001), Ser. C, No. 201, at paras.106-114.
\textsuperscript{140} \textit{Fredin v. Sweden} (1991) ECHR Sers. A/192, paras. 41-51. See also \textit{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.
\textsuperscript{142} See \textit{Hatton v. UK} [2003] ECHR (Grand Chamber).
caused by such development projects,\textsuperscript{143} 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 \textit{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.’\textsuperscript{144} 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.\textsuperscript{145}

The most significant feature of \textit{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 which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake...’\textsuperscript{146} 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 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:

- (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
- (b) A description of the significant effects of the proposed activity on the environment;
- (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
- (d) A non-technical summary of the above;
- (e) An outline of the main alternatives studied by the applicant.\textsuperscript{147}

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.\textsuperscript{148}

\textsuperscript{143} See also Öner (Öneryildiz), para. 107; \textit{Taskin}, paras. 116 - 7.
\textsuperscript{144} \textit{Taskin}, at para. 118.
\textsuperscript{145} 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 organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.’
\textsuperscript{146} \textit{Taskin}, para. 119.
\textsuperscript{147} Aarhus Convention, Article 6(6).
\textsuperscript{148} 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 \url{http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/conventiontextenglish.pdf}
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.\textsuperscript{149}

\textbf{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:\textsuperscript{150} South Asia comprises the countries of the South Asian Association for Regional Cooperation: Afghanistan, Bhutan, India, Sri Lanka, Nepal, Bangladesh, Pakistan, and the Maldives. Northeast Asia comprises China, Japan, North Korea and South Korea. Southeast Asia includes the ten countries of the Association of Southeast Asian Nations (ASEAN): Brunei, Myanmar, Cambodia, Indonesia, Laos, 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.\textsuperscript{151} 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 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 North-East 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 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 South East Asia).\textsuperscript{152}

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’, 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.\textsuperscript{153}

\textsuperscript{150} 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 B. Boer, R. Ramsay and D. Rothwell \textit{International Environmental Law in the Asia Pacific} (Kluwer 1997). It is noted that Australia and New Zealand are ASEF members, but they are not specifically focused on in this background paper.
\textsuperscript{151} J. M. Fox, 'How Blaming 'Slash and Burn' Farmers is Deforesting Mainland Southeast Asia' (2000) 47(Asia Pacific) \textit{East West Centre}
\textsuperscript{152} See Office of the High Commissioner for Human Rights http://www.ohchr.org/EN/Countries/Pages/WorkInField.aspx
\textsuperscript{153} See Rio Declaration on Environment and Development 1992
\textsuperscript{154} 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
In contrast to Europe, Asia does not have a region-wide approach to environmental matters. However, its sub-regions of Northeast Asia, South Asia, and Southeast Asia (ASEAN) 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 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

http://www.undp.org/content/undp/en/home/mdgoverview/mdg_goals/mdg1/

155 The North-East Asian Subregional 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 building; see http://www.neaspec.org/

156 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/

157 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.

158 Ibid
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. Some 20% of the world’s land is considered degraded. Analysts identify various hotspots including Africa south of the equator, South-East Asia and China. Land degradation and desertification is considered to be a much greater threat in drylands than in lands that are not considered dry.

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 less fertile and less productive because of repeated droughts, climate change and unsustainable land use. This is an issue that affects a number of Asian countries such as China and India.

Practices which result in land degradation and desertification are clearly unsustainable, and many instances can be cited which indicate breaches of basic human rights. 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].

In contrasting Europe and Asia with regard to drylands, a report on global drylands points out there are numerous dryland areas in Europe, particularly around the Mediterranean and Central Asia, but Asia has the greatest concentration of dryland degradation.

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

\[159\] United Nations Convention to Combat Desertification art. 1.


\[161\] Ibid p. 16.


\[166\] Note 164 above, at 28.


\[168\] Ibid., at 33.
poverty, poor health and nutrition, lack of food security, migration, displaced persons and demographic dynamics.169

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.170

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 2030.171

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.

