

Human Rights and the Environment

13th Informal ASEM Seminar on Human Rights

Seminar Report

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Introduction

A clean and healthy environment is important for the full enjoyment of human rights. With increasing environmental degradation and climate change, the inter-connections between sustainable development, human rights and environmental protection have raised new questions some of which were addressed at the 13th Informal ASEM Seminar on Human Rights, titled “Human Rights and the Environment” (21-23 October 2013, Copenhagen, Denmark).

The Informal ASEM Seminar on Human Rights series is organised by the Asia-Europe Foundation (ASEF), the Raoul Wallenberg Institute (as delegated by the Swedish Ministry for Foreign Affairs), the French Ministry of Foreign Affairs and the Philippine Department of Foreign Affairs. The 13th Seminar was hosted by the Danish Ministry of Foreign Affairs and the Danish Institute for Human Rights. It brought together over 135 participants including official government representatives and civil society experts, representing 48 of the 51 ASEM partners to discuss the challenges presented by environmental degradation on the promotion and protection of human rights. Additional side events at the Seminar included an event on ‘*Climate Change and Indigenous People*’ and a special panel on ‘*Environment, Human Rights and the Role of Private Actors*’.

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

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

The procedural rights of access to information, public participation in decision-making and access to justice are key to the effective engagement of the public in environmental matters. Subject to the specific situation of each country, provision should be made to guarantee effective access to justice. The ideal situation of making such provisions legally binding may take time. Pending such measures, soft-law approaches should be applied as a first step. For example, even if the *Aarhus Convention* cannot be fully replicated quickly in Asia or signed

and ratified by every country, the procedural rights provided for in the Convention can be legislated for and implemented in different regions and adapted to domestic requirements¹.

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

¹ Detailed information about the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters can be found on page 8 (working group 2: Access to Information, Participatory Rights and Access to Justice) of this report.

Working Group Reports

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

1. Sustainable development

In its discussion on the concept of sustainable development, there was general agreement in the Group that the concept entails three basic premises: all States aim at achieving economic development; economic development has to be achieved while avoiding environmental degradation and; there must be a social benefit from such development. This can be obtained through a balance between policies aiming at the promotion of economic growth, environmental protection and promotion of human rights.

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

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

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

2. Causes and origins of unsustainable development

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

On the part of many governments, there is a failure to regulate environmental nuisances. Even when such regulation exists, it is often insufficiently strong. In many cases there are also

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

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

failures in the enforcement of the law providing environmental standards. This lack of regulation or enforcement leads to environmental degradation and human rights violations.

It was also considered that some business fail to comply with national laws on environmental protection or human rights. This lack of compliance is especially visible in large, even in multinational corporations. However, it is also common to small local businesses.

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

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

The main conclusions of this discussion were:

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

3. Human Rights as a tool to protect the environment

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

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

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

The group concluded:

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

4. Is there a need for a right to the environment? If so, what would the content of such right be?

There was less consensus among the group on the need and possible content of a 'right to the environment'.

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

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

The group agreed that many constitutions have incorporated a right to the environment. This happened in the constitutions of some Asian countries⁴ and in many constitutions in Europe⁵. In this sense, the promotion of such a right in international law would be following constitutional precedents.

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

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

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

The overall conclusions of the discussion on this topic were:

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

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

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

5. The importance of education in the promotion of sustainable development

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

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

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

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

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

- i. Individuals are to be understood not only as the victims but also as the cause of environmental degradation. Awareness for a more environmentally behaviour in all areas of human activity is fundamental in achieving a truly sustainable development.
- ii. Nature creates many business opportunities for the corporate sector. Such opportunities will be wasted by environmental degradation. Corporate profits and nature should not be understood as opposed to each other but as potential allies.

- iii. Politicians and the judiciary should have in mind long-term objectives of policies and law. There should be awareness of humanity's role as steward of the planet. The present generation must have in mind the interests of future generations.
- iv. Academia should study solutions for environmental and human rights problems. It also has a fundamental role in the research and promotion of sustainable solutions for present concerns. The role of academics is always important in giving credibility to a policy of protection of the environment and human rights. This is particularly important in developing countries.
- v. Different organs of the State, such as parliaments, governments, courts and municipalities, together with NGOs and other social, economic, religious and cultural groups representing different interests of civil society have a fundamental role in the education of all sectors of society for environmental and human rights issues.

6. The boundaries of planet earth and sustainable development

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

The group considered that development that does not permit the natural regeneration of planet earth is not sustainable, and that States and the private sector should bear in mind the conclusions on green economy of the UN Rio+20 Conference. The group also praised the work of UNEP on promoting the concept of the green economy.⁶

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

In summary, the group generally agreed that:

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

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

7. Sustainable development and the relationship between the developed and developing worlds

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

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

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

8. Foreign trade, investment and sustainable development

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

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

The group recommended that:

- i. Multinational corporations be called on to promote a sustainable behaviour in their activity;
- ii. Investor States should seek to agree on the forms of action for companies incorporated within their jurisdictions.

II. Working Group 2: Access to Information, Participatory Rights and Access to justice

1. 1998 Aarhus Convention

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

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

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

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

2. Access to environmental information

The working group, after a lively discussion, agreed that in environmental matters, openness, transparency and access to environmental information need to be improved, both in Europe and in Asia. It was of the opinion that a global agreement like the Aarhus Convention might be desirable, but that the prospect of reaching such an agreement in the foreseeable future is unlikely. Further, the execution of a regional agreement, for example in the Asian region, would not be easy, because, with the exception of the ASEAN Human Rights Commission which was established in 2010, no regional organisation exists to act as a driving force.

The Working Group acknowledged that public international law instruments on human rights already contain some provisions on information and participation rights which can also extend to environmental issues. However, these provisions are not always easily applicable to everyday concerns of individual citizens or of environmental organisations on matters such as land use, pollution control, permitting of economic activities or waste management. Also,

these provisions are often laid down in soft-law instruments. The Working Group was of the opinion that discussions on the interrelationship between human rights and environmental concerns at international, regional and national levels should be continued and deepened. The goal should be to integrate the existing mechanisms of international human rights law as they may apply to the environment.

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

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

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

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

3. Participation in environmental decision-making

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

The difference between consultation and participation was clarified by the group, as follows: consultation is a unilateral process, where citizens and environmental groups are given the opportunity to comment on a specific or general proposed activity. Participation, in contrast, is bi-lateral and gives more overt protection to the rights and interests of those involved: the administration identifies the public concerned, makes available to that public the necessary information and documentation, accepts submissions, opinions and alternative proposals, takes these comments into consideration and, once the decision is taken, explains the option chosen and the reasons for this choice. The new element, which the Aarhus Convention brought to the discussion on environmental policy decisions, is that the administration is now obliged to listen to the public and can be sanctioned if it omits to do so.

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

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

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

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

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

4. Access to justice in environmental matters

With regard to access to justice in environmental matters, the Group felt that there should be, according to the specific situation of each country, binding legal provisions on access to courts. Pending such measures, soft-law approaches which facilitate access to justice, such as

guidelines or recommendations, might be applied as a first step, though the second step should not be "forgotten".

It was noted that in 2010, the United Nation Environment Programme (UNEP) adopted "Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters" which might inspire national legislators. Until now, however, this soft-law approach appears to have had limited influence on national legislation.

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

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

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

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

5. Capacity-building of actors on environmental issues

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

Unlike other policy sectors – agriculture (farmers), fisheries (fishers), competition (competitors), trade and industry (producers and traders) etc - the environment has no social group behind it which actively participates in shaping, elaborating, amending and applying the legal provisions affecting the sector. For this reason, public authorities need to make specific efforts in protecting the environment against vested interest pressures. Civil society stakeholders should be entitled and enabled to contribute to this task, as they are affected by environmental impairment. Better access to environmental information, improved

participation in decision-making and reasonable provisions on access to the courts can improve the protection, preservation and improvement of the environment, for the benefit of the present and of future generations.

III. Working Group 3: Actors, Institutions and Governance

1. Initial questions:

i. Defining vulnerable groups

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

- For local and national environmental issues, human rights concerns of specific groups were easily identified; examples included: pollution; deforestation and the impact of building and operating hydro dams.
- For global environmental issues, human rights concerns are more generalised, but still affect some groups more than others; the main concerns expressed were: Climate change, where particularly vulnerable groups included Arctic peoples, island peoples, and poorer communities without adequate resources to adapt to rapid change; biodiversity depletion, where vulnerable groups identified included forest peoples and fishing communities

Some of these issues are revisited more specifically below.

ii. Human rights, environment protection and transitional justice

A further question raised in the initial discussion was that of transitional justice, a concept from human rights law that could be imported into the realm of environmental law. This was said to arise in circumstances where the environment of landowners or managers has been severely impacted by the policies of former authoritarian regimes in some countries in both Asia and Europe, whereby large scale mining and forestry activities were carried out without adequate or any environmental impact assessment or other participation by local people. This included situations where a large proportion of traditionally occupied land was classified as forest areas and later regarded by the authorities as State forest areas, without any recognition of the fact that they were customary or traditionally-occupied lands. The issuing of forestry, plantation and mining licenses over these lands resulted in major land disputes, which prevented the implementation of sustainable natural resources management principles. These situations have caused serious environmental problems with some victims continuing to suffer many years later. The point was made that the concept of transitional justice in human rights breaches can be borrowed by environmental law systems to address ecosystem restoration and well as to provide some restitution for victims by recognising their environmental rights.

2. Potential conflicts between human rights and environment protection

i. General

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

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

ii. Human rights and conservation conflicts in the Indigenous context

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

- *Article 28:* 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. ...
- *Article 29:* 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for Indigenous peoples for such conservation and protection, without discrimination.

iii. Human rights and development conflicts: hydro dams

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

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

The positive effects included:

- Reducing reliance on fossil fuels
- Benefiting navigation
- Assisting flood control

The negative effects included:

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

3. Environmental impact assessment, governance and human rights

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

- i. The use of strategic impact assessment, which involves long term broad-scale, often cumulative and transboundary, impact assessment which takes into account the environmental, human rights and social concerns of any particular development. Examples of hydro dams on major international rivers in Europe and Asia were mentioned.
- ii. Social impact assessment: this includes where development activity affects communities and specific groups within communities' terms of social and cultural rights to life
- iii. Human rights impact assessment was discussed as a specific aspect of social impact assessment, asking the question of how a particular development activity affects the specific human rights of relevant individuals and communities, including livelihood, privacy, family, shelter etc.

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

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

4. Addressing multi-stakeholder concerns

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

While there was general agreement concerning the adoption of the basic procedural elements of information and public participation of the Aarhus Convention in the Asian region, it was also recognised that institutional backing and capacity building was required to make these procedural elements a reality. Merely setting up a legal framework would not guarantee implementation. Discussion then centred on how best to promote Aarhus elements, with the following options being explored:

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

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

5. The need for an international authority within the UN system on environmental issues

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

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

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

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

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

6. Market mechanisms, human rights and environment protection

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

- Can market mechanisms address both environment protection and human rights concerns?
- Are voluntary Corporate Social Responsibility codes adequate to address environment protection and human rights concerns?

There was some agreement that market mechanisms can only be consistently effective if backed by adequate regulatory frameworks.

The concept of “social licensing” was also discussed. This is defined as follows:

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

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

7. Concluding points

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

IV. Working Group 4: Climate Change and Human Rights Implications

1. The link between climate change and human rights

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

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

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

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

2. Climate change-induced displacement

One of the most complicated issues in this context is of forced migration or ‘climate refugees’. As yet there is no specific and agreed definition of ‘climate refugee’. The group felt that a separate definition may promote ‘potential discrimination’. There was consensus to go with a ‘soft law’ approach such as specific guidelines or social, economic criteria for describing a climate refugee. Meanwhile, the fact that climate change is not a stand-alone cause for migration cannot be disregarded, as there are other causal factors as well as State failure to protect people from becoming refugees for reasons other than climate change.

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

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

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

There is a clear need to have international and regional level discussions on how to manage environmentally displaced people. The overall costs of climate change migration at the regional and international level must be analysed and existing and new mechanisms should be explored to share the costs. Existing mechanisms at international level, such as Article 1 of the *International Covenant on Economic, Social and Cultural Rights*: ‘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 and current *United Nations Framework Convention on Climate Change* (UNFCCC) discussions on the ‘Loss and Damage associated with climate change impacts’⁷, seem to provide some space to address the issue but the extent of those mechanisms need to be explored further.

States should continue the discussion of climate change-related migration at the UN Human Rights Council and ensure that it is considered in the preparation of the sustainable development goals (SDG) discussions and decisions. A Special Rapporteur or Representative to provide legal solutions on how to manage environmentally displaced people could be appointed; or conversely, this role could be assigned to the existing special rapporteurs. The engagement of the affected communities in these discussions and decisions is also required.

3. Indigenous populations and climate change adaptation

Indigenous populations are adversely affected by climatic hazards and impacts all over the world. Their direct dependence on natural resources and forests are hugely disrupted by climate change. Climate change exacerbates their existing vulnerabilities, as they are already marginalised in terms of political participation and decision making. State and civil societies should effective processes and mechanisms in place to empower Indigenous populations so that they can enjoy procedural rights. The Arctic Council⁸ can be a good example which facilitates the inclusion of indigenous groups in scientific and policy decision making. State and civil society should also provide them with space at the national and international level so that they can communicate their problems or propose potential solutions that are context-specific and respectful of their culture, traditions and diversity. Platforms like ASEF can organise a pre-COP (Conference of Parties) conference on Indigenous groups.

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

States should empower Indigenous populations so that they can better enjoy procedural rights. Particular attention should be given to the participation requirements of Indigenous populations who may face additional barriers to participation and justice. When defining

⁷ http://unfccc.int/adaptation/workstreams/loss_and_damage/items/6056.php

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

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

policy, decision makers need to address the specific contexts of that particular community – respecting their culture, tradition and diversity – whether shifting livelihoods, migrating to new areas or ensuring property rights.

4. Education, innovation and environmental protection

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

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

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

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

Innovations, however, do not only mean technological and scientific innovation; there can be social or behavioural innovation as well. For example, modifying old practices or using old practices in newer contexts, such as consensus based decision-making by the Sami¹² Communities. States should take into account the risks and benefits of different stakeholders

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

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

¹² http://en.wikipedia.org/wiki/Sami_people

while making development decisions at local, national and international levels. Realisation and implementation of procedural rights can be instrumental in this regard in promoting the integration of human rights considerations in climate change with the protection of biodiversity or traditional practices.

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

Conclusions

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

1. States should adopt a human-rights-based approach to environmental protection as part of their national environmental regulatory framework.
2. The need for economic development is a driving force for many countries. In balancing development, human rights and environmental protection, Governments should ensure that strategic impact assessments are undertaken for significant development projects so as to assess the long-term social, environmental and human rights impacts of a development on both individuals and communities. Environment impact assessment requirements should be legislated and based on Principle 10 of the *Rio Declaration* – namely, access to information, public participation and access to justice.
3. Extensive training on human rights responsibilities and environment protection should be provided for judges, lawyers, public prosecutors, civil servants and other policy makers who are involved in the application and adjudication of all environmental laws and regulatory instruments as appropriate in both the European and Asian regions.
4. States should attempt to address existing legal barriers that make access to justice difficult for individual litigants and environmental organisations in environmental matters. Effective systems of legal aid and pro-bono legal assistance should be made available where possible to citizens and organisations.
5. Governments should establish mechanisms to promote capacity-building and human rights education for citizens, environmental organisations and public authorities with regard to public participation in environmental decision-making procedures. They should also provide easy access to all relevant documents, including environment impact statements and related studies. The public should have the opportunity to make submissions and comments on projects before administrative decisions are taken.
6. The effects of climate change often require quick adaptation. However, it is recognised that institutional barriers can make it difficult for some Indigenous and other local communities to adapt quickly. States should ensure that all projects and programmes affecting Indigenous and local communities and their lands have their free, prior and informed consent and the capacity for them to monitor the implementation of such projects.
7. States should empower Indigenous and other relevant local communities so that they can exercise procedural rights. Particular attention should be given to the participation requirements of Indigenous populations which may face additional barriers to participation and justice. When defining policy, decision makers need to address the specific context of that particular community – respecting their culture, traditions and diversity – whether changing livelihoods, migrating to new areas or maintaining property rights.
8. Access to information, participation in environmental decision-making and access to judicial process are vital to addressing environment protection in the context of

human rights. Access to information should be open, cost-free, effective and provided without discrimination. Governments are recommended to implement the recommendations of UNEP on access to information and participation in decision-making in environmental matters (*Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*):

- a. In the absence of enabling provisions, existing mechanisms of international law on access to information should be integrated into national environmental law and be made fully operational and effective.
 - b. Countries should consider whether regional agreements should be drafted to introduce binding provisions on access to information, participation in decision-making and access to justice in environmental matters.
 - c. In Asia, this could be done by adapting the basic procedural elements of information and public participation of the *Aarhus Convention* at the regional level through each regional environmental organisation in South Asia, ASEAN and North East Asia, with institutional backing and capacity building to encourage domestic level adoption. In ASEAN, the newly established Human Rights Commission could pursue such an initiative on the basis of Article 28(f) of the 2012 ASEAN Human Rights Declaration, which focuses on environmental rights.
9. States should give more prominence to human rights perspectives in international environmental issues, especially in the negotiation of the post-Kyoto Protocol climate change regime and the drafting of the Sustainable Development Goals (SDGs). Human rights organisations should participate more actively in this process alongside environmental and governmental actors.
 10. The United Nations Environment Programme (UNEP) should remain the key authority within the UN system on environmental issues and ensure that it keeps up with environmental challenges and the increasingly close link to human rights in the 21st century. In keeping with the Rio+20 Outcome Document: *The Future We Want*, governments should support the ongoing process of strengthening and upgrading of UNEP.
 11. States should encourage UNEP to ensure the active participation of relevant stakeholders in the UN system “*drawing on best practices and models from relevant multilateral institutions and exploring new mechanisms to promote transparency and the effective engagement of civil society*” (*The Future We Want*). Other UN agencies such as the UN Human Rights Council and UNDP should also be key partners in this discussion.
 12. There is an urgent need to promote international and regional level discussion on how to manage environmentally displaced people. The overall social, cultural and economic costs of climate change migration at the regional and international level need to be analysed, and existing and new mechanisms explored to manage the burden of those costs.
 13. States should continue the discussion of climate change-related migration in the UN Human Rights Council and ensure that it is placed at the highest possible level in the international SDG discussions and decisions.

The aim of the Informal ASEM Seminar on Human Rights is to promote mutual understanding and co-operation between Europe and Asia in the area of political dialogue, particularly on human rights issues.

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