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Tuula Honkonen and Seita Romppanen (editors)

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Foreword

UN Environment and the University of Eastern Finland have been collaborating under the theme of International Environmental Law-making and Diplomacy since 2003. Courses and publications seek to enhance understanding of this complex field, enhance the capacity of practitioners – including present and future negotiators of multilateral environmental agreements (MEAs) – and build global networks of scholars and diplomats able to address society's pressing environmental challenges.

The fifteenth Course in this ongoing series was held on August 20-30, 2018 at the University of Eastern Finland's Joensuu campus. The course engaged 33 participants from 29 countries as well as lecturers and resource persons from across the world.

The special theme for 2018 was human rights and the environment. This was a timely choice, as the world has never faced a more urgent set of inter-connected environmental problems, including climate change, biodiversity loss, pollution and the over-exploitation of the Earth's limited natural wealth.

As part of society's response to these ecological challenges, a new human right has emerged. First identified in the 1972 Stockholm Declaration, the right to a safe, clean, healthy and sustainable environment is now recognized in law in more than 155 states, through a combination of constitutional provisions, legislation, and ratification of regional treaties that include this right. The right to a healthy environment has both procedural and substantive components. The procedural elements include the right of access to environmental information, the right to participate in environmental decision-making, and the right of access to justice and effective remedies. The substantive elements are clean air, clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study, and play, a safe climate, and healthy biodiversity and ecosystems.

The right to a safe, clean, healthy and sustainable environment has contributed to some encouraging outcomes, including stronger environmental laws, improved implementation and enforcement of those laws, powerful court decisions, and most importantly improved environmental outcomes such as cleaner air and safe drinking water. However, much remains to be done, from achieving global recognition of this right to greater efforts everywhere to respect, protect, and fulfill this fundamental human right.

The papers in this volume of International Environmental Law-making and Diplomacy Review, from both lecturers and participants in the 2018 Course, explore various aspects of the relationship between human rights and the environment, including:

- an introduction to the inclusion of human rights in MEAs as well as the inclusion of environmental provisions in international human rights instruments;
- human rights in the creation and management of marine protected areas in the high seas;
- a negotiation exercise involving the evolution of the Paris Agreement on climate change;
- the implications of the Minamata Convention on Mercury for indigenous peoples;
- the extent of human rights obligations in international biodiversity law;
- challenges in applying human rights law in the context of exposures to hazardous chemicals in Africa;
- human rights and climate change; and
- the recent negotiation of the Escazú Agreement on environmental democracy in Latin America and the Caribbean.

The diversity of these contributions, both thematically and geographically, illustrates the sweeping scope of the right to a safe, clean, healthy and sustainable environment. In light of today's global environmental emergency, meeting the obligations to respect, protect and fulfil human rights could help to spur the transformative changes that are so urgently required. The ongoing collaboration of the United Nations Environment Programme and the University of Eastern Finland is helping to advance both environmental protection and respect for human rights by enhancing our understanding and capacity in negotiating and implementing MEAs.

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Associate Professor, Institute for Resources, Environment and Sustainability,
University of British Columbia

Editorial preface

1.1 General introduction

The lectures presented on the fifteenth annual University of Eastern Finland[1] – UN Environment Course on Multilateral Environmental Agreements (MEAs), from which the papers in the present *Review* originate, were delivered by experienced diplomats and MEA professionals, members of government and senior academics.[2] One of the Course's principal objectives is to educate participants by imparting the practical experiences of experts involved in international environmental law-making and diplomacy – both to benefit the participants on each Course and to make a wider contribution to knowledge and research through publication in the *Review* publication. The papers in this *Review* and the different approaches taken by the authors therefore reflect the professional backgrounds and experiences of the lecturers, resource persons and participants (some of whom are already experienced diplomats). The papers in the *Reviews* of different years, although usually having particular thematic focuses, present various aspects of the increasingly complicated field of international environmental law-making and diplomacy.

It is intended that the current *Review* will provide practical guidance, professional perspective and historical background for decision-makers, diplomats, negotiators, practitioners, researchers, students, teachers and different stakeholders who work with international environmental law-making and diplomacy. The *Review* encompasses different approaches, doctrines and theories in this field, including international environmental law and governance, international environmental law-making, environmental empowerment, and the enhancement of sustainable development generally. The special themes of the *Reviews* bring naturally their own approaches and special questions into the publication. The papers in the *Review* are thoroughly edited.

The first and second Courses were hosted by the University of Eastern Finland, in Joensuu, Finland where the landscape is dominated by forests, lakes and rivers. The special themes of the first two Courses were, respectively, 'Water' and 'Forests'. An aim of the organizers of the Course is to move the Course regularly to different parts of the world. In South Africa, the coastal province of KwaZulu-Natal is an extremely

[1] The University of Joensuu merged with the University of Kuopio on 1 January 2010 to constitute the University of Eastern Finland. Consequently, the University of Joensuu – UNEP Course was renamed the University of Eastern Finland – UNEP Course. The Course activities are concentrated on the Joensuu campus of the University.

[2] General information on the University of Eastern Finland – UNEP Course on International Environmental Law-making and Diplomacy is available at <http://www.uef.fi/unep>.

biodiversity-rich area, both in natural and cultural terms, and the chosen special themes for the 2006 and 2008 Courses were therefore 'Biodiversity' and 'Oceans'. These two Courses were hosted by the University of KwaZulu-Natal, on its Pietermaritzburg campus. The fourth Course, held in Finland, had 'Chemicals' as its special theme – Finland having played an important role in the creation of international governance structures for chemicals management. The sixth Course was hosted by UNEP in Kenya in 2009, in Nairobi and at Lake Naivasha, with the special theme being 'Environmental Governance'. The theme for the seventh Course, which returned to Finland in 2010, was 'Climate Change'. The eighth Course was held in Bangkok, Thailand in 2011 with the theme being 'Synergies Among the Biodiversity-Related Conventions'. The ninth Course was held in 2012 on the island of Grenada, near the capital St George's, with the special theme being 'Ocean Governance'. The tenth Course, which in 2013 returned to its original venue in Joensuu, Finland, had 'Natural Resources' as its special theme. The eleventh Course was again held in Joensuu with a special theme of 'Environmental Security'. The twelfth Course was hosted by Fudan University in Shanghai, China, with the recurring special theme 'Climate Change'. The thirteenth Course was again hosted by the UEF in Joensuu, with the special theme 'Effectiveness of Multilateral Environmental Agreements'. The fourteenth Course was held at the Château des Comtes de Challes, Chambéry, France and at the International Environment House, Geneva, Switzerland. The special theme of the Course was 'Trade and Environment'. The most recent, fifteenth, Course was hosted by the UEF in Joensuu. The special theme of the Course was 'Environment and Human Rights' – and this is therefore the special theme of the present volume of the *Review*.

The Course organizers, the Editorial Board and the editors of this *Review* believe that the ultimate value of the *Review* lies in the contribution that it can make, and hopefully is making, to knowledge, learning and understanding in the field of international environmental negotiation and diplomacy. Although only limited numbers of diplomats and scholars are able to participate in the Courses themselves, it is hoped that through the *Review* many more are reached. The papers contained in the *Review* are generally based on lectures or presentations given during the Course, but have enhanced value as their authors explore their ideas, and provide further evidence for their conclusions.

Before publication in the *Review*, all papers undergo a rigorous editorial process. Each paper is read and commented on several times by both editors, is returned to the authors for rewriting and the addressing of queries, and is only included in the *Review* after consideration by, and approval of, the Editorial Board. As is alluded to above, the papers published in the *Review* vary in nature. Some are based on rigorous academic research; others have a more practical focus, presenting valuable reflections from those involved in the real-world functioning of international environmental law and law-making; and still others are a combination of both. Since the 2012 vol-

ume, papers have undergone an anonymous peer-review process[3] where this process is requested by their author(s).

1.2 Environment and human rights

The special theme of the 2018 Course (and hence of the current volume of the Review) was environment and human rights. Environmental dimensions of human rights or a human rights approach to environmental protection has been subject to increasing attention in recent years. Environmental degradation and phenomena such as climate change have given raise to such severe consequences affecting people's lives, property, living and working conditions etc. that human rights have increasingly been invoked as a legal means to prohibit certain harmful activities or to seek redress in face of severe harm or damage incurred.

In very broad terms, the discussion on environment and human rights can be based either on an ecocentric or anthropocentric view. According to the ecological approach to human rights, the environment is seen as a critical condition for life, which requires limitations to human activities and individual freedoms. In essence, the environment must be protected primarily for its own sake. In contrast, the anthropocentric view on environment and human rights perceives the environment more as a good and stresses individual human rights that need protection. The approaches are not in practice always so distinct as presented above, but the two approaches give rise to an interesting theoretical discussion on the very nature of environmental human rights.

Another categorization that can be made in the context of environment and human rights is their division into substantive and procedural environmental rights. The former seek to secure such fundamental rights as the right to life, right to health, right to adequate standard of living etc. The latter provide for tools to achieve substantial rights; the tools include the right to access environmental information, right to participate in the decision-making concerning environmental issues and right to access to justice in environmental matters.

Human rights treaties generally respect state sovereignty and require a state party to secure the relevant rights and freedoms for everyone within its own territory or subject to its jurisdiction. An interesting issue to discuss within this context is, then, the possible extraterritorial applicability of environmental human rights. This issue

[3] Per generally accepted academic practice, the peer-review process followed involves the sending of the first version of the paper, with the identity of the author/s concealed, to at least two experts (selected for their experience and expertise) to consider and comment on. The editors then relay the comments of the reviewers, whose identities are not disclosed unless with their consent, to the authors. Where a paper is specifically so peer-reviewed, successfully, this is indicated in the first footnote of that paper. A paper may be sent to a third reviewer in appropriate circumstances. As part of the peer-review process, the editors work with the authors to ensure that any concerns raised or suggestions made by the reviewers are addressed.

has been recently raised especially in the case of climate change impacts. An example would be to consider whether the International Covenant on Civil and Political Rights[4] imposes human rights obligations on states (big emitters of greenhouse gases) with regard to people who are not within the territory of those states (residents of small island states which face very severe consequences from climate change).

A persistent question continues to attract debate in the international environmental law circles: Is there an internationally recognized right to a decent environment? We can start sketching an answer to this by reciting several observations from recent years. Firstly, there is the development of 'greening' of human rights in international law. This means that rights found in human rights treaties – such as civil, political and cultural rights – are given interpretations or are applied in situations where environmental dimensions are clearly present. This has meant that the right to life, right to private life, right to health, right to water, and right to property, for instance, have been applied in legal contexts that explicitly involve environmental issues.

A related matter is the role of international and regional human rights courts and other human rights bodies in giving recognition to environmental human rights. Since 1990s, these courts have increasingly dealt with environmentally relevant cases.

Secondly, the right to a healthy environment is today recognized in the constitutions of numerous countries. Even if these provisions are in many cases rather declaratory than giving people a clearly enforceable human right, the significance of this trend cannot be overlooked, and it is bound to have some ramifications to the international level.

In conclusion, it can be said that in the absence of a specific human rights focused MEA (perhaps excluding the Aarhus Convention[5] on procedural environmental rights and the new Escazú Agreement[6]), environmental human rights have been enforced through interpretation of more general international and regional human rights treaties where seen relevant. Even though these general human rights treaties are giving greater environmental relevance to their provisions, would we need an explicit human right to a decent or healthy environment recognized in international (environmental) law? Would it even be a realistic option at any time scale? Or is the current approach of giving the existing human rights treaties new interpretations better? In the past, there have been attempts to establish an internationally recognized right to a decent environment, but they have largely failed. The issue is

[4] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 *United Nations Treaty Series* 171.

[5] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, <http://www.unece.org/env/pp/>.

[6] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018, not yet in force, available at <https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf> (visited 21 October 2019).

sensitive and has close links to issues such as the realization of sustainable development and rights of indigenous people, which have controversial connotations within many states. Be the future status of international environmental human rights as it may, it can be said with certainty that environmental interpretations of human rights continue to be relevant and that specific environmental human rights are getting recognition in a large number of countries.

1.3 The papers in the 2018 *Review*

The present *Review* is divided into three Parts. Part I introduces readers to the nexus of environment and human rights. In the paper constituting Part I, Ben Boer and Rosemary Mwanza examine human rights in MEAs, on the one hand, and environmental protection in human rights instruments, on the other hand. The paper reveals substantive evidence of convergence between the multilateral environmental regime and the international human rights regime. The convergence development has not, however, resulted into the merging of human rights law and environmental law into a single regime. Nevertheless, the development demonstrates that the convergence is an inevitable outcome of efforts to advance the interdependent objectives of protecting human well-being and protecting the environment as two fundamental concerns for the international legal regime.

Part II of the *Review* introduces selected perspectives on the theme of environment and human rights. In the opening paper of Part II, Annalisa Savaresi analyzes developments in the interplay between the climate change and the human rights instruments. The paper considers relevant treaty regimes in both fields and also reviews the use of human rights arguments in climate change litigation. In the paper, Savaresi not only examines the relevant legal developments but also assesses the progress made and identifies obstacles standing on the way to cooperation between the climate change and human rights regimes. The paper concludes by offering some reflections on the future of the relations between the human rights and climate change regimes, noting that future developments in this field depend, on the one hand, on the willingness of state and institutional actors to build bridges and use these; and, on the other, on judges' willingness to recognize that human rights and climate change obligations are mutually reinforcing and should be read alongside one another.

The second paper of Part II, by Konstantia Koutouki and Frederic Perron-Welch, addresses environmental human rights obligations in the Convention on Biological Diversity (CBD).[7] The authors first note that the full enjoyment of human rights depends on a healthy, sustainable environment, which includes biodiversity. The CBD contains environmental human rights obligations, both substantial and procedural.

[7] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

In the paper, Koutouki and Perron-Welch review these obligations and analyze them in comparison to the recently proposed Framework Principles on Human Rights and the Environment (Framework Principles).[8] The authors conclude that the CBD contains legal obligations that are consistent with the environmental human rights norms put forward in the Framework Principles, but that the state obligations are often couched in flexible terms, leaving room for variable results in terms of implementation. A mutually supportive interpretation of obligations found in the CBD and existing or emerging international human rights norms provides Parties with an opportunity to increase the urgency, policy coherence and legitimacy of international and national efforts to implement the Convention.

The second paper by Konstantia Koutouki and Frederic Perron-Welch in the present Review focuses on the Minamata Convention on Mercury[9] and its implications for indigenous peoples. Mercury is a widely used heavy metal that is heavily persistent and bioaccumulative in the environment once introduced, causing significant negative effects on human health and the environment. Mercury contamination disproportionately affects indigenous communities globally. In the paper, Koutouki and Perron-Welch review the recent efforts of the international community to regulate mercury and examine the Minamata Convention especially from the perspective of protecting indigenous peoples from the negative effects of mercury. The authors use the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[10] as a lens for interpreting the duties of states to prevent mercury pollution. The paper concludes that the Minamata Convention is an important instrument for protecting the environmental human rights of indigenous peoples and recommends that the national implementation of the Convention should happen in alignment with the human rights of indigenous peoples expressed in the UNDRIP.

The fourth paper of Part II, by Kanako Hasegawa, a Course participant, asks whether human rights are relevant to high-seas marine protected areas. High seas cover a significant part of the Earth's surface and have unique ecosystems, but are also home to fisheries, marine genetic resources and deep-sea minerals that interest people. Marine protected areas (MPAs) can be an effective tool to protect marine biodiversity and to manage fisheries resources, when they are properly managed. The International Conference on an internationally legally binding instrument (ILBI) under the Convention on the Law of the Sea[11] on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) has been initiated and within it, a new procedure for the establishment of MPAs in the high seas is being negotiated. So far, human rights issues have not been well integrated

[8] 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Doc. A/HRC/37/59 (2018), Annex.

[9] Minamata Convention on Mercury, Geneva, 19 January 2013, in force 16 August 2017, <http://www.mercuryconvention.org/>.

[10] UNGA Res. 61/295 of 2 October 2007.

[11] UN Convention on the Law of the Sea (UNCLOS) (Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261.

into the discussion on the ILBI. Hasegawa argues in her paper that a human rights perspective is useful in bringing social dimensions to high seas MPAs. Human rights are closely relevant to high seas MPAs including access rights, withdrawal rights, right to information, right to participation and inter-generational rights. These rights could be reallocated through the establishment of MPAs in the high seas.

The paper by Yahya Msangi, a Course participant, addresses the role human and environmental rights, especially access to justice, in the specific context of exposure to hazardous chemical substances in Africa. Through a review of several case studies, Msangi highlights how human and environmental rights have been immensely affected by chemicals in developing countries during recent decades and demonstrates the prevailing challenges and limitations that people in Africa have faced when trying to access justice and obtain remedies in specific cases of chemical contamination incidents. The paper discusses various elements that may hinder or facilitate access to justice in these cases: toxic investments; bilateral cooperation and trade agreements; the blended financing model; gaps in MEAs; the inadequacy of the Strategic Approach to International Chemicals Management (SAICM);[12] and the weaknesses of the Agenda 2030.[13] In the conclusion of the paper, Msangi provides a list of recommended actions that could be taken to improve access to justice for victims of dumping of chemicals and illegal trade of hazardous waste in Africa and beyond.

In the last paper of Part II, Daniel Zavala Porras, a Course participant, examines the developments in regionally regulating environmental human rights in the Latin America and Caribbean. The countries of the region signed the Escazú Agreement[14] in 2018, and through this Agreement the author illustrates the opportunities and challenges that negotiating an MEA offers with respect to the advancement of environmental rights. The Escazú Agreement has several unique features compared to the Aarhus Convention,[15] but it is also a result of political compromises as noted in the paper. Zavala Porras concludes that the Escazú Agreement can be seen as a further step in the development of 'greening' of human rights and that it asserts the importance of public participation in environmental decision-making in a moment where political decisions with regards to environmental protection and climate action are most needed.

Part III of the *Review* reflects the interactive nature of the Course – and the fact that education and dissemination of knowledge are at the core of the Course and of the

[12] See <http://www.saicm.org/>.

[13] 'Transforming our world: The 2030 Agenda for Sustainable Development', UNGA Res. 70/1 of 25 September 2015.

[14] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018, not yet in force, available at <https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf> (visited 27 August 2019).

[15] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, <http://www.unece.org/env/pp/>.

publishing of this *Review*. During the Course, negotiation simulation exercises were organized to introduce participants to the real-life challenges facing negotiators of MEAs. Excerpts from, explanation of, and consideration of the pedagogical value of, the main exercise are included in a paper in Part III of the *Review*. This paper describes a negotiation exercise that, based on experiences from exercises run in previous years of the Course, was devised and run by Anne Daniel and Tuula Honkonen assisted by Bradlie Martz-Sigala and Angela Kariuki in running the exercise. The scenario for the negotiation simulation focused on substantive, institutional and procedural issues in the context of the Ad Hoc Working Group on the Paris Agreement (APA). The simulation was hypothetical but drew on issues at play in actual ongoing negotiations.

The scenario was set at Part 6 of the first session of the APA. Negotiations took place within four informal consultation groups established to negotiate on four themes: further guidance on adaptation communications; transparency mechanisms; global stocktake; and compliance. Participants were given individual instructions and a hypothetical, country-specific, negotiating mandate and were guided by international environmental negotiators. The general objectives of the simulation exercise were to promote among participants, through simulation experience:

1) Understanding of the challenges and opportunities related to negotiating more specific infrastructure in a new MEA, both in general and in the specific context of the international climate change regime.
2) Understanding of the principles and practices of multilateral negotiations, and appreciation of the value and role of the rules of procedure.
3) Familiarity with specific substantive and drafting issues; and
4) Discussion and appreciation of different perspectives on substantive and institutional issues related to international cooperation on climate change.

It could be said that the negotiation exercises provide, in a sense, the core of each Course. This is because each Course is structured around the practical negotiation exercises which the participants undertake. More generally, the programmes of more recent Courses have included an increasing number of interactive exercises, partly as a response to feedback received from Course participants.

The inclusion of the simulation exercises has been a feature of every *Review* published to date, and the Editorial Board, editors and Course organizers believe that the collection of these exercises has significant value as a teaching tool for the reader or student seeking to understand international environmental negotiation. It does need to be understood, of course, that not all of the material used in each negotiation exercise is distributed in the *Review*. This is indeed a downside, but the material is often so large in volume that it cannot be reproduced in the Course publication.

It is the hope of the editors that the various papers in the present *Review* will not be considered in isolation. Rather, it is suggested that the reader should make use of all of the *Reviews* (currently spanning the years 2004 to 2018), all of which are easily accessible online through a website provided by the University of Eastern Finland,[16] to gain a broad understanding of international environmental law-making and diplomacy.

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[16] See <http://www.uef.fi/en/unep/publications-and-materials>.

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Part I

Introduction to the Nexus of Environment and Human Rights

The Converging Regimes of Human Rights and Environmental Protection in International Law

Ben Boer[1] *and Rosemary Mwanza*[2]

1 Introduction

Environmental protection and the protection of human rights represent two fundamental policy objectives for the international legal system. These objectives are served by the international environmental regime comprising mostly of multilateral environmental agreements (MEAs), and the international human rights regime comprised of numerous human rights treaties, respectively. Having developed in parallel, these two regimes exist, at least in theory, to serve independent objectives. However, several developments point to evidence of their convergence. The convergence is attributable, *inter alia*, to the profound interdependence that exists between human well-being and the well-being of the environment. Protection of the environment can be seen as a fundamental precondition to the effective protection of human rights, while human rights provide much needed human well-being underpinnings for MEAs.

This paper examines human rights in MEAs, on the one hand, and environmental protection in human rights instruments, on the other hand, in order to reveal substantive evidence of convergence between the multilateral environmental regime and the international human rights regime. It uncovers four tracks of convergence. Firstly, human rights law and environmental law share a number of common principles. Several principles incorporated into environmental law are derived from principles found in human rights treaties. Secondly, human rights found in avowedly

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human rights treaties can be applied instrumentally to improve environmental outcomes. International and regional human rights adjudicative bodies have interpreted the state's duty to fulfill civil, political, economic and social rights as one that is conditioned on freedom from the consequences of environmental protection. In this sense, human rights law has provided the standards for placing limits on the destructive conduct by people on the environment. Several human rights treaties have recognized procedural environmental rights and substantive rights to a clean and healthy environment. These developments within the realm of human rights law demonstrate a convergence to the extent that human rights treaties can act instrumentally to advance the objectives of multilateral environmental treaties and of environmental law more generally. Thirdly, though most MEAs do not recognize human rights directly, a majority recognize the protection of or the advancement of human well-being as one of their foundational principles. Human rights can thus be said to provide a foundational underpinning of many MEAs. In this sense, MEAs can act as a legal tool for advancing a fundamental objective of human rights law, namely, the protection of human well-being. Fourthly, though conceptually distinct, the human right to a clean, healthy and sustainable environment and the emerging rights of nature serve mutually affirming objectives.

2 Common principles shared between human rights law and environmental law

Human rights law and environmental law share a number of key principles. This commonality has emerged as a result of two developments. Firstly, some environmental law principles have developed as a result of the reformulation of human rights law to take into account environmental concerns. Human rights law has evolved over a considerably longer time as compared to many other areas of international law. Not surprisingly, therefore, the corpus of human rights law has provided a wealth of theoretical tools for clarifying the interlinkages between the spheres of concern of a variety of policy areas and human well-being. This trend is evident in the adoption of a human rights approach for policy areas such as food security,[3] corporate accountability,[4] and climate change.[5] Since environmental law is a relatively new discipline compared with human rights law, environmental law has likewise benefited from various aspects of human rights law, as is evident from the reformulation of human rights in environmental terms. Secondly, some common principles provide the foundational values from which human rights law and environmental

[3] Arne Oshaug, Wenche Barth Eide and Asbjørn Eide, 'Human rights: A Normative Basis for Food and Nutrition-Relevant Policies' 19 *Food Policy* (1994) 491-516.

[4] Hans M. Haugen, 'Human Rights Principles – Can They be Applied to Improve the Realization of Social Human Rights? in Armin von Bogdandy and Rüdiger Wolfrum, (eds), 15 *Max Planck Yearbook of United Nations Law* (2011) 419-444.

[5] Bridget Lewis, 'Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice' 34 *Netherlands Quarterly of Human Rights* (2017) 206-226.

law derive. This development is attributable mainly to the fact that the two disciplines share and serve common values. This section discusses these two pathways of commonality. However, a brief overview of environmental law principles is first provided.

2.1 Promotion of common overarching goals

Environmental law and human rights law share several overarching goals. This section identifies of those the common dignity, rule of law, equity, democracy, and accountability.

The protection of human dignity is a central goal for both environmental law and human rights law. The Preamble of the UDHR provides that 'inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' The ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[6] have included in their Preambles language to the effect that the rights they enumerate 'derive from the inherent dignity of the human person.'[7] Numerous other international human rights treaties contain language that reiterates the idea that human dignity is one of the grounding principles for human rights.[8] Human rights scholars have also advanced the argument that human rights exists to protect and promote human dignity.[9]

In the context of environmental law, the centrality of dignity as a protected goal is evident from the fact that it is now possible to speak of environmental dignity and environmental dignity rights as a regulatory response to protect the environment.[10] Environmental law scholars have expounded on the role of dignity as a foundational value in overcoming environmental challenges. For instance, Daly and May argue that 'environmental outcomes should be informed by dignity rights.'[11] The centrality of human dignity for environmental law stems from the idea that environmental degradation threatens and/or diminishes self-reliance: 'the ability to be self-reliant is challenged when land is no longer fertile, when people are uprooted and resources are no longer available to support the full development of personality'… and denies the 'ability of increasing numbers of people to control the course of their

[6] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 *United Nations Treaty Series* 195.

[7] Similar language is also found in Art. 13 of ICESCR (education) and Art. 10 of the ICCPR (protection of persons deprived of liberty).

[8] Christopher McCrudden, 'Human Dignity and the Judicial Interpretation of Human Rights', 19 *European Journal of International Law* (2008) 655-724.

[9] See, for instance, John Tasioulas, 'On the Foundations of Human Rights' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 2014) at 45-70.

[10] Erin Daly and James R. May, 'Environmental Dignity Rights' in Sandrine Maljean-Dubois (ed.), *The Effectiveness of Environmental Law* (Intersentia, 2017) 125-148 at 125.

[11] *Ibid.* at 126.

own lives.'[12] One of the ways in which environmental law seeks to advance human dignity is through principles that prioritize the protection of human beings in the environmental context. The principles include the right to environment or right to an ecologically sound environment, gender equality; participation of minority and vulnerable groups, and, indigenous and tribal peoples principle.

The environmental rule of law has emerged as a composite principle of environmental law. Several documents in which a formulation of the environmental rule of law can be found attest to the fact that numerous principles can fit within the concept. In 2015, the UNEP issued an Issue Brief describing environmental rule of law as the link between critical environmental needs encapsulated by the concept of sustainable development, on the one hand, and rule of law as a governance principle, on the other hand.[13] According to UNEP, environmental rule of law is operationalized through enforcement of legal rights and obligations, respect to human rights and access to justice.[14] The IUCN World Declaration on the Environmental Rule of Law[15] defines the environmental rule of law as 'the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically sustainable development in the rule of law.'[16] Notably, the Declaration lists 14 tools aimed to 'add procedural strength and help build the procedural and substantive components of the environmental rule of law,' together with 13 substantive principles.[17]

As its name suggests, environmental rule of law derives from the broader concept of the rule of law. Though the precise meaning of the rule of law remains contested,[18] it has been possible for scholars to determine its role in relation to human rights. Precisely, rule of law serves as a pillar for human rights by serving as a check for the arbitrary exercise of public power and by ensuring that everyone is subjected to the law of a given polity. In this way, the rule of law is seen as an essential pillar for preventing violations of human rights law and for grounding mechanisms of accountability whenever such violations occur. Whereas the suggested formulations of the environmental rule of law suggest that numerous substantive principles can fit within the environmental rule of law framework, the concept retains a particular core, namely that it requires public officials to exercise environmental governance powers within the confines of clearly promulgated environmental laws and to ensure

[12] James R. May and Erin Daly, 'Bridging Constitutional Dignity and Environmental Rights Jurisprudence' 7 *Journal of Human Rights and the Environment* (2016) 218-242 at 231.
[13] UNEP, 'Issue Brief: Environmental Rule of Law: Critical to Sustainable Development' (2015), available at <http://wedocs.unep.org/handle/20.500.11822/10664> (visited 28 October 2019).
[14] *Ibid.*
[15] IUCN World Declaration on the Environmental Rule of Law, available at <https://www.iucn.org/sites/dev/files/content/documents/world_declaration_on_the_environmental_rule_of_law_final_2017-3-17.pdf> (visited 27 October 2019).
[16] *Ibid.* at 2.
[17] *Ibid.* at 4.
[18] Jeremy Waldron, 'Is the Rule of Law an essentially untested concept (In Florida)? 21(2) *Law and Philosophy* (2002) 137-164 at 138-144.

that every actor is subjected to those laws.[19] Thus, at a minimum, both the rule of law and the environmental rule of law are trained towards government officers who wield public power with the goal being to ensure that they exercise public power within the boundaries set by law.

Environmental law and human rights law are underpinned by the concept of equity. Key principles have developed to inform on how environmental law could best serve equity; these include the principles of intergenerational and intragenerational equity. These two principles are deemed central to environmental law as they provide a conceptual inroad for distributive justice in environmental matters.[20] Much of the literature on environmental justice is centered on the need to achieve acceptable levels of equity in the distribution of environmental burdens and benefits, an outcome that may be described as 'environmental equity.' The principles of intergenerational equity and intragenerational equity can be said to inform policy outputs that aim to achieve environmental equity. For instance, the foundational role of equity for environmental law is seen in the content of the regulatory responses to climate change in that equity has informed the design of dissimilar obligations between developed and developing countries in order to reflect their respective contribution to the accumulation of greenhouse gasses in the atmosphere.[21] Efforts to achieve equitable distribution of the burdens arising from climate change are underpinned by the principle of common but differentiated responsibilities and respective capabilities, as delineated in the Climate Change Convention.[22]

In the context of human rights law, social and economic rights can be understood as human rights norms whose goal is to promote equity.[23] As with the principles of equity in environmental law, equity in the context of human rights law serves to entrench fairness in the distribution of benefits and burdens of social cooperation.

The right to participate in the political process recognized under the ICCPR constitutes the legal expression of a foundational value of democracy in human rights law. Democracy's counterpart in environmental law consists of the principles of public participation, prior informed consent and the right to environmental information derive from the broad notion of democracy. Together, these principles constitute

[19] Louis J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart Publishing, 2015) 159-162.

[20] See, for instance, Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publisher, 1989) 36-37; and Lynda M. Collins, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance', 30 *The Dalhousie Law Journal* (2007) 79-140.

[21] Rowena Maguire and Bridget Lewis, 'The Influence of Justice Theories on International Climate Policies and Measures', 8(1) *Macquarie Journal of International and Comparative Environmental Law* (2018) 16-35; and Idowu Ajibade, 'Distributive Justice and Human Rights in Climate Policy: The Long Road to Paris', 7(2) *Journal of Sustainable Development and Policy* (2016) 65-80.

[22] See Art. 3.1, United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <http://unfccc.int>.

[23] Jeremy Waldron, 'Social-Economic Rights and Theories of Justice' in Thomas Pogge (ed.) *Freedom from Poverty as a Human Right: Theory and Politics* (UNESCO Publishing, 2009) 21-49.

what is referred to as 'environmental democracy' encapsulated in Principle 10 of the Rio Declaration and expanded by the provisions relating to the protection of environmental defenders in the Escazú Agreement.[24] In both the human rights and environmental law disciplines, democracy is understood as means of enabling deliberation and meaningful participation by the public in matters that affect their interests. Democracy also serves as a means of legitimizing actions taken by public agents who are expected to act in the interest of members of public whenever they execute public functions.

Democracy in both the human rights and environmental law also enables citizens to exercise vigilance over public officials and other actors whose conduct bears on their human rights and environmental interests. Further, accountability is a central part of both human rights law and environmental law. Key environmental law principles that encapsulate accountability for environmental wrongs are the polluter pays principle and the access to justice principle. These principles have served as the basis for the development of policies and laws to facilitate imposition of liability for conduct that is harmful to the environment. The European Union Directive on environmental liability[25] is a fitting example of a legal norm whose purpose is to promote accountability for environmental harm. The polluter pays principle and the access to justice principle have likewise informed efforts to develop institutional mechanisms of accountability for environmental harm. The explosion of environmental courts and tribunals in national jurisdictions[26] and calls from the early 1990s to establish an international environmental court[27] serve to illustrate the centrality of accountability as a fundamental goal for environmental law. Human rights law is similarly founded on the idea that those who violate human rights should be held accountable. This ideal has inspired the development of standards of conduct that guide the determination on when an actor's conduct amounts to a violation and the type of sanctions that their conduct should attract. For instance, the search for effective mechanism of accountability under international human rights law has fueled the efforts aimed at finding legal mechanisms to hold corporations accountable for human rights violations at the international level.[28]

[24] Article 9 of the Escazú Agreement.

[25] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143 (2004) 56–75.

[26] George (Rock) Pring and Catherine (Kitty) Pring, 'Environmental Courts and Tribunals' in Michael Faure (ed.) *Elgar Encyclopedia of Environmental Law* (Edward Elgar, 2016) at 452-464.

[27] Alessandra Lehmen, 'The Case for the Creation of an International Environmental Court: Non-State Actors and International Environmental Dispute Resolution', 26(2) *Colorado Natural Resources, Energy and Environmental Law Review* (2015) 179-217; see also Roger H. Charlier, 'Enforcing and Protecting Sustainable Development Amedeo Postiglione & the International Court of the Environment', 19 *Journal of Coastal Research* (2003) 944-946.

[28] The work of the UN Secretary-General's Special Representative on Business and Human Rights (see <https://www.business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights> (visited 28 October 2019)) is illustrative of the importance of achieving accountability as a goal of human rights law.

2.2 Principles of international environmental law: an overview

The development of environmental law principles is an ongoing process as new principles emerge to fill existing gaps and respond to contemporary environmental challenges. Since there is presently no single legally binding environmental treaty from which a definitive list of environmental law principles may be drawn, determination of what principle counts as an authentic norm of international environmental law for the purpose of comparison is not straightforward.[29] This is the case in particular because of the difficulties that attend any attempt to define what is meant by the term 'principle' as used in the international environmental law context. Relevant literature has provided a variety of approaches that could be useful in approaching this question. In the context of environmental law, principles could be taken to mean a legal norm, or 'legal foundation of a norm'.[30] Principles could also be used to refer to norms that are juxtaposed to rules and concepts within a hierarchy of 'bindingness'. In this taxonomy, principles sit between rules which carry the most normative 'bindingness', while concepts carry the least.[31] In the context of environmental protection, principles may also be taken to mean norms that are specifically relevant to environmental protection regardless of their normative status within the body of environmental law.[32] For the purpose of demonstrating the similarities between principles found in environmental law and those found in human rights law, the term principle is used in this section to refer to norms from a variety of environmental treaties, conventions, declarations, and protocols related to protection of the environment. On this understanding, consideration of a wide variety of principles with differing legal status, which may otherwise be foreclosed by an assessment limited only to those that have a definitive legal status either as customary international law or as emerging obligations, is possible.

The emergence of distinctively international environmental law principles is often traced to the Report of the United Nations Conference on the Human Environment,[33] which was the outcome of the 1972 Stockholm Conference on the Human Environment. Since that time, a variety of documents containing principles, culminating to the adoption of the Agenda for Sustainable Development 2030[34] in 2015 have articulated, restated and introduced new principles into the body of

[29] The draft IUCN Covenant on Environment and Development (5th ed., 2015, available at <https://portals.iucn.org/library/sites/library/files/documents/EPLP-031-rev4.pdf> (visited 27 October 2019)) is a substantive attempt at providing such an overarching treaty.

[30] Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (2nd ed., Cambridge University Press, 2018) 58.

[31] *Ibid.*

[32] *Ibid.*

[33] Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/Rev.1 (1972).

[34] 'Transforming our world: The 2030 Agenda for Sustainable Development', UNGA Res. 70/1 of 25 September 2015.

international environmental law.[35] Sands and Peel list seven general principles of environmental law, namely the principles of permanent sovereignty and responsibility; preventive action; cooperation; sustainable development; precaution; polluter pays; and the principle of common but differentiated responsibilities.[36] The formulation provided by Dupuy and Viñuales sets out additional principles, including the no-harm principle; prior informed consent; environmental impact assessment; participation; and intergenerational equity.[37]

Developments that have taken place beyond the adoption of the Agenda for Sustainable Development 2030 in 2015 demonstrate that emerging principles of environmental law continue to be drafted to fill existing gaps and to respond to critical needs for environmental protection. The composite concept of the environmental rule of law is an example of an articulation of a cluster of environmental law principles that includes those already generally accepted as such, and others that are emerging. The environmental rule of law was first recognized in 2013 by the United Nations Environment Programme (UNEP)[38] Governing Body Decision.[39] In 2016, the World Commission on Environmental Law under the International Union for the Conservation of Nature (IUCN)[40] promulgated the IUCN World Declaration on the Environmental Rule of Law.[41] The preamble to the Declaration sets out the goal of building the environmental rule of law as the legal foundation for environmental justice. It contains a number of paragraphs recognizing that humanity exists within nature and that all life depends on the integrity of the biosphere and the interdependence of ecological systems. It emphasises the anthropogenic stresses on the Earth, the close relationship between human rights and environmental conservation and protection, and the fundamental importance of ecological integrity. The preamble also recognizes the contribution of environmental law principles to the development of legal and policy regimes for conservation and sustainable use of nature at all governance levels, and it supports the evolution of such principles. The Preamble also respects the importance of indigenous knowledge and cultures, and recognizes that education and empowerment of women and girls is fundamental. It further recognizes the existing gaps and shortcomings that prevent environmental law from achieving adequate environmental conservation and protection and addressing environmental crimes. It also observes the essential role that judges and courts play in building the environmental rule of law.

[35] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th ed., Cambridge University Press, 2018) 21-50; Dupuy and Viñuales, *International Environmental Law, supra* note 29, at 58-104; Ben Boer, 'Environmental Principles and the Right to a Quality Environment' in Ludwig Krämer and Emanuela Orlando (eds), *Principles of Environmental Law* (Edward Elgar Publishing, 2018) at 52-75.

[36] Sands and Peel, *Principles of International, supra* note 34, at 197-249.

[37] Dupuy and Viñuales, *International Environmental Law, supra* note 29, at 58-99.

[38] Now referred to as UN Environment. See <http://www.unenvironment.org>.

[39] 'Advancing Justice, Governance and Law for Environmental Sustainability', UNEP Governing Council Dec. 27/9 (2013). Though the Decision did not offer clarification on the meaning of the term, it hinted that the environmental rule of law includes environmental governance features such as 'information disclosure, public participation, implementable and enforceable laws,' among others. *Ibid.* at 26.

[40] See <http://www.iucn.org>.

[41] IUCN World Declaration on the Environmental Rule of Law, *supra* note 15.

The body of the Declaration contains 13 principles of environmental rule of law, including: obligation to protect nature; right to nature and rights of nature; right to environment; ecological sustainability and resilience; *in dubio pro natura* ('When in doubt, in favor of nature'); ecological functions of property; intragenerational equity; intergenerational equity; gender equality; participation of minority and vulnerable groups, indigenous and tribal peoples; non-regression; and progression. This formulation includes principles that have so far not been expressly articulated as international environmental law principles. One of these is the *in dubio pro natura* principle, where, 'in cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment (Principle 5). Another is the 'ecological functions of property' principle', which includes a duty on those 'in possession or control of land, water or other resources to maintain the essential ecological functions associated with those resources and refrain from activities that would impair such functions' (Principle 6).

Another instrument, the draft Global Pact on the Environment[42] represents ongoing efforts to develop a binding international environmental law document with the aim to, *inter alia*, 'integrate, consolidate, unify and ultimately entrench many of the fragmented principles of IEL'.[43] To this end, it restates principles that are already recognized as part of international environmental law as well as emerging principles. They include the principles of the right to an ecologically sound environment; a duty of care to the environment; integration; sustainable development; intergenerational equity; prevention; precaution; polluter pays; access to information; public participation; access to environmental justice; resilience; non-regression; cooperation; and accountability.

2.3 Environmental law principles articulated as human rights principles

The above overview of existing principles of environmental law demonstrates the extent to which human rights have been formulated in environmental terms in order to fill legal gaps within environmental law. Procedural rights recognized in human rights instruments include the right to participation, access to information and access to justice, which enable citizens to participate in the democratic process within their respective countries. The right to political participation is recognized in key human rights instruments. Article 21 of the Universal Declaration of Human Rights (UDHR)[44] recognizes the right of everyone to '…to take part in the government of his [or her] country, directly or through freely chosen representatives….' Similarly,

[42] See <https://globalpactenvironment.org/en/>.

[43] Louis Kotzé and Duncan French, 'A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for Lex Anthropocenae?', 18 *International Environmental Agreements: Politics, Law and Eco-nomics* (2018) 811-838 at 816.

[44] Universal Declaration of Human Rights, UNGA Res. 217A of 10 December 1948.

Article 25 of the International Covenant on Civil and Political Rights (ICCPR)[45] states that '[e]very citizen shall have the right and the opportunity …. [t]o take part in the conduct of public affairs, directly or through freely chosen representatives…' Effective political participation often rests on the ability to exercise freedom of expression, freedom of association and the right of peaceful assembly, which are recognized in the Articles 19 and 20 of the UDHR and Articles 25, 22 and 21 of the ICCPR. The cluster of procedural rights and freedoms that constitute the right of political participation have been formulated in environmental law as the right of the public to participate in decision-making processes that bear on the environment.[46] This principle was articulated through Principle 10 of the 1992 Rio Declaration on Environment and Development[47] and has subsequently been elaborated in Article 6 of the Aarhus Convention[48] and Article 7 of the Escazú Agreement.[49]

In similar fashion, the principle of access to environmental information derives from the generic right of access to information, which is found in international human rights law and a majority of national constitutions around the globe.[50] In environmental law, the right is formulated as the right of access to environmental information, which was also first articulated in Principle 10 of the Rio Declaration. As in the case with the right of participation, regional human rights instruments have led the way in elaborating the content of the right as a principle of environmental law, specifically in Article 4 of Aarhus Convention and Articles 5 and 6 of the Escazú Agreement.

The right of access to justice is also recognized in some international treaties and regional human rights treaties. The UDHR states that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.[51] Article 2 of the ICCPR recognizes the right as one that entails the responsibility of the state to provide competent judicial, administrative or legislative mechanisms through which a person can obtain an effective remedy for the violation of human rights listed in the Con-

[45] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 *United Nations Treaty Series* 171.

[46] UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876

[47] United Nations Declaration on Environment and Development, UN Doc. A/CONF.151/26/Rev.1, 13 June 1992, Principle 10.

[48] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, <http://www.unece.org/env/pp/>.

[49] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018, not yet in force, available at <https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf> (visited 21 October 2019).

[50] Maeve McDonagh, 'The Right to Information in International Human Rights Law' 30 *Human Rights Review* (2013) 28-53.

[51] Article 8.

vention.[52] These provisions have informed the formulation of the right of access to justice in environmental matters as a core principle of environmental law. Principle 10 of the Rio Declaration states that '[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided'. The Aarhus Convention and the Escazú Agreement both include provisions on access to justice on environmental matters.[53]

The right to equality of treatment is found in human rights instruments. It provides the legal basis upon which citizens can demand protection from the state against different forms of discrimination. This right is recognized in key international human rights instruments such as the ICCPR[54] and the Convention on the Rights of the Child (CRC).[55] The right to equality is a foundational basis for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as well.[56] In the context of environmental law, several principles instantiate the right of equality. They include the principles of gender equality, participation of minority and vulnerable groups, and the principle recognizing the importance of protecting indigenous and tribal peoples in the environmental context.

3 Environmental protection in the international human rights instruments

It is widely accepted that the satisfaction of basic human rights recognized in international human rights instruments is pre-conditioned on a certain quality of the environment.[57] This section highlights how the provisions of key international human rights instruments interact with environmental protection. The UDHR, together with the ICCPR and the ICESCR constitute the International Bill of Human Rights. The UDHR presents the earliest efforts by the international community

[52] Article 2(3) provides that each Party to the Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

[53] Article 8 of the Aarhus Convention; Art. 8 of the Escazú Agreement.

[54] Article 26 of the ICCPR.

[55] Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 28 *International Legal Materials* 1456, Art. 2.

[56] Convention on the Elimination of All Forms of Discrimination against Women, (New York, 18 December 1979, in force 3 September 1981, 1249 *United Nations Treaty Series* 18.

[57] Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment Under International Law', 16 *Tulane Environmental Law Journal* (2002) 65-126; Donald K. Anton and Dinah L. Shelton (eds), *Environmental Protection and Human Rights* (Cambridge University Press, 2012) 130; Bridget Lewis, 'Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection', 8 *Macquarie Journal of International and Comparative Environmental Law* (2012) 36-47.

to foreground human wellbeing in the context of international relations between states. The Declaration came on the heels of the conclusion of World War II, which brought to light the fragility and limitations of national institutions to protect human well-being. The UDHR consists of 30 articles which proclaim fundamental rights and freedoms meant to be enjoyed by 'all members of the human family'.[58] Though not a legally binding instrument, the rights and freedoms proclaimed in the UDHR are foundational to the ICCPR and the ICESR, which are binding on their signatories.

Of all the three instruments that constitute the International Bill of Human rights, only the ICESCR expressly mentions the environment. Article 12 recognizes the 'improvement of all aspects of environmental and industrial hygiene' as a condition to the fulfillment of the right to the highest standard of health. Though couched in the language of hygiene, this provision has important relevance to the environmental context. Environmental pollution leads to contamination of drinking water, air and living spaces leading to poor sanitation. Poor sanitation negatively impacts physical and mental well-being of the populations affected. Signatories of the ICESCR would rely on Article 12 to develop legislation to ensure the protection of the environment for the purpose of securing standards of hygiene that are compatible with holistic physical and mental well-being.

Despite the lack of a guarantee for a quality environment in the three instruments, the right to a clean and healthy environment can be said to have begun with the recognition of the right to life in the UDHR and continued with the 1966 Covenants and subsequent hard and soft law international instruments. The foundational role of the right to life in environmental matters has been recognized in international law. In the case of *Gabčíkovo-Nagymaros Project*, decided by the International Court of Justice, Justice Weeramantry stated in his separate opinion:

> 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.[59]

Elsewhere, the right to a quality environment has been described as 'nothing less than the right to life itself.'[60] The right of life is thus a powerful normative basis for establishing standards for preventing and remediating environmental damage that poses the risk of death to populations.

[58] Preamble of the UDHR.

[59] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, *ICJ Reports* 1997, 7.

[60] Hilario G. Davide Jr., 'The Environment as Life Sources and the Writ of Kalikasan in the Philippines', 29(2) *Pace Environmental Law Journal* (2012) 592-601.

Apart from protecting the right of human beings to live, the right to life is concerned with guaranteeing material conditions that are essential to support livelihoods as well. In this case, certain provisions of the three instruments reinforce the goal of the right to life in the environmental context. These are the right to adequate standards of living and the right to adequate standards of health. The UDHR indirectly recognizes these rights through the provisions of Article 25(1) which states that 'everyone has the right to a standard of living adequate to his/her health and wellbeing and that of his/her family'. The proclamation found in the UDHR is further elaborated in Article 11 (adequate standards of living) and Article 12 (adequate standards of health) of the ICESCR. Adequate standards of living are attained where citizens have access to adequate shelter, food and clothing. Securing the right to food and shelter can be the basis for disallowing unsustainable exploitation of natural resources which are meant to support livelihoods. Protection of the right to health, in particular, is linked to better environmental protection in the sense that human health thrives in an environment that is sanitary and free from pollutants that endanger human wellbeing.[61]

The right to equality and non-discrimination is essential to achieving a quality environment. This right is spelled out in the UDHR (Article 2) and the ICCPR (Article 26). In the recently published 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', non-discrimination is included as part of an expansively formulated right to a clean and healthy environment.[62] The right to non-discrimination has been replicated in other human rights instruments and subsequently has been relied on by marginalized groups such as indigenous peoples to challenge discriminatory government policies that negatively impact their right to utilize and conserve environmental resources.[63]

In addition to those rights that bear directly on the material well-being of humans in the environmental context, international human rights instruments have provided for civil and political rights that empower citizens to advocate for better environmental conditions. Specifically, they are useful in protecting the environment in enabling raising awareness and autonomy; fostering public participation and empowerment;

[61] Dinah Shelton, 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice', 1 *Human Rights and International Legal Discourse* (2007) 9.

[62] UN Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles, John H. Knox', UN Doc. A/HRC/37/59 (2018).

[63] For instance, *African Commission on Human and Peoples' Rights v. Republic of Kenya* (2017). Members of the Ogiek community in Kenya relied on Article 2 of the African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981, in force 21 October 1986, 21 *International Legal Materials* 58) to challenge the government's move to expel them from their ancestral lands in the Mau forest. The Court found that eviction of the Ogiek without consultation amounted violation of the right to non-discrimination recognized in Art. 2 of the Charter, among other rights.

and contributing to the legitimacy of governmental action.[64] These rights include ICCPR's right to political participation (Article 25), certain 'liberty' rights including right to information (Article 19) and association (Article 22). The right to political participation can be used to compel governments to facilitate the participation of communities in the environmental decision-making process. The right of access to information is a useful tool for compelling governments to disclose environmental information while the freedom of association provides the legal basis for citizens to organize both formally and informally in the furtherance of environmental goals.

Thematic international human rights instruments include the 1979 CEDAW and the 1989 CRC. The CEDAW does not directly recognize the right to a quality environment. However, it contains two provisions that are relevant to environmental protection. Article 14(f) proclaims the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. Article 14(h) mandates state Parties to provide adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications. The relevance of the provisions of the CEDAW in the environmental context are hinged on the realization that pre-existing inequalities exacerbate the impact of environmental damage on women who are also least prepared to counter them owing to limited access to resources that enable resilience. The connection between forms of discrimination against women that the CEDAW seeks to redress and their disparate vulnerability to the consequences of environmental damage has taken centre stage in the discourse relating to how to mitigate the consequences of climate change.[65]

Like the CEDAW, the CRC makes no direct mention of the right to a quality environment. but proclaims the right to the highest attainable standards of health in Article 24(1), which is relevant to the protection of children in the environmental context. In terms of Article 24(1)(c), the right to the highest attainable standards of health is to be achieved through measures aimed at combating 'disease and malnutrition, …through, *inter alia,* the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution…' This provision contemplates governmental responses similar to the kind envisioned in similarly worded provisions in the ICESCR and CEDAW.

The foregoing analysis demonstrates that international human rights treaties have an instrumental role to play in bridging the conceptual divide between human rights law and environmental law. In particular, international human rights treaties have

[64] James R. May, 'Constitutional Directions in Procedural Environmental Rights', 28 *Journal of Environmental Law and Litigation* (2013) 27-58.

[65] Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 37: Gender-related dimensions of disaster-risk reduction in the context of climate change', UN Doc. CEDAW/C/GC/37 (2018).

provided standards by which environmentally damaging conduct that results in harm to human wellbeing is assessed in order to formulate appropriate responses. As such, convergence between the two legal regimes has evolved from the fact that protection of those human rights found in international human rights treaties redounds to the benefit of the environment. This approach is what Boyle has termed as greening of human rights.[66]

4 Environmental protection in regional human rights instruments

Like international human rights treaties, regional human rights treaties have played an instrumental role in linking human rights. Human rights protected in regional human rights treaties have been used instrumentally to achieve environmental outcomes. Similarly, key regional treaties have expressly recognized environmental procedural rights and a substantive right to a clean and healthy environment. This section analyzes how these developments have contributed to the convergence of human rights law and environmental law at the regional level.

The earliest regional human rights instrument is the European Convention on Human Rights (ECHR)[67] which was concluded in 1950. The Convention contains no direct provisions on environmental rights. However, the European Court on Human Rights[68] has interpreted the Convention to imply environmental rights. Several cases emanating from the Court 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 environmental information. Examples include the Guerra case[69] (right to respect for private and family life); the Lopez Ostra case[70] (right to respect for private and family life); the Öneryildiz case[71] (right to life); the Fadeyeva case[72] (right to respect for private and family life); the Budayeva case[73] (right to life); and the Tatar case[74] (right to respect for private and family life). Although protection of the environment is a legitimate objective that can justify governments limiting certain rights including the right to possessions and property,

66 Alan Boyle, 'Human Rights and the Environment: Where Next?', 23 *European Journal of International Law* (2012) 613-642.

67 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953.

68 See <https://www.echr.coe.int>

69 Guerra and Others v. Italy, Judgment of the European Court of Human Rights No. 116/1996/735/932 (19 February 1998).

70 *Lopez Ostra v. Spain*, European Court of Human Rights App. No. 16798/90, Judgment of 9 December 1994.

71 *Oneryildiz v. Turkey*, European Court of Human Rights App. No. 48939/99, Judgment of 30 November 2004.

72 *Fadeeyva v. Russia*, European Court of Human Rights App. No. 55723/00, Judgment of 9 June 2005.

73 *Budayeva and Others v. Russia*, European Court of Human Rights App. Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 20 March 2008.