169 Convention to Combat Desertification 1994, Annex 2, Article 2(d)
170 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, Antonio 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=49aee93a4c&scid=49aee93a2f&comid=42b2f01a4
171 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, Myanmar, Vietnam, Thailand, Laos, Cambodia and the Philippines) and it entered into force in November 2003. Indonesia has not yet ratified the agreement. 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 could be pursued. The Malaysian Bar Association has suggested such action. Recently, Singaporean officials have also considered the possibility of taking action against two Indonesian forest companies situated in Singapore. However, the reality may be is 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.

**Europe**

In contrast to Asia, the regulation of transboundary air pollution in Europe has been addressed regionally in various ways since the 1970s. 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. In addition, there is a

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174 ‘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


178 See further, 22nd Annual Report 2013: Convention on Long-range Transboundary Air Pollution.
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. Various studies have now been carried out concerning these effects, although not many specifically examine human rights issues. 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. However, the human rights aspects of dam construction are generally not well taken into account by relevant government and private sector interests. On the other hand, some non-government organisations do recognise these connections and are very active in their advocacy. Examples of these issues arise in non-peninsular Malaysia, with the construction of the Bakun Dam, the Yangtze Three Gorges Dam Project in Hubei Province, China, the cascade of dams on the Mekong (Lancang) River in Yunnan Province, China, and dams on the tributaries

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182 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


and, in the longer term, on the mainstream of the lower Mekong River.\textsuperscript{185}

**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.\textsuperscript{186} The matter was eventually brought to the International Court of Justice, known as the Gabčíkovo–Nagymaros Case or the Danube Dam Case.\textsuperscript{187} 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’,\textsuperscript{188} 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.\textsuperscript{189}

The Gabčíkovo–Nagymaros Case is thus very significant in terms of drawing close links between human rights and environmental protection.\textsuperscript{190} It continues to have lasting effect in cases at national level in arguments to support the existence of environmental rights.

**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


\textsuperscript{186} Judgment, 25.


\textsuperscript{188} Judgment at 91.

\textsuperscript{189} Ibid., at 91-92.

\textsuperscript{190} See additionally C. Weeramantry, ‘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’ (1998) 22 Melbourne University Law Review 503, 504-505

\textsuperscript{191} 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.
problems of definition and anthropocentricity, well-rehearsed in the literature. 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. 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. Such right, it has been suggested, 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. 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. 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

193 See P. Alston, note 54, above.,
195 A.E Boyle, note 11, above.
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. 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.

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 forty 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. 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’. In the Pulp Mills Case, the Court again noted the ‘interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.’

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.

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199 The Millennium Ecosystem Assessment Ecosystems and Human Well-Being: Synthesis recorded that some 60% (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).
202 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. The majority of them are found in developing countries, with some exceptions. 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 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, 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’.

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 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 which have the potential to affect the environment:

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204 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.
205 1987 Constitution of the Republic of the Philippines
206 Oposa v Factoran, Philippines Supreme Court G.R. No. 101083 July 30, 1993
207 Oposa v Factoran, note 206, above.
208 Law No. 32 of 2009.
(1) Everybody shall be entitled to proper and healthy environment as part of human rights.

(2) 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.

(3) Everybody shall reserve a right to submit recommendations and/or objections against businesses and/or activities predicted to affect the environment.  

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'.  

For example in Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan, 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.’

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. 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.

Pakistan has also seen some significant public interest environmental cases, the most important one being Shehla Zia v WAPDA, which concerned the proposed building of an electric grid station near a residential area. The 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 which 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:

209 The Republic of Indonesia, Law on Environmental Protection and Management (2009)
212 As quoted in Rahman, note 210, above.
213 1986-987 AIR 1086, 1987 SCR (1) 819;
214 See further http://mcmef.org/environment_jurisprudence.html.
215 PLD 1994 SC 693,
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.  

**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 Verschuuren 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.’ 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 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:

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 which shows due respect for health at the same level of importance as the human rights of 1789 and the welfare rights of 1946.

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219 http://www.capefrance.com/sig/ecology_1.html
It means that sustainable development preoccupations now run right to the heart of French law, economy and social life. The Charter for the environment:

- innovates in setting up the notion of the duty, for every individual and all public authorities, to contribute to preserving the environment.
- reinforces the notion of ecological responsibility,
- establishes the precautionary principle to protect against risks without jeopardising innovation.

