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#THE TIME IS NOW

THE CASE FOR UNIVERSAL RECOGNITION OF THE RIGHT TO A SAFE, CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT

David Boyd, John Knox, Marc Limon

UNIVERSAL RIGHTS GROUP

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FOREWORD

The international community's foremost priorities in 2021 will be to 'build back better' from the COVID-19 pandemic, and to finally confront the climate crisis. Both will require a political acknowledgement of deep and critical interrelationship between the natural environment and human rights.

Almost 50 years ago, UN member States met in Stockholm, Sweden, and declared that: 'Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.' Since that time, UN member States, with Costa Rica in the vanguard, have adopted a wide range of resolutions exploring and asserting the inter-linkages between the environment, ecosystem health and climate security, including the risks associated with the latter, and the enjoyment of human rights. Those resolutions, together with landmark reports by UN Special Rapporteurs, have shown in detail how the enjoyment of human rights is heavily dependent on a clean and healthy environment; how, conversely, environmental damage, eco-system destruction and global warming can have a terrible impact on the enjoyment of human rights (including the rights to health and to life – a point seen very clearly in the context of the COVID-19 crisis), especially the rights of those in already-vulnerable situations; and how human rights obligations and commitments can help strengthen environmental policymaking, driving more effective, equitable and sustainable outcomes.

Over time, this evolving understanding has powered a huge wave of support for the recognition of the human right to a clean, healthy and sustainable environment, in national constitutions and legislation, in national and regional court decisions, and in regional treaties. Today, over 150 UN member States recognise the right of their people to a clean, healthy and sustainable environment (R2E) in either national or international law. Regarding the latter, I am particularly pleased that later this year the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), which recognises R2E, will enter into force.

Over recent years, Costa Rica has been proud to work with like-minded States at the UN, including the Maldives, Morocco, Slovenia and Switzerland, to translate this national- and regional-level progress into UN-level movement, advancing discussions towards the universal recognition of R2E. We have been heartened in this regard by growing support for this step amongst senior UN figures, including the UN Secretary-General, the High Commissioner for Human Rights, the Executive Director of UNICEF and the Executive Director of the UN Environment Programme, as well as civil society.

In 2021, as a result of this work and the decades long struggle stretching back to the 1972 Stockholm Conference on the Environment, an important window of opportunity exists to make a final push for universal recognition of R2E, via a Human Rights Council resolution followed by a resolution at the General Assembly.

The policy report before you, for which I am pleased to provide this short foreword, seeks to tell the story of efforts, over nearly five decades, to craft and insert this crucial missing piece into the Universal Declaration of Human Rights jigsaw, to describe the content of R2E, and to make the case for the urgent recognition of this critical human right by the United Nations. #TheTimeIsNow.

Rodolfo Solano Quirós
Minister of Foreign Affairs of Costa Rica

EXECUTIVE SUMMARY

In September 2020, Costa Rica, the Maldives, Morocco, Slovenia and Switzerland delivered a joint statement at the 45th session of the Human Rights Council (Council) committing themselves to bring forward resolutions, at the Council in Geneva and at the General Assembly in New York, declaring universal recognition of the right to a safe, clean, healthy and sustainable environment (R2E).

The statement followed a steady build-up of momentum over the course of 2020. During that time, senior UN figures, including the Secretary-General, the High Commissioner for Human Rights, the Executive Director of UNICEF and the Executive Director of the UN Environment Programme, joined a growing chorus of support for universal recognition.

Notwithstanding, the story of the push for universal recognition of R2E goes back much further.

Environmental concerns were entirely absent during UN discussions on the Universal Declaration of Human Rights and the negotiation of the two international human rights covenants, for the simple reason that the instruments were negotiated before the advent of the modern environmental movement in the late 1960s. The first significant effort to change this *status quo* came almost 50 years ago, when States adopted the 1972 Stockholm Declaration and Action Plan for the Human Environment. The Stockholm Declaration catalysed a global movement to better connect human rights and environmental concerns in national legislation and even in national constitutions. Increasingly, that included moves by governments to recognise, at domestic level and in regional treaties, the inalienable right of their people to a safe, clean, healthy and sustainable environment.

However, post-Stockholm progress at the UN lagged far behind that seen at national and regional levels. The first significant attempt to address this imbalance came in the mid-1990s, when a group of States led by Costa Rica, South Africa and Switzerland tabled three resolutions at the UN Commission on Human Rights (the Commission) on 'Human rights and the environment.' However, from the very start, these States faced considerable opposition from several large UN members, with the result that the resolutions were relatively unambitious and were eventually discontinued.

This remained the situation until 2006, when the Commission was replaced by the Council, and a Small Island Developing State, the Maldives, took it upon itself to revive international efforts to draw links between human rights and environmental harm. It acted first through a series of resolutions on human rights and climate change and then, from 2011 onwards, through annual resolutions on human rights and the environment. In 2012, the Council created its first mandate on human rights and the environment, and appointed John Knox as an independent expert charged with clarifying the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. The mandate was renewed in 2015 and its title changed to Special Rapporteur; in 2018, it was renewed again with the appointment of David Boyd, who was charged with reporting annually to the General Assembly as well as to the Council.

It was the unspoken hope of the Maldives that the norm-setting exercise initiated by the Council resolutions on climate change and the environment, clearly important in of itself, might also represent a first step towards open and informed intergovernmental reflections on the relative merits of declaring a new universal right to a safe, clean, healthy and sustainable environment. In 2018, in reports to the Council and to the General Assembly, Professors Knox and Boyd urged the UN to recognise the right. By early 2020, there was a clear sense of political momentum towards universal recognition, thanks in large part to the leadership and ambition of States such as the Maldives, Costa Rica, Switzerland, Slovenia, Morocco, Fiji, Finland and Monaco, and of many civil society organisations, including AIDA, CIEL, Earthjustice and the Universal Rights Group.

Unfortunately, the onset of the COVID-19 pandemic delayed the plan to table the necessary Council and General Assembly resolutions in 2020.

Against this background, in September 2020, a group consisting of the current and former UN Special Rapporteurs on human rights and the environment, civil society leaders and academics, sent a letter to the core group of States supporting the mandate urging them:

[...] to seize the historic opportunity now before us and to publicly commit to tabling the necessary resolutions [recognising R2E] before both the Council and the General Assembly by the end of 2021 – in time for the 50th anniversary of the Stockholm Conference on the Human Environment in 2022.

This was complemented by a further letter from almost 1,000 civil society organisations urging the Council 'to recognise without delay the human right of all to a safe, clean, healthy and sustainable

environment.' 'In view of the global environmental crisis that currently violates and jeopardises the human rights of billions of people on our planet,' the letter continued, 'global recognition of this right is a matter of utmost urgency.'

Perhaps influenced by these interventions, on 15 and 24 September 2020, members of the core group on human rights and the environment delivered two important statements that point towards the likelihood of universal recognition of R2E in 2021.

The first statement was issued by Ambassador Stadler Repnik of Slovenia and noted that over recent months the core group had 'started a series of informal consultations on a possible global recognition' of R2E. 'I sincerely believe,' she continued, 'that the time has come to act together and to act now.'

This was followed, on 24 September, by a joint statement at the Council, delivered by Costa Rica and others, reaffirming their firm belief 'that a safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights [...] Therefore, a possible recognition of the right at a global level could have numerous important implications on our and future generations.'

With these historic steps, the international community has come within touching distance of what would be the capstone of a decades-long endeavour: the elaboration, declaration and UN-level recognition of the right to a safe, clean, healthy and sustainable environment.

THE CONTENT OF THE HUMAN RIGHT TO A SAFE, CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT

What is the content of a human right to a safe, clean, healthy and sustainable environment? One advantage of the long quest for UN recognition of R2E is that its content has already been largely developed. Even in the absence of global recognition, human rights institutions have delineated clear and consistent State obligations to protect the environment. R2E is therefore not an empty vessel waiting to be filled. On the contrary, the content of the right has already emerged, but it is waiting for a vessel to integrate it and give it shape.
The obligations of States to respect, protect and fulfil a globally recognised R2E have evolved along three paths: the recognition of R2E at the regional and national levels; the application of other human rights, such as the rights to life and health, to environmental issues; and the inclusion of procedural rights in environmental treaties.

In 2018, these three paths converged with the adoption of UN Framework Principles of Human Rights and the Environment, elaborated by the UN Special Rapporteur on human rights and environment and presented to the Council. These bring together and summarise the human rights obligations of States in relation to the enjoyment of a safe, clean, healthy and sustainable environment. As Marcos Orellana, the Special Rapporteur on toxic waste and human rights, has said, recognition of an overarching global human right to a clean, safe, healthy and sutainable environment would bring together the environmental aspects of existing rights, so that their content would no longer be dispersed and fragmented, but integrated in a single normative frame. The Principles do not exhaust the possibilities of R2E or set a ceiling on what the right may become, but they do provide practical, comprehensive guidance on what R2E, together with other human rights, already requires of States, as well as a solid platform for its further development.

The 16 Principles assert that States:

- Should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights, and should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment (Principles 1 and 2);
- Should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment (Principle 3);
- Should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence (Principle 4);
- Should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters (Principle 5);
- Should provide for education and public awareness on environmental matters (Principle 6);

- Should provide 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 (Principle 7);

- Should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights (Principle 8);

- Should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process (Principle 9);

- Should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment (Principle 10);

- Should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights (Principle 11);

- Should ensure the effective enforcement of their environmental standards against public and private actors (Principle 12);

- Should cooperate with each other 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 (Principle 13);

- Should take 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 (Principle 14);

- Should ensure that they comply with their obligations to indigenous peoples and members of traditional communities (Principle 15);

- Should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development (Principle 16).

Side event during the 37th session of the Human Rights Council on Framework Principles of Human Rights and the Environment, March 2018, Geneva.

HOW WOULD UNIVERSAL RECOGNITION OF THE RIGHT TO A SAFE, CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT HELP IMPROVE LIVES AND PROTECT THE PLANET?

For decades, there has been a lively debate among scholars about the merits of UN recognition of R2E. Would such a step offer tangible benefits? Proponents have asserted that recognition would contribute to a variety of positive procedural and substantive outcomes ranging from increased public participation in environmental management, to cleaner air and water. Critics have argued that such a right would duplicate existing norms, and would ultimately prove unenforceable and ineffective.

In truth, this debate should have been settled long ago. We now have more than four decades of experience with the recognition and implementation of R2E. While legal recognition of this right by no means offers a panacea, the evidence is clear: where the right exists, it has a proven track record of catalysing effective and equitable action, in protection of both people and planet.

In cooperation with the Vance Center for International Justice, the UN Special Rapporteur on human rights and the environment recently prepared an updated list of States that legally recognise R2E. According to that study, there are 110 States where R2E enjoys constitutional protection, and 126 States have ratified regional treaties that include recognition of the right (these two groups of States overlap significantly). Taken together, this means that more than 80 per cent of UN member States (156 out of 193) now legally recognise the right to a safe, clean, healthy and sustainable environment.

There are two primary pathways through which international recognition of R2E can lead to improved environmental outcomes and a decline in adverse impacts on human and ecosystem health. The first is through the influence of international human rights law on national constitutional, environmental and human rights law. The second is through the application of R2E in cases brought before international courts and tribunals.

Regarding the former, international recognition of R2E has a clear positive impact on the development of national constitutions, legislation and jurisprudence. The Stockholm Declaration has been regularly cited as an inspiration by States rewriting their constitutions and/or amending legislation to include environmental rights and responsibilities. This leads to stronger environmental laws, the improved implementation and enforcement of those laws, and improved environmental outcomes (e.g. cleaner air, safe drinking water), particularly for vulnerable and marginalised populations.

Similarly, there are many examples of international law influencing national court decisions relating to R2E. For example, the Stockholm Declaration influenced decisions of the Supreme Court of India protecting the implicit constitutional R2E.[1] In another example, R2E in the African Charter led Kenyan and Nigerian courts to make important rulings finding R2E to be an essential part of the constitutional right to life (even though it is not explicitly articulated as such in either the Kenyan nor Nigerian Constitutions).[2] Likewise, Costa Rican and Colombian courts have cited the San Salvador Protocol in cases involving R2E.[3]

Regarding the latter, there is a growing body of regional jurisprudence – from the African Commission and Court on Human and Peoples' Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the European Committee of Social Rights, and the European Court of Human Rights – related to violations of R2E. The connection between environmental degradation and human rights has influenced international tribunal rulings on cases involving countries from Argentina to Turkey and from Russia to Nigeria. Air pollution, water pollution, noise pollution, exposure to toxic substances, and the failure to enact and enforce environmental laws, have all been identified as violations of various human rights, including the rights to life, health, water, culture, and a healthy environment.

Given that both of these pathways have produced legal and environmental benefits, there is a *prima facie* case that further international recognition of R2E would provide additional benefits of a similar nature. Indeed, this argument is supported by reference to the impacts of UN resolutions adopted in 2010 recognising the right to clean water and sanitation. Those texts led to important constitutional reforms and legislative changes in a number of countries, influenced a number of court decisions, and - most importantly - contributed to improved quality of life for millions of people.

CONCLUSIONS AND RECOMMENDATIONS

Most of the members of the UN have already formalised the clear and compelling relationship between human rights and the environment, by adopting R2E in their national constitutions and/or in regional treaties. They have done so because they recognise that a safe, clean, healthy and sustainable environment is necessary to human dignity, equality and freedom, and therefore demands recognition as a fundamental human right.

As a result of decades of courageous and determined work – a story told in this policy report - an important window of opportunity now exists to make a final push to secure universal recognition of R2E, via a Council resolution followed by a resolution at the General Assembly.

The authors of this report believe the broad and growing support for such a move amongst the UN's leadership, Special Procedures and civil society reflects widespread support amongst States (including, of course, the more than 150 States that already legally recognise the right). It is also our belief that the COVID-19 pandemic (in particular the understanding that the crisis was partly caused by humankind's failure to protect and conserve the natural environment), as well as a widespread determination to place human rights, the environment and climate at the centre of global efforts to 'build back better,' adds to the sense that now is the time for that final push. Finally, our sense of urgency is fuelled by the simple and unavoidable fact that the grave and worsening climate, environment and biodiversity crises facing the world, and their impacts on the enjoyment of human rights (including millions of preventable deaths caused by air pollution), require us to use every tool at our disposal to push back.

While it will be important to build a broad coalition of States, both developed and developing, behind universal recognition, it seems clear that the momentum built over the past five decades, coupled with the large number of countries that have already recognised R2E, and the greater public awareness of the crucial inter-relationship between human rights and the environment that has emerged due to the climate crisis and the COVID-19 pandemic, together mean **#TheTimeIsNow.**

Environmental human rights defender and Goldman Prize Winner, Máxima Acuña Atalaya, February 2016, Peru.

INTRODUCTION

Young activists call for stronger environmental protection policies during the 2019 global climate strike, April 2019, London.

In September 2020, Costa Rica, the Maldives, Morocco, Slovenia and Switzerland delivered a joint statement at the 45th session of the Human Rights Council committing themselves to bring forward resolutions, in Geneva to the Council and in New York to the General Assembly, declaring universal recognition of the right to a safe, clean, healthy and sustainable environment.

The statement followed a steady build-up of momentum over the course of 2020. During that time, senior UN figures, including the Secretary-General, the High Commissioner for Human Rights, the Executive Director of UNICEF and the Executive Director of the UN Environment Programme, joined a growing chorus of support for universal recognition. For example, during the 44th session of the Council in June/July 2020, the High Commissioner, Michelle Bachelet, said:

It is time for global recognition of the human right to a healthy environment – recognition that can lead to stronger policies, at all levels, to protect our planet and our children. The right to a healthy environment is grounded in measures to ensure a safe and stable climate; a toxic-free environment; clean air and water; and safe and nutritious food. It encompasses the right to an education with respect for nature; to participation; to information; and to access to justice [...].

Notwithstanding, the story of this important step – for both human rights and the natural environment – goes back much further, a tale told in this policy brief. After recounting key moments on this journey, the policy brief then summarises what we mean by 'the right to the safe, clean, healthy and sustainable environment' (R2E), including the substantive content of such a right. It then explains why universal recognition of R2E is so important – what it would bring to international efforts to strengthen the enjoyment of human rights, defend and conserve the natural environment, and leverage the linkages between the two. The policy brief also presents case studies showing, at a practical level, how legal recognition of R2E (in many of the more than 150 or more countries that have done so) has helped improve lives and protect planet Earth.

The authors' goals are straightforward, yet exceptionally important: to explain how the world arrived at this critical juncture; to show, in practical terms, what universal recognition of R2E would mean for people and the planet; and – ultimately – to lend support to the growing calls around the world for States to seize the day and take the last few remaining steps on the path to UN recognition of this fundamental human right.

#TheTimeIsNow

I.

TOWARDS UNIVERSAL RECOGNITION OF R2E: A JOURNEY 50 YEARS IN THE MAKING

International efforts to draw attention to, understand, clarify, and leverage the relationship between human rights and the environment have made remarkable progress since the establishment of the UN Human Rights Council in 2006. Environmental concerns were entirely absent during UN discussions on the Universal Declaration of Human Rights and the negotiation of the two international human rights covenants, because the instruments were negotiated before the advent of the modern environmental movement in the late 1960s. The first significant attempt to change this *status quo* came almost 50 years ago, when States meeting at the 1972 United Nations Conference on the Environment (the first major UN meeting on the subject) adopted the Stockholm Declaration and Action Plan for the Human Environment (hereinafter the Stockholm Declaration). The Declaration placed environmental issues at the forefront of international concerns and marked the start of a dialogue between developed and developing countries on the link between economic growth, the conservation and protection of the natural environment, and the rights of people around the world. It proclaimed that: 'Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself;' and, in Principle 1, asserted 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, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'[4]

The Stockholm Declaration catalysed a global movement to better connect human rights and environmental concerns in national constitutions and legislation. Increasingly, that included moves by governments to recognise, at domestic level and in regional treaties, the inalienable right of their people to a safe, clean, healthy and sustainable environment (see chapter III).