74 *Tatar v. Romania*, European Court of Human Rights App. No. 67021/01, Judgment of 17 March 2009.

human rights law does not protect the environment per se. Rather, it is an indirect way of achieving environmental objectives.[75]

In the Americas, the relevant human rights instruments are the 1969 American Convention on Human Rights[76] and the 1988 San Salvador Protocol to the American Convention on Human Rights.[77] Article 26 of the Convention mentions economic, social and cultural rights but contains no direct reference to the environment. Articles 4 and 5 guarantee the right to life and personal integrity. The relationship between the human rights contained in the two instruments and the environment was recently clarified through an Advisory opinion issued by the Inter-American Court of Human Rights[78] at the request of Republic of Columbia.[79] Specifically, the Court clarified what environmental obligations states have within the American Convention human rights system. The Court clarified that the right to a clean and healthy environment is expressly recognized in Article 11(1) of San Salvador Protocol. Even then, Article 26 of the American Convention on Human Rights, which deals with social, economic and cultural rights, incorporates a right to a clean and healthy environment. It went further to state that the right to life and personal integrity recognized under the Convention creates obligations in relation to the environment. According to the Court, the obligations embodied therein include obligations to: prevent significant environmental damage, comply with the precautionary principle, cooperate in good faith, provide information, facilitate public participation and access to justice.[80] The extrapolation of environmental obligations from human rights treaties in this way points to the fact that human rights concerns and environmental concerns do not occupy two distinct spheres. They converge in a mutually-affirming manner to advance the protection of human well-being of the environment.

The instrumental use of human rights law to achieve environmental objectives can be observed in the Inter-American context in the same way that similar rights have worked in the European context. However, the situation in the Americas differs from the European context because the San Salvador Protocol specifically recognizes the right to a quality environment and a corresponding duty on Parties to the Protocol. Article 11(1) states that '[e]veryone shall have the right to live in a healthy environment and to have access to basic public services.' Article 1(2) obligates Parties to 'promote the protection, preservation, and improvement of the environment.'

[75] Boyle, 'Human Rights and', *supra* note 66.

[76] American Convention on Human Rights, San José, 22 November 1969, in force 18 July 1978, <https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf> (visited 28 October 2019).

[77] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, San Salvador, 17 November 1988, in force 16 November 1999, 28 *International Legal Materials* 156.

[78] See <http://www.corteidh.or.cr/index-en.cfm>.

[79] The Inter-American Court of Human Rights Advisory Opinion OC-23/17. A discussion of the Advisory Opinion in English can be viewed at <https://www.escr-net.org/caselaw/2019/advisory-opinion-oc-2317> (visited 28 October 2019).

[80] Inter-American Court of Justice, Advisory Opinion c-23/17of 15 November 2017.

One of the main weakness of the San Salvador Protocol relates to the lack of an effective enforcement mechanism for the right to a clean and healthy environment. Specifically, under the Inter-American human rights system, the right to a clean and healthy environment does not provide a legal basis on which a direct individual petition against state Parties can be made before the Commission[81] or the Court. Nonetheless, violations of the right have been addressed indirectly through petitions that allege violations of the rights recognized in the Convention such as the right to life, the right to property, the right to prior and informed consent in the context of environmental pollution or economic exploitation of environmental resources.[82]

In addition to providing norms that are useful to achieving environmental objectives, regional human rights instruments have contributed to the convergence of human rights law and environmental law by recognizing stand-alone environmental rights and the human right to a clean and healthy environment. The 1981 African Charter on Human and Peoples' Rights[83] is the first regional human rights instrument to recognize a human right to a clean and healthy environment. Article 24 of the Charter provides that '[a]ll peoples shall have the right to a general satisfactory environment, favorable to their development'. Noteworthy is the fact that the Charter makes a link between a satisfactory environment and development. Development could encompass social, cultural and economic wellbeing. This nexus demonstrates that achieving environmental objectives cannot be considered in isolation from the goals served by social, economic and cultural rights.[84] Application of the right in the *SERAC v Nigeria*[85] case demonstrated that the right contemplated in the Charter is an expansive one, encompassing substantive and procedural elements. Specifically, though procedural rights are not explicitly provided for under Article 24, the Human Rights Commission read them into the Charter. It ordered the Nigerian government to: investigate human rights violations and prosecute officials of the security forces and officials of the Nigerian National Petroleum Company; make adequate compensation to the victims, including relief and resettlement assistance, and undertake a cleanup of land and rivers polluted and damaged by the activities of the oil operations; take measures to ensure that appropriate environmental and social impact assessments are undertaken in case of future oil development activities, and, properly inform the people about possible health and environmental risks.[86]

[81] See <https://www.oas.org/en/iachr/>.

[82] Riccardo Pavoni, 'Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights' in Ben Boer (ed.), *The Environmental Dimension of Human Rights* (Oxford University Press, 2015) 69-106, at 71; and Sophie Thériault, 'Environmental justice and the Inter-American Court of Human Rights' in Anna Grear and Louis Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing, 2015) 309-329.

[83] African Charter on Human and People's Rights, Nairobi, 27 June 1981, in force 21 October 1986, 21 *International Legal Materials* 58.

[84] Werner Scholtz, 'Human Rights and the Environment in the African Union Context' in Grear and Kotzé, *Research Handbook on Human, supra* note 82, 401-422.

[85] African Commission on Human Rights and Peoples' Rights, *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, Communication No. 155/96, 2001 ('Ogoni case').

[86] *Ibid.*

The 2012 ASEAN Declaration on Human Rights[87] was adopted by the heads of the ten ASEAN member countries in 2012. It is considered a landmark in the development of human rights protection for the citizens of these countries. Article 28 includes reference to many of the rights recognized in other regions such as Europe, Africa and Latin America as being the basis for using human rights to achieve broader environmental aims. Article 28 sets out the right to an adequate standard of living which includes the right to food, clothing, affordable housing, medical care and social services, safe drinking water and sanitation, and the right to a safe, clean and sustainable environment. As a declaration, this instrument is not normatively forceful compared to the other human rights instruments from Africa, Americas and Europe. Nonetheless, it marks a milestone in the development of human rights and environmental rights. It recognizes rights whose relevance to protecting human well-being in the environmental context has been demonstrated. For instance, the right to safe drinking water and sanitation is not attainable in situations where environmental pollution is allowed to continue unchecked. The right to food may be compromized where farmlands are contaminated through toxic pollution. In addition to the possibility of applying these social economic rights to advance environmental goals, the recognition of the right to a clean and healthy environment signifies a readiness on the part of member countries to fulfill negative and positive obligations.[88]

Regional environmental instruments have played a role in bridging human rights and environmental protection. In this respect, the Convention on Access to Information, Public Participation and Access to Justice (Aarhus Convention) and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) are of relevance. Adopted in 1997 within the UN Economic Commission for Europe (UNECE),[89] the Aarhus Convention was later opened for any state to join. The Preamble to the Aarhus Convention asserts that 'every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'. While the Convention endorses the right to live in an adequate environment, it fails to provide a legal basis for citizens directly to invoke this right. Instead, its focus is strictly procedural in content. It grants public rights regarding access to environmental information, public participation in decisions bearing on the environment and access to justice in environmental dispute settlement bodies. In so doing, the Convention gives life to Principle 10 of the 1992 Rio Declaration, in mandatory language to the same category of procedural rights.[90]

[87] ASEAN Human Rights Declaration, Phnom Penh, 18 November 2012, <https://asean.org/asean-human-rights-declaration/>.

[88] See further, Ben Boer, 'Environmental Law and Human Rights in the Asia-Pacific' in Boer (ed), Environmental Dimensions of Human Rights (Oxford University Press, 2015) 135-179, at 153-155.

[89] See <http://www.unece.org>.

[90] See discussion in Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 2009) 273-275.

Despite its procedural focus, the Convention represents an important extension of environmental rights, but also of the corpus of human rights law.[91] It has enabled human rights and environmental protection to interact. As Hey explains, inadequate or improper protection of the environment may lead to violations of the rights protected by the European Convention of Human Rights. The procedural rights recognized in the Convention empower the public to advocate for adequate environmental protection measures and to challenge development and other activities that are harmful to the environment. In this sense, ECHR rights benefit from the procedural rights recognized in the Aarhus Convention.[92]

Concluded in 2018, the Escazú Agreement represents the latest development in regional human rights and environmental treaties. In terms of Article 1, the Agreement's objective is

> to guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development.

Like the Aarhus Convention, the Escazú Agreement makes provisions for environmental procedural rights including the right of access to environmental information (Articles 5 and 6), the right of public participation in the environmental decision-making process (Article 7) and the right of access to justice in environmental matters (Article 8). In addition, the Agreement makes a ground-breaking contribution to human rights law and environmental protection by being the first instrument to protect the human rights of environmental defenders (Article 9).

The provisions highlighted above show that the Escazú Agreement is clearly both a human rights instrument and an environmental rights instrument. The combination of the two subjects of regulation indicates that convergence between human rights law and environmental law is taking place through the conclusion of instruments that encompass provisions from both fields of law to achieve the mutually dependent goals of protection of human well-being and the environment. That the Agreement is more than an environmental treaty in the style of the Aarhus Convention is similarly evident from the fact that in addition to guaranteeing procedural environmental rights, it 'seeks to address the region's most important challenges, namely the scourge of inequality and a deep-rooted culture of privilege …' and contemplates a 'shift towards a new development model' that facilitates the inclusion of

[91] *Ibid.* at 274.

[92] Ellen Hey, 'The Interaction Between Human Rights and the Environment in the European 'Aarhus Space" in Grear and Kotzé, *Research Handbook on Human, supra* note 82, 353-376.

'those that have been underrepresented, excluded or marginalized and give a voice to the voiceless, leaving no one behind.'[93] By making a link between environmental protection and development, the Escazú Agreement follows the model set by the African Charter in which a nexus between environmental protection, a concern for which environmental rights exist, and development, a concern addressed by social and economic rights, is made.[94]

5 Human rights in multilateral environmental treaties

This section highlights how international environmental law interacts with human rights law within multilateral environmental law agreements. The discussion in this section is limited to selected MEAs including the 1972 World Heritage Convention,[95] the 1971 Ramsar Convention on Wetlands of International Importance,[96] the 1979 Convention on Migratory Species of Wild Animals (CMS),[97] the 1992 Convention on Biological Diversity (CBD),[98] the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the 1994 Convention to Combat Desertification (UNCCD),[99] and the 2013 Mercury Convention.[100] As the titles suggest, these MEAs focus on thematic areas of international environmental regulation which have a bearing on human rights. They are not human rights instruments per se but their provisions have clear human rights underpinnings.

The World Heritage Convention is the best known of the heritage treaties. It recognizes the equal importance of and close connection between cultural and natural heritage. In many cases, it is very difficult, or even impossible, to distinguish cultural and natural heritage. Conceptually, in the past two decades, there has been a convergence between the natural heritage and the cultural heritage, epitomized by the idea

[93] Alicia Bárcena, 'Preface to the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean' in Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (UN, 2018), available at <https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf> (visited 20 November 2019) 7-9 at 8.

[94] See further Lalanath de Silva, 'Escazú Agreement 2018: A Landmark for the LAC Region', 2 *Chinese Journal of Environmental Law* (2018) 90–95.

[95] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <http://whc.unesco.org>.

[96] Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>.

[97] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>.

[98] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[99] United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <http://www.unccd.int>.

[100] Minamata Convention on Mercury, Geneva, 19 January 2013, in force 16 August 2017, <http://www.mercuryconvention.org/>.

of 'cultural landscapes', now incorporated into the Operational Guidelines for the Implementation of the World Heritage Convention.[101] Cultural heritage is normally divided into tangible and intangible aspects. The tangible heritage is further divided into cultural and natural heritage. Intangible heritage can relate to cultural and/or natural environments. The legal framework for the protection of intangible heritage is the Convention for the Safeguarding of the Intangible Cultural Heritage,[102] which was adopted in 2003. However, the Convention does not itself guarantee the right to culture or the right to nature; at most, these rights can be implied from the Convention's goal to protect cultural and natural heritage.

The human rights implications of the Convention are that it seeks to protect natural heritage, the destruction of which endangers health, cultural identity, standards of living, among other rights. Article 2 of the World Heritage Convention defines 'natural heritage' as:

> natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Some of natural sites on the World Heritage List[103] are biodiversity sites and forests/parks, whose conservation as World Heritage sites ensures that their cultural value is protected. The protection of cultural sites such as forests may alleviate some of the pressures of climate change by ensuring that forests are allowed to serve a dual purpose, both as cultural sites and as carbon sinks. Since climate change affects a variety of human rights – such as rights to water, health and food – protection of the cultural value of such sites can contribute to securing the right to food, environment, and adequate drinking water, among others.

The human rights implications of the management of natural and cultural heritage have fuelled calls to emphasize human well-being within the conservation agenda contemplated by the World Heritage Convention.[104] The participatory rights recognized under the Operational Guidelines for the Implementation of the World Heritage Convention have obvious human rights underpinnings. The Guidelines

[101] Available at <https://whc.unesco.org/document/178167> (visited 29 October 2019).
[102] Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003, in force 20 April 2006, <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> (visited 29 October 2019).
[103] See <https://whc.unesco.org/en/list/>.
[104] See, generally, Peter Bille Larsen (ed.), *World Heritage and Human Rights: Lessons from the Asia-Pacific and global arena* (Earthscan Routledge, 2018); William Logan, 'Cultural Diversity, Cultural Heritage and Human Rights: Towards Heritage Management as Human Rights-Based Cultural Practice', 18(3) *International Journal of Heritage Studies* (2012) 231-244.

acknowledge the important role of 'those individuals and other stakeholders, especially local communities, indigenous peoples, governmental, non-governmental and private organizations and owners who have an interest and involvement in the conservation and management of a World Heritage property'.[105] The recognition of the importance of participation of these groups affirms the importance of participatory rights in achieving the goals of the Convention. Such participatory rights have underpinnings in human rights law, particularly the right of participation in Article 25 of the ICCPR.

In the realm of biodiversity conservation, the CBD sets out as its objectives as:

> the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.[106]

This language, read together with other provisions of the Convention. do not point to the existence of a human right to biological diversity as such. However, the protection and conservation of biological diversity has clear human rights implications. The correlation between biodiversity and human rights has been clarified by the Special Rapporteur on Human Rights and the Environment in his Report on Biodiversity and Human Rights, stating that:

> [t]he full enjoyment of human rights, including the rights to life, health, food and water, depends on the services provided by ecosystems. The provision of ecosystem services depends on the health and sustainability of ecosystems, which in turn depend on biodiversity. The full enjoyment of human rights thus depends on biodiversity, and the degradation and loss of biodiversity undermine the ability of human beings to enjoy their human rights.[107]

The language used in the Special Rapporteur's Report indicates that in serving the objectives of the legal framework relating to the conservation of biological diversity, the CBD and other relevant MEAs service the goals of human rights as well. In fact, meeting the objective of the Convention is one of the ways in which states can secure and fulfill human rights to life, health, food and water. The Global Biodiversity Outlook recognizes the role of healthy, biodiverse ecosystems as the foundation for human well-being and that the degradation of ecosystems has a negative impact on

[105] Operational Guidelines for the Implementation of the World Heritage Convention, *supra* note 102, at para. 40.
[106] Article 1 of the CBD.
[107] 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Doc. A/HRC/34/49 (2017) para. 5.

human well-being because it compromises the availability of sufficient ecosystems services for everyone. [108]

The regulation of wetlands is governed by the Convention on Wetlands of International Importance. Though the Convention does not employ the language of human rights, its Preamble acknowledges the 'interdependence of man and his environment.' The notion that humans and their environment stand in a relationship of mutual and profound interdependence has informed much of the development in the human rights and the environment discourse. The Preamble of the Convention also underlines the 'fundamental ecological functions of wetlands as regulators of water regimes.' Wetlands perform a variety of hydrological functions.[109] These functions may impact on a variety of human rights such as the right to water. Thus, though the Convention is decidedly one that is concerned with the protection of wetlands as such, its relevance to the protection of human rights is clear.

International environmental law has developed specific legal regimes for the protection of animals. One such regime is created by the Convention on the Conservation of Migratory Species of Wild Animals (CMS). The Convention aims to protect wild animals for 'the good of mankind.'[110] The Convention is underpinned by the principle of intergenerational equity, because it recognizes that 'man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely.'[111] Generally, inter-generational equity has been understood as a framework for securing the human rights and interests for future generations.[112] On this logic, it can be argued that the Convention protects the interests of present and future generations in the value of migratory species of wild animals. The Preamble of the Convention recognizes the value of migratory wild animals for 'environmental, ecological, genetic, scientific, aesthetic, recreational, cultural, educational, social and economic' purposes. Such purposes are no doubt linked to the realization of human rights. For instance, the contribution of migratory wild animals to social and economic purposes correlates with the realization of social and economic rights which are contemplated in the ICESCR.

Some MEAs deal with particular substances that are believed to pose a serious threat of pollution. The Mercury Convention, concluded in 2013, seeks to 'protect the human health and the environment from anthropogenic emissions and releases

[108] Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook 4* (2014), available at <https://www.cbd.int/gbo/gbo4/publication/gbo4-en-hr.pdf> (visited 29 October 2019), Strategic Goal D.

[109] Andy Bullock and Mike Acreman, 'The Role of Wetlands in the Hydrological Cycle', 7(3) *Hydrology and Earth Sciences* (2003) 358-389.

[110] Preamble.

[111] *Ibid.*

[112] Edith Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity', 11(4) *Ecology Law Quarterly* (1984) 495-582.

of mercury and mercury compounds.'[113] Though the Convention is dedicated to addressing the prevalence of mercury as a serious global environmental threat, its interlinkage with the right to health are made clear in the introduction to the Convention, which states that its objective is 'to protect human health and environment from anthropogenic release of mercury'.[114] The Convention sets out a range of measures to meet this objective, including 'measures to control the supply and trade of mercury, including setting limitations on specific sources of mercury such as primary mining, and to control mercury-added products and manufacturing processes in which mercury or mercury compounds are used, as well as artisanal and small-scale gold mining.'[115]

Other MEAs seek to regulate processes that constitute different forms of environmental degradation. Examples in this category are the UNCCD and the UNFCCC. As its title suggests, the UNCCD aims to provide a framework for combating land degradation in arid, semi-arid and semi-humid areas in the world, most of which are located on the African continent.[116] Land and soil have been the 'poor cousins' in the environmental field, and consequently in the degree of protection that they have attracted in environmental law. For instance, the issue of land degradation and desertification is not characterized by the Convention as an issue of 'common concern of humankind' in the way that the UNFCCC and CBD characterize climate change and biodiversity.[117] Nonetheless, the Convention contributes to human rights protection by providing a framework for responding to land and soil degradation which has been known to produce a variety of negative impacts on human rights, particularly in respect to undermining food security, access to water, energy security and exacerbating the impacts of climate change.[118] Even though there is no direct mention of any human rights in the Convention, the language used in the Convention places the protection of human beings at the centre of its goal. For instance, the Preamble states that '[h]uman beings in affected or threatened areas are at the centre of concerns to combat desertification and mitigate the effects of drought'. This linkage has been acknowledged in related documents as well.[119]

[113] Article 1.

[114] 'Introduction' in 'Minamata Convention on Mercury. Text and annexes (UN Environment, 2017), available at <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP1%20version/Minamata-Convention-booklet-eng-full.pdf> (visited 21 November 2019) 9-10 at 9.

[115] *Ibid.*

[116] Article 2 of the Convention.

[117] Ben Boer, 'Land Degradation as a Common Concern of Humankind' in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing, 2014) 289-307; Ben Boer and Ian Hannam, 'Developing a Global Soil Regime', 1 *International Journal of Rural Law and Policy* (2015) 1-13.

[118] See discussion in United Nations Convention to Combat Desertification Secretariat, 'Zero Net Land Degradation: A Sustainable Development Goal for Rio+20' (2012), available at <http://www.drought-management.info/literature/UNCCD_zero_net_land_degradation_2012.pdf> (visited 29 October 2019).

[119] See, for instance, United Nations Convention to Combat Desertification Secretariat, 'Human Rights and Desertification: Exploring the Complementarity of International Human Rights Law and the United Nations Convention to Combat Desertification' (2008), available at <https://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/UNCCD.pdf> (visited 29 October 2019).

The climate change legal regime has developed remarkably since the adoption of the UNFCCC to include the Kyoto Protocol[120] of 1997 and the Paris Agreement[121] in 2015. These key instruments are supplemented by numerous soft law documents. According to Article 2, the UNFCCC's objective is the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'. Generally, the UNFCCC's reference to human rights is sparse, limited to the mention of the negative impacts of climate change to 'the operation of socio-economic systems or on human health and welfare'[122] and the principles that the climate system is to be protected for the benefit of present and future generations.[123] The narrow nature of the UNFCCC as an avowedly environmental treaty has informed the argument that 'the climate change regime needs to move beyond its traditional international environmental law model to encompass consideration of the specific vulnerabilities of individuals and communities.'[124] The Kyoto Protocol is similarly lacking in respect to provisions on human rights except in reference to the concept of vulnerability. Nonetheless, it has been argued that vulnerability can serve as a framework for incorporating human rights concern within the Kyoto framework and the climate regime as a whole.[125] Despite the lack of explicit human rights language in the UNFCCC and the Kyoto Protocol, both of these instruments can be said to frame human rights concerns in terms of human interests at a general level.

Signaling a break from the marginal treatment of human rights in other climate change instruments, the Paris Agreement explicitly incorporates human rights in its Preamble. It provides that:

> Parties should, when taking action to address climate change, respect, promote, and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations, and the right to development, as well as gender equality, empowerment of women, and intergenerational equity.

It is noteworthy that the rights language used in the Paris Agreement is contained in the Preamble and not the operative parts of the Agreement. Moreover, the language requires states to take human rights into account when they take action in response to climate change. This leaves out the obligations to take human rights into account

[120] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22.
[121] Paris Agreement to the United Nations Framework Convention on Climate Change, Paris, 12 December 2015, in force 4 November 2016; 55 *International Legal Materials* (2016) 740.
[122] Article 1(1).
[123] Article 3(1).
[124] Phillip Cullet, 'The Kyoto Protocol and Vulnerability: Human Rights and Equity Dimensions' in Stephen Humphrey (ed.), *Human Rights and Climate Change* (Cambridge University Press, 2009), 183-206.
[125] *Ibid.*

as a normative framework.[126] This limitation does not negate the fact that climate change jeopardizes protected human rights and measures taken to adapt to and mitigate climate change could have positive (or, as in some cases, negative) human rights impacts.[127]

6 Rights of nature

To understand the complementarity that exists between the rights of nature and the human right to a clean and healthy environment, it is important first to highlight the tensions between the two. Various international instruments as well as national constitutions and courts now recognize that the rights of nature have become part of environmental law. They refer to legal rights conferred to earth/nature as whole[128] or to specific elements of nature such as rivers.[129] The rights of nature have been inspired by indigenous worldviews and ecocentric Western thought. Some examples of indigenous worldviews include concepts such as *buen vivir* (or *sumac kawsay*: the good life) from South America[130] and *Ubuntu* from South Africa.[131] The trajectory of Western thought forging an alternative perspective on the place of nature in relation to human beings has been captured in works such as Christopher Stone's seminal article 'Should Trees Have Standing?: Towards Legal Right for Natural Objects'.[132] By and large, alternatives to the prevailing worldview espouse the notion that the relationship between humans and other constituents of nature should be governed by a 'set of reciprocal rights and responsibilities.'[133] Emerging rights of nature can be understood as a legal instantiation of the types of rights and responsibilities envisioned within these indigenous knowledge systems. For example, the

[126] Lavanya Rajamani, 'Human Rights in the Climate Change Regime: From Rio to Paris and Beyond' in John Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), 236-251.

[127] See, generally, Samudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge, 2015).

[128] An example can be found in Arts 71-73 of the 2008 Ecuador Constitution which grants legal rights to *Pachamama* or nature.

[129] See, for instance, Whanganui River Settlement Agreement, available at <https://www.govt.nz/treaty-settlement-documents/southern-whanganui/>; Catherine J. Iorns Magallanes, 'Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand', 22 Vertigo (2015), available at <https://journals.openedition.org/vertigo/16199#tocfrom2n1> (both visited 29 October 2019); see also discussion on rights granted to rivers in Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court', 7(1) *Resources (2018)* 13.

[130] Johannes M. Waldmueller and Laura Rodríguez, 'Buen Vivir and the Rights of Nature: Alternative Visions of Development' in Jay Drydyk and Lori Keleher (eds) *Routledge Handbook of Development Ethics* (Routledge, 2018) 234-247.

[131] Danford T. Chibvongodze, 'Ubuntu is Not Only about the Human! An Analysis of the Role of African Philosophy and Ethics in Environment Management', 52(2) *Journal of Human Ecology* (2016) 157-166.

[132] Christopher Stone, 'Should Trees Have Standing?: Towards Legal Right for Natural Objects', 45 *Southern California Law Review* (1972) 450-501.

[133] David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017); Klaus Bosselmann, 'A Vulnerable Environment: Contextualising Law with Sustainability', 2 *Journal of Human Rights and the Environment* (2011) 45-63.

Ecuador Constitution referred to earlier grants nature the right to be respected, restored, and protected. Alongside these rights of the nature is the right of humans to benefit from nature in order to attain *buen vivir*.[134]

These ideas are usually contrasted with the prevailing worldview on the relationship between humans and nature. As Boyd explains, the prevailing worldview is shaped by three main ideas. The first idea is anthropocentrism, which means that humans see themselves as separate from nature and superior to it. Second is the idea that animate and inanimate constituents of nature are the property of humans and as such can only be the object and never subject of rights. The third idea is that governments and business should pursue limitless economic growth without regard to ecological limits, which repudiates the idea of limitless economic growth.[135] The human right to a clean and healthy environment or 'quality' environment is now becoming recognized as part of human rights law.[136] Like all human rights, it places humans at the centre of the governance agenda at the international, regional and national levels.[137] As such, it does not readily mark a departure from the anthropocentric mould that characterizes the still prevailing worldview (or business as usual), that continues to facilitate contemporary environmental calamities such as rapid climate change and vast losses of biodiversity. It can also be regarded as representing the antithesis of the rights of nature, independent of its instrumental value to humans.

In light of this tension, some scholars are have cautioned against the use of human rights to protect nature.[138] Grear argues that doing so entails putting forward humanness as the model against which the entitlement of non-human nature to legal protection is judged.[139] This kind of approach, Grear argues, creates the risk that nature will be granted legal protection only in as far as its characteristics are found to mirror those of humans.[140] However, though a human right at its core, the right to a healthy environment envisions an environmentally-embedded human being whose well-being can only be achieved when nature is given optimum protection. Implicit in such a human right therefore is the idea that environmental challenges are not

[134] Article 74 of the Constitution of Ecuador.

[135] David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017).

[136] See, for instance, Ben Boer, 'Environmental Principles and the Right to a Quality Environment' in Ludwig Krämer and Emma Lees (eds), *Edward Elgar Encyclopaedia on Environmental Law* 2018 (Edward Elgar, 2018) 52-75.

[137] Conor Gearty, 'Do Human Rights Help or Hinder Environmental Protection', 1 *Journal of Human Rights and the Environment* (2010) 7-22.

[138] Klaus Bosselmann, 'A Vulnerable Environment: Contextualising Law with Sustainability', 2 *Journal of Human Rights and the Environment* (2011) 45-63; Anna Grear, 'The Vulnerable Living Order: Human Rights and the Environment in a Critical and Philosophical Perspective', 2 *Journal of Human Rights and the Environment* (2011) 23-44.

[139] Anna Grear, 'It's Wrongheaded to Protect Nature with Human-Style Rights', Aeon, 19 March 2019, available at <https://aeon.co/ideas/its-wrongheaded-to-protect-nature-with-human-style-rights> (visited 29 October 2019).

[140] *Ibid.*

limited to the impacts that environmental damage has on humans but rather, on the damage done to an entire vulnerable living order, of which humans are a part.[141]

Taking into account the above reservations, the optimum protection of nature might nevertheless be achieved through the recognition and enforcement of the rights of nature, even though the exact delineation of such rights remains unclear. Certainly, the full realization of rights of nature necessitates limits on certain human activities such as exploitation of natural resources. For instance, full realization of the rights of a river to continue to flow unimpeded and unpolluted to the sea would necessitate prohibition on activities that would undermine the capacity of the river to flourish. However, in the long run, such a prohibition could inspire creative approaches to utilizing the river's resources without undermining its rights. Such an approach would be one informed by the best available science and a consideration of environmental ethics. The outcomes of such an approach would likely differ from what can be gained from an anthropocentric norm such as the human right to a healthy environment. While the river in such a case would be a direct beneficiary, human beings stand to benefit indirectly from a river whose right to flourish is protected, particularly by being free of pollution. Viewed this way, the rights of nature in turn alerts us that not only does nature have inherent value independent of its instrumental value to humans, but it exists in a relationship of profound interdependence with humans. Not only is the well-being of humans threatened where the well-being of nature is threatened, its protection likewise benefits humans as indirect beneficiaries.

7 Conclusion

While some scholars see a complementary relationship between human rights and environmental law regimes, other scholars have argued that such a complementarity does not exist.[142] One of the arguments proffered in opposition to the human rights and environment discourse is that introducing environmental concerns into the human rights frameworks 'diminishes the importance and focus on protection of more immediate human rights concerns.'[143]

The foregoing discussion has explored how environmental protection has made inroads into human rights instruments and conversely, how human rights language has made inroads into MEAs. Human rights instruments have accommodated environmental objectives by providing standards for evaluating environmentally damaging conduct for which human rights inspired remedies may be formulated. Moreover, human rights instruments have explicitly recognized environmental rights as part of

[141] Anna Grear, 'Foregrounding Vulnerability: Materiality's Porous Affectability as a Methodological Platform' in Andreas Philippopoulos-Mihalopoulos, and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar Publishing, 2017) 3-28.
[142] Anton and Shelton, *Environmental protection and, supra* note 57, at 119.
[143] *Ibid.*

human rights norms. MEAs in turn have accommodated human rights by acknowledging human rights underpinnings of their provisions and by acknowledging the human rights implications of the environmental problems they seek to regulate. This development has not resulted into the merging of human rights law and environmental law into a single regime. It can therefore be argued that the convergence suggested above has not entailed some of the risks highlighted by those who have expressed misgivings in respect to linking human rights and the environment. What the development demonstrates is that while the two regimes remain conceptually distinct, their convergence is an inevitable outcome of efforts to advance the interdependent objectives of protecting human well-being and protecting the environment as two fundamental concerns for the for the international legal regime.

Part II

Environment and Human Rights in Selected Areas

Human Rights and Climate Change

Annalisa Savaresi[1]

1 Introduction

By virtue of its subject matter, climate change law is particularly likely to overlap with human rights law. Climate change threatens the enjoyment of a wide range of human rights, including the right to life, adequate housing, food and the highest attainable standard of health.[2] Conversely, measures adopted to tackle climate change (so called 'climate change response measures') may themselves have – and indeed have already had – negative impacts on the enjoyment of human rights.[3] This is especially the case for measures affecting access to, and the use of, natural resources, such as land, water and forests, which can affect the enjoyment of rights, such as that to culture, the respect for family life, access to safe drinking water and sanitation, and indigenous peoples' self-determination.[4] To complicate matters further, the protection of human rights may at times be perceived to 'stand in the way' of climate

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[2] Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Report on the Relationship between Climate Change and Human Rights', Doc. A/HRC/10/61 (2009) 16.

[3] *Ibid.* at 65–68.

[4] OHCHR, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', Doc. A/HRC/31/52 (2016) 50–64.

change response measures,[5] as is exemplified by the use of human rights arguments to resist the development of renewable-energy generation infrastructure.[6] So, while in principle there is no incompatibility between climate change and human rights norms, in practice policy conflicts between the two may well emerge.[7]

This complex relationship between climate change and human rights law has increasingly been recognized in the literature,[8] by states and international organisations. Starting in 2008, the Human Rights Council (HRC),[9] its Special Procedures mandate holders, and the Office of the High Commissioner of Human Rights (OHCHR),[10] have increasingly devoted attention and resources to the problem of climate change.

Equally, parties to the climate regime have progressively taken notice of potential conflicts and synergies with state obligations concerning human rights, in the context of the debate on so-called 'climate justice'.[11] References to both climate justice and human rights were eventually included in the text of the 2015 Paris Agreement,[12] which became the first international environmental treaty to explicitly mention states' obligations under human rights law.[13]

This paper analyzes these developments, looking at progress made thus far, as well as obstacles standing on the way to greater interplay and cooperation between the

5 See, for instance, Ole W. Pedersen, 'The Janus-Head of Human Rights and Climate Change: Adaptation and Mitigation', 80(4) *Nordic Journal of International Law* (2011) 403-423; Bridget Lewis, 'Balancing Human Rights in Climate Policies', in Ottavio Quirico and Mouloud Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, 2016) 39-52.

6 See, for instance, Marjan Peeters and Sandra Nóbrega, 'Climate-Change-Related Aarhus Conflicts: How Successful Are Procedural Rights in EU Climate Law?', 23 *Review of European, Comparative & International Environmental Law* (2014) 354-366.

7 As noted in Savaresi, 'Climate Change and', *supra* note 1.

8 See *supra* note 5 and *infra* note 11.

9 See HRC, 'Human Rights and Climate Change', Doc. A/HRC/Res/7/23 (2008); HRC, 'Human Rights and Climate Change', Doc. A/HRC/Res/10/4 (2009); HRC, 'Human Rights and Climate Change', Doc. A/HRC/Res/18/22 (2011); HRC, 'Human Rights and Climate Change', Doc. A/HRC/Res/26/27 (2014); HRC, 'Human Rights and Climate Change', Doc. A/HRC/Res/29/15 (2015); HRC, 'Human Rights and Climate Change', Doc. A/HRC/RES/32/33 (2016); HRC, 'Human Rights and the Environment', Doc. A/HRC/34/20 (2017); and HRC 'Human Rights and Climate Change', Doc. A/HRC/RES/38/4 (2018).

10 A summary of the activities of the Office of the High Commissioner is available at <www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx> (visited 1 July 2019).

11 The literature on this matter is vast: see Simon Caney, 'Cosmopolitan Justice, Responsibility, and Global Climate Change' (2005) 18 *Leiden Journal of International Law* 747; Stephen Humphreys, 'Conceiving Justice: Articulating Common Causes in distinct Regimes' in Stephen Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press, 2009) 299-319; Friedrich Soltau, *Fairness in International Climate Change Law and Policy* (Cambridge University Press, 2009); Jutta Brunnée, 'Climate Change, Global Environmental Justice and International Environmental Law', *Environmental Law and Justice in Context* (Cambridge University Press, 2009) 316-332; Eric A. Posner and David Weisbach, Climate Change Justice (Princeton University Press, 2010); Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press, 2014).

12 Paris Agreement to the United Nations Framework Convention on Climate Change, Paris, 12 December 2015, in force 4 November 2016; 55 *International Legal Materials* (2016) 740.

13 Preamble of the Paris Agreement.

climate change and the human rights regimes. The paper starts by looking at the treatment of climate change by human rights bodies. It continues by considering the approach to human rights adopted by parties to the climate regime. Lastly, the use of human rights arguments in climate change litigation is reviewed. The conclusion offers some reflections on the future of the relations between the human rights and climate change regimes.

2 States' human rights obligations and climate change

Building on the well-established body of literature on human rights and the environment,[14] much recent scholarship has investigated the interplay between human rights and climate change law.[15] This literature points to areas where climate change and human rights law obligations may enter into conflict, or rather, be mutually supportive.[16] This scholarship also highlights how 'human rights occupy much of the space of justice discourse' and, as such, represent an essential 'term of reference'[17] to address the complex and multi-layered corrective, substantive, procedural and formal justice claims raised by climate change law.[18]

The advantages of taking a human rights approach to the matter of climate change are, eminently, that to translate climate change concerns in terms of obligations owed directly to individuals; and, relatedly, that to provide access to remedies that may not otherwise be available.[19]

[14] See, for instance, Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment', 28 *Stanford Journal of International Law* (1991) 103-138; Alan Boyle and Michael R Anderson, *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1998); Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental Law Review* (2007) 471-511; Dinah Shelton, *Human Rights and the Environment* (Edward Elgar, 2011).

[15] See, for instance, Special Issue, 38 *Georgia Journal of International and Comparative Law* (2009); Humphreys, *Human Rights and, supra* note 11; Siobhan McInerney-Lankford, Mac Darrow and Lavanya Rajamani, 'Human Rights and Climate Change. A Review of the International Legal Dimensions' (World Bank 2011), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/2291/613080PUB0Huma158344B09780821387207.pdf?sequence=1&isAllowed=y> (visited 1 July 2019); Quirico and Boumghar, *Climate Change and, supra* note 5; Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Handbook on Human Rights and Climate Governance* (Routledge, 2018).

[16] See, for instance, Daniel Bodansky, 'Introduction: Climate Change and Human Rights: Unpacking the Issues', 38 *Georgia Journal of International and Comparative Law* (2009) 511-524; Pedersen, 'The Janus-Head of', *supra* note 5; Savaresi, 'Climate Change and', *supra* note 1.

[17] Stephen Humphreys, 'Competing Claims: Human Rights and Climate Harms' in Humphreys, *Human Rights and, supra* note 11, at 37.

[18] See Lavanya Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change', 22(3) *Journal of Environmental Law* (2010) 391-429 at 393.

[19] Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2017) 299; Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights', 67(4) *International & Comparative Law Quarterly* (2018) 759-777 at 765; Savaresi, 'Climate Change and', *supra* note 1, at 34.

Together with powerful advocacy by civil society – most crucially, by former UN High Commissioner on Human Rights, Mary Robinson[20]– these scholarly musings have prompted both the parties to the climate regime and human rights bodies to consider how the interplay between state obligations in this area ought to be managed.

Over the last decade, a series of HRC resolutions have stressed the potential of human rights obligations to 'inform and strengthen' climate change law- and policy-making, by 'promoting policy coherence, legitimacy and sustainable outcomes'.[21] The HRC has also called upon states to integrate human rights in their climate actions,[22] and encouraged its special procedures mandate holders to consider the issue within their respective mandates.[23]

The practice of international human rights bodies has been greatly informed by the work of Professor John Knox,[24] who served as the first UN Special Rapporteur on human rights and the environment between 2012 and 2018.[25] Knox was not mandated to formulate new human rights obligations, but, rather, to map existing practices, highlight the best ones,[26] promote, clarify and report on the realization of human rights obligations relating to the environment.[27] Knox's reports have mapped and systematically interpreted state practice concerning human rights and the environment, bringing about much needed clarity on the contents of state obligations, and highlighting emerging common trends.

Special Rapporteur Knox has looked specifically at the implications of states' human rights obligations in relation to climate change.[28] His report on climate change notes how obligations associated with the protection of substantive human rights – such as the right to life, adequate housing, food and the highest attainable standard of

[20] The Mary Robinson Foundation – Climate Justice, 'Principles of Climate Justice' (2015), available at <https://www.mrfcj.org/wp-content/uploads/2015/09/Principles-of-Climate-Justice.pdf> (visited 28 January 2019).

[21] See *supra* note 9.

[22] HRC Res. 32/33 (2016) at 9; and HRC Res. 34/20 (2017) at 5.

[23] HRC Res. 26/27 (2014) at 7.

[24] See, for instance, John H. Knox, 'Diagonal Environmental Rights' in Sigmund Skogly and Mark Gibney (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010) 82-103; John H. Knox, 'Climate Change and Human Rights Law', 50(1) *Virginia Journal of International Law* (2009) 163-218; John H. Knox, 'Linking Human Rights and Climate Change at the United Nations', 33 *Harvard Environmental Law Review* (2009) 477-498; John H. Knox, 'Climate Ethics and Human Rights', 5 *Journal of Human Rights and the Environment* (2014) 22-34; John H. Knox, 'Human Rights Principles and Climate Change' in Cinnamon Carlarne, Kevin R. Grey and Richard Tarasofsky (eds), *Oxford Handbooks in International Climate Change Law* (Oxford University Press, 2016) 213.

[25] Prof Knox was initially appointed to serve as the Independent Expert (2012-2015) and subsequently as Special Rapporteur (2015-2018).

[26] As mandated in HRC 'Human Rights and the Environment', Res. 19/10 (2012).

[27] As mandated in HRC 'Human Rights and the Environment', Res. 28/11 (2015).

[28] OHCHR, 'Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment. Focus report on human rights and climate change' (2014), available at <https://www.ohchr.org/Documents/Issues/Environment/Mappingreport/ClimateChangemapping15-August.docx> (visited 11 February 2019); and OHCHR, 'Report of the Special Rapporteur', *supra* note 4.

health – require that states take both preventative measures to avert the impacts of climate change on the enjoyment of human rights; and remedial measures to address such impacts, once they have occurred.[29] These obligations entail taking action, on the one hand, to reduce emissions, and, on the other, to adapt to changes that are foreseeable, such as rising sea levels, or increased floods, wildfires, etc. Substantive human rights obligations furthermore require that states engage in international cooperation to deal with the global and transboundary implications of climate change.[30]

Procedural obligations associated with the enjoyment of substantive rights, instead, require that states assess the impacts of both climate change and of measures to tackle climate change, and that they make such information public.[31] Equally, states must provide access to remedies for climate-related human rights violations, which might include monetary compensation and injunctive relief.[32] Finally, obligations associated with the right to take part in the conduct of public affairs require that states facilitate public participation in decision-making over action to tackle climate change, especially by those likely to be affected.[33] These obligations entail that states protect individuals and groups against abuse by third parties, including business enterprises, by taking steps to 'prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'.[34]

While states generally enjoy a certain discretion to strike a balance between legitimate societal interests, Special Rapporteur Knox has pointed out that the balance struck cannot be 'unreasonable or result in unjustified, foreseeable infringements of human rights.'[35] In assessing whether a balance is reasonable, relevant factors include whether the decision-making process satisfies the procedural obligations described above; whether its outcomes accord with national and international standards; and whether they are not retrogressive and non-discriminatory. In this connection, states owe specific obligations to members of groups particularly vulnerable to harm, such as women, children and indigenous peoples.[36]

Together with other HRC special procedures mandate holders, the Special Rapporteur has actively sought to inform the drafting and implementation of the Paris

[29] *Ibid.* at 33.
[30] *Ibid.* at 43-44.
[31] *Ibid.* at 54-55.
[32] *Ibid.* at 63.
[33] *Ibid.* at 59.
[34] *Ibid.* at 66; and OHCHR, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', Doc. A/HRC/17/31 (2011), annex, principle 1.
[35] OHCHR, 'Report of the Special Rapporteur', *supra* note 4, at 67; and OHCHR, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', Doc. A/HRC/37/59 (2018) para. 33(e).
[36] OHCHR, 'Report of the Special Rapporteur', *supra* note 4, at 81; and OHCHR, 'Report of the Special', *supra* note 35, at principles 14-15.

Agreement.[37] The OHCHR has also taken the unprecedented initiative to make formal submissions to the treaty bodies of the climate regime on matters such as gender, finance, capacity-building and the so-called sustainable development mechanism.[38]

Human rights bodies have furthermore started to monitor and sanction human rights violations associated with climate change and the implementation of climate change response measures.[39] For example, in its concluding observations on the report of Bangladesh, the UN Committee on Economic, Social and Cultural Rights recommended that the state ensure that strategies and action plans on climate change and disaster response and risk reduction are formulated and implemented on the basis of human rights, with the meaningful participation of affected communities and civil society.[40] Similarly, in its concluding observations on the report of Argentina, the Committee recommended that the state reconsider the large-scale exploitation of unconventional fossil fuels, and promote alternative and renewable energy sources and reduce greenhouse gas emissions.[41]

These developments show that international human rights bodies increasingly practice systemic integration in the interpretation of obligations under the human rights and climate change regimes. This approach is consistent with the interpretative principle of systemic integration enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[42] According to the latter principle, when undertaking new obligations, states must interpret these in a way that is mutually supportive, rather than conflicting with their obligations under other instruments.[43] More generally, these developments clearly show that human rights law has a role to play in the fight against climate change. The next section considers what parties to the climate regime have made of human rights bodies' activities and suggestions.

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[37] See, for instance, 'Statement of the United Nations Special Procedures Mandate Holders on the occasion of the Human Rights Day Geneva, Climate Change and Human Rights' (10 December 2014), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&LangID=E>; 'Joint statement by UN Special Procedures on the occasion of World Environment Day: Climate Change and Human Rights' (5 June 2015), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E>; and 'COP21: "States' human rights obligations encompass climate change" – UN expert' (Statement of the UN Special Rapporteur on Human Rights and the Environment at COP21) (3 December 2015), available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?Newsid=16836&Langid=E> (all visited 11 February 2019).

[38] All submissions are available at <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/UNFCCC.aspx> (visited 11 May 2017).

[39] CIEL, 'States' Human Rights Obligations in the Context of Climate Change. Synthesis Note on the Concluding Observations and Recommendations on Climate Change Adopted by UN Human Rights Treaty Bodies' (CIEL 2018), available at <http://www.ciel.org/wp-content/uploads/2018/01/HRTBs-synthesis-report.pdf>. (visited 2 March 2018).

[40] UN Committee on Economic, Social and Cultural Rights, 'Concluding observations on the initial report of Bangladesh', Doc. E/C.12/BGD/CO/1 (2018) at 14.

[41] UN Committee on Economic Social and Cultural Rights, 'Concluding observations on the fourth periodic report of Argentina', Doc. E/C.12/ARG/CO/4 (2018) at 14.

[42] Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331.

[43] As argued in Savaresi, 'Climate Change and, *supra* note 1, at 35.

3 The climate regime and human rights

The first mention of human rights obligations in the climate regime predates the adoption of the Paris Agreement. In 2010 the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC)[44] acknowledged the need to ensure compatibility between measures to address climate change and the protection of human rights, by asserting that 'parties should, in all climate change related actions, fully respect human rights'.[45] In the same decision, Parties also took note of HRC Resolution 10/4,[46] which includes a list of the human rights most affected by climate change[47] and calls for all relevant human rights special procedures to give consideration to the issue of climate change within their respective mandates.[48] While path-breaking, this COP decision did not address, but rather sidestepped the concern that not all parties to the climate regime have ratified the same human rights treaties, and, consequently, that states' obligations in this connection may vary to a certain extent. Furthermore, the parties avoided to specifically engage with the question of how states should concretely take human rights into account in construing, developing, and operationalizing the commitments enshrined in the climate treaties.[49]

In principle, parties to the climate regime could draft and interpret rules to address the impacts of climate change and of climate change response measures by building upon substantive and procedural obligations included in human rights instruments. Furthermore, international, regional and national human rights bodies may be used as institutionalized pathways to monitor and sanction human rights violations associated with climate change and the implementation of climate change response measures.[50] To date, neither of these issues has specifically been addressed in formal decisions by parties to the climate regime, ostensively for lack of political will to do so.

Some references to human rights have nevertheless been made, either implicitly or explicitly, in guidance adopted by the climate regime's treaty bodies in areas where potential tensions with the protection of human rights are particularly evident, like

[44] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <http://unfccc.int> ('UNFCCC').

[45] 'The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention', UNFCCC Dec. 1/CP.16 (2010), Appendix I, 2 (a).

[46] *Ibid.* at Preamble, para. 7.

[47] HRC Res. 10/4, preamble.

[48] *Ibid.* at para. 3

[49] As noted also in Annalisa Savaresi, 'The Role of REDD in Harmonising Overlapping International Obligations' in Erkki Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law. A Global Perspective* (Springer, 2013) 391-418 at 415.

[50] As suggested also in Annalisa Savaresi, 'The Paris Agreement: A New Beginning?', 34(1) *Journal of Energy & Natural Resources Law* (2016) 16-26 at 23.

REDD+[51] and climate finance.[52] There remains, however, considerable ambiguity, as to whether these references may be regarded as actual human rights conditionalities for the disbursement of finance, and/or the tradeability of carbon credits.[53]

These matters came to the fore in the lead-up to the adoption of the Paris Agreement, when the inclusion of references to human rights in the text of the treaty became the subject of intense debate.[54] Some parties supported the inclusion of an all-encompassing reference, such as: 'All parties … shall ensure respect for human rights and gender equality in the implementation of the provisions of this Agreement'.[55] Other parties expressed reservations, maintaining that not all states have ratified international or regional human rights treaties.[56]

The negotiating text of the Paris Agreement included multiple references to human rights, both in the preamble and in the prescriptive part of the treaty.[57] Eventually, only one made it into the final text. The preamble of the Paris Agreement specifies that Parties 'should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights'. The preamble also lists in this connection: 'the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable

[51] 'The Cancun Agreements', *supra* note 45, Appendix I, 2.a, where reference is made to the fact that REDD+ actions 'complement or are consistent with the objectives of national forest programmes and relevant international Conventions and agreements'. See also UN-REDD Programme, 'Social and Environmental Principles and Criteria', UN Doc. UNREDD/PB8/2012/V/1 (2012) 2; UN-REDD Programme, 'Guidelines on Free, Prior and Informed Consent' (2012); and UN-REDD Programme, 'Legal Companion to the UN-REDD Programme Guidelines on FPIC' (2012). For an analysis, see Annalisa Savaresi, 'The Human Rights Dimension of REDD', 21(2) *Review of European Comparative & International Environmental Law* (2012) 102-113; Annalisa Savaresi, 'REDD+ and Human Rights: Addressing Synergies between International Regimes' (2013) 18(3) *Ecology and Society* (2013) 5-13.

[52] See, for instance, Adaptation Fund, 'Environmental and Social Policy' (2013), available at <https://www.adaptation-fund.org/wp-content/uploads/2013/11/Amended-March-2016_-OPG-ANNEX-3-Environmental-social-policy-March-2016.pdf> at 15; and Green Climate Fund, 'Guiding Framework and Procedures for Accrediting National, Regional and International Implementing Entities and Intermediaries, Including the Fund's Fiduciary Principles and Standards and Environmental and Social Safeguards', Doc. GCF/B.07/02 (2014), available at <https://www.greenclimate.fund/documents/20182/24943/GCF_B.07_02_-_Guiding_Framework_for_Accreditation.pdf/a855fdf1-e89b-47fb-8a41-dfa2050d38b9> at 1.7. For an analysis, see Liane Schalatek and OHCHR, 'Promoting Rights-Based Climate Finance for People and Planet' (Henrich Boell Stiftung, 2017), available at <https://us.boell.org/2017/11/01/promoting-rights-based-climate-finance-people-and-planet-0> (all visited 11 February 2019).

[53] As noted also in Annalisa Savaresi, 'The Legal Status and Role of Safeguards' in Christina Voigt (ed.), *Research Handbook on REDD+ and International Law* (Edward Elgar Publishing, 2016) 126-156.

[54] Savaresi, 'The Paris Agreement', *supra* note 50, at 25.

[55] UNFCCC, 'Negotiating Text' (12 February 2015), available at <https://unfccc.int/files/bodies/awg/application/pdf/negotiating_text_12022015@2200.pdf> (visited 11 February 2019) at 12bis.

[56] As reported by Human Rights Watch, 'Human Rights in Climate Pact Under Fire' (7 December 2015), available at <https://www.hrw.org/news/2015/12/07/human-rights-climate-pact-under-fire> (visited 5 December 2016).

[57] For an overview of references to human rights in the Paris Agreement negotiating text, see Annalisa Savaresi and Jacques Hartmann, 'Human Rights in the 2015 Agreement' (Legal Response Initiative, 2015), available at <http://legalresponseinitiative.org/wp-content/uploads/2015/05/LRI_human-rights_2015-Agreement.pdf> (visited 2 January 2019).

situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity'.[58]

This preambular reference draws attention to Parties' obligations under treaties they have ratified already, or may ratify in future, rather than foreshadowing new ones. Even within this limited remit, the reference to human rights in the Paris Agreement is not devoid of legal consequence. Preambular text carries political and moral weight. By forging an explicit link with human rights instruments, the Paris Agreement's preamble engenders an expectation that Parties will take into account their human rights obligations when they adopt measures to tackle climate change. The Paris Agreement's reference to human rights may therefore be viewed as a reminder to practice systemic integration in the interpretation of Parties' obligations under that treaty.[59]

The operative part of the Paris Agreement also makes implicit reference to human rights-related considerations, such as gender-responsiveness, public participation and access to information.[60] These references have implications for the operationalization of newly established bodies and processes under the climate regime, such as the Local Communities and Indigenous Peoples Platform,[61] the Paris Committee on Capacity-building,[62] and the Gender Action Plan.[63] Albeit timid, these textual references are an entry point for greater cross-fertilization between the climate change and the human rights regimes,[64] especially in relation to climate finance and the vexed matter of so-called loss and damage associated with climate change.

The first opportunity to put this potential to the test came with negotiations on the so-called rulebook of the Paris Agreement – i.e. the set of guidance concerning the implementation of the treaty and the operationalization of the new procedures established therein, including, for instance, the contents and the processes for the submission of Parties' nationally determined contributions. Several suggestions were made to specifically refer to human rights in the rulebook, for instance in the context of guidance concerning mitigation and how Parties are planning to meet their nationally determined contributions in a way that respects, protects and fulfils human rights.[65]

[58] Preamble of the Paris Agreement.
[59] As argued in Savaresi, 'The Paris Agreement', *supra* note 50, at 23; and Savaresi, 'Climate Change and', *supra* note 1, at 43.
[60] Paris Agreement, Arts 7(5), 11(2) and 12.
[61] 'Adoption of the Paris Agreement', UNFCCC Dec. 1/CP.21 (2016) 135–136; and 'Report of the Conference of the Parties on its Twenty-second Session, Held in Marrakech from 7 to 18 November 2016', UNFCCC Doc. FCCC/CP/2016/10 (2017) 163–167.
[62] ÚNFCCC Dec. 1/CP.21, at para. 71.
[63] 'Establishment of a Gender Action Plan', UNFCCC Dec. 3/CP.23 (2018).
[64] Savaresi, 'Climate Change', *supra* note 1, at 34.
[65] For a discussion, see Sébastien Duyck et al, 'Human Rights and the Paris Agreement's Implementation Guidelines: Opportunities to Develop a Rights-Based Approach', 12 *Carbon & Climate Law Review* (2018) 191-202.