III. 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 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, non-government organisations 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. In Ecuador and Bolivia, constitutional changes have introduced the idea granting all nature equal rights to humans, legally recognizing 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
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. 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 standard of information that are to be made available in different participatory procedures. 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’. Despite this sentiment, the possibility of extending the Aarhus Convention to Asian countries is currently fairly remote.

The focus of the Aarhus Convention is strictly procedural in content, limited to:

(a) Public participation in environmental decision-making
(b) Access to justice
(c) Access to environmental information held by public authorities.

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221 In the Asian region, these include the Consumers Association of Penang, Malaysia, http://consumer.org.my/, the Indonesian Centre for Environmental Law http://www.icel.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/

222 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


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.\textsuperscript{225} 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).\textsuperscript{226} Article 9(4) requires that adequate, fair and effective remedies be provided. This reflects the decisions in López Ostra and Guerra under Article 8 of the ECHR.\textsuperscript{227}

The three essential elements of the Aarhus Convention have all been incorporated into European human rights law through the jurisprudence of the ECtHR.\textsuperscript{228} 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.\textsuperscript{229} Thus in Grinkovskaya, 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.\textsuperscript{230} 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.\textsuperscript{231} 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.\textsuperscript{232}

\textsuperscript{225} 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.’


\textsuperscript{228} Taskin v. Turkey [2006] 42 EHRR 50; Tatar v. Romania [2009] ECtHR; Önerylidiz v Turkey [2005]

\textsuperscript{229} See para. 118. See also Tatar v. Romania [2009] ECtHR, para. 88.

\textsuperscript{230} See para. 72 of Grinkovskaya v. Ukraine (App no. 38182/03, judgment of 21 July 2011).

\textsuperscript{231} See para. 107 of Di Sarno and others v Italy (Application n. 30765/08, judgment of 10 January 2012).

\textsuperscript{232} See Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v European Commission (Case T-396/09/14) and Stichting Natuur en Milieu and another v European Commission
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, and that process is now being actively encouraged. Nevertheless, while some countries may be keen to accede to Aarhus, 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 which 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). 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.

(Case T-338/08), decisions of the General Court of 14 June 2012.

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’.

Article 28(f) of the Constitution of the International Law Commission provides: ‘[t]he right to a safe, clean and sustainable environment’.

For example, Mongolia has enquired about membership; see note 234, above.


C. Wood, 'EIA in Developing Countries: an Overview' (Paper presented at the New Directions in
John Boyle\textsuperscript{238} points out some of the major differences in the characteristics of EIA processes as developed in Western countries compared with other countries:

- Democratic principles reflected in Western EIA
- Politicians and governments are accountable to the public.
- Political and business elites do not have an unfettered right to do as they please.
- Government bureaucratic and decision-making processes must be open and responsive to public concerns.
- Resources considered a nation’s common heritage—air, water, health, forests, wildlife, landscape beauty—cannot be unilaterally appropriated for private purposes.
- 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.\textsuperscript{239}

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,\textsuperscript{240} 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\textsuperscript{241}. Further, in many Asian countries, implementation of EIA is strongly influenced by cultural norms that are still adhered to by the local communities.\textsuperscript{242}

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,\textsuperscript{243} in addition to overcoming technical and financial issues.\textsuperscript{244} 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.\textsuperscript{245}

\textsuperscript{238} J. Boyle, 'Cultural Influences on Implementing Environmental Impact Assessment: Insights From Thailand, Indonesia, and Malaysia' (1998) 18 \textit{Environmental Impact Assessment Review} 95
\textsuperscript{239} Ibid., at 104.
\textsuperscript{240} C. Briffett, 'EIA in Southeast Asia: Fact and Fiction?' (1999) 49 \textit{Geo Journal} 333
\textsuperscript{241} Briffet, note 219 above.
\textsuperscript{242} Ibid.
\textsuperscript{243} Boyle, note 238, above.
\textsuperscript{244} Briffett, note 240, above.
\textsuperscript{245} 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.
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. Both technical and political factors still play pivotal role, which means that implementation is not always in line with the existing legislation.

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. 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. 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.

In Pakistan likewise, 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.

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.