However, post-Stockholm progress at the United Nations lagged far behind. The first significant attempt to address this imbalance came in the mid-1990s, when a group of States led by Costa Rica, South Africa and Switzerland tabled a series of three resolutions at the UN Commission on Human Rights (the Commission), the predecessor to the Human Rights Council, on 'Human rights and the environment.'[5] However, from the very start, these States faced considerable opposition from several large UN members (developed and developing countries), with the result that the resolutions were relatively unambitious and were eventually discontinued.

This remained the situation until 2006, when the Commission was replaced by the Human Rights Council (the Council), and a Small Island Developing State, the Maldives, took it upon itself to revive international efforts to draw links between human rights and environmental harm. It acted first through a series of resolutions on human rights and climate change and then, from 2011 onwards, through annual resolutions on human rights and the environment. It was the unspoken hope of the Maldives that the norm-setting exercise initiated by these texts, clearly important in and of itself, might also represent a first step towards open and informed intergovernmental reflections on the relative merits of declaring a new universal right to a safe, clean, healthy and sustainable environment. In pursuing this strategy, the Maldives was confronted by the same alignment of States that had opposed the Costa Rica-led initiative over a decade earlier.

This chapter will begin by describing why some States have consistently opposed steps, at international level, towards strengthened links between human rights and the environment. The chapter then explains how the Maldives and its allies (especially Costa Rica, Slovenia and Switzerland), through Council initiatives on human rights and climate change, and then on human rights and the environment, were able to circumvent this political opposition, bringing the international community to within touching distance of the elaboration and declaration of a new universal right to a safe, clean, healty and sustainable environment.

POLITICAL OPPOSITION TO ENVIRONMENTAL RIGHTS AT THE UNITED NATIONS

Throughout the 1990s and the first decade of the 21st century, the default position of many powerful UN member States (developed and developing) was a *de facto* belief that the promotion and protection of human rights and the preservation and protection of the environment were, and should remain, two completely separate areas of UN policy. Drawing links between the two was not only unnecessary; it was, from the viewpoint of many States, deeply unwelcome.

Why was this the case? As chapter III in this policy brief explains, many States have adopted a notably progressive position on human rights and the environment at the national level, even going so far as to recognise a constitutional right to a clean, safe, healthy and sustainable environment. Yet at the international level, despite some small steps forward such as the aforementioned Stockholm Declaration and, to a lesser extent, the 1992 Rio Declaration on Environment and Development, those same States would generally reject the notion that environmental harm had any implications for fundamental rights, or that promoting human rights norms could help protect against environmental damage.

Former UN Secretary-General Boutros Boutros-Ghali and Secretary-General of the UN Conference on Environment and Development (UNCED) Maurice Strong, during the first day of UNCED, June 1992, Rio de Janeiro.

The basic reason for this apparent schizophrenia can be understood through reference to attempts by some countries (and resistance thereto on the part of others) from 1994 onwards to move the international human rights community towards a more progressive understanding of the links between human rights and the environment.

Building on reports submitted to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities by its Special Rapporteur on human rights and the environment, Fatma Zohra Ksentini,[6] in 1994 a group of States, led by Costa Rica, South Africa and Switzerland, began tabling resolutions at the Commission on 'Human rights and the environment.'[7] These early resolutions were interesting for two principal (interconnected) reasons. First, they were notably unambitious – a result of difficult negotiations between the global North and global South. Second, a reading of the texts gives a strong sense of the latter's determination to 'balance' environmental concerns with a linked (and overriding) determination to not, under any circumstances, put their national socio-economic development at risk. This determination can be most obviously seen in the repeated references, in the texts, to the concept of the 'right to development.'[8]

The tension between an emphasis on development and an emphasis on environmental protection can be clearly seen playing out in the evolution of the Commission's various resolutions on human rights and the environment from 1994 to 1996. For example, resolution 1994/65, while recognising in one operative paragraph that 'environmental damage has potentially negative effects on human rights,' nevertheless reiterates in another paragraph language from the 1992 Rio Declaration stating that 'the right to development must be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations,' and (in a preambular paragraph) that 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 and developmental policies.'[9]

Further developing this theme, while acknowledging that 'the promotion of an environmentally healthy world contributes to the protection of the human rights to life and health of everyone,' the resolution nonetheless makes clear that 'in this connection States shall act in accordance with their common but differentiated responsibilities and respective capabilities,' and that, in order to protect the environment, developing countries will need 'access to and the transfer of environmentally sound technologies [...] on

favourable terms,' and 'new and additional financial resources [...] to achieve sustainable development.'

After 1996, the resolutions (which continued to include language such as 'common but differentiated responsibilities' and 'additional financing') were discontinued. The issue of human rights and the environment would be largely absent from the Commission's agenda for the next five years.

In April 2001, the Commission adopted decision 2001/111, which called for an expert seminar on human rights and the environment to be convened jointly by the Office of the High Commissioner for Human Rights (OHCHR) and the UN Environment Programme (UNEP).[10] The seminar was eventually held in January 2002 in Geneva.

Later that year, which was also the year of the World Summit on Sustainable Development, the initiative on human rights and the environment returned in earnest, but with draft resolutions now called: 'Human rights and the environment as part of sustainable development.'[11] This was a small but highly symbolic shift. According to a Costa Rican diplomat involved in the negotiations, the name change was one of a number of concessions extracted from the main sponsors by large developing States. The goal of these countries, in 2002 as in 1994–1996, was to place the mutually dependent goals of promoting human rights and protecting the environment within the wider framework of (sustainable) development.

Asserting the right to development, these States worked to block any attempt (real or imagined) by Western States to push an environmental or human rights agenda as a way of holding back the socio-economic development of poorer countries. At the same time, they sought to assert the principles of common but differentiated responsibilities, respective capabilities and historical responsibility to make the case that any downward pressure on human rights in the developing world, caused by environmental harm, was not (wholly or even principally) their responsibility, but rather the responsibility of developed countries. Thus, unless the global North were to create an enabling environment (e.g., through international cooperation to mitigate transboundary environmental harm, or through financial support or technology transfers) then they could not be held responsible for the human rights consequences of such harm.

The following year, the Commission adopted another resolution: 2003/71. After opening with a piece of historical revisionism, 'recalling the *extensive work*, reports and resolutions [of] the Commission on Human Rights on issues relevant to environmental protection *and sustainable development*' (emphasis added), and the underwhelming assertion that 'environmental damage can have potentially negative effects on the enjoyment of some human rights,'[12] the resolution sets out many of the positions common in earlier texts.

Towards the end of the text, members of the Commission do acknowledge what an impartial observer might see as the crux of the issue (and thus as the main focus of any resolution): the 'relationship between the environment and human rights.' However, in a crucial qualification, they make clear that this is only a 'possible relationship.'[13]

HUMAN RIGHTS AND CLIMATE CHANGE

This remained the situation until members of the new Human Rights Council took their seats for the first time in June 2006. By this point, UN-level efforts to clarify and leverage the relationship between human rights and the environment had ground to a halt. As a Costa Rican diplomat involved in the last resolutions of the Commission noted: 'we [the main sponsors of the resolutions] had been tied in so many knots, from so many sides, that the resolutions had become incomprehensible and the initiative had lost any sense of purpose.'

The key to overcoming the impasse would not be (for the time being) further resolutions on human rights and the environment, but rather a completely new initiative, focused on human rights and climate change. This initiative was significant because it reflected a new determination on the part of small, vulnerable developing countries to question and then openly oppose the 'development first' paradigm, presented by their larger, more powerful partners in the Global South. For these environmentally vulnerable States, it was unthinkable that the prioritisation of economic growth or development (often presented through the lens of the right to development) could be used as a justification or excuse to harm the natural environment, especially in a globalised world in which such harm is increasingly transboundary. Similarly, it was unthinkable that the international community could ignore the real and present threat posed by environmental harm (especially harm linked to climate change) to internationally recognised human rights.

From 2006 onwards, climate change and its relationship with human rights became the issue within which these vulnerable country concerns were distilled and projected. The links

7th session of Human Rights Council, March 2008, Geneva.

between human rights and climate change first began to be drawn, at the intergovernmental level, during the seventh session of the Council in March 2008. Prompted by the Malé Declaration of November 2007,[14] a number of countries, including the Maldives and Philippines, noted the serious consequences of climate change for the full enjoyment of human rights and called on the Council to address the human rights dimension. Then, in March 2008, a core group of States, including Bangladesh, Germany, Ghana, Maldives, Philippines, Switzerland, UK, Uruguay and Zambia, secured the adoption by consensus of Council resolution 7/23 on 'Human rights and climate change.'[15]

Resolution 7/23 was the first UN resolution to state explicitly that climate change poses 'an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.'[16] The resolution also asked OHCHR to prepare a study on the nature and extent of those implications. That study, published the following January, detailed the adverse impacts of global warming on a spectrum of human rights, including the rights to life, food, water, the highest attainable standard of health, housing, and self-determination; described the effects on specific groups including women, children and indigenous peoples; and presented a survey of possible State obligations related to climate change.[17]

A second Council resolution (10/4), adopted in March 2009, echoed the findings of the OHCHR report and affirmed that 'human rights obligations and commitments have the potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.'[18] Although the final texts of resolutions 7/23 and 10/4 were more coherent and focused on the principal issue at hand (i.e., the relationship between human rights and climate change/environment) than the earlier Commission texts, the negotiations leading up to their adoption were far from straightforward. The Commission may have been replaced by the Council, but the old political fault lines remained firmly in place, especially over

the relative emphasis placed on human rights, environmental protection, and socio-economic development, and over the relative emphasis given to individual State responsibility/obligation on the one hand, and the responsibility of the international community on the other.

In particular, during negotiations, large emerging economies (e.g., China, Egypt, India, Iran, Nigeria, Saudi Arabia) insisted on the inclusion of strong and repeated references to the right to development (especially as a collective right), as well as to the (State-centric rather than individual-centric) principles of historic responsibility, respective capabilities, and common but differentiated responsibilities. According to diplomats, if such concepts and principles (or, as they often referred to them, 'safeguards') could not be included, then the resolutions should be withdrawn by the main sponsors.

Western European States opposed the inclusion of such language, arguing that such references risked creating the impression (and precedent) that developing countries could only guarantee the enjoyment of human rights if they were provided with a conducive international environment in which to do so: namely an environment wherein they are left to pursue their collective right to development, wherein rich countries would provide development assistance to support such efforts, and wherein rich countries would take responsibility for mitigating transboundary environmental harm and pay for vulnerable States to adapt.

In the end, a compromise was reached whereby the core group of main sponsors agreed to include two carefully worded preambular paragraphs in resolution 7/23 (the text of the second paragraph also appeared in resolution 10/4):

Recalling that the Vienna Declaration and Programme of Action reaffirmed the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and as an integral part of fundamental human rights,

Recognizing that human beings are at the centre of concerns for sustainable development and that the right to development must be fulfilled so as to equitably meet the development and environmental needs of present and future generations.[19]

The main sponsors refused to include any explicit reference to common but differentiated responsibilities, respective capabilities, or historic responsibilities, on the grounds that these (albeit) important principles of sustainable development and climate change diplomacy had no place in a human rights text.

Notwithstanding, certain Western States, notably Canada (a Council member at the time) and the United States (an observer), continued to express concern. These States were especially worried about setting two interconnected precedents: first, that individual harm caused by environmental degradation could be considered a human rights violation; and second, that polluting (or high emitting) countries (i.e., industrialised or emerging economies) could be held accountable for resulting human harm in a third country, such as Bangladesh, Maldives or the Philippines.

These concerns led Canada and the United States to repeatedly disavow the idea, during the negotiations over the resolution, that there was any relationship between human rights and climate change. With that in mind, they proposed an important amendment to operative paragraph 1, replacing 'has consequences' with 'may have consequences,' so that the language would read:

Concerned that climate change may have consequences, both direct and indirect, for the full enjoyment of human rights.[20]

Canada and the United States also insisted on the deletion of a paragraph in the draft text that would become resolution 10/4, which listed a number of human rights particularly affected by global warming.

Nevertheless, after the OHCHR report made clear that climate change does have implications for human rights, and also identified the specific rights that are particularly at risk, Canada and the United States agreed to stronger wording in a preambular paragraph of resolution 10/4:

Noting that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.[21]

Despite these compromises, Canada and the United States – principally reflecting their concern about being accused (due to their 'historic responsibility' for climate change) of violating human rights in vulnerable developing States – joined large emerging economies in calling the main sponsors to withdraw the resolutions. The main sponsors refused.

THE OHCHR REPORT

OHCHR's report on the relationship between human rights and climate change, called for by resolution 7/23 and published in January 2009, identified three key legal questions:

1. Is there a relationship between climate change and human rights, and if so, what is the nature of that relationship?

2. Does climate change constitute a violation of human rights, especially the rights of vulnerable people?

3. Irrespective of whether climate change represents a human rights violation, what are States' national-level and international-level human rights obligations pertaining to climate change?

Regarding the first question, the OHCHR report concluded that:

Climate change-related impacts [...] have a range of implications for the effective enjoyment of human rights. The effects on human rights can be of a direct nature, such as the threat extreme weather events may pose to the right to life, but will often have an indirect and gradual effect on human rights, such as increasing stress on health systems and vulnerabilities related to climate change-induced migration.[22]

After clearly stating that there is an important connection between climate change and the enjoyment of human rights, OHCHR then provided its views on the exact nature of the relationship. It drew four broad conclusions:

1. Certain specific rights are most directly affected: the right to life; the right to adequate food; the right to water; the right to health; the right to adequate housing; and the right to self-determination.

2. The human rights impacts of climate change will be felt unevenly both between and within nations.

3. Climate change is very likely to lead to large-scale human rights crises with horizontal impacts across the aforementioned specific rights and across the aforementioned vulnerable population groups.

4. As well as the direct and indirect impacts of climate change itself, measures taken to mitigate and adapt to global warming can also have adverse secondary effects on human rights.

Regarding the second question, OHCHR stated:

While climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense.[23]

On the third question, OHCHR argued that although 'the physical impacts of global warming cannot easily be classified as human rights violations [...] addressing that harm remains a critical human rights concern and obligation under international law.'[24]

In a summary of a number of different General Comments by the Committee on Economic, Social and Cultural Rights, the OHCHR report proposed four distinct types of international or extraterritorial human rights obligations. Specifically, it contended, States have legal obligations to:

- refrain from interfering with the enjoyment of human rights in other countries;

- take measures to prevent third parties (e.g., private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries;

- take steps through international assistance and cooperation, depending on the availability of resources, to facilitate the fulfilment of human rights in other countries; and

- ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.[25]

In its conclusions, OHCHR built on this analysis and stated that: 'International human rights law complements the UNFCCC [United Nations Framework Convention on Climate Change] by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realisation of human rights.'[26]

JUNE 2009 PANEL DEBATE

In its resolution 10/4, the Council decided 'to hold a panel discussion on the relationship between climate change and human rights at its eleventh session.'[27] The panel took place three months later, on 15 June 2009.[28]

High Commissioner for Human Rights Navanethem Pillay addressed the Council on Human Rights at the ninth session, September 2009, Geneva.

During the debate, no delegation argued with the notion that climate change has implications for a wide range of explicitly identified, internationally protected human rights; that already vulnerable 'climate frontline' countries are most at risk (and least able to adapt); and that the human rights impacts do not fall evenly across a given population, but rather disproportionately affect already marginalised or vulnerable groups, such as women and children.[29]

Despite progress in forming a consensus on the broad parameters of the relationship between climate change and human rights, significant differences in emphasis persisted in 2009, especially regarding the legal implications of the relationship. In particular, while many developing and vulnerable States argued that human rights law creates legal obligations that are applicable to international action on the issue of climate change, developed countries by-and-large continued to insist that climate change and human rights inhabit two separate and very different bodies of law, with no formal connection between the two. For example, during the debate, the US delegation agreed that 'climate change [...] has implications for the full enjoyment of human rights' but at the same time noted that 'there is no direct formal relationship between climate change and human rights as a legal matter.' Similarly, Canada argued that situations *may* occur in which environmental degradation amplified by climate change *may* set conditions that impact on the effective enjoyment of human rights, but went on to make clear that there is no legal link between the UNFCCC and the international human rights conventions.

These differences in emphasis were amplified in the context of the other two key questions posed in the OHCHR report, namely whether climate change impacts constitute a human rights violation, and what human rights obligations exist, at national and international levels, in relation to climate change.

On the first point, a few (though not many) States used the June panel debate to question the assertion made by OHCHR that 'the physical impacts of global warming cannot easily be classified as human

rights violations, not least because climate change-related harm often cannot clearly be attributed to acts or omissions of specific States.'[30] The strongest opponent of this reading was Pakistan, which argued that it is possible to establish responsibility for climate change and to link that responsibility to human rights harm: 'We believe it is important and possible to disentangle [the] basics of this causal relationship.' Responsibility for climate change, they went on, can be determined at two levels: developed countries' historical responsibility for climate change; and their failure to comply with international legal obligations.

India also questioned the idea that it is difficult to assign responsibility and, like Pakistan, posited that responsibility can be determined on the basis of both historic emissions and developed States' failure to abide by international legal obligations (under the UNFCCC) on contemporary emissions:

The present crisis that we are now discussing is the result of activity over the past two centuries, where the contribution of developing countries had been minimal [...] It is a matter of concern that despite the targets for reductions in emissions that [developed] countries assumed under the Kyoto Protocol, there are few signs that these will be met. The question of accountability for failure to implement legally binding and internationally agreed provisions relating to emissions reduction targets needs to be looked at closely.

Notwithstanding the importance of these differences, the main division between States in June 2009 was on the question of the relative weight of national human rights obligations in the context of the climate crisis as against extraterritorial obligations. Again, the fault line between States ran roughly along developed-developing country lines.

For their part, most (but not all) developed countries insisted that while the climate crisis may be international in scope, human rights promotion and protection is the sole purview of national governments *vis-à-vis* their citizens and others within their jurisdiction. It is therefore up to individual States to promote and protect the human rights of their people in the face of such crises, irrespective of the additional burden placed upon them.

On the other hand, the importance of recognising and enforcing extraterritorial human rights obligations in the face of climate change was made, in varying formulations, by almost all developing country delegations that took part in the debate, as well as by some more progressive developed country representations. Most vocal were environmentally vulnerable States. Bangladesh offered the frankest rebuttal of the State-centric assessment offered by industrialised countries:

It is often said that human rights protection is the responsibility of the national authorities - basically downgrading international cooperation. Even in dealing with climate change, which is a global issue, too much emphasis is put on national responsibility [...] Least Developed Countries and Small Island States will be the worst affected by climate change although they have contributed least to global greenhouse gas emissions. It is not only unfair but also unjustified to hold these countries responsible fully for protecting their people.

Many vulnerable States were quick to emphasise that the need to give greater emphasis to extraterritorial obligations should not be seen as commensurate with a reluctance to accept their own human rights obligations. Rather, while accepting the importance of domestic action, they were nonetheless robust in their defence of the idea that to effectively protect human rights in the face of climate change, observance of their international human rights obligations must necessarily be combined with respect, on the part of the international community, for extraterritorial obligations – most particularly the obligation 'to refrain from taking action which interferes with the enjoyment of human rights in other countries, and to take steps through international cooperation to facilitate the fulfilment of those rights.'[31]

For example, the Maldives, speaking on behalf of twelve SIDS, emphasised that while they were committed through domestic policies to address the human rights implications of climate change,

with emission levels continuing to rise and considering the barriers preventing direct and simplified access to adaptation funding, as well as the current inadequacy of new and additional adaptation funding, the fact is that it will become increasingly difficult for us [acting alone] *to fully safeguard the fundamental freedoms and rights of our island populations. This then raises the issue of international cooperation [...] We believe that such cooperation is not only desirable; it is vital and, moreover, is a legal obligation under the core international human rights instruments. Under these agreements there is a clear extraterritorial obligation beholden on State Parties to refrain from acting in such a way as knowingly undermines human rights in other countries; a fact reinforced by reference to Principle 2 of the Rio Declaration. There is also an extraterritorial legal obligation to take steps through international assistance to facilitate the fulfilment of human rights in other countries.*[32]

Children drink fresh water from a nearby water source, October 2010, Papua New Guinea.

A FORK IN THE ROAD

After the conclusion of the June 2009 panel, the main sponsors of the Council's two resolutions on human rights and climate change (Bangladesh, Germany, Ghana, Maldives, Philippines, Switzerland, UK, Uruguay, and Zambia) faced two questions.

The first was how to leverage the emerging consensus on the human rights impacts of climate change, by feeding into and helping to promote ambition in the UNFCCC climate change negotiations, and promoting a rights-based approach to (international and domestic) climate policy. On this question, the Council had already decided, with resolutions 7/23 and 10/4, to transmit its deliberations and conclusions on the relationship between human rights and climate change to the Conference of Parties (COP) to the UNFCCC. This decision, together with intensive lobbying by the Maldivian and Swiss delegations to the COP, especially in the run-up to COP15 in Copenhagen and COP16 in Cancun, and a late intervention at COP16 by Ambassador Luis Alfonso de Alba (the first President of the Human Rights Council and, by the time of COP16, Mexico's Special Envoy on climate change); eventually resulted in the inclusion of human rights language in the Cancun Agreements (a non-binding COP 'decision,' rather than a treaty).

Preambular paragraph 7 of the decision taken at the Cancun COP (decision 1/COP.16) notes:

Resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status, or disability.[33]

Building on this, operative paragraph 8 (under 'a shared vision for long-term cooperative action') affirms that: 'Parties should, in all climate change-related actions, fully respect human rights.' This was the first inclusion of human rights language in a multilateral climate change (or environmental) instrument. The text used in operative paragraph 8 would be closely reflected, five years later, in the wording of preambular paragraph 10 of the Paris Agreement:[34]

Acknowledging 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.'

The second question facing the main sponsors of Council resolutions 7/23 and 10/4 was: how to usefully continue their work at the Council to further clarify human rights norms as they pertain to climate change, and do so in a manner that would maintain consensus? This was a significant challenge.

Broadly speaking, the boundary of consensus was marked by the same issues that had divided countries during negotiations of the various Commission resolutions on human rights and the environment. Large developing countries continued to hold that it was unfair to expect them to make significant progress in the areas of human rights and environmental protection in the absence of socio-economic development, and that international cooperation must form an important part of facilitating such development. These countries therefore emphasised the concepts of the right to development, international cooperation, and common but differentiated responsibilities. Developed countries, on the other hand, argued that human rights promotion and protection are solely the concern of national governments, and that concepts such as the right to development should not be used as an excuse for the failure of developing countries to respect human rights. Some, such as the United States and Canada, were also concerned that the initiative on human rights and climate change should not encourage litigation on the part of climate-vulnerable communities. There was, in short, a real risk, as the main sponsors of resolutions 7/23 and 10/4 surveyed the politics of the Council in 2011, that the initiative on human rights and climate change might be seized by one side of this divide and used as a political tool to attack the other.

A SIDEWAYS STEP: THE RETURN OF HUMAN RIGHTS AND ENVIRONMENT

Against this background, the Maldives approached Costa Rica and Switzerland, two of the three former main sponsors of the Commission's resolutions on human rights and the environment (Switzerland was also a member of the core group on human rights and climate change), to discuss their interest in restarting that initiative at the Council.

High-level Advisory Group on Climate Change Financing (AGF) during the UN Conference on Climate Change (COP16) in Cancun, Decemer 2010, Mexico.

The thinking of these countries was that further meaningful, useful and consensus-based progress at the Council on human rights and climate change was highly unlikely. Yes, it was possible to put forward further resolutions, but if those resolutions did not achieve anything substantively useful, then there was a real risk of the initiative either treading water or being hijacked and used to push political agendas.

At the same time, the three countries rejected the argument of certain civil society organisations (e.g., CIEL, Earthjustice, Friedrich-Ebert-Stiftung) and some members of the human rights and climate change core group (principally Bangladesh and the Philippines – countries that had always been inclined to sway towards the position of the large emerging economies), that the Council should establish a new Special Procedures mandate on human rights and climate change.

According to the Maldives, Costa Rica and Switzerland, the Council's initiative on human rights and climate change had fulfilled its purpose – to generate awareness and understanding about the impacts of global warming on human rights, to show how human rights principles could be leveraged to improve global climate change policy, and to transfer that understanding to the main UN forum for addressing climate change: the UNFCCC COP. A common refrain of these States was that the problem of climate change would never, in the final analysis, be resolved by the Human Rights Council; it would be resolved, if at all at, UN-level, by UNFCCC climate negotiators. Thus, for example, a new Special Procedures mandate might generate interesting debates at the Council, but he or she would be unlikely to play a useful role in driving more ambitious and just international climate policy responses, especially considering the heavily intergovernmental nature of negotiations at the UNFCCC COP.

What was needed, rather, was a norm-clarifying and norm-defining effort at the Council, to understand more precisely how human rights principles and commitments might be applied to international and national environmental policy, including climate change policy. In other words, the main sponsors wanted to move beyond general debates between States on the presence and nature of the relationship between human rights and the environment, to a more practical exercise premised on setting out the norms and, ultimately, working with all relevant stakeholders to apply those norms internationally and domestically.

Crucially, such an exercise would be more feasible and achieve better results within the overall context of human rights and the environment, than if the focus were to remain centred on climate change. Climate change was, at the time (and so it remains), an issue of high politics. With so much at stake internationally, with such impassioned positions among countries of the global South, the global North, and civil society, and with such differences of opinion over questions of responsibility, it was unlikely that States at the Council would be able to come to a common understanding on whether and how to apply human rights principles and commitments.

Questions of environmental conservation and protection more broadly, on the other hand, were unlikely to generate the same level of political reaction, thus providing an opportunity for more objective reflection. Even in the wider context of environmental (not just climate change) policy, further progress would be difficult if left to inter-State negotiation. Far better would be for the Council to appoint an Independent Expert (a type of Special Procedures mandate) to clarify and set down relevant norms in an objective manner and free from political influence.

With this in mind, in March 2011, at the 16th session of the Council, the Maldives, Costa Rica and Switzerland, together with a wider core group that included Morocco, New Zealand, Slovenia and Uruguay, began consultations on a new draft resolution on human rights and the environment – the first text on the subject for eight years.

The eventual result, Council resolution 16/11, represented a fine balancing act between the needs and concerns of large emerging economies and those of large developed countries. The preamble recalled relevant principles of sustainable development (e.g., common but differentiated responsibilities), but, crucially, it did so by directly citing relevant international instruments (e.g., Principle 7 of the Rio Declaration) rather than by asserting the principles in their own right (in a human rights text); and repeated paragraphs found in Council resolutions 7/23 and 10/4 on the right to development.

Further preambular paragraphs then recalled the broad parameters of the common ground agreed by States in the context of the Council's two resolutions on climate change, the OHCHR report and the 2009 panel debate. For example, in resolution 16/11, the Council recalled:

- Sustainable development and the protection of the environment can contribute to human well-being and the enjoyment of human rights.
- Environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights.
- While these implications affect individuals and communities around the world, environmental damage is felt most acutely by those segments of the population in already vulnerable situations.

- Human rights obligations and commitments have the potential to inform and strengthen international, regional, and national policymaking in the area of environmental protection, promoting policy coherence, legitimacy and sustainable outcomes. (The resolution's preamble ends with a call on States to take human rights into consideration when developing environmental policies.)

- Many forms of environmental damage are transnational in character and effective international cooperation to address such damage is important in order to support national efforts for the realisation of human rights.[35] (This last point represented a carefully negotiated compromise between developed countries, which emphasised the primary responsibility of the home State to promote and protect human rights, and developing countries keen to emphasise the importance of international cooperation).

The aim of these paragraphs was to define the existing common ground around human rights and climate change/human rights and the environment – to clarify and set down, in an intergovernmental text, the contours of contemporary consensus.

The operative paragraphs then put in place the first step through which the main sponsors of the resolution would seek to further expand the contours of that common ground. Most importantly, the Council asked OHCHR to prepare an assessment of the current situation *vis-à-vis* the relationship between human rights and the environment, internationally, regionally and nationally.[36] The aim here was threefold: to set down in an official UN document (an OHCHR report) the current state of international agreement around the relationship; in so doing, to identify gaps and areas where further norm clarification and norm-setting would be needed or useful; and to demonstrate that many States had gone much further at national level (e.g., by agreeing to constitutional provisions on environmental rights) than they were currently willing to do at international level. The resolution asked OHCHR to prepare this 'scoping' report for consideration at the Council's 19th session, one year later (March 2012).[37]

Following the presentation of the report at the 19th session, the Maldives, together with Costa Rica, Switzerland and other members of the core group tabled a new draft resolution welcoming the study prepared by OHCHR, yet recognising, nonetheless, 'that certain aspects of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment require further study and clarification.'

With that normative gap in mind, the text called for the establishment of 'an independent expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.' As an Independent Expert (rather than a Special Rapporteur), the new three-year Special Procedures mandate would focus mainly on studying and clarifying human rights norms relating to the enjoyment of a healthy environment. As noted earlier in this chapter, the Council had already reached the outer limits of intergovernmental consensus on issues of human rights, climate change, and the environment; the aim of this new independent, objective, and expert mechanism would be to work through inclusive dialogue and consultation 'to study [...] the human rights obligations, including non-discrimination obligations, relating to the enjoyment of a safe, clean, healthy and sustainable environment.' In other words, he or she would further clarify and codify the human rights normative framework related to the environment.

It was the unspoken hope of the main sponsors that such a norm-clarifying and norm-setting exercise, undertaken in consultation with, and with the consent of all States, would represent important progress in and of itself, and that it would also represent a first step towards open and informed intergovernmental reflections on the relative merits of declaring a new universal right to a safe, clean, healthy and sustainable environment.

At the conclusion of the first three-year term, the Council decided (in resolution 28/11 of March 2015), on the basis of a text negotiated by Costa Rica on behalf of the core group, to renew the mandate for a further three years – but this time as a Special Rapporteur. This meant the mandate-holder would be expected to expand his focus beyond clarifying and setting down relevant norms, to working with States and other stakeholders to see those norms implemented and realised at national level.[38]

The resolutions adopted by the Council on human rights and the environment in March 2016 (resolution 31/8) and March 2017 (resolution 34/20) show the extensive evolution of governments' views since they had returned to the topic in 2011.[39] Resolution 31/8 was a remarkably ambitious text, adopted by consensus on the basis of a draft prepared by Slovenia as the lead negotiator for the core group.

It set out, in many cases for the first time in an intergovernmental text, a range of newly clarified human rights norms relating to the environment. Resolution 31/8 is significant both as an indicator of how far the Council had travelled in five years, and because much of the text contained therein, and echoed in resolution 34/20, helped to inform the content of the Framework Principles on Human Rights and the Environment and, therefore, the potential substantive content of a UN-recognised R2E (see chapter II).

Human Rights Council, June 2010, Geneva.

With resolution 31/8, the Council called on or encouraged States to:

- Respect, protect and fulfil human rights obligations when taking actions to address environmental challenges, and when developing environmental laws and policies.
- Adopt and implement laws ensuring, among other things, the rights to information, participation and access to justice in the field of the environment.
- Facilitate public awareness and participation in environmental decision-making, including on the part of civil society and vulnerable population groups, by protecting all human rights, including the rights to freedom of expression, and to freedom of assembly and association.
- Ensure non-discrimination when undertaking environmental action, including climate action, to ensure that laws and policies are responsive to the needs of persons and communities in vulnerable situations.
- Promote a safe and enabling environment for civil society and environmental human rights defenders, so that they may operate free from threats, hindrance and insecurity.
- Provide for effective remedies for human rights violations and abuses, including those relating to the enjoyment of a safe, clean, healthy and sustainable environment, in accordance with their international obligations and commitments.
- Take into account human rights obligations and commitments relating to the enjoyment of a safe, clean, healthy and sustainable environment in the implementation and monitoring of the Sustainable Development Goals (SDGs).
- Facilitate the exchange of knowledge and experiences between national experts in the environmental and human rights fields, in order to promote coherence between different policy areas.
- Collect disaggregated data on the effects of environmental harm on vulnerable groups, as appropriate.
- Build capacity for the judicial sector to understand the relationship between human rights and the environment.
- Foster a responsible private business sector and encourage corporate sustainability reporting in accordance with relevant international standards and initiatives.

- Address compliance with human rights obligations and commitments relating to the enjoyment of a safe, clean, healthy and sustainable environment in the framework of their interaction with the international human rights mechanisms (e.g., UPR, Treaty Bodies, Special Procedures).

- Ensure that projects supported by environmental finance mechanisms respect all human rights.[40]

As well as providing possible substantive content for a future international R2E, the resolutions repeatedly used a formulation, first seen in resolution 16/11, designed to provide a potential stepping-stone to such a right: namely 'the promotion and protection of human rights as they relate to the enjoyment of a safe, clean, healthy and sustainable environment.' As noted by observers at the time of the adoption of resolution 16/11, this wording (especially the inclusion of the phrase 'enjoyment of') seemed designed to enable proponents, at some point in the future, to add the words '[...] the right to [...]' so that the UN would consider 'the enjoyment of [the right to] a safe, clean, healthy and sustainable environment.' Indeed, paragraph 5(a) of resolution 31/8 and paragraph 6(a) of resolution 34/20 give a clear indication that this was the ultimate objective of the main sponsors. They each encouraged States:

To adopt an effective normative framework for the enjoyment of a safe, clean, healthy and sustainable environment.

FEBRUARY 2020 EXPERT SEMINAR

Building on this significant body of work since 2008, and in order to provide a platform for the final push towards universal recognition of the right to a safe, clean, healthy and sustainable environment (R2E), on 6 February 2020 the Council's core group on human rights and the environment (Costa Rica, Maldives, Morocco, Slovenia and Switzerland), with the support of the Universal Rights Group (URG), the Commonwealth Small States Office in Geneva, the Geneva Academy, UNICEF, UNEP and OHCHR, convened an expert seminar to consider the growing movement towards national-level recognition of R2E around the world, to understand the value of this right for individual rights-holders and for the environment, and to answer one central question: is it time for universal recognition of R2E?

The meeting began with introductory remarks by the Ambassadors of Slovenia and the Maldives, before hearing keynote addresses by the UN High Commissioner for Human Rights, Michelle Bachelet, the Executive Director of UNEP, Inger Andersen, and UNICEF's Deputy Director of Programmes, Henriette Ahrens. States and civil society were then able to offer comments and present their positions on R2E.

The **High Commissioner for Human Rights** drew attention to the importance of universal recognition of R2E, which, she said, has the potential to 'transform the lives of millions.' She argued that a healthy environment 'is just as vital to human well-being as shelter, clean water or freedom of expression.' For this reason, 'all people everywhere should have the right to live in a healthy environment and have the ability to hold those who impede that right to account.' Noting that more than 150 countries have already recognised this basic reality through constitutional provisions, laws and regional agreements, she said that global recognition was the natural and necessary next step to drive more ambitious policies to protect people and planet.

Similarly, the **Executive Director of UNEP** underlined the mutually interdependent relationship between the environment and rights. She noted how legal recognition of R2E has been expanding for decades (ever since the 1972 Stockholm Conference), with more than 100 countries having incorporated it into their constitutions and many more having recognised it through national laws and jurisprudence, or through regional agreements. As a result, the right is protected in more than three-quarters of countries around the world.

Notwithstanding, 'far more needs to be done,' she said. At a time of a global climate emergency, 'we need every tool in the toolbox to push back, and R2E is one of those tools. UNEP therefore fully supports universal recognition.'

UNICEF's Deputy Director of Programmes addressed the particular importance of universal recognition for children. She noted that more than 1.7 million children under the age of five lose their lives every year as a consequence of avoidable environmental impacts, with millions more suffering disease, disability and an array of other harms, including respiratory conditions, heart disease, lung cancer, neurodegenerative disease and impaired cognitive development – all of which have been shown to be linked to exposure to unsafe environments. She urged participants to understand that 'the environmental and climate crises are also child rights crises.'

She further pointed to the disproportionate impacts of environmental degradation on children living in poverty, and to how it exacerbates existing inequalities within and across generations and societies. This in turn makes universal recognition of R2E essential for the achievement of the SDGs 'leaving no one behind.'

Ambassador of Slovenia H.E. Sabina Stadler Repnik calls UN member states to create bridges and alliances to address global concerns, September 2016, New York.

For all these reasons, she said, 'UNICEF fully supports global recognition of the right to a healthy environment and believes that if coupled with rapid and systematic action by States to prevent and control exposure to unsafe environmental conditions, it would have substantial and long-lasting positive impact for children and their rights.'

Unfortunately, the onset of the COVID-19 pandemic put paid to the core group's plan to use the Seminar as a launchpad for a final push towards universal recognition in 2020. Against this background, on the first day of the Council's final session of 2020 (from 14 September to 7 October), a group consisting of the current and former UN Special Rapporteurs on human rights and the environment, civil society leaders and academics,[41] sent a letter to the core group[42] urging them:

...to seize the historic opportunity now before us and to publicly commit to tabling the necessary resolutions [recognising R2E] before both the Council and the General Assembly by the end of 2021 – in time for the 50th anniversary of the Stockholm Conference on the Human Environment in 2022. This public commitment could be extended, for example, via a joint statement during the present 45th session of the Council [...] and a joint statement during the upcoming meeting of the Third Committee of the General Assembly (75th session).

We of course pledge our full support to you in this crucial endeavour – for people and planet.

The letter came on top of a further civil society appeal to the core group (entitled 'The Time Is Now'), signed by over 1000 civil society organisations from 100 countries, calling for the Council to recognise 'the right of all to a safe, clean, healthy and sustainable environment [...] without delay.'[43]

Perhaps influenced by these interventions, on 15 and 24 September 2020, members of the core group on human rights and the environment delivered two important statements that point towards the likelihood of universal recognition of R2E in 2021.

The first was issued by Ambassador Stadler Repnik of Slovenia and noted that over recent months the core group had 'started a series of informal consultations on a possible global recognition' of R2E. 'I sincerely believe,' she continued, 'that the time has come to act together and to act now.' She concluded by expressing her expectation that the ongoing process of consultations would result in the consensual recognition of R2E by UN member States.[44]

This was followed, on 24 September, by a joint statement at the Council, delivered by Costa Rica on behalf of Maldives, Morocco, Slovenia and Switzerland, reaffirming their firm belief 'that a safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights [...] Therefore, a possible recognition of the right at a global level could have numerous important implications on our and future generations.'[45]

With these historic steps, UN member States, including Costa Rica, the Maldives, Slovenia and Switzerland, and many human rights and environmental civil society organisations – with the strong support of the first and current UN Special Rapporteurs on human rights and the environment, John Knox and David Boyd (two of the authors of this policy brief), have moved the international community to within touching distance of what would be the capstone of a decades-long endeavour: the elaboration, declaration and UN-level recognition of the right to a safe, clean, healthy and sustainable environment.

II.

THE CONTENT OF THE RIGHT TO A SAFE, CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT

What is the content of the human right to a safe, clean, healthy and sustainable environment? One advantage of the long quest for UN recognition of R2E is that its content has already been largely developed. Even in the absence of global recognition, human rights institutions have delineated clear and consistent State obligations to protect the environment. R2E is therefore not an empty vessel waiting to be filled. On the contrary, the content of the right has already emerged, but it is waiting for a vessel to integrate it and give it clearer shape.

The obligations of States to respect, protect and fulfil a globally recognised human right to a clean, safe, healthy and sustainable environment have evolved along three paths: the recognition of the right to a healthy environment at the regional and national levels; the application of other human rights, such as the rights to life and health, to environmental issues; and the inclusion of procedural rights in environmental treaties.

This chapter explains the development of environmental human rights law in each of these areas. It then describes the Framework Principles of Human Rights and the Environment, which bring together and summarise the human rights obligations of States in relation to the enjoyment of a safe, clean, healthy and sustainable environment. As Marcos Orellana, the Special Rapporteur on toxic waste and human rights, has said, recognition of an overarching global human right to a healthy environment would bring together the environmental aspects of existing rights, so that their content would no longer be dispersed and fragmented, but integrated in a single normative frame.[46] The Framework Principles do not exhaust the possibilities of R2E or set a ceiling on what the right may become, but they do provide practical, comprehensive guidance on what R2E, together with other human rights, already requires of States, as well as a solid platform for its further development.

THE DEVELOPMENT OF ENVIRONMENTAL HUMAN RIGHTS LAW

This section describes each of the three main paths of development of environmental human rights law: (1) the recognition of an autonomous R2R at the regional and national levels; (2) the application of other rights to environmental issues; and (3) the inclusion of procedural rights in environmental treaties.[47]

REGIONAL AND NATIONAL RECOGNITION

In 1981, the African Charter became the first human rights treaty to include an environmental right, providing in article 24 that all peoples have the right to 'a general satisfactory environment favourable to their development.' Seven years later, the San Salvador Protocol to the American Convention on Human Rights was the first treaty to present the right to live in a healthy environment as an individual right. Two later instruments, the 2004 Arab Charter on Human Rights and the 2012 Human Rights Declaration of the ASEAN countries, included the right to a 'healthy' (Arab Charter) or 'safe, clean, and sustainable' (ASEAN Declaration) environment as an element of the right to an adequate standard of living. Although the European Convention on Human Rights and the European Social Charter do not explicitly recognise the right to a healthy environment, in 1998 the UN Economic Commission for Europe adopted the Aarhus Convention, which sets out rights of access to information, public participation, and remedy and states that its parties shall guarantee these rights '[in]order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.'[48]

At the end of 2019, David Boyd, the Special Rapporteur on human rights and the environment, reported to the Human Rights Council that 126 States belonged to regional treaties recognising R2E. This total included 52 parties to the African Charter, 16 parties to the San Salvador Protocol, 16 parties to the Arab Charter, and 45 parties to the Aarhus Convention.[49] Another 10 States have adopted the ASEAN Declaration.

At the national level, at least 100 countries provide 'direct constitutional protection' to environmental rights,[50] and at least 12 other countries, including India and Pakistan, have held that the right is inherent in the constitutional right to life.[51] Some countries, such as Argentina, Colombia, Costa Rica, Greece, India, Pakistan and the Philippines, have developed an extensive jurisprudence based on the right to a healthy environment. In all, Boyd reports that 156 of the 193 members of the United Nations have legally recognised the right.[52]

'GREENING' HUMAN RIGHTS

In addition to formal recognition of R2E, advocates have sought to 'green' other rights. International human rights institutions have long held that States have obligations not only to refrain from violating human rights directly, but also to protect their enjoyment from interference by others. Human rights tribunals and other expert bodies have held that environmental harm interferes with the full enjoyment of a wide range of human rights and that States have failed to meet their obligations to protect against such interference.

The first case from a regional human rights tribunal to illustrate this approach was Lopez Ostra v. Spain (1994), in which the European Court of Human Rights held that pollution that prevented an individual from living in her home could interfere with her right to respect for private and family life protected by article 8 of the European Convention, even if the pollution did not endanger her health. The Court held that States have a duty to take reasonable and appropriate measures to protect against such interference, including by corporations. Later decisions construing article 8 have allowed governments discretion in setting substantive standards but have imposed strict procedural requirements, including that States assess the environmental effects of proposed activities, make environmental information public, and provide access to judicial remedies. Similarly, the European Court has held that to protect the right to life (recognised in article 2 of the Convention) from environmental harm, States must establish legal frameworks to deter violations and investigate and punish violations if they nevertheless occur.[54]

The first important environmental case in the African regional system concerned massive oil pollution in the Niger Delta region by the Nigerian Government and Royal Dutch Shell. The African Commission found that such exploitation violated the human rights of the Ogoni people living in the delta, including their right to a satisfactory environment and their right to health, and held that Nigeria had duties to take 'reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.'[55]

The Inter-American Court of Human Rights has held that States have obligations to consult with indigenous and tribal peoples regarding any proposed concessions or other activities that may affect their traditional lands and natural resources, ensure that no concession will be issued without a prior environmental and social impact assessment, and guarantee that they receive a 'reasonable benefit' from any such plan, if approved. A State may proceed with a development project that would have a major impact in their territory only if it obtains 'their free, prior, and informed consent, according to their customs and traditions.'[56] In 2017, the Court issued a far-reaching advisory opinion on human rights and the environment, stating, among other things, that the responsibility of States under the American Convention extends to actions within their territory or control that cause transboundary environmental harm, and that the rights to information, public participation and access to justice are integral to the rights of life and personal integrity in the environmental context.[57]

Many of the Independent Experts and Special Rapporteurs appointed by the Human Rights Council and its predecessor, the Commission on Human Rights, have addressed environmental issues within the scope of their mandates. In 1995, the Commission appointed a Special Rapporteur to investigate the effects on human rights of illicit dumping of toxic products in developing countries. That mandate has expanded to include the management and disposal of hazardous substances and wastes more generally.[58] Other mandate-holders that have addressed environmental issues include the Special Rapporteur on the rights of indigenous peoples,[59] the Special Rapporteur on human rights defenders,[60] the Special Rapporteur on the right to food,[61] and the Special Rapporteur on extreme poverty and human rights.[62]

As explained in chapter I, in 2012 the Council created a new mandate for an Independent Expert to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. The first mandate-holder, John Knox, issued a series of reports that described in detail how human rights bodies have applied human rights norms to environmental issues.[63] In 2015, the Council renewed the mandate for another three-year term, changed the title of the mandate-holder to Special Rapporteur, and requested that he promote the realisation of the obligations. To that end, he prepared the Framework Principles on Human Rights and the Environment that are described below. In 2018, the Council renewed the mandate for another three years, appointing David Boyd as Special Rapporteur. Professor Boyd has issued reports describing how human rights law, and the right to a healthy environment in particular, applies to particular substantive areas including air pollution, climate change and biodiversity.[64] He has also issued a report describing over 500 good practices in the implementation of the right to a healthy environment from more than 170 States.[65]

Although UN human rights treaty bodies have lagged behind regional tribunals in issuing environmental decisions, they are beginning to catch up. In August 2019, the Human Rights Committee, which oversees State compliance with the International Covenant on Civil and Political Rights (ICCPR), for the first time held that a State had violated the right to life by failing to protect individuals from environmental harm – specifically, the fumigation of toxic chemicals on agricultural fields, which caused injury and death.[66] The Committee held that the government concerned had an obligation to investigate and sanction those responsible, provide full reparation to the victims, and take measures to prevent similar violations in the future. More cases are pending, including two claims concerning climate change: a petition by Torres Strait Islanders against Australia (also before the Human Rights Committee), and a claim by Greta Thunberg and 15 other youth and children against Argentina, Brazil, France, Germany and Turkey (before the Committee on the Rights of the Child).

RIGHTS IN MULTILATERAL ENVIRONMENTAL AGREEMENTS

Multilateral environmental agreements almost never refer to human rights explicitly, although the Paris Agreement on climate change (2015) is a prominent exception: its preamble states that its parties 'should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights' (see chapter I). However, many environmental treaties do encourage or require parties to provide access to information or to promote public participation on issues within their scope. Principle 10 of the 1992 Rio Declaration goes further, stating:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

In 2010, the Governing Council of the UN Environment Programme adopted the Bali Guidelines, a set of 26 voluntary guidelines that provide general guidance to States on promoting the effective implementation of their commitments to Principle 10 within the framework of their national legislation and processes.[67]

At the regional level, the Aarhus Convention (1998), which has 47 parties in Europe and Central Asia, and the Escazú Agreement (2018), ratified (so far) by 12 countries in Latin America and the Caribbean, each set out detailed requirements that their parties collect and provide environmental information, facilitate public participation in environmental decision-making, and ensure that members of the public have access to legal remedies. Both of these agreements explicitly connect the rights detailed in the agreement to R2E.[68]

THE FRAMEWORK PRINCIPLES ON HUMAN RIGHTS AND THE ENVIRONMENT

The 16 Framework Principles on Human Rights and the Environment presented to the Human Rights Council in 2018 set out the obligations of States under international human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment.[69] They were the result of extensive research and consultations in different regions of the world. The principles were published in October 2017 in draft form, in order to provide opportunity for comments. Comments received were then taken into account before the Framework Principles were finalised.

Although decisions by national courts and human rights commissions are certainly relevant to the content of a globally recognised R2E, the Framework Principles are based primarily on international instruments and decisions by international institutions. The goal was to clarify, and facilitate the implementation of, the universal human rights obligations of States as they relate to the enjoyment of a safe, clean, healthy and sustainable environment, in accordance with the mandate given to the Special Rapporteur by the Council.

While many of the obligations described in the Framework Principles and related commentary are based directly on treaties or binding decisions from human rights tribunals, others draw on statements by human rights bodies that have the authority to interpret human rights law but not necessarily to issue binding decisions. The coherence of these interpretations, however, provides clear evidence of a trend towards greater uniformity and certainty in our understanding of human rights obligations as they relate to the environment. These trends are further supported by State practice, including in international environmental instruments and before human rights bodies. As a result, and as the Special Rapporteur made clear when he presented the Framework Principles to the

Council, they reflect actual and emerging international human rights law.

The Framework Principles provide a sturdy basis for understanding and implementing human rights obligations relating to the environment, but they do not purport to describe all of the human rights obligations that can be brought to bear on environmental issues today, much less attempt to predict those that may evolve in the future. They describe the main human rights obligations that currently apply in the environmental context in order to facilitate their practical implementation and further development.

The following part of this chapter briefly describes the 16 Framework Principles presented to the Council.

Principles 1 and 2: States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights, and States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment

Human rights and environmental protection are interdependent. A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of many human rights, including the rights to life, to the highest attainable standard of physical and mental health, to an adequate standard of living, and to participation in cultural life and development, as well as the overarching right to a healthy environment itself. At the same time, the exercise of human rights, including the rights to freedom of expression and association, to education and information, and to participation and effective remedy, is vital to the protection of the environment.

The obligations of States to respect human rights, to protect the enjoyment of human rights from harmful interference, and to fulfil human rights by working towards their full realisation, all apply in the environmental context.[70] States should therefore refrain from violating human rights through causing or allowing environmental harm; protect against harmful environmental interference from other sources, including business enterprises, other private actors and natural causes; and take effective steps to ensure the conservation and sustainable use of the ecosystems and biological diversity on which the full enjoyment of human rights depends. While it may not always be possible to prevent all environmental harm that interferes with the full enjoyment of human rights, States should undertake due diligence to prevent such harm and reduce it, to the extent possible, and provide for remedies for any remaining harm.

At the same time, States must fully comply with their obligations with respect to human rights, such as freedom of expression, that are exercised in relation to the environment. Such obligations not only have independent bases in human rights law; they are also required in order to respect, protect and fulfil those human rights for which enjoyment depends on a safe, clean, healthy and sustainable environment.

Special Rapporteur on human rights and the environment, Professor David Boyd, during an official mission to Fiji, December 2018, Fiji.

Principle 3: States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment

The obligations of States to prohibit discrimination and to ensure equal and effective protection against discrimination[71] apply to the equal enjoyment of human rights relating to a safe, clean, healthy and sustainable environment. States therefore have obligations, among others, to protect against environmental harm that results from or contributes to discrimination, to provide for equal access to environmental benefits, and to ensure that their actions relating to the environment do not themselves discriminate.

Discrimination may be direct, 'when someone is treated less favourably than another person in a similar situation for a reason related to a prohibited ground,' or indirect, when facially neutral laws, policies or practices have a disproportionate impact on the exercise of human rights as distinguished by prohibited grounds of discrimination.[72] In the environmental context, direct discrimination may include, for example, failing to ensure that members of disfavoured groups have the same access as others to information about environmental matters, to participation in environmental decision-making, or to remedies for environmental harm.[73] In the case of transboundary environmental harm, States should provide for equal access to information, participation and remedies, without discriminating on the basis of nationality or domicile.[74]

Indirect discrimination may arise, for example, when measures that adversely affect ecosystems, such as mining and logging concessions, have disproportionately severe effects on communities that rely on those ecosystems. Indirect discrimination can also include measures such as authorising toxic and hazardous facilities in large numbers in communities that are predominantly composed of racial or other minorities, thereby disproportionately interfering with their rights, including their rights to life, health, food and water. Like directly discriminatory measures, such indirect differential treatment is prohibited unless it meets strict requirements of legitimacy, necessity and proportionality.[75]

More generally, to address indirect as well as direct discrimination, States must pay attention to historical or persistent prejudice against groups of individuals, recognise that environmental harm can both result from and reinforce existing patterns of discrimination, and take effective measures against the underlying conditions that cause or help to perpetuate discrimination.[76] In addition to complying with their obligations of non-discrimination, States should take additional measures to protect those who are most vulnerable to, or at particular risk from, environmental harm.[77]

Principle 4: States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence

Human rights defenders include individuals and groups who strive to protect and promote human rights relating to the environment.[78] Those who work to protect the environment on which the enjoyment of human rights depends are protecting and promoting human rights as well, whether or not they self-identify as human rights defenders. They are among the human rights defenders most at risk, and the risks are particularly acute for indigenous peoples and traditional communities that depend on the natural environment for their subsistence and culture.[79]

Like other human rights defenders, environmental human rights defenders are entitled to all of the rights and protections set out in the UN Declaration on Human Rights Defenders, including the right to be protected in their work and the right to strive for the protection and realisation of human rights at the national and international levels.[80] To that end, States must provide a safe and enabling environment for defenders to operate free from threats, harassment, intimidation and violence. The requirements for such an environment include that States: adopt and implement laws that protect human rights defenders in accordance with international human rights standards;[81] publicly recognise the contributions of human rights defenders to society and ensure that their work is not criminalised or stigmatised; develop, in consultation with human rights defenders, effective programmes for protection and early warning; provide appropriate training for security and law enforcement officials; ensure the prompt and impartial investigation of threats and violations and the prosecution of alleged perpetrators; and provide for effective remedies for violations, including appropriate compensation.[82]

Children in Marlborough, New Zealand, call on their authorities to take action to stop climate change. New Zealand, 2019.

Principle 5: States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters

The obligations of States to respect and protect the rights to freedom of expression, association and peaceful assembly encompass the exercise of those rights in relation to environmental matters. States must ensure that these rights are protected whether they are being exercised within structured decision-making procedures or in other forums, such as the news or social media, and whether or not they are being exercised in opposition to policies or projects favoured by the State.

Restrictions on the exercise of these rights are permitted only if they are provided by law and necessary in a democratic society to protect the rights of others, or to protect national security, public order, or public health or morals.[83] These restrictions must be narrowly tailored to avoid undermining the rights. For example, blanket prohibitions on protests surrounding the operations of mining, forestry or other resource extraction companies are unjustifiable.[84] States may never respond to the exercise of these rights with excessive or indiscriminate use of force, arbitrary arrest or detention, torture or other cruel, inhuman or degrading treatment or punishment, enforced disappearance, the misuse of criminal laws, stigmatisation, or the threats of such acts. States should never hinder the access of individuals or associations to international bodies, or their right to seek, receive and use resources from foreign as well as domestic sources.[85] When violence occurs in an otherwise peaceful assembly or protest, the Special Rapporteur on the rights to freedom of peaceful assembly and association has made clear that States 'have a duty to distinguish between peaceful and non-peaceful demonstrators, take measures to de-escalate tensions and hold the violent individuals – not the organisers – to account for their actions. The potential for violence is not an excuse to interfere with or disperse otherwise peaceful assemblies.'[86]

States must also protect the exercise of these rights from interference by businesses and other private actors. States must ensure that civil laws relating to defamation and libel are not misused to repress the exercise of these rights. States should protect against the repression of legitimate advocacy by private security enterprises, and States may not cede their own law enforcement responsibilities to such enterprises or other private actors.

Principle 6: States should provide for education and public awareness on environmental matters

States have agreed that the education of the child shall be directed to, among other things, the development of respect for human rights and the natural environment.[87] Environmental education should begin early and continue throughout the educational process. It should increase students' understanding of the close relationship between humans and nature, help them to appreciate and enjoy the natural world, and strengthen their capacity to respond to environmental challenges.

Increasing public awareness of environmental matters should continue into adulthood.[88] To ensure that adults as well as children understand environmental effects on their health and well-being, States should make the public aware of the specific environmental risks that affect them and how they may protect themselves from those risks. As part of increasing public awareness, States should build the capacity of the public to understand environmental challenges and policies,[89] so that they may fully exercise their rights to express their views on environmental issues, understand environmental information, including assessments of environmental impacts, participate in decision-making and, where appropriate, seek remedies for violations of their rights.[90] States should tailor environmental education and public awareness programmes to the culture, language and environmental situation of particular populations.

Principle 7: States should provide 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

The human right of all persons to seek, receive and impart information[91] includes information on environmental matters.[92] Public access to environmental information enables individuals to understand how environmental harm may undermine their rights, including the rights to life and health, and supports their exercise of other rights, including the rights to expression, association, participation and remedy, as well as the overarching right to a healthy environment. Many global environmental instruments call on States to provide environmental information.[93] The two regional agreements on access rights make clear that the detailed obligations they set out on access to environmental information contribute to the protection of R2E.[94]

Access to environmental information has two dimensions. First, States should regularly collect, update and disseminate environmental information, including information about: the quality of the environment, including air and water; pollution, waste, chemicals and other potentially harmful substances introduced into the environment; threatened and actual environmental impacts on human health and well-being; and relevant laws and policies.[95] In particular, in situations involving imminent threat of harm to human health or the environment, States must ensure that all

information that would enable the public to take protective measures is disseminated immediately to all affected persons, regardless of whether the threats have natural or human causes.[96]

Second, States should provide affordable, effective and timely access to environmental information held by public authorities, upon the request of any person or association, without the need to show a legal or other interest.[97] Grounds for refusal of a request should be set out clearly and construed narrowly, in light of the public interest in favour of disclosure. States should also provide guidance to the public on how to obtain environmental information.[98]

Principle 8: To avoid undertaking or authorising actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights

Prior assessment of the possible environmental impacts of proposed projects and policies is called for by international environmental instruments as well as mandated by national laws.[99] Human rights bodies have also made clear that prior environmental assessment is required to ensure that proposed actions do not cause environmental harm that violates human rights.[100]

The key elements of effective environmental assessment are widely understood: the assessment should be undertaken as early as possible in the decision-making process; the assessment should provide meaningful opportunities for the public to participate, should consider alternatives to the proposed project or policy, and should address all potential environmental impacts, including transboundary effects and cumulative effects that may occur as a result of the interaction of the proposal with other activities; the assessment should result in a written report that clearly describes the impacts; and the assessment and the final decision should be subject to review by an independent body. The procedure should also provide for monitoring of the proposal as implemented, to assess its actual impacts and the effectiveness of protective measures.[101]

To protect against interference with the full enjoyment of human rights, the assessment of environmental impacts should also examine the possible environmental effects of proposed projects and policies on the enjoyment of all relevant rights, including the rights to life, health, food, water, housing and culture. As part of that assessment, the procedure should examine whether the proposal will comply with obligations of non-discrimination (Principle 3), applicable domestic laws and international agreements (Principles 11 and 13) and the obligations owed to those who are particularly at risk from environmental harm (Principles 14 and 15). The assessment procedure itself must comply with human rights obligations, including by ensuring that public information about the assessment, the making of the assessment, and the final decision, are publicly available (Principle 7); by facilitating public participation on the part of those who may be affected (Principle 9); and by providing for effective legal remedies (Principle 10).

Business enterprises should conduct human rights impact assessments in accordance with the Guiding Principles on Business and Human Rights, which provide that businesses 'should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships,' include 'meaningful consultation with potentially affected groups and other relevant stakeholders,' 'integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.'[102]

Principle 9: States should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process

The right of everyone to take part in the government of their country and in the conduct of public affairs[103] includes participation in decision-making related to the environment. Such decision-making includes the development of policies, laws, regulations, projects and activities. Ensuring that these environmental decisions take into account the views of those who are affected by them increases public support, promotes sustainable development and helps to protect the enjoyment of rights that depend on a safe, clean, healthy and sustainable environment.[104] Many international environmental instruments recognise the importance of public participation in environmental decision-making.[105] Again, the Aarhus Convention and the Escazú Agreement have detailed requirements, which they tie directly to the human right to a healthy environment.[106]

To be effective, public participation must be open to all members of the public who may be affected and occur early in the decision-making process. States should provide for the prior assessment of the impacts of proposals that may significantly affect the environment, and ensure that all relevant information about the proposal and the decision-making process is made available to the affected public in an objective, understandable, timely and effective manner.[107]

With respect to the development of policies, laws and regulations, drafts should be publicly available, and the public should be given opportunities to comment directly or through representative

bodies. With respect to proposals for specific projects or activities, States should inform the affected public of their opportunities to participate at an early stage in the decision-making process and provide them with relevant information, including information about: the proposed project or activity and its possible impacts on human rights and the environment; the range of possible decisions; and the decision-making procedure to be followed, including the time schedule for comments and questions and the time and place of any public hearings.

States must provide members of the public with an adequate opportunity to express their views,[108] and take additional steps to facilitate the participation of women and of members of marginalised communities.[109] States must ensure that the relevant authorities take into account the expressed views of the public in making their final decisions, that they explain the justifications for the decisions, and that the decisions and explanations are made public.[110]

Principle 10: States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment

The obligations of States to provide for access to judicial and other procedures for effective remedies for violations of human rights[111] encompass remedies for violations relating to the environment.[112] States must therefore provide for effective remedies for violations of the obligations set out in these Framework Principles, including those relating to the rights of freedom of expression, association and peaceful assembly, access to environmental information, and public participation in environmental decision-making.

In addition, in connection with the obligations to establish, maintain and enforce substantive environmental standards (see Principles 11 and 12), each State should ensure that individuals have access to effective remedies against private actors, as well as government authorities, for failures to comply with the laws of the State relating to the environment.[113]

To provide for effective remedies, States should ensure that individuals have access to judicial and administrative procedures that meet basic requirements, including that the procedures: (a) are impartial, independent, affordable, transparent and fair; (b) review claims in a timely manner; (c) have the necessary expertise and resources; (d) incorporate a right of appeal to a higher body; and (e) issue binding decisions, including for interim measures, compensation, restitution and reparation, as necessary to provide effective remedies for violations. The procedures should be available for claims of imminent and foreseeable as well as past and current violations. States should ensure that decisions are made public and that they are promptly and effectively enforced.

Children harvesting fruits in Juella, Quebrada de Humahuaca, Jujuy, Argentina. May 1 2010.

States should provide guidance to the public on how to seek access to these procedures, and should help to overcome obstacles to access such as language, illiteracy, expense and distance. Standing should be construed broadly, and States should recognise the standing of indigenous peoples and other communal landowners to bring claims for violations of their collective rights. All those pursuing remedies must be protected against reprisals, including threats and violence. States should protect against baseless lawsuits aimed at intimidating victims and discouraging them from pursuing remedies.

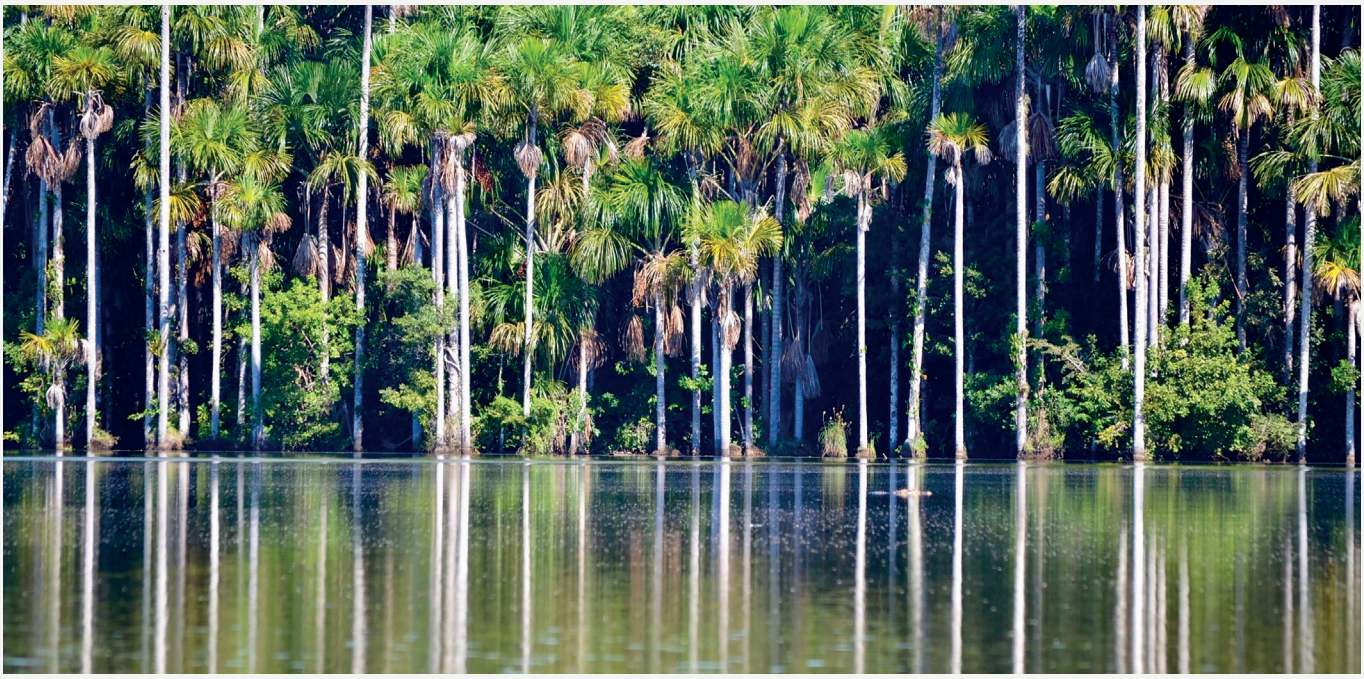
Principle 11: States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights

To protect against environmental harm and to take necessary measures for the full realisation of human rights that depend on the environment, States must establish, maintain and enforce effective legal and institutional frameworks for the enjoyment of a safe, clean, healthy and sustainable environment.[114] Such frameworks should include substantive environmental standards, including with respect to air quality, the global climate, freshwater quality, marine pollution, waste, toxic substances, protected areas, conservation and biological diversity.

Ideally, environmental standards would be set and implemented at levels that would prevent all environmental harm from human sources and ensure a safe, clean, healthy and sustainable environment. However, limited resources may prevent the immediate realisation of the rights to health, food, water and other economic, social and cultural rights. The obligation of States to achieve progressively the full realisation of these rights by all appropriate means[115] requires States to take deliberate, concrete and targeted measures towards that goal, but States have some discretion in deciding which means are appropriate in light of available resources.[116] Similarly, human rights bodies applying civil and political rights, such as the rights to life and to private and family life, have held that States have some discretion to determine appropriate levels of environmental protection, taking into account the need to balance the goal of preventing all environmental harm with other social goals.[117]

This discretion is not unlimited. One constraint is that decisions as to the establishment and implementation of appropriate levels of environmental protection must always comply with obligations of non-discrimination. Another constraint is the strong presumption against retrogressive measures in relation to the progressive realisation of economic, social and cultural rights.[118] Other factors that should be taken into account in assessing whether environmental standards otherwise respect, promote and fulfil human rights include the following:

- The standards should result from a procedure that itself complies with human rights obligations, including those relating to the rights of freedom of expression, freedom of association and peaceful assembly, information, participation and remedy, in accordance with Principles 4-10.



Tambopata National Reserve, one of the biggest protected areas of the Peruvian Amazon Rainforest, June 2013, Peru.

- The standards should take into account and, to the extent possible, be consistent with all relevant international environmental, health and safety standards, such as those promulgated by the World Health Organization.

- The standards should take into account the best available science. However, the lack of full scientific certainty should not be used to justify postponing effective and proportionate measures to prevent environmental harm, especially when there are threats of serious or irreversible damage.[119] States should take precautionary measures to protect against such harm.

- The standards must comply with any applicable specific human rights obligations. For example, in all actions concerning children, the best interests of the child must be a primary consideration.[120]

- Finally, the standards must not strike an unjustifiable or unreasonable balance between environmental protection and other social goals, in light of the effects on the full enjoyment of human rights.[121]

Principle 12: States should ensure the effective enforcement of their environmental standards against public and private actors

Governmental authorities must comply with the relevant environmental standards in their own operations, and they must also monitor and effectively enforce compliance with those standards by preventing, investigating, punishing and redressing violations of the standards by private actors as well as governmental authorities. In particular, States must regulate business enterprises to protect against human rights abuses resulting from environmental harm and to provide for remedies for such abuses.[122] States should implement training programmes for law enforcement and judicial officers to enable them to understand and enforce environmental laws, and they should take effective steps to prevent corruption from undermining the implementation and enforcement of environmental laws.

In accordance with the Guiding Principles on Business and Human Rights, the responsibility of business enterprises to respect human rights includes the responsibility to avoid causing or contributing to adverse human rights impacts through environmental harm, to address such impacts when they occur and to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.[123] Businesses should comply with all applicable environmental laws, issue clear policy commitments to meet their responsibility to respect human rights through environmental protection, implement human rights due diligence processes (including human rights impact assessments) to identify, prevent, mitigate and account for how they address their environmental impacts on human rights, and enable the remediation of any adverse environmental human rights impacts they cause or to which they contribute.[124]

Principle 13: States should cooperate with each other 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

The obligations of States to cooperate to achieve universal respect for, and observance of, human rights[125] require them to work together to address transboundary and global threats to human rights. Moreover, every State has obligations in relation to actions within its own territory or control that cause transboundary environmental harm to human rights.[126] Transboundary and global environmental harm can have severe effects on the full enjoyment of human rights, and international cooperation is necessary to address such harm. States have entered into agreements on many international environmental problems, including climate change, ozone depletion, transboundary air pollution, marine pollution, desertification and the conservation of biodiversity.

The obligation of international cooperation does not require every State to take exactly the same actions. The responsibilities that are necessary and appropriate for each State will depend in part on its situation; and agreements between States to address global problems such as climate change, for example, may appropriately tailor their individual commitments to take account of their respective capabilities and challenges.[127] Multilateral environmental agreements often include different requirements for States in different economic situations, and provide for technical and financial assistance from developed to developing States.

Once their obligations have been defined, however, States must comply with them in good faith. No State should ever seek to withdraw from any of its international obligations to protect against transboundary or global environmental harm. States should continually monitor whether their existing international obligations are sufficient. When those obligations and commitments prove to be inadequate, States should quickly take the necessary steps to strengthen them, bearing in mind that the lack of full scientific certainty should not be used to justify postponing effective and proportionate measures to ensure a safe, clean, healthy and sustainable environment.

States must also comply with their human rights obligations relating to the environment in the context of other international legal frameworks, such as agreements for economic cooperation and international finance mechanisms.[128] For example, they should ensure that agreements facilitating international trade and investment support, rather than hinder, the ability of States to respect, protect and fulfil human rights and to ensure a safe, clean, healthy and sustainable environment. International financial institutions, as well as State agencies that provide international assistance, should adopt and implement environmental and social safeguards that are consistent with human rights obligations, including by: (a) requiring the environmental and social assessment of every proposed project and programme; (b) providing for effective public participation; (c) providing for effective procedures to enable those who may be harmed to pursue remedies; (d) requiring legal and institutional protections against environmental and social risks; and (e) including specific protections for indigenous peoples and those in vulnerable situations.

Principle 14: States should take 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

As the Human Rights Council has recognised, 'while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by those segments of the population that are already in vulnerable situations.'[129] Persons may be vulnerable because they are unusually susceptible to certain types of environmental harm, or because they are denied their human rights, or both. Vulnerability to environmental harm reflects the 'interface between exposure to the physical threats to human well-being and the capacity of people and communities to cope with those threats.'[130]

Those who are at greater risk from environmental harm for either or both reasons often include women, children, persons living in poverty, members of indigenous peoples and traditional communities, older persons, persons with disabilities, ethnic, racial or other minorities and displaced persons.[131] The many examples of potential vulnerability include the following:

A. In most households, women are primarily responsible for water and hygiene. When sources of water are polluted, they are at greater risk of exposure, and if they travel longer distances to find safer sources, they are at greater risk of assault. Nevertheless, they are typically excluded from decision-making procedures on water and sanitation;

B. Children are vulnerable for many reasons, including that they are developing physically and are less resistant to many types of environmental harm. Of the approximately 6 million deaths of children under the age of 5 in 2015, more than 1.5 million could have been prevented through a reduction in environmental risks.[132] Moreover, exposure to pollution and other environmental harms in childhood can have lifelong consequences, including by increasing the likelihood of cancer and other diseases;

C. Persons living in poverty often lack adequate access to safe water and sanitation, and they are more likely to burn wood, coal and other solid fuels for heating and cooking, causing household air pollution;

D. Indigenous peoples and other traditional communities who rely on their ancestral territories for their material and cultural existence face increasing pressure from governments and business enterprises seeking to exploit their resources. They are usually marginalised from decision-making processes and their rights are often ignored or violated;

E. Older persons may be vulnerable to environmental harm because they are more susceptible to, *inter alia*, heat, pollutants and vector-borne diseases;

F. The vulnerability of persons with disabilities to natural disasters and extreme weather is often exacerbated by barriers to receiving emergency information in an accessible format, and to accessing means of transport, shelter and relief;

G. Because racial, ethnic and other minorities are often marginalised and lack political power, their communities often become the sites of disproportionate numbers of waste dumps, refineries, power plants and other polluting facilities, exposing them to higher levels of air pollution and other types of environmental harm; and

H. Natural disasters and other types of environmental harm often cause internal displacement and transboundary migration, which can exacerbate vulnerabilities and lead to additional human rights violations and abuses.

To protect the rights of those who are particularly vulnerable to or at risk from environmental harm, States should ensure that their laws and policies take into account the ways that some parts of the population are more susceptible to such harm, and the barriers some face in exercising their human rights related to the environment.

For example, States should develop disaggregated data on the specific effects of environmental harm on different segments of the population, conducting additional research as necessary, to provide a basis for ensuring that their laws and policies adequately protect against harm. States should also take effective measures to raise awareness about environmental threats among those most at risk. In monitoring and reporting on environmental issues, States should provide detailed information on the threats to, and status of, the most vulnerable. Assessments of the environmental and human rights impacts of proposed projects and policies must include a careful examination of the impacts on the most vulnerable, in particular. In the case of indigenous peoples and local communities, assessments should be in accord with the Akwé: Kon Voluntary Guidelines adopted by the Conference of Parties to the Convention on Biological Diversity.

States should develop environmental education, awareness and information programmes to overcome obstacles such as illiteracy, minority languages, distance from government agencies and limited access to information technology, in order to ensure that everyone has effective access to such programmes and to environmental information in forms that are understandable to them. States should also take steps to ensure the equitable and effective participation of all affected segments of the population in relevant decision-making, taking into account the characteristics of the vulnerable or marginalised populations concerned.

States should ensure that their legal and institutional frameworks for environmental protection effectively protect those who are in vulnerable situations. They must comply with their obligations of non-discrimination as well as any other obligations relevant to specific groups. For example, any environmental policies or measures that may affect children's rights must ensure that the best interests of children are a primary consideration.

In developing and implementing international environmental agreements, States should include strategies and programmes to identify and protect those vulnerable to the threats addressed in the

Members of the Yaguas tribe -who were relocated from the virgin jungle of the Amazon to a place near the city of Iquitos - strive to protect their culture and environment, amidst escalating threats to their survival, October 2018, Peru.

agreements. Domestic and international environmental standards should be set at levels that protect against harm to vulnerable segments of the population, and States should use appropriate indicators and benchmarks to assess implementation. When measures to safeguard against or mitigate adverse impacts are impossible or ineffective, States must facilitate access to effective remedies for violations and abuses of the rights of those most vulnerable to environmental harm.

Principle 15: States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities

Specific obligations include: (a) recognising and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used; (b) consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources; (c) respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources; and (d) ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.

Indigenous peoples are particularly vulnerable to environmental harm because of their close relationship with the natural ecosystems on their ancestral territories. The UN Declaration on the Rights of Indigenous Peoples and the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention 1989 (No. 169), as well as other human rights and conservation agreements, set out obligations of States in relation to the rights of indigenous peoples. Those obligations include, but are not limited to, the four highlighted above, which have particular relevance to the human rights of indigenous peoples in relation to the environment.

Traditional (sometimes called 'local') communities that do not self-identify as indigenous may also have close relationships to their ancestral territories and depend directly on nature for their material needs and cultural life. Examples include the descendants of Africans brought to Latin America as slaves, who escaped and formed tribal communities. To protect the human rights of the members of such traditional communities, States owe them obligations as well.[133] While those obligations are not always identical to those owed to indigenous peoples, they should include the obligations described below.[134]

First, States must recognise and protect the rights of indigenous peoples and traditional communities to the lands, territories and resources that they have traditionally owned, occupied or used,

Event Marking International Day of the Indigenous Peoples, August 2016, New York.

including those to which they have had access for their subsistence and traditional activities.[135] The recognition of the rights must be conducted with due respect for the customs, traditions and land tenure systems of the peoples or communities concerned.[136] Even without formal recognition of property rights and delimitation and demarcation of boundaries, States must protect against actions that might affect the value, use or enjoyment of the lands, territories or resources, including by instituting adequate penalties against those who intrude on or use them without authorisation.[137]

Second, States must ensure the full and effective participation of indigenous peoples and traditional communities in decision-making on the entire spectrum of matters that affect their lives. States have obligations to consult with them when considering legislative or administrative measures which may affect them directly, before undertaking or permitting any programmes for the exploration or exploitation of resources pertaining to their lands or territories and when considering their capacity to alienate their lands or territories or otherwise transfer their rights outside their own community.[138] States should assess the environmental and social impacts of proposed measures and ensure that all relevant information is provided to them in understandable and accessible forms. Consultations with indigenous peoples and traditional communities should be in accordance with their customs and traditions, and occur early in the decision-making process.

The free, prior and informed consent of indigenous peoples or traditional communities is generally necessary before the adoption or implementation of any laws, policies or measures that may affect them, and in particular before the approval of any project affecting their lands, territories or resources, including the extraction or exploitation of mineral, water or other resources, or the storage or disposal of hazardous materials.[139] Relocation of indigenous peoples or traditional communities may take place only with their free, prior and informed consent and after agreement on just and fair compensation and, where possible, with the option of return.[140]

Third, States should respect and protect the knowledge and practices of indigenous peoples and traditional communities in relation to the conservation and sustainable use of their lands, territories and resources.[141] Indigenous peoples and traditional communities have the right to the conservation and protection of the environment and the productive capacity of their lands, territories and resources, and to receive assistance from States for such conservation and protection. States must comply with the obligations of consultation and consent with respect to the establishment and maintenance of protected areas in the lands and territories of indigenous peoples and traditional communities, and ensure that they can participate fully and effectively in the governance of such protected areas.[142]

Fourth, States must ensure that indigenous peoples and traditional communities affected by extraction activities, the use of their traditional knowledge and genetic resources, or other activities in relation to their lands, territories or resources, fairly and equitably share the benefits arising from such activities.[143] Consultation procedures should establish the benefits that the affected indigenous peoples and traditional communities are to receive, in a manner consistent with their own priorities. Finally, States must provide for effective remedies for violations of their rights, and just and fair redress for harm resulting from any activities affecting their lands, territories or resources.[144] They have the right to restitution or, if this is not possible, just, fair and equitable compensation for their lands, territories and resources that have been taken, used or damaged without their free, prior and informed consent.[145]

Principle 16: States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development

The obligations of States to respect, protect and fulfil human rights apply when States are adopting and implementing measures to address environmental challenges and to pursue sustainable development. That a State is attempting to prevent, reduce or remedy environmental harm, seeking to achieve one or more of the Sustainable Development Goals, or taking actions in response to climate change does not excuse it from complying with its human rights obligations. These obligations apply to the measures through which environmental protection is achieved as well as to the decisions about which levels of environmental protection to pursue. When taking actions in response to climate change, such as pursuing adaptation measures or renewable energy projects, States must likewise comply with their human rights obligations.[146]

Pursuing environmental and development goals in accordance with human rights norms not only promotes human dignity, equality and freedom, it also helps inform and strengthen policymaking. Ensuring that those most affected can obtain information, freely express their views and participate in the decision-making process, for example, makes policies more legitimate, coherent, robust and sustainable. Most important, a human rights perspective helps to ensure that environmental and development policies improve the lives of the human beings who depend on a safe, clean, healthy and sustainable environment - which is to say, all human beings.

III.

HOW WOULD UNIVERSAL RECOGNITION OF THE RIGHT TO A SAFE, CLEAN, HEALTHY AND SUSTAINABLE ENVIRONMENT HELP IMPROVE LIVES AND PROTECT THE PLANET?

For decades, there has been a lively debate among scholars about the merits of UN recognition of the right to a healthy environment. Would such a step offer tangible benefits?[147] Proponents have asserted that recognition would contribute to a variety of positive procedural and substantive outcomes ranging from increased public participation in environmental management, to cleaner air and water. Critics have argued that such a right would duplicate existing norms, and would ultimately prove unenforceable and ineffective.

In truth, this debate should have been settled long ago.[148] We now have more than four decades of experience with the recognition and implementation of R2E. While legal recognition of R2E by no means offers a panacea, a one-stop-shop for tackling the myriad environmental challenges facing humanity, the evidence is clear: where the right exists, it has a proven track record of catalysing effective and equitable action, in protection of both people and planet. Notwithstanding, there is one important caveat to this broad conclusion: like all human rights, R2E is of limited practical utility in countries with weak rule of law systems.

In cooperation with the Vance Center for International Justice, the UN Special Rapporteur on human rights and the environment recently prepared an updated list of States that legally recognise the right to a safe, clean, healthy and sustainable environment (see Annex I).[149] There are 110 States where this right enjoys constitutional protection. Such protections are optimal because constitutions represent the highest and strongest form of law in domestic legal systems. Furthermore, constitutions play an important cultural role, reflecting society's values and aspirations. A good example is article 112 of Norway's Constitution, which states: 'Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.'

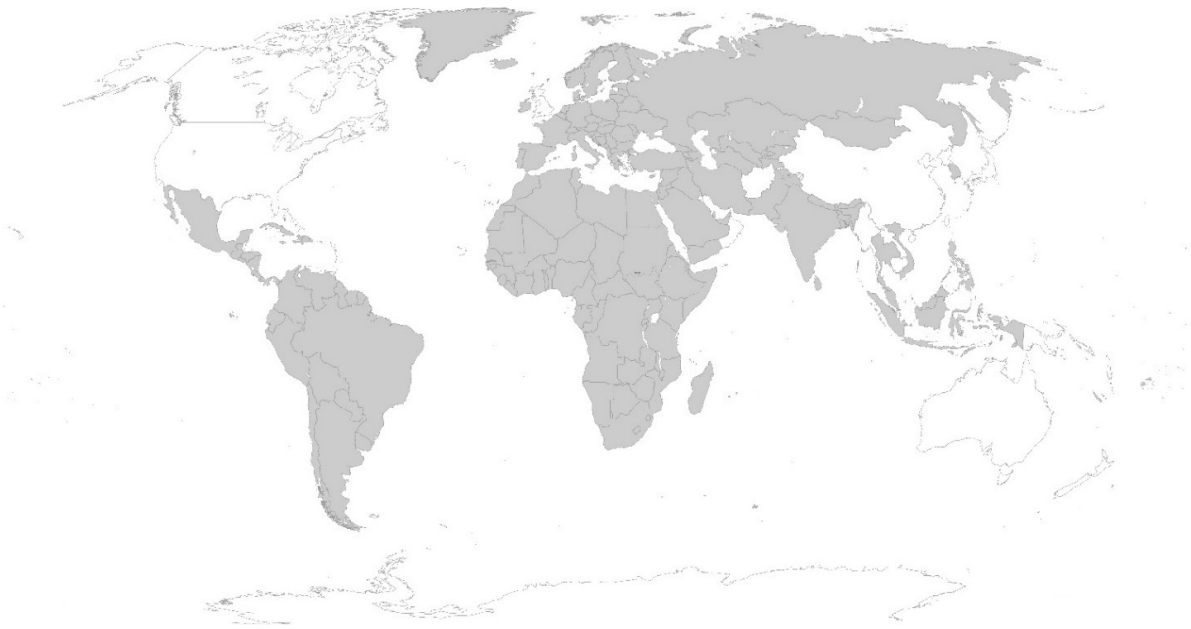
It is also important that legislation be enacted and implemented to respect, protect and fulfil the right to a safe, clean, healthy and sustainable environment. There are 101 States where this right has been incorporated into national legislation. Good practices, in that regard, can be seen in Argentina, Brazil, Colombia, Costa Rica, France, the Philippines, Portugal and South Africa – countries where R2E serves as a unifying principle that permeates legislation, regulations and policies.

R2E is explicitly included in regional treaties ratified by 126 States. This includes: 52 States that are parties to the African Charter on Human and Peoples' Rights; 45 States that are parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention); 16 States that are parties to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); and 16 States that are parties to the Arab Charter on Human Rights. As of 20 January 2021, 12 States have ratified the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), it will enter into force on 22 April, 2021.[150] Ten States have adopted the non-binding Declaration on Human Rights of the Association of South-East Asian Nations (ASEAN). Many countries have also signed non-binding soft law declarations that include the right to a healthy environment, such as the 2007 Malé Declaration.

In total, more than 80 per cent of UN member States (156 out of 193) now legally recognise the right to a safe, clean, healthy and sustainable environment (see map below). The Special Rapporteur has collected the texts of all constitutional and legislative provisions that recognise this right.[151]

FIGURE 1.

UN States that recognise a legal right to a healthy environment



States in grey recognise the right to a healthy environment in their constitutions, legislation, as parties to a regional treaty, or a combination of these instruments.

EXAMINING THE EFFECTS OF R2E AT INTERNATIONAL LEVEL

There are two primary pathways through which international recognition of the right to a healthy environment can lead to improved environmental outcomes and a decline in adverse impacts on human and ecosystem health. The first is through the influence of international human rights law on national constitutional, environmental and human rights law. The second is through the application of the R2E in cases brought before international courts and tribunals.

Regarding the former, international recognition of the right to a healthy environment has had a clear impact on the development of national constitutions, legislation and jurisprudence. The Stockholm Declaration, the first international instrument referring to R2E, is often cited as an inspiration by States that subsequently rewrote their constitutions and/or amended legislation to include environmental rights and responsibilities. Similarly, there are many instances of international law influencing national court decisions relating to R2E. For example, the Stockholm Declaration influenced decisions of the Supreme Court of India protecting the implicit constitutional right to a clean, safe, healthy and sustainable environment.[152] In another example, R2E in the African Charter led Kenyan and Nigerian courts to make important rulings finding R2E to be an essential part of the constitutional right to life (even though it is not explicitly articulated as such in either the Kenyan nor Nigerian Constitutions).[153] Likewise, Costa Rican and Colombian courts have cited the San Salvador Protocol in cases involving the right to a healthy environment.[154]

Regarding the latter, there is a growing body of jurisprudence – from the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the European Court of Human Rights, the European Committee of Social Rights, and the African Commission and Court on Human and Peoples' Rights – related to violations of the right to a healthy environment. The connection between environmental degradation and human rights has influenced international tribunal rulings on cases involving countries from Nigeria to Argentina and from Russia to Turkey. Air pollution, water pollution, noise pollution, exposure to toxic substances, and the failure to enact and enforce environmental laws, have all been identified as violations of various human rights, including the rights to life, health, water, culture, and a clean, safe, healthy and sustainable environment.

Notwithstanding, there are significant concerns as to the effectiveness of these international processes. Relatively few cases reach regional human rights bodies, the processes are reactive and extremely lengthy, remedies have thus far been very limited, and the on-the-ground implementation of decisions has been modest, to say the least. A well-known example is the *SERAC* case, in which the African Commission issued an important decision on the impacts of oil and gas exploitation on the people of Nigeria.[155] Widespread oil pollution was identified as a violation of R2E. Yet despite praise for the legal precedent set by the ruling, there has been limited improvement in the environmental conditions enjoyed by communities in oil-producing regions.

Given that both of these pathways have produced legal and environmental benefits, there is a *prima facie* case that further international recognition of R2E would provide additional benefits of a similar nature. Indeed, this argument is supported by reference to the impacts of UN resolutions adopted in 2010 recognising the rights to clean water and sanitation. These texts led to important constitutional reforms and legislative changes in a number of countries, also influenced a number of court decisions and have contributed to on the ground progress in securing safe water and adequate sanitation for many millions of people.

EXAMINING THE EFFECTS OF R2E AT NATIONAL LEVEL

Despite a clear global trend towards the recognition of R2E in national law, there has been (at least until recently) relatively little research conducted into the tangible benefits of the right. In the absence of such research, a largely theoretical debate has emerged between the proponents of R2E who have argued that its recognition leads to better environmental laws and policies, improved implementation and enforcement, improved public participation, and the strengthened enjoyment of other human rights; and critics who have argued that R2E is too vague to be useful, is redundant because it overlaps with existing protections, is not enforceable, may lead to a steep rise in litigation, and may even, according to some, constitute a threat to democracy (because it shifts power from elected legislators to judges).

Over recent years, a more considered and consistent effort has been made to move beyond these abstract debates and show, using concrete national case studies (covering over a hundred countries), what the practical benefits of R2E have been.

This new body of research, including by the current UN Special Rapporteur (and one of the authors of this study), David Boyd, demonstrates that the incorporation of R2E into a country's constitution has several positive consequences, namely the development of stronger environmental laws, improved implementation and enforcement of those laws, and the development of court decisions defending the right from violations.[156] Furthermore, evidence suggests that the potential drawbacks highlighted by critics have not materialised. Perhaps most importantly, empirical evidence demonstrates that R2E contributes to stronger environmental performance, including cleaner air, safer drinking water, and smaller ecological footprints.

Unfortunately, there is not yet comparable research into the effects of recognising R2E through national legislation or regional treaties.

STRONGER ENVIRONMENTAL LAWS

In at least 80 States, environmental laws have been measurably strengthened following recognition of R2E in national constitutions. Laws have been amended, for example, to focus on environmental rights, to enhance access to environmental information, to strengthen public participation in decision-making, and to improve access to justice. Such good practice examples were found in countries across Eastern and Western Europe, Latin America and the Caribbean, Asia, and Africa.[157] For example, Spain's recognition of a constitutional right to a healthy environment more than three decades ago (1978) has exerted a major influence on the development of national environmental legislation. Spain's Environmental Responsibility Law and its Law on Natural Heritage and Biodiversity, both enacted in 2007, make repeated reference to article 45 of the Constitution, which sets out the right to a healthy environment. In France, the inclusion of R2E in the Constitution in 2005 has contributed, *inter alia,* to pioneering laws banning fracking (hydraulic fracturing) for oil and gas, banning the use of bee-killing neonicotinoid pesticides, and prohibiting French businesses from exporting pesticides not authorised for use in France.

In other countries, the constitutional right to a healthy environment has exerted an important influence upon the entire body of environmental law and policy. This is certainly the case in Argentina, where the inclusion of R2E in the 1994 constitutional reform process 'triggered the need for a new generation of environmental legislation.'[158] After 1994, Argentina passed a new comprehensive

environmental law, which 'sought to make the constitution a reality,' as well as a law governing access to environmental information, and minimum standard laws on issues ranging from industrial waste to clean water.[159] The new Constitution also created a 'cascade effect,' as provincial constitutions were amended to incorporate the right to a healthy environment, and provincial environmental laws were altered to include R2E as a guiding principle.[160] The assertion of a constitutional right to a healthy environment had similar impacts on environmental law in Portugal, Costa Rica, Brazil, Colombia, South Africa and the Philippines.[161] Important reforms are also underway in France following the enactment of its Charter for the Environment in 2005.[162]

Of course, recognition of R2E is not the only factor contributing to improvements in environmental law and policy. For example, the European Union's accession process has exerted a major influence on environmental legislation in Eastern Europe. Other important factors include pressure from the public and civil society, advances in scientific knowledge, the migration of ideas and legislative approaches from other jurisdictions, and international assistance from agencies such as the UN Environment Programme (UNEP) and the International Union for the Conservation of Nature (IUCN).

IMPROVED IMPLEMENTATION AND ENFORCEMENT

Recognition of the constitutional right to a healthy environment can also encourage improvements in the implementation and enforcement of environmental laws. In most cases, progress is driven by close cooperation between the State and civil society, with the latter drawing attention to violations and campaigning for additional resources to be deployed to protect the environment. A good example of this is Brazil, where concerned citizens and NGOs can report alleged violations of the constitutional right to a healthy environment and secondary environmental laws to an independent *Ministério Público*, which then conducts investigations, and brings civil actions and prosecutions. The 1988 constitutional changes that empowered the *Ministério Público* to enforce constitutional environmental rights resulted in a dramatic improvement in the enforcement of domestic environmental laws.[163] A Brazilian judge has written that 'hundreds of pages would be needed to mention all the precedents' set by Brazilian courts in recent years when hearing cases related to the protection of people's constitutional right to a healthy environment.[164] In the state of São Paulo alone, between 1984 and 2004, the *Ministério Público* filed over 4,000 civil actions in cases addressing a range of environmental harms, from deforestation to air pollution.[165] While the enforcement of environmental laws

Official visit to Madagascar of Former Special Rapporteur on Human Rights and the Environment, Professor John Knox, October 2016, Madagascar.

has worsened during the current Brazilian administration, there are a number of lawsuits underway that seek to reverse this trend by arguing that 'backsliding' is inconsistent with the State's obligation to respect and fulfil the constitutional right to a healthy environment. Today, there are agencies similar to the *Ministério Público* in a majority of Latin American States.

STRENGTHENED ACCOUNTABILITY

One important and measurable benefit of the recognition of R2E in national constitutions is that it strengthens State and private sector accountability for the enforcement of, and respect for, environmental laws. Court cases and court decisions referencing R2E are one useful indicator of this. National court decisions defending R2E have been handed down in more than 50 UN member States. Those States are mostly in Europe, Latin America and the Caribbean, though a small number of cases have also been handed down in Asia and Africa.[166]

What is more, over time, the frequency and importance of such cases appear to be increasing.

The number of reported cases per State ranges from one (e.g., Malawi, the Seychelles) to hundreds (e.g., in some Latin American, Asian and European countries). Although language barriers make precise tallies difficult, researchers have recorded thousands of court cases focused on R2E *inter alia* in Colombia, Costa Rica, Brazil, Argentina, India, the Philippines, Belgium, and Greece. This very likely *underestimates* the scale of the movement towards R2E-related litigation.[167]

Courts have ruled that the constitutional right to a healthy environment imposes four types of duties upon governments: to respect the right by not infringing it through State action; to protect the right from infringement by third parties (which may require regulations, implementation and enforcement); to take actions to fulfil the right (e.g., by providing services including clean water, sanitation and waste management); and to promote the right (e.g., through public education or mass media). In addition, courts have consistently held that laws, regulations and administrative actions that violate the constitutional right to a healthy environment will be struck down. While the precise nature of what constitutes a 'healthy environment' varies from country to country, the objective is always the same: to secure improved environmental conditions.

It is rare for courts to decide that the right to a healthy environment is not directly enforceable, though this has occurred in South Korea, Spain and Paraguay. In these cases, the courts are constrained by constitutional language specifying that the right can

Official visit to Madagascar of Former Special Rapporteur on Human Rights and the Environment, Professor John Knox, October 2016, Madagascar.

only be enforced pursuant to enabling legislation. Overall, however, constitutional principles related to the right to a healthy environment 'have created the right conditions for courts of law [...] to begin to play a more prominent role in protecting the environment.'[168]

INCREASED PUBLIC INVOLVEMENT

Constitutional environmental provisions have also served to enhance the public's role in environmental governance. The right to a healthy environment has been interpreted consistently as including procedural environmental rights (see chapter II): access to information, participation in decision making and access to justice. Citizens, in ever-increasing numbers, are actively asserting these rights. Other factors contributing to a growing public engagement with environmental governance include growing civil society activism, advances in communications technology (particularly the Internet), and – in many nations – the transition from closed, authoritarian types of government to open, participatory democracy.

Several Latin American States – Costa Rica, Colombia, Argentina and Brazil – are global leaders in terms of access to environmental justice. The Philippines, with its special procedural rules for environmental litigation, is moving in the same direction.[169] Procedural innovations have significantly increased the ability of citizens, communities and environmental NGOs to seek judicial protection of their constitutional rights, including the right to a healthy environment. These innovations help to reduce costs, decrease delays and minimise the risks previously associated with the pursuit of judicial remedy.

PROTECTION FOR ENVIRONMENTAL HUMAN RIGHTS DEFENDERS

A central benefit of recognition of the right to a healthy environment is the extra protection and power it affords to so-called environmental human rights defenders (EHRDs), individuals working at the interface of environmental and human rights protection.

Global Witness reports that more than 200 EHRDs are being killed annually.[170] Yet these murders, often at the behest of corrupt government officials working with businessmen and/or organised criminal groups, are but the tip of the iceberg. Thousands more suffer threats, intimidation, violence, stigmatisation and criminalization simply for working to defend their natural environment and the rights of their communities.[171]

Recognition of R2E helps protect EHRDs and provides an important tool to allow them to undertake their important work more effectively. Regarding protection, the presence of constitutional provisions on R2E helps reduce stigmatisation by showing that EHRDs are working to defend their rights (in addition to working to safeguard the environment) and to promote sustainable development and the public good (i.e., they are not 'anti-development'). Moreover, where violations take place, the protection of R2E helps promote accountability and access to justice. R2E also helps EHRDs undertake their important work safely and effectively. By asserting the right (including its component parts such as access to information, access to decision-making, and access to justice), in conjunction with other human rights, they are better able to fight back against projects and policies that harm the environment, and, where their rights are violated, to secure remedy and redress.

A new treaty covering the Latin America and Caribbean regions, known as the Escazú Agreement, is the first treaty in the world requiring States to take specific actions to protect EHRDs as part of their obligation to respect, protect and fulfil the right to a healthy environment.

ADVANCE SCREENING OF NEW LAWS AND REGULATIONS

Constitutional recognition of R2E generally requires that all proposed laws and regulations be screened to ensure that they are consistent with the State's duty to respect, protect, promote and fulfil the right. In some countries, this is a formal process. For example, in France, the Constitutional Council reviews proposed legislation prior to its enactment. In others, the screening process is informal. For example, in Colombia, because the Constitutional Court routinely scrutinises government legislation, lawmakers take constitutional case law into active consideration when drafting and agreeing new laws, in order to avoid challenges later.[172]

PROVIDING A SAFETY NET

In some countries, the constitutional right to a healthy environment has been used to close gaps in environmental law. Citing R2E, for example, courts in Costa Rica and Nepal have ordered the Governments to adopt legislation/regulations to protect fisheries and reduce air pollution, respectively.[173] The courts did not spell out the content of those laws in detail, but rather made the point that

legislation/regulation constitutes an essential part of the State's obligation to respect, protect, promote and fulfil R2E. Elsewhere, courts have used the presence of this obligation to encourage (if not compel) the State to take action. For example, in Uganda the Government was pressed to enact legislation on plastic bags, in India the Government was pressed to enact legislation on smoking in public, and in Sri Lanka the Government was pressed to enact legislation on air quality standards.[174]

PREVENTING 'ROLLBACKS'

Another legal advantage flowing from constitutional recognition of R2E is that it may prevent a future weakening of environmental laws and policies (commonly referred to as 'rollbacks'). Courts have articulated the principle, based on R2E, that current environmental laws and policies represent a baseline that can be improved upon but not weakened.[175] This concept is often termed the 'standstill' principle (for example, in Belgium, Hungary, South Africa, and many parts of Latin America). In France, it is known as the 'non-regression' principle.[176] Belgian authorities are precluded from weakening levels of environmental protection except in limited circumstances where there is a compelling public interest. For example, a proposal to accommodate motor racing by weakening standards for air and noise pollution was rejected.[177] Similarly, Hungary's Constitutional Court rejected an attempt to privatise publicly owned forests because private lands are governed by weaker environmental standards.[178] The 'standstill' principle recognises that as a given society pursues sustainable development, the only direction consistent with human rights obligations is toward stronger environmental laws and policies.

PROMOTING ENVIRONMENTAL JUSTICE

Recognition of R2E helps promote environmental justice by requiring a minimum standard of environmental quality for all members of society. This has meant, for example, that vulnerable or marginalised communities in Latin America, Asia and Africa have been able to use R2E to argue for improvements in the provision of clean drinking water, better sewage treatment, and adequate waste management. Millions of people enjoy clean drinking water today because the constitutional right to a healthy environment was leveraged by such communities to compel governments to strengthen laws, invest in infrastructure, and protect water supplies.

There are many examples of courts addressing environmental injustices by defending peoples' right to live in a healthy environment. Citizens in countries as diverse as Russia, Romania, Chile and Turkey, for example, have brought lawsuits based on R2E and obtained remedy for damage caused by industrial pollution.[179] In another example, people in the Peruvian village of La Oroya asserted their right to a healthy environment in court as a key means of securing medical treatment after villagers became sick due to exposure to lead and other heavy metals emitted by a nearby smelter.[180]

In other cases, R2E has helped secure environmental justice at a more systemic level. For example, in 2008 in Argentina, peoples' right to a healthy environment was used in the Supreme Court to press for the clean-up and restoration of the Matanza-Riachuelo watershed. The court's favourable decision (likewise based on R2E)[181] has led to improved living conditions for millions of vulnerable and economically marginalised Argentinians, as well as significant improvements in the natural environment (e.g., the number of environmental inspectors in the region increased from three to 250, and 200 monitoring stations have been built to measure water, air and soil quality).[182] Regarding improved living conditions and related improvements in the enjoyment of human rights, since the Supreme Court's decision was handed down: three new water treatment plants and eight new/upgraded sewage treatment plants have been built; hundreds of polluting companies and illegal garbage dumps have been closed; thousands of people have been relocated from riverside slums to social housing; hundreds of kilometres of riverbank have been restored; and dozens of new parks, playgrounds, plazas and other public spaces have been created.[183] As the World Bank has recognised, prior to 2008 there had been numerous previous promises to clean-up and restore the Matanza-Riachuelo watershed. However, it was only when the Supreme Court issued its ruling, grounded in a recognition that all Argentinians have the right to live in a clean and healthy environment, that change finally occurred – to the benefit of people's rights and the natural environment.

CREATING A LEVEL PLAYING FIELD

A further benefit of legal recognition of R2E, evident from the case studies, is that it counteracts the idea that the natural environment can be compromised in favour of the progressive realisation of economic and social rights. For example, in the past, property rights have sometimes been used to override common concerns for the environment. By elevating those concerns to the level of a human right, R2E thus raises the status of environmental protection.

This is especially important when one considers that, according to the Vienna Declaration, States must treat *all human rights* 'globally in a fair and equal manner, on the same footing, and with the same emphasis.'[184]

This benefit can be clearly seen in a number of national court cases. For example, 1999, Slovenia's Constitutional Court upheld a tax on water pollution based on the constitutional interest in environmental protection,[185] while in Belgium, following recognition of R2E, 'courts are no longer inclined when facing conflicting interests, to automatically sacrifice environmental interests in favour of economic interests.'[186]

Other examples include: decisions by the Greek Council of State to strike down approval of the Acheloos water diversion project; Colombia's repeated refusal to permit the Eco Oro gold mine to proceed in an ecosystem that provides drinking water for millions of people; the Finnish Supreme Administrative Court's decision to block the Vuotos hydroelectric project; Costa Rican court decisions blocking offshore oil and gas development; the Ecuadorian Constitutional Court's rejection of the Baba Dam; Hungarian and Russian court decisions preventing the privatisation of public forests; and the Thai Supreme Court's decision to block dozens of petrochemical projects.[187] These cases involved powerful actors and had major economic implications, yet in each case the courts decided to protect the human right to a healthy environment.

USING EMPIRICAL EVIDENCE TO MEASURE THE IMPACT OF R2E

While these national case studies provide important anecdotal evidence of the practical benefits that accrue from a State's decision to recognise R2E in law, and thus the likely benefits of universal recognition, the ultimate measure of the impact of legal recognition of people's right to live in a safe, clean, healthy and sustainable environment is the degree to which it contributes, at an empirical level, to the enjoyment of human rights and to healthier ecosystems.

The evidence in this regard is strikingly positive. In a 2011 study on the subject, Boyd found that countries that have recognised the right to a healthy environment in their constitutions have smaller ecological footprints, rank higher in comparative environmental indices, are more likely to ratify international environmental agreements, and have made faster progress in reducing emissions of sulphur dioxide, nitrogen oxides, and greenhouse gases than States that are yet to do so. For example, between 1980 and 2005, wealthy industrialised countries that have recognised R2E reduced sulphur dioxide emissions by 84.8 per cent, while those that do not have constitutional provisions on R2E reduced their emissions by just 52.8 per cent.[188]

A second, more sophisticated, empirical analysis of the effects of constitutional environmental rights on environmental performance, published in 2016, reached the same conclusion.[189] The study cross-referenced the presence of constitutional R2E provisions against environmental performance (using the 'Yale Center for Environmental Law and Policy's Environmental Performance Index'). It concluded that: 'Ultimately we find evidence that constitutions do indeed matter.' A third study, also from 2016, found constitutional recognition of R2E to be positively correlated with equitable access to safe drinking water.[190]

Official Mission of the Special Rapporteur on Human Rights and the Environment, professor David Boyd, to Norway, September 2019, Norway

IV.
CONCLUSIONS AND RECOMMENDATIONS

The human right to a clean, healthy and sustainable environment (R2E) does not appear in the Universal Declaration of Human Rights and the two Covenants because those instruments were drafted before the advent of the modern environmental movement in the 1960s and 70s. However, in recent decades there has been a huge wave of support for the recognition of R2E at national, regional and international levels. Over one hundred national constitutions now recognise the right, as do regional agreements in Africa, the Americas, Asia and Europe. At UN-level, the first UN Special Rapporteur for human rights and environment and co-author of this report, John Knox, ended his term in 2018 by calling for States to recognise R2E at the United Nations. The current mandate-holder and also co-author of this report, David Boyd, has repeated that call and shown how legal recognition of R2E helps empower rights-holders, supports the work and protects the rights of environmental human rights defenders, and helps safeguard the environment and climate. Likewise, civil society leaders have drawn attention to the fact that legal recognition of R2E supports the realisation of other fundamental human rights, and more than 1000 civil society organisations have called for its urgent recognition.

Over the past year, senior UN figures, including the Secretary-General, the High Commissioner for Human Rights, the Executive Director of UNICEF and the Executive Director of the UN Environment Programme, have joined the growing chorus of support for universal recognition. During the 44th session of the Human Rights Council, for example, the High Commissioner, Michelle Bachelet, said:

It is time for global recognition of the human right to a healthy environment – recognition that can lead to stronger policies, at all levels, to protect our planet and our children. The right to a healthy environment is grounded in measures to ensure a safe and stable climate; a toxic-free environment; clean air and water; and safe and nutritious food. It encompasses the right to an education with respect for nature; to participation; to information; and to access to justice [...]

As a result of decades of determined work – a story told in this policy report - an important window of opportunity now exists to make a final push to secure universal recognition, via a Council resolution followed by a resolution at the General Assembly. The authors of this report believe the growing support for such a move amongst the UN leadership, Special Procedures and civil society reflects widespread support amongst States, over 150 of which now legally recognise the right. Although the COVID-19 pandemic has delayed the push for R2E, the fact that the crisis was partly caused by humankind's failure to protect and conserve the natural environment has underscored the importance of recognition of the fundamental importance of the environment to the enjoyment of human rights. The widespread determination to place human rights, the environment and climate at the centre of global efforts to 'build back better' adds to the sense that now is the time for that final push for recognition. Finally, our sense of urgency is fuelled by the simple and unavoidable fact that the growing climate, environment and biodiversity crises facing the world, which are already causing huge levels of suffering (including millions of deaths every year from air pollution), and which threaten far greater harms in the near future, require the international community to use every tool at its disposal to defend the environment and the rights of everyone who depends on it.

While it will be important to continue to build a broad coalition of States, both developed and developing, behind universal recognition, it seems clear that the momentum built over the past five decades, coupled with the large number of countries that have already recognised R2E, and the greater public awareness of the crucial inter-relationship between human rights and the environment that has emerged due to the climate crisis and the COVID-19 pandemic, together mean #TheTimeIsNow.

In order for the international community to seize this historic opportunity, we recommend that the Human Rights Council core group on human rights and environment, led by Costa Rica, the Maldives, Morocco, Slovenia and Switzerland, table the necessary resolutions before both the Council and the General Assembly by the end of 2021 – in time for the 50th anniversary of the Stockholm Conference on the Human Environment in 2022 – and that all UN members join together to recognise the human right to a safe, clean, healthy and sustainable environment, to the great and lasting benefit of people and the planet.


UNITED NATIONS
I have the
RIGHT to a healthy
ENVIRONMENT

ANNEX I

Legal recognition of the right to a healthy environment

	National Constitution	International treaty*	National legislation
Afghanistan	N	N	N
Albania	N	Y	N
Algeria	Y	Y	N
Andorra	N	N	N
Angola	Y	Y	Y
Antigua and Barbuda	N	N	N
Argentina	Y	Y	Y
Armenia	N	Y	Y
Australia	N	N	N
Austria	N	Y	N
Azerbaijan	Y	Y	Y
Bahamas	N	N	N
Bahrain	N	Y	N
Bangladesh	Yi	N	N
Barbados	N	N	N
Belarus	Y	Y	Y
Belgium	Y	Y	Y
Belize	N	N	N
Benin	Y	Y	Y
Bhutan	N	N	Y
Bolivia (Plurinational State of)	Y	Y	Y
Bosnia and Herzegovina	N	Y	Y
Botswana	N	Y	N
Brazil	Y	Y	Y
Brunei Darussalam	N	N	N
Bulgaria	Y	Y	Y
Burkina Faso	Y	Y	Y
Burundi	Y	Y	N
Cambodia	N	N	N
Cabo Verde	Y	Y	Y

	National Constitution	International treaty*	National legislation
Cameroon	Y	Y	Y
Canada	N	N	N
Central African Republic	Y	Y	Y
Chad	Y	Y	Y
Chile	Y	N	Y
China	N	N	N
Colombia	Y	Y	Y
Comoros	Y	Y	Y
Congo	Y	Y	N
Costa Rica	Y	Y	Y
Côte d'Ivoire	Y	Y	Y
Croatia	Y	Y	Y
Cuba	Y	N	Y
Cyprus	Yi	Y	Y
Czechia	Y	Y	Y
Democratic People's Republic of Korea	N	N	N
Democratic Republic of the Congo	Y	Y	Y
Denmark	N	Y	N
Djibouti	N	Y	Y
Dominica	N	N	N
Dominican Republic	Y	N	Y
Ecuador	Y	Y	Y
Egypt	Y	Y	N
El Salvador	Yi	Y	Yi
Equatorial Guinea	N	Y	N
Eritrea	N	Y	Y
Estonia	Yi	Y	Yi
Eswatini	N	Y	N
Ethiopia	Y	Y	N

	National Constitution	International treaty*	National legislation
Fiji	Y	N	N
Finland	Y	Y	Y
France	Y	Y	Y
Gabon	Y	Y	Y
Gambia	N	Y	Y
Georgia	Y	Y	Y
Germany	N	Y	N
Ghana	Yi	Y	N
Greece	Y	Y	Y
Grenada	N	N	N
Guatemala	Yi	Y	Y
Guinea	Y	Y	N
Guinea-Bissau	N	Y	Y
Guyana	Y	Y	N
Haiti	N	N	Y
Honduras	Y	Y	Y
Hungary	Y	Y	Y
Iceland	N	Y	N
India	Yi	N	Y
Indonesia	Y	N	Y
Iran (Islamic Republic of)	Y	N	N
Iraq	Y	Y	N
Ireland	Yi	Y	N
Israel	N	N	N
Italy	Yi	Y	N
Jamaica	Y	N	N
Japan	N	N	N
Jordan	N	Y	N
Kazakhstan	N	Y	Y
Kenya	Y	Y	Y
Kiribati	N	N	N
Kuwait	N	Y	N
Kyrgyzstan	Y	Y	Y
Lao People's Democratic Republic	N	N	N

	National Constitution	International treaty*	National legislation
Latvia	Y	Y	Y
Lebanon	N	Y	Y
Lesotho	N	Y	Y
Liberia	Yi	Y	Y
Libya	N	Y	N
Liechtenstein	N	N	N
Lithuania	Yi	Y	Y
Luxembourg	N	Y	N
Madagascar	N	Y	Y
Malawi	Y	Y	Y
Malaysia	Yi	N	N
Maldives	Y	N	N
Mali	Y	Y	N
Malta	N	Y	N
Marshall Islands	N	N	N
Mauritania	Y	Y	Y
Mauritius	N	Y	N
Mexico	Y	Y	Y
Micronesia (Federated States of)	N	N	N
Monaco	N	N	Y
Mongolia	Y	N	Y
Montenegro	Y	Y	Y
Morocco	Y	N	Y
Mozambique	Y	Y	Y
Myanmar	N	N	N
Namibia	Yi	Y	N
Nauru	N	N	N
Nepal	Y	N	N
Netherlands	N	Y	N
New Zealand	N	N	N
Nicaragua	Y	Y	Y
Niger	Y	Y	Y
Nigeria	Yi	Y	Y
North Macedonia	Y	Y	Y
Norway	Y	Y	Y

	National Constitution	International treaty*	National legislation
Oman	N	N	N
Pakistan	Yi	N	N
Palau	N	N	Y
Panama	Yi	Y	Y
Papua New Guinea	N	N	N
Paraguay	Y	Y	Y
Peru	Y	Y	Y
Philippines	Y	N	Y
Poland	N	Y	N
Portugal	Y	Y	Y
Qatar	N	Y	N
Republic of Korea	Y	N	Y
Republic of Moldova	Y	Y	Y
Romania	Y	Y	Y
Russian Federation	Y	N	Y
Rwanda	Y	Y	Y
Saint Kitts and Nevis	N	Y	N
Saint Lucia	N	N	N
Saint Vincent and the Grenadines	N	Y	N
Samoa	N	N	N
San Marino	N	N	N
Sao Tome and Principe	Y	Y	Y
Saudi Arabia	N	Y	Y
Senegal	Y	Y	Y
Serbia	Y	Y	Y
Seychelles	Y	Y	N
Sierra Leone	N	Y	N
Singapore	N	N	N
Slovakia	Y	Y	Y
Slovenia	Y	Y	Y
Solomon Islands	N	N	N
Somalia	Y	Y	N
South Africa	Y	Y	Y
South Sudan	Y	N	N
Spain	Y	Y	Y

	National Constitution	International treaty*	National legislation
Sri Lanka	Yi	N	N
Sudan	Y	Y	N
Suriname	N	Y	N
Sweden	N	Y	N
Switzerland	N	Y	N
Syrian Arab Republic	N	Y	N
Tajikistan	N	Y	Y
Thailand	Y	N	Y
Timor-Leste	Y	N	Y
Togo	Y	Y	Y
Tonga	N	N	N
Trinidad and Tobago	N	N	N
Tunisia	Y	Y	Y
Turkey	Y	N	N
Turkmenistan	Y	Y	Y
Tuvalu	N	N	N
Uganda	Y	Y	Y
Ukraine	Y	Y	Y
United Arab Emirates	N	Y	N
United Kingdom of Great Britain and Northern Ireland	N	N	N
United Republic of Tanzania	Yi	Y	Y
United States of America	N	N	N
Uruguay	N	Y	Y
Uzbekistan	N	N	Y
Vanuatu	N	N	N
Venezuela (Bolivarian Republic of)	Y	N	Y
Viet Nam	Y	N	Y
Yemen	N	Y	Y
Zambia	N	Y	Y
Zimbabwe	Y	Y	Y
TOTAL	**110**	**126**	**101**

Y = Yes, Yi= implicit, N = No

*Includes the African Charter, the San Salvador Protocol, the Aarhus Convention, the Arab Charter and the Escazú Agreement.

ENDNOTES

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70 See, e.g., Human Rights Committee, General Comment No. 36 on the right to life (2018), paras. 26, 62; Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health (2000), para. 33.

71 E.g., International Covenant on Civil and Political Rights, arts. 2(1), 26; International Covenant on Economic, Social and Cultural Rights, art. 2(2); International Convention on the Elimination of All Forms of Racial Discrimination, arts. 2, 5; Convention on the Elimination of All Forms of Discrimination Against Women, art. 2; Convention on the Rights of the Child, art. 2; Convention on the Rights of Persons with Disabilities, art. 5. The term "discrimination" here refers to "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." Human Rights Committee, General Comment No. 18, Non-discrimination (1989), para. 7.

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84 See Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/29/25 (28 April 2015), para. 22.

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89 See UN Environment Programme Governing Council, Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (2010), guideline 14.

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91 Universal Declaration of Human Rights, art. 19; International Covenant on Civil and Political Rights, art. 19.

92 See, e.g., Inter-American Court of Human Rights, Claude-Reyes et al. v. Chile, ser. C, No. 151 (2006), para. 76 (construing rights to freedom of

expression and remedy in the American Convention on Human Rights). The duty to provide environmental information may also derive from rights in addition to the right to freedom of expression. See, e.g., European Court of Human Rights, Öneryildiz v. Turkey, No. 48939/99 (2004), paras. 75, 90, 98, 108 (construing rights to life, private and family life, and effective remedy); Taşkin v. Turkey, No. 46117/99 (2004), pp. 118-19, 126 (rights to private and family life and to fair hearing); Inter-American Court of Human Rights, Saramaka People v. Suriname, ser. C, No. 185 (2008), para. 17 (rights to property and remedy).

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117 E.g., European Court of Human Rights, Hatton v. United Kingdom, No. 360022/97 (2003), para. 98. Over time, environmental protection is not in conflict with economic development, because sustainable development is possible only with strong environmental protection. Nevertheless, States still have discretion as to how best to allocate scarce resources in particular instances as they strive for the full realization of all human rights. See Rio Declaration, principle 11 ("Environmental standards, management

objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.").

118 Committee on Economic, Social and Cultural Rights, General Comment 3 (1990), para. 9 (the Covenant "imposes an obligation to move as expeditiously and effectively as possible" towards the goal of full realization of the rights, and "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources"); General Comment 15 (2002), para. 19 ("If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.").

119 See Rio Declaration, principle 15.

120 Convention on the Rights of Child, art. 3(1).

121 For example, a decision to allow massive oil pollution in the pursuit of economic development could not be considered reasonable in light of its disastrous effects on the enjoyment of the rights to life, health, food and water. See African Commission on Human and Peoples' Rights, Social and Economic Rights Action Centre v. Nigeria, No. 155/96 (2001).

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129 Human Rights Council res. 34/20, pmbl. para. 13. Many human rights instruments set out specific obligations relevant to those whose rights are often denied or who are otherwise in vulnerable situations. E.g., International Covenant on Civil and Political Rights, art. 27; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child; Convention on the Rights of Persons with Disabilities; United Nations Declaration on the Rights of Indigenous Peoples.

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Secretary-General Boutros Boutros-Ghali (right) is greeted by Maurice Strong, Secretary-General of the United Nations Conference on Environment and Development (UNCED), upon his arrival at Rio Centro for the first day of the Conference. Mr. Strong also presided as Secretary-General of the Environment Conference at Stockholm, 5-16 Photo # 281670; Photo UN; June 1972; non-commercial use authorisation.

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For the first time the Hight Commissioner for Human Rights Navanethem Pillay addressed the Council on Human Rights at the ninth session; N Photo; September 2009; License CC BY-NC-ND 2.0

Meles Zenawi (third from left), Prime Minister of the Federal Democratic Republic of Ethiopia and Co-chair of Secretary-General Ban Ki-moon's High-level Advisory Group on Climate Change Financing (AGF), addresses the Group's high-level event on the sidelines of the UN Conference on Climate Change (COP16) in Cancun, Mexico. UN Photo; Decemer 2010; non-commercial use authorisation.

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URG

Maison de la Paix,
Chemin Eugène-Rigot 2E,
Building 5
CH-1202 Geneva, Switzerland

T +41 22 755 14 56

www.environment-rights.org
www.universal-rights.org
info@universal-rights.org
@URGThinkTank

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