Human rights bodies certainly tried to keep the pressure on. In 2018, the High Commissioner for Human Rights issued a letter to party delegations about the importance of incorporating human rights in the Paris Agreement's rulebook[66] and for the first time attended the COP in person. Similarly, the HRC special procedures mandate holders issued a joint statement, calling for parties to integrate human rights considerations into the rulebook.[67]

Their requests, however, went unheard, and human rights language is absent from the Paris Agreement's rulebook. Some implicit references may nevertheless be found in the guidance concerning the preparation of Parties' nationally determined contributions, which mentions 'domestic institutional arrangements, public participation and engagement with local communities and indigenous peoples, in a gender-responsive manner'.[68] Equally, adaptation communications might include information 'on gender-responsive adaptation action and information on traditional knowledge, knowledge of indigenous peoples and local knowledge systems related to adaptation'.[69]

These rather meagre and cautious references have engendered much frustration amongst civil society and human rights activists.[70] Nevertheless, references to human rights in the work of the treaty bodies have in the meantime continued to appear, for instance in relation to the Local Communities and Indigenous Peoples Platform.[71] Some Parties have furthermore reportedly expressed support for the establishment of a human rights focal point at the UNFCCC Secretariat.[72]

While hardly breakthroughs, these developments show that the movement towards greater integration of human rights considerations in the climate regime continues, even though not at the speed desired by civil society activists.

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66 'Open letter of the UN High Commissioner for Human Rights on integrating human rights in climate action' (21 November 2018), available at <https://www.ohchr.org/Documents/Issues/ClimateChange/OpenLetterHC21Nov2018.pdf> (visited 11 February 2019).

67 'Joint statement of the United Nations Special Procedures Mandate Holders on the occasion of the 24th Conference of the Parties to the UNFCCC' (6 December 2018), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23982&LangID=E> (visited 11 February 2019).

68 'Further guidance in relation to the mitigation section of decision 1/CP.21', UNFCCC Dec. 4/CMA.1 (2018), Annex I, 4.a.

69 'Further guidance in relation to the adaptation communication, including, inter alia, as a component of nationally determined contributions, referred to in Article 7, paragraphs 10 and 11, of the Paris Agreement', UNFCCC Dec. 9/CMA.1 (2018), Annex, h.

70 See, for instance, Center for International Environmental Law (CIEL), 'Katowice COP24 Outcome Incompatible with Paris Agreement' (15 December 2018), available at <https://www.ciel.org/news/katowice-cop24-outcome-incompatible-with-paris-agreement/> (visited 30 January 2019); Global Forest Coalition, 'Implications of Katowice: Where Human Rights Were Ignored While Big Business Captured the Negotiations' (29 January 2019), available at <https://globalforestcoalition.org/implications-of-katowice-where-human-rights-were-ignored-while-big-business-captured-the-negotiations/> (visited 30 January 2019).

71 'Local Communities and Indigenous Peoples Platform', UNFCCC Dec. 2/CP.24 (2018).

72 CIEL, 'Report from the Katowice Climate Conference Promoting Human Rights in Climate Action at COP-24' (December 2018), available at <https://www.ciel.org/reports/public-briefing-notes-to-enhance-human-rights-at-the-katowice-climate-conference-cop24/> (visited 30 January 2019).

4 Climate change litigation and human rights

Beyond international regimes, human rights arguments are increasingly used in climate change litigation to request that both states and non-state actors take action to address climate change and its impacts. As noted above, the use of human rights arguments to address gaps and provide remedies where other areas of the law do not is not new. So, it is hardly surprising that human rights arguments are increasingly used in climate change litigation.

On the one hand, since the adoption of the Paris Agreement, more and more litigants around the world have used human rights law arguments to suggest that states should do more to pre-empt catastrophic climate change.[73] On the other, human rights arguments have been used to seek redress for harm to persons, property and/or the environment associated with climate change.[74] These two scenarios are looked at in further detail below.

4.1 Pre-empting catastrophic climate change

In recent years courts and human rights bodies have increasingly been asked to consider the human rights implications of states' action (for instance, licenses for oil extraction[75]) or inaction (insufficient ambition in targets enshrined in law and policy being one example[76]) on climate change. Two landmark decisions taken in 2018 have shown that, when properly framed, human rights arguments may be successful.

In the first, a group of Colombian youth successfully challenged the Colombian Government for failure to take action to counter deforestation in the Amazon, on the basis of human rights – including those to a healthy environment, life, and health – enshrined in the Colombian Constitution, as well as international treaties. As a result, a Colombian court ordered the government to take action to tackle deforestation in the Amazon, and to involve the applicants in the related decision-making process.[77]

Similarly, in the Netherlands, the Urgenda Foundation, together with more than 800 Dutch citizens, successfully sued the Dutch Government for not taking suf-

[73] See the review of litigation carried out in Savaresi and Auz, 'Climate Change Litigation', *supra* note 1.

[74] See the reportage by the Climate Liability News, available at <http://www.climateliabilitynews.org> (visited 2 November 2018).

[75] *Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy,* Case no. 16-166674TVI-OTIR/06 (Oslo District Court) (4 January 2018); English translation available at <https://elaw.org/system/files/attachments/publicresource/OsloDistrictCt_20180104.pdf?_ga=2.190227816.2102297674.1551362906-954583716.1551362906> (visited 2 February 2019).

[76] *The State of the Netherlands v Urgenda Foundation,* The Hague Court of Appeal (9 October 2018), case 200.178.245/01 (English translation), available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610> 43 (visited 12 February 2019).

[77] STC4360-2018 (4 April 2018), Supreme Court of Colombia, case 11001-22-03-000-2018-00319-01 (English translation) 22.

ficiently ambitious action to reduce emissions.[78] While in 2010 a court of first instance had set aside the human rights arguments put forward by the applicants on procedural grounds, in 2018 the Court of Appeal of the Hague[79] noted that, by not taking adequate action to reduce emissions, the state had failed to fulfil its duty of care pursuant to, amongst others, the right to life and the right to respect for private and family life under the European Convention on Human Rights.[80]

These victories have encouraged litigants and human rights advocates to push the boundaries even further. For example, in 2018, the UN Special Rapporteur on Human Rights and the Environment, David Boyd, unprecedentedly intervened in a case before an Irish court,[81] drawing attention to the state's 'clear, positive and enforceable obligations' to protect its citizens against the infringement of human rights caused by climate change.[82]

Applicants are also becoming more ambitious in their demands. The so-called People's Climate Case sought to challenge lack of ambition in European Union (EU) climate legislation, on the basis of human rights enshrined in the Charter of Fundamental Rights of the EU,[83] including in relation to subjects living outside of the territory of the EU.

These developments clearly show not only that human rights arguments are being increasingly deployed, but also that demands associated with the protection of human rights are becoming bolder. Far from targeting only actual harm to persons and/or property, in fact, human rights arguments are deployed to sanction harm that is predicted to happen in future – and thus affect future generations – or harm occurring outside of the bounds of a state's territory. The next sections look more closely at how these arguments are potentially revolutionary and how they fit into the bigger picture of climate change litigation.

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78 *Urgenda Foundation v The State of the Netherlands,* District Court of The Hague (24 June 2015), case C/09/456689/ HA ZA 13-1396 (English translation), available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196> (visited 12 February 2019).

79 *The State of the Netherlands v Urgenda Foundation,* The Hague Court of Appeal (9 October 2018), case 200.178.245/01 (English translation), available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610> 43 (visited 12 February 2019).

80 European Convention on Human Rights, Rome, 4 November 1950, in force 3 September 1953, <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer> (visited 15 February 2019).

81 Climate Case Ireland, available at <https://www.climatecaseireland.ie>.

82 Special Rapporteur on Human Rights and the Environment, 'Statement on the Human Rights Obligations related to Climate Change with a Particular Focus on the Right to Life' (2018), available at <https://www.ohchr.org/Documents/Issues/Environment/FriendsIrishEnvironment25Oct2018.pdf> (visited 29 January 2019).

83 Charter of Fundamental Rights of the European Union, 55 OJ C 326/02 (2012) at 391.

4.2 Seeking redress for harm to persons and property caused by climate change

While human rights remedies are ill-suited to address environmental damage alone, they potentially provide an avenue to address personal injury and property damage. Qualifying the effects of climate change as human rights violations poses a series of technical obstacles, including disentangling complex causal relationships and projections about future impacts.[84] Yet, these obstacles are not insurmountable.[85]

The suitability of human rights law to address harm caused by climate change depends upon whether a victim can substantiate a claim that a duty bearer has contributed to climate change, in such a way as to amount to a human rights violation.[86] In this regard, Special Rapporteur Knox has persuasively argued that, as scientific knowledge improves, tracing causal connections between particular emissions and resulting harms is less difficult.[87]

A landmark advisory opinion delivered by the Inter-American Court of Human Rights in 2017 suggested that states have specific obligations to undertake positive action to secure the protection against human rights violations associated with environmental harm beyond their territorial boundaries.[88]

The Court considered that any harm that can directly or indirectly have an effect on the enjoyment of substantive human rights is to be considered significant in this connection.[89] From this obligation to prevent significant damage, a series of specific obligations arise, which include a general obligation to regulate, supervise and monitor activities carried by state or private entities under a state's jurisdiction that can lead to environmental damage.[90] As seen above, states' well-established obligation to address environmental harm that interferes with the full enjoyment of human rights can be interpreted in a way to extend to human rights violations caused by climate change impacts. Most saliently, this includes harm caused by private actors.[91]

Corporations' own responsibilities for human rights breaches associated with climate change have increasingly come under the spotlight. Corporations, rather than

[84] OHCHR), 'Report on the Relationship', *supra* note 2, at 70.
[85] OHCHR, 'Report of the Special', *supra* note 4, at 41.
[86] See Savaresi and Hartmann, 'Using Human Rights', *supra* note 1, at 2.
[87] OHCHR, 'Report of the Special', *supra* note 4, at 36-37.
[88] Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance, OJ L330/1. See also Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ('Malabo Protocol'), Malabo, 27 June 2014, not yet in force, Art. 46.
[89] See Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 November 2017, para. 140.
[90] *Ibid.* at paras 145-150.
[91] Savaresi and Hartmann, 'Using Human Rights', *supra* note 1.

states, are responsible for the lion's share of global greenhouse gas emissions.[92] Because of this reason, both state and non-state actors around the world are increasingly suing corporations for harm associated with climate change, using human rights arguments, together with arguments construed on the basis of tort law.[93]

However, this is an area where human rights law is not clear-cut. The so-called business and human rights regime hinges on the state duty to protect, the corporate responsibility to respect, and access to remedies, which form the three pillars of the UN Guiding Principles on Business and Human Rights.[94] While these principles are commonly regarded as soft law, recent developments provide some evidence that the corporate responsibility to respect human rights has gained traction in both national and international law.[95]

As testified by the ongoing negotiations on an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,[96] and by developments in national law,[97] and decisions by national[98] and international courts, in recent years much attention has been dedicated to clarifying corporate responsibility vis-à-vis the protection of human rights.

These arguments are being tested in the first ever inquiry on the responsibility of the world's largest corporate emitters – dubbed the 'Carbon Majors' and including the likes of BP, Chevron, Exxon and Shell – for human rights violations or threats

[92] See Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010', 122(1-2) *Climatic Change* (2014) 229-241; Peter C. Frumhoff, Richard Heede and Naomi Oreskes, 'The Climate Responsibilities of Industrial Carbon Producers', 132(2) *Climatic Change* (2015) 157-171; and Brenda Ekwurzel et al., 'The Rise in Global Atmospheric CO2, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers' 144(4) *Climatic Change* (2017) 579-590.

[93] See the reportage: Climate Liability News, 'Exxon Climate Investigation' (26 June 2019), available at <https://www.climateliabilitynews.org/category/exxon-climate-investigation/> (visited 12 February 2019).

[94] OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Doc. A/HRC/17/31 (2011).

[95] See discussion in Ioana Cismas and Sarah Macrory, 'The Business and Human Rights Regime under International Law: Remedy without Law?' in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill, 2018) 224-260.

[96] The process was initiated by the Human Rights Council in 2014, with Resolution 26/9, 'Elaboration of an International Legally Binding Instrument on Transnational and other Business Enterprises with respect to Human Rights', Doc A/HRC/RES/26/9. See also Human Rights Council, 'Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx> (visited 1 July 2019).

[97] See the review of legislation in Claire Methven O'Brien and Sumithra Dhanarajan, 'The Corporate Responsibility to Respect Human Rights: A Status Review', 29(4) *Accounting, Auditing and Accountability Journal* (2015) 542-567.

[98] See, for instance, Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20; Rechtbank Den Haag 1 May, C/09/540872 / HA ZA 17-1048 [2019 ECLI:NL:RBDHA:2019:4233.]

thereof resulting from the impacts of climate change.[99] The inquiry was initiated before the Philippine Human Rights Commission, at the request of a group of Filipino citizens and NGOs, following the widespread loss of life and harm to property and persons associated with the increasingly extreme weather events in the Philippines. The inquiry was established to assess the responsibility of the world's largest corporate emitters for human rights violations, or threats thereof, resulting from the impacts of climate change.[100] The petitioners based their arguments on the human rights obligations enshrined in both national and international law, suggesting that these instruments impose specific obligations on the Carbon Majors.[101]

The inquiry is expected to conclude in 2019. Should the Philippine Human Rights Commission find that the Carbon Majors' are responsible for human rights violations resulting from the impacts of climate change, this would be a primer and could have repercussions on the use of human rights arguments in ongoing climate change litigation against the Carbon Majors elsewhere. For instance, Friends of the Earth (Netherlands), six NGOs and around 400 citizens have recently announced their plans to sue Shell for breaches of the duty of care associated with its contribution to climate change and its continued investments in fossil fuels. Similar to *Urgenda*, the applicants are planning to rely, amongst others, on the right to life and the right to respect for private and family life, home and correspondence recognized by the European Convention of Human Rights.[102]

The outcome of the Carbon Majors inquiry may therefore resonate well beyond the Philippines. For the time being, the inquiry has already set a significant precedent, by showing that a national human rights commission may look into the responsibility of corporate actors headquartered outside of the state where it operates. The inquiry's findings may furthermore establish that corporations may be held responsible for human rights violations associated with the impacts of climate change, marking another milestone in the history of climate change litigation worldwide.

[99] Republic of the Philippines Commission on Human Rights, Case No: CHR-NI-2016-0001, Petition requesting for investigation of the responsibility of the Carbon Majors for human rights violations or threats of violations resulting from the impacts of climate change (2015), available at <http://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-and-Annexes/CC-HR-Petition.pdf> (visited 2 November 2018).

[100] Decision of Philippines Human Rights Commission to assert its jurisdiction to investigate the petition, see National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People (2017), available at <http://www.greenpeace.org/seasia/ph/PageFiles/735291/Press%20Release%20(NICC%20Press%20Con%2012%20Dec.%202017).docx> (visited 2 November 2018).

[101] Annalisa Savaresi, Ioana Cismas and Jacques Hartmann, 'Amicus Curiae Brief: Human Rights and Climate Change' (Asia Pacific Forum of National Human Rights Institutions & the Global Alliance of National Human Rights Institutions 2017), available at <http://www.asiapacificforum.net/media/resource_file/APF_Paper_Amicus_Brief_HR_Climate_Change.pdf> (visited 2 November 2018) at 6.

[102] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 30, Arts. 2 and 8.

5 Conclusion

The relationship between human rights and climate change law is multilayered. At the international level, states' human rights obligations concerning both the impacts of climate change and response measures have pervasive legal ramifications. With the adoption of the Paris Agreement, these ramifications have been put in the spotlight. The agreement is potentially a game changer, and has already opened up new avenues to improve coordination and address synergies with the human rights regime. Human rights bodies have underscored the potential for systemic integration, and there is evidence that, at least in some cases, institutions in the climate regime have progressively to taken human rights concerns into account.

At the national level, human rights law provides declaratory relief to name and shame human rights abusers, and has already been used to successfully argue that states should do more to tackle climate change. On the impacts of climate change, however, human rights remedies offer limited, if any, compensatory relief, or means to deter further harm, and clearly are no replacement for liability for climate change impacts. Yet, as happened in other areas of environmental law prior to this, successful human rights complaints can help to bring about a change in attitude by courts and law-makers.[103] In this connection, human rights law can contribute to a shift in legal culture to deal with one of the most intractable challenges yet to face humankind.[104]

Moving ahead, much more could be done: at the international level, institutional cooperation could be systematized and become instrumental to the streamlining of human rights considerations into the climate regime. Human rights bodies may be systematically used as institutionalized pathways to monitor and sanction human rights violations associated with climate change and the implementation of climate change response measures. At the national level, human rights arguments may be used to put pressure on both state and corporate actors, both to increase ambition on climate change and to redress harm caused by climate change.

This paper has shown that the genie is already out of the bottle. What the future may hold, however clearly depends, on the one hand, on the willingness of state and institutional actors to build bridges and use these; and, on the other, on judges' willingness to recognize that human rights and climate change obligations are mutually reinforcing and should be read alongside one another. In this, as well as in many other such instances before, where there is a will there is a way.

[103] As suggested, for instance, in Boyle, 'Human Rights or', *supra* note 14, at 642.
[104] As argued in Savaresi and Hartmann, 'Using Human Rights', *supra* note 1, at 16.

Environmental Human Rights Obligations in the Convention on Biological Diversity

Konstantia Koutouki[1] *and Frederic Perron-Welch*[2]

1 Introduction

The full enjoyment of human rights depends on a healthy, sustainable environment, which includes biodiversity. Biodiversity ensures the ongoing provision of ecosystem services that underlie the human rights to life, health, food and water. As such, the degradation and loss of biodiversity undermines the enjoyment of human rights and deprives people of key components of human well-being.

The Convention on Biological Diversity (CBD)[3] provides the primary international legal framework governing biodiversity. Its three objectives are: 1) the conservation of biodiversity; 2) the sustainable use of its components; and 3) the fair and equitable sharing of benefits resulting from the utilization of genetic resources.[4] The CBD was opened for signature at the 1992 United Nations Conference on Environment and Development (Rio Conference), and has been in force for 25 years. Although it is often perceived to be an environmental law treaty, its objectives attempt to strike a balance between environmental obligations, the human right of peoples to self-

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[3] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.cbd.int>.

[4] Article 1.

determination, and the associated right of peoples (in the form of states) to permanent sovereignty over natural resources.[5]

The CBD builds on two foundational human rights instruments, namely the International Covenant on Economic, Social and Cultural Rights (ICESCR)[6] and the International Covenant on Civil and Political Rights (ICCPR).[7] In their common Article 1, these Covenants state that:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

These commitments are affirmed by the UN Declaration on the Right to Development,[8] which states in its first article that:

> 1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
> 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

The aim of this paper is to describe how environmental human rights obligations present themselves in the CBD. It begins with an overview of the concept of environmental human rights obligations, elaborates the procedural and substantive human rights obligations found in the CBD, and concludes with a reflection on how

[5] Article 3:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the 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.

[6] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 *United Nations Treaty Series* 195.

[7] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 *United Nations Treaty Series* 171.

[8] 'Declaration on the Right to Development', UNGA Res. 41/128 of 4 December 1986, Annex.

the human rights obligations found in the CBD compare to the proposed Framework Principles on Human Rights and the Environment (Framework Principles).[9]

2 Environmental human rights obligations

2.1 Introduction

The then Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Professor John H. Knox, presented the Framework Principles to the Human Rights Council (HRC) in March 2018. These 16 principles are not novel human rights, but rather 'reflect the application of existing human rights obligations in the environmental context.'[10] The HRC took note with appreciation of the report presenting the Framework Principles, and called upon states 'to implement fully their obligations to respect and ensure human rights without distinction of any kind, including in the application of environmental laws and policies.'[11] The first report of the Special Rapporteur to the UN General Assembly was submitted in July 2018 and recommended that the General Assembly recognize the human right to a safe, clean, healthy and sustainable environment, building on the human rights norms elaborated upon in the Framework Principles.[12] In his report to the General Assembly, the Special Rapporteur noted that the human rights obligations that apply in the environmental context are both procedural[13] and substantive.[14] These distinct types of obligations are discussed in the two sub-sections below.

2.2 Procedural environmental human rights obligations

The procedural obligations on states identified in the Framework Principles include: respecting and protecting rights to freedom of expression, association and peaceful assembly in relation to environmental matters;[15] providing for education and public

[9] 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Doc. A/HRC/37/59 (2018), Annex.

[10] *Ibid.* para. 8.

[11] HRC, 'Human Rights and the Environment', UN Doc. A/HRC/RES/37/8 (2018), para 3; John H. Knox, 'The Past, Present and Future of Human Rights and the Environment', 53 *Wake Forest Law Review* (2018) 649-665 at 656.

[12] 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Note by the Secretary-General', UN Doc A/73/188 (2018).

[13] Donald K Anton and Dinah Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011) at 356: 'those rights whose enjoyment could be considered a prerequisite to effective environmental protection.'

[14] *Ibid.* at 436: 'Substantive rights… place limits on the outcome of the process, ensuring that those in power do not abuse their dominant position to discriminate or cause environmental degradation at a level that infringes on the enjoyment of guaranteed human rights.'

[15] Framework Principles, Principle 5.

awareness on environmental matters;[16] providing public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request;[17] requiring the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights;[18] providing for and facilitating public participation in decision-making related to the environment, and taking the views of the public into account in the decision-making process;[19] and, providing access to effective remedies for violations of human rights and domestic laws relating to the environment.[20]

2.3 Substantive environmental human rights obligations

The substantive obligations of states identified in the Framework Principles include: ensuring a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights;[21] respecting, protecting and fulfilling human rights in order to ensure a safe, clean, healthy and sustainable environment;[22] prohibiting discrimination and ensuring equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment;[23] establishing and maintaining substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights;[24] ensuring the effective enforcement of environmental standards against public and private actors;[25] cooperating with other states to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights;[26] taking additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities;[27] ensuring compliance with obligations to indigenous peoples and members of traditional communities;[28] and, respecting, protecting and fulfilling human rights in actions taken to address environmental challenges and pursue sustainable development.[29]

[16] Principle 6.
[17] Principle 7.
[18] Principle 8.
[19] Principle 9.
[20] Principle 10.
[21] Principle 1.
[22] Principle 2.
[23] Principle 3.
[24] Principle 11.
[25] Principle 12.
[26] Principle 13.
[27] Principle 14.
[28] Principle 15.
[29] Principle 16.

2.4 The link between human rights and biodiversity

These procedural and substantive rights apply to biodiversity as a natural extension of minimizing environmental harm and protecting human life and human health. In his report on human rights obligations relating to the conservation and sustainable use of biodiversity, Professor Knox explained that:

> [t]he full enjoyment of human rights, including the rights to life, health, food and water, depends on the services provided by ecosystems. The provision of ecosystem services depends on the health and sustainability of ecosystems, which in turn depend on biodiversity. The full enjoyment of human rights thus depends on biodiversity, and the degradation and loss of biodiversity undermine the ability of human beings to enjoy their human rights.[30]

The right to life was first recognized in the Universal Declaration of Human Rights (UDHR),[31] and buttressed by the ICCPR.[32] The right to health is also recognized in the UDHR,[33] and the ICESCR.[34] In addition, the right to food is recognized in the UDHR[35] and the ICESCR,[36] and has been interpreted to include the adequacy and sustainability of food availability and access.[37] While the right to water is not explicitly mentioned in these human rights instruments, it has been determined to be implicit in the ICESCR through the rights to an adequate standard of living, and the highest attainable standard of health.[38] It has also been determined to contain an obligation to protect water sources from, amongst other things, pollution and inequitable extraction.[39]

The CBD is the global framework convention addressing biodiversity loss. Although the CBD does not explicitly mention the term 'human rights', it does incorporate provisions that provide some of the substantive and procedural environmental human rights mentioned in the Framework Principles. However, given the CBD's em-

[30] 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Note by the Secretariat', UN Doc. A/HRC/34/49 (2017). (SR Biodiversity Report)

[31] Universal Declaration of Human Rights, UNGA Res. 217A of 10 December 1948, Art. 3: 'Everyone has the right to life, liberty and security of person'.

[32] ICCPR, Art. 6: 'Every human being has the inherent right to life. This right shall be protected by law…'

[33] UDHR, Art. 25(1): 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family…'

[34] ICESCR, Art. 12(1): 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'

[35] UDHR, Art. 25(1): 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food…'

[36] ICESCR, Art. 11(1): 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food…'

[37] Committee on Economic, Social and Cultural Rights, 'General Comment 12: The right to adequate food (Art. 11)', UN Doc. E/C.12/1999/5 (1999), para. 7.

[38] Committee on Economic, Social and Cultural Rights, 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' UN Doc. E/C.12/2002/11 (2003).

[39] *Ibid.* at para. 23.

phasis on state sovereignty found in Article 3,[40] these obligations are formulated in ways that grant significant latitude to states in terms of their implementation. These procedural and substantive environmental human rights and the relevant provisions of the CBD are discussed in the following section.

3 Procedural environmental human rights in the CBD

The CBD contains clear duties addressing some of the procedural rights mentioned in the Framework Principles, namely the duty to provide education and awareness (Principle 6), to require prior assessment of impacts (Principle 8), and to ensure public participation (Principle 9). In regard to Principle 6, the CBD requires Parties to promote and encourage understanding of the importance of, and measures required for, the conservation of biodiversity, as well as dissemination of this information through media and in educational programmes.[41] With regard to Principles 8 and 9, the CBD provides that each Party, 'as far as possible and as appropriate', must introduce appropriate procedures requiring environmental impact assessment of proposed projects that are likely to have significant adverse effects on biodiversity in order to avoid or minimize these effects and, 'where appropriate', allow for public participation in these procedures.[42] The CBD also requires that Parties introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biodiversity are duly taken into account.[43] These provisions are not as strong as those found in some other environmental instruments, given that they are limited by terms such as 'as far as possible and as appropriate' in the chapeau, 'appropriate procedures', 'where appropriate', 'appropriate arrangements', and '*significant* adverse impacts' (emphasis added).[44]

The right of access to remedy is not addressed in a conclusive manner in the CBD, and it remains contentious among Parties. Article 14(2) states that '[t]he Conference of the Parties [COP] shall examine, on the basis of studies to be carried out, *the issue of liability and redress, including restoration and compensation,* for damage to biodiversity, *except where such liability is a purely internal matter*' (emphasis added). The COP has dealt with the issue for many years, but its most recent decision on the

[40] Nico J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997) 227.
[41] Art. 13(a) of the CBD.
[42] Art. 14(1).
[43] *Ibid.*
[44] See, for instance, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, <http://www.unece.org/env/pp/> (Aarhus Convention); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018, not yet in force, available at <https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf> (visited 27 December 2018) (Escazú Agreement).

matter simply '*[i]nvites* Parties to continue to address the issue of liability and redress in the context of Article 14(2), including restoration and compensation for damage to biodiversity through, as appropriate, national policy, legislation, national biodiversity strategies and action plans',[45] and requests Parties to submit information on their experience in implementing past decisions.

4 Substantive environmental human rights in the CBD

States have a duty to adopt legal and institutional frameworks to protect against environmental harm that interferes with the enjoyment of human rights. This includes a general obligation to adopt frameworks safeguarding biodiversity in order to protect the rights to life, health, food, water, culture, and non-discrimination.[46] States also have an obligation to strike a reasonable balance between environmental protection and other legitimate societal goals such that this balance does not result in unjustified, foreseeable infringements of human rights.[47] In addition, states may have more specific duties to protect places or components of biodiversity necessary for the enjoyment of the rights of vulnerable communities.[48] Finally, some types of harm to environmental human rights may also trigger the duty of international cooperation, which is the case with the CBD.[49]

4.1 Frameworks for safeguarding biodiversity

The CBD contains numerous provisions that aim to promote the protection of substantive environmental human rights, which should be implemented through the measures laid out in Article 6. Article 6 requires Parties, in accordance with their particular conditions and capabilities, to '[d]evelop national strategies, plans or programmes for the conservation and sustainable use of biodiversity or adapt existing strategies, plans or programmes to reflect the measures set out in the [CBD] relevant to the [Party] concerned',[50] and to '[i]ntegrate, as far as possible and as appropriate, the conservation and sustainable use of biodiversity into relevant sectoral or cross-sectoral plans, programmes and policies.'[51]

4.2 Balancing environmental protection and societal goals

Article 7 expands on what is necessary to address biodiversity loss, including outlining specific components of biodiversity that are important, identifying processes

[45] 'Liability and redress (Art. 14, paragraph 2)', CBD Dec. 14/21 (2018).
[46] SR Biodiversity Report, para. 33.
[47] *Ibid.* para. 34.
[48] *Ibid.* para. 35.
[49] *Ibid.* para. 36.
[50] Article 6(1) of the CBD.
[51] Article 6(2).

that are adversely impacted, and upholding data collection methods.[52] Article 8 addresses in-situ conservation[53] by outlining protected areas and providing obligations for regulating, managing and controlling risks associated with the use of biotechnology within those areas.[54] Article 9 complements Article 8 by adding provisions concerning ex-situ conservation,[55] including the adoption of measures for the preservation of biodiversity and for the recovery and rehabilitation of threatened species, and the regulation of biological resources to avoid undermining ecosystems.[56] Article 10 of the CBD addresses the second objective of the Convention by encouraging cooperation between government authorities, and between governments and the private sector, for the sustainable use of biological resources.[57]

Article 14 concerns safeguards in the event of an emergency, which include promoting national arrangements for responses to activities or events that present a grave or imminent danger to biodiversity.[58] Parties also have an obligation to adopt, 'as far as possible and as appropriate', economically and socially sound measures that act as incentives for the conservation and sustainable use of biodiversity.[59] Furthermore, Article 20(1) states that each Party 'undertakes to provide, in accordance with its capabilities, financial support and incentives in respect of those national activities which are intended to achieve the objectives of the CBD, in accordance with its national plans, priorities and programmes.'

4.3 Vulnerable groups

The CBD also contains several provisions pertaining to vulnerable communities, namely indigenous and local communities. Buttressed by the general provision of promoting sustainable traditional use of biological resources laid out in Article 10(c), Article 8(j) specifically requires Parties to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities who embody traditional ways of living; promote their wider use with the approval and involvement of the holders; and encourage equitable benefit-sharing arising from their use.[60]

[52] Article 7.
[53] Article 2: 'In-situ conservation' means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.
[54] Article 8.
[55] Article 2: 'Ex-situ conservation' means the conservation of components of biological diversity outside their natural habitats.
[56] Article 9.
[57] Article 10.
[58] Article 14.
[59] Article 11.
[60] Article 8(j).

4.4 International cooperation

As biodiversity loss is a common concern of humankind, many articles of the CBD contain obligations on international cooperation for the conservation and sustainable use of biodiversity. Article 5 lays out the general provision,61 which is then expanded to include specific examples, such as cooperating in providing financial and other support for in-situ conservation, particularly to developing countries;[62] cooperating in providing financial and other support for ex-situ conservation and in the establishment and maintenance of ex-situ conservation facilities in developing countries;[63] promoting, on the basis of reciprocity, notification, exchange of information and consultation on activities under a Party's jurisdiction or control which are likely to significantly adversely affect the biodiversity of other states or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate;[64] notifying potentially affected states in the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biodiversity within the area under the jurisdiction of other states or in areas beyond the limits of national jurisdiction, as well as initiating action to prevent or minimize such danger or damage;[65] and encouraging international cooperation to supplement national emergency response to activities or events that present a grave and imminent danger to biodiversity and, where appropriate and agreed by the states or regional economic integration organizations concerned, to establish joint contingency plans.[66]

The CBD also includes many provisions on international cooperation addressing science and technology, as scientific knowledge on biodiversity and technology allowing for its conservation and sustainable use are recognized as core requirements in meeting the Convention's objectives. This need is recognized in the preamble, which notes the general lack of information and knowledge on biodiversity and the urgent need to develop scientific, technical and institutional capacities to provide the basic understanding upon which appropriate measures can be planned and implemented. The preamble also notes the importance of, and the need to promote, international, regional and global cooperation among states, intergovernmental organizations, and the non-governmental sector for the conservation and sustainable use of biodiversity. In addition, Parties acknowledge that the provision of appropriate access to relevant technologies can be expected to make a substantial difference in the world's ability to address biodiversity loss, and that special provision is required to meet the needs of developing countries, including the provision of appropriate access to relevant technologies, noting in particular the special conditions of least developed countries (LDCs) and small island developing states (SIDS).

61 Article 5.
62 Article 8(m).
63 Article 9(e).
64 Article 14(1)(c).
65 Article 14(1)(d).
66 Article 14(1)(e).

Scientific research, education and training obligations are outlined in Article 12, which requires Parties to establish and maintain education and programs to help identify and sustain biodiversity, promote research that contributes to conservation and sustainable use, particularly in developing countries,[67] and promote and cooperate in the use of scientific advances in biodiversity research in developing methods for conservation and sustainable use.[68]

With regard to genetic resources, Article 15 encourages Parties to facilitate access to genetic resources for environmentally sound uses, and not impose restrictions that run counter to the objectives of the CBD;[69] to develop and carry out scientific research on genetic resources with the full participation of, and where possible, in the provider Parties;[70] and to establish legislative, administrative or policy measures to fairly and equitably share the results of research and development, and the benefits arising from the commercial and other use of genetic resources with the provider Party, based on mutually agreed terms (MAT).[71]

Article 16 details obligations on access to and transfer of environmentally sound technology that is relevant to conservation, sustainable use, and utilization of genetic resources,[72] emphasizing provision/facilitation on fair and most favorable terms, including concessional and preferential terms, while also ensuring the effective and adequate protection of intellectual property rights (IPR).[73] Article 16 further details the obligation of Parties to take legislative, administrative or policy measures to ensure that those Parties providing genetic resources, particularly developing ones, are provided access to and transfer of technology which makes use of those resources, on MAT, including technology protected by patents and other IPR.[74] Second, Parties must take such measures, with the aim of ensuring that the private sector facilitates access to, joint development and transfer of environmentally sound technology for the benefit of both governmental institutions and the private sector of developing countries.[75] Lastly, Parties must cooperate to ensure that patents and other IPRs are supportive of, and do not run counter to, the objectives of the CBD.[76]

Article 17 pertains to cooperation through the exchange of information on biodiversity, stating that Parties shall first facilitate information exchange 'from all publicly available sources, relevant to the conservation and sustainable use of biodiversity, taking into account the special needs of developing countries.' Second, it states

[67] Article 12(b).
[68] Article 12(c).
[69] Article 15(2).
[70] Article 15(6).
[71] Article 15(7).
[72] Article 16(1).
[73] Article 16(2).
[74] Article 16(3).
[75] Article 16(4).
[76] Article 16(5).

that: 'Information exchange will include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with technology transfer. It shall also, where feasible, include repatriation of information.' To this end, voluntary guidelines on the repatriation of traditional knowledge were adopted at CBD COP 14 in 2018.[77]

Article 18 of the CBD focuses on technical and scientific cooperation, including its promotion through international and national institutions,[78] in developing policies,[79] and in joint research,[80] while centering local indigenous perspectives in such processes.[81] Article 19 concerns the handling of biotechnology and the distribution of its benefits, including measures that should be taken to promote access to biotechnology,[82] negotiating a treaty on biosafety (now the Cartagena Protocol on Biosafety),[83, 84] and delegating responsibility to a national authority for sharing information on living modified organisms.[85]

During the negotiations leading to the CBD, Parties also recognized that financial resources would play a significant role in supporting developing countries to meet the objectives of the CBD.[86] To this end, the preamble acknowledges that substantial investments are required to conserve biological diversity. This is expanded upon in Articles 20 and 21, which establish commitments on mobilizing financial resources and direct financial assistance, with a particular focus on the obligations of developed countries and the needs of developing countries.

Article 20 provides for a number of relevant commitments. The first and most significant is that developed country Parties must provide *new and additional* financial resources to enable developing country Parties to meet the agreed full incremental costs of implementing measures that fulfil the obligations of the Convention, and to benefit from its provisions. These costs are agreed between developing country Parties and

[77] 'The Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge of Indigenous Peoples and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity', CBD Dec. 14/12 (2018).
[78] Article 18(1) of the CBD.
[79] Article 18(2).
[80] Article 18(5).
[81] Article 18(4).
[82] Article 19(2).
[83] Article 19(3).
[84] Cartagena Protocol on Biosafety, Montreal, 29 January 2000, in force 11 September 2003, 39 *International Legal Materials* (2000) 1027, <http://www.cbd.int/biosafety>.
[85] Article 19(4).
[86] See also Art. 20(4) of the CBD:

> The extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.

the Global Environment Facility (GEF)[87] – the multilateral financing mechanism designated under Article 21 – in accordance with the policy, strategy, programme priorities and eligibility criteria and indicative list of incremental costs established by the COP (per Article 21(1)).[88] COP 1 established a list of developed country Parties and other Parties that voluntarily assume the obligations of the developed country Parties.[89] Article 20 requires that this list be periodically reviewed and, if necessary, amended. Contributions from other countries and sources on a voluntary basis are also encouraged. The implementation of these commitments must take into account the need for adequacy, predictability and the timely flow of funds, and the importance of burden-sharing among the contributing Parties included in the list.[90] Article 20 further notes that, in addition to the provision of financial resources through the GEF, developed country Parties can also provide financial resources to developing country Parties through bilateral, regional and other multilateral channels.[91]

In the provision of financial resources, special consideration must be given to the needs, situation of, and conditions in developing countries. First, Parties must take full account of the specific needs and special situation of LDCs in their actions with regard to funding and transfer of technology.[92] Second, they must also take into consideration the special conditions resulting from the dependence on, distribution and location of, biodiversity within developing country Parties, and SIDS in particular.[93] Third, consideration must be given to the special situation of the most environmentally vulnerable developing countries, such as those with arid and semi-arid zones, and coastal and mountainous areas.[94]

Article 21 states that the multilateral mechanism for the CBD – the GEF – will provide financial resources to developing country Parties on a grant or concessional basis, under the authority and guidance of the COP for these purposes. By the end of May of 2016, the GEF had provided financial support to 1,115 national projects on biodiversity, for a total of USD 2.7 billion with co-financing of USD 8.8 billion. An additional USD 0.7 billion, with co-financing of USD 1.4 billion, funded 178 regional and global projects.[95] The COP determines the policy, strategy, programme priorities and eligibility criteria relating to access to and utilization of these financial resources.[96] Contributions are to take into account the need for predictability, ade-

[87] See <https://www.thegef.org/>.
[88] The first such document was adopted at COP 1, see 'Financial resources and mechanism', CBD Dec. I/2 (1994), Annex I.
[89] *Ibid.* Annex II.
[90] Article 20(2) of the CBD.
[91] Article 20(3).
[92] Article 20(5).
[93] Article 20(6).
[94] Article 20(7).
[95] Braulio Ferreira de Souza Dias, 'GEF and the Convention on Biological Diversity' (20 October 2016), available at <https://www.thegef.org/news/gef-and-convention-biological-diversity> (visited 28 July 2019).
[96] The most recent document adopted in this regard is 'The Financial Mechanism', CBD Dec. XIII/21 (2016).

quacy and timely flow of funds, in accordance with the amount of resources needed to be decided periodically by the COP and the importance of burden-sharing among the contributing Parties included in the list referred to above. Voluntary contributions to the GEF can be made by developed country Parties and other countries and sources. Article 21 also provides for good governance, stating that the financial mechanism must operate within a democratic and transparent system of governance.

5 Conclusions

In sum, the CBD contains legal obligations that are consistent with the environmental human rights norms put forward in the Framework Principles. However, it often couches state obligations in flexible terms, for instance, 'as far as possible and appropriate', 'in accordance with its capabilities', and 'in accordance with national legislation and policies'. As has been noted, these flexible terms may lead to variable results in terms of implementation, and can be interpreted as 'an expression of disagreement among CBD parties as to whether certain interpretations reflect existing or emerging international law, based also on the fact that each individual party to the CBD may not have formally accepted the same underlying international human rights norms'.[97]

The CBD addresses procedural rights such as the rights to impact assessment and access to environmental information, and partially fulfills the right to public participation in environmental decision-making, but does not address the question of protecting freedom of expression and association. The CBD also fails to include provisions on access to remedies for harm to biodiversity, leaving it to Parties to elaborate this right at the national level as they see fit. This right may, however, be assured through regional treaties such as the Aarhus Convention or the Escazú Agreement,[98] or the clarifications on procedural obligations found in the Framework Principles, which can assist in 'understanding international human rights law obligations as limitations to the discretion of CBD parties in their interpretation and implementation of otherwise open-ended treaty language'.[99]

The CBD clearly sets out substantive duties to adopt legal and institutional frameworks that protect against environmental harm, including a general obligation to adopt frameworks to safeguard biodiversity. Although it does not elaborate specific duties to protect places or components of biodiversity necessary for the enjoyment of rights of vulnerable communities, the general provisions could have collateral effects that achieve this goal. Moreover, voluntary guidelines have been adopted by

[97] Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law', 53(4) *Wake Forest Law Review* (2018) 691-712 at 710.
[98] *Ibid* at 695.
[99] *Ibid.*

the COP on impact assessment for developments that are proposed to take place in, or are likely to have an impact on, sacred sites and traditional lands and waters.[100]

Finally, the most comprehensive provisions of the CBD address the duty of international cooperation to prevent harm to biodiversity that leads to infringements of environmental human rights. This includes state duties to: provide financial resources to developing countries; notify, exchange information, and consult on transboundary matters as well as on biodiversity in general; provide special consideration for LDCs, environmentally vulnerable countries, and SIDS; equitably share benefits and provide favourable access to technology; and cooperate in scientific and technical research on biodiversity. To clarify the meaning of some of these provisions, the Framework Principles provide substantive obligations 'that serve to clarify the limits of State discretion in pursuing the CBD objectives relating to biodiversity conservation and sustainable use.'[101]

Given the shocking conclusions of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES),[102, 103] this may be the last opportunity humanity has to curb biodiversity loss and prevent ecosystem collapse.[104] As recently noted by a group of Special Rapporteurs and Members of Working Groups, 'the erosion of nature, the extinction of species and the loss of biological diversity at unprecedented rates severely threatens human rights for present and future generations.'[105] A mutually supportive interpretation of obligations found in the CBD and existing or emerging international human rights norms, such as those outlined in the Framework Principles, provides CBD Parties with an opportunity to increase the urgency, policy coherence and legitimacy of international and national efforts to implement the Convention.[106] This is of particular importance in the context of the post-2020 global biodiversity framework,[107] which will succeed the (largely unsuccessful) Strategic Plan for Biodiversity 2011-2020 and its Aichi Biodiversity Targets.[108]

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[100] 'Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities', CBD Dec. VII/16 (2004), Annex.

[101] Morgera, 'Dawn of a New', *supra* note 97, at 695.

[102] See <https://www.ipbes.net/>.

[103] 'Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services', Advance Unedited Edition (6 May 2019), available at <https://www.ipbes.net/news/ipbes-global-assessment-summary-policymakers-pdf> (visited 28 July 2019).

[104] Jonathan Watts, 'Stop biodiversity loss or we could face our own extinction, warns UN', *The Guardian* of 6 November 2018, available at <https://www.theguardian.com/environment/2018/nov/03/stop-biodiversity-loss-or-we-could-face-our-own-extinction-warns-un> (visited 28 July 2019).

[105] OHCHR, 'Failing to protect biodiversity can be a human rights violation – UN experts' (25 June 2019), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24738&LangID=E> (visited 28 July 2019).

[106] Morgera 'Dawn of a New', *supra* note 97, at 710.

[107] See CBD, 'Preparations for the Post-2020 Biodiversity Framework', available at <https://www.cbd.int/conferences/post2020> (visited 16 August 2019).

[108] 'The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets', CBD Dec. X/2 (2011).

The Minamata Convention on Mercury and its Implications for Indigenous Peoples

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1 Introduction

Mercury is a chemical element of global concern owing to its long-range atmospheric transport, its persistence in the environment once introduced, its ability to bioaccumulate in ecosystems, and its significant negative effects on human health and the environment, disproportionately affecting indigenous communities globally. It is naturally present in the Earth's crust and released through natural processes, but humans have also released an estimated 350,000 tons of mercury into the atmosphere over the past 4,000 years.[3] Once released into the environment, mercury can take more than 2,000 years to return to permanent storage in deep ocean sediments, lake sediments, and subsurface soils.[4] It is recognized that mercury contamination can have far reaching social, cultural, economic, health, and spiritual impacts on indigenous peoples, who often do not benefit from the economic activities responsible for the release of mercury into the environment.[5]

The first well known incident of mercury poisoning occurred in the city of Minamata, Japan, in 1956. The cause was the Chiasso company's release of industrial waste-

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[3] Henrik Selin, 'Global Environmental Law and Treaty-Making on Hazardous Substances: The Minamata Convention and Mercury Abatement', 14(1) *Global Environmental Politics* (2014) 1-19 at 2.

[4] *Ibid.*

[5] Margaret Wheatly, 'The importance of social and cultural effects of mercury on aboriginal peoples', 17(1) *Neurotoxicology* (1996) 251-256.

water contaminated with mercury into Minamata Bay beginning in 1932. What became known as 'Minamata Disease' killed some residents and caused others to suffer serious neurological damage from eating contaminated seafood. A similar situation has plagued the indigenous community of Grassy Narrows in Canada for decades but has received less international attention. In that case, mercury-containing effluent was released into the local river system in the late 1960s and early 1970s by the Dryden Chemical Company. 90 per cent of the indigenous population in Grassy Narrows First Nation, 100 km downstream, show signs of mercury poisoning from eating contaminated fish.[6] Health impacts from mercury pollution have continued for three generations and are still ongoing due to insufficient remediation.[7]

However, direct industrial releases of this type are only one cause for concern, as atmospheric emissions of mercury make up more than half of all anthropogenic releases.[8] In 2015, 85 per cent of atmospheric emissions were from four sources: 1) mercury-dependent artisanal and small-scale gold mining (ASGM) (38 per cent); 2) coal burning (21 per cent); 3) smelting non-ferrous metals[9] (15 per cent); and 4) cement production (11 per cent).[10] There are also regional variations in the sources of anthropogenic releases. For instance, ASGM accounts for 70-80 per cent of emissions in Latin America and Africa.

As the numbers above indicate, ASGM is the largest individual source of mercury pollution on Earth. The practice is widespread, 'with an estimated 10 to 19 million miners working primarily in Asia, Africa and South America'.[11] Although each mining operation may be small, ASGM is a significant contributor to local and global economies, generating approximately 15 to 25 per cent of the world's gold.[12] Because of the high quantities of mercury handled by workers, and the mercury vapor produced by the mercury amalgam process, the health impacts are staggering and often extend to local communities.[13] Such health impacts are particularly dangerous for young children and fetuses, leading to an increased likelihood of physical deformities, neurological damage and lowered IQ.[14] ASGM can also result in mercury

6 Matt Prokopchuk, 'Grassy Narrows mercury victims up to 6 times more likely to have debilitating health problems, report says' CBC News (24 May 2018), available at <https://www.cbc.ca/news/canada/thunder-bay/grassy-narrows-health-report-release-1.4675091> (visited 24 July 2019).

7 Adam Mosa and Jacalyn Duffin, 'The interwoven history of mercury poisoning in Ontario and Japan', 189(5) CMAJ (2017) E213–E215; HC George Wong, 'Mercury poisoning in the Grassy Narrows First Nation: history not completed', 189(22) *CMAJ* (2017) E784.

8 UN Environment, *Global Mercury Assessment 2018* (UNEP, 2019), available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/27579/GMA2018.pdf?sequence=1&isAllowed=y> at 2-3. Atmospheric releases in 2015 totalled 2220 tonnes, while releases to water totalled 1800 tonnes.

9 The Minamata Convention considers this class of metal to include lead, zinc, copper and industrial gold (Annex D).

10 UN Environment, *Global Mercury Assessment, supra* note 8.

11 Louisa J. Esdaile and Justin M. Chalker, 'The Mercury Problem in Artisanal and Small-Scale Gold Mining', 24(27) *Chemistry: A European Journal* (2018) 6905–6916.

12 *Ibid.* at 6906.

13 *Ibid.* at 6906-6907.

14 *Ibid.* at 6907.

contamination of surrounding ecosystems, leading to the accumulation of mercury in fish and other food supplies upon which local (often indigenous) communities depend.[15]

Airborne mercury emissions from coal burning, smelting, and cement production travel long distances and are a significant source of contamination, being deposited further and further north every year.[16] For indigenous peoples in the North like the Inuit, whose culture is very closely tied to the land, ice, flora and fauna of the Arctic and who 'historically… obtained their food from traditional activities such as hunting, fishing and foraging',[17] mercury contamination of traditional food sources is having profound health impacts on current and future generations.

With this in mind, the aim of this paper is to address the recent efforts of the international community to regulate mercury; to set out the substance of the Minamata Convention on Mercury,[18] its pertinence for indigenous peoples and its relevant provisions; and to highlight the importance of using the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[19] as a lens for interpreting the duties of states to prevent mercury pollution.

2 History of the Minamata Convention on Mercury

In 2001, the 21st Governing Council (GC) of the United Nations Environment Programme (UNEP) requested a global assessment of mercury and its compounds.[20] The resulting Global Mercury Assessment,[21] presented to GC 22 in 2003, responded to this environmental crisis by launching the Programme for International Action on Mercury, which provides technical assistance and global capacity-building to

[15] *Ibid.*

[16] Government of Canada, 'Mercury: Atmospheric Transport' (2013), available at <https://www.canada.ca/en/environment-climate-change/services/pollutants/mercury-environment/about/atmospheric-transport.html> (visited 3 April 2019):

> the volatility of elemental mercury (Hg0), which allows mercury to travel in a multi-step sequence of emission to the atmosphere, transportation, deposition and re-emission. As a result, mercury from point source emissions may remain localized in the environment, or may be transported regionally and even globally… relatively high concentrations of mercury found in the High Canadian Arctic, an area with no significant sources of mercury, may be linked to the long-range transport of pollutants on air currents from Asia and Europe. Mercury, like other semi-volatile compounds such as PCBs, is thought to participate in a global distillation phenomenon that transfers chemical emissions from equatorial, subtropical and temperate regions to the Polar Regions via the "grasshopper effect.

[17] Konstantia Koutouki, 'Crimes against Future Inuit Generations: Heavy Metals and Persistent Organic Pollutants (POPS)', 20 *Australian Indigenous Law Review* (2017) 243-263 at 259.

[18] Minamata Convention on Mercury, Geneva, 19 January 2013, in force 16 August 2017, <http://www.mercuryconvention.org/>.

[19] UNGA Res. 61/295 of 2 October 2007.

[20] 'Mercury Assessment', UNEP Governing Council Dec. 21/5 (2001) at 26.

[21] 'Global Mercury Assessment' (UNEP Chemicals, 2002), available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/11718/final-assessment-report-25nov02.pdf?sequence=1&isAllowed=y> (visited 4 April 2019).

mitigate mercury pollution.[22] The EU, Norway, and Switzerland had proposed the negotiation of a comprehensive legally binding instrument on mercury, supported by the African Group and many Latin American countries.[23] However, the proposal was not accepted due to opposition from several countries including the United States, Canada, Australia, New Zealand, China, and India.[24]

Establishing such a programme of action required governments to submit long-term action plans on mercury to the UNEP Executive Director.[25] The submissions demonstrated an ongoing divide on the question of whether to negotiate an international legally binding instrument. This led GC 23 to continue the development of the Programme for International Action, and to assess 'the need for further action on mercury, including the possibility of a legally binding instrument, partnerships and other actions.'[26]

By 2007, GC 24 expanded international cooperation by establishing an ad hoc open-ended working group (OEWG) of governments, regional economic integration organizations and stakeholder representatives to support, consult and update legal tools.[27] Momentum on a legally binding instrument on mercury shifted when the United States changed its opposition to a legally binding instrument on mercury when the Obama administration entered the White House in January 2009, and one month later, after long negotiations, the UNEP GC finally decided at its 25th session to launch negotiations for a global mercury convention.[28]

The mandate of the intergovernmental negotiating committee was to resolve negotiations prior to GC 27 in early 2013,[29] receiving a boost from the 2012 Rio+20 Conference. In the Rio+20 outcome document, *The Future We Want*, States welcomed the negotiating process for a legally binding instrument and called for a successful outcome to the negotiations.[30] The text of the Minamata Convention on Mercury was adopted by the Conference of Plenipotentiaries on 10 October 2013 in Japan, and entered into force on 16 August 2017. As of the date of publication, the Minamata Convention had 110 Parties. The Convention covers mercury sources that are collectively responsible for 96 per cent of the atmospheric emissions included in the 2013 UNEP assessment.[31] Two Conferences of the Parties (COPs) to the

[22] Henrik Hallgrim Eriksen and Franz Xaver Perrez, 'The Minamata Convention: A Comprehensive Response to a Global Problem', 23(2) *Review of European, Comparative & International Environmental Law* (2014) 195-210 at 196.
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.* at 197.
[26] *Ibid.*
[27] *Ibid.* at 198.
[28] *Ibid.*
[29] *Ibid.* at 199.
[30] Rio +20 Outcome Document 'The Future We Want', UNGA Res. 66/288 of 11 September 2012, available at <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf> (visited 15 February 2019), para. 221.
[31] Selin, 'Global Environmental Law', *supra* note 3, at 7.