**Europe**

In Europe the EIA process is well developed. In 1985, the EU approved a directive on EIA that makes the process compulsory for a wide variety of projects. These may be public or private projects; they have in common the fact that they are ‘likely to have significant effects on the environment’. 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) promoted the Convention on Environmental Impact Assessment in a Transboundary Context (known as the Espoo Convention). Parties to this Convention

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247 Ibid.


249 Ibid.

250 Ibid.


252 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.

253 Art 2.1 of the Directive.

254 United Nations Economic Commission for Europe, which includes all the countries in Europe as well as some countries in Central Asia and North America.

255 Espoo EIA Convention, done at Espoo in 1991: see *http://www.unece.org/env/eia/about/eia_text.html* . Even though most states in Europe are parties to
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.\textsuperscript{256} 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.\textsuperscript{257} 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, \textit{inter alia},\textsuperscript{258} 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.\textsuperscript{259} 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.\textsuperscript{260} 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).\textsuperscript{261} It applies in full only to ‘plans and programmes’;\textsuperscript{262} ‘policies and legislation’ are covered to a more limited extent.\textsuperscript{263} 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.\textsuperscript{264}

The ECtHR has already considered on numerous occasions\textsuperscript{265} 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’.\textsuperscript{266} 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.

\textit{The growth of green courts and tribunals}

this convention there are some exceptions such as Iceland, Russia and Turkey.

\textsuperscript{256} See Article 2.
\textsuperscript{257} UNEP EIA Principles, Principle 4; 1991 Convention on Transboundary EIA, Article 4(1) and Appendix II.
\textsuperscript{258} See the activities listed in the 1991 Convention on Transboundary EIA, Annex 1.
\textsuperscript{259} In \textit{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 and Veerheem, \textit{Strategic Environmental Assessment: Status, Challenges and Future Directions} (Netherlands Ministry of Housing and Environment, 1996); Therivel and Partidario, \textit{The Practice of Strategic Environmental Assessment} (London, 1996); Therivel, Wilson et al, \textit{Strategic Environmental Assessment} (London, 1992).
\textsuperscript{260} Protocol on Strategic Environmental Assessment, signed in Kyiv in 2003; entered into force on 11 July 2010; see \url{http://www.unece.org/env/eia/about/sea_text.html}.
\textsuperscript{261} Articles 3(5) and 4.
\textsuperscript{262} See Article 4.
\textsuperscript{263} See Article 13.
\textsuperscript{264} See Article 8.
\textsuperscript{265} In \textit{Hatton and others v. UK}, \textit{Taskin and others v Turkey}, \textit{Giacomelli v. Italy 59909/00} (2006.11.2) and, more recently, \textit{Hardy and Maile v. UK}, (App. no. 31965/07, judgment of 14 February 2012).
\textsuperscript{266} See para. 221 of \textit{Hardy and Maile v. UK}. 48
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. It is informally estimated that there are over 400 of such bodies on a global basis. By the establishment of these courts and tribunal, the role of the judiciary in implementing and enforcing environmental is seen 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 China and they continue to be the subject of a good deal of discussion. India has perhaps the most developed specialised body in Asia with the establishment of the National Green Tribunal in 2010, which has already decided a range of significant cases. 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.

269 In China, over 140 of such courts have been established as part of the ordinary court system since 2007; however there are many inconsistencies operation of these courts and in the procedural rules that are followed. Nevertheless, a good deal of research is being carried out on this courts, and in due course their existence in operation should be regularised; See Zhang Minchun and Zhang Bao, ‘Specialized Environmental Courts in China: Status Quo, Challenges and Responses’ Journal of Energy & Natural Resources Law, Vol 30 No 3, August 2012.
270 See for example, a recent ‘The Amritsar Dialogue Statement on Green Courts and Tribunals’
http://www.jnu.ac.in/SIS/AmritsarDialogueStatement.pdf
272 For a list of National Green Tribunal judgments see http://greentribunal.in/judgment.php
IV. 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.275 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.276 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.277 Its human rights-based approach to programming can thus be seen in the activities of various UN bodies, including UNESCO278, the International Labour Organisation and its Convention 169,279 the World Health Organisation,280 the United Nations Development Programme,281 the United Nations Environment Programme, 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.282 However, the Report283 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.284

Non-government Organisations

276 Ibid.
279 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
283 http://www.business-humanrights.org/SpecialRepPortal/Home
284 See Knox Report, note 1, above.
284 See below.
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 co-operation with national institutions and civil society’.  

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. Its latest World Report sets out a range of environment and human rights issues affecting countries around the world. It argues:

Un fortunately, 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.

There are also many NGOs which, 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.

**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):

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• To develop strategies for the promotion and protection of human rights and fundamental freedoms;
• 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;
• To enhance public awareness of human rights among the peoples of ASEAN
• To promote capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN Member States;
• To encourage ASEAN Member States to consider acceding to and ratifying international human rights instruments;
• 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’. It has been the subject of some civil society comment.

**ASEAN Human Rights Declaration**

The ASEAN Human Rights Declaration, 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:

28. 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, regarding the right to ‘enjoyment of a safe, clean, healthy and sustainable environment’.

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**

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292 See note 1, above.
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 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

293 See above.
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.\textsuperscript{294}

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.\textsuperscript{295} As recorded by one analyst:

The ASEAN HR 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.

Therefore, ASEAN should aim to develop a binding human rights document while, at the same time, playing a harmonizing role amid the political development gap between ASEAN member states so that the relevant human rights provisions can be enforced effectively in the region.\textsuperscript{296}

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)),\textsuperscript{297} 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 causing 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.

\textit{The rule of law, development, environment and human rights in Asia}


\textsuperscript{295} Paula Gerber, \textit{ASEAN Human Rights Declaration: a step forward or a slide backwards?} (2012) \textless http://theconversation.com/asean-human-rights-declaration-a-step-forward-or-a-slide-backwards-10895\textgreater. 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 which 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 Kheng Lian Koh and N.A. Robinson, ‘Regional Environmental Governance: Examining the Association of Southeast Asian Nations (ASEAN) Model’ in \textit{Global Environmental Governance}, available at \texttt{environment.research.yale.edu/documents/downloads/h-n/koh.pdf}; see also A. Føllesdal, \textit{The Human Rights Declaration of the Association of Southeast Asian Nations: A Principle of Subsidiarity to the rescue?} PluriCourts Research Paper No. 13-07, 2013.


\textsuperscript{297} ASEAN, ‘ASEAN Human Rights Declaration’ (2012).
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\textsuperscript{298} 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:

\ldots

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; \ldots

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, 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.

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 which go some way to filling the institutional gaps in legislative implementation and enforcement. Bangladesh, India, Pakistan and Sri Lanka, for example, has 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. A number of jurisdictions have also introduced environmental courts or green benches of their regular courts.

**Regional actors in Asia**

The Asia Pacific Forum of National Human Rights Institutions has 15 full members and six associate members so far. Membership is comprised of those countries that comply with the Paris Principles on the status of human rights national institutions. The Forum is a regional organisation that supports the establishment and strengthening of National Human Rights Institutions in the Asia-Pacific region.

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299 For example, the 2007 ASEAN Declaration on Sustainability: http://www.asean.org/news/item/asean-declaration-on-environmental-sustainability
301 See further below.
302 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. See also Asia Pacific Forum, 'Advancing Human Rights in Our Region' (2011-2012) <http://www.asiapacificforum.net/members>.
Rights Institutions (‘NHRIs’) in the Asia Pacific. 303 The main purpose of the Asia Pacific Forum is to support all the member states to comply with the ‘Paris Principles’. 304

Another human rights player in Asia is ‘The Asian Forum for Human Rights and Development’. This consists of independent national human rights organisations from several Asian countries. The forum was established to share information and to communicate regards developments and progress related to human rights protection in Asia. 305

Region 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 306, the Convention on Environmental Impact Assessment in a Transboundary Context 307, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes 308, the Convention on the Transboundary Effects of Industrial Accidents 309 and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. 310

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 (ECHR – European Convention of Human Rights). 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.

304 See above.
305 AFHRD, Asian Forum for Human Rights and Development (<www.forum-asia.org>
306 CLRAP, done at Geneva in 1979, downloaded from 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.
307 Espoo EIA Convention, done at Espoo in 1991, downloaded from 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.
308 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.
Another important regional organisation working in the fields of environment and human rights is the Organization for Security and Co-operation in Europe (OSCE). The main purpose of OSCE was initially to serve as a dialogue area for peace between democratic and socialist states in Europe. With the end of the ideological division of Europe, this dialogue arena institutionalized 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 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. Human rights have also developed in a similar fashion. From a mere reference in the principles of the EU, 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.

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 forty years. International support for transboundary EIA originated in a series of OECD recommendations, which relied in particular on the principle of non-discrimination. As defined by the OECD, non-discrimination entails giving equivalent treatment to the domestic and transboundary effects of polluting or environmentally harmful activities. 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. Although now covered by the Aarhus Convention, it was OECD instruments which first elaborated the principle of non-discriminatory access to justice, information and public participation in environmental matters.

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

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311 In the Treaty of the European Union, as amended by the Treaty of Lisbon, this is recognized in article 11.
312 Article 2 of the Treaty of the European Union.
313 Article 6.2 of the Treaty of the European Union.
314 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.
315 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)
recommendations starting in the 1970s, 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 has established an Asian Judges Network on the Environment that promotes regular meetings and capacity-building in the region. 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 environment. This salutary trend needs to be reinforced by building the capacity of subordinate judges, prosecutors and the Environmental Protection Agencies.

**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 recognize environmental management as among the highest corporate priorities and as a key

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321 P. Hassan, ‘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.

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determinant to sustainable development.\textsuperscript{322} It is also been 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\textsuperscript{324} 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. 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 neighbors 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.\textsuperscript{325}

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.\textsuperscript{326} This is illustrated, for example, by the development of ISO 26000 - Social Responsibility by the International Standards Organisation,\textsuperscript{327} which provides guidance

\textsuperscript{322} Agenda 21 1992, para. 30.3.
\textsuperscript{324} See Note 1, above.
\textsuperscript{327} International Standards Organisation available at http://www.iso.org/iso/home/standards/iso26000.htm
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, to 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, 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 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 criticized 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.’

V. 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. In 2009, the Office of the U.N. High Commissioner for Human Rights (OHCHR) became the first international human rights body to examine the relationship between climate change and human rights,

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329 Ibid., at 53.
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.³³¹

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, 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:

<table>
<thead>
<tr>
<th>Climate Impact</th>
<th>Human Impact</th>
<th>Rights Implicated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sea Level Rise</td>
<td>• Loss of land</td>
<td>• Self-determination [ICPR, ECOSHR, 1]</td>
</tr>
<tr>
<td></td>
<td>• Drowning, injury</td>
<td>• Life [ICLR, 6]</td>
</tr>
<tr>
<td></td>
<td>• Lack of clean water, disease</td>
<td>• Health [ECOSHR, 12]</td>
</tr>
<tr>
<td></td>
<td>• Damage to coastal infrastructure, homes, and property</td>
<td>• Water [CDMWR, 14; ICRC, 24]</td>
</tr>
<tr>
<td></td>
<td>• Loss of agricultural lands</td>
<td>• Means of subsistence [ECOSHR, 1]</td>
</tr>
<tr>
<td></td>
<td>• Threat to tourism, lost beaches</td>
<td>• Standard of living [ECOSHR, 12]</td>
</tr>
<tr>
<td>Temperature Increase</td>
<td>• Spread of disease</td>
<td>• Adequate housing [ECOSHR, 12]</td>
</tr>
<tr>
<td></td>
<td>• Changes in traditional fishing</td>
<td>• Culture [ICPR, 27]</td>
</tr>
<tr>
<td></td>
<td>• Livelihood and commercial fishing</td>
<td>• Property [UIHHR, 17]</td>
</tr>
<tr>
<td></td>
<td>• Threat to tourism, lost coral and fish diversity</td>
<td></td>
</tr>
<tr>
<td>Extreme Weather Events</td>
<td>• Dislocation of populations</td>
<td>• Life [ICPR, 6]</td>
</tr>
<tr>
<td></td>
<td>• Contamination of water supply</td>
<td>• Health [ECOSHR, 12]</td>
</tr>
<tr>
<td></td>
<td>• Damage to infrastructure: delays in medical treatment, food crisis</td>
<td>• Water [CDMWR, 14; ICRC, 24]</td>
</tr>
<tr>
<td></td>
<td>• Psychological distress</td>
<td>• Means of subsistence [ECOSHR, 1]</td>
</tr>
<tr>
<td></td>
<td>• Increased transmission of disease</td>
<td>• Adequate standard of living [ECOSHR, 12]</td>
</tr>
<tr>
<td></td>
<td>• Damage to agricultural lands</td>
<td>• Adequate and secure housing [ECOSHR, 12]</td>
</tr>
<tr>
<td></td>
<td>• Disruption of educational services</td>
<td>• Education [ICPR, 13]</td>
</tr>
<tr>
<td></td>
<td>• Damage to tourism sector</td>
<td>• Property [UIHHR, 17]</td>
</tr>
<tr>
<td></td>
<td>• Massive property damage</td>
<td></td>
</tr>
<tr>
<td>Changes in Precipitation</td>
<td>• Outbreak of disease</td>
<td>• Life [ICPR, 6]</td>
</tr>
<tr>
<td></td>
<td>• Change in disease vectors</td>
<td>• Health [ECOSHR, 12]</td>
</tr>
<tr>
<td></td>
<td>• Erosion</td>
<td>• Means of subsistence [ECOSHR, 1]</td>
</tr>
<tr>
<td></td>
<td>• Displacement of agricultural soils</td>
<td></td>
</tr>
</tbody>
</table>


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’.³³² They are intended to:

(a) 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;

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(b) address climate displacement within a State and not cross-border climate displacement; and
(c) set out protection and assistance principles, consistent with then Guiding Principles on Internal Displacement, to be applied to climate-displaced persons.

The Principles contain the following definitions:

. (b) ‘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.
. (c) ‘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 1980’s, climate change is an issue in respect of which all states have legitimate concerns. The UN Human Rights Council is therefore right to take an interest in the matter. Would human rights law help us to address climate change or ensure justice for those most affected? Certainly the connection has been noted. In 2009 the UN Human Rights Council adopted Resolution 10/4 (2009) 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

333 See UN GA Resolution 43/53 on Global Climate Change (1988); 1992 Convention on Climate Change, Preamble.
legal sense.’\(^{336}\) 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.’\(^{337}\) 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.\(^{338}\) But this essentially domestic, internally focused perspective does not address the larger global issue of preventing climate change – it 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.\(^{339}\) 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.\(^{340}\) 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 UK, 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?

\(^{336}\) OHCHR 2009 Report, para. 70.  
\(^{337}\) Ibid, para. 91.  
\(^{339}\) 1950 European Convention on Human Rights, Article 1; 1966 UN Covenant on Civil and Political Rights, Article 2.  
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.\textsuperscript{341} Inadequately controlled transboundary pollution is clearly a breach of general international law,\textsuperscript{342} 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.\textsuperscript{344} 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.\textsuperscript{345}

\textbf{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 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\textsubscript{2} 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 Organization (WTO) free trade regime 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 negotiations remains whether

\textsuperscript{341} 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.

\textsuperscript{342} \textit{Pulp Mills Case}, 2010 ICJ Reports, paras. 101, 187.

\textsuperscript{344} Above, Section 2.

\textsuperscript{345} J. Knox, ‘Climate Change and Human Rights Law’ (2009) 50 \textit{Virginia JIL} 2; Boyle, Note 174, above
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 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. 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. 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 above pre-industrial levels. 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. 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. As Rajamani explains, ‘symmetry rather than differentiation is intended to be the central organizing principle of the future climate regime.’

*Common but differentiated responsibilities in Asia*


347 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.’

348 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).

349 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.

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.\(^{351}\)

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.\(^{352}\)

**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 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.\(^{353}\) The effects of climate change on Indigenous and local communities are generally regarded as more severe than on other segments of populations.\(^{354}\) 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 organization, 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

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\(^{351}\) Singapore Declaration on Climate Change, Energy and the Environment, 2007  

\(^{352}\) 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.

\(^{353}\) Asia Indigenous Peoples Pact, *Indigenous People and Climate Change Adaptation in Asia’ available at  
at 2.

\(^{354}\) J. Salick and A. Byg, 'Indigenous people and climate change' (Tyndal Centre Publication, 2007)
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. 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. 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. 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.

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. 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’ and the Water Convention includes transboundary impacts on ‘cultural heritage or socio-economic conditions’. Similarly the Industrial Accidents Convention considers the adverse effects of pollution on ‘material assets and cultural heritage, including historical monuments.’

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355 See note 353. above.
356 Salick and Byg, note 353, above..
357 Ibid.
358 For example, this idea is implicit in the incorporation of Mother Earth in the Ecuadorian and Bolivian constitutions; see note 220 above.
359 See Articles 29 and 32 UNGA Res. 61/295, Declaration on the Rights of Indigenous Peoples.
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 upon future generations a ruined earth. 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.

This has not prevented international law from developing the idea of rights of future generations, even if in non-legally binding documents. The Stockholm Declaration considers that present generations have a duty to preserve the environment and its resources for future generations. The Rio Declaration considered the right to development in relation to future generations and their needs in an equitable approach. The UNFCC considers that ‘the action of states should protect the climate system for the benefit of present and future generations of humankind’. In the Rio + 20 Final Report, the rights of future generations and the co-related obligations of present obligations are significantly developed.

This interest in future generations is also a concern of UNECE’s conventions. The Water Convention considers the need of water for future generations. 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.

VI. Some conclusions

- 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

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365 These instruments are nevertheless considered soft law.
368 See Article 3 of UNFCC.
370 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.’
371 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.unece.org/fileadmin/DAM/env/documents/2013/TEIA/1321013_ENG_Web_New_ENG.pdf.
2012, ASEAN adopted a Human Rights Declaration which affirms the existing corpus of human rights law established by the Universal Declaration of Human Rights.

- 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.

- 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 (Art 8), and less often, on the right to life (Art 2). Other relevant rights include the right of access to justice (Art 6).

- The greening of human rights law is not only a European phenomenon, but extends across the IACHR, AfCHPR, and ICCPR. There is evidence of convergence in the environmental case law and a cross-fertilisation of ideas between the different human rights systems.

- 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.

- 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.

- 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.

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372 For example, Judge Higgins has drawn attention to the way human rights courts ‘work consciously to co-ordinate their approaches.’ See R. Higgins, ‘A Babel of Judicial Voices?’ (2006) 55 ICLQ 791, 798. See also Diallo Case (Guinea v. Democratic Republic of Congo) 2010 ICJ Reports, paras. 64-68.

373 See Judge Trindade in Caesar v Trinidad and Tobago (2005) IACHR Sers. 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).
**Annex 1: Acronyms**

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>AfCHPR</td>
<td>African Convention on Human and Peoples’ Rights</td>
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<tr>
<td>AmCHR</td>
<td>American Convention on Human Rights</td>
</tr>
<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<tr>
<td>CBDR</td>
<td>Common But Differentiated Responsibility</td>
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<tr>
<td>COP</td>
<td>Conference of the Parties</td>
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<tr>
<td>CoE</td>
<td>Council of Europe</td>
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<tr>
<td>DLDD</td>
<td>Desertification, Land Degradation and Drought</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EIA</td>
<td>Environmental Impact Assessment</td>
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<td>EIS</td>
<td>Environmental Impact Statement</td>
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<td>EHRR</td>
<td>European Human Rights Reports</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>IACHR</td>
<td>The Inter-American Commission on Human Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic Social and Cultural Rights</td>
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<tr>
<td>IUCN</td>
<td>International Union for Conservation of Nature ()</td>
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<tr>
<td>MERCOSUR/MERCOSUL</td>
<td>Mercado Común del Sur/ Mercado Comum do Sul</td>
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<tr>
<td>MDG</td>
<td>Millennium Development Goals</td>
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<tr>
<td>MEA</td>
<td>Multilateral Environmental Agreement</td>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner on Human Rights</td>
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<tr>
<td>OSCE</td>
<td>Organization for Security and Co-operation in Europe</td>
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<tr>
<td>SEA</td>
<td>Strategic Impact Assessment</td>
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<tr>
<td>SDG</td>
<td>Sustainable Development Goal</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>Acronym</td>
<td>Full Name</td>
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<tr>
<td>UNCCD</td>
<td>United Nations Convention to Combat Desertification</td>
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<td>UNECE</td>
<td>United Nations Economic Commission for Europe</td>
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<tr>
<td>UNFCCC</td>
<td>United Nations Framework Convention on Climate Change</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNHRC</td>
<td>United Nations Human Rights Council</td>
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