

Environmental Rule of Law and Human Rights in Asia Pacific: Supporting the Protection of Environmental Human Rights Defenders

Working Paper

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Introduction

This Working Paper presents trends in the application of the environmental rule of law and human rights¹ in Asia Pacific, with special emphasis on the protection of environmental human rights defenders (EHRDs).

This Working Paper argues that realization of human rights and the environmental rule of law is necessary for the achievement of the Sustainable Development Goals (SDGs). This is especially so for SDG 16, which seeks to “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.

Achievement of the SDGs depends on governments upholding the rule of law, ensuring access to justice

for all and developing effective, accountable and transparent institutions, ultimately leading to the realization of gender equality and human rights for all.²

The valuable role of EHRDs in advancing the environmental rule of law and contributing to the achievement of SDGs is also recognized in this Working Paper. The indicators for SDG Target 16.10 - relating to the guarantee of public access to information and protection of fundamental freedoms, in accordance with national legislation and international agreements – are specifically applicable to EHRDs.

Scope of this Working Paper

The growing global concern for the plight of EHRDs, the common threats they face, and potential pathways for enabling greater protections to ensure EHRDs are protected and supported in their peaceful endeavours are canvassed in this Working Paper.

Key international developments, including the environmental rule of law, SDGs, UNEP’s Defenders Policy and Response Mechanisms are summarized in Part I. Recent advancements in international law relating to environmental human rights are also noted here. Common threats facing EHRDs throughout the Asia Pacific region are then set out in Part II.

A range of positive paths and best practice models, derived from experiences across the region and elsewhere, are then proposed in Part III. These are aimed at encouraging and facilitating active engagement by States and public authorities, the private sector, and civil society organizations in good practices to promote environmental rule of law, achieve SDGs, and ensure EHRDs are protected and supported in their peaceful endeavours and contributions to these ends.

The last section of the Working Paper sets out a series of recommendations for legal and policy reform in the Asia Pacific region relating to human rights and environmental law. These identify matters which must be urgently addressed across the Asia Pacific, including upholding the environmental rule of law, achievement of SDGs, the realization of the right to a healthy environment, and affording greater protection to EHRDs.

¹ In this Working Paper, the term ‘human rights’ is used in the broadest international legal sense, which necessarily recognizes the full nature and scope of relevant rights, e.g., 1st, 2nd and 3rd generation rights, substantive, and procedural rights, individual, group and collective rights, including for Indigenous peoples, local communities, children and minorities. Specific rights are identified and discussed throughout this Working Paper as appropriate.

² See United Nations (2021), 18, where the UN Secretary General explains: “The 2030 Agenda for Sustainable Development and the Sustainable Development Goals are at the core of Our Common

Agenda. The 2030 Agenda is a plan of action for people, planet, prosperity and peace, that seeks to realize the human rights of all and to achieve gender equality. The Sustainable Development Goals are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental. Many of the actions proposed in this report thus seek to accelerate achievement of the Goals, not least in the light of gaps and delays caused by the COVID-19 pandemic. Actions already underway to achieve the Goals will, in turn, be key for the implementation of Our Common Agenda”.

I. Background

1. Key linkages between Human Rights and the Environment

The linkages between human rights and environmental considerations are evidenced in the expansive understandings of the right to life, the rights to health, self-determination, and development. Environmental concerns also arise regularly in respect of Indigenous peoples and local communities' rights to their traditional lands, territories, and natural resources. This further extends to discussions on the rights of indigenous women who find that their rights are often being eroded as the world becomes increasingly modernized.³ "Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture".⁴

Most recently these linkages have given rise to formal international recognition of the human right to a clean, healthy and sustainable environment (discussed below).

On the other hand, the adverse linkages between poor environmental conditions and human well-being are clear. What is more, they are increasing in many parts of the world, especially in situations involving extractive industry activities, logging, and infrastructure developments that impact local communities and Indigenous peoples throughout the Southeast Asian region. The adverse effects of environmental degradation are also experienced disproportionately by "persons, groups and peoples already in vulnerable situations".⁵

Recently recognized examples of the linkages between human rights and the environment, and the disproportionate impacts of environmental degradation are set out below in Boxes 1 and 2.