Minamata Convention have been held thus far; COP 3 will be held in November 2019. The Convention's differing types of obligations relating to emission sources, and timelines for phasing out use, will be discussed below.

3 Substance of the Minamata Convention

The Minamata Convention plays a very important role in addressing mercury risks. Its aim is to protect human and environmental health from mercury by addressing the political issues and technical matters related to its production, use and trade.[32] Prevention, rather than precaution, is the main principle underpinning the Convention, perhaps because the harms of mercury are scientifically established, and the principle of a precautionary approach is only relevant where there is a lack of full scientific certainty.[33] It is expected that implementation of the Convention will gradually lead to a reduction in mercury levels in the global environment.[34]

Another important principle in the Minamata Convention is that of common but differentiated responsibilities. The Convention 'provide[s] for targeted differentiation and flexibility in specific substantive provisions'[35] through a series of obligations relating to the supply and trade of mercury. This includes provisions that prohibit[36] or slow down[37] mercury mining, bolstering management protocols for handling and disposing of mercury,[38] and establishing obligations for mercury added products.[39] The Convention also addresses ASGM by combining mandatory and voluntary approaches, where relevant.[40] Parties that have ASGM and processing on their territory must take steps to reduce, and where feasible eliminate, the use of mercury and mercury compounds in, and the emissions and releases to the environment of mercury from, ASGM and related processing.[41] If a Party determines that ASGM and processing on its territory is 'more than insignificant', it must notify the Secretariat and develop and implement a national action plan.[42] Annex C of the Convention establishes the mandatory elements of these plans.

[32] *Ibid.* at 2.
[33] Eriksen and Perrez, 'The Minamata Convention', *supra* note 20, at 201.
[34] UN Environment, *Minamata Convention: Text and Annexes* (2017), available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/8541/-Minamata%20convention%20on%20mercury_%20text%20and%20annexes%20-2013Minamata%20convention%20-%20Eng.pdf?sequence=3&amp%3BisAllowed=> (visited 15 August 2019) at 10.
[35] Eriksen and Perrez, 'The Minamata Convention', *supra* note 22, at 203.
[36] Article 3(3) of the Minamata Convention.
[37] Article 3(4). The consequence of this provision is to prevent primary mined mercury from being used in ASGM. Eriksen and Perrez, 'The Minamata Convention', *supra* note 20, at 204.
[38] Article 3(5)(b) of the Minamata Convention.
[39] Eriksen and Perrez, 'The Minamata Convention', *supra* note 22, at 205.
[40] *Ibid.* at 206.
[41] Article 7(2) of the Minamata Convention.
[42] Article 7(3).

Emissions from existing point sources (coal-fired power plants and industrial boilers, smelting and roasting processes used in the production of non-ferrous metals, waste incineration facilities, and cement clinker production facilities) must also be controlled,[43] with Parties requiring new plants to use best available techniques and best environmental practices to control and, where feasible, reduce emissions.[44] For point sources not mentioned in the obligations above, Parties must identify those point sources and take measures to control releases to land and water.[45] Lastly, the Convention establishes obligations on environmentally sound interim storage of mercury other than waste mercury,[46] mercury wastes,[47] and contaminated sites.[48]

These substantive aspects of the Convention aim at reducing, and where possible, eliminating the uses of mercury in industrial processes and its discharge into the environment. Yet, as things stand, these obligations, 'even if properly implemented in all major countries, may at best only limit future projected increases in mercury emissions and releases rather than bringing them down from current levels.'[49] This would be a concerning outcome, particularly given that current levels are already having significant health and environmental impacts.

4 Minamata Convention and the rights of indigenous peoples

The Minamata Convention contains two paragraphs in its preamble that recognize the particular impacts of mercury on indigenous peoples and vulnerable members of their communities:

> Noting the particular vulnerabilities of Arctic ecosystems and Indigenous communities because of the biomagnification of mercury and contamination of traditional foods and concerned about Indigenous communities more generally with respect to the effects of mercury.
>
> Aware of the health concerns, especially in developing countries, resulting from exposure to mercury of vulnerable populations, especially women, children, and, through them, future generations.

Indeed, the contamination of water and food sources from releases of mercury to land and water is a critical concern for indigenous communities. It is of particular

[43] Article 8(3).
[44] Article 8(4).
[45] Articles 9(3)-(4).
[46] Article 10.
[47] Article 11.
[48] Article 12.
[49] Selin, 'Global Environmental Law', *supra* note 3, at 16.

concern in relation to the consumption of traditional foods by children and expectant or nursing women, as studies have shown levels consistent with cognitive deficits.[50]

Inuit culture is very closely tied to the land, ice, flora, and fauna of the Arctic. The traditional Inuit diet predominantly includes meat and fat from a variety of hunted species, such as seals, whales, caribou, and fish.[51] Marine mammals in particular contain high levels of mercury, and studies have shown that exposure to mercury in the womb is already having a significant impact on Inuit children.[52]

As a result of these profound health impacts, the Inuit Circumpolar Council (ICC)[53] played a significant role in negotiations towards the Minamata Convention, both as part of the Canadian delegation (ICC Canada) and as an independent observer (mostly ICC Greenland).[54] Indigenous peoples more broadly – including the ICC – also played a sizable role in the negotiations through the Global Indigenous Peoples' Caucus.[55] Their concerns were broadly captured in Article 16 of the Minamata Convention on health impacts, with some jurisdictions like Latin America mandating that health provisions be included in the negotiations and final agreement.[56]

The UN Declaration on the Rights of Indigenous Peoples contains several provisions that are relevant to the issue of mercury, its impacts on indigenous peoples, and the implementation of the Minamata Convention. Article 29 describes several interrelated environmental human rights. First, it states that indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. Given the particular vulnerability of indigenous peoples to mercury due to their reliance on traditional foods, national implementation of the Minamata Convention must ensure that the needs of indigenous peoples are taken into account, especially – but not exclusively – in relation to ASGM (Article 7), emissions (Article 8), and releases (Article 9). Second, Article 29 of UNDRIP proclaims that states shall take effective measures to ensure that no storage or disposal of hazardous materials takes place in the lands or territories of indigenous peoples without their free, prior and informed consent (FPIC). In implementing the Minamata Convention's provisions on environmentally sound storage (Article 10) and mercury wastes (Article 11), this right to FPIC must be respected. Third, Article 29 of UNDRIP asserts that states shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and

50 Koutouki 'Crimes against Future' *supra* note 17, at 247.

51 *The Inuit Way: A Guide to Inuit Culture* (Pauktuutit Inuit Women of Canada, 2006) at 42.

52 Lindsey Konkel 'How Brain-Damaging Mercury Puts Arctic Kids at Risk', National Geographic, online (27 March 2015), available at <http://news.nationalgeographic.com/2015/03/150327-inuit-mercury-beluga-iq-canada-nunavik-arctic-faroe-islands/> (visited 4 April 2019).

53 See <https://www.inuitcircumpolar.com/>.

54 Timo Koivurova, Paula Kankaanpaa and Adam Stepien, 'Innovative Environmental Protection: Lessons from the Arctic', 27 *Journal of Environmental Law* (2015) 285-311 at 299.

55 *Ibid.* at 300.

56 Eriksen and Perrez, 'The Minamata Convention', *supra* note 22, at 209.

restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such hazardous materials, are duly implemented. Implementation of the Minamata Convention's provisions on contaminated sites (Article 12) and health aspects (Article 16) must therefore include actions to address the needs of indigenous peoples.

A further relevant provision pertains to traditional medicines, as mercury is also contaminating these important cultural and medical resources through atmospheric deposition and other means. UNDRIP Article 24 states that: 'Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.' Environmental degradation, such as that caused by mercury pollution, can lead to the loss or diminution of traditional medicinal plants and the community's spiritual and cultural life associated with the administration of traditional medicine.[57] Pollution is also leading to the loss of traditional knowledge associated with these medicinal plants, animals and minerals,[58] further violating Article 31 of UNDRIP. In addition, UNDRIP Article 24(2) states that 'Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.' Given the heavy health burden placed on indigenous peoples by mercury pollution, it is critical that states ensure that this right to the highest attainable standard of health is achieved. Effective implementation of the Minamata Convention will be important in this regard, particularly Article 16 on health aspects.

5 Conclusion

Given the significant impacts of mercury pollution on indigenous peoples and their ways of life, the adoption and entry into force of the Minamata Convention is an important step forward in addressing the harm caused by this widespread pollutant. Indigenous peoples played an important role in the negotiations of the Convention through the Global Indigenous Peoples' Caucus and Inuit Circumpolar Council,59 resulting in explicit recognition of their particular vulnerabilities in its preamble. In order to ensure that national implementation of the Minamata Convention has the best possible outcomes for indigenous peoples, alignment with the human rights of indigenous peoples expressed in the UNDRIP must be prioritized.

[57] Koutouki, 'Crimes against Future', *supra* note 17, at 248.
[58] *Ibid.* at 260.
[59] Koivurova, Kankaanpaa and Stepien, 'Innovative Environmental Protection', *supra* note 54, at 300.

Are Human Rights Relevant to High-Seas Marine Protected Areas?

Kanako Hasegawa[1]

1 Introduction

The high seas[2] occupy around 58 per cent of the oceans[3] and account for more than 40 per cent of the Earth's surface. Together with the seabed beyond continental shelf (Figure 1), they are collectively termed as Areas Beyond National Jurisdiction (ABNJ). ABNJ have unique ecosystems such as seamounts and thermal vents that are rich in biodiversity. Mora et al. have estimated that around 90 per cent of the species in the oceans are yet to be described, which means that more than 2 million species are still unknown to us.[4] Our knowledge on deep-sea biodiversity has been limited[5] and it has been even said that 'we know more about the moon surface than the deep-sea floor'.[6] As the 'last frontier' on Earth, the high seas and the resources both within the water column and on the seabed are gaining increasing attention.

Marine genetic resources and deep-sea minerals are among those resources in ABNJ that are attracting commercial as well as political attention. Bioprospecting, search for new compounds from organisms, in ABNJ has been growing in search of new compounds and products originated from marine organisms, and an increasing

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[2] As per Art. 86 of the UN Convention on the Law of the Sea (UNCLOS) (Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261), the high seas are 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State'.

[3] Jane Lubchenco and Kirsten Grorud-Colvert, 'Making Waves: The Science and Politics of Ocean Protection', 350(6259) *Science* (2015) 382-383 at 382.

[4] Camilo Mora et al, 'How Many Species Are There on Earth and in the Ocean?', 9(8) PLOS Biology (2011), DOI:10.1371/journal.pbio.1001127.

[5] Eva Ramirez-Llodra et al, 'Deep, Diverse and Definitely Different: Unique Attributes of the World's Largest Ecosystem', 7 *Biogeosciences* (2010) 2851-2899 at 2852.

[6] This was said by Paul Snelgrove.

number of patents has been registered. These patents are, however, owned by only few countries in the world. A recent study showed that 10 countries own 90 per cent of the patents associated with marine genetic resources and only three countries (USA, Germany and Japan) own 70 per cent of them.[7] This illustrates the current lack of and, thus, the need for a legal framework to ensure equitable access and benefit-sharing with regard to marine genetic resources. The question as to who owns the marine resources and how to share the benefits is becoming increasingly relevant. Yet, the human dimensions have not been well considered for the conservation and the management of marine biodiversity in the high seas apart from benefit-sharing.

Marine Protected Areas (MPAs) are becoming increasingly important as human activities are intensifying in the oceans including in the high seas. Deep-sea mining is an emerging economic activity in the oceans. The International Sea Bed Authority,[8] responsible for coordinating activities in the Area (Figure 1) has so far granted 28 exploration contracts for polymetallic nodules, seabed massive sulphides and cobalt-rich ferro-manganese crusts. To date, the exploitation of deep-sea minerals in the ABNJ has not been conducted.[9] Previous studies have shown that mining activities may cause considerable negative impacts on organisms living in the oceans[10] Therefore, precautionary approaches need to be taken in order to prevent detrimental effects while exploring the economic potential of deep-sea mining.

Another major human activity in the high seas is fisheries. With the improvement of fishing technologies, high-seas fisheries increased ten folds between 1950 and 2014.[11] However, the global decline of fish stocks accompanied by intensifying fisheries in the high seas has been a global concern. Current management practices by the Regional Fisheries Management Organizations on the high seas is inadequate.[12] According to the Food and Agricultural Organization of the United Nations (FAO),[13] 33 per cent of the global fish stocks is overfished while 60 per cent are fully fished.

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7 Sophie Arnaud-Haond, Jesús M. Arrieta and Carlos M. Duarte, 'Marine Biodiversity and Gene Patents', 331(6024) *Science* (2011) 1521-1522 at 1521.

8 The International Seabed Authority is an international organization established under the UNCLOS and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (New York, 28 July 1994, in force 28 July 1996, 33 *International Legal Materials* (1994) 1309).

9 Jennifer M. Durden et al, 'A Procedural Framework for Robust Environmental Management of Deep-Sea Mining Projects Using a Conceptual Model', 84 *Marine Policy* (2017) 193-201 at 193.

10 For instance, Daniel O. B. Jones et al, 'Biological Responses to Disturbance from Simulated Deep-Sea Polymetallic Nodule Mining', 12(2) *PLOS ONE* (2017), DOI:10.1371/journal.pone.0171750.

11 Daniel Pauly and Dirk Zeller, 'Sea around Us Concepts, Design and Data' (2015), <http://www.seaaroundus.org>.

12 Sarika Cullis-Suzuki and Daniel Pauly, 'Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations', 34(5) *Marine Ecology Progress Series* (2010) 1036-1042 at 1041.

13 FAO, *State of the World Fisheries and Aquaculture* (2018), available at <http://www.fao.org/3/I9540EN/i9540en.pdf> (visited 6 February 2019).

Given the increasing human activities in ABNJ and concern over the future of marine biodiversity, the International Conference on an internationally legally binding instrument (ILBI) under the Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) has been initiated. The elements of a package for further discussion include area-based management tools including MPAs.[14] MPAs can be an effective tool to protect marine biodiversity and to manage fisheries resources, when they are properly managed.[15]

As a new ILBI is being prepared and a new procedure for the establishment of MPAs in the high seas under the ILBI is being discussed,[16] this paper brings forward a question: are human rights relevant to MPAs in ABNJ? The law of the sea regime on ILBI has been developed independently of the human rights legal regime. Consequently, human rights issues have not been well integrated into the discussion on the ILBI. The absence of discussion, however, does not imply irrelevance of human rights issues for the conservation of marine biodiversity.

By examining human rights issues in protected areas within national jurisdictions and their possible relevance to MPAs in the high seas, this paper argues that a human rights perspective is useful in bringing social dimensions to high seas MPAs. In preparing the ILBI for the conservation of marine biodiversity in ABNJ, human rights perspectives can bring forward important questions such as who is going to access MPAs, who is going to manage the MPAs, and who participates in the decision-making process.

[14] 'Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction', UNGA Res.72/249 of 24 December 2017.

[15] Crow White and Christopher Costello, 'Close the High Seas to Fishing?', 12(3) *PLOS Biology* (2014), DOI: 10.1371/journal.pbio.1001826.

[16] See 'Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018', 25(179) *Earth Negotiations Bulletin* (2018).

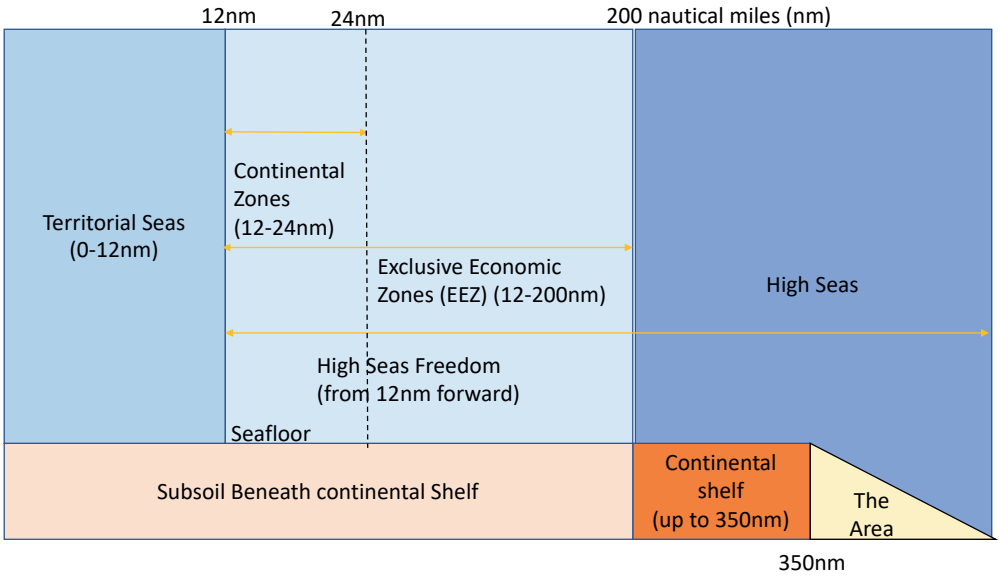

Figure 1. Maritime zone definition set by UNCLOS.[17]

2 Marine Protected Areas and human rights

According to the International Union for Conservation of Nature (IUCN),[18] MPAs are defined as 'any area of intertidal or subtidal terrain, together with its overlying waters and associated flora, fauna, historical and cultural features, which has been reserved by legislation or other effective means to protect part or all of the enclosed environment'.[19] MPAs are one of the principal tools for the conservation of biodiversity and ecosystem services.[20]

Currently, 7.4 per cent of the ocean is designated as MPAs. Within the national waters including the exclusive economic zones, 16.8 per cent is designated as MPAs while in ABNJ only 1.2 per cent are covered under MPAs.[21] Nevertheless, a growing

[17] Source: Colleen M. Corrigan and Francine Kershaw, 'Working Toward High Seas Marine Protected Areas. An Assessment of Progress Made and Recommendations for Collaboration' (UNEP and WCMC, 2008), available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/8315/Working_towards_high_seas_marine_protected_areas.pdf?sequence=3&isAllowed=y> (visited 8 August 2019).

[18] See <http://www.iucn.org>.

[19] Graeme Kelleher (ed.), *Guidelines for Marine Protected Areas* (IUCN, 1999), available at <https://portals.iucn.org/library/sites/library/files/documents/PAG-003.pdf> (visited 25 August 2019).

[20] Bethan C. O'Leary et al, 'Effective Coverage Targets for Ocean Protection', 9(6) *Conservation Letters* (2016) 398-404 at 398; Callum M. Roberts, Julie P. Hawkins and Fiona R. Gell, 'The Role of Marine Reserves in Achieving Sustainable Fisheries', 360 *Philosophical Transactions of the Royal Society of London B: Biological Sciences* (2005) 123-132.

[21] UNEP-WCMC, IUCN and National Geographic Society, 'Protected Planet Report. Tracking progress towards global targets for protected areas' (2018), available at <https://livereport.protectedplanet.net/pdf/Protected_Planet_Report_2018.pdf> (visited 25 August 2019) at 6.

number of MPAs have been established over the past years.[22] Recently, large MPAs, greater than 100,000 km2, have started to be established around the world. Currently, 20 MPAs account for the majority of the total MPA coverage.[23]

Declaring and designating certain marine areas as MPAs alone, however, does not guarantee successful conservation. These MPAs may become so-called 'paper parks. Gill et al have shown that many MPAs have failed to have effective and equitable management processes with widespread limitation in financial and human resources.[24] Edgar et al have also pointed out that MPA coverage alone does not optimize conservation of marine biodiversity and more attention is needed on better MPA design, their durable management and on compliance practices.[25] For large marine protected areas, enforcement and governance mechanisms remain to be an issue for effective conservation.[26]

Not only the conservation measures but also social issues are crucial for the management of MPAs.[27] Charles and Wilson[28] have identified 10 human dimensions of MPA management: 1) objectives and attitudes; 2) people-oriented entry points; 3) attachment to place; 4) meaningful participation; 5) knowledge has a people side; 6) effective governance; 7) rights; 8) distribution of costs and benefits; 9) displacement; and 10) MPAs within a bigger social, ecological and political setting. These social dimensions also need to be considered together with biological characteristics such as habitat types and species composition when establishing MPAs.

While it has not been widely discussed, the establishment of MPAs impacts on the existing rights system. Rights that existed before the creation of an MPA may be reallocated, enacted or removed through the establishment of the MPA. The main issues with MPAs in this regard are: who has the right to manage a MPA (*management rights*); who has access to the MPA (*access rights*); who can withdraw resources, such as fish, from the MPA (*withdrawal rights*);[29] who can exclude individuals from

[22] Grant R. McDermott et al, 'The Blue Paradox: Preemptive Overfishing in Marine Reserves', *Proceedings of the National Academy of Sciences* (2018), DOI:10.1073/pnas.1802862115.

[23] UNEP-WCMC and IUCN, 'Marine Protected Areas' (2019), available at <http://www.protectedplanet.net/marine>.

[24] David A. Gill et al, 'Capacity Shortfalls Hinder the Performance of Marine Protected Areas Globally', 543(7647) *Nature* (2017) 665-669 at 665.

[25] Graham J. Edgar et al, 'Global Conservation Outcomes Depend on Marine Protected Areas with Five Key Features', 506(7487) *Nature* 506 (2014) 216-220 at 216.

[26] Pierre Leenhardt, Bertrand Cazalet, Bernard Maxine Salvat, Joachim Claudet and Feral, 'The Rise of Large-scale Marine Protected Areas: Conservation or Geopolitics?' 85 *Ocean & Coastal Management* (2003) 112-118 at 112.

[27] Anthony Charles and Lisette Wilson, 'Human Dimensions of Marine Protected Areas', 66(1) *ICES Journal of Marine Science* (2008) 6-15 at 6; Robert S. Pomeroy, John E. Parks and Lani M. Watson, *How Is Your Mpa Doing?: A Guidebook of Natural and Social Indicators for Evaluating Marine Protected Area Management Effectiveness* (IUCN, 2004), available at <https://portals.iucn.org/library/efiles/documents/PAPS-012.pdf> (visited 6 February 2019) at 2.

[28] *Ibid.*

[29] Charles and Wilson, 'Human Dimensions of', *supra* note 27, at 10.

the MPA (*exclusion rights*); and who can transfer resource management and exclusion rights to another actor (*alienation rights*).[30] Reallocation of these rights may have implications on the governance, economic well-being, health, education, social capital and culture of the people who use the marine resources.[31]

Food security is also an important issue related to the *right to food*. In general, MPAs can increase food security and empower coastal communities but for the minority of fishers, it may have negative impacts[32] and fishermen may face short-term costs due to the loss of fishing opportunities.[33] This economic loss may in turn impact health and access to education in those affected communities. Other less tangible impacts from such economic loss could be changes in culture, local knowledge, identity and sense of place.[34] Thus, the establishment and management of MPAs clearly have impacts on access to food, education and health services. This demonstrates the relevance of human rights in the establishment of MPAs.

While the participation in the relevant decision-making and management processes of MPAs can empower people, previous studies have revealed that the creation of protected areas can potentially lead to the violation of human rights.[35] Although limited case studies are available with regard to marine protected areas, experiences from terrestrial protected areas show that conservation efforts may impoverish local communities[36] despite good intention. Reviewing conservation policy and practices in India, Wani and Kothari have emphasized that people living within protected areas should enjoy human rights including right to association, right to assembly, right to say what they want without fear of persecution, right to participation, right to information, and right to a reasonable standard of living and livelihood security.[37]

3 Rights-based approaches (RBAs)

Following the recognition that human rights need to be respected while making conservation efforts, some researchers and organizations started advocating rights-based approaches (RBAs). Campese describes RBAs involves 'integrating rights

[30] Michael B. Mascia and C. Anne Claus, 'A Property Rights Approach to Understanding Human Displacement from Protected Areas: The Case of Marine Protected Areas', 23(1) *Conservation Biology* (2009) 16-23 at 18.

[31] Michael Mascia, 'Social Dimensions of Marine Reserves' in Michael Mascia: Marine Reserves: A Guide to Science, Design and Use (Island Press, 2004) 164-186 at 19.

[32] Michael B. Mascia, C. Anne Claus and Robin Naidoo, 'Impacts of Marine Protected Areas on Fishing Communities', 24(5) *Conservation Biology* (2010) 1424-1429 at 1424.

[33] Martin D. Smith et al, 'Political Economy of Marine Reserves: Understanding the Role of Opportunity Costs', 107(43) *Proceedings of the National Academy of Sciences* (2010) 18300-18305 at 18300.

[34] Mascia and Claus, 'A Property Rights Approach', *supra* note 30, at 18.

[35] Ashish Kothari, 'Protected Areas and People: The Future of the Past', 17(2) *Parks* (2008) 23-34 at 25.

[36] Milind Wani and Ashish Kothari, 'Protected Areas and Human Rights in India: The Impact of the Official Conservation Model on Local Communities', 15 *Policy Matters* 15 (2007) 100-114 at 100.

[37] *Ibid.* at 112.

norms, standards, and principles into policy, planning, implementation, and outcomes assessment to help ensure that conservation practice respects rights in all cases and supports their further realization where possible.' [38]

The RBAs have been used in the international development community, with the increasing recognition the human rights are integral to development outcomes.[39] When applied to conservation and natural resource management, RBAs can draw attention to factors which is beyond resource access such as the health and welfare of resource-dependent communities.[40]

Regarding marine resource management, a human rights approach to fisheries or rights-based fishing has been advocated. The Committee on Fisheries of FAO[41] has recognized that

> a rights-based approach, in defining and allocating rights to fish, would also address the broader human rights of fishers to an adequate livelihood and would therefore include poverty-reduction criteria as a key component of decisions over equitable allocation of rights, including in decisions over inclusion and exclusion, gender equality, and the protection of small-scale fishworkers' access to resources and markets.[42]

Previously, research on fisheries governance in relation to human rights had largely focused on access rights for small-scale fishers[43] and indigenous peoples' rights.[44] However, there is a growing recognition that a broader human rights perspective beyond fishing rights is required for fisheries governance.[45] Ratner et al have described various human rights issues in relation to fisheries in developing countries such as forced evictions, child labour, forced labour, detention without trial or under unacceptable conditions, and the right to life, liberty and security of person.[46] Not

[38] Jessica Campese, *Rights-Based Approaches: Exploring Issues and Opportunities for Conservation* (CIFOR, 2009), available at <http://www.cifor.org/publications/pdf_files/Books/BSunderland0901.pdf> (visited 6 February 2019) at 1.

[39] Urban Jonsson, 'Human Rights Approach to Development Programme' (UNICEF, 2003), available at <https://www.unicef.org/rightsresults/files/HRBDP_Urban_Jonsson_April_2003.pdf> (visited 24 August 2019) at 7.

[40] Blake D. Ratner, Björn Åsgård and Edward H. Allison, 'Fishing for Justice: Human Rights, Development, and Fisheries Sector Reform', 27 *Global Environmental Change* (2014) 120-130 at 120.

[41] See <http://www.fao.org>.

[42] FAO, 'Managing Transition to Rights-Based Approach Including Access to Resources, Markets and Social Empowerment' (2007) available at <http://www.fao.org/fishery/topic/16152/en> (visited 24 August 2019).

[43] Anthony J. Charles, 'Human Rights and Fishery Rights in Small-Scale Fisheries Management' in Robert S. Pomeroy and Neil L. Andrew (eds), *Small Scale Fisheries Management* (CAB International, 2011) at 59-74; Ratner, Åsgård and Allison, 'Fishing for Justice', *supra* note 40.

[44] Robert Charles G. Capistrano, 'Reclaiming the Ancestral Waters of Indigenous Peoples in the Philippines: The Tagbanua Experience with Fishing Rights and Indigenous Rights', 34(3) *Marine Policy* (2010) 453-460.

[45] Ratner, Åsgård and Allison, ''Fishing for Justice', *supra* note 40.

[46] *Ibid.*

only fishing rights but also these other human rights issues, such as labour rights of fishworkers, need to be considered when managing fisheries through the RBAs.

Despite the increasing recognition of the RBAs, critics on human-rights-based approaches to fisheries have pointed out its conceptual weakness[47] and limited empirical understanding[48] of the concept. Moreover, as compared to studies on the RBAs for terrestrial protected areas, empirical studies on the application of the RBAs to MPAs have been very limited. While the RBAs can bring in social dimensions going beyond increased participation in decision-making and management,[49] further research is needed to understand how RBAs can incorporate human rights perspectives in the design and management of MPAs including fisheries activities since fishery may not be the only human activity within the particular marine and coastal ecosystems.

4 UN Convention on the Law of the Sea and human rights law

UNCLOS is generally regarded as the constitution for the oceans and the seas. While it does not have specific articles on marine protected areas, Part XII deals with the protection and preservation of the marine environment. Article 192 clearly states that 'States have the obligation to protect and preserve the marine environment'. Article 193 assures the sovereign right of states to exploit their natural resources while Article 194 indicates that states shall take measures to prevent, reduce and control pollution. Furthermore, the UN Fish Stocks Agreement[50] spells out the duty to use the best scientific information available and the application of the precautionary approach to protect biodiversity in the marine environment.[51]

It should be noted that UNCLOS deals with rights of states rather than the right of individuals. Human rights law, on the other hand, deals with individuals.[52] Historically, human rights law and environmental law have been developed by separate

[47] Andrew M. Song, 'Human Dignity: A Fundamental Guiding Value for a Human Rights Approach to Fisheries?', 61 *Marine Policy* (2015) 164-170 at 164.

[48] Anthony Davis and Kenneth Ruddle, 'Massaging the Misery: Recent Approaches to Fisheries Governance and the Betrayal of Small-Scale Fisheries', 71(3) *Human Organization* (2012) 244-254 at 248.

[49] Campese, *Rights-Based Approaches, supra* note 38.

[50] Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995, in force 11 December 2001, 34 *International Legal Materials* (1995) 1542, <http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm> (visited 9 February 2019).

[51] Kristina M. Gjerde, 'High Seas Marine Protected Areas and Deep-Sea Fishing', *FAO Fisheries Reports* 838 (2007), <http://www.fao.org/tempref/docrep/fao/010/a1341e/a1341e02d.pdf> (visited 6 February 2019).

[52] Irini Papanicolopulu, 'Human Rights and the Law of the Sea' in David Joseph Attard, Malgosia Fitzmaurice and Norman A. Martínez Gutiérrez (eds), *The Imli Manual on International Maritime Law: Volume I: The Law of the Sea* (Oxford University Press, 2014) ch. 19.

clusters of scholars, experts and organizations. Law of the sea is one of the oldest branches of international law and it has its own specialists and the framework convention, UNCLOS.[53] This academic division may have contributed to the differences between human rights law and the law of the sea regimes.

UNCLOS does not specifically mention human rights because it is not a human rights instrument. However, concerns on humans can be seen in the instrument.[54] Scholars have argued that human rights apply to people at sea as well as on land. Papanicolopulu has pointed out that human rights and the law of the sea are interacting in three ways. First, human rights law and labour law provide the standards for the treatment of individuals at sea. Second, the law of the sea provides the structural framework for states to ensure that human rights are ensured. Third, the law of the sea has started examining how maritime activities may impact human rights.[55]

Under UNCLOS, community rights are also recognized through the concept of 'common heritage of mankind'.[56] This concept is applicable to the international seabed, which is called 'Area' (Figure 1). Article 136 of UNCLOS states that '[t]he Area and its resources are the common heritage of mankind.' Following the previous article, Article 137 further states that '[a]ll rights in the resources of the Area are vested in mankind as a whole'.

On the other hand, the Universal Declaration on Human Rights,[57] generally regarded as the foundation of international human rights law, does not have specific reference to the ocean or to the environment. Recently, however, there has been a growing discussion on the right to a healthy environment. Lewis has examined that there are two approaches to conceptualizing environment in the human rights law. One way is to view a healthy environment as a pre-condition for the enjoyment of human rights. Another way is to consider the environment as an entitlement to which a human right to a healthy environment exists.[58] Some studies have suggested that the second approach to recognize a human right to a healthy environment is emerging as customary law.[59]

In this regard, the interlinkage of environmental law and the human rights law is clearly important and such a relationship should not exclude the legal regime for

[53] Tullio Treves, 'Human Rights and the Law of the Sea', 28(1) *Berkeley Journal of International Law* (2010) 1-14 at 1.
[54] *Ibid.* at 3.
[55] Papanicolopulu, 'Human Rights and', *supra* note 52, at 529.
[56] *Ibid.*
[57] Universal Declaration of Human Rights, UNGA Res. 217A of 10 December 1948.
[58] Bridget Lewis, 'Environmental Rights or a Right to the Environment: Exploring the Nexus between Human Rights and Environmental Protection', 8(1) *Macquarie Journal of International and Comparative Environmental Law* (2012) 36-47 at 36.
[59] W. Paul Gormley, 'The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms', 3 *Georgetown International Environmental Law Review* (1990) 85-116 at 85; Lewis, 'Environmental Rights or', *supra* note 58, at 40.

the marine environment. The right to a healthy marine environment is part of the broader right to a healthy environment, and human maritime activities governed by UNCLOS should guarantee the fulfilment of human rights through state protection.

5 Marine Protected Areas in the high seas

Concerns over the growing threats to marine biodiversity have been catalysing the establishment of marine protected areas in the high seas, in addition to the ones within national jurisdictions. Although the total area covered by MPAs in the high seas is lagging behind compared to the territorial waters,[60] progress has been made to better protect high-seas biodiversity through marine protected areas. In September 2010, for instance, 15 European nations participating in the OSPAR Convention[61] established the first network of six high seas MPAs.[62]

As was done under the OSPAR Convention, MPAs can be designated by regional bodies, including regional seas conventions, as well as by regional fisheries bodies. The North East Atlantic Fisheries Commission (NEAFC),[63] a regional fishery body, has established regulatory areas including temporal bottom fishing closures.[64] The Northwest Atlantic Fisheries Organization (NAFO)[65] has also set temporal closure for shrimp fisheries. NAFO members also decided to protect seamount areas from high seas bottom trawling from 2007 to 2010.[66] High seas MPAs have also been established under other regional seas conventions. Examples include the Pelagos Sanctuary established under the Convention for the Protection of the Mediterranean Sea against Pollution of (Barcelona Convention)[67] and its Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean.[68]

[60] Lubchenco and Grorud-Colvert, 'Making Waves: The', *supra* note 3, at 382.

[61] Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992, in force 25 March 1998, 32 *International Legal Materials* (1993) 1069.

[62] Bethan C. O'Leary et al, 'The First Network of Marine Protected Areas (Mpas) in the High Seas: The Process, the Challenges and Where Next', 36(3) *Marine Policy* 36 (2012) 598-605 at 598.

[63] See <https://www.neafc.org/>.

[64] See NEAFC, 'NEAFC Convention and Regulatory Areas', available at <https://www.neafc.org/page/27> (visited 9 February 2019).

[65] See <https://www.nafo.int/>.

[66] Colleen M. Corrigan and Francine Kershaw, 'Working toward High Seas Marine Protected Areas' (UNEP, 2008), available at <https://www.cbd.int/doc/meetings/mar/ewbcsima-01/other/ewbcsima-01-unep-wcmc-en.pdf> (visited 8 February 2019); Monica Patricia Martinez Alfaro, 'Do We Need Marine Protected Areas on the High Seas? Analysis of the Legal Implications of the Establishment of Protected Areas on the High Seas', LLM thesis. Universitatis Islandiae (2013), available at <https://skemman.is/bitstream/1946/16398/1/monica%20martinez-ritger%C3%B0.pdf> (visited 8 February 2019).

[67] Convention for the Protection of the Mediterranean Sea against Pollution, Barcelona, 16 February 1976, in force 12 February 1978, 15 *International Legal Materials* (1976) 290, amended to be the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, Barcelona, 10 June 1995, in force 9 July 2007, <http://web.unep.org/unepmap/>.

[68] Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, Barcelona, 10 June 1995, in force 12 December 1999, <https://wedocs.unep.org/rest/bitstreams/2477/retrieve> (visited 10 February 2019).

MPAs can also be established under global instruments. Scovazzi has shown that several global instruments have provisions to create conservation areas including the following: the Convention for the Regulation of Whaling;[69] the International Convention for the Prevention of Pollution from Ships (MARPOL);[70] and Annex V to the Protocol on Environmental Protection to the Antarctic Treaty.[71, 72] The International Maritime Organization (IMO)[73] has a set of guidelines for the establishment of Particularly Sensitive Sea Areas (PSSAs). A PSSA is defined as an 'area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities.'[74] PSSAs can be established in the high seas and once established, the IMO member states need to follow specific measures such as discharge restrictions and ships' routing measures.[75]

There are both benefits and costs associated with the establishment of high seas MPAs. If effectively managed, MPAs can be an effective conservation tool and help sustainable management of fish stocks. Although deep-sea ecosystems have low resilience and slow recovery,[76] the protection of sensitive habitats, such as seamounts in the high seas and deep-water corals, is useful for the protection of fish habitats.[77] Sumaila et al have shown that closing the high seas for fishers could reduce inequality in the distribution of fisheries benefits among maritime states.[78]

Nevertheless, high-seas MPAs can also have negative socio-economic impacts such as loss of jobs for fishermen due to a decline in fish catch.[79] Not only the loss of jobs but also decreased fish catch due to the closure of fisheries grounds may cause concerns over global food security. However, a recent study by Schiller et al showed that species from the high seas are largely consumed in food-secure countries and regions such as Japan, Europe and the United States, and that high seas fisheries have a very

[69] International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 10 November 1948, 161 *United Nations Treaty Series* 72.

[70] International Convention for the Prevention of Pollution from Ships, 1973, first signed 2 November 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), adopted 17 February 1978. The combined instrument entered into force on 2 October 1983, 12 *International Legal Materials* (1973) 1319, <http://www.imo.org>.

[71] Protocol on Environmental Protection to the Antarctic Treaty, Madrid, 4 October 1991, in force 14 January 1998, 30 *International Legal Materials* (1991) 1461.

[72] Tullio Scovazzi, 'Marine Protected Areas on the High Seas: Some Legal and Policy Considerations', 19(1) *International Journal of Marine Coastal Law* (2004) 1-17 at 9.

[73] See <http://www.imo.org>.

[74] International Maritime Organization (IMO), 'Particularly Sensitive Sea Areas (Pssa)' (2019), available at <http://www.imo.org/en/MediaCentre/HotTopics/PSSA/Pages/default.aspx.> (visited 27 January 2019).

[75] Scovazzi, 'Marine Protected Areas', *supra* note 72, at 8-9.

[76] Veerle A. I. Huvenne et al, 'Effectiveness of a Deep-Sea Cold-Water Coral Marine Protected Area, Following Eight Years of Fisheries Closure' 200 *Biological Conservation* (2016) 60-69 at 60.

[77] Ussif Rashid Sumaila et al, 'Potential Costs and Benefits of Marine Reserves in the High Seas', 345 *Marine Ecology Progress Series* (2007) 305-310 at 308.

[78] U Rashid Sumaila et al, 'Winners and Losers in a World Where the High Seas Is Closed to Fishing', 5 *Scientific reports* (2015) 305-310 at 305.

[79] Sumaila et al 'Potential Costs and', *supra* note 77, at 306.

limited role in global food security.[80] Thus, food security may not be significantly affected by the creation of high seas MPAs and, rather, it could have a positive impact through the long-term recovery of fish stocks.

Until now, the high seas MPAs have been managed on a sectoral basis regulating certain sectoral activities such as shipping and fisheries. For instance, within PSSAs, only shipping-related activities are regulated while only fishing activities are regulated within regulatory areas under Regional Fisheries Bodies. As the sector-based approach failed to address interaction of different human activities, there is an increasing recognition that more integrated management is needed for high seas MPAs.[81]

6 Are human rights relevant to Marine Protected Areas in the high seas?

For the integrated management of MPAs in ABNJ, socio-economic dimensions need to be considered along with environmental issues. So far, the discussion on high seas MPAs has been primary on the conservation and sustainable management of ecosystem functioning and services. Limited attention has been paid to human dimensions in creating the high seas MPAs, perhaps due to the large distance from inhabited areas and assumptions that there are only limited socioeconomic impacts. But, are human rights irrelevant to high seas MPAs?

First of all, the issue of *access rights* to the high seas MPAs can be considered. Under UNCLOS, flag-states have the freedom of navigation, overflight, laying of submarine cables and pipelines, construction of artificial islands or installations, fishing, and marine scientific research, subject to the conditions set by UNCLOS and other rules of international law.[82] Even though freedom of navigation is granted, ships may need to detour MPA-designated areas depending on the management rules set for the location. This means that access right to a certain area might change through the creation of an MPA. It should be noted that high-sea MPAs that have been established under regional as well as international agreements only apply to the member states of these agreements. This means that non-parties to these agreements may not be obliged to follow the management rules even when the MPA is in principle closed for access.

Secondly, *withdrawal rights* of states can be impacted by the presence of MPAs in ABNJ. For instance, under decisions by fisheries management organizations, state parties may decide to restrict their fishery activities in certain areas of the high seas.

[80] Laurenne Schiller et al, 'High Seas Fisheries Play a Negligible Role in Addressing Global Food Security', 4(8) *Scientific Advances* (2018), DOI: 10.1126/sciadv.aat8351.

[81] Natalie C. Ban et al, 'Systematic Conservation Planning: A Better Recipe for Managing the High Seas for Biodiversity Conservation and Sustainable Use', 7(1) *Conservation Letters* 7 (2014) 41-54 at 52.

[82] Gjerde, 'High Seas Marine', *supra* note 51, at 149.

These rules apply to the member states of respective regional bodies and the states may be required to give up withdrawal rights as well as the freedom of fishing. In case a non-member state to the relevant regional fisheries bodies does not comply with the guideline, it would be considered as a non-regulated fishery under the UN Fish Stock Agreement. This change in the withdrawal right will impact fishermen's life especially in the short term as they may face economic losses due to the loss of fisheries ground and decreased catch.

In addition to fish, genetic resources can be subject to withdrawal in the high seas. While there is a heated discussion as to whether marine genetic resources fall under the regime of common heritage of humankind or not,[83] withdrawal rights could be changed through the presence of MPAs. In this sense, individuals or groups of individuals, such as commercial operators conducting bioprospecting, may be financially impacted by the change in the withdrawal rights.

Thirdly, *management rights* of certain coastal states can be examined. Under the MPAs established by regional instruments, only a certain number of countries within their respective regions are eligible for and engaged in the management of the MPAs in these high-seas. A relevant question is whether these states can be entrusted for the protection of the high seas if the high seas do not belong to any state. Certain costal states could be geographically located closer to the MPAs than other states, but it does not have to guarantee management rights. For the equitable management of the high seas ecosystems and their services, the allocation of management rights needs to be fully examined since the oceans are connected and the management of the high seas may well have an impact on territorial waters.

The issues of management rights lead to the question of the rights to participation. It is relevant to ask who should participate in the creation, management and monitoring of high seas MPAs. The oceans, including the high seas, have an important function for human wellbeing including the generation of oxygen, food supply and absorption of heat as a climate regulator. If these services are to be protected, the protection of the high seas could be of concern to any individuals. As such, in principle, any individuals have rights to participate in a process to protect a safe and healthy environment. This means that appropriate measures and relevant information for participation need to be available instead of relying on closed-door decisions on the creation, management and monitoring of MPAs in ABNJ.

Last but not least, other emerging rights such as inter-generational rights could be considered to be relevant to high seas MPAs. Conservation efforts do not produce results in one day, and a decision today will have an implication on future gener-

[83] Marjo Vierros et al, 'Who Owns the Ocean? Policy Issues Surrounding Marine Genetic Resources', 25(2) *Limnology Oceanography Bulletin* (2016) 29-63 at 34.

ations. Principle 3 of the Rio Declaration[84] states that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.' In line with the Principle, the rights of future generations to a healthy ocean and its natural resources need to be considered when discussing the conservation and sustainable management of the high seas.

7 Conclusion

Until now the creation of high-seas MPAs has been taking a technocratic approach focusing on conservation benefits, and the consideration for human dimensions has not been well made. However, examples of MPAs in the territorial waters, as well as experiences from terrestrial protected areas, have shown the importance of socioeconomic dimensions. Some recent studies have started to analyze the impact of high seas MPAs on indigenous rights. For instance, in eastern and central Polynesia, non-fish natural resources such as whales, dolphins, tuna, and turtle are often considered to be totemic animals of extended families and clans. Property rights of indigenous people could, therefore, include rights to these traditional cultural resources, beyond fishing rights.[85] Further research is needed to understand how to best consider human rights in high seas MPAs.

Considering that UNCLOS and human rights law are interlinked, there is a possibility to better include human rights perspectives in developing high seas MPAs in the framework of a new ILBI to be developed under UNCLOS. Human rights are closely relevant to high seas MPAs including access rights, withdrawal rights, right to information, right to participation and inter-generational rights. These rights could be reallocated through the establishment of MPAs in the high seas. It could thus be concluded that human rights are relevant to high seas MPAs even though there may be no humans living in the high seas.

As the Intergovernmental Conference on an ILBI under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction continues, I would recommend considering human dimensions, including human rights, together with other legal and scientific dimensions in the discussion on area-based management tools including MPAs. Rights-based approaches, which have been used for conservation, could provide a useful framework in examining socio-economic impacts of any future governance process for MPAs in ABNJ. It is to be hoped that human dimensions will be properly incorporated in the consideration of a mechanism for site-selection, management, monitoring and enforcement of MPAs in the high seas.

[84] UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876.

[85] Pierre Leenhardt et al, 'The Rise of Large-scale Marine Protected Areas: Conservation or Geopolitics?', 85 *Ocean & Coastal Management* (2013) 112-118 at 115.

The Dilemma of Accessing Justice, Human and Environmental Rights: The Case of Exposure to Hazardous Chemical Substances in Africa

Yahya Msangi[1]

1 Introduction

The use of chemicals is one of the oldest practices in the history of humankind. In fact, the history of humans cannot be separated from that of chemistry. By 1000 BC, civilizations used technologies that would eventually form the basis of the various branches of chemistry. Examples include extracting metals from ores, making pottery and glazes, fermenting beer and wine, extracting chemicals from plants for medicine and perfume, rendering fat into soap, making glass, and making alloys like bronze. Chemicals have also been used by human beings in wars, in ensuring food security through pest control, fishing and hunting and in promotion of health.

Production of large quantities of chemicals was triggered by the industrial revolution and the first chemical to be produced in large quantities was sulfuric acid. Sulfuric acid was needed in the textile industries for bleaching. From textile production, large quantities of chemicals moved into agriculture, manufacturing and arms industries.

The later part of the nineteenth century saw a huge increase in the exploitation of petroleum extracted from the earth for the production of a host of chemicals which largely replaced the use of whale oil, coal tar and naval stores used previously. Large-scale production and refinement of petroleum provided feed-stocks for liquid-fuels such as gasoline and diesel, solvents, lubricants, asphalt, waxes, and for

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the production of many of the common materials of the modern world, such as synthetic fibers, plastics, paints, detergents, pharmaceuticals, adhesives and ammonia as fertilizer and for other uses.[2]

Though Africa is the least producer of chemical substances, it is one of the regions of the world where human and environmental rights have been immensely affected by chemicals. Between 2000 and 2017, the global chemical industry's production capacity (excluding pharmaceuticals) almost doubled, from about 1.2 to 2.3 billion tonnes. If pharmaceuticals are included, global sales totaled USD 5.68 trillion in 2017, making the chemical industry the world's second largest manufacturing industry. In 2017, Africa's share of the global sales was below 1.4 per cent and it is projected to decrease to less than 1 per cent in 2030.[3] Regardless of this dismal performance in the global trade of chemicals, Africa is faced with a variety of challenges in this respect. These challenges include deliberate dumping by external actors; misuse and abuse of chemicals; unfairness in international trade arrangements; lack of technical skills and technologies; lack of or inadequate legislation and enforcement; and poor national investment policies.

In general, access to justice in environmental matters is theoretically possible within and outside the African continent, but practically there are challenges and limitations. This is what this paper refers to as the 'dilemma of accessing justice, human and environmental rights in Africa' when exposure to toxic substances occurs on a serious scale.

Effective remedies and prosecution, in the context of this paper, depend on the degree of access to justice secured by those who incur damage as a result of, for instance, an act involving dumping of toxic chemicals and waste in a developing country of Africa. Access to justice is a universal human right governed by various international and regional legal instruments and national constitutions.

This paper will explore the underlying causes of the challenges that people, activists and institutions in Africa face in accessing justice in environmental matters. The paper will do so by examining various elements that may hinder or facilitate access to justice. These elements include the nexus between dumping of toxics in the continent, the case of toxic investments, bilateral cooperation and trade agreements, gaps in multilateral environmental agreements (MEAs), the inadequacy of the Strategic Approach to International Chemicals Management (SAICM),[4] the weaknesses of

[2] See <https://www.medichem.org/history/chemicalindustry.asp> (visited 26 February 2016).

[3] 'Global Chemicals Outlook II. From Legacies to Innovative Solutions: Implementing the 2030 Agenda for Sustainable Development', Synthesis Report (UNEP, 2019), available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/27651/GCOII_synth.pdf?sequence=1&isAllowed=y> (visited 18 August 2019) at 28-30.

[4] See <http://www.saicm.org/>.

the Agenda 2030[5] and the Paris Climate Agreement.[6] In my view, these elements can play a significant role in improving access to justice provided that the current gaps and inadequacies are identified, understood and properly addressed by all relevant actors. The SAICM 2020 and post-2020 goal of ensuring that chemicals are used in a manner that does not cause harm to the present and future generations will depend on how these elements are re-defined to eliminate the challenges and inherent gaps.

2 A review of international and African human rights instruments and institutions relevant for accessing justice in cases involving hazardous chemicals

At the international level, most human rights treaties were drafted and adopted before environmental protection became a matter of international concern. As a result, there are few references to environmental matters in international human rights instruments, although the rights to life and to health are certainly included.

It can be said that the link between human rights and environmental protection was established for the first time at the international arena in 1972 during the Stockholm Conference. Principle 1 of the Stockholm Declaration[7] stated that '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'.

Since then international environmental instruments assumed a human-right-based approach but applying two different concepts; the first one recognized environmental protection as a pre-condition for enjoying internationally recognized human rights, especially the rights to life and health. Instead of viewing environmental protection as a requirement for protection of human rights, the second concept considers certain human rights as key elements for protecting the environment.[8] This second concept gained more popularity when a declaration (Rio Declaration on Environment and Development[9]), adopted during the first Earth Summit in 1992, included a principle that set procedural rights as key to achieving sustainable development. Principle 10 states that 'access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed

5 'Transforming our world: The 2030 Agenda for Sustainable Development', UNGA Res. 70/1 of 25 September 2015.

6 Paris Agreement to the United Nations Framework Convention on Climate Change, Paris, 12 December 2015, in force 4 November 2016; 55 *International Legal Materials* (2016) 740.

7 Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1973), 11 *International Legal Materials* (1972) 1416.

8 Dinah Shelton, 'Human Rights, Health and Environmental Protection: linkages in law and practice', WHO Background Paper (2002), available at <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> (visited 18 August 2019) at 3-4.

9 UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876.

because environmental issues are best handled with the participation of all concerned citizens, at the relevant level'. Since then MEAs such as the Aarhus,[10] Basel,[11] Rotterdam,[12] Stockholm[13] and currently the Minamata Convention[14] have included this right in their articles. However, with the exception of the Aarhus Convention, the other instruments have excluded the procedural part i.e. the right of access to effective judicial and administrative proceedings. This has limited their ability to facilitate access to justice, particularly in developing countries.

At the regional level, The African Union (AU)[15] Charter on Human and People's Rights,[16] also known as the Banjul Charter, contains provisions that are fundamental to accessing justice in the state Parties. The provisions are applicable also in a situation where toxic chemicals or waste have been dumped and affect people and their environment. Article 7(1) of the Charter recognizes the right of every individual to have his cause heard, which includes the right to 'appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'. Article 9(1) states categorically that every individual has the right of access to information. Article 13(2) accords individuals the right of access to government services. Article 16 in paras 1 and 2 provides individuals the right to good mental and physical health and requires the state to ensure that individuals enjoy this right. Article 24 provides individuals the right to have an environment that is suitable for their development.

To give effect to the aforementioned rights, the Charter on Human and People's Rights established a commission (African Union Commission on Human and Peoples' Rights).[17] Under Article 45(2) of the Charter, one of the tasks of the Commission is to ensure the protection of human and peoples' rights under the conditions laid down by the Charter. Finally, under Article 60, the Charter requires the Commission to draw inspiration from international law on human and peoples' rights, particularly from the provisions of instruments on human and peoples' rights, including the Charter of the United Nations,[18] the Charter of the Organization of

[10] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, <http://www.unece.org/env/pp/>.

[11] Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int>.

[12] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <http://www.pic.int>.

[13] Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <http://chm.pops.int>.

[14] Minamata Convention on Mercury, Geneva, 19 January 2013, in force 16 August 2017, <http://www.mercuryconvention.org/>.

[15] See <https://au.int/>.

[16] African Charter on Human and People's Rights, Nairobi, 27 June 1981, in force 21 October 1986, 21 *International Legal Materials* 58 (1982).

[17] See <http://www.achpr.org/>.

[18] Charter of the United Nations, 26 June 1945, available at <http://www.un.org/en/documents/charter/index.shtml>.

African Unity,[19] the Universal Declaration of Human Rights (UDHR),[20] other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the African Charter are members.

The African Court on Human and Peoples' Rights (ACHPR)[21] is a continental court established by African countries to ensure protection of human and peoples' rights in Africa. It complements and reinforces the functions of the African Commission on Human and Peoples' Rights. The ACHPR has jurisdiction to consider all cases and disputes referred to it concerning the African Charter on Human and Peoples' Rights (the African Charter), the Court Protocol[22] and any other relevant human rights instrument ratified by the state(s) concerned.[23] Cases to the ACHPR may be filed directly by a state party to the Court's Protocol which the complaint has been logged at the Commission, a state party to the Court's Protocol whose citizen is a victim of a human rights violation, an African Intergovernmental Organization or a relevant non-governmental organization (NGO) with observer status if the state party which they come from has made a declaration allowing such direct application. In addition, a state party to the Court's Protocol with an interest in a case may be permitted by the Court to join the proceedings. The important thing here is that individuals or a group of individuals may, on certain conditions, file a case to the ACHPR. These can potentially include cases of dumping of toxic chemicals and waste if an individual or a group of individuals feels that their rights as enshrined in the African Charter on Human and Peoples' Rights has been infringed.

However, it is important to note that so far only nine of the 30 state Parties to the Protocol have issued a declaration recognizing the competence of the Court to receive cases from NGOs and individuals. The nine states are: Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Mali, Malawi, Tanzania and Rep. of Tunisia. Fortunately, one of the famous cases mentioned in this paper, i.e. the Trafigura case, took place in Cote d' Ivoire. However, due to several factors – including denial of information, lack of awareness of the existence and procedures of the court, corruption and the involvement of a foreign company – prevented victims from accessing justice through the ACHPR.

[19] Charter of the Organization of African Unity, Addis Ababa, 25 May 1963, <https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf> (visited 1 June 2019).

[20] Universal Declaration of Human Rights, UNGA Res. 217A of 10 December 1948.

[21] See <http://www.african-court.org/en/>.

[22] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Ouagadougou, 10 June 1998, in force 25 January 2004, <http://www.african-court.org/en/images/Basic%20Documents/africancourt-humanrights.pdf> (visited 1 June 2019).

[23] Kate Stone, 'African Court of Human and People's Rights (Advocates for International Development, 2012), available at <http://www.a4id.org/sites/default/files/user/African Court of Human and People's Rights.pdf> (visited 18 August 2018) at 3.

On its part, the Bamako Convention[24] is a regional instrument that was put into place to deal specifically with the transboundary movement of hazardous waste in the African continent. It also established a ban for the import of hazardous waste into Africa. It was adopted by the AU heads of state in Bamako, Mali, in 1991. Though the Convention does not contain any specific reference to the rights of people to a good health and the environment, it still recognizes the deleterious effects that toxic waste can have on peoples' health and the state of the environment in its Preamble. However, unlike the Basel Convention, the Bamako Convention cannot be used to access justice when a foreign country exports or dumps toxic waste into the continent since it only has jurisdiction over AU member states signatories to the Convention.

3 The nexus between dumping of toxics and access to justice in Africa

Estimating the amount of toxic waste dumped, legally and illegally trafficked from developed to developing countries, has proved to be an extremely challenging task because of the level of secrecy involved and the lack of regular and reliable monitoring mechanisms. Estimates have differed from one organization to another; however in a month-long operation conducted in about 43 countries in June 2017, under the coordination of Interpol, more than 1.5 million tonnes of illegal waste were discovered. The operation was initiated by Interpol's Pollution Crime Working Group[25] in response to a call from the global law enforcement community to gather more information about illegal waste streams between countries and regions. The majority of the illegal waste discovered during the operation was metal or electronic waste, generally related to the car industry. In total, 226 waste crimes were reported, in addition to 413 administrative violations. Criminal cases included 141 shipments carrying a total of 14,000 tonnes of illegal waste, as well as 85 sites where more than 1 million tonnes of waste was illegally disposed. Some 326 individuals and 244 companies were reported to be involved in criminal or administrative violations in total. The operational results confirmed that Asia and Africa were the main destinations for waste illegally exported from Europe and North America, with trafficking also occurring between countries within Europe.[26] Though in this operation metal and electronic waste formed a large part of illegally dumped and traded waste, it gave an impression that the same trend applies to the dumping and illegal trafficking of hazardous substances and waste from developed countries into Africa and Asia.

[24] The Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Bamako, 30 January 1991, in force 22 April 1998, 30 *International Legal Materials* (1991) 773.

[25] See <https://www.interpol.int/Crimes/Environmental-crime/Pollution-crime>.

[26] Interpol, 'Hazardous materials seized in largest global operation against illegal waste' (8 August 2017), available at <https://www.interpol.int/News-and-Events/News/2017/Hazardous-materials-seized-in-largest-global-operation-against-illegal-waste> (visited 19 August 2019).

Africa has experienced many cases of toxic dumping and illegal trade from developed world in which the dilemma of accessing justice was faced by those who were affected. Illegal dumping and trade in hazardous waste gained momentum in the 1980s when the first reported case involved a firm in United States (US) and the Republic of Sierra Leone. In 1980, the then Organisation of African Unity (OAU) and the US administration had to exert pressure on the government of the day in Sierra Leone to renege on a contract that was worthy of USD 25 million.[27]

In March 1988 in Guinea, a Norwegian shipping company, A.S. Bulk Handling Inc. dumped 15,000 tons of a substance officially listed as 'raw material for bricks' in an abandoned quarry on Kassa, a resort island near Conakry. Soon after the act of dumping, residents from the mainland noticed that the island's vegetation was starting to shrivel. A Government investigation discovered that the material was incinerator ash from the US, the first shipment under a contract to dispose of 85,000 tons of chemical wastes in Guinea. In July the same year, a Norwegian freighter completed removal of the waste. The Norwegian consul was jailed for being party to the dumping.[28]

As another example from 1980s, in February 1988, officials in Guinea-Bissau signed a five-year contract to bury 15 million tons of toxic wastes from European tanneries and pharmaceutical companies. In return, Guinea-Bissau would receive a yearly payment of USD 120 million – slightly less than the country's gross national product of USD 150 million.[29]

Similar incidences have since occurred in many countries, but for the purpose and intent of this paper, just a few cases will be revisited to allow for a critical assessment of the dilemma of accessing justice in cases involving hazardous chemicals and wastes. The selected cases will assist in responding to a key question: was access to justice provided or attainable when toxic chemicals and waste were dumped into a developing country?

Let us now explore the link between dumping of toxic chemicals and waste and access to justice. To be able to do so two issues need to be considered; the right to health and healthy environment and the right of access to justice as part of the basic human rights.

On one hand, the right to a good healthy life and environment is provided in various international legal instruments including Article 25(1) of the UDHR (1948),

[27] 'Dumping Ground Third World', 6(2) *Environmental Policy and Law* (1980) 96.

[28] Jennifer Clapp, *Toxic Exports, The Transfer of Hazardous Waste from Rich to Poor Countries* (Cornell University Press, 2001) 36.

[29] James Brooke, 'Waste Dumpers Turning to West Africa', *The New York Times* of 17 July 1988, available at <https://www.nytimes.com/1988/07/17/world/waste-dumpers-turning-to-west-africa.html> (visited 19 August 2019).

Article 12 of the International Covenant on Economic, Social and Cultural Rights (CESCR) (1966),[30] Article 5(e) of the International Convention on the Elimination of All forms of Racial Discrimination (1965),[31] Articles 11(1)(f) and 12 of the Convention on Elimination of All Forms of Discrimination Against Women (1979)[32] and Article 24 of the Convention of the Rights of the Child (UNCRC) (1989).[33]

The right to health is also provided by regional instruments such as under Article 11 of the European Social Charter (1961)[34] and the African Union Charter on Human and People's Rights (1981) under Article 16.

At the national level, in general, various instruments have been created to safeguard human health against harmful chemicals and waste. There are environmental laws intending to safeguard the general environment against pollution by toxic chemicals and waste. Many countries have legislation on specific hazardous substances including, for instance, radio-active materials, nuclear energy, asbestos and mercury. All African countries have occupational safety and health legislation that regulate the management of toxic chemicals in all workplaces and the surrounding communities.

On the other hand, access to justice is a right recognized under various major international and regional human rights instruments including: Article 8 of the UDHR, Article 3(b) of the International Covenant on Civil and Political Rights (ICCPR),[35] and Article 7 of the UNCRC, Article 7 of the African Charter on Human and People's Rights, Article 12 of the International Convention on the Rights of the Child, and Article 4 of the African Charter on the Rights and Welfare of the Child (ACRWC).[36]

The UDHR states that: 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. On its part, the ICCPR provides for the same right in more detail by requiring each state Party to the Covenant to undertake:

[30] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 *United Nations Treaty Series* 195.
[31] International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, in force 4 January 1969, 660 *United Nations Treaty Series* 195.
[32] Convention on the Elimination of All Forms of Discrimination against Women, (New York, 18 December 1979, in force 3 September 1981, 1249 *United Nations Treaty Series* 18.
[33] Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 28 *International Legal Materials* 1456.
[34] European Social Charter, ETS No. 35, Turin, 1961, in force 26 February 1965, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035> (visited 3 June 2019).
[35] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 *United Nations Treaty Series* 171.
[36] African Charter on the Rights and Welfare of the Child, 1 July 1990, in force 29 November 1999, OAU Doc. CAB/LEG/24.9/49 (1990).

a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
b. To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
c. To ensure that the competent authorities shall enforce such remedies when granted.

The right of access to justice is also recognized in national instruments. It is my personal opinion that these pieces of national legislation are far better than the relevant international legal instruments since apart from recognizing the right to health they also provide means of accessing justice and compensation when this right is abused. A good example is the Tanzanian Occupational Safety and Health Act (OSHA).[37] Articles 66-72 of Part VII (Hazardous Materials in Processes) provide guidelines on how chemicals should be used in order to eliminate or reduce exposure to workers while part VIII (Chemical Provisions) assigns specific responsibilities to employers, suppliers and manufacturers of chemicals, including the obligation of ensuring access to information.

Part II (Administration) and Part IX (Offences, Penalties and Legal Proceedings) is where the Tanzanian OSHA is better placed to provide access to justice than international legal instruments. Under Article 4(1) of Part II, the OSHA calls for the appointment of Chief Inspectors while under Article 5(1) it requires the Chief Inspector to appoint Inspectors. Furthermore, Section 11 of the OSHA requires the appointment of Safety and Health Representatives by the workforce. It also requires the Chief Inspector and Inspectors to be accompanied by these representatives during an inspection. This requirement opens the door of access to justice to workplace victims of exposure to hazardous substances or of any other hazard that is detrimental to their health. The Chief Inspector and The Inspectors are assigned the powers of prosecution – again facilitating access to justice.

In my view, national instruments such as the Tanzanian OSHA have facilitated the operationalization of the internationally recognized polluter pay principle better than the international instruments. Remediation and compensation are key requirements for facilitating access to justice. The polluter pay principle becomes null and void if an instrument lacks a procedure for remediation and compensation as most international instruments do.

Therefore, though many international instruments have accorded people the right to a healthy life and environment and the right of access to justice, the reality on

[37] Occupational Safety and Health Act, No. 5 of 13 February 2003.

the ground does not reflect these good intentions. The majority of these instruments have failed to operationalize these good intentions due to various factors including the omission of operational procedures in their provisions, the narrow mandates given to responsible institutions, the lack of an international court to deal with these issues, the business interest of corporations and states where they are registered or based, unequal terms of trade between developed and developing countries, lack of or poor legislation in developing countries, and corruption.

For instance, the lack of an international court that has a mandate over these international human rights instruments transforms the concept of a legally binding nature of these instruments into a myth that is rarely applicable when a Party or its associates contravene provisions of the international instrument. In such a situation access to justice becomes a favor rather than a right. Andrew Watson Samaan made important observations about this subject; he observed that though there is a flurry of international law-making effort since the Stockholm meeting in 1972, success has been hampered by the lack of enforcement mechanisms. In his opinion, there is a plethora of international environmental organizations none of which have enforcement powers.[38] When countries become parties to MEAs, they can develop laws to address these gaps as they take action to implement the agreements.

There is hardly any incident of dumping that is cited in this paper where access to justice was possible as will be presented in the selected cases. This paper will examine famous cases of dumping in Africa where challenges of accessing justice will be analyzed. This paper will also examine other issues that have contributed to the limited access to justice in Africa including trade arrangements, development and economic planning, climate change mitigation and adaptation, financing mechanism, and international programs for the sound management of chemicals.

It is my hope lessons learnt from these cases will assist in the identification of factors that have prevented African people and victims from accessing justice and hopefully inform national and regional strategies for enhancing access to justice for current and future victims. It is my hope increased access to justice will act as a deterrent to potential polluters.

[38] Andrew Watson Samaan, 'Enforcement of International Environmental Treaties: At Analysis', 5(1) *Fordham Environmental Law Review* (1993) 261-283.

4 Selected African dumping cases and access to justice

4.1 Case 1: the dumping in Abidjan, Côte d'Ivoire

4.1.1 Introduction to the case

The Trafigura case in Abidjan is the most recent and well publicized case of deliberate toxic dumping in Africa. It involved a company known as Trafigura, a Dutch /International Petroleum Trading Company, whose London office chattered the Ship. In 2006, toxic waste belonging to Trafigura was dumped around Abidjan and a number of people were affected. Official local autopsy reported that 12 victims appeared to show fatal levels of the poisonous gas hydrogen sulphide, one of the dumped waste's lethal by-products. In that lethal accident, 15 deaths, 69 hospitalized cases and more than 108,000 medical consultations were reported. The UN human rights special rapporteur, Professor Okechukwu Ibeanu, criticized Trafigura for potentially 'stifling independent reporting and public criticism' in a report the oil trader tried and failed to prevent being published in 2009. According to secret emails received by The Guardian newspaper, Trafigura knew well in advance that its waste was toxic and was banned in Europe but allowed it to be shipped to Africa. For three years, Trafigura denied its waste was toxic and illegally shipped to Africa.[39] This act of deliberate dumping presents a good case on how human and environmental rights can be abused in a developing country.

Why am I convinced that the Trafigura episode presents a good case of human rights abuse? First and foremost is the fact that Trafigura had full knowledge of the fact that the cargo that they were shipping to a developing country was toxic waste already banned in Europe. The fact that Trafigura had full knowledge of the hazardous nature of the waste qualifies this as a breach of the Basel Convention, the EU Waste Shipments Regulation 1013/2006 and EU Waste Framework Directive (WFD).[40] Second, for three years Trafigura was involved in denying the public access to information which is a violation of the international instruments such as the Aarhus Convention.[41]

Another reason why this was an illustrative environmental human rights abuse case is the fact that it exposed the double standard in the justice system of home countries i.e. countries where a transnational corporation is based. Although the possibility of

[39] David Leigh, 'How UK oil company Trafigura tried to cover up African pollution disaster', *The Guardian* of 16 September 2009.

[40] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312 3-30.

[41] Amnesty International and Greenpeace, 'The Toxic Truth about a Company Called Trafigura, a Ship Called Probo Koala and the Dumping of Toxic Waste in Côte d'Ivoire' (2012), available at <https://www.amnesty.org/download/Documents/AFR310022012ENGLISH.PDF> (visited 19 August 2019).

suing a corporate entity existed in the Netherlands as well as in the United Kingdom (UK), the criminal act of Trafigura was never subjected to a full court proceeding.

The case also brought into light the failure of national government and its judicial system to hold a transnational corporation accountable when it commits a crime inside its territory.

The Trafigura case raises some important questions that need critical analysis and responses if the international community wants to enhance access to justice for victims of toxic dumping or exposure, and to strengthen the effectiveness of international human rights instruments.

4.1.2 How effective are national criminal laws in prosecuting corporate crimes?

In this case, victims relied more on the legal systems in the Netherlands and UK to access justice instead of accessing it within their own country. Several factors contributed to this dependency on foreign legal systems. These included the lack of cooperation from authorities, the lack of qualified legal practitioners to handle the case, fear and corruption. The dependency on foreign legal systems resulted into challenges that further limited access to justice. For instance, in the case of the Netherlands, the court restricted itself in determining to what extent Trafigura, its officials and associates, broke the laws of the Netherlands. It did not consider the criminal act committed in Abidjan. In the UK, the civil claim represented only one third of the victims, thus denying the majority of the victims access to justice. Although the court decision in the UK facilitated access to compensation, it did not guarantee a mechanism that was supposed to ensure the cash would be distributed fairly to real victims. This was due to the fact that those who made the decision in London were not familiar with the situation on the ground when large sums of money (USD 160 million) were involved. This is one of the main reasons that up to the present day many victims have not received compensation.

The failure of the national legal system was also exposed when the Attorney General filed a case against Trafigura and its associates in Abidjan. The resulting decision was very disappointing with regard to access to justice for the victims.

Legal action commenced dramatically in Côte d'Ivoire when Trafigura executives were arrested while visiting the country one month after the waste had been dumped. In September 2006, Trafigura Chairman and a senior executive were arrested, along with an executive of locally registered company called Puma Energy. The three were detained until February 2007, when they were released immediately following the negotiation of a settlement deal between Trafigura and the government, under the terms of which Trafigura agreed to pay USD 198 million in compensation as well as to pay for clean-up and recovery. Trafigura described the settlement with the government as serving to 'complete remediation and compensate the Ivorian gov-

ernment and any victim'.[42] The terms of the deal purported to absolve Trafigura from liability for criminal or civil cases arising from the matter. The settlement did not, however, protect the local companies involved: in October 2008, the director of the local company Compagnie Tommy was convicted (on charges of manslaughter) and sentenced to a term of 20 years imprisonment for his part in the affair. The Côte d'Ivoire Attorney General had requested that he be sentenced to life in prison for poisoning. A local shipping agent was also convicted and sentenced to five years imprisonment.[43]

By confining itself in prosecuting individuals and ignoring corporate entities, this trial trivialized access to justice since it was impossible for the victims to demand liability and compensation from individuals who were found guilty by the court. To make matters worse, the same court of Côte d'Ivoire concluded that a settlement paid by Trafigura to the authorities was sufficient to oust the rights of victims, denying them the opportunity to seek private redress in local courts. As a consequence of the settlement between Trafigura and the government in July 2014, the Côte d'Ivoire Supreme Court blocked a local legal action against Trafigura, confirming that the settlement paid to the state effectively shielded the company from claims under the Ivoirian legal system.[44]

One can therefore conclude that the justice system in Côte d'Ivoire was not able to prosecute a transnational corporation of the magnitude of Trafigura. This situation is common in many developing countries and corporations have exploited this legal vacuum.[45] Access to justice for victims can only be strengthened if nations and the international community design legal regimes that can remove this legal vacuum. In my view, one of the solutions would be to create an international court of justice that would directly deal with persons and business entities.

[42] Peter Murphy, 'Trafigura to pay $ 198 mln settlement to Ivory Coast', Reuters (13 February 2007), available at <https://reuters.com/article/us-ivorycoast-toxic-settlement-idUSL1333815220070213> (visited 19 August 2019).

[43] Daniel Blackburn, 'Removing Barriers to Justice. How a treaty on business and human rights could improve access to remedy for victims' (Stichting Onderzoek Multinationale Ondernemingen (SOMO) Centre for Research on Multinational Corporation, 2017), available at <https://www.somo.nl/wp-content/uploads/2017/08/Removing-barriers-web.pdf> (visited 19 August 2019) at 27-28.

[44] *Ibid.* at 26.

[45] Axel Marx et al, 'Access to legal remedies for victims of corporate human rights abuses in third countries' (European Parliament, Policy Department for External Relations, 2019), available at <http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf> (visited 19 August 2019) at 14-17.

4.1.3 What is the responsibility of the home state when a company from its territory commits a crime outside its borders?

4.1.3.1 The importance of the responsibility of the home state

This question is important because the Trafigura incident highlighted the lack of responsibility of the Netherlands and the UK and other European countries whose territorial waters were traversed by the ship on its way to Abidjan. All these countries (including Côte d'Ivoire) are signatories to the Basel Convention. One would expect them to honor their international commitments. Article 9 of the Convention defines 'illegal traffic' as any transboundary movement of hazardous waste without notification, without consent of a party or with consent secured under false information or fraud, the lack of conformity between the content and accompanying documents and an act of deliberate dumping. Based on this definition, the Trafigura case qualifies as an act of illegal trafficking of hazardous waste under the Convention. The states involved failed in their international responsibility of preventing illegal trafficking of hazardous waste.

These states did not only fail on their international obligation under the Basel Convention but also failed to ensure access to justice for the victims which was a clear violation of major international and regional human rights instruments (both soft and legally binding instruments). In the case of soft instruments, several examples exist: the link between environmental protection and human rights was first explicitly recognized in 1972, in the Stockholm Declaration, adopted by the United Nations Conference on the Human Environment. Principle 1 of this declaration proclaims: '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.' In the 1989 Hague Declaration,[46] the heads of state and government of 24 countries, both developed and developing, stressed the relationship between the protection of the Earth's atmosphere and the right to life, described as 'the right from which all other rights stem'.[47] The Declaration recognizes 'the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere'.[48] In the case of a legally binding instrument, three instruments can be used to highlight the violation: the African Charter of Human and People's Rights, the American Convention on Human Rights and The Arhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice on Environmental Matters.

[46] Hague Declaration on the Environment, the Hague, 11 March 1989, 28 *International Legal Materials* 1308.
[47] *Ibid.* at 1.
[48] *Ibid.* at 2.

On its part The African Charter of Human and People's Rights, adopted in 1981, provides that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development' (Article 24).

The Additional Protocol to the American Convention on Human Rights,[49] adopted in 1988, does explicitly recognize an individual's right, as it stipulates that '[e]very one shall have the right to live in a healthy environment and to have access to basic public services (Article 11).[50]

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adoptedin 1998, established a conceptual link between substantive and procedural environmental rights by stating that 'citizens must have access to environmental information, be entitled to participate in decision-making and have access to justice in environmental matters' in order 'to be able to assert' their right to live in an environment adequate to their health and well-being, as well as to 'observe' their concomitant duty 'to protect and improve the environment for the benefit of present and future generations'.[51]

The cases filed in the Netherlands and UK support this line of argument: let us examine the two cases and see how the violations took place.

4.1.3.2 The case in the Netherlands[52]

In September 2006, Greenpeace filed a report with the Dutch Public Prosecutor requesting that a criminal investigation be instigated into offences relating to the dumping of toxic waste in Côte d'Ivoire.

In June 2008, the Dutch Public Prosecutor brought charges relating to the illegal export of waste from the Netherlands to Africa, as well as other criminal offences, against the Dutch-based Trafigura Beheer BV, Trafigura Ltd London-based executives, and the Captain of the *Probo Koala*, the ship that took the waste load to Abidjan. Charges were also brought against Amsterdam Port Services (APS) and its director in relation to breaches of the Environmental Management Act.[53] The Municipality of Amsterdam was charged with being a party to the transfer of hazardous

[49] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, San Salvador, 17 November 1988, in force 16 November 1999, 28 *International Legal Materials* 156.

[50] Maguelonne Déjeant-Pons and Marc Pallemaerts, 'Human rights and the environment. Compendium of instruments and other international texts on individual and collective rights relating to the environment in the international and European framework' (Council of Europe, 2002), available at <https://rm.coe.int/1680489692> (visited 20 August 2019) at 11.

[51] *Ibid.*

[52] This section is largely based on information provided in Amnesty International and Greenpeace, 'The Toxic Truth', *supra* note 41, at 155-163.

[53] Environmental Management Act No. 239 (2002).

waste to the *Probo Koala* or, alternatively, with giving APS the permission to transfer hazardous waste back on to the *Probo Koala*.

Two years later, in July 2010, the Dutch Court of First Instance handed down guilty verdicts on a number of counts.[54] Trafigura was found guilty of violations of the European Waste Shipment Regulation (EWSR)[55] and of delivering and concealing hazardous goods. An official of Trafigura based in London was found guilty of delivering hazardous goods while concealing their hazardous nature, while the captain of the *Probo Koala* was found guilty of complicity in forgery regarding the information provided on documents relating to the ship's waste, and complicity in the delivery of hazardous goods. APS and its director were found to have violated the Dutch Environmental Management Act by transferring the waste back to the *Probo Koala* from the APS barge. However, the Court also found that APS had 'made an excusable error of the law' because it was entitled to rely on the advice provided by the Environment and Buildings Department of the Amsterdam Municipality with respect to the permission to return the waste to the *Probo Koala*. On that basis, the Court accepted an 'absence of all guilt' defense put forward by the APS.[56]

On 23 December 2011, the Court of Appeal ruled that Trafigura would be fined €1 million for breaching the rules on the transport of hazardous waste, contrary to the EWSR, the EU Port Reception Facilities Directive[57] and the MARPOL Convention of 1983.[58]

In November 2012, a settlement was reached, with the company agreeing to pay the existing € 1 million fine, plus a further € 367,000. Following the fine and settlement agreement, the criminal prosecution of the manager was withdrawn by the Dutch Public Prosecutor's Office.[59]

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[54] Public Prosecutor's Office No: 13/846003-06 (Promise), Decision of Amsterdam Court, Economic Crimes Bench, in the criminal case against Trafigura Behher BV, 23 July 2010.

[55] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190 at 1; and Regulation (EU) No 660/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EC) No 1013/2006 on shipments of waste, OJ L 189 at 135.

[56] Decision of Amsterdam Court, *supra* note 54.

[57] Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues, OJ L 332 at 81. The Directive is currently being revised; see European Parliament legislative resolution of 13 March 2019 on the proposal for a directive of the European Parliament and of the Council on port reception facilities for the delivery of waste from ships, repealing Directive 2000/59/EC and amending Directive 2009/16/EC and Directive 2010/65/EU.

[58] International Convention for the Prevention of Pollution from Ships, 1973, first signed 2 November 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), adopted 17 February 1978. The combined instrument entered into force on 2 October 1983, 12 *International Legal Materials* (1973) 1319, <http://www.imo.org>.

[59] David Leigh, 'How UK oil company Trafigura tried to cover up African pollution disaster', *The Guardian* of 16 September 2009.

It is important to note that the case in the Netherlands just dealt with the illegal export of toxic waste and did not involve the illegal dumping in a foreign country. The role played by Trafigura in relation to the dumping of toxic waste in Abidjan has never been subject to a full court proceeding.[60] To a great extent, the failure of the Dutch Court to include the act of illegal dumping in its trial facilitated the denial of access to justice to victims contrary to the aforementioned international legal instruments that govern access to justice and of which the Netherlands is a party.

4.1.3.3 The case in the UK

Although no criminal investigation was undertaken in the UK, in November 2006 a civil claim was filed in the High Court of England and Wales against Trafigura Limited and Trafigura Beheer BV (the Trafigura Defendants) for damages relating to personal injury and economic loss. The claim was brought by some 30,000 Ivorians who sought damages for personal injuries that they alleged had been caused by exposure to the toxic waste. The UK law firm Leigh Day & Co undertook to represent the claimants on a 'no win no fee' basis, which meant that the victims would not be required to pay legal costs if their case was unsuccessful in court. Under the arrangement, the law firm also took on the full costs of evidence gathering and securing expert witnesses. Despite the civil claim being reported as the largest group action of its kind brought in the UK legal history, the 30,000 claimants represented less than one third of the people estimated to have been affected by the dumping of the waste.

In September 2009, the parties reached a settlement under which the Trafigura defendants agreed to pay approximately £ 30 million (USD 45 million) in total to the claimants. Given that there were 30,000 claimants, this total amounted to approximately £ 1,000 per claimant. Because the civil claim was settled out of court, there was no final determination of liability by the court.

The main question here is whether out-of-court trials can deliver justice to victims of deliberate toxic waste dumping?

The civil claim in the UK which resulted in an out-of-court settlement was accompanied by conditionalities that obstructed access to justice to those who were not represented in the civil claim. For instance, the parties to the civil claim agreed that there will be no admission of liability by Trafigura defendants for the harm alleged by the claimants; the information and materials used in the claim should be confidential, there would be no public comment by the parties and the claimant's law firm would not represent any further actions that may be brought by the people affected by the toxic waste.[61]

[60] Amnesty International and Greenpeace, 'The Toxic Truth', *supra* note 41.
[61] *Ibid.*

In which ways did these conditionalities prohibited access to justice? Firstly, the broad confidentiality provisions meant that the import information and documents will not be available to those who still seek justice as victims of the dumping. For instance, expert medical evidence will never be seen by other victims and cannot be challenged or used to aid effective health and legal interventions. Secondly, barring of Leigh Day & Co – who had useful information, skills and experience on the case from acting on behalf of any other potential clients – imposed a significant challenge for the victims. This conditionality blocked access to justice within the UK judicial system. Thirdly, the compensation of 30,000 victims who represented less than one third of the total number of victims derailed the process of accessing justice to many other victims.

However, the fact that 30,000 of the victims were able to have their voices heard in the UK judicial system and eventually earned a compensation of £ 1000 per victim cannot be ignored. To some extent, the civil claim in the UK facilitated access to justice to some of the victims though this is no longer feasible. It is important to note that the legal framework that enabled 30,000 Ivorians to seek a remedy in the UK has since been amended and it is unlikely that such cases will be possible in the future.

One can say with a high degree of confidence that the Netherlands and the UK failed to facilitate access to justice for the Ivorian victims as they would have facilitated justice had the dumping occuredin their territories. Had the latter been the case, with the business entity involved having been registered and based in Abidjan: what would have been the response from London and Amsterdam? A possible solution to this challenge and to prevent similar problems in the future would be for developed states to hold accountable business entities that are based in their countries using national laws regardless of where they operate their businesses.

4.1.4 What are the common challenges that victims of dumping of chemicals and toxic waste face in a developing country?

To respond to this question, let us look at what the challenges faced by the victims in Abidjan were from the day *Probo Koala* docked into Abidjan todate. The main challenge was the deliberate attempt to deny or withhold information by both Trafigura and the responsible government authorities. The denial began when Trafigura sent out misinformation about the real content of their shipment. Perhaps if government authorities had correct information, they would have prevented Probo Koala from offloading its shipmentin Abidjan the same way that Nigerian authorities refused to allow the shipment to be offloaded in Lagos. Right information could have saved the lives of many victims including the truck drivers. Had this shipment been properly

labelled as required under the Globally Harmonized System (GHS)[62] many more lives would have been saved or protected. Unfortunately, the shipmentwas not accompanied by labels or material safety data sheets (MSDSs) as required by the EU regulation for registration, evaluation, authorization and restrictions of chemicals (REACH).[63]

The second challenge that was faced by victims and which is somehow related to lack of information was related to securing health services. Although health services are usually below standard in many developing countries, on this particular case a lack of evidence of what caused the health problems complicated matters. Even those who managed to report to health facilities could not be provided with appropriate emergency services due to lack of information. For many hours and days, neither the victims nor the staff of clinics knew what was behind the problem. Some victims decided to seek the services of traditional practitioners and spiritual healers in the belief that the problem was associated with witchcraft or miracles.

The third challenge that victims faced was the failure to identify who was responsible for the dumping. The lack of proper labeling was the major contributing factor. Usually, a proper label contains the identity of the manufacturer and/or distributor of a chemical product. It would have been easy and simple to identify the owner of the shipment had it been accompanied by a standard label. In a normal situation, the victims could have identified the owner from responsible government agencies such as the port authority or the customs but in this case, these agencies were parties to the crime. Their strategy was to hide as much information as possible from the public particularly in the first few critical hours of the emergency.

The fourth challenge that the victims faced was the hijacking of the process of access to justice by government authorities. In the aftermath of the toxic waste dumping, the Ivorian authorities took a number of legal and other measures to uncover the truth about what had happened and bring those responsible to justice. The Prime Minister established a National Commission of Enquiry and the State Prosecutor initiated prosecutions against a number of private actors and public officials.

The establishment of the National Commission and the publication of its findings were important steps taken by the Ivorian government to expose the truth in rela-

[62] The GHS is an internationally-agreed system that provides countries with the regulatory building blocks to develop or modify existing national programmes. It sets criteria for the classification of chemical hazards and offers protective measures through labels and safety data sheets. See <https://www.unitar.org/cwm/portfolio-projects/globally-harmonized-system-classification-and-labelling-chemicals> (visited 5 September 2019).

[63] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396 at 1.

tion to the toxic waste dumping. However, the National Commission's powers were relatively limited: the statute establishing the National Commission did not prescribe how the government should take forward the Commission's findings; nor did it reference any follow-up mechanisms that could provide access to judicial recourse to ensure effective sanctions and remedies. For instance, the statute did not require that public officials or private individuals found to be accountable be removed from public office or prosecuted. As a result, whether or not this was done appears to have been discretionary. To the surprise of many, the National Commission of Enquiry completed an investigation and published a report, but its key findings with respect to why the dumping happened and who was responsible were not pursued for reasons that remain unclear. It is, therefore, reasonable to say that the establishment of the National Commission was a strategy intended to deny access to justice for the victims and to exonerate Trafigura officials and their associates from this heinous crime they had committed against the people in Abidjan.

On the prosecution side, although three executives of the Trafigura Group were initially charged by the prosecutor, these charges were ultimately dropped and in 2007 the Ivorian government entered into an out-of-court settlement agreement with the Trafigura Group. Under this agreement, the government received a total compensation amounting to CFA 95 billion (approximately USD 200 million). This money was intended to compensate the state and the victims, and to pay for the cleanup of the waste. However, the nature of the settlement created obstacles to the victims' pursuit of justice and remedy. The settlement provided surety for bail and required that on-going prosecutions against Trafigura parties be discontinued. It also limited the rights of the victims to seek compensation.

Access to justice was similarly denied in the criminal case initiated by the Ivorian state prosecutors in September 2006. During that month, the authorities arrested and charged a number of individuals in connection with offences relating to the toxic waste dumping. The charges brought against these individuals included offences such as poisoning and breaches of public health and environmental laws, as well as breaches of the national law domesticating the Basel Convention relating to the movement of hazardous waste. While this action by the Public Prosecutor was commendable, it failed to guarantee access to justice since he failed to bring charges against the corporate entities involved in the dumping. It is these corporate entities and not individuals that withheld important information, entered into a non-transparent and none-inclusive agreement and owned the toxic cargo. It is these corporate entities and not individuals who had contravened various international legal instruments and national legislations. These charges could not be brought against individuals who went on trial in Abidjan. In view of all these actions, one can confirm that the outcome of the prosecutions denied justice to the victims.

The fifth common challenge is the difficulties of receiving money allocated for compensation. Due to high levels of corruption, there is no guarantee that a court de-

cision or an out-of-court settlement for compensation will benefit the real victims of an incident of toxic dumping or chemical pollution. This was the case with the out-of-court settlements in the UK and in Abidjan.

As much as I know, there is no evidence that the money that Trafigura paid to the Ivorian government (USD 160 million) was spent on rehabilitating the environment neither compensating victims for loss of income or for expenses related to the health problems resulting from the exposure to toxic waste. In fact, in 2010, the government launched an investigation against allegations of embezzlement of money that were meant for victims of the dumping of waste. The media raised these allegations against a senior public official. . What is the lesson learnt here? In developing countries, accessing compensation is more than just a court ruling. In addition to a court ruling in favor of the victims, the responsible business entity must be held accountable to ensure that each of the victims are targeted to receive the prescribed amount of compensation. The responsibility of the business entity should not be restricted to the disbursement of funds but to oversee the delivery of the funds to each victim. The payment procedures should be prompt, private, transparent and free of the practice of using subcontractors and service fees. There should be a report back mechanism to the court and a complaint mechanism if such a need arises in the process of delivering funds to the victims. The business entity must be requested to maintain its presence in the country where it committed the crime until all payments to the victims are paid.

The sixth common challenge faced by the victims was on how to estimate the actual cost of the damage they had incurred. All the out-of-court settlements in London and in Abidjan were negotiated under an environment shrouded with secrecy and between a powerful international company and local communities that lacked knowledge and skills required for such negotiations. It was a match between Goliath and David. To date, there is no information or data on how the figures were arrived at. Was it the right compensation? Was it any close to the real amount? If this same incident had occurred in a European capital, would the process and the compensation have been the same? Do human and environmental rights differ according to geographical location or race? Where is the universal applicability of human and environmental rights?

There has always been a challenge in applying international agreements across all member states within the UN system. Daniel Blackburn has stated that access to justice for victims of business-related human rights violations is a widespread and growing problem around the world.[64] Complaints of human rights abuses committed by multinational businesses include land rights issues, forced labor, lack of protection for workers and local people from hazardous substances, as well as poor safety standards. Blackburn has pointed out that international businesses have re-

[64] Blackburn, 'Removing Barriers to', *supra* note 43, at 4.

mained largely outside the formal regulatory system of human rights law and some are taking advantage of these loopholes. In his view, international human rights supervisory regimes are predicated on state-based systems. He then raises a fundamental question: how can businesses be regulated if they operate across national boundaries yet are only subject to the domestic supervisory frameworks of nation states?[65] His argument supports the view that in the current regime of international human rights instruments full access to justice is not possible for victims unless the UN Framework (Protect, Respect and Remedy Framework) and the Guiding Principles on Business and Human Rights (UNGPs)[66] are improved to address issues related to transnational litigation, legal barriers particularly those related to liability, responsibilities of subsidiary companies and access to the judicial system by victims, protection of the defenders or representatives of victims, application of due diligence practices, enforcement and remedy. In 2005, a Special Representative for Business and Human Rights was appointed by the UN Secretary General. His mandate resulted in the 'Protect, Respect and Remedy Framework' that outlined the duties and responsibilities for states and businesses to address business-related human rights abuses. This was followed by the UNGPs in 2011. Both the Framework and the UNGPs were unanimously endorsed by the UN Human Rights Council. According to Blackburn, while the UNGPs have garnered international consensus and support because they include real and plausible strategies for reform, they however lack binding force, legal compulsion, and the supervisory framework needed to implement real legal change.[67]

On her part, Rozelia S. Park, in her examination of international environmental racism through the lens of transboundary movement of hazardous wastes, has stated that 'a major issue in international environmental racism is the phenomenon of transboundary movement of hazardous wastes.[68] Governments and corporations, usually from developed nations, create hazardous waste in their country as a by-product of manufacturing and pay developing countries to dispose of this. In her opinion, the shipment of hazardous waste from developed to developing countries is environmental racism on an international scale because most often it is cited that the reason why developed countries export their hazardous waste to developing countries is that the disposal of wastes is much more strictly regulated and, thus, more expensive in developed countries than in developing countries. Strict regulations in one country make it less expensive and simpler to ship the waste to another country, usually in the developing world, in order to dispose of it. Countries that agree to

[65] *Ibid.* at 13.

[66] See Office of the High Commissioner for Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework' (UN, 2011), available at <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> (visited 20 August 2019).

[67] Blackburn, 'Removing Barriers to', *supra* note 43, at 14.

[68] Rozelia S.Park, 'An Examination of International Environmental Racism Through the Lens of Transboundary Movement of Hazardous Wastes, 5(2) *Indiana Journal of Global Legal Studies* (1998) 659-709 at 660.

take the waste usually have inadequate waste disposal facilities, non-existent liability schemes, and insufficient enforcement mechanisms and personnel. In contrast to this often-cited reason, environmental racism holds that developed countries are more willing to use developing countries as a dumping ground, not because of cost or convenience but because of race and poverty.[69]

4.2 Case 2: The dumping at Koko Village, Nigeria

In the mid-1980s, Italy could only process 20 per cent of the toxic waste it generated. The rest it quietly sent abroad.[70]

Under a dubious arrangement with the local businessmen to store drums of waste for a payment of USD 100 per month, a total of 18,000 drums containing hazardous waste were dumped in Koko. In 1988, the arrangement was exposed by Nigerian students studying in Italy, and a Nigerian local newspaper sent an investigation team to Koko. The team discovered the drums, some of which were already leaking. Thereafter, the Nigerian government took action and Italy agreed to remove the waste. In mid-July, a barge called *Karin B* docked in Koko to collect the dented and leaky drums. Nigerian workers helped re-load 2,100 tons of chemicals. The ship departed for international waters and attempted to dock at four different European ports when crew members started complaining of chest pain.[71]

A year later in 1989, the Basel Convention was adopted, intending to prevent shipment and disposal of hazardous waste from industrial to developing countries via a procedure of strict requirements and consents. Italy became a Party to the Convention.

The Koko case brought another dimension of human rights, i.e. the forced displacement of a community, to the issue of exposure to hazardous chemicals in Africa. Due to the level of toxicity in the area, the Nigerian government decided to relocate the community to another area. This move received strong resistance from community members who regarded Koko as their ancestral land. They also feared that relocation would have complicated access to compensation. Instead of relocation, they demanded their land to be cleansed of the toxic waste. It took 21 solid years for the 94 victims in Koko to get compensation. The 94 victims of the dumping were awarded a total of USD 264,666. The compensation was based on an out of court settlement between the Nigeria Port Authority and the victims.

[69] *Ibid.* at 660.

[70] Stephanie Buck, 'In the 1980s, Italy paid a Nigerian town $100 a month to store toxic waste, and it's happening again: Toxic colonialism at its worst', Timeline (26 May 2017), available at <https://timeline.com/koko-nigeria-italy-toxic-waste-159a6487b5aa> (visited 12 March 2019).

[71] *Ibid.*

4.3 Case 3: Koko II: the dumping continues

Old habits die hard: 30 years later, in February 2017, a local media reported a new wave of toxic dumping in Koko. This time around the waste was coming from a local Nigerian manufacturer who claimed they were recycling non-toxic sludge. However, tests from an accredited laboratory confirmed the toxicity of the cargo.[72] This second dumping presents a good case of two very important issues:

First, denial of access to justice provides an incentive for more illegal dumping and a further denial of justice. In the first dumping, apart from securing the removal of the toxic waste and its return to Italy, victims were not given access to justice in any form. Second aspect is that of double standards. While in the first incidence the company paid compensation it did not do so during the second incident. There was no compensation for the victims neither did the victims receive required health services. A trial never took place. This seems to have encouraged a local company 30 years later to purchase toxic waste in the international market and dump it in the same town of Koko.

Second, in the case of toxic dumping, denial of justice can take place regardless of whether a corporation is based abroad or in the country where dumping takes place. Though one would have expected access to justice to be easier since the main culprit was a local company, in fact, the denial was more severe than in the first dumping case. Throughout this case, the local company denied the toxicity of the cargo and refused to provide information, forcing concerned journalists to take samples to an accredited laboratory where the toxicity of the cargo was confirmed. It is believed that many children and other community members were exposed to the toxic waste through drinking water.[73] However, any attempt to follow up the case was met by use of hoodlums and security agents. Any attempt by journalists to invite the local government to take action was not well received and in one extreme case one journalist from a local TV station was nearly lynched and another was forced to move out of Koko Town.[74] What this implies is that denial to justice is more severe when the company is locally registered or when the involved individuals are nationals of a developing country where corruption is rampant, laws are weak, ignorance is high and politicians hold too much power over the electorate.

[72] Nigeria Communications Week, 'Panic as Another Toxic Waste Scare Hits Koko' (16 February 2017), available at <http://nigeriacommunicationsweek.com.ng/panic-as-another-toxic-waste-scare-hits-koko/> (visited 12 March 2019).

[73] *Ibid.*

[74] Ebenezer Adurokiya, '30 Years After, Another Toxic Waste Scare Hits Koko As Suspect Sends Soldiers, Hoodlums After Journalists', *Nigerian Tribune* of 27 February 2017.

5 Toxic investments, bilateral cooperation and trade agreements and their implications on access to justice

5.1 EU, free trade agreements and economic partnership agreements

In a communiqué[75] issued in 2015, Cecilia Malmström, European Union (EU) Trade Commissioner, stated that though European citizens want trade to deliver real economic results for consumers, workers and small companies at home, they also believe open markets do not require the EU to compromise on core principles such as human rights and sustainable development around the world or high quality safety and environmental regulation and public services at home. European citizens also want to know more about the trade negotiations carried out in their name.

In 2017, through a Commission report,[76] the EU stressed that bilateral and regional free trade agreements (FTAs) are supposed to be major drivers of economic growth and they are expected to bring important benefits for the people and companies in the EU and in partner countries. The Commission stressed that by the year 2017, FTAs had increasingly taken into account labor and environmental issues.

In 2017, a total of seven Economic Partnership Agreements (EPAs) were being implemented with 29 African, Caribbean and Pacific countries. These include 14 Caribbean Countries, 13 African countries and two Pacific countries.[77]

According to the EU, EPAs and all 'new generation' FTAs and Deep and Comprehensive Free Trade Areas (DCFTAs)[78] it has concluded since 2010 include a Trade and Sustainable Development (TSD) chapter with legally binding commitments, the enforcement of which is overseen by TSD committees that meet once a year.[79] However, it is quite evident that the priority of TSD initiative was to assist developing countries overcome challenges that prevented them from accessing the economic benefits of expanded trade as clearly stated in the EC report.

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[75] EU, 'Trade for all: Towards a more responsible trade and investment policy' (2015), available at <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> (visited 23 February 2019) at 5.

[76] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements 1 January 2017 – 31 December 2017, COM(2018) 728 final (2018) at 7.

[77] *Ibid.* at 37.

[78] Free trade agreements are entered into by two or more countries who want to seal the economic cooperation among themselves and agree on each other's terms of trading. In the agreement, member countries specifically identify the duties and tariffs that are to be imposed on the member countries when it comes to imports and exports. The key terms of free trade agreements and free trade areas include:

> **Import goods** are products that were manufactured from a foreign land and are brought into another country and consumed by its domestic residents. Basically, it is anything that has been made overseas and brought into a country for domestic consumption.
> **Export goods** are the opposite of import goods wherein the manufacturer is one country who brings its products to another country to sell them. They are products that are shipped from the manufacturing country to its affiliate(s) overseas.

[79] *Ibid.* at 41.

This prioritization is an outcome of the December 2005 World Trade Organization (WTO)[80] Ministerial Conference in Hong Kong that acknowledged these constraints and paved the way for the concept of Aid for Trade (AfT) Initiative[81] to emerge as a complement to the Doha Development Agenda.[82] The Initiative aims to improve the quantity and quality of Aid for Trade, allowing developing countries to more easily access the benefits of the WTO agreements, to expand their productive sectors and to integrate more fully into the international trading system.[83]

It is my belief that the issues of strengthening the role of civil society organizations (CSOs), climate change and labor conditions were inserted for the sole purpose of green washing EPAs since all codes designed for Aid for Trade are geared towards increased volumes in trade in key sectors and paying little attention to human and environmental impacts and rights. A look into the EU External Investment Plan (EIP),[84] adopted in September 2017 to help boost investment in partner countries in Africa and the European neighborhood, support my view. The main stated objectives of the EIP are to contribute to sustainable development, contribute to jobs and growth and to unblock bottlenecks to private investment by addressing the risks. Usually investors are worried about certain risks including sudden changes of laws and regulations governing investments, susceptibility to local legal actions against their investments, unexpected change of regimes through coups, etc. They want safeguards against these risks. These are nice objectives but need to be looked together with the proposed actions in order to get a clear understanding of what the real intentions of the EIP are. Under the EIP, the EU is committing itself to support developing countries in the mobilization of finance – through the European Fund for Sustainable Development –,[85] provision of technical assistance to help prepare investment projects and development of a favorable investment climate and business environment. The link between the objectives and these proposed actions is not so clear. As one reads between the lines, it is obvious that the proposed actions reflect the true nature and purpose of the EIP. In this regard, the EIP is more of a trade promotion tool than a mechanism for promoting human rights and social justice. For instance, some of the safeguards given to investors prohibit or limit access to information or take away the right of individuals to take legal action against an investor, On this regard EIP is not very different to Export Processing Zones which

[80] See <http://www.wto.org>.

[81] See WTO, 'Aid for Trade', available at <https://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm> (visited 21 August 2019).

[82] See WTO, 'The Doha round', available at <https://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development> (visited 6 July 2019).

[83] Georg Koopmann and Ruth Hoekstra, 'Aid for Trade and the Political Economy of Trade Liberalization' (Hamburg Institute of International Economics (HWWI), | 2010), available at <https://www.econstor.eu/bitstream/10419/48192/1/664030653.pdf> (visited 21 August 2019) at 4.

[84] See European Commission, 'EU External Investment Plan Promoting investment in countries neighbouring the EU and in Africa', available at <https://ec.europa.eu/europeaid/policies/financing-development/eip_en> (visited 4 August 2019).

[85] See European Commission, 'European Fund for Sustainable Development (EFSD)', available at <https://ec.europa.eu/europeaid/tags/european-fund-sustainable-development-efsd_en> (visited 6 July 2019).

generally go beyond the conditions of FTZs to include a variety of measures aimed at encouraging investment in manufacturing capacity exclusively for export. In addition to the exemption from duties on imported intermediate goods, raw materials and equipment when output is sold abroad, taxation and industrial regulations are typically more generous than elsewhere in the country. Tax holidays and the guarantee of the repatriation of profit are often provided. Infrastructure is typically well developed and often subsidized. Wages are sometimes lower than elsewhere with unionization discouraged. Red tape measures are minimized with approval often on a one-stop basis.[86]

5.2 United States and AGOA

Trade between Africa, Caribbean and Pacific ACP countries and the US is done through AGOA (African Growth and Opportunity Act). AGOA is a United States Trade Act,[87] enacted in 2000, and has since been renewed to run until 2025. The legislation significantly enhances market access to the US for qualifying Sub-Saharan African countries. Under AGOA, the US President is authorized to designate a sub-Saharan African country as an eligible country after meeting a given set of conditions including establishing or making progress in establishing a market-based economy, and ensuring the realization of rule of law, political pluralism, and the right to due process and a fair trial. A country must also guarantee equal protection under the law and elimination of barriers to US trade and investments, including the protection of intellectual property rights, the setting of a conducive national environment for foreign investors and the resolution of trade disputes.

AGOA also contains conditionalities that are specific to human rights; these are those which require a Sub-Saharan country to uphold internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. Under AGOA, a qualified sub-Saharan country is also obliged not to engage in gross violations of internationally recognized human rights or provide support for acts of international terrorism, and to cooperate in international efforts to eliminate human rights violations and terrorist activities.[88]

[86] Howard Stein, 'Africa, Industrial Policy and Export Processing Zones: Lessons from Asia', a paper prepared for Africa Task Force Meeting, Addis Ababa, Ethiopia, 10-11 July, 2008, available at <http://policydialogue.org/files/events/Stein_africa_ind_policy__export_processing_zones.pdf> (visited 1 September 2019) at 3.

[87] Enacted on 18 May 2000 as Public Law 106 of the 200th Congress.

[88] *Ibid.* at section 4.

There are numerous concerns about AGOA including claims that it contradicts some WTO rules.[89] It was designed in and by the US without consultation with other partners. Furthermore, it is dominated by oil and raw materials and it arguably interferes with the sovereignty of other countries since it contains a clause requiring participating African countries not to oppose US foreign policy.[90]

The important question in the context of the present paper is: can AGOA address issues related to health and environmental justice in a manner that can guarantee citizens access to justice?

In my view, AGOA is not designed to deal with such matters. AGOA is a business-oriented program similar to EUs' Free Trade Agreements and Economic Partnership Agreements. First, the criteria for qualification are silent on environmental issues; it does not require a qualified country to take measures to protect the environment or to address climate change. There is completely no mention of this in the criteria.

Second, though the criteria do mention issues of fundamental human rights and International Labour Organization (ILO) core labor standards, AGOA does not provide a mechanism (institutional or policy) that would require compliance with them at the country level. For instance, the number of ratification and domestication of ILO core labor conventions in qualified sub-Saharan countries does not reflect an effective performance on this requirement. The Freedom of Association and Protection of the Right to Organize Convention[91] can be taken as an example. By 2000, when AGOA was created, all African countries that qualified (with the exception of Kenya) had already ratified the Convention, some since 1960s (Benin, Cameroon, Chad, Ethiopia, Ghana, Nigeria and Togo). Some ratified the Convention a year before (Malawi and Cape Verde). Tanzania ratified the Convention in 2000, the year it qualified for AGOA. What does this tell us?

The first group of countries that qualified for AGOA was selected on the basis of their ratification status to this Convention. However, ratification alone is not sufficient to judge the upholding of freedom of association and protection of the right to organize. Ratification of the ILO conventions must be supported by their national implementation in order to make it an effective protector of relevant rights. An ef-

[89] A good example is a rule under Articles I and XIII of the WTO's General Agreement on Tariffs and Trade (GATT) (General Agreement on Tariffs and Trade, Marrakech, 15 April 1994, available at <http://www.wto.org>) which prohibits favored nation and discrimination provisions in any trade arrangement. The US government was forced to apply for waiver to the WTO Goods Council. The waiver meant that the AGOA preferences are exempted from the most favored nation and non-discrimination provisions of the WTO.

[90] Akiko Yanai, 'Current issues on the African Growth and Opportunity Act (AGOA)', Institute of Developing Economies (IDE) discussion paper No. 661, (2017), available at <https://ir.ide.go.jp/?action=repository_uri&item_id=48871&file_id=22&file_no=1> (visited 6 June 2019) at 5-8.

[91] ILO Convention No. 87, San Francisco, 9 July 1948, in force 4 July 1950, 68 *United Nations Treaty Series* 17.

fective national implementation must provide for regular monitoring, a procedure for lodging complaints and compensation among other things. In all these countries, this Convention is nationally implemented but the problem lies in regular inspections, complaints procedures and compensation or access to justice. Over the years, some of these countries have appeared before the ILO Standards Committee after being accused by workers and their organizations for poor enforcement or national implementation of the provisions.[92] Therefore, using ratification as criteria for qualification in AGOA is insufficient.

In addition, the US did not take this conditionality with the seriousness that it deserves, and a good example is Kenya. Though Kenya is one of the pioneers of AGOA, it has never ratified the ILO Convention No 87. One may argue that Kenya has ratified the ILO Convention No. 98[93] (on the right to organize and to bargain collectively) but the Convention No. 87 offers protection to those who organize themselves. Without this protection, the right cannot be exercised without risks. Therefore, in my opinion, though workers in Kenya have the right to organize and to bargain collectively, in reality they have no effective legal protection if an employer decides to take punitive measures against them for exercising their right to organize and bargain as a collective group.

Third, AGOA's focus has been on the economic and trade sectors that are well known for their intensive use of chemicals i.e. agriculture and textile industries. However, the closest that AGOA was able to address the issue of chemical safety is occupational safety and health where it requires eligible countries to take measures to protect workers' health. Again, AGOA did not provide for any mechanism that would ensure countries uphold this right. In my opinion, this conditionality is included in AGOA for the purpose of green-washing AGOA. This time round, ratification status – tough it does not provide a good measure of performance – was not considered at all.

The major international convention on occupational safety and health is the Occupational Safety and Health Convention.[94] By the year 2000, when AGOA started, only 5 AGOA eligible countries had ratified and nationally implemented this Convention: Cape Verde (2000), Ethiopia (1991), Lesotho (2009), Nigeria (1994) and Zambia (2013). The rest of the AGOA eligible countries, i.e. Benin, Botswana, Cameroun, Chad, Djibouti, Ghana, Kenya, Malawi, Tanzania and Togo, are yet to ratify this Convention. What does this tell us? Occupational safety and health are not a key concern in AGOA.

[92] There are many ILO Conventions that have been ratified by Parties but never brought before a competent authority for domestication into national legislation.
[93] ILO Convention No. 98, Geneva, 1 July 1949, in force 18 July 1951, 125 *United Nations Treaty Series* 3.
[94] ILO Convention No. 155, Geneva, 22 June 1981, in force 11 August 1983.

In terms of chemical safety, the main ILO convention is Convention No. 170 concerning safety in the use of chemicals at work.[95] So far, only one country (Tanzania) has ratified and nationally implemented this Convention. Due to the nature of trading under AGOA, where the emphasis is on sectors that require intensive use of chemicals, the qualification criteria should have prioritized this core labor standard. The fact that all except one pioneer country have not ratified this standard is a good indication that AGOA does not take chemical safety as seriously as it should. The Convention No. 170 is accompanied by a recommendation (ILO Recommendation 171)[96] that provides guidance to countries on how to manage chemicals in working environments in a manner that will not cause harm to the health of workers, their families and to the environment. If AGOA has the intention of addressing occupational safety and health as indicated in its criteria, it has to provide support to or guidelines for the successful implementation of this standard, in particular ILO Convention No. 170, in all investments under it.

To strengthen my line of argument, I would like to revisit two international initiatives that testify to my position that international and bilateral trade agreements only provide lip service to human and environmental rights and access to justice. One is the African Stockpiles Project and the other is the Busan Partnership for Effective Development Cooperation.

5.3 The African Stockpiles Program (ASP): a good example of how official trade and bilateral aid can be used to dump chemicals in Africa

In 2000, negotiations that would eventually result in the Stockholm Convention on Persistent Organic Pollutants (POPs) were coming to a close. Governments of the world recognized the need for a global mechanism to end the production of POP chemicals and dispose of existing POP chemical stockpiles. Most of the POPs covered by the Stockholm Convention are pesticides. At the same time, African countries requested assistance to deal with their stockpiles of POPs pesticides. The World Wide Fund for Nature (WWF)[97] and the Pesticides Action Network (PAN),[98] together with partner organizations, proposed an ambitious undertaking to remove all obsolete pesticide stocks from Africa: the African Stockpiles Programme (ASP). ASP-phase 1 countries were Ethiopia, Mali, Morocco, Nigeria, South Africa, Tanzania, Tunisia, Eritrea and Mozambique. The project was financed by the Global Environmental Facility (GEF),[99] World Bank and bilateral donors.[100]

[95] ILO Convention No. 170, Geneva, 25 June 1990, in force 4 November 1993.
[96] Occupational Health Services Recommendation No. 171, adopted on 26 June 1985.
[97] See <http://wwf.org>.
[98] See <http://pan-international.org/>.
[99] See <http://www.thegef.org>.
[100] World Bank, 'Ethiopia, Mali, Morocco, South Africa, Tanzania, Tunisia - First Africa Stockpile Program Project (English)', Report No. ICR2682 (2013), available at <http://documents.worldbank.org/curated/en/731181468001819072/pdf/ICR26820REVISE00dsiclosed0120120130.pdf> (visited 6 June 2019) at 8-14.

The African Stockpiles Programme was launched in 2005 with the goal to clear all obsolete pesticide stocks from Africa and establish measures to help prevent their recurrence. By that time, it was estimated that there were 50,000 tonnes of obsolete pesticides in the continent.[101]

A series of questions need to be asked: how did this accumulation happen and what were its implications on access to justice?

A team of independent evaluators concluded that among the factors that contributed to this accumulation were donations and purchases of pesticides in excess of requirements, inadequate coordination among and within international aid agencies and domestic commercial interests, international bans on certain pesticide products, inadequate stores and poor stock management, and unsuitable products and packaging.[102] Such accumulations finally resulted into infringement of peoples' rights and including access to justice. A good case involved the donation of approximately 600 metric tonnes obsolete DDT by Greece to the government of Tanzania through the Ministry of Agriculture. The DDT was later dumped at Vikuge Village after it was discovered that the chemical was ineffective for pest control. The DDT was donated to the government of Tanzania in 1986 in different forms such as liquid, powder, pellets, and sprays.[103] The DDT endangered the lives of people, animals and the environment as it was dumped in an open space not far away from a stream from which people and animals depended for their water supply. In my view, the donation of partly expired pesticides by the Greece government to the government of Tanzania can be termed as a deliberate act of dumping of chemicals under the name of bilateral cooperation. In this case, there was a clear violation of the Basel Convention where a Party deliberately exported waste in the form of obsolete pesticides to another Party and without proper notification. No complaints were ever brought against the Greek government, neither did it participate in the clean-up. There was no thorough study on the extent of damage to human and environmental health apart from collecting the little remaining stocks for shipping back to Europe. There was no legal action taken by the victims due to lack of information, lack of supportive local legislation, know-how and the challenges of litigating against a foreign or own government.

In my opinion, the ASP failed miserably in ensuring justice is accessed by the community and individuals affected by the stockpiles. One would have expected institu-

[101] Clifton Curtis and Cynthia Palmer Olsen, 'The Africa Stockpiles Programme: cleaning up obsolete pesticides; contributing to a healthier future', 27(2-3) *UNEP Industry and Environment* (2004), available at <http://d2ouvy59p0dg6k.cloudfront.net/downloads/aspuneparticle.pdf> (visited 6 June 2019) 37-38.

[102] IEG, World Bank Group, 'Project performance Assessment Report: Ethiopia, Mali, Morocco, South Africa, Tanzania, Tunisia; Africa Stockpiles Program', (2016), available at <http://documents.worldbank.org/curated/en/168841477341223021/pdf/108524-PPAR-PUBLIC.pdf> (visited 12 March 2019) at 1-2.

[103] AGENDA in collaboration with International POPs Elimination Network (IPEN), 'Vikuge Preliminary Site Report, Coast Region, Tanzania' (2004), available at <http://www.ipen.org/sites/default/files/documents/6urt_vikuge_preliminary_report-en.pdf> (visited 26 February 2019) at 11.

tions like the World Bank and international NGOs involved in the project to have recognized and prioritized issues related to human and environmental rights. Unfortunately, the ASP ignored this though at that particular period the World Bank developed environmental and social standards (ESS) that were later transformed into the Environmental and Social Framework (ESR) in order to safeguard people and the environment.[104] Had the World Bank and others insisted on the application of ESS in the ASP, in my view, the Tanzanian government would have taken human rights issues into consideration and not only focused on the removal of the obsolete pesticides from the community. Tanzania would have been able to initiate the Basel process and hold the Greek government accountable and, therefore, pave the way for justice to take place.

5.4 The Busan Partnership for Effective Development Cooperation

The European Commission's commitment to improving aid and development effectiveness through development cooperation is reflected in its endorsement of key international agreements. These include the 2005 Paris Declaration,[105] the 2008 Accra Agenda for Action,[106] the 2011 Busan Outcome Document[107] and the 2014 Mexico Communiqué.[108]

These agreements have influenced bilateral cooperation, trade and development projects between developed and developing countries since the adoption of the Paris Declaration in 2005. They have, therefore, determined issues related to human and environmental rights in the development process. However, these agreements did

[104] World Bank, 'The World Bank Environmental and Social Framework' (2017), available at <http://documents.worldbank.org/curated/en/383011492423734099/pdf/114278-WP-REVISED-PUBLIC-Environmental-and-Social-Framework.pdf> (visited 6 June 2019) at 11-12.

[105] Ministers of developed and developing countries responsible for promoting development and Heads of multilateral and bilateral development institutions, held a meeting in Paris on 2 March 2005 with the aim of taking far-reaching and monitorable actions to reform the ways aid is delivered in order to achieve Millennium Development Goals (MDGs) and to increase effectiveness. The meeting resulted in the Paris Declaration on Aid Effectiveness, available at <https://www.oecd.org/dac/effectiveness/34428351.pdf> (visited 7 June 2019).

[106] Ministers of developing and donor countries responsible for promoting development and Heads of multilateral and bilateral development institutions met in Accra, Ghana, on 4 September 2008 and affirmed their commitment to accelerate and deepen implementation of the Paris Declaration on Aid Effectiveness through application of agreed set of actions. The Accra Agenda for Action is available at <https://www.oecd.org/dac/effectiveness/34428351.pdf> (visited 7 June 2019).

[107] Heads of State, Ministers and representatives of developing and developed countries, heads of multilateral and bilateral institutions, and representatives of different types of public, civil society, private sector, parliamentary, local and regional organizations met in Busan, Republic of Korea, from 29 November to 1 December 2011 and adopted the Busan Partnership for Effective Development Cooperation. It was the 4th High Level meeting on Aid Effectiveness.

[108] Ministers and leading representatives of developing and developed countries, multilateral, regional and bilateral development and financial institutions, parliaments, local and regional authorities, private sector entities, philanthropic foundations, trade unions and civil society organizations met in Mexico City on 15-16 April 2014 during the first High-Level Meeting of the Global Partnership for Effective Development Co-operation and issued a communiqué on Building Towards an Inclusive Post-2015 Development Agenda.

not prioritize human and environmental rights in their provisions despite the fact that all adopted four key principles for development effectiveness: country ownership; transparency and accountability; focus on results; and inclusive development partnerships.

For instance, in the Paris Declaration, a set of indicators were designed to measure the effectiveness of aid and development, but none was on human rights. The same weakness can be observed in the Accra Agenda for Action though it introduced the need to strengthen engagement of civil society organizations. This paved the way for CSOs to bring aboard issues related to human rights. The Busan Partnership, on its part, reaffirmed commitment to human rights, decent work, gender equality, environmental sustainability and disability but failed to provide guidelines or indicators for measuring the effectiveness of development on these social and environmental rights. In the Mexico Communiqué, nothing new on human and environmental rights was introduced.

Having recognized the limitations of these agreements, CSOs, led by IBON International, BetterAid and AidWatch Canada,[109] carried out consultations with all stakeholders, including governments. In 2010, they met in Turkey and adopted a set of eight principles that would assist CSOs to monitor and evaluate the effectiveness of development. These are known as Istanbul Principles.[110] The Istanbul principles were built on the Busan Principles and hence can provide a better measure of the effectiveness of development cooperation. The first principle includes a requirement for an investment or aid or any form of development cooperation to provide for access to social justice and human rights (Principle 1: Respect and promote human rights and social justice). The second principle provides recognition to gender rights (Principle 2: Embody gender equality and equity while promoting women and girls' rights) while the third principle recognizes the importance of empowering people, local ownership and the right to participation in all stages (Principle 3: Focus on people's empowerment, democratic ownership and participation).

One would have expected both development partners, including the US and EU, to enshrine the Busan and Istanbul Principles in their development cooperation programs; in this regard, unfortunately, in my view, FTAs, EPAs and AGOA have not taken into account these important principles. There is no independent monitoring of the effectiveness of trade agreements under these development cooperation programs, there is little engagement of civil societies, and there is weak local ownership of the programs. Although both Busan and Istanbul principles are not legally bind-

[109] Brian Tomlinson, *CSOs on the Road from Accra to Busan: CSO Initiatives to Strengthen Development Effectiveness: Documenting the Experiences of the CSO BetterAid Platform and the Open Forum on CSO Development Effectiveness* (BetterAid, 2012) 21-27.

[110] Open Forum for CSO Development Effectiveness, 'The SIEM REAP CSO Consensus on International Framework for CSO Development Effectiveness', agreed by the Second Global Assembly, Siem Reap, Cambodia, June 28-30, 2011, available at <http://www.cso.csopartnership.org/wp-content/uploads/2016/01/hlf4_82.pdf> (visited 28 February 2019) at 7-17.

ing, their inclusion in the Busan partnership puts an obligation for Parties to uphold them in their development partnerships. Consequently, this would have a positive impact on human rights and access to justice where it was needed.

6 The gaps in MEAs and their effect on accessing justice

In his 2015 report on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes', sections 76-80, the UN Special Rapporteur identified the need to enable people to claim and defend their rights. The special Rapporteur is of the opinion that enjoyment of human rights is at the core of rights-based environmental agreements such as the Aarhus Convention.[111]

In my view, the limitation of the chemicals and toxic waste related MEAs in facilitating access to justice, as proposed by the UN Special Rapporteur, is rooted on the fact that they lack a rights-based approach in their design. Access to justice, from a rights-based perspective, refers to the ability of people from disadvantaged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through formal and informal justice systems, for grievances in accordance with human rights principles and standards.[112] This definition by the UN High Commissioner applies to situations where people and their environment are negatively affected by toxic chemicals and waste. In a situation where people are affected by dumped toxic chemicals and waste and are unable to access justice, their levels of poverty increase due to increasing expenses on health services, loss of livelihoods and incomes, etc.

While a number of international instruments have established principles and minimum rules for the administration of justice and offer fairly detailed guidance to states on human rights and justice, the majority of MEAs provide limited support to these objectives. There is, therefore, a mismatch between MEAs and international human rights instruments and this is due to the fact that MEAs have failed to take into account elements that are critical for accessing justice. These elements include legal protection, legal awareness, legal aid and counsel, adjudication, enforcement and civil society oversight.[113] The ability to access justice depends on these elements which, in my opinion, are not fully taken into account by most of the MEAs.

[111] 'Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Başkut Tuncak', UN Doc A/HRC/30/40 (2015).

[112] OHCHR, 'Principles and guidelines for a human rights approach to poverty reduction strategies' (2002), available at <https://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> (visited 7 June 2019) at 9.

[113] UNDP, 'Access to Justice', Practice note (2004), available at <https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf> (visited 7 June 2019) at 5-6.

Since the Basel Convention is the most relevant to the theme of this paper, let us examine its provisions viz-a-viz the key elements for accessing justice mentioned in the preceding paragraph.

In terms of legal protection, the Basel Convention has a limitation; in order for an instrument to provide legal protection, it first must have a legal mandate over the matter brought before it. For some time, the Basel Convention could not handle cases related to dumping of toxic plastic waste because this type of waste did not fall under its mandate. People affected by the dumping of hazardous plastic waste could not enjoy legal protection under the Convention.

This limitation was acknowledged by the international community and the 14th Conference of the Parties (COP14) adopted a decision whereby plastic waste was moved from Annex IX to Annex II (other wastes) under the Convention.[114] The main significant impact of this extension is that it will allow plastic waste to be managed in an environmentally sound manner and support less developed nations that import waste. The Basel Convention framework will now be used to implement a transparent and traceable system for the export and import of most plastic wastes under which exporting states must now obtain prior written consent from importing states. This development represents a positive change in the global management of plastic waste and places plastic waste within a globally recognized legal standard for the control of international movements of waste.[115]

Another limitation within regard to the provision of legal protection can be seen in the preamble where Parties to the Basel Convention issued a series of statements of purpose. None of the statements provides an indication that the protection of human rights (including the right of access to justice) is one of the objectives of the signatories to the Convention. This is so despite the fact that the last statement in the preamble aims at protecting human and environmental health.

Access to compensation (provided under Article 12 on Consultations and Liability and the right to recourse (provided under Article 18 has proven elusive to victims due to the non-inclusion of the other key elements i.e. legal awareness, legal aid and counsel and adjudication in the articles of the Convention.

The Basel Convention is not very clear on whether an individual or a group of individuals can submit a dispute to a court of law. The lack of clarity originates from Article 20 (Settlement of disputes) of the Convention and Article 17 of the Protocol

[114] 'Amendments to Annexes II, VIII and IX to the Basel Convention', Basel Dec. BC-14/12 (2019).

[115] Latham & Watkins LLP, 'Basel Convention Extends to Include Transboundary Movements of Plastic Waste' (23 May 2019), available at <https://www.globalelr.com/2019/05/basel-convention-extends-to-include-transboundary-movements-of-plastic-waste/> (visited 2 September 2019).

for Liability and Compensation.[116] They both refer only to disputes between Parties and provide no clarity on whether any other affected individual or group of individuals has the right of submitting a dispute to the International Court of Justice or before a competent court. In my view, this lack of clarity forces an affected individual or a group of individuals to rely on national authorities for accessing justice. In a situation where government authorities are party to the abuse or are shrouded with corruption and abuse of human rights, access to justice becomes a challenge.

Another limitation of the Basel Convention is the time limitation that is recognized under the Protocol for Liability and Compensation. Article 13 (Time limit and liability) contains a requirement under para. 1 that claims for compensation must be brought within 10 years from the date of an accident. While it is always good for the conduct of justice for claims to be lodged as soon as the incident has happened, in the case of toxic dumping this can pose some serious challenges. First of all, most cases of dumping happen secretly, and it may take more than the 10 years for people to discover it or even identify the perpetrator(s). In many developing countries, local legislation needs review in order to allow victims to access justice; the process of review may take several years. In principle, it does not make sense for a serious crime of dumping of toxic chemicals and waste to be exonerated from facing a judicial process simply because of a time limit. A crime remains a crime no matter the length of the period it has gone un-reported or un-litigated.

Access to justice is also limited in the framework of the Basel Convention in a very serious manner by its non-recognition of the role of CSOs in its implementation. The only article that makes a reference to CSOs is Article 15(6) where NGOs are allowed to attend a COP. However, this right of participation is not fully guaranteed since if one-third of the Parties show objection an NGO may be barred from attending a COP. For people to access justice, their representative organizations, i.e. CSOs, ought to have a role in the implementation of the Basel Convention. Excluding CSOs in Articles 9 (illegal traffic), 12 (Consultations on liability), 13 (Transmission of information), 19 (Verification) and 20 (Settlement of disputes) has seriously limited the ability of CSOs to ensure that the people they represent have access to justice and that the perpetrators are held liable and that appropriate remedy is provided to the victims.

Dispute resolution is an area where access to justice can be made possible; however, as was the case with the Basel Convention, the Rotterdam Convention also restricts the settlement of disputes (Article 20) only to Parties. In the rules on arbitration (Annex VI), the role of CSOs in the arbitration process is not recognized. The notion presented here is that disputes will only arise between Parties; however, in the trade on chemicals and pesticides people and their environment may be negatively

[116] Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999, <http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf> (visited 27 March 2019).

affected. This may be due to non-compliance with the prior informed consent (PIC) procedures or an unexpected event such as a spill-over during handling. In such a case, the Convention does not provide means of accessing justice through the International Court of Justice as provided under Article 20(b) or through the Arbitral Tribunal as provided under Annex VI of Article 2(1). In my view, this is a result of this MEA not embracing the rights-based approach during its negotiation and eventual design.

The Rotterdam Convention also resembles the Basel Convention on civil society representation in the COP context. In fact, the text under Article 15(6) in the Basel Convention was copied and pasted into Article 18(7) of the Rotterdam Convention. The participation of CSOs is not fully guaranteed since if one-third of the Parties object this right will be withdrawn. In a way, this precondition may affect access to justice; for fear of being rejected by a COP, a CSO may negate its obligation of ensuring access to justice is given to victims by a Party or a corporate entity.

However, Article 10 of the Stockholm Convention introduced an important aspect with regard to access to justice. It assigned Parties the duty of ensuring that the public receive information and education to raise their level of awareness about government actions towards implementation of the Convention and on the human and environmental impacts that can be caused by POPs.

In similarity with its predecessors, i.e. the Basel and Rotterdam Conventions, the Stockholm Convention also restricts submission of a dispute only to Parties. The Convention does not provide a procedure for settling disputes that may arise if an individual or a group of individuals or any other stakeholder is negatively affected when Parties and corporations operate under the rules and guidelines of the Convention. For instance, if an individual or a group of individuals want to appeal against a request by their government for an exemption[117] on DDT or any other hazardous substance, because they think it will erode their right to good health and safe environment, the Convention fails to facilitate this objection.

The Stockholm Convention also failed to recognize the role that CSOs can play in research and monitoring. There is no specific recognition of CSOs in Article 11 (Research, development and monitoring). Research and monitoring can generate data that is relevant to the promotion of human rights including the right of access to justice. Access to justice requires independent and pro-people research and monitoring; by nature of their work CSOs are better positioned to provide this service than those recognized in Article 11 i.e.; governments, industry and academia. Since governments and the industry are potential offenders, the right of access to information as stipulated under Article 10 (Public Information, Awareness and Education) may be undermined and thus negate the good intentions of Article 10.

[117] Under the Stockholm Convention, exemptions to specific use of certain listed substances can be secured under Article 4.

7 Blended financing model: a new barrier against access to justice

The term blended finance implies the mixing of both public and private funds through a common investment scheme or deal, with each party using their expertise in a complementary way. The concept and model were developed within the Redesigning Development Finance Initiative from the World Economic Forum.[118]

The rationale for those who favor blended financing is that there is a shortage of resources and that the funding gap to meet the requirements of fulfilling Sustainable Development Goals (SDGs)[119] cannot be met through public resources (such as Official Development Assistance) alone. The gap has to be filled by private investments. The current challenge for the SDG era is how to channel private resources to the sectors and countries that are central for the global achievement of the SDGs and for broader development efforts. To them, blended finance is the answer. Investors and commercial institutions are increasingly attracted to emerging and frontier markets, and this trend overlaps with the challenges faced by development funders, who face significant financial constraints and a lack of capacity or expertise in structuring transactions or sourcing deals. Thus, there is a good opportunity for these two trends to converge.[120]

Blended financing is not a completely new initiative; it is just an extension of the Public Private Partnership (PPP) paradigm. Experience and time have shown that PPPs have some unique inherent problems; the first is that those who design them (mostly financial institutions) have more experience than officials in developing countries. They usually favor the private sector and funding agencies. Second, PPPs tend to be too expensive to developing countries because the private sector is typically principally interested in increasing their profits. This raises the cost of investments and ignores non-profit-making social and environmental problems. The third problem is that through PPPs, the private sector opened up an unlimited access to public funds. The capacity of a developing country to address non-profit-making social and environmental problems is reduced. With blended financing, the private sector has fortified and widened its access to funding. It can now access more public funds as well as funds from financial institutions.[121] Therefore, the new funding mechanism, i.e. blended financing, cannot address the problem associated with chemical

[118] World Economic Forum, 'Sustainable Development Investment Partnership (SDIP)', available at <http://www.weforum.org/global-challenges/projects/redesigning-development-finance/> (visited 26 February 2019).

[119] UNGA Res. 70/1.

[120] OECD, *Making Blended Finance Work for the Sustainable Development Goals* (2018), available at <https://www.oecd-ilibrary.org/development/making-blended-finance-work-for-the-sustainable-development-goals_9789264288768-en> (visited 18 February 2019) at 13-23.

[121] Tom Groenfeldt, '"Blended Finance" – Lipstick On The Public-Private Partnership Pig?', *Forbes* of 20 April 2018, available at <https://www.forbes.com/sites/tomgroenfeldt/2018/04/20/blended-finance-lipstick-on-the-public-private-partnership-pig/#1dc6d02f452b> (visited 20 February 2019).

safety. Since blended financing has been identified as the opportunity for filling the investment gap (estimated at 2.5 trillion USD per year) in the financing of Agenda 2030,[122] it is obvious that the SDGs will not be able to assist the people affected by hazardous chemicals and waste to assess justice. It is hard to imagine how the key targets on the sound management of chemicals and waste will be realized under a financing mechanism that is based on profit maximization.

8 The Strategic Approach to International Chemicals Management (SAICM) and its limitations on access to justice

Management of chemicals has presented a challenge to nations and the international community for many years; there has been fragmentation of instruments, institutions and approaches. The first attempt to overcome these challenges resulted in the establishment of the Intergovernmental Forum on Chemical Safety (IFCS). The IFCS was created by the International Conference on Chemical Safety (ICCS) held in Stockholm in 1994. The concept of an intergovernmental forum to address chemical safety originated during preparations for the 1992 United Nations Conference on Environment and Development (UNCED). In the run-up to the UNCED, the UNCED Preparatory Committee identified the collaborative effort of the United Nations Environment Programme (UNEP),[123] the International Labor Organization (ILO)[124] and the World Health Organization (WHO)[125] in the Intergovernmental Programme on Chemical Safety (IPCS) as the nucleus for international cooperation on environmentally sound management of toxic chemicals. IPCS was thus invited to identify possible intergovernmental mechanisms for risk assessment and management of chemicals. In response, UNEP, ILO and WHO convened an expert meeting in 1991 to consider priority areas for an international strategy and possible proposals for an intergovernmental mechanism for the environmentally sound management of chemicals. The meeting resulted in a recommendation to establish an intergovernmental forum on chemical risk assessment and management. This recommendation was forwarded to UNCED.[126]

Under the umbrella of the IFCS (Forum III), the international community met in Salvador, Bahia, Brazil, in 2000 and adopted the Bahia Declaration on Chemical

[122] UNDP, 'Financing the 2030 Agenda. An Introductory Guidebook for UNDP Country Offices' (2018), available at <http://www.undp.org/content/dam/undp/library/Sustainable%20Development/2030%20Agenda/Financing_the_2030_Agenda_CO_Guidebook.pdf> (visited 22 February 2019) at 6 and 83-89.

[123] See <https://www.unenvironment.org/>.

[124] See <http://www.ilo.org>.

[125] See <http://www.ilo.org>.

[126] International Institute for Sustainable Development (IISD), 'A Brief Introduction to the Intergovernmental Forum on Chemical Safety' (2010), available at <http://enb.iisd.org/process/chemical_management-ifcsintro.html> (visited 22 February 2019).

Safety.[127] The Bahia Declaration played a big role in the negotiation and adoption of both the Stockholm and Rotterdam Conventions. However, the Declaration – like the Basel Convention that was adopted in 1989, almost 11 years before – did not adopt a rights-based approach, Though to some extent the Declaration succeeded in bringing aboard CSOs in global negotiations, it failed to promote issues related to access of justice. The Bahia Declaration influenced international negotiations on two conventions i.e. the Rotterdam and Stockholm Conventions. A look into these Conventions, which were adopted after the Bahia Declaration, supports the lack of a rights-based approach. The two Conventions did not show significant and positive deviation from the Basel Convention on issues related to human rights, including access to justice. There was not much improvement on the key elements i.e. legal protection, legal awareness, legal aid and counsel, adjudication, enforcement and civil society oversight.

Though the IFCS failed in influencing a right-based approach in the Rotterdam and Stockholm Conventions, it somehow succeeded in shaping the Strategic Approach to International Chemicals Management (SAICM) to adopt a multi-stakeholder approach. One ought to remember that the IFCS opened the door for CSOs to participate in an intergovernmental framework on a sensitive topic – chemicals. The strengthened engagement of CSOs in an intergovernmental process did not fit well with some stakeholders, particularly the chemical industry and governments. It was, therefore, not surprising that the IFCS faced criticism and attempts were made to 'sunset'[128] it. As one of the founders of IFCS and a regular participant in all the six forums of IFCS, I observed that those who disliked the IFCS argued that it was misplaced since it was under the WHO instead of UNEP. They insisted that chemicals issues are more of environmental issues rather than a human health issue. Those who supported the existence of the IFCS (mostly NGOs and the WHO) argued that chemical safety is both a health and an environmental issue but given the two areas human health has to be prioritized. They also insisted that WHO is a specialized agency of the UN while UNEP was only a Programme. In their view, placing chemical issues under a specialized UN agency was the best option for political, sustainability and financial reasons.

Under this conflict of interest and ideas, the then Governing Council of UNEP (UNEP GC) took decisions that called for Forum IV of the IFCS to discuss the further development of a strategic approach to international chemicals management.[129] The first meeting of the Preparatory Committee for the development of SAICM took place in 2003, alongside IFCS Forum IV. Stakeholders began negotiating the

[127] WHO, 'Bahia Declaration on Chemical Safety', Intergovernmental Forum on Chemical Safety Third Session Final Report (2000), available at <http://www.who.int/ifcs/documents/forums/forum3/en/Bahia.pdf> (visited 19 February 2019).

[128] Sun-setting was a phrase commonly used in Forum meetings to suggest that the IFCS should be brought to an end.

[129] 'Strategic approach to international chemicals management', UNEP GC Dec. SS.VII/3 (2002) and 'Chemicals', UNEP GC Dec. 22/4 IV (2003).

exit strategy for IFCS and the creation of another international framework for the sound management of chemicals. Between 2003 and 2006 a series of preparatory meetings were held under the IFCS (including Forum V), and in February 2006 SAICM was adopted in Dubai during the first International Conference on Chemicals Management (ICCM 1). The last IFCS forum (Forum VI) was held in September 2008 where the IFCS was 'sun-set' as stated by one delegate from a Party that had always expressed its negative attitude towards the Forum.

One of the significant achievements of the IFCS in the area of human and environmental rights was on the provision of information. The Globally Harmonized System (GHS) was a product of the work of IFCS. The GHS is a tool through which citizens and all other actors receive safety information that allows them to take precautions when handling products that contain hazardous substances.

After the demise of the IFCS, international efforts to manage chemicals were put under SAICM; however, one of the first limitations was the voluntary nature of SAICM. During preparatory meetings, civil society organizations and activists lobbied for the adoption of a legally binding mechanism. This was objected by representatives from the industry and some parties who are major producers and exporters of chemicals. Though decisions were usually reached through consensus, this had to go through a vote, and those who preferred a voluntary SAICM won.

In my view, there are several factors that reduced the ability of SAICM to uphold human rights and deliver justice to victims of toxic dumping or exposure to hazardous substances, but the most important one is the voluntary nature of SAICM. In the Dubai Declaration,[130] heads of state committed themselves to some key principles needed for promoting access to justice; these include those under section 4 (the role of civil society), section 10 (respect of human rights and fundamental freedoms), 20 (requirement for the chemical industry to provide information and data to the public), 23 (protection of most vulnerable groups) and 24 (protection of children and un-born). However, due to the voluntary nature of SAICM, these have not been realized because the chemical industry and governments are not legally obliged to take actions that would facilitate their realization. For instance, under Section 3 of the same Dubai Declaration the private sector is encouraged to promote voluntary initiatives.

Apart from being a voluntary programme, SAICM also lacks a rights-based approach in its formulation. Although in the Overarching Policy Strategy (OPS),[131] the scope

[130] Dubai Declaration on International Chemicals Management, 6 February 2006, available at <http://www.saicm.org/Portals/12/Documents/saicmtexts/New%20SAICM%20Text%20with%20ICCM%20resolutions_E.pdf> (visited 8 June 2019).

[131] Overarching Policy Strategy for SAICM, Dubai, 6 February 2006, available at <http://www.saicm.org/Portals/12/Documents/saicmtexts/New%20SAICM%20Text%20with%20ICCM%20resolutions_E.pdf> (visited 8 June 2019).

of SAICM includes environmental, social, health and labor issues, promotion of human rights and access to justice is not recognized in the objectives section. Since the objectives exclude human rights, the actions listed in the Global Plan of Action (GPA)[132] also do not target the promotion of human rights or access to justice in particular. As a consequence, none of the projects implemented under the Quick Start Program (QSP)[133] was on access to justice or remedy. Projects carried out by governments were mostly on issues related to research, policy formulation and construction of national plans for the sound management of chemicals. The majority of projects implemented by CSOs were related to awareness-raising and prevention of exposure to hazardous chemicals.

In its GPA, SAICM identified key working areas and associated activities, actors, timeframes, indicators and implementation aspects. One of the key areas in the GPA is liability and compensation.[134] The relevant activity for this key working area is activity number 199 which urged national governments to establish effective implementation and monitoring arrangements between 2006-2010. This is one of the key work areas in the GPA that has seen little progress in its implementation. There is no evidence that national governments in Africa have established implementation and monitoring mechanisms on liability and compensation as requested in the GPA. The voluntary nature of SAICM does not enable CSOs to hold their governments or the industry accountable for the failure to implement such a critical work area.

Another significant challenge that is confronting SAICM is related to its time-bound nature in that it was supposed to come to an end at the end of 2020. There is a danger that after 2020 SAICM will end under an environment that there is no clear and agreed framework on how to manage hazardous substances and waste in a comprehensive manner. In recognition of this, UNEP has organized two inter-sessional meetings to discuss the possibility of a post-2020 SAICM and its link to Agenda 2030. The first intersession was held in Brazil (February 2017) the second in Sweden (March 2018) and the third in Bangkok (October 2019) where the SAICM beyond 2020 is being deliberated on. This discussion is critically important to issues related to access to justice since the policy principles are expected to guide the implementation of SAICM beyond 2020 (if parties agree to an extension).

In my opinion as a co-chair of the contact group (the other co-chair was a representative from the Government of Panama) that was mandated to lead the discussions on the policy principles I have a feeling that human rights, including access to justice in the post 2020 SAICM, will not be prioritized. There is a strong demand from

[132] Global Plan of Action, 6 February 2006, available at <http://www.saicm.org/Portals/12/Documents/saicmtexts/New%20SAICM%20Text%20with%20ICCM%20resolutions_E.pdf> (visited 8 June 2019).
[133] The QSP was a funding mechanism established to facilitate an enabling environment for implementation of SAICM. Funding was made accessible to governments and CSOs. It was later dissolved and a special programme was established in which funding was restricted to governments only.
[134] GPA at 77.

parties and the industry to retain the existing formulation of text on policy principles in the 'new' SAICM. This is a real problem since section VI of the OPS calls governments to be guided by certain principles that are recognized in various MEAs but that are not legally binding to parties. For instance, under section VI (Principles and Approaches), sub-sections a and b, the OPS mentions Principle 22 of the Stockholm Declaration on the Human Environment[135] that states: 'States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction'. Another example is the reference the OPS made to the ILO Convention No. 170 concerning safety in the use of chemicals at work. Convention No. 170 was adopted in 1990 and entered into force in 1993. However, as of August 2019, only 21 Parties have ratified this Convention. It is obvious in my opinion, that Parties may not be willing, particularly some major exporters of chemicals and hazardous waste, to respect this instrument. Retention of such language in the 'new' SAICM will therefore not improve access to human rights. In my opinion, the 'new' SAICM should overhaul the OPS to make it more responsive to and supportive of the demand for upholding of human and environmental rights. Retaining statements of purpose that have little chance of being applied at the national level will not improve access to justice. It is my hope that this issue will be debated again in the coming third intersession that is scheduled to be held in Thailand in October 2019.

9 Agenda 2030, chemical safety and access to justice

Given that chemicals and waste affect all aspects of development, the sound management of chemicals and waste is relevant and support the implementation of many, if not all, SDGs. The use of chemicals has, become part and parcel of our everyday life; almost all sectors of the economy use chemicals while chemicals are used in almost all homes and public places. Chemicals are needed for our economic and social development and they have contributed in the design of many useful innovations. However, chemicals can also have negative impacts on our social-economic development. For instance, exposure to chemicals can intensify levels of poverty through increased medical bills and consequently increase poverty. On the other hand, misuse and intensive use of agrochemicals can cause soil degradation which in turn contributes to food insecurity through crop failures. Chemicals can pollute environmental resources such as aquatic ecosystems and contribute to climate change through the accumulation of greenhouse gases in the stratosphere. It is therefore obvious that the way we use chemicals will determine the extent to which we will achieve the 17 SDGs.

[135] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1973), 11 *International Legal Materials* (1972) 1416.

Sound management of chemicals and waste is a specific target under SDG 12 on Sustainable Consumption and Production. Chemicals, waste and air quality are also referred to under SDG 3 on Good Health and Well-being, SDG 6 on Clean Water and Sanitation, SDG 7 on Affordable and Clean Energy, SDG 11 on Sustainable Cities and Communities, SDG14 on Life Below Water and SDG 15 on Life on Land.

The Preamble of the 2030 Agenda notes a determination to take 'bold and transformative steps which are urgently needed to shift the world on to a sustainable and resilient path.' The overall plan seeks to 'realize human rights of all, to achieve gender equality and the empowerment of all women and girls'; and to 'ensure the lasting protection of the planet and its natural resources'.[136]

However, regardless of the good intentions and the setting of targets aimed at achieving the sound management of chemicals, Agenda 2030 in my opinion fails to address issues of human rights and access to justice when chemicals impact on the well-being or livelihoods of people and their environment. None of the 17 SDGs, even those that contain key targets on sound management of chemicals and waste, addresses issues of liability and compensation. For instance, it is well known that chemicals can contribute to deepening of poverty,[137] but under SDG 1 (No Poverty) none of the 7 targets address this issue. Under SDG 3, where a direct reference to chemical safety is made (Target 3.9), the ambition is to decrease the number of deaths and illnesses. Exposure to toxic chemicals and waste impose a huge and sometimes a life-time financial burden to the victim in terms of increased medical costs, inability to participate actively in economic activities or the need to move away from the affected area to start a new life somewhere else. The relocation costs money in terms of transport, construction of another house and costs associated with living in another unfamiliar area. In the worst case scenario, the burial of loved ones imposes both financial and psychological cost on the victim.

It is therefore evident that the objective of Agenda 2030 on poverty alleviation may not be realized if those who expose people and their environment to toxic chemicals and waste are not held accountable through concrete national targets and indicators. In my view, and with regard to dumping of chemicals, Agenda 2030 is full of statements of purpose, but it does not provide a firm foundation for governments to build upon when designing their national implementation strategies. In my opinion, Agenda 2030 as designed in relation to chemicals and waste, may not be able to address issues related to the rights of people to healthy lives, healthy environments and the right of access to justice.

[136] Preamble.

[137] Chemicals have negative impacts on household incomes. They can increase medical expenses, reduce crop yields, remove people from productive work due to illnesses, cause nutritional problems if they affect water bodies, etc.

KEY SDG TARGETS FOR CHEMICAL SAFETY

Target 12.4 of SDG 12: 'By 2020, achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment'.

Target 3.9 of SDG 3: 'By 2030, substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination'.

Target 6.3 of SDG 6: 'By 2030, improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally'.

Target 7.A of SDG 7: 'By 2030, enhance international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology'.

Target 11.6 of SDG 11: 'By 2030, reduce the adverse per capita environmental impact of cities, including by paying special attention to air quality and municipal and other waste management'.

Target 14.1 SDG 14: 'By 2025, prevent and significantly reduce marine pollution of all kinds, in particular from land-based activities, including marine debris and nutrient pollution'.

Target 14.3 of SDG 14: 'Minimize and address the impacts of ocean acidification, including through enhanced scientific cooperation at all levels'.

Target 14.4 of SDG 14: 'By 2020, effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implement science-based management plans, in order to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics'.

Target 15.5 of SDG 15: 'Take urgent and significant action to reduce the degradation of natural habitats, halt the loss of biodiversity and, by 2020, protect and prevent the extinction of threatened species'.

10 Conclusion

Although Africa is a consumer rather than a manufacturer of chemicals, it is the continent that is most affected by chemicals – mainly through dumping and illegal trade. Ironically, while access to justice and remedy is somehow easier in the manufacturing countries, in Africa access to justice is a nightmare that people have lived with for many years.

Cases presented in this paper highlighted the dilemma of accessing justice in the continent. This dilemma is driven by a variety of factors which include difficulties of litigating across national boundaries, conflicts between trade regimes or bilateral cooperation and human rights, corruption at both ends of the conflict, lack of awareness by the victims, failure to provide or to access information, weaknesses in national legislation and the mismatch between international human rights instruments and chemicals-related MEAs, specifically the Basel, Rotterdam and Stockholm Conventions.

Access to justice has also suffered a setback because of the lack of a rights-based approach in the SAICM and the non-inclusion of a specific goal on sound management of chemicals and hazardous waste in Agenda 2030 despite the fact of the negative impact chemicals and hazardous waste can inflict on all of the 17 SDGs.

The lack of access to justice and remedy has become a catalyzing factor for repeated acts of human and environmental rights abuse in the continent. It has also helped to expose other problems such as the existence of discriminatory practices in the international application of fundamental human rights, the excessive power of the corporate world over fundamental human rights and even over the sovereignty of African states, the inadequacy of local judiciary systems and the role that corruption plays in denying justice and remedy.

In my opinion, the removal of barriers to justice requires some actions to be taken in order to overcome this dilemma. The following actions may go a long way in improving access to justice for victims of dumping of chemicals and illegal trade of hazardous waste in the continent and beyond:

- Bridging the gap between international human rights instruments and chemicals-related MEAs (including the Bamako Convention). Each of these MEAs should recognize fundamental rights and establish a mechanism within its mandate to monitor compliance. It does not make sense for the international community to adopt human rights instruments and principles while at the same time adopting other instruments and principles that do not give support to human rights. All UN instruments including MEAs should be required to give support to the UN Declaration on Human Rights; the International Covenant on Economic, Social and Cultur-

al Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on Elimination of All Forms of Discrimination Against Women; and the Convention on the Rights of the Child.

- I would propose thata specific International Court of Justice be established that will handle cases related to illegal dumping, trade and trafficking of chemicals and hazardous waste. Alternatively, the existing International Court of Justice as constituted can take up this issue.

- Making it mandatory for a corporation to be held accountable to similar standards across all countries. The application of home state regulations needs to be encouraged in order to fill regulatory gaps that are usually a result of a number of factors. These include the inability of the regulatory regime in a developing country to regulate transnational companies due to various reasons including the hiding of a transnational company behind a sub-contractor or subsidiary, corruption or a weak legal framework.

- Enhancing the responsibility and accountability (applying corporate accountability principles including the producer extended principle) of the chemical industry beyond voluntary initiatives. The producer extended responsibility includes initiatives such as the Product Stewardship, Responsible Care and Safe Use that are flagship programs of the International Council Chemical Associations (ICCA).[138] These initiatives have not succeeded in increasing corporate responsibility and accountability because of their voluntary nature and the lack of external evaluation. The world and the industry itself need to move a step further.

- Capacity-building on litigation across borders, bio-monitoring, environmental sampling and monitoring, sound management of chemicals, emergency response and medical treatment of victims of chemicals, label interpretation (GHS), etc.

- Public education on sound management of chemicals and on how to act in an emergency situation.

- Mainstreaming of chemicals in all 17 SDGs through introduction SMART139 national goals.

- Making trade agreements and bilateral cooperation more responsive to human rights including issues related to access to justice and remedy.

[138] See <https://www.icca-chem.org>
[139] SMART = Specific, Measurable, Achievable, Relevant, and Time-based goals.

- Bringing SAICM in line with basic human rights instruments in the on-going initiative of reformulating it beyond 2020. One way of doing this is to ensure that items 199 (liability and compensation), 204 (prevention of illegal traffic in toxic and dangerous goods) and 205 (trade and environment) in the GPA are fully implemented.

- Expanding the mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes beyond reporting situations but also to include initiating legal actions against offenders through the International Court of Justice.

- Expanding the mandate of the African Court on Human and Peoples' Rights to enable it to deal with cases of illegal dumping and trade on chemicals and toxic waste. Together with this, all AU member states should submit their consent that allows citizens and civil societies from all AU member states to file cases.

It is my conviction that these actions, if implemented, would facilitate access to justice and remedy for victims in the continent and beyond. However, going by experience since the 1972 Stockholm Conference and the first Earth Summit in 1992, implementation of these recommendations is not going to be an easy task. There are extreme inward-looking interests amongst the main producers and exporters of chemical products and toxic waste that have always overridden the rights of people to live healthy lives and to have access to safe and healthy environment. These vested interests are mainly driven by economic, political and other strategic interests such as security of nations. Successful implementation will depend on how good-hearted and powerful global citizens and civil society organizations increase pressure at the national, sub-regional, regional and global levels.

The Development of Environmental Law in Times of the Anthropocene: the Case of the Escazú Agreement

Daniel Zavala Porras[1]

1 Introduction

Among the most elaborate and diverse identities that pre-Columbian civilizations developed in Central America and Northern Mexico, known before the Spanish conquest as Mesoamerica or *Abya Yala*, was the belief that a person's spirit or destiny could be related to a double animal. A 'nagual', a sort of alchemist or sorcerer, could not only share the ventures and misadventures of his fellow non-human being, but could even turn himself into that animal, spiritually or physically.

Beyond its historic and cultural value, the example of Nagualism illustrates how, in the long march of humanity, human beings have related themselves to nature, their environment, and even the unknown, based on different approaches, hierarchies, and social orders. Similarly, as the aforementioned case, other traditions such as animism or totemism[2] viewed their relationship with nature through the lens of interdependency and dynamism, in what anthropologist Arturo Escobar describes as 'relational ontologies'.[3]

Learning from these cultures and their approaches to nature and their environment allows us to understand that, unlike modern societies that have compartmentalized the study and comprehension of nature and culture as separate silos, others have built their norms, rules and ways of living around unified conceptions of what is

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[2] Philippe Descola, 'Mas allá de la Naturaleza y la Cultura' in Leonardo Montenegro (ed.), *Cultura y Naturaleza* (1st ed., Jardín Botánico de Bogotá José Celestino Mutis, 2001).

[3] Arturo Escobar, *Sentipensar con la tierra: nuevas lecturas sobre desarrollo, territorio y diferencia* (1st ed., Universidad Autónoma Latinoamericana, Colección Pensamiento Vivo, Ediciones UNAULA, 2014).

understood as human and the non-human. Contemporary civilizations, instead, favoured what Philippe Descola describes as the 'great separation',[4] the dualistic approaches and anthropocentric epistemologies that have impacted, perhaps for too long, our forms of relating to our environment, how it is understood, studied and assessed.

On the basis of this fundamental ontological and epistemological division, our world is being interpreted, our questions problematized, and the possible responses formulated. Modernity itself, along with the processes of economic accumulation, growth, innovation and technological progress, has relied on legal regimes rooted on individualistic approaches of rights and liberties. The most recent stage of globalization has come primarily to deepen the identification of nature as a mere 'material organization from which life (and its resources) emerges'.[5]

In spite of this ontological separation, the human rights doctrine has progressively incorporated environmental concerns in its development. The recognition of the intergenerational and universal right to a healthy environment in several national jurisdictions has enabled significant changes in environmental law enforcement and human rights protection. At the regional and international level, human rights bodies have attributed states' obligations in light of environmental standards, and as such, are contributing to the interdependency.

In this context, on 4 March 2018, Latin America and the Caribbean agreed on a legally binding environmental instrument aimed to enhance the implementation of Principle 10 of Rio Declaration,[6] principle which underscores the importance of the participation of all concerned citizens in environmental matters and encompasses three fundamental 'access rights': access to information, access to participation and access to justice.

The first environmental treaty in Latin America and the Caribbean and the only one of its kind that has emerged so far from the United Nations Conference on Sustainable Development (Rio+20), the so-called Escazú Agreement[7], was adopted by 24 countries, only a few months after the Inter-American Court of Human Rights (IACHR) had issued its Advisory Opinion (OC-23/17) on the 15th November,

[4] Maristella Svampa, 'Imágenes del fin. Narrativas de la crisis socioecológica en el Antropoceno', 278 *Nueva Sociedad* (noviembre-diciembre 2018) 151-164 at 162.

[5] Enrique Leff, 'Los derechos del ser colectivo y la reapropiación social de la naturaleza: a guisa de prólogo' in Eduardo Leff (coord.), *Justicia Ambiental: Construcción y defensa de los nuevos derechos ambientales culturales y colectivos en América Latina* (Programa de las Naciones Unidas para el Medio Ambiente, Serie Foros y debates ambientales, 2001) 8.

[6] UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876.

[7] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018, not yet in force, available at <https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf> (visited 21 October 2019).

2017.[8] Originally requested by Colombia, the IACHR's advisory opinion recognizes the 'irrefutable' relationship between the environment and the realization of all human rights, establishing the right to a healthy environment as a fundamental human right. The IACHR's decision recognizes both the 'individual and collective' dimension of the right to a healthy environment.

These new political and legal instruments, together with the most recent report of the Intergovernmental Panel on Climate Change (IPCC)[9] will affect the growing body of international and environmental law. Notwithstanding the 'greening' of human rights,[10] the question remains whether these advancements are sufficient to re-orient development models in such a way as the current patterns of climate change require, for instance.

Another concern that needs to be considered is the individual and collective basis of human rights norms. Although human rights are interdependent and mutually-reinforcing, their character of universality and collective enjoyment has long been debated in multiple backgrounds. How well can this debate within the doctrine of human rights communicate with the question on the environment, a collective and equally profitable good that was not long ago considered a non-excludable, non-rivalrous resource?

After reviewing the contributions of international human rights law and environmental law to new forms of co-habitation and co-dependency with our environment, this paper uses the case of the Escazú Agreement, its process of gestation and negotiation, to illustrate the opportunities and limits that negotiating a multilateral environmental agreement (MEA) offers with respect to the advancement of environmental rights, and more broadly, to the paradigm shift towards a fair, supportive, informed, cooperative, inclusive, nature-based enforcement of environmental and human rights law.

[8] Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of 15 November 2017, available in Spanish at <http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf> (visited 18 February 2019); Official Summary Issued by the Inter-American Court, Advisory Opinion OC-23/17 of 15 November 2017 requested by the Republic of Colombia', available at <http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf> (visited 28 January 2018).

[9] Masson-Delmotte, Valerie et al (eds), *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018), available at <https://www.ipcc.ch/sr15/> (visited 6 August 2019).

[10] See, for instance, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Doc. A/HRC/25/53 (2013) para. 12.

2 Emergence and limits of environmental human rights law

The 'greening' of human rights has succeeded in elucidating how environmental degradation interferes with the development of humankind, and in establishing responsibilities for the protection of human rights through environmental protection. Although this progress has largely been driven by inter-state political processes, human rights bodies, regional tribunals, and other international human rights mechanisms have also significantly contributed to the development of a net of individual and collective environmental safeguards, as well as to normatively strengthening the relationship between human well-being and ecological preservation goals.

These standards can be grouped under three different dimensions: the establishment of proper legal and institutional frameworks; the safeguard of rights in cases of non-state abuses; and the prevention of extra-territorial or transboundary harm.[11] On this basis, judicial and quasi-judicial mechanisms have interpreted, for instance, the failure of states to protect the collective property rights of indigenous peoples,[12] or the protection of the right to life and property[13] from environmental pollution and ecological degradation,[14] among others.

Regional human rights bodies such as the European Court of Human Rights have determined state responsibility on the procurement of a fair balance between economic development and the enjoyment of human rights,[15] including the duty to regulate private parties.[16] Human rights bodies from the universal system have exposed the adverse effects of corporate action on the enjoyment of the rights such as the right to water, food, housing or collective property.[17]

Environmental degradation has also allowed the broadening of the scope of jurisdiction on transnational cases by requiring states 'to refrain from activities that interfere, directly or indirectly, with the enjoyment of the right to water in other countries'.[18] Furthermore, the International Court of Justice has studied transboundary environmental harm through the principle of pacta sunt servanda, inferring that the obligation to comply with a signed treaty also involves the respect to another country's self-compliance.[19]

[11] 'Report of the Special', *supra* note 10, at para. 48.
[12] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* judgment of the Inter-American Court of Human Rights No. 79 (31 August 2001).
[13] For instance, in *Oneryildiz v. Turkey,* European Court of Human Rights App. No. 48939/99, Judgment of 30 November 2004.
[14] *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria,* judgment of the African Commission on Human and People's Rights No. 155/96, (27 May 2002).
[15] *Lopez Ostra v. Spain,* judgment of the European Court of Human Rights No. 16798/90 (9 December 1994), para. 51.
[16] 'Report of the Independent', *supra* note 10, at para. 58.
[17] *Ibid.* at para. 60.
[18] *Ibid.* at para. 64.
[19] *Ibid.* at para. 65.

The principles of equality and non-discrimination are a cross-cutting element of environmental matters under human rights law. The duty to protect against environmental degradation is interdependent with the right to 'equal access to environmental benefits'.[20] Conditions of living, housing, access to basic services, unequal treatment or access to justice, among other factors of discrimination, represent a condition of vulnerability for many people including children, persons with disabilities, older persons, women or indigenous peoples, to whom the state owes a responsibility for protection.

The situation of environmental human rights defenders is at most risk. The killings of 207 environmental defenders were reported in 2017,[21] and the number of reported killings rose to 321 in 2018.[22] 77 per cent of these deaths occurred on indigenous lands.[23] Latin America and the Caribbean remain, according to the data collected, the deadliest region in the world for environmental defenders: two countries alone, Colombia and Mexico, accounted for 54 per cent of the total murders in 2018.[24] In Guatemala, killings of human rights defenders were increased by 136 per cent in one year.[25]

Judicial prosecution, harassment, violent attacks and blackmail are among the many methods of persecuting and disrupting the protest of peoples, groups and communities against environmental harm. Environmental human rights defenders nowadays face backlash from the expansion of extractivism through agribusiness, large-scale agriculture, mining and oil operations, poaching and logging. States have the duty to tackle the root causes of violence in terms of inclusion and participation, guarantees of protection, and through the eradication of a culture of impunity that impedes to hold those responsible of threats and crimes accountable.

Today, the nexus between human rights and the environment is undeniable in the face of scientific evidence and data on human's footprint and environmental interference on human rights' fulfillment. Former International Court of Justice's Vice President, Judge Weeramantry, has described environmental protection as 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'.[26] Is this enough evidence to affirm that human rights law and environmental law have converged on the 'instantiation of the interests of humanity rather than *raison d'état*'?[27]

[20] *Ibid.* at para. 25.

[21] Global Witness, 'At What Cost? Irresponsible business and the murder of land and environmental defenders in 2017' (2018), available at <https://www.globalwitness.org/documents/19392/Defenders_report_layout_AW2_lowres.pdf> (visited 15 February 2019).

[22] 'Front Line Defenders Global Analysis 2018' (2019), available at <https://www.frontlinedefenders.org/sites/default/files/global_analysis_2018.pdf> (visited 15 February 2019) at 4.

[23] *Ibid.*

[24] *Ibid.* at 7.

[25] *Ibid.*

[26] Mario A. Delgado Galarraga, 'Exploring the connection between indigenous peoples' human rights and international environmental law', 9(2) *Revista Chilena de Derecho y Ciencia Politica* (2018) 1-61 at 10.

[27] Francesco Francioni, 'International Human Rights in an Environmental Horizon', 21(1) *European Journal of International Law* (2010) 41-55 at 42.

Even though grassroots movements, community-based organizations and academia, among others, have come to define the era of human-made global transformation as the 'Anthropocene',[28] as a statement of the current relationship that humans have forged with respect to their environment, the pushbacks faced currently by the human rights agenda and the threats suffered by environmental defenders show how fragile international agreements can be.

This is especially true when the people who are directly impacted by those decisions, or those that are better informed on their implications, are excluded from taking part in broader platforms of dialogue, interaction, and decision-making processes. For instance, the rights to association, freedom of expression, petition, participation in the conduct of public affairs and peaceful assembly, widely recognized and interpreted under international human rights instruments, were not understood as part of environmental concerns until the early 1980s.

After describing the implications of access rights for the respect of human rights in environmental law enforcement and their evolution in international and regional law, the Escazú Agreement will serve as a case of assessing the opportunities and limits the codification of procedural rights for environmental democracy and justice.

3 Access rights as means for achieving environmental protection

The World Charter of Nature,[29] adopted by the United Nations General Assembly a decade after the 1972 Stockholm Conference on Human Environment, was the first international document to explicitly address access rights as functional for the purposes of environmental protection. The Charter claims 'the urgency of maintaining the stability and quality of nature and of conserving natural resources'[30], and determines that 'all planning' requires, among its essential elements, 'the establishment of inventories of ecosystems and assessments of the effects on nature of proposed policies and activities'.[31]

This instrument is the first to delineate the right to information as a means for achieving environmental protection, as well as the right to participation in decision-making in environmental matters. Access to justice, a fundamental pillar under international human rights law, is settled in paragraph 23 of the Charter: 'all persons, in accordance with their national legislation,… shall have access to means of redress when their environment has suffered damage or degradation'.[32]

[28] Term coined by Paul Crutzen. Svampa, 'Imágenes del fin', *supra* note 4, at 151.
[29] 'World Charter for Nature', UNGA Res. 37/7 of 28 October 1982.
[30] Preamble.
[31] Para. 16.
[32] Para. 23.

The United Nations Conference on Environment and Development of Rio in 1992 served as a catalyzer for the incorporation of access rights in international environmental law. Despite being considered as an instrument that pursues to conciliate economic growth and environmental sustainability,[33] the Rio Declaration made a significant contribution to the democratization of environmental governance, as well as to the centrality of access rights.

The Rio Declaration establishes that individuals

> 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 proceeding including redress and remedy, all be provided.[34]

Procedural rights guarantee transparency and accountability in the design and implementation of policies, allow the formation of support-coalitions to the implementation of environmental decision-making, and set favorable conditions for more peaceful inclusive and sustainable societies and models of sustainable development. By virtue of procedural obligations, states have to adopt timely measures to make the enjoyment of human rights effective, but they should also refrain from infringing on them. Procedural human rights require 'proactive action by the State in adopting the necessary actions to ensure the free and full exercise' of human rights.[35]

Regarding the right to participate in public affairs in matters affecting the environment, states must create spaces for participation, involve people since early stages of discussion, provide training to eliminate barriers to access deliberation processes; guarantee conditions of freedom and security for the people who participate, and ensure real opportunities of influence.[36] Within the Latin American context, a very important contribution in this regard is the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development.[37]

Access to information is often considered as both an active and passive right, to the extent that it not only implies the production or availability of information, but

[33] Francioni, 'International Human Rights', *supra* note 27, at 45; and Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordhman Environmental Law Review* (2006) 471-511.

[34] Principle 10.

[35] Comisión Económica de las Naciones Unidas para América Latina y el Caribe (CEPAL), *Sociedad, derechos y medio ambiente: estándares internacionales de derechos humanos aplicables al acceso a la información, a la participación pública y al acceso a la justicia* (2016), available at <https://repositorio.cepal.org/bitstream/handle/11362/40735/4/S1600931_es.pdf> (visited 21 October 2019) at 24.

[36] *Ibid.* at 29-30.

[37] Organización de Estados Americanos (OEA), *Estrategia Interamericana para la Promoción de la Participación Pública en la Toma de Decisiones sobre Desarrollo Sostenible* (2001), available at <https://www.oas.org/dsd/PDF_files/ispspanish.pdf> (visited 26 January 2019).

also the very existence of means of provision. Consequently, providing information on environmental issues should bring more opportunities to participate in decision-making, allowing for public involvement in the management and governance of collective environmental resources.

A very specific process of environmental law brought by procedural rights has been the conduct of environmental impact assessments (EIAs). EIAs coincide with the responsibility to collect information on ecosystems and to evaluate the impacts of human activities on the environment, recognized, for instance, by the United Nations Convention on the Law of the Sea[38] (Section 4), the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples (Article 7),[39] but also and particularly the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)[40] and its Protocol on Strategic Environmental Assessment.[41] Nowadays, EIA's are usually mandatory in project permit or funding requirements by states or international organizations, and have been associated with human rights cases in regional jurisprudence, concerning for instance violations of the right to property or the determination of an appropriate balance between individual and public interests.[42]

Concerning the right to access justice, it is itself a right and a means to protect and enforce the exercise of those rights that could have been infringed. The six essential components of this pillar have been established by the Committee on the Elimination of All Forms of Discrimination against Women, which can be resumed in: justiciability; availability; accessibility; good quality; provision of remedies; and accountability of justice systems.[43]

Human rights instruments and bodies have reiterated the principle that states must provide effective remedies when people's protected rights are violated. This has implied, in the case of indigenous communities and local farmers, for instance, the right to demand from states to provide accommodation and land for cultivation, as well as just compensation when they have been displaced.[44]

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[38] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261.

[39] Convention (No. 169) concerning indigenous and tribal peoples in independent countries, Geneva, 27 June 1989, 1650 *United Nations Treaty Series* 383.

[40] Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, in force 10 September 1997, 30 *International Legal Materials* (1991) 802.

[41] Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, Kyiev, 21 May 2003, in force 11 July 2010, <http://www.unece.org/env/eia/sea_protocol.html>.

[42] United Nations Environment Programme (UNEP) and Center for International Environmental Law (CIEL), *UNEP Compendium on Human Rights and the Environment: Selected International Legal Materials and Cases* (2014), available at <http://wedocs.unep.org/bitstream/handle/20.500.11822/9943/UNEP_Compendium_HRE.pdf?sequence=1&isAllowed=y> (visited 15 February 2019) at 4.

[43] Committee on the Elimination of Discrimination against Women, General recommendation No. 33 on women's access to justice, UN Doc. CEDAW/C/GC/33 (2015).

[44] 'Report of the Independent', *supra* note 10, at 41.

Regional law has provided more concrete measures and obligations for states concerning access to justice in environmental matters. For instance, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have demanded access to justice in the situation of alleged violation of rights under the American Convention on Human Rights[45] as a consequence of environmental damage. The Court of Justice of the Economic Community of West African States, for its part, has established the need for accountability and responsibility and to ensure adequate reparation in the context of pollution.[46]

Overall, the reinforcement of procedural obligations under environmental law has progressively gained space in international documents. The Draft Principles on Human Rights and the Environment, released in 1994, dedicated an entire part to interpret the provisions under this triad of rights.[47] The outcome document of the 2012 Rio+20 Conference recognizes the need for 'opportunities for people to influence their lives and future, participate in decision-making and voice their concerns are fundamental for sustainable development'.[48]

More recently, the 2030 Agenda for Sustainable Development and its 17 goals and 169 targets[49] put access rights at the center of state action and mainstream procedural obligations across many Sustainable Development Goals (SDGs). They are also grouped in SDG 16, which expresses the commitment of states to guarantee public access to information, the adoption of inclusive, participatory and representative decisions, and equal access to justice.

A number of MEAs have since the early 1990s incorporated provisions emanated from Principle 10 of the Rio Declaration, though they vary as to how and the extent to which the rights of public participation, availability of information and the enforceability and opportunity of justice are included.

[45] American Convention on Human Rights, San José, 22 November 1969, in force 18 July 1978, <https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf> (visited 20 February 2019).

[46] 'Report of the Independent', *supra* note 10, at para. 42.

[47] See UN Economic and Social Council Sub-Commission on Prevention and Protection of Minorities, 'Human rights and the environment: Review of further developments in fields with which the sub-commission has been concerned', Final Report of Fatma Zohra Ksentini, Doc. E/CN.4/4.Sub.2/1994/9 (1994) including a Draft Declaration on Principles of Human Rights and the Environment, which states among its 27 principles that 'the information shall be timely, clear, understandable and available without undue financial burden to the applicant'; also 'the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions', and 'the right to effective remedies and redress in administrative or judicial proceedings form environmental harm or the threat of such harm'.

[48] Rio +20 Outcome Document 'The Future We Want', UNGA Res. 66/288 of 11 September 2012 at para. 13.

[49] 'Transforming our world: the 2030 Agenda for Sustainable Development', UNGA Res. 70/1 of 25 September 2015.

4 Environmental democracy and the experience of Aarhus

From the United Nations Desertification Convention[50] which states that in the design and implementation of programmes to combat desertification Parties should take decisions with the participation of populations and local communities (Article 3); the Biodiversity Convention[51] that calls for supporting local populations in the development and implementation of remedial action in degraded areas (Article 10); the Rotterdam Convention[52] requiring appropriate access to information on chemical handling and accident management and on safer alternatives for human health or the environment for the public (Article 15); to the United Nations Framework Convention on Climate Change[53] that encourages public participation in addressing climate change and its effects (Article 6(a)),[54] MEAs set standards for fulfilling environmental democracy.

Environmental democracy is based on the certainty that, in order to serve the collective interest of protecting the environment, it is essential to guarantee a regime and state of liberties, rights and obligations. Environmental democracy is also deeply linked to the idea of pluralism, open access to information, legitimacy-building, trust and community.[55] Democratic governance of environmental matters is finally deeply rooted in the broader concept of 'environmental justice' and common but differentiated responsibilities at all levels.

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) had been until 2018 the only international treaty focused on and protecting procedural rights, and 'the most ambitious venture in the field of environmental democracy under the auspices of the United Nations'.[56] Named after the city where it was adopted, Aarhus Convention was negotiated between 1995 and 1998, and entered into force in 2001.

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[50] UN Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <http://www.unccd.int>.

[51] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>.

[52] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <http://www.pic.int>.

[53] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <http://unfccc.int>.

[54] CEPAL, *Sociedad, Derechos y medio, supra* note 35; and 'Report of the Independent', *supra* note 10, at para. 38.

[55] For further analysis on the concept of environmental democracy, see Michael Mason, *Environmental Democracy: A Contextual Approach* (Routledge, 1999); William M. Lafferty and James Meadowcraft (eds), *Democracy and the Environment: Problems and Prospects* (Edward Elgar,1996); and Sheila Jasanoff, The Dilemma of Environmental Democracy', 13(1) *Issues in Science and Technology* (1996), available at <https://issues.org/jasano/> (visited 6 August 2019).

[56] Galarraga, 'Exploring the connection', *supra* note 25, at 14.

Born as an initiative within the United Nations Economic Commission for Europe (UNECE)[57] and its member states, it remains open, according to Article 19, to 'any Member State of the United Nations'.[58] Although no country among the 47 Parties to the Aarhus Convention is outside the UNECE space,[59] the influence of the Convention for many actors in other regions and particularly in Latin America and the Caribbean is undeniable.

If Aarhus has had a recognizable impact on the recognition and enjoyment of access rights in European legal systems, and if it provides margins for extensive access to information, participation and justice in environmental matters (Article 3(5)),[60] its implementation is considered heterogeneous and uneven among countries. For instance, there have been reported difficulties in permitting active diffusion of information, as well as lack of sanctions in case of non-compliance.[61]

5 The contribution of public participation to the Escazú Agreement

The conditions that generated the path for the adoption of the Escazú Agreement were to a large extent favored by the activism of regional civil society and international organizations. A first step was made in 2007 by the Economic Commission for Latin America and the Caribbean,[62] announcing its intention to partner with the Access Initiative for Latin American and the Alliance for Principle 10,[63] a group of social organizations that conducted one of the most relevant evaluations on the application of access rights in Latin America.[64]

During the negotiations of the regional preparatory meeting for the Rio+20 Conference in 2011, the involvement of civil society was decisive in the reflection of access

[57] See <http://www.unece.org>.

[58] Aarhus Convention, Art. 19 (3).

[59] See United Nations Treaty Collection, 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters', available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&lang=_en&clang=_en> (visited 27 January 2019).

[60] 'The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive participation in decision-making and wider access to justice in environmental matters'. Article 3(5).

[61] Lucia Casado Casado, 'Acceso a la información, participación pública y acceso a la justicia en materia de medio ambiente: veinte años del Convenio de Aarhus', IX(1) *Revista Catalana de Dret Ambiental* (2018) 1-10.

[62] See <https://www.cepal.org/en>.

[63] See CEPAL, 'Observatory on Principle 10 in Latin America and the Caribbean', available at <https://observatoriop10.cepal.org/en> (visited 6 August 2019).

[64] Guillermo Acuña, 'El acceso a la información y participación pública en la toma de decisiones ambientales en América Latina: avances y desafíos hacia una mejor aplicación del Principio 10 de la Declaración de Rio', in Programa de las Naciones Unidas para el Medio Ambiente, Quinto Programa Regional de Capacitación en Derecho y Políticas Ambientales (2010) at 127.

rights in its outcome.[65] Latin American and Caribbean states assumed 'the importance of participation and contribution of civil society to sustainable development, in particular women, indigenous peoples, local and traditional communities and encourage[d] all actors to a greater interrelation with the actions of governments'.[66] Similarly, the states expressed the need to achieve commitments to the 'full implementation of the rights of access to environmental information, participation and justice'.[67]

The conditions were settled for a joint declaration during the Rio+20 Conference, 'on the application of Principle 10 of the Rio Declaration on Environment and Development',[68] which paved the way for the subsequent negotiations of a regional agreement. Ten countries recognized at that time 'that the rights of access to information, participation and justice regarding environmental issues are essential for promoting sustainable development, democracy and a healthy environment'.[69]

They also declared their willingness to launch a process to explore the feasibility of adopting a regional instrument, ranging from guidelines, workshops and best practices to a regional convention open to all countries in the region and with the meaningful participation of all concerned citizens. Latin America and the Caribbean can and must take a meaningful step forward on this front.[70]

After the 2012 Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development,[71] ECLAC assumed the responsibility as technical secretariat to conduct a study in view of contributing to a negotiation process. At this stage, the nature of the outcome of the process was not yet determined. Five preparatory meetings were convened between 2012 and 2014,[72] where the institutional, political and technical bases for the multilateral negotiations were laid down.

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65 Gastón Medici Colombo, 'El Acuerdo Escazú: la implementación del Principio 10 de Rio en América Latina y el Caribe', IX(1) *Revista Catalana de Dret Ambiental* (2018) 1-66 at 10.

66 'Conclusiones de la reunión regional preparatoria para América Latina y el Caribe' (9 September 2011), available at <https://www.cepal.org/noticias/paginas/5/43755/Conclusiones_reunion_prep_Rio+20-2011-esp.pdf> (visited 27 January 2019), para. 12.

67 *Ibid.* para. 10(v).

68 Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development, Statement by the Governments of Chile, Costa Rica, Dominican Republic, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru and Uruguay (2012), available at <https://www.cepal.org/rio20/noticias/paginas/8/48588/Declaracion-eng-N1244043.pdf> (visited 27 January 2019).

69 *Ibid.*

70 *Ibid.*

71 See *supra* note 68.

72 Preparatory meetings: Santiago, Chile (November 2012); Guadalajara, Mexico (April 2013); Lima, Peru (October 2013); San José, Costa Rica (September 2014); and Santiago, Chile (November 2014).

States first agreed on a plan of action and road map for the implementation of the Declaration of 2012.[73] At the third meeting of the focal points of 2013, the signatory states of the Declaration approved the document entitled 'Lima Vision for a Regional Instrument on Access Rights Relating to the Environment',[74] which established the right to a healthy environment. The Vision document recognized that access rights deepen and strengthen democracy and contribute to better protection of the environment and human rights; and that cooperation, capacity-building and political consensus-building were essential for the implementation of Principle 10. In the following meeting, states approved the 'Contents of San Jose for the regional instrument', establishing the substantive basis for the discussion and underscoring the will to deliver a regional instrument.[75]

At that stage, expectations from civil society and inter-governmental organizations were particularly high with respect to the content of this instrument but also regarding its binding nature. Their objective was to achieve ambitious commitments rather than minimum standards. Marcos Orellana, a representative from civil society who was also part of the negotiations expressed his view as follows:

> [I]t was answered that an instrument with international obligations and mechanisms of implementation would allow signatory countries to adapt their domestic legislation in light of regional standards, with the support of the international community cooperation. In addition, compliance mechanisms of the instrument would allow to strengthen compliance with national standards.[76]

The fourth meeting of the focal points of the 19 signatory countries to the Declaration, in November 2014, issued the Santiago Decision: a determination for the beginning of formal negotiations on a regional instrument.[77] To that end, they created a negotiating committee and a group of seven presiding officers,[78] co-chaired by Costa Rica and Chile, and supported by ECLAC, to coordinate the debates carried forward. It finally, but most importantly, addressed the significant participation by

[73] Plan of Action to 2014 for the Implementation of the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean and Its Road Map (2013), available at <https://repositorio.cepal.org/bitstream/handle/11362/38731/S2013208_en.pdf?sequence=1&isAllowed=y> (visited 7 August 2019).

[74] Lima Vision for a Regional Instrument on Access Rights Relating to the Environment (31 October 2013), available at <https://repositorio.cepal.org/bitstream/handle/11362/38734/S2013914_en.pdf?sequence=1&isAllowed=y> (visited 27 January 2019).

[75] Contenidos de San Jose para el instrumento regional (September 2014), available at <https://www.cepal.org/sites/default/files/pages/files/contenidos_de_san_jose.pdf> (visited 27 January 2019).

[76] Medici Colombo, 'El Acuerdo Escazú', *supra* note 65.

[77] Santiago Decision, Fourth meeting of the focal points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean (10 November 2014), available at <https://repositorio.cepal.org/bitstream/handle/11362/37214/S1420707_en.pdf?sequence=1&isAllowed=y> (visited 27 January 2019) at para 2.

[78] Costa Rica, Chile (co-chairs), Argentina, Mexico, Peru, Saint Vincent and the Grenadines and Trinidad and Tobago.

the public, which was invited to designate two representatives to maintain continuous dialogue with the Presiding Officers.[79]

The participation of the public in the negotiation rounds is perhaps one of the main and unique contributions of the Escazú Agreement. The treaty was made through an open, transparent and participatory process, in which the interested public contributed through 'modalities for participation' providing for three levels: attendance, reporting, and making statements.[80] As a result, members of the public were able to submit language proposals, participate in face-to-face and virtual meetings, and have access to documents for meetings in a timely manner through a regional public mechanism.

Even if it would not be possible to determine exactly to what extent the proposals made by the public are reflected in the final document, the presence, lobbying and pressure of organized groups of civil society was undoubtedly necessary to give transparency to the process, provide an informed basis for decision-making, and to ensure the commitment of certain countries.[81] In that regard, the lasting impact of this process will be partly dependent on its capacity to inspire new participatory mechanisms in national and international discussions, especially those involving environmental matters.

After six years of negotiations, two years of preparatory meetings, and nine meetings of the Negotiating Committee, the adoption of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, in the town of Escazú, Costa Rica, was celebrated as an unprecedented milestone for the environment. It has been referred to as 'one of the most important human rights treaties and one of the most important environmental treaties of the last twenty years',[82] and a 'turning point'.[83]

[79] Santiago Decision, *supra* note 77.

[80] Modalities for participation of the public in the negotiation committee of the Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean (8 April 2016), available at <https://repositorio.cepal.org/bitstream/handle/11362/40413/S1600323_en.pdf?sequence=1&isAllowed=y> (visited 27 January 2019).

[81] Luis Pablo Beauregard, 'Mexico, la gran interrogante en la negociación del primer acuerdo ambiental de América Latina', *El Pais* (3 March 2018), available at <https://elpais.com/internacional/2018/03/03/mexico/1520046297_347493.html> (visited 27 January 2018).

[82] 'United Nations Special Rapporteur on human rights and the environment highlights recently adopted ECLAC Regional Agreement on environmental access rights', ECLAC Briefing note (29 March 2018), available at <https://www.cepal.org/en/notes/united-nations-special-rapporteur-human-rights-and-environment-highlights-recently-adopted> (visited 27 January 2019).

[83] 'Latin America and the Caribbean Adopts Its First Binding Regional Agreement to Protect Rights of Access in Environmental Matters', Economic Commission for Latin America and the Caribbean (ECLAC) Press Release (4 March 2018), available at <https://negociacionp10.cepal.org/9/en/news/latin-america-and-caribbean-adopts-its-first-binding-regional-agreement-protect-rights-access> (visited 27 January 2019).

It was also needed in the context of increasing opposition towards extractive activities, including agribusiness and mining, by communities, indigenous peoples and environmental human rights defenders. According to a report, 60 per cent of the murders of environmental defenders listed in 2017 happened in Latin America,[84] and 25 per cent of them were committed by state security forces.[85] Within the 10 most dangerous countries for its people, seven countries are located in Latin America, one of which registers the largest number of murders per capita in the world.[86]

Particular vulnerability is faced by indigenous peoples who defend their land, and whose killings represent 25 per cent of total murders of environmental defenders despite making up only 5 per cent of the world's population.[87] At the same time, evidence suggests that women defenders are not only fighting for environmental justice and their families, but also for their right to take up positions of leadership, have their own voice and speak out without discrimination.

There seems to be sufficient evidence supporting the need for a legal instrument that could ensure the rights to information, public participation in decision-making and access to justice in environmental matters in a region where, despite laws and normative frameworks, few cases of effective implementation and evaluation are documented.[88]

6 The political balances in the Escazú Agreement

According to Enrique Leff,

> the process of modernization, guided by economic growth and technological progress, has been based on a legal regime based on positive law, forged in an ideology of individual liberties that privileges private interests. This legal order has served to legitimize, regulate and implement the deployment of market logics in the process of economic globalization. This globalizing inertia, which becomes the model of life, unique thought and measure of all things, denies and ignores nature.[89]

Environmental legal regimes pose in this regard several difficulties to overcome going beyond the ontological separation between human rights and environmental

[84] Global Witness, 'At What Cost?', *supra* note 21, at 8.
[85] *Ibid.*
[86] *Ibid.* at 10.
[87] *Ibid.*
[88] Joaquin A. Tognoli, 'Desafíos de la democracia ambiental en el marco de la firma del Acuerdo Regional sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe (Acuerdo de Escazú)', Anuario en Relaciones Internacionales 2018 (septiembre), Instituto de Relaciones Internacionales, Universidad Nacional de la Plata.
[89] Leff, *supra* note 5, at 7-8.

rights. Extended domestic regimes of exceptions with regards to environmental information, limitations to the involvement of communities in environmental decision-making as well as to broad active legal standing in access to justice limit the collective dimension of the right to a healthy environment.

The negotiations of the first environmental treaty of Latin American on the procedural obligations derived from Principle 10 of Rio Declaration represented an opportunity to advance towards the democratization of structures and decision-making in environmental matters.

The final document of the Escazú Agreement is composed of a Preamble and 26 articles, which in turn are divided in a first part dedicated to substantive provisions (Articles 1 to 11), and a second part on institutional and treaty arrangements (Articles 12 to 26), following the nature of other MEAs, including the Aarhus Convention. Moreover, the Agreement focuses on the state – society relationship as traditionally established in human rights treaties.

The objective of the treaty is to guarantee 'the full and effective implementation in the Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters', therefore contributing 'to the protection of the right of every person of present and future generations to live a healthy environment and to sustainable development'.[90]

One of the main improvements of Escazú from previous documents is the inclusion in Article 2 of the first ever definition in an environmental treaty of persons or groups in vulnerable situations, as 'those… that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party's national context and in accordance with its international obligation'.

Significantly, unlike Aarhus, the Escazú Agreement incorporates a set of principles in Article 3, including the principles of equality and non-discrimination; transparency and accountability; the preventive and precautionary principles as well as the principle of intergenerational equity. However, the Agreement also introduced other, more innovative principles including those of good faith, maximum disclosure, *pro persona*, and the principle of non-regression and progressive realization. These are particularly relevant if we consider that there have been attempts in the fora of UNECE to weaken the normative content of the right to access to justice under the Aarhus Convention.[91]

[90] Article 1.

[91] Sebastien Bechtel, 'What can the Aarhus region learn from the Escazu Agreement?' (22 August 2018), available at <https://www.clientearth.org/what-can-the-aarhus-region-learn-from-the-escazu-agreement/> (visited 27 December 2018).

In contrast, the Escazú Agreement included the principle of permanent sovereignty of states over their natural resources, and excluded the principle of *pro natura*, which had been part of the negotiations until the last round. Its inclusion could be seen as an important step towards the recognition of the rights of nature and leave behind the anthropocentric understanding of our relationship to it.[92]

In the general provisions (Article 4), the Escazú Agreement calls for guaranteeing 'the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement',[93] and adopting the necessary measures to guarantee its implementation.[94] Following on the principle of non-regression and progressive realization, it determines that there will be no impediments under the Agreement to more favorable rights and guarantees set forth.[95] and calls Parties to interpret its provisions in the 'most favorable' manner for the full enjoyment of access rights.[96]

If we consider the Articles dedicated to access rights,[97] the Escazú Agreement is broader than Aarhus in its provisions, although it does address in-depth some specific elements. For instance, the Aarhus Convention recognizes the right to access information held by public authorities in all sectors and levels,[98] while the Escazú Agreement addresses this right through the determination of the competent authority responsible for providing this information. It includes any public body that exercises authority or functions for access to information, as well as private organizations that receive public funds, benefits, or perform public functions and services.[99]

Regarding the regime of exceptions under which environmental information can be denied, provisions from the Aarhus Convention seem more favorable than Escazú, to the extent that the latter is anchored in Parties' domestic legal regimes of exceptions, although somehow balanced by putting the burden of proof for refusal under the competent authority's responsibility (Article 5). Default exceptions that are included in Escazú 'in cases where a Party does not have a domestic legal regime of exceptions', are of little added value in a regional context of many countries having laws on information with pre-defined exceptions.[100]

[92] Medici Colombo, 'El Acuerdo Escazú', *supra* note 65, at 29.
[93] Art. 4(1) of the Escazú Agreement.
[94] Art. 4(3).
[95] Art. 4(7).
[96] Art. 4(8).
[97] Access to information and generation and dissemination are ruled by Arts 5 and 6; public participation in Art. 7; and access to justice in Art. 8.
[98] Including national, regional and subnational governments, but also natural or legal persons performing public administrative functions or providing public services as well as institutions of regional economic integration organizations. However, Art. 2(2) excludes bodies or institutions acting in a judicial or legislative capacity.
[99] 'But only with respect to the public funds or benefits received or to the public functions and services performed', Art. 2(b).
[100] Lalanath De Silva, 'Escazu Agreement 2018: A Landmark for the LAC Region', 2 *Chinese Journal of Environmental Law* (2018) 93-98 at 97.

Under the Escazú Agreement, the generation and dissemination of environmental information is rather descriptive in terms of what environmental information systems should include: the identification of polluted areas, the conservation of natural resources and ecosystem services; academic and scientific reports, environmental impact assessments,[101] among other elements. This kind of regulation cannot be found in the Aarhus Convention. Furthermore, the Escazú Agreement requires the publication of five-year period national reports on the state of the environment, as well as to promote, through legal or administrative frameworks, the generation and sharing of environmental information by private entities.[102]

With respect to the right to participation in environmental decision-making (Article 7), both treaties, Escazú and Aarhus, require measures to allow public participation and express opinions on activities that may have significant impacts on the environment and health, 'from the early stages'[103] and 'when all options are open',[104] respectively. The Latin American and Caribbean treaty adds the promotion of public participation in international forums and negotiations on environmental matters.

As to access to justice, the Escazú Agreement seems to be more comprehensive in its interpretation than the Aarhus Convention, by defining it as the capacity to challenge any decision, action or omission that affects or could affect the environment[105] whereas the latter only refers to contravening provisions of national law. Furthermore, Escazú demands not only 'effective, timely, public, transparent and impartial procedures that are not prohibitively expensive',[106] but also provides for broad active legal standing, another meaningful contribution to the collective dimension of the right to a healthy environment. Among other relevant provisions, access to justice under the Escazú Agreement provides for the reversal of or dynamic burden of proof.[107]

Articles 9, 10, 11 and 12 close the substantive part of Escazú with provisions for capacity-building, including training, awareness-raising and programs for public, judicial and administrative officials, and education in environmental matters; and for the creation of channels for cooperation among state parties, including the establishment of a universal clearing house, operated by ECLAC, on access rights and on relevant legislative, administrative and policy measures and good practices. The agreement paves the way for alliances with actors of various kinds, such as other regions, intergovernmental organizations, civil society and the private sector.

[101] Art. 6(3).
[102] Art. 6(12).
[103] Art. 7(4).
[104] Art. 6(4) of the Aarhus Convention.
[105] Art. 8(2c) of the Escazú Agreement.
[106] Art. 8(3b).
[107] Bechtel, 'What can the Aarhus', *supra* note 91.

More importantly, Article 9 on human rights defenders in environmental matters constitutes a landmark for international human rights and environmental law, guaranteeing – in a general provision that will certainly require deeper interpretation by subsequent Conferences of the Parties (COPs) – 'a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity'.[108] The regional particularities that are reflected in this Article are also expressed in different parts of the text, including the observation and protection of the rights of indigenous peoples and local communities.[109]

Concerning institutional and treaty arrangements, a COP is established (Article 15) to be convened by ECLAC no later than one year after the entry into force of the Agreement, with meetings being held at regular intervals as decided by the COP. Although the discussion on the rules of procedure of financial provisions was part of the negotiations, the final text leaves these arrangements, including the modalities of public participation, as a mandate of the first COP.

Notwithstanding, Escazú creates a Committee to Support Implementation and Compliance as a subsidiary body of the COP to promote the application of and support the Parties in the implementation of the Agreement (Article 18). Its functions are consultative, transparent, non-adversarial, non-judicial and non-punitive, and it has the competency to formulate recommendations.

Finally, unlike other environmental treaties such as the Aarhus Convention, Article 23 of Escazú excludes any reservation to the Agreement, bringing this MEA closer to a human rights rather than an environmental treaty.

7 Conclusion

The negotiations on and the text of the Escazú Agreement reflect different political compromises, for instance between the high expectations of many states or civil society representatives to incorporate a human rights-based approach in the text, and the will to retain in different parts of the document the principle of permanent sovereignty of states over their natural resources. Moreover, the reference to domestic legislation is quoted in different parts of the Agreement text; for instance, in the case of broad active legal standing which was originally included to expand the interpretation of who is able to sue to enforce environmental laws (Article 8(3c)).

If these elements could be interpreted as a basis for improvement of national normative and institutional guarantees, following the principle of progressive realization,

[108] Art. 9.
[109] Art. 7(15).

domestic legislation prevails in many cases over international norms. This concern is equally noticeable in clauses where authorities are called to warrant the effective enjoyment of procedural rights, but at the same time expressions such as 'shall endeavour', 'use its best endeavours', 'encourage', and 'in accordance with capacities' are used.

Despite the ambiguities that they can represent in terms of enforceability, these compromises also helped to overcome important differences among countries that would have prevented a successful outcome. In this regard, the final agreement reflects a political balance between, on the one hand, groundbreaking concepts and progressive principles, and generic or broad provisions, on the other, leaving space for domestic interpretation and adaptation. We also need to view this outcome in its broader international context, a time of growing skepticism for multilateralism and consensus-building, where it has become increasingly difficult to gather different standpoints into a single will.

In striking the balance of interests between minimum standards and challenging goals, ambitious delegations pushed for the inclusion of human rights-oriented provisions, in the sense of guaranteeing the non-regression and progressive realization of these rights (for instance, by prohibiting reservations), where they could be subject to domestic regimes. The responsibility and dedication of the public, who were vital to frame countries' room of maneuver, should be acknowledged.

Through the study of the process that led to the adoption of the Escazú Agreement and its negotiation, this paper has shown how the expectations or ambition on environmental protection and climate action are channeled through political compromises, thus avoiding to directly address the relationship between humans and nature. And yet, this instrument not only incorporates very promising provisions for the democratization of decision-making in environmental matters, but also for the broader discussion on the relationship of humankind to nature. Once entered into force, the Escazú Agreement is expected to be interpreted in light of the new clarifications provided by the decision OC-23/17 and other instruments that are nowadays exploring the inherent rights to nature and its implications for human action.

It is still too early to predict if these provisions will allow the establishment of actions and policies on environmental rights granting equal importance to human life and the rest of the living organisms. The negotiations on the Escazú Agreement resulted, for instance, in the exclusion of the principle of pro natura for a human-centered approach. Despite the substantive and meaningful advances in the comprehension of the interdependency between the human species and the environment, legal instruments in environmental and human rights law have not been able to, so far, transform the rationale, motivated to a large extent by economic purposes, of distinguishing individuals from nature as mere resources.

In this context, the debate on strengthening the coherence and coordination between environmental law instruments and other environment-related instruments[110] and narrowing the normative and institutional gaps through the creation of an international covenant on development and the environment has emerged. However, as has been seen throughout the analysis of the greening process, the function and limits of access rights and the contributions of the Escazú Agreement, it will require more than a declaration of rights to surpass the anthropocentric vision of Modernity, and to allow other forms of life, in addition to the human life itself, to be not only recognized but also converted into new interpretations of our role in the evolution of nature.

[110] According to UNGA Res. 72/277 ('Towards a Global Pact for the Environment') of 14 May 2018, the term 'environment-related instruments' encompasses those international legal instruments that do not fall exclusively within the field of the environment or have as their primary objective the protection of the environment.

Part III

Interactive Negotiation Skills in the Area of Environment and Human Rights

The Joensuu Negotiations – A Multilateral Simulation Exercise: Paris Climate Agreement Rulebook[1]

Anne Daniel[2] and Tuula Honkonen[3]
with contributions by Bradlie Martz-Sigala[4] and Angela Kariuki[5]

1 Overview

1.1 Introduction

This paper describes the elements, structure, course and outcomes of a negotiation simulation exercise for the University of Eastern Finland – UN Environment Course on Multilateral Environmental Agreements (MEAs), held in Joensuu 28-29 August 2018.

The scenario for the negotiation simulation focused on substantive, institutional and procedural issues in the context of the Ad Hoc Working Group on the Paris Agreement (APA). The simulation was hypothetical but drew on issues at play in actual ongoing negotiations.

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1 This paper is partly drawn from the description of negotiation exercises on the previous UEF – UN Environment MEA Courses, conducted by Cam Carruthers.

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The exercise began with the first day plenary of the APA. Four key issues had been identified requiring further negotiation, namely: further guidance on adaptation communications; transparency mechanisms; global stocktake; and compliance.

As participants convened in the plenary, the APA Co-chairs reminded delegations of the previous agreement that the APA would establish a contact group that would, after hearing plenary discussion on the four topics, propose to establish four informal consultation groups with the aim of producing agreed texts as decisions to be forwarded to the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA) and the Conference of the Parties of the Framework Convention on Climate Change (COP). In concrete terms, the APA Co-Chairs would propose to establish groups to produce agreed text on the following issues:

A. further guidance on adaptation communications;
B. transparency mechanisms;
C. global stocktake; and
D. compliance.

A supplementary objective of the exercise was that it would produce discussion and results, including a paper in the annual Course *Review*, which may be of interest to international climate policy stakeholders and experts, and participants in related multilateral fora. The theme also provided an opportunity for participants to gain understanding about evolving legal architectures in international environmental governance.

1.2 Simulation objectives

The negotiation simulation exercise focused on the negotiations under the Paris Climate Agreement.[6] The general objectives are to promote among participants, through simulation experience:

1) Understanding of the challenges and opportunities related to negotiating more specific infrastructure in a new MEA, both in general and in the specific context of the international climate change regime.
2) Understanding of the principles and practices of multilateral negotiations, and appreciation of the value and role of the rules of procedure.
3) Familiarity with specific substantive and drafting issues; and
4) Discussion and appreciation of different perspectives on substantive and institutional issues related to international cooperation on climate change.

Within the exercise, the specific objective of the meeting was to produce an agreed text on the four issues set out above.

[6] Paris Agreement to the United Nations Framework Convention on Climate Change, Paris, 12 December 2015, in force 4 November 2016; 55 *International Legal Materials* (2016) 740.

1.3 Simulation scenario

The negotiation simulation scenario and the issues set out within it were hypothetical, but based on actual and recent discussions which were not concluded by the time the simulation was carried out. For purposes of stimulating debate, the developers of the exercise took these issues and developed a series of texts designed to raise debate and enable participants to have a negotiating experience that was as close to real life as possible. The issues were substantially simplified to facilitate the exercise.

The scenario was set at Part 6 of the first session of the Ad Hoc Working Group on the Paris Agreement.[7]

At the beginning of the exercise, the APA Co-Chairs, after reminding the group of previous agreement on the organization of work, proposed that the APA would meet as a contact group to address each of the four key issues in plenary before conferring the texts on four informal consultation groups that would each have a single facilitator. The informal consultation groups were to work on the remaining four draft decision texts that were still heavily bracketed, showing lack of consensus among the Parties. The stated aim of the groups was to produce an agreed text ready to be considered by the APA in its final plenary.

After the opening of the APA plenary on Day 1, the exercise continued in the informal consultation groups. The groups negotiated till the end of the first day of the exercise, reported to APA plenary at 9:30 on Day 2 and continued negotiations on the second day, before returning to the APA plenary at 16:30 for discussions and possible agreement that the draft decisions were ready to be forwarded to the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement.

The APA had two Co-Chairs previously elected who were continuing in office, so no elections were required. Facilitators for the informal consultation groups were identified in advance through consultations, noting that in real life chairs are identified in advance of meetings to facilitate preparation. The APA's established practice is to seek to balance developed country and developing country representation in these elected positions by having co-facilitators, but in the current negotiating environment, due to lack of numbers, a single facilitator was confirmed in the contact group for each of the four informal groups. An attempt was made to have a balance of regions, interests and gender in these positions.

The negotiation texts addressed decision texts, and annexes containing both substantive and procedural issues related to each of the topics.

[7] In real life, this Bangkok Climate Change Conference took place in September 2018. For further information and the outcome documents, see <https://unfccc.int/sb48-2>.

1.4 Introduction to the exercise

Some roles, including the APA Co-Chairs, played a resource function and could be useful to participants. Those playing such roles were to serve all participants and work for a positive outcome in addition to their confidential individual instructions (they were encouraged to signal to the other Parties when they took up their partisan roles, e.g. 'I'm taking off my President's hat…') but in the informal consultation groups it was assumed that they were acting as negotiators.

Participants were required to follow their interests and positions with respect to the issue assigned to their informal consultation group. The groups were to narrow their focus as quickly as possible to identify issues to be addressed, and to dispose of issues expeditiously where possible. Participants were encouraged to work hard to achieve their objective of providing the final APA plenary with clean text.

The importance of participants carefully reading the text of the treaty underlying the negotiations, i.e. the Paris Agreement, was emphasized. Everything that they were to agree on had to be in line with the Agreement text.

Participants were strongly urged to follow their instructions, and to elaborate interventions with a compelling rationale to advance their positions. Participants were also encouraged to take the initiative and be inventive and to intervene in contact groups and in plenary even if they had no specific instructions on a particular issue, but to do so consistent with their overall instructions. However, participants were asked, when making plenary interventions on substance, to do so only once and on the specific topic of their informal group.

Participants were highly encouraged to seek support from other participants for, and identify opposition to, their positions, even including positions discussed in other contact groups. To this end, participants were to consider developing joint drafting proposals and making interventions on behalf of more than one state. It was pointed out to the participants that, where possible, it was a good idea to make alliances and develop coordinated strategies to intervene in support of others, or to take the lead in other cases.

Participants were also asked to think about issues for discussion in the 'post-mortem', a facilitated review of the exercise, which was to follow the exercise, and include issues of both process and substance within the exercise, as well as issues relating to the structure and management of the exercise itself.

The simulation was designed to focus on both the negotiation process as well as the substantive issues, and it was designed to be difficult, with failure to reach agreement being a real possibility. Unavoidably, a random distribution of positions was likely to result in making some Parties appear more or less constructive, and indeed for sim-

ulation purposes some positions were designed to cause difficulties. It is important to note that the positions in the confidential individual instructions were developed and assigned randomly. They were entirely hypothetical and were not intended to reflect specific positions of particular Parties or the views of organizations or individuals. In fact, the names of country delegations were made up, rather than being real country names. This meant that not only did the instructions have to provide details about individual countries to each delegate for background purposes, it also meant that they had to convey this background information, including socio-economic and geographical, to other delegations during interventions.

Individual delegates often face situations similar to this exercise, where they have little opportunity to prepare, but should still define objectives and develop a strategy. Informal diplomacy is where most progress toward agreement on concepts is made, while contact group/informals, and occasionally plenary discussion, is required for agreement on specific texts. Drafting often involves a fine balance between accommodation and clarity. In real life, decision-making on final text in plenary may appear to be simply 'pro-forma' (merely a formal repetition of what has already been agreed) but there can be surprises. Decisions in the plenary are critical and can sometimes move very quickly, at times moving back and forth on an agenda, so that being prepared with an effective intervention at any moment is essential. While in this scenario the APA did not have final decision-making authority, it had to agree on the texts that it would forward to the COP and the CMA for further consideration.

The APA Co-Chairs and the four informal consultation group facilitators played important roles, setting up and managing the process – and managing time – to produce agreement. They were encouraged to consult broadly, including with each other and state representatives. The key to success would be thoughtful organization of the work of the groups, including strategic management of how the smaller informal groups and the plenary sessions functioned and were linked.

Because of the small numbers in each of the four groups, there was no attempt to organize along UN regional lines or established real-life negotiation groups, but participants were encouraged to work constructively with other delegates to find compromise solutions.

2 Instructions

2.1 Confidential individual instructions

The core of the simulation was set out in **confidential** individual instructions. They showed the positions of the Party with regard to the issues being negotiated. It is to be noted that, generally, no overarching strategy was provided (this had to be developed by each participant).

The confidential individual instructions attempted to provide rationale for positions outlined, but noted that unanticipated issues could arise and negotiators would need to react in a manner that was consistent with their overall instructions. In some cases, the instructions could seem internally inconsistent and even contradictory (this happens in real life, and is interesting to watch!).

2.2 General instructions

The general instructions were conveyed as follows:

1) At a minimum, please review the general and confidential individual instructions and the negotiation texts.
2) Each participant is assigned a role as a Lead Negotiator for a particular Party (this is a 'speaking role').[8] The confidential individual instructions will be provided to each participant a number of days before the exercise begins.
3) Participants representing Parties have been sent with full credentials from their governments to participate in the APA, using their confidential individual instructions as a guide.[9]
    a. Participants should do their best to achieve the objectives laid out in their instructions. You should develop a strategy and an integrated rationale to support your positions.
    b. On any issues on which you do not have a position in your confidential individual instructions, you should develop your own positions consistent with your other instructions, with a view to securing agreement on the issues where you do have a position.
    c. Do not share your confidential individual instructions with other participants.
    d. You can work with your fellow negotiators and allies – within the scope of your confidential individual instructions. If possible, consult with others before the session, to identify and coordinate with those who have similar instructions, and even prepare joint interventions. You should build alliances and try to support anyone with a similar position. You should try to identify participants with opposing views, and influence them both in formal negotiations, as well as in informal settings.
    e. Because the country names are made up, you will need to listen carefully to interventions to determine whether countries are developed or developing, least developed or small island developing states and other details about each country and its situation and needs.
    f. Participants should, of course, always be respectful of each other's views and background.

[8] There were no non-Party states, intergovernmental or non-governmental organization roles in the exercise as the rules of procedure only allowed for representatives of Parties to negotiate.

[9] Confidential individual instructions were developed without reference to actual country positions, and it was not necessary for the simulation that participants attempt to follow positions in the real negotiations.

4) Questions on procedure, etc. should be addressed primarily to the APA Co-Chairs or informal consultation group facilitators in their respective sessions, who as necessary will be guided by the resource persons of the exercise.
5) In the APA plenary and informal consultation groups, the APA Co-Chairs/ facilitators sit at the head of the room. Parties will be provided with a 'flag' or country nameplate. To speak, raise your 'flag' and signal to the APA Co-Chair/ informal consultation group facilitator who keeps the speakers' list.
6) The simulation will begin and end in the APA plenary. The first task for Parties is to agree on the establishment of four groups, and to elect a facilitator for each group. The usual practice is that developing country Parties and developed country Parties are equally represented. For the exercise, the selection will be based on informal consultations, and decided by consensus.
7) If and when the APA plenary breaks into the four groups, please join the group identified in your confidential individual instructions.
8) The four groups must reach agreement on what to report back to the APA plenary.[10]
9) The APA Co-Chairs and, once elected, the contact group facilitators, must play their role in the session of the body they manage, and in that body, refrain from taking positions. Due to the small numbers in the four groups, the APA Co-Chairs will be 'taking their Co-Chair hat off' and functioning as delegates with positions. Back in plenary they will resume their neutral roles.
10) Please use the materials provided, as well as advice and information from other participants and found elsewhere. Do frequently consult the provisions of the Paris Agreement.
11) The exercise will take place over a two-day period. Participants are encouraged to consult informally before the exercise for nominations to the official positions and in the evening of the first day to form alliances and broker solutions (as in real life).

2.3 Evaluation

Following the exercise, participants were requested to respond to the evaluation questions in the course evaluation in relation to the exercise. In addition, there would be a specific wrap-up and evaluation session.

[10] It was possible for the four groups to split up into smaller groups to work on text or to try to reach agreement on sensitive issues. Such smaller drafting groups were to be run on an informal basis, with reference to participants by name not country.

3 Key simulation documents

3.1 Agenda of the Ad Hoc working Group on the Paris Agreement at its first session

Agenda of the Ad Hoc working Group on the Paris Agreement at its first session

1. Opening of the session.
2. Organizational matters:
   (a) Election of officers;
   (b) Adoption of the agenda;
   (c) Organization of the work of the session.
3. Further guidance in relation to the mitigation section of decision 1/CP.21 on:
   (a) Features of nationally determined contributions, as specified in paragraph 26;
   (b) Information to facilitate clarity, transparency and understanding of nationally determined contributions, as specified in paragraph 28;
   (c) Accounting for Parties' nationally determined contributions, as specified in paragraph 31.
4. Further guidance in relation to the adaptation communication, including, inter alia, as a component of nationally determined contributions, referred to in Article 7, paragraphs 10 and 11, of the Paris Agreement.
5. Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement.
6. Matters relating to the global stocktake referred to in Article 14 of the Paris Agreement:
   (a) Identification of the sources of input for the global stocktake;
   (b) Development of the modalities of the global stocktake.
7. Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement.
8. Further matters related to implementation of the Paris Agreement:
   (a) Preparing for the convening of the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement;
   (b) Taking stock of progress made by the subsidiary and constituted bodies in relation to their mandated work under the Paris Agreement and section III of decision 1/CP.21, in order to promote and facilitate coordination and coherence in the implementation of the work programme, and, if appropriate, take action, which may include recommendations.
9. Other matters.
10. Closure of and report on the session.

3.2 Negotiation text for group A

Decision on further guidance in relation to the adaptation communication, including, inter alia, as a component of NDCs, referred to in Article 7, paragraphs 10 and 11, of the Paris Agreement[11]

[*In pursuit* of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,]

Recalling article 7 paragraph 10 of the Paris Agreement which [requires each Party to] [encourages each Party to] [provides that each Party should], as appropriate, submit and update periodically an adaptation communication,

Further recalling article 7 paragraph 11 of the Agreement which requires the adaptation communication to be submitted and updated periodically as a component of or in conjunction with other communications or documents,

Further recalling article 7 paragraph 13 of the Agreement which requires continuous and enhanced international support to be provided to developing countries for the implementation of provisions on adaptation communication,

Recognizing the importance of the adaptation communication for achieving the global goal on adaptation under the Agreement,

Recognizing the importance of flexibility with regard to the provisions concerning adaptation communication,

[*Reminding* Parties that the preparation, submission and updating of an adaptation communication is not mandatory under the Agreement,]

[*Further reminding* Parties that an adaptation communication should not pose an additional burden for [developing country] Parties,]

Recognizing the links between adaptation and sustainable development [, including Sustainable Development Goals],

[*Recognizing* the role of adaptation, and the interlinkages it offers, to [ensure] [achieve] the right to sustainable development [for developing countries],]

[11] The negotiating text has been developed for simulation purposes only, and while it is largely based on the FCCC/APA/2018/L.2/Add.1, 'Informal note by the co-facilitators on agenda item 4: Further guidance in relation to the adaptation communication…', the text has been prepared by the organizers, modified and greatly simplified for purposes of the simulation and is not the result of negotiations under the Paris Agreement.

The Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement,

A. Purpose

Option 1:
Decides that the purposes of the adaptation communication and the related guidance are:

1. communicate national adaptation priorities, implementation and support needs, and plans and actions;
2. [contribute and] inform progress towards the global goal for adaptation, and inform the review of overall progress towards that goal;
3. facilitate clarity, transparency and understanding of adaptation actions [and support provided;]
4. provide input to the global stocktake;
5. [enhance and catalyse actions and support for developing countries [to implement communicated adaptation action];]
6. help countries build and retain capacity; and
7. enhance learning and understanding of adaptation by sharing lessons, experiences, evidence and good practices,

Option 2:
Decides that the purposes of this guidance are:

1. assist Parties in submitting and updating an adaptation communication;
2. [assist Parties in communicating information referred to in Article 7 paragraph 10 of the Agreement (priorities, implementation and support needs, plans and actions);] and
3. facilitate learning, cooperation, and support,

Decides that the purposes of an adaptation communication are:

1. communicate national adaptation priorities, implementation and support needs, and plans and actions;
2. [contribute and]inform progress towards the global goal for adaptation, and inform the review of overall progress towards that goal;
3. provide input to the global stocktake;
4. [enhance actions and support for developing countries [to implement communicated adaptation action];] and
5. enhance learning and understanding of adaptation, sharing experiences and good practices,

B. Preparation and adoption of the guidance

Decides to establish an expert group with the task of preparing further guidance in relation to the adaptation communication, including, inter alia, as a component of NDCs, referred to in Article 7, paragraphs 10 and 11, of the Paris Agreement, for approval at the next Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement,[12]

[*Decides* that [all aspects of] the further guidance in relation to the adaptation communication will

Option 1:
respect the principles affirmed in the Paris Agreement,

Option 2:
respect the principle of common but differentiated responsibility[, and respective capabilities, in the light of different national circumstances],

Option 3:
be developed to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,]

[*Decides* that the expert group shall pay particular attention to the respective national capabilities and circumstances of Parties,]

Agrees that the members of the expert group will be selected by the Parties [on the basis of equitable geographical representation,] [on the basis of their recognized competence in relevant scientific, technical, socioeconomic or legal fields,] [taking into account the goal of gender balance]. The members will serve in
[Option 1: their individual capacity]
[Option 2: their expert capacity]
[Option 3: the best interests of the Paris Agreement],

Invites the Adaptation Committee to [contribute to] [participate in] the work of the expert group, [as appropriate],

Decides that the expert group will report to the Ad Hoc Working Group on the Paris Agreement on the progress in fulfilling its task,

[12] Please note that the details of the structure of the expert group will not be negotiated here due to time constraints.

C. Principles

Agrees that the guidance [shall] [should] [be informed by] [be based on] [rely on] the following principles:

1. common but different responsibilities and respective capabilities [in light of different national circumstances];
2. [equity;]
3. [national context, country-drivenness and respect for national sovereignty;]
4. Sustainable development;
5. recognizing the [specific needs and] special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention;
6. [international cooperation and support;]
7. flexibility;
8. [applicability to all;]

D. Modalities for communicating, submitting and updating the adaptation communication

Reminds Parties that the adaptation communication shall be, as appropriate, submitted and updated periodically, as a component of or in conjunction with other communications or documents,

Welcomes article 7 paragraph 12 of the Agreement which provides that the adaptation communications shall be recorded in a public registry maintained by the secretariat,

Decides that the Parties shall start applying the guidance [immediately upon its adoption] [after a submitted NDC],

Recognizes the flexibility with regard to adaptation communication contained in Articles 7.10 and 7.11 of the Agreement,

Decides that adaptation communication should be clearly identified, from beginning to end, including by numbering the first and subsequence adaptation communication,

E. Modalities to update/revise/review the guidance

Invites Parties to submit experiences on the use of the guidance to assist its revision,

Invites the Secretariat to prepare a synthesis report of the submissions presented by Parties [by [date]],

Invites Parties to take stock of, and if necessary revise, the further guidance [on a regular basis] [every [two] [four] [six] years] [at future sessions of the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement] [after the first global stocktake], taking into account, inter alia, the experience of Parties in implementing it,

F. Modalities of support for the preparation, updating and implementation of the adaptation communication

[*Decides*] [*Agrees*] that [continuous and enhanced] [international] support shall be provided [by developed countries] for developing countries for the [preparation and submission] [preparation, submission, update and implementation] of the adaptation communication [through existing financial institutions under the Convention],

[*Requests* the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement to establish incentive mechanisms to encourage and support developing country Parties to prepare, communicate and implement their adaptation communications [and to provide relevant information in a successive and durable manner],]

Requests the Global Environment Facility[, Adaptation Fund] and Green Climate Fund to provide support for the preparation, submission, and updating of adaptation communications [by developing countries],

Annex I
Elements of adaptation communication

Option 1:

A. Common set of elements:
   1. national circumstances;
   2. impacts, vulnerabilities and risk assessments;
   3. adaptation priorities, policies, plans, actions, strategies and/or programmes, as appropriate;
   4. [adaptation support needs of developing country Parties;]
   5. adaptation efforts of developing countries (for recognition);
   6. [communication of indicative projected levels of public financial resources to be provided by developed country Parties to developing country Parties, including finance, technology and capacity building;]

B. [Additional] [opt in opt out]:
   1. information on adaptation actions that result in mitigation co-benefits;
   2. cooperative dimension at the national, regional and international level;
   3. progress on implementing adaptation actions and plans;
   4. economic diversification; information on adaptation actions and/or eco-

nomic diversification plans and/or national development plans that result in mitigation co-benefits;
5. adaptation efforts of developing countries (for recognition);
6. [traditional knowledge or community based adaptation climate change and local communities' involvement;]
7. legal framework and institutional arrangements as appropriate;
8. [monitoring and evaluation]

Option 2
Optional elements to be used by countries at their discretion:

1. national circumstances [, including population, levels of development, legal frameworks and institutions];
2. expected impacts, risks and vulnerability and adaptive capacity;
3. national goals related to adaptation, resilience, and reducing vulnerability
4. adaptation priorities, plans, strategies, planned actions, resilience-building activities and expected results;
5. economic diversification plans; information on adaptation actions and/or economic diversification plans and/or national development plans that result in mitigation co-benefits;
6. co-benefits of adaptation;
7. cooperation to enhance adaptation at national, regional and international levels;
8. [information on synergies with other international conventions;]
9. implementation and support needs, including the costs of meeting those adaptation needs;
10. adaptation actions currently under implementation;
11. implementation and results achieved;
12. monitoring and evaluation, and approaches used;
13. good practices, lessons learned and information sharing;
14. barriers for implementation of adaptations, challenges, and gaps

3.3 Negotiation text for group B

Decision on modalities, procedures and guidelines for the transparency framework for action and support: technical expert review[13]

Recalling [relevant principles and characteristics of the Paris Agreement and in the light of equity, sustainable development, efforts to eradicate poverty and the best available science];

[13] The negotiating text has been developed for simulation purposes only, and while it is largely based on the FCCC/APA/2018/L.2/Add.1, 'Informal note by the co-facilitators on agenda item 5: Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement', the text has been prepared by the organizers, modified and greatly simplified for purposes of the simulation and is not the result of negotiations under the Paris Agreement.

[*Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,]

In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,

Recalling article 13 of the Paris Agreement which established an enhanced transparency framework for action and support [to build mutual trust and confidence and to promote effective implementation] [with built-in flexibility which takes into account Parties' different capacities],

[*Recalling* also that article 13 prescribes that the transparency framework shall provide flexibility in the implementation of the provisions of the Article to those developing country Parties that need it in the light of their capacities,]

[*Further recalling* that according to article 13, the transparency framework shall recognize the special circumstances of the least developed countries and small island developing States, and be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties,]

Recalling Decision 1/CP.21 which provides that the flexibility provided to developing country Parties under article 13 paragraph 2 of the Agreement includes the scope, frequency and level of detail of reporting, and the scope of review, the latter possibly providing for in-country reviews to be optional, as reflected in the development of modalities, procedures and guidelines for the transparency framework for action and support,

Recalling that according to article 13, each party shall provide the following information that [will] [shall] [may] be used within the transparency framework for action and support:

1. A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases,
2. Information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4,
3. Information related to climate change impacts and adaptation under Article 7, as appropriate,

In addition, developed and developing country parties [shall][should] provide information on financial, technology transfer and capacity-building support as prescribed in article 13,

Aware of the purpose of the framework for transparency of action which is to provide a clear understanding of climate change action in the light of the objective of the Convention and to inform the global stocktake under Article 14,

Recognizing the need for assistance to developing countries in identifying capacity-building needs,

The Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement,

Recognizes the modalities, procedures and guidelines for the transparency framework for action and support adopted by the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement in its last meeting,

[*Agrees*][*Decides*] that the modalities, procedures and guidelines will be applied by a[n] [ad hoc] technical expert group, whose terms of reference are set out in the annex to this decision,

Also [*agrees*] [*decides*] that the [ad hoc] technical expert group will meet [once] [twice] before the Second Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement, [subject to available resources],

Requests the Executive Secretary to organize the meeting[s] of the [ad hoc] technical expert group, [and to provide it with relevant information in its possession],

Decides that the [ad hoc] technical expert group shall consider the Party's support provided and its implementation [and achievement] of its nationally determined contribution,

Invites the [ad hoc] technical expert group to assess the [adequateness of] [the amount of] the support which [will] [shall] [, as appropriate,] [on a continuous basis] be provided to developing countries for the implementation of article 13 and of the provisions of this decision; to enhance the transparency of support provided in accordance with Article 9 of the Agreement;

Invites the [ad hoc] technical expert group to [apply] [take into consideration][, as appropriate] flexibility provided to those developing country Parties that need it in the light of their capacities, as set out in the reporting requirements for the Parties and in the terms of reference of the technical expert group,

Invites Parties [and the [ad hoc] technical expert group] to facilitate improved reporting and transparency over time under the Agreement. To this end, the Modalities, procedures and guidelines for the transparency framework for action and support [will] [shall] be [regularly] reviewed and updated. The first review and update will take place [three][six] years after their [formal acceptance] [adoption by the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement], and be conducted periodically thereafter at [four][six] [eight] year intervals.

Annex: Terms of reference of the technical expert group

Objectives [and principles]

The objective of [the work of] the technical expert group is to

1. promote transparency, accuracy, completeness, [environmental integrity,] consistency and comparability in the provision of information by Parties;
2. identify and share good practices among Parties[, yet respecting the confidentiality of information];
3. avoid duplication of work and placing of undue burden on Parties [and the secretariat] in the generation and management of [relevant] [required] information;
4. provide flexibility to developing countries that need it in light of their capacities,

Scope [and functions]

The scope of the functions of the technical expert group covers the following:

1. assessment of the transparency, completeness, consistency, accuracy, and timeliness of the reported information and identification of issues;
2. [assessment of progress made in:
    a. implementing [and achieving] Parties' Nationally Determined Contributions (NDCs) under Article 4;
    b. [the adequateness of] the provision of support to developing country Parties under Articles 9, 10 and 11 of the Paris Agreement[, as appropriate]; and
    c. the implementation of methodological and reporting requirements[, taking into account national circumstances and capacities];]
3. identification of good practices;
4. identification of capacity-building needs;

Information to be reviewed

The technical expert group [will] [shall] review information on [all] aspects of the implementation of the Paris Agreement, including mitigation, [mitigation co-benefits resulting from Parties' adaptation actions and/or economic diversification,] adaptation, [social and economic impacts of response measures,] loss and damage, finance (under Article 10), technology development and transfer, and capacity-building.

In addition, the technical expert group [may] [shall] review any additional technical information that may be provided by the Party.

The technical expert group shall treat confidential data [identified by Parties] confidentially and maintain confidentiality after review. Review experts should be bound by agreements of confidentiality.

The technical expert review team

The technical expert review group shall be composed of experts selected from the UNFCCC roster of experts.

The experts of the technical expert review group [shall] [should] have recognized competence in the areas to be reviewed.

In the composition of the technical expert review group, there [shall] [should] be a balance between experts from developed and developing country Parties, [of geographical representation] [of gender among experts] [from Parties at different level of expertise].

The technical expert review group will consist of [fifteen][twenty-five] members. [Three][Five] members will be nominated by each of the five UN regions[, based on expertise in matters to be reviewed]. Members will [represent Parties][serve in their personal capacities]. [Four][Six] observers will be selected by the [secretariat] [group] representing academia, non-governmental organizations, [business sector] [and other relevant sectors].

The technical expert review group shall include [two] lead reviewers [with one reviewer to be from a developed and one from a developing country Party]. The selected lead reviewers [shall] [have the responsibility to] ensure the quality and objectivity of the reviews and provide for the continuity, comparability and timelines of the reviews.

The format of the review [and roles of different actors]

The technical expert reviews shall be conducted[, as a rule,] in the form of desk reviews.
[In-country reviews are optional for developing countries that need it in light of capacities.]
[[Developing country] Parties can request review formats such as in-country review.]

[Simplified reviews are possible for reports of Parties with national emissions below an agreed threshold, that do not contain either initial or final information on an NDC.]

Reviews by the technical expert review group include consultation meetings between the review team and the Party concerned [via teleconference or any other means].

The technical expert review group shall[, as far as possible,] coordinate with relevant UNFCCC review processes.

Review procedures

The technical expert review shall commence after the submission of the transparency report within [two] [six] months.

The review team, in preparation for review, shall conduct a desk review of the transparency report. [In-country reviews [and other review formats] may be conducted as requested by [developing country] Parties that need it in light of capacities.]

The technical expert group shall notify the Party concerned of any questions regarding the information provided in the transparency report at any stage of review. The Party concerned [shall] [should] respond to questions and provide additional information [as requested by the review group] [in due course] [without undue delay].

[The technical review team shall offer suggestions and advice on how to resolve issues identified, taking into account the national circumstances of the Party under review.]

The Review team shall produce a draft technical expert review report to be sent to the Party under review within [two] [three] months after the review.
The Party concerned shall comment on the draft technical expert review report within [one] [three] month[s] of receipt of the report.
The review team shall produce the final version of the technical expert review report, taking into account the comments within [one] [three] month[s] of receipt of the Party comments.

The technical expert review report [shall] [should] be completed within [10 months of the transparency report submission due date] [12 months after the submission date of the transparency report] [15 months of the transparency report submission date].

[Findings in the technical expert review report [shall] [should] be limited to the technical assessment vis-a-vis the relevant modalities, procedures and guidelines [and presented together with the relevant recommendations and/or encouragements].]

[The technical expert review report [shall] [should] be limited to the review of accuracy of the data reported under the relevant categories.]

[The technical expert review report shall include an examination of progress in achieving a Party's NDC.]

The technical expert review reports shall be published by the secretariat.

[The technical expert review reports shall feed the global stocktake under Article 14 of the Agreement.]

[The technical expert review reports [shall] [may] be forwarded to the Committee under Article 15 of the Agreement, as appropriate, to facilitate the work of the compliance mechanism.]

Frequency and timing of the review

Each transparency report [for developed country parties] submitted under Art 13 of the Agreement will undergo review.

Flexibility for frequency and timing of the technical expert review shall be applied particularly for the least-developed countries[and small island developing countries].

[Frequency of the review shall be determined by Parties themselves.]

The first technical expert review shall begin [three][six] years after the date of entry into force of the Convention and be conducted periodically thereafter at [two][four] [six] year intervals.
[In addition, the review group shall conduct an annual initial check of national GHG inventory report.]

3.4 Negotiation text for group C

Draft decision on the Global Stocktake (GST)[14]

Recalling the provisions of Articles 14 and [other relevant Articles of the Paris Agreement] and [relevant] paragraphs [41, 45, 99 to 101] of decision 1/CP.21;

[*Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,]

[*In pursuit* of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances],

Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge,

Also recognizing the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change,[as provided for in the Convention],

Affirming that the GST is a [crucial][important] element of the ambition mechanism to ratchet ambition towards achieving the long-term global goals of the Paris Agreement, [taking into account equity for individual Parties];

The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement,

1. *Decides* to adopt the Modalities for the Global Stocktake (GST) referred to in Article 14 of the Paris Agreement, as contained in the annex;

2. *Requests* the secretariat to immediately convene [subject to available resources] the [committee elected as per decision 5/CMA.1[15]][joint contact group] to begin its work [on Activity A];

[14] The text is based on the 8 May 2018 informal note by the co-facilitators, which provided elements only and not drafted text. To make the exercise user-friendly for non-climate experts, the substance has been substantially simplified.

[15] This refers to the draft decision that will need to be adopted if this work proceeds through the committee mentioned throughout the annex to this decision.

3. [*Decides* that Activities A and B are to be undertaken [before][by] [2023] so that the CMA in [2023][2025] can decide on the outputs of the GST];

4. *Invites* Parties [and others, when called upon to do so], to contribute to the GST [wherever possible][at each phase].

Annex

I. General Modalities

A. Overarching [elements][principles]

1. These modalities recall the provisions of Articles 14 and [other relevant Articles of the Paris Agreement and paragraphs of decision 1/CP.21] [relevant principles and characteristics and in the light of equity, sustainable development, efforts to eradicate poverty and the best available science] [The GST is a crucial element of the ambition mechanism to ratchet ambition towards achieving the long-term global goals of the Paris Agreement]

B. Timing and duration

1.The GST will [start][be undertaken] in year 2023 and every [five][seven][ten] years thereafter.

[2.The GST will be allocated adequate time to be conducted in a comprehensive manner with fixed milestones along the way to ensure completion of each GST.]

[Alt.1. The GST will be short, in order to avoid undue burden on Parties, and concise in order to ensure durability and resilience of the process.]

[Alt.2.The overall timing and duration of the GST should be consistent with the timing and duration of Activities A, B and C.]

[Alt.3.The GST is a process lasting [for more than half a year and less than one year] [at least one year][12 to 18 months][not more than six months in total and should be kept to a minimum].]

C. Structure (phases/activities)

1.The GST process will consist of:

(a)*Activity A* - a preparatory phase involving information gathering and compilation, including technical input

(b)*Activity B* - a technical phase involving technical consideration of inputs, taking stock, assessing collective progress and preparing outputs

(c)*Activity C* - a political phase involving consideration of outputs, [further actions to better achieve collective progress] and closure of the GST.

D. [Outputs][Outcome[s]]

[1.The outputs should lead to the outcome[s] identified in Article 14.3 of the Paris Agreement. They should identify gaps in collective progress, as well as lessons learned and good practices. [This includes outputs of Activities A, B and C.]]

[Alt.1.The [outputs][outcome[s]] should focus on the stocktake of collective progress, [with no individual Party focus], and a non-policy prescriptive consideration of collective progress that Parties can use to inform the updating and enhancement of their successive climate actions and support, and [enhancing]further international cooperation [for climate action].]

[2.The Secretary General of the United Nations will invite Parties to submit their NDCs at a special event organized by the Secretariat as the launching point for enhanced NDCs pursuant to Article 14 and 4.]

E. Governance

1. The GST will be conducted by the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA) in an effective and efficient manner, avoiding duplication of work, taking into account the results of relevant work conducted under [the Convention], the Paris Agreement [and the Kyoto Protocol].

2. The GST will be conducted [with the assistance of][by]:

[Option 1: a committee of experts established for this purpose by the CMA, consisting of [three][two] representatives of each of the five UN regions, one representative each of small island developing states and the least developed countries, [and two experts from one of the technical bodies of the [Convention or] Agreement]. Detailed terms of reference are contained in Appendix 1 to this Annex.][16]

[Option 2: the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBSTA), which will establish a joint contact group on this matter. Detailed terms of reference are contained in Appendix 1 to this Annex.]

[16] Due to the limited timespan of this exercise, the details of the committee have not been included for negotiation but typically would be an important part of any such negotiations.

II Activity A - Preparatory phase: Information gathering and compilation, including technical input

A. [Aim

The aim of Activity A is to gather and compile the information for the GST [, including technical input].]

B. Timing and duration

Activity A should:

[Option 1: start in 2020 [and every five years thereafter], [bearing in mind that new or updated NDCs will become available in that year]

[Option 2: run continuously from 2021 or 2022, and every five years thereafter, (or previous year to be agreed if pre-2020 inputs could be considered) and should end no later than [six][X] months before the CMA in 2023, [and every five years thereafter,] [unless critical information that requires consideration emerges after the cut-off date].]

[Option 3: start in 2023 with sufficient time for preparing the information for the GST.]

C. Inputs for the Compilation

[1.Inputs to the GST are restricted to [existing] information relevant for the scope of the GST from Parties, constituted bodies, constituted forums and other institutional arrangements under subsidiary bodies and/or serving the Paris Agreement, UN Agencies, IPCC and other scientific bodies, regional groups, civil society organizations [and other identified sources of input,] [including on equity and CBDR in the light of different national circumstances.]]

[Alt.1.Sources of input should be limited to Parties, constituted bodies and forums and other institutional arrangements under subsidiary bodies and/or serving the Paris Agreement.]

[Alt.2.Inputs will be invited/gathered according to their relevance in providing the most up-to-date information with regard to collective progress in meeting the long-term goals of the Paris Agreement.]

2. The [committee][joint contact group] may in addition to the [existing] relevant information in paragraph 1 above invite specific expert inputs based on the information needs identified [by the committee] [joint contact group].

3.The deadline for submission of information [pursuant to paragraph II.C.1] should be [2020][2021][2022][2023] in order to give the [committee] [joint contact group] sufficient time to consider them for inclusion in their compilation. [Parties [and non-Party stakeholders] would be able to upload their submissions online on the GST platform.]

4. [The compilation would then be utilized by the [committee] [joint contact group] as the basis of its work on Activity B.]

[4.alt. The compilation would then be approved by the [2022][2023] [SBSTA, SBI] and CMA before its use by the [committee] [joint contact group].

D. Synthesis

1. The [committee] [joint contact group] will request [the secretariat][the SBSTA and the SBI] to synthesize information for Activity B into an agreed format and make it available on a GST platform.

2. The [committee] [joint contact group] will [invite the SBSTA and the SBI to] identify [any] potential information gaps and[, where necessary and feasible,] make requests for additional input, bearing in mind the cut-off date for Activity A and the need to consider critical information.

E. Outputs

The synthesis of information to be utilized for purposes of Activity B will consist of the initial synthesis [as augmented by information obtained to fill [any] gaps].

III Activity B - Technical phase: Technical consideration of inputs, taking stock, assessing collective progress and preparing outputs

A. [Aim

1.The aim of this phase is to:

[Option 1: Build a strong foundation for Activity C by considering all inputs in the light of equity and CBDR-RC[17], in the light of different national circumstances in a facilitative, [transparent] and comprehensive manner.]

[Option 2: Undertake a technical assessment of collective progress towards achieving the purpose of the Paris Agreement expressed as goals in Article 2.1 (a-c).]

[17] Common but differentiated responsibilities and respective capabilities.

[Option 3: Take stock of the implementation of the Paris Agreement to assess collective progress towards achieving the purpose of the Paris Agreement and its long-term goals.]]

B. Timing and duration

1. Activity B will commence:

Options:

- [upon completion of the synthesis report on the timetable agreed in paragraph II.D above]
- [at the SB sessions in the year prior to the stocktake year (2023) and conclude before the beginning of Activity C]
- [at the SB session in the year in which the GST will be conducted].

C. Structure

1. Activity B will

Options:

- [comprise a series of technical dialogues between Parties and experts, moderated by the SB chairs]
- [comprise a series of technical/thematic workshops/roundtables moderated by the SB chairs]
- [be carried out by a technical committee to be established by the CMA]
- [be carried out by the [committee][joint contact group] that developed the compilation and synthesis.]

D. Consideration of synthesis report

1.All the inputs and topics should be discussed and assessed in a balanced, holistic and comprehensive [and facilitative] manner, in particular the linkage among various issues, with a balanced allocation of time between mitigation, adaptation and the means of implementation and support, [in light of equity and the best available science].

[2.Equity should be looked at in terms of various indicators, reference benchmarks, including but not limited to historical responsibilities for increase in temperature, capacity to act due to development levels, sustainable development, etc.]

[2alt. All inputs to the synthesis document will be assessed on the basis of the best available science.]

E. Output

1. The work of the structure agreed in paragraph III.C above will result in a report for consideration of the CMA [in 2023][2024]2025].

2.The report will [provide clarification in terms of technical advice on the state of progress][be neutral without recommendations][provide recommendations for Activity C].

IV: Activity C - Political phase: Consideration of outputs and Closure of the GST

A. [Aim

The aim of this phase is to inform Parties in updating and enhancing, in a nationally determined manner, their actions and support as well as in enhancing international cooperation for climate action.]

B. Timing and duration

1.This phase will be conducted at the CMA session in [the year when the GST will end][2023][2025].

C. Final Output of the GST

The output of the GST will [reflect equity and][the best available science][be comprehensive and facilitiative]consider mitigation, adaptation and the means of implementation and support and be contained in a:

Options:

- [summary of key messages and recommendations for strengthening action and scaling up support in accordance with identified needs by the CMA]
- [summary of key messages from Activity C, including key political messages and general policy recommendations from Events by the Presidency]
- [a decision adopted by the CMA]
- [formal declaration agreed by all Parties and adopted by the CMA]
- [final statement by the Presidency]
- [final conclusions of the High-level Segment]
- [format to be decided by the Presidency].

3.5 Negotiation text for group D

The Paris Rulebook: Negotiations for a Compliance Mechanism under the Paris Agreement[18]

Recalling the provisions of Article 15 and [all] other Articles of the Paris Agreement and paragraphs 102 and 103 of decision 1/CP.21;

Recalling also the purpose of [this mechanism][these procedures] to facilitate implementation and promote compliance [and encourage, assist [and enable] Parties to implement provisions and comply with their obligations];

[*Emphasizing*][*Reiterating*] the importance of compliance information [to the global stocktake] and to the achievement of the purposes of the Paris Agreement;

The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement,

1. Decides to adopt, further to Article 15 of the Paris Agreement, the [compliance][non-compliance] [procedures] [mechanism] set out in the annex to this decision;
2. Requests the secretariat to convene the first meeting of the committee established by [these procedures][the Paris Agreement] [subject to available resources][within six months of this meeting].

Annex
[COMPLIANCE][NON-COMPLIANCE] [PROCEDURES][MECHANISM]

A. Purpose, principles and nature

[A.1 [Purpose][Objective]
The [purpose][objective] of [this mechanism][these procedures] is to:
(a) Facilitate implementation and promote compliance (Art 15.1)19
(b) Encourage, assist [and enable] Parties to implement provisions and comply with their obligations
[(c) Prevent situations of non-implementation or non-compliance]
[(d) To enhance the effectiveness and durability of the Agreement]
[e) To complement other processes and mechanisms under the Paris Agreement and the Convention].]

[18] The negotiating text has been developed for simulation purposes only, and while it is based on the FCCC/APA/2018/L.2/Add.1 'Elements of Relevant Guidance' on compliance, the text has been prepared by the organizers and greatly simplified for purposes of the simulation and is not the result of negotiations under the Paris Agreement.

[19] All references to articles are to the Paris Agreement.

A.2 Principles
[1. Nothing in the design or operations of the [Art 15 Mechanism][these procedures] can change the content or legal character of the Paris Agreement's provisions.]
[2. [All aspects of] [these procedures] [this mechanism] [must respect][respects] the principle of common but differentiated responsibility][, and respective capabilities, in the light of different national circumstances.]
[[3. [These procedures] [this mechanism] will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. (Art. 2.2)] [The committee shall pay particular attention to the respective national capabilities and circumstances of Parties. (Art. 15.2)]]
[4. [These procedures] [this mechanism] will be [operated][administered] in a manner that is transparent, non-duplicative, [complementary], effective, [independent] and inclusive.]

A.3 Nature
1. [These procedures] [this mechanism] will [function][be administered] in a facilitative, transparent, non-adversarial, non-punitive manner (Art 15.2)
2. The committee will be expert-based [and facilitative] and pay particular attention to the respective national capabilities and circumstances of [all] Parties.
[3. It will apply to all obligations under the Paris Agreement.]

B. Scope and Function

1. The Committee will examine [general issues of non-compliance affecting all Parties] [as well as individual cases of non-compliance initiated pursuant to Section E].

2. For purposes of individual cases, the scope of the Committee's work is [all provisions of the Agreement containing the word "shall"][legally-binding provisions on individual obligations of Parties] [limited to the specific obligations under Articles 4, 6, 7, 9, 10, 11 and 13].

C. Institutional arrangements

C.1 Composition (1/CP.21, para 102)
The Committee will be comprised of twelve members with recognized competence in relevant scientific, technical, socioeconomic or legal fields to be elected by the CMA on the basis of equitable geographical representation, with two members each from the five regional groups of the United Nations and one member each from the small island developing States and the least developed countries, while taking into account the goal of gender balance. [One alternate shall be elected per UN region or constituency to provide continuity should a member resign or be unable to complete the term of office.]

C.2 Term of office, staggered election for continuity

1. Members [and alternate members] will be elected to serve for a period of [three][four] years and be eligible to serve a maximum of two consecutive terms.
2. Six members [and six alternate members] will be elected at the CMA initially for a term of two years and six members [and alternate members] for a term of [three][four] years.
3. Thereafter, the CMA will elect at each of its regular sessions six members [and alternate members] for a period of [three][four] years.
4. The members [and alternate members] will remain in office until their successors are elected.

C.3 Capacity of Members [and alternate members]

Members of the Committee [and their alternate members] will serve in
[**Option A**: their individual capacity]
[**Option B**: as a representative of a Party]
[**Option C**: the best interests of the Paris Agreement.]

D. Meetings

D.1 Frequency of meetings

Unless otherwise decided [by the CMA], the Committee will meet at least [once] [twice][X times] a year, beginning in [2019][2020].

D.2 Open or closed meetings

Option A (open as default)

1. Meetings of the Committee are to be held in public unless the Committee, of its own accord or at the request of the Party concerned, decides that part or all of the meeting is to be held in private.

Option B: (closed as default)

1. Meetings of the Committee are to be held in a closed session[, subject to the provisions of the present modalities and procedures on the participation of the Party concerned] [but][the Committee of its own accord, at the request of the Party or otherwise concerned, may invite the Party concerned to participate in a part of its meeting].
2. Only members [and alternate members] of the Committee and secretariat officials may be present during the [elaboration][deliberations on] and adoption of a decision of the Committee.

D.3 Quorum

Adoption of decisions [or recommendations] by the Committee requires a quorum of at least [two thirds][three fourths][ten] of the members to be present.

D.4 Decision-making
Option A: (*consensus*)
[The Committee shall reach agreement on any decision [or recommendation] by consensus.]
Option B: (*consensus, with voting as last resort*)
[The Committee shall make every effort to reach agreement on any decision [or recommendation] by consensus. If all efforts at reaching consensus have been exhausted, as a last resort, decisions [and recommendations] are to be adopted by:

- [Option 1: a majority of the members present and voting
- Option 2: at least two-thirds of the members present and voting
- Option 3: at least three-fourths of the members present and voting
- Option 4: at least nine of the members present and voting]

E. Initiation of consideration of Individual Cases

1. A party may refer its own [non-compliance][compliance difficulties] to the Committee. Any submission under this subparagraph shall be made in writing, through the Secretariat, and should include details as to which specific obligations are concerned and an assessment of the reason why the Party may be unable to meet those obligations. [Where possible, substantiating information, or advice as to where such substantiating information may be found, shall be provided.]

[2. A party [that is affected or may be affected by another Party's difficulties] may refer a case of another Party's [non-compliance][compliance difficulties] to the Committee][with that Party's consent.] [Any Party intending to make a submission under this subparagraph should before so doing undertake consultations with the Party whose compliance is in question.] Any submission made under this subparagraph shall be made in writing, through the Secretariat, and is to include details as to which specific obligations are concerned and information substantiating the submission;

[3. The Committee may initiate consideration of a party's [non-compliance][compliance difficulties] based on its review of [Information from the NDC registry] [Information from any other relevant registries established under the Paris Agreement] [Information provided by other bodies, mechanisms and arrangements under the PA] and identify [questions] [difficulties] relating to a Party's [non-compliance] [compliance difficulties]. The Committee shall consider [such questions][difficulties] in accordance with paragraphs 6-8 below.]]

4.The Secretariat shall forward submissions made under subparagraph E.1 above, within fifteen days of receipt of such submissions, to the members of the Committee for consideration at the Committee's next meeting.

5.The Secretariat shall, within [fifteen][30] days of receipt of any submission made under subparagraph E.2 above, send a copy to the Party whose [compliance] [non-compliance] with the Convention is in question and to the members of the Committee for consideration at the Committee's next meeting.

6. A Party whose compliance is in question [or the Party affected] may present responses or comments at every step of the proceedings described in the present procedures and mechanisms.

7. Such a Party shall be entitled to participate in the consideration of the submission by the Committee. For this purpose, the Committee shall invite such a Party to participate in the discussions on the submission no later than [sixty][ninety] days before the start of the discussions. Such Party, however, may not take part in the elaboration of a recommendation of the Committee.

8. Comments or additional information in response to a submission, provided by a Party whose compliance is in question, should be forwarded to the Secretariat within ninety days of the date of receipt of the submission by that Party[, unless the Party requests an extension]. Such extension may be provided by the [Chair][committee], where a reasonable justification has been provided, for a period of up to [30][90] days. Such information shall be immediately transmitted to the members of the Committee for consideration at the Committee's next meeting. Where a submission has been made pursuant to subparagraph 17 (b) above, the information shall be forwarded by the Secretariat to the Party that made the submission.

9. The Committee shall share its draft conclusions and recommendations [which shall also include its reasons] with the Party concerned for consideration and an opportunity to comment within ninety days of receipt of the draft by the Party. Any such comments are to be reflected in the report of the Committee.

10. The Committee [may decide][shall] not [to] proceed with submissions which it considers to be:

(a) *De minimis;*
(b) Manifestly ill-founded.

G. Measures

1. The Committee shall, paying particular attention to [equity][the respective national capabilities and circumstances of Parties], consider submissions made to it in accordance with Section E above with a view to establishing the facts and the root causes of the matter of concern and to assisting in its resolution and may[, after consultation with the Party whose compliance is in question]:

(a) Provide [non-binding] advice;
(b) Issue non-binding [decisions][recommendations] on steps to remedy the

[compliance difficulties][non-compliance situation], including on establishing and strengthening domestic regulatory measures and monitoring, as appropriate;

(c) [Provide][Facilitate} technical and financial assistance, including by providing advice on sources and modalities of technology transfer, training and other capacity-building measures;

(d) [Request][Invite] the Party concerned to develop a voluntary [and facilitative] compliance action plan, including timelines, targets and indicators and to submit progress reports within a time frame to be agreed upon by the Committee [and the Party concerned];

(e) [Provide assistance, upon request, in the development, and review of the implementation, of the action plan;]

(f) Report to the Conference of the Parties serving as the meeting of the Parties to the Agreement on efforts made by the Party concerned to return to compliance and maintain the case as an agenda item of the Committee until the matter is [adequately] resolved.

2. If, after undertaking the facilitation procedure set forth in paragraph G.1 above and taking into account the cause, type, degree, duration and frequency of [compliance difficulties][non-compliance], including the financial and technical capacities of a Party whose compliance is in question [and the extent to which financial or technical assistance has been previously provided,] the Committee considers it necessary to pursue further action to address a Party's compliance [problems][difficulties], it may recommend to the Conference of the Parties serving as the meeting of the Parties to the Agreement that it [consider][take] one or more of the following actions:

(a) Providing further support under the Convention or Agreement for the Party concerned, including further advice and the facilitation, as appropriate, of access to financial resources, technical assistance, technology transfer, training and other capacity-building measures;

(b) Providing advice regarding future compliance in order to help Parties implement the provisions of the Convention and avoid non-compliance;

(c) [In cases of repeated or persistent non-compliance,] issuing a statement of [concern regarding current] non-compliance][issuing a confidential letter];

[(d) Requesting the Executive Secretary to make public cases of non-compliance;]

[(e) In case of repeated or persistent non-compliance, [as a last resort,] suspending rights and privileges under the Convention, [undertaking any final action that may be required [consistent with international law] to achieve the objectives of the Convention;]]

[(f) Undertaking any additional action that may be required for the achievement of the objectives of the Paris Agreement under Article 16 (4)(d).]

H. Identification of [systemic][general] issues

1. [Systemic][General] issues [include][mean] a common source of difficulty for implementation and compliance faced by a number of Parties in relation to any provision of the Paris Agreement.

2. Consideration of a systemic issue may be initiated by the:
   (a) Conference of the Parties serving as the meeting of the Parties to the Paris Agreement
   (b) [committee] [based on systemic challenges identified in the course of its work][where so directed in its work programme approved by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement.]

3. The review of a systemic issue and any related conclusions and recommendations will be submitted by the committee in a[n annual] report to the Conference of the Parties serving as the meeting of the Parties of the Paris Agreement.

5 Review of the exercise

The following is a brief summary of the proceedings and analysis based on our observation of the exercise, as well as written evaluations from participants.

There were 34 official participants in all, not including the facilitators and the other resource people who supported or played various roles in respect of the simulation. The participants were mainly from Ministries of Foreign Affairs or from ministries responsible for environmental matters of their respective countries. Academic, non-governmental organizations and intergovernmental organizations were also represented.

The simulation commenced with the first day plenary of Part 6 of the first session of the APA. The session followed the agenda distributed to the participants. There was no need to adopt the agenda since the first session of the APA was ongoing; nor was there a need to elect the members of the Bureau since those were previously agreed to continue until December 2018. The co-chairs reminded the Parties that agenda items 3 and 8 had been previously agreed and referred to the upcoming joint COP and CMA. The present meeting would therefore focus on agenda items 4, 5, 6 and 7. At this point, one pre-selected delegate, briefed by the organizers on this point, raised a point of order. The purpose was to illustrate to participants how a point of order could be raised and then resolved in an MEA meeting, as they occur infrequently.

The co-chairs had been advised that this issue might be raised and had been provided with information about the relevant rule[20] and how to proceed should that eventuality arise. The delegate raised the point of order regarding the statement that negotiation on Agenda item 3 (mitigation) was finished at the last session. His delegation had some further comments to make on Nationally Determined Contributions under that agenda item. The co-chair referred to the meeting report of the last session and ruled that the agenda item had indeed been concluded then and that no further work was required, as previously agreed by the APA plenary. The delegate was not satisfied with the co-chair's response, and appealed the ruling, so the matter was taken to a vote. No other Party supported the delegation that raised the point of order and thus the ruling of the co-chair stood.

The plenary was then constituted as a contact group to discuss items 4, 5, 6 and 7 individually. The interventions were short and reflected some initial positions of the Parties. Under item 4 (guidance on adaptation communication), linkages between adaptation to the impacts of climate change and mitigation of greenhouse gases were highlighted by a Party; this was clearly related to the point of order made earlier. Under item 5 (modalities, procedures and guidelines for the transparency framework), interventions reflected tensions between developed and developing countries that are visible in the requirements of the transparency framework and in the need for support by Parties. Under item 6 (global stocktake), Parties presented concerns over the principle of common but differentiated responsibilities (the realization of funding and flexibilities to developing countries), the timeframes for the global stocktake and the process by which the stocktake would be undertaken. Under item 7 (compliance), the interventions reflected various levels of urgency, depending on the climate situation of each Party intervening (for instance, large emitter, small island state), and touched on key compliance procedure issues such as triggers (initiation of the procedure) and measures that a compliance committee could take with respect to a non-compliant Party.

The four informal consultation groups were established and their facilitators agreed following the proposals of the co-chairs. Before ending the plenary, the co-chairs emphasized to the Parties that as the text had previously been negotiated, the outstanding issues were those in square brackets and clean text was not to be re-opened unless by doing so an issue in square brackets would be resolved. After that, the delegates broke immediately into the informal consultation groups.

Participants in the informal consultation group on guidance on adaptation communication focused their discussions on the purpose and relevant principles of the

[20] Rule 34 provides: During the discussion of any matter, a representative may at any time raise a point of order which shall be decided immediately by the President in accordance with these rules. A representative may appeal against the ruling of the President. The appeal shall be put to the vote immediately and the ruling shall stand unless overruled by a majority of the Parties present and voting. A representative may not, in raising a point of order, speak on the substance of the matter under discussion.

guidance, its preparation and adoption, procedural aspects relating to submitting and updating the communications and the relevant capacity-building, and on the concrete elements of the adaptation communication document. The group reached agreement on the preambular paragraphs of the decision text, except for one issue: the delegates disagreed on the question whether it was appropriate to mention the Sustainable Development Goals (SDGs) in the preamble. Some delegates welcomed the draft text, highlighting the importance of bringing a human rights approach to the decision. In contrast, some delegates did not see this as very important and pointed out the timebound characteristic of the SDGs which is not well-suited to the context under negotiation. As a result, the group left the concept of SDGs bracketed in the text. In general, the group paid close attention to the aspects of state sovereignty and the special situation of developing countries (and of the least developed among them) throughout the negotiations. The group added, for instance, an indicative list of national circumstances that would have to be included in the adaptation communications of Parties.

Overall, the group performed very well and showed good negotiation skills and tactics. After negotiating the preamble, delegates agreed to take the Annex (elements of an adaptation communication) and leave the principles and procedural issues as the last item to be negotiated. Delegates actively referred to the provisions of the Paris Agreement, making sure that the decision text was in line with the Agreement. This was evident, for instance, when parties negotiated capacity-building measures: they checked what the Paris Agreement states about the issue. Delegates also urged consistency across paragraphs and in the terminology used (for instance, with respect to the alternative wordings 'rely on', 'be based on' and 'be informed by') in the course of the negotiations. Another important aspect was the recognition by delegates of the difference between a financial mechanism and financial institution. The facilitator did a good job in asking questions and seeking clarification, in summarizing parties' views and suggesting compromise language when needed. There were also conditional offers of compromise in a few contentious questions. A showcase of an 'effective' negotiation tactic was the case where a contentious provision was quickly adopted by the group when the only delegate opposing it was temporarily out of the room – not always politically viable in real life!

The informal consultation group on modalities, procedures and guidelines for the transparency framework held animated discussions over the course of three days. The group quickly identified the developed country Parties, Parties with economies in transition, and developed country Parties, and cooperated within their economic constituencies. This led to a consistent divide on the strength of wording used. While the industrialized negotiators opted for stronger wording of ambitious guidelines and compliance, the developing country representatives, as expected, argued for the opposite. The facilitator chose to analyze and work through the text from back to front by paragraph, starting in the annex. This proved to be an effective strategy. The agreed language in the annex was then used with a justification of language consist-

ency, by both industrialized and developing countries, for the rest of the document. Certain issues were not addressed in the first two days when consensus could not be reached, both in annex and main text, to allow delegates to contemplate and reflect on how these issues could be resolved by consensus.

On the second day of negotiations, the group took the realistic nature of climate negotiations to heart and continued negotiating 90 minutes after the planned end of the day's session. Teamwork between developed and developing delegates was a main theme, with many remarks made by first agreeing with their like-minded delegations, and followed by adding more reasoning to strongly support positions of others in their economic constituencies.

The last day of negotiations brought an unexpected surprise: one of the delegates from a developing country announced an administrative turnabout, and that the new administration was taking a progressive stance on environmental issues, so much so that the delegate would now be working with the developed country delegates in regards to a more ambitious text. With this change in dynamics, many 'tit-for-tat' wordings[21] were negotiated but with the developed delegates winning more arguments, but still giving small amounts of leeway to come to consensus. With 90 minutes of overtime the day before in addition to significant policy change of one country, the negotiations concluded with a clean, fully agreed text over an hour early before the final plenary. The transparency group was the only group to reach a clean text to present at the plenary.

The informal consultation group on the global stocktake was tasked with negotiating a decision on one of the key elements in the ambition mechanism of the Paris Agreement, the global stocktake (GST). The group agreed on the importance of their work to finalize the decision which accounts for what has been achieved so far, and what is yet to be done to achieve the objectives of the Paris Agreement. The group included parties with very strong stances on certain issues, which made for a lively and robust negotiation. In fact, one party was given a very difficult position to oppose and debate even some of the oldest agreed principles of international environmental law relating to climate change.

The first day was spent negotiating text primarily in the preambular section. The chair was exceptional in encouraging consensus on less contentious issues as a first priority and encouraging the parties to return to more difficult issues later. In this regard, parties focused on simplifying the text, removing references they felt were either unnecessary or repetitive. Over the course of the negotiating period, the group managed to agree on four preambular paragraphs. The principle of common but differentiated responsibilities (CBDR), although an agreed principle in internation-

[21] Tit-for-tat is a kind of strategy of retaliation where cooperation is rewarded by cooperation and injury by injury, the idea being to give an equivalent in return when decisions or actions are taken in turns by two parties.

al environmental law, proved to be a sticking point and source of much discussion, even in the preamble. Some parties called for its deletion while the majority opted to keep it. The matter remained unresolved. This was particularly interesting as it reflects real-life situations where governments are unable to agree on the inclusion of this principle in some international texts.[22]

The informal consultation group collectively agreed that the GST is the engine of the Paris Agreement, reaching consensus on the use of the word 'crucial' as opposed to 'important', where parties felt that 'crucial' carries more weight. Parties also spent significant time discussing the importance of balancing the science, policy and legal principles that are key to the Paris Agreement. Parties showed professionalism in negotiating the preambular paragraphs and in some cases, it was an indication of their prior engagement in negotiating positions for their respective governments. At the same time, however, as the group was made up of negotiators who were engaging in such a scenario for the very first time, it became clear that the group had studied their positions and familiarized themselves with the techniques, terminology and rules of procedure. The delegates also made use of the resource person in the room who not only acted as Secretariat support (providing on-screen editing of the negotiations) but was also called upon as a 'technical expert' in relation to the rules of procedure applicable to their negotiation.

Moving to the operative section, the group also demonstrated that they had familiarized themselves not only with their country positions, but with the contents, modalities and arrangements for the GST, beyond just the negotiation exercise. This was evident from the amount of time spent on and vigour with which the group negotiated the first three operative paragraphs. The group appreciated the urgency in finalizing a credible road map to design and adopt a robust, effective implementation package, and in preparing for the first full global GST which will take place in 2023. In that regard, they decided to move to the Annex to discuss general modalities. At the proposal of the chair, the discussion moved to part C on the structure (phases/activities) where they agreed on each of the definitions of the activities A, B, and C which will form part of the GST process. These were agreed without any objections and the discussion then moved back to the operative part. After prolonged heated discussion, they reached consensus on activities A and B to be undertaken by

[22] For example, in 2016, governments were unable to agree on the draft outcome document, or ministerial declaration, of the second session of the UN Environment Assembly – the highest decision-making body on the environment. As a result, the Assembly failed to adopt an outcome document, despite negotiating and convening bilateral talks into the early hours of the day after the official ending of the session. A second example of how issues and challenges around CBDR have played out in other intergovernmental processes is in the ongoing course of sessions of the ad hoc open ended working group established through UN General Assembly Resolution 72/277, 'Towards a Global Pact for the Environment.' In this instance, negotiating delegations have warned against any move backwards such as the abandonment of the principle of CBDR in climate change in the process of discussing gaps in international environmental law. Delegations have also cited the risk of regression in the case of the carefully negotiated update to the principle of CBDR as part of the Paris Agreement on climate change.

2023 so that the GST outcomes can be decided by the CMA in 2024. Unfortunately, the group was unable to agree on the majority of modalities in Part I, and did not discuss Parts II, III, or IV at all.

Based on the discussions among the group, parties were clearly concerned with how the GST would work in terms of the timescale, structure, institutions and other modalities. Parties agreed that balancing equity and available science is important; but there was discussion around how equity would be considered. Despite reaching consensus on the inclusion of these issues in the text, it was clear that parties had very different ideas of what it meant in the climate change context.

The fourth informal consultation group, on compliance, had a fairly detailed text to negotiate with multiple options on many issues, yet managed to complete a first reading of the entire text, and achieve agreed text in a number of areas. Consensus text was achieved for the most part[23] with respect to objectives and principles of the mechanism/procedures, although text stating that one of the objectives was to 'prevent' situations of non-compliance remained in brackets. Agreed text was reached on the nature of the mechanism, its scope and function, institutional arrangements, quorum, identification of systemic issues, term of office, and capacity of members. In the latter area, the debate was – as in many MEA negotiations – whether the members of the compliance committee should serve in their individual capacity, as a representative of a Party or in the best interests of the treaty (the latter a precedent started with the Basel Convention[24] compliance mechanism). The final compromise text states that members will serve independently and in the best interests of the Paris Agreement, but for systemic issues of non-compliance may consult others, including within their regions.

As in real compliance negotiations, the more difficult issues to resolve related to decision-making, whether individual cases should be held in open or closed format, and the Party-to-Party trigger. Surprisingly, as this is a controversial trigger in many MEAs, a committee trigger was agreed where the committee could initiate consideration of a Party's compliance difficulties should the Party not be able or willing to submit information related to the obligations under the Paris Agreement. Measures, also a controversial subject in many MEA negotiations, were for the most part resolved, although surprisingly the one measure under the list of actions that could be taken by the CMA that was not agreed was the issuing of a statement of concern or the issuance of a confidential letter.

[23] Recurring textual issues throughout the entire text remained in some of these otherwise agreed provisions, such as whether to refer to compliance 'procedures' or a compliance 'mechanism'. As with real life negotiations, this type of issue was parked until after the substantive issues were resolved.

[24] Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <http://www.basel.int>.

Delegates followed their instructions, which were designed to (and did) lead to fairly contentious discussions that reflected a range of views. This provided the opportunity for the facilitator to specifically direct the most opposed delegations to develop compromise text during the breaks or overnight. Where useful compromise text was proposed, members of the group were willing to agree to it in a constructive way. Delegates were also mindful to refer to the Paris Agreement, as well as the relevant paragraphs of the decision adopting the Paris Agreement, related to compliance. All delegates participated, and even those with difficult instructions followed those – at times with sufficient injection of humour to make acceptance of their interventions more palatable to the group. Many of the interventions were quite skilled, and some negotiators reflected an understanding of how to intervene on only those matters that were of most concern to their delegation. The facilitator kept proceedings moving by seeking to achieve consensus text, but moving on when that was not possible, and also helped maintain a good spirit of cooperation within the group.

On the morning of day two, there was a short plenary session where the facilitators of all informal consultation groups provided progress reports. According to the reports, all the groups had made good progress on their texts, but there were still numerous open issues left to resolve. Each group requested more time to complete their respective negotiations. After the short stocktaking plenary, participants again broke into their respective consultation groups and resumed their negotiations.

Following the conclusion of the informal consultation groups, all participants reconvened as the APA plenary. In an ideal situation, they all would have had clean texts to present to the plenary. However, only one group had actually been able to conclude their negotiations with a clean, fully agreed text, while the others had made substantial progress. It was stressed to the groups that this reflected real life where contentious issues, including the ones they were negotiating, took many meetings to resolve. The fact that the APA's first session was currently at Part 6 illustrated the point.

The group on adaptation communication presented their negotiated text. There were a couple of bracketed sections remaining but overall, the group had managed to resolve the main issues in the text.

The group on modalities, procedures and guidelines for the transparency framework was the only group that had managed to conclude their negotiations with a clean, fully agreed text.

The group on the global stocktake presented their feedback to the plenary through their chair – four paragraphs agreed in the preambular section, three in the operative section, and the section on Structure (phases/activities) in Part I of the Annex. The facilitator underscored the importance of the GST as the basis for intense and thorough discussions and negotiations. He conceded that despite their best efforts, the group was delayed by a lengthy discussion on timing and could make no further

progress. As such, the text presented, despite being heavily bracketed throughout, was recommended by the facilitator for forwarding by the APA to the CMA for consideration.

The facilitator of the group on compliance noted that his group had completed a first reading of the entire text, with many issues resolved as noted above. He outlined the various issues outstanding, and asked that the text developed this week be forwarded by the APA to the CMA for consideration.

Due to time constraints, the final plenary had an opportunity to finalize the text on only one draft decision, but the organizers felt it was important to do so in order for participants to better appreciate the challenges of negotiating in a plenary setting. The co-chairs, in consultation with the organizers, decided that the plenary would focus on the text of the group on adaptation communication in its attempt to try to resolve outstanding issues from the negotiations, and that all other decisions would be forwarded to the CMP for further consideration as reported by the informal groups.

The plenary went through the major areas of concern left open in the negotiated text of the group on adaptation communication. The co-chairs tried to broker a solution on the outstanding issues and some compromise language was introduced.

6 Evaluation of the exercise

The resource people for the exercise were generally very satisfied with how the simulation turned out and with the performance of the participants. The exercise reached its objectives and was run without major difficulties. The participants were well-prepared with their positions and tactics, were meticulous and creative when needed and generally participated very intensively in the negotiations. All informal consultation groups benefited from constructive proposals, compromise solutions and good discussions. It was delightful to observe participants paying close attention to ensuring consistency of the negotiated text with the Paris Agreement and to debating the appropriate terminology and language to be used. Staff of the University of Eastern Finland did an excellent job in ensuring that the simulations were supported from an administrative and technical perspective, including facilitating negotiation of text on overhead screens as is done in real negotiating venues.

Based on written evaluations, participants were generally very satisfied with the exercise. They thought that the simulation was a good training opportunity for their negotiation skills, both in terms of substance and on procedural issues. It was said that the exercise particularly helped 'to understand the structure and negotiation procedures under climate change processes'. The draft decision texts were perceived as authentic-looking and, overall, the exercise 'felt real' in a good way.

Participants were also generally happy with their individual instructions. A number of participants welcomed the presented rationales behind the positions, along with their detailed nature. Organizers had taken considerable time to prepare the negotiating texts, as none existed at that time from the actual climate negotiations, basing them on lists of elements that had come out of the May negotiations in Bonn. Then they prepared detailed negotiating positions for each delegate on the text they were negotiating. One participant expressed the need to better highlight the priorities of the individual positions.

Many participants highlighted the usefulness and relevance of the negotiation exercise for their work:

- 'Negotiation exercise was really useful for my future working experience.'
- 'The simulation of negotiation helped to improve my work performance.'
- 'Negotiation was brand new to me, I believe that the basics I have learned in this matter
- of negotiation will allow me to move forward, to be able to participate in high-level and preparatory meetings, to give my point of views and defend our respective countries.'

It was also pointed out how the exercise made the participants appreciate what goes on in the MEA negotiations. In particular. one participant noted that it gave them a greater appreciation of how difficult it could be to make progress, while another said that the negotiation process created camaraderie within the group. Another noted that the process helped underscore the importance of being flexible in negotiations and in weighing one's words carefully.

Participants also had suggestions for improvement. An oft-cited suggestion, familiar from previous simulations, was that the exercise would benefit from some more time to be allocated to it. Unfortunately, this is difficult to realize in practice given the tight schedules of the Courses. Moreover, it is to be noted that the length of the simulation was prolonged to two full days a couple of years ago, as a response to participants' feedback. It was also wished that the materials of the exercise would be handed out earlier to the participants, giving them more time to familiarize themselves with the theme and content of the exercise. Despite having been given separate Guidance for Facilitators,[25] some of the group Facilitators stated that they could have used more detailed instructions on their roles and benefited from an extra resource person present in the group, seeing to it that the group operated procedurally in a correct way. Another suggestion was that each group be paused for ten minutes each hour to allow the resource persons to provide guidance and coaching. These comments reflect an ongoing debate on whether the chairs/facilitators should

[25] This was new this year, and was supplemented by facilitators also being given a link to the Training Manual for chairs of meetings of the Basel, Rotterdam and Stockholm Conventions, annex 2 of which is about chairing contact groups.

be drawn from the very class that is attempting to learn basic negotiating skills, or whether experienced resource persons should undertake the task. More generally, the Course feedback indicated a need to dedicate more time for preparatory lectures on negotiation skills.

In conclusion, the exercise was a success, mainly due to the efforts of participants to prepare for the negotiations and take them seriously, working hard to achieve agreed text by the end of the second day. Efforts made by organizers to improve in areas suggested by previous years' participants, such as lengthening the negotiations and providing more detailed individual instructions, were appreciated. All in all, it was clear that this continues to be an important and popular part of the two-week MEA course.

The articles in the present Review are based on lectures given during the 15th University of Eastern Finland – UN Environment Course on Multilateral Environmental Agreements, which was held from 20 to 30 August 2018 in Joensuu, Finland. The special theme of the course was "The Environment and Human Rights". The aim of the Course was to convey key tools and experiences in the area of international environmental law-making to present and future negotiators of multilateral environmental agreements. In addition, the Course served as a forum for fostering North-South co-operation and for taking stock of recent developments in the negotiation and implementation of multilateral environmental agreements and diplomatic practices in the field.

The lectures were delivered by experienced hands-on diplomats, government officials and members of academia. The Course is an event designed for experienced government officials engaged in international environmental negotiations. In addition, other stakeholders such as representatives of non-governmental organizations and the private sector may apply and be selected to attend the Course. Researchers and academics in the field are also eligible.

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