Box 1

Recently recognized examples of the linkages between human rights and the environment

The global crises we currently face, including climate change, the loss of biodiversity, and pollution, represent some of the biggest threats to humanity, severely affecting the exercise and enjoyment of human rights. Some examples include:

- Rising global temperatures are increasing water shortages and land degradation, including soil erosion, vegetation loss, wildfires, and permafrost, affecting people's rights to life, health, food, water and adequate standard of living, among other rights.
- Air pollution is considered one of the biggest environmental threats to health resulting in an estimated seven million premature deaths every year in violation of the rights to health and life.
- Over 38 million people were newly displaced by climate-related disasters in 2021. This directly affects the enjoyment of the rights to adequate housing, education, health and security, among others.

Source: United Nations Environment Programme, United Nations Human Rights Office of the High Commissioner and United Nations Development Programme (2022) *What is the Right to a Healthy Environment? - Information Note*. Available at: <https://wedocs.unep.org/20.500.11822/41599> (Accessed: 13 February 2023).

³ See for example, United Nations Office of the Special Adviser to the Secretary-General on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues (2010).

⁴ Töpfer, K. (Executive Director UNEP) (2001).

⁵ United Nations Environment Programme (UNEP), United Nations Human Rights Office of the High Commissioner (OHCHR) and United Nations Development Programme (UNDP) (2022).

Box 2**Recently recognized examples of the disproportionate impacts**

Some examples of those who have often been and may continue to be disproportionately affected by the triple planetary crisis of climate change, loss of biodiversity and pollution include:

- Women and girls, as environmental degradation reinforces pre-existing gender inequalities and discrimination on issues such as gender-based violence, and rights of access and tenure over land and natural resources.
- Children who, because of inter alia their less-developed physiology and immune systems, experience the effects of environmental degradation more intensely due to food and water shortages, and transmission of diseases.
- Indigenous Peoples who often face grave and even life-threatening risks for defending the traditional lands, resources and territories upon which their communities depend for survival, livelihoods and religious and customary practices.

Source: United Nations Environment Programme, United Nations Human Rights Office of the High Commissioner and United Nations Development Programme (2022) *What is the Right to a Healthy Environment? - Information Note*. Available at: <https://wedocs.unep.org/20.500.11822/41599>. (Accessed: 13 February 2023).

2. Environmental Human Rights Defenders

There has been a longstanding recognition of and concern for the plight of human rights defenders around the world.⁶ Many of them act in defence of land and the environment and have become known as environmental human rights defenders or EHRDs.

In accordance with the United Nations' definition of human rights defenders and EHRDs (see Boxes 3 and 4 below), "everyone and anyone has the right to promote and protect a safe, clean, healthy and sustainable environment, necessary for the enjoyment of a vast range of human rights". In 2023 EHRDs were defined by the Special Rapporteur on Environmental Defenders under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) as "all persons engaging in activities to protect their right to a clean, healthy and sustainable environment".⁷

While many human rights defenders are at risk of physical attack, intimidation and harassment, EHRDs are often the most targeted for their endeavors. Globally, EHRDs who have been killed now number in the thousands.⁸ As documented by both global and nationally based organizations, EHRDs are subjected to threats at increasingly alarming levels. Indigenous people, women and other vulnerable groups engaging in EHRD activities are often the most likely victims.⁹

People who advocate on behalf of the environment, seek to defend their land or to realize the human right to a healthy environment may be subjected to murder and other physical injury, discrimination, judicial harassment, cyber-attacks, land grabbing, enforced or involuntary disappearances and, in general, the shrinking of civic space, as detailed below in Part II -Threats to EHRDs.

Three factors have been identified by Knox, the former UN Special Rapporteur on the Right to

⁶ UN General Assembly (1998). Resolution 53/144. For further discussion of human rights defenders and the Mandate for what is now the UN Special Rapporteur on Human Rights Defenders, see: OHCHR (2023a); OHCHR (2023b).

⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998). (Aarhus Convention).

⁸ Menton, M. and Le Billon, P. (2021); Global Witness (2021), 27; Business & Human Rights Resource Centre (2022).

⁹ International Work Group for Indigenous Affairs (2021), 13. See also further detailed discussion of indigenous women human and environmental rights defenders, The International Work Group for Indigenous Affairs (IWGIA) (2022).

Box 3

Who are Human Rights Defenders?

Any person, group, society or organization which, personally or professionally, individually or with others, acts peacefully to promote and work for the protection and realization of human rights and fundamental freedoms at the national and international levels.

Source: United Nations Special Rapporteur on human rights defenders, *About Human Rights Defenders*. Available at: <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/about-human-rights-defenders> (Accessed: 13 February 2023).

Box 4

Who are Environmental Human Rights Defenders?

Any individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna.

Source: United Nations General Assembly, *Report of the UN Special Rapporteur on the situation of human rights defenders A/71/281* (3 August 2016) para 7.

Environment, as contributing to the vulnerability of EHRDs:

- Growing demand for the extraction and exploitation of natural resources;
- The lack of political power and legal recognition of the groups that are often most affected by this increasing demand; and
- Weak or corrupt legal institutions that create a culture of impunity.¹⁰

Additional risk factors contributing to the growing vulnerability of EHRDs include marginalization and the lack of effective rule of law.

EHRDs often “belong to groups that are already marginalized or in situations of relative ‘powerlessness’ within their country or society”, e.g., “Indigenous peoples or other minority communities dependent on their natural environment (e.g., rainforests) for subsistence and the maintenance of their traditional culture.”¹¹

Moreover, in the words of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (right to a healthy environment), the vulnerability of EHRDs is further exacerbated by the “failure of many governments to comply with the rule of law themselves or to enforce

it against others”.¹² The absence of effective rule of law entails complicity on the part of the State, impunity of perpetrators, and application of laws against EHRDs. As Knox explains further, the failure to comply with the rule of law “tends to take at least three forms”:

- The direct involvement by State officials or representatives in violence against EHRDs;
- The failure of governments to investigate and punish harassment and violence directed against EHRDs;
- The adoption and implementation of laws that restrict space for EHRDs to speak, protest, organize and take other actions, in , the violation of the EHRDs’ rights to freedom of expression and association.¹³

The duties of States are also noted by the UN Special Rapporteur on the right to a healthy environment:

States have obligations to protect against environmental harm that interferes with the enjoyment of human rights. Those obligations extend to everyone, including EHRDs. In addition, because EHRDs also work to protect the rights of others, they fall within the scope of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized

¹⁰ Knox, J. (2017), 10.

¹¹ Ibid, 11.

¹² Ibid.

¹³ Ibid, 11-13.

Human Rights and Fundamental Freedoms (the UN Declaration on Human Rights Defenders). Among other rights, EHRDs have the right to protection from States so that they can carry out their work.¹⁴

3. The Environmental Rule of Law

The concept of the environmental rule of law, sometimes referred to as EROL, provides the links between environment protection, the human right to a healthy environment, and the endeavours of States to achieve the Sustainable Development Goals (SDGs). The environmental rule of law was first internationally recognized in United Nations Environment Programme's Governing Council Decision 27/9, Advancing Justice, Governance and Law for Environmental Sustainability.¹⁵ As part of recognizing the growing importance of rule of law in the field of the environment, in particular to reduce violations of environmental law and achieve sustainable development overall, the Governing Council declared that the "violation of environmental law has the potential to undermine sustainable development and the implementation of agreed environmental goals and objectives at all levels", and further, that the "rule of law and effective governance play an essential role in reducing such violations".¹⁶ In consequence, "the first United Nations Environment Assembly called on all countries "to work for the strengthening of environmental rule of law at the international, regional and national levels".¹⁷

In its first global report on environmental rule of law in 2019, the United Nations recognized the interconnections between the environmental rule of law and EHRDs:

Increasingly legislators, policymakers, and stakeholders are recognizing the harms being brought about by the fragmented state of environmental governance and threats to civil society and environmental defenders. To address

this situation, environmental rule of law offers a conceptual and policy framework for strengthening the implementation of environmental law in a systematic and holistic manner. This conceptualization has been gaining popularity across the globe in the past several years as a way to give life to environmental laws and to build stronger rule of law across all of society.¹⁸

It is also worth noting the International Union for Conservation of Nature's World Declaration on the Environmental Rule of Law¹⁹ of 2016 (IUCN World Declaration), which builds on the United Nations Environment Programme Governing Council's Decision 27/9, and offers the following succinct definition and rationale of environmental rule of law:

The environmental rule of law is understood as the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically sustainable development in the rule of law. Strengthening the environmental rule of law is the key to the protection, conservation, and restoration of environmental integrity. Without it, environmental governance and the enforcement of rights and obligations may be arbitrary, subjective, and unpredictable.

The IUCN World Declaration also sets out the following 13 principles for promoting and achieving environmental justice through environmental rule of law, all of which are directly or indirectly relevant to EHRD issues:

- Obligation to Protect Nature;
- Right to Nature and Rights of Nature;
- Right to Environment;
- Ecological Sustainability and Resilience;
- In Dubio Pro Natura;²⁰
- Ecological Functions of Property;
- Intragenerational Equity;
- Intergenerational Equity;

¹⁴ Ibid, 14.

¹⁵ UNEP Governing Council (2013). Decision 27/9, para 5(a).

¹⁶ Ibid.

¹⁷ UNEP (2019), 13.

¹⁸ Ibid, 8.

¹⁹ International Union for Conservation of Nature (IUCN), World Commission on Environmental Law (2016).

²⁰ Tr from Latin: If in doubt, decide in favour of the environment.

- Gender Equality;
- Participation of Minority and Vulnerable Groups;
- Indigenous and Tribal Peoples; and
- Non-regression; and
- Progression.

4. SDG 16 and the environmental rule of law

The key messages in the United Nations Environment Programme's 2021 Issue Brief SDG 16: Human rights and the Environmental Rule of Law²¹ underline the links between environmental rule of law, the human right to a healthy environment, the SDGs and the role of EHRDs:

- Environmental rule of law is critical for the protection of the environment, the promotion of the right to live in a healthy environment, and achievement of the SDGs.
- Environmental human rights defenders play an important role in upholding, implementing and advancing environmental rule of law.
- Legal protection of environmental human rights defenders requires urgent attention throughout the Asia-Pacific region.
- Environmental harm disproportionately impacts individuals, groups and peoples already living in vulnerable situations – including women, children, the poor, ethnic, sexual and gender minorities, migrants, Indigenous people, older persons, and persons with disabilities.

COVID-19 exacerbates already existing inequalities, coupled with a triple environmental crisis: climate change, loss of biodiversity and pollution. The poor and marginalized are among the most impacted by both COVID-19 and environmental harm that threatens their full and effective enjoyment of all human rights, including through adverse effects on access to food and land, water and sanitation, housing, livelihoods, decent work, healthcare, and other basic necessities.²²

The United Nations Environment Programme Issue Brief on SDG 16, human rights and environmental rule of law states that:

At the core of the 2030 Agenda lies a clear understanding that human rights, peace and security, and development are deeply interlinked and mutually reinforcing. SDG Goal 16 provides a framework for peace, justice for all, and strong institutions, which is fundamental to accelerating progress of all other SDGs. SDG 16 thus acts both as an enabler and a precondition for achieving the 2030 Agenda as a whole.

Promoting the rule of law (SDG Target 16.3) is critical to ensuring achievement of fundamental freedoms, including access to information, guarantees of civic space and free, independent, plural, and diverse media. It assists in building and supporting public participation, inclusive and peaceful societies, and in holding public institutions and officials accountable for their actions. These key dimensions of SDG 16, as well as effective, accountable, and transparent institutions, are also preconditions for realizing economic, social and cultural rights, including the right to a safe, clean, healthy and sustainable environment and the objective of leaving no-one behind (LNOB). They embody some of the key elements of the environmental rule of law, critical to the achievement of sustainable development.²³

5. The human right to a clean, healthy and sustainable environment

On 8 October 2021, the United Nations Human Rights Council adopted a ground-breaking resolution - *Res 48/13 The human right to a clean, healthy and sustainable environment*²⁴ - by a recorded vote of 43 to 0, with 4 abstentions (HRC Res 48/13). On 28 July 2022 the UN General Assembly adopted a resolution giving universal recognition to the right to a clean, healthy, and sustainable environment (GA Res

²¹ UNEP (2021).

²² Ibid, 1.

²³ Ibid, 2.

²⁴ Human Rights Council (HRC) (2021). *The human right to a clean, healthy and sustainable environment*. A/HRC/Res/48/13 (8 October 2021).

76/300).²⁵ The UN General Assembly's resolution is based on and expressed in similar terms to HRC Res 48/13.

Together, HRC Res 48/13 and GA Res 76/300 represent the culmination of many years of work by the Human Rights Council, UN General Assembly, and UN Special Rapporteurs on Human Rights and the Environment²⁶ in association with a wide network of stakeholders on human rights obligations relating to the enjoyment of a clean, healthy and sustainable environment.

Significantly, with regard to the specific concerns of this Working Paper concerning particular groups, these Resolutions recognize that "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", including Indigenous Peoples, peoples with disabilities, women and girls, children and older persons.²⁷

Both resolutions also recognize that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy human rights".²⁸ As the Human Rights Council points out, this includes the right to life.²⁹ The UN General Assembly also refers to other pressing challenges, namely loss of biodiversity and desertification.³⁰



Importantly from the point of view of procedural access rights, one of the chief concerns of this Working Paper, both resolutions - HRC 48/13 and GA Res 76/300 - further recognize "that the exercise of human rights, including the rights to seek, receive and impart information, to participate effectively in the conduct of government and public affairs and to an effective remedy, is vital to the protection of a clean, healthy and sustainable environment".³¹

As noted in HRC Res 48/13 (2021), over 155 States have already recognized the right to a healthy environment in some form, e.g., provisions in international agreements, national constitutions, legislation, laws, or policies.³² In some parts of the world, a right to a healthy environment is recognized in regional human rights law treaties and the case law of regional human rights institutions.³³ The European Court of Human Rights has incorporated the right to a healthy environment into its case law

²⁵ UN General Assembly (2022). *The human right to a clean, healthy and sustainable environment*. A/RES/76/300 (28 July 2022).

²⁶ See OHCHR (2023c), where the mandate and appointments of the UN Special Rapporteur on human rights and the environment are explained as follows: "The Human Rights Council established the mandate for the Independent Expert on human rights and the environment in 2012 (resolution 19/10). Mr. John Knox was appointed the first Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment for a three-year term. His mandate was further extended in March 2015 as a Special Rapporteur for another three years (resolution 28/11). In March 2018, the Human Rights Council further extended the mandate (resolution 37/8) and appointed Mr. David. R. Boyd as the Special Rapporteur for three years. In March 2021 the Human Rights Council extended the mandate for another three years (resolution 46/7)."

²⁷ UNGA, A/RES/76/300 (28 July 2022), Preamble, rec 11; HRC A/HRC/RES/48/13 (18 October 2021), Preamble, rec 10.

²⁸ UNGA, A/RES/76/300 (28 July 2022), Preamble, rec 13; HRC, A/HRC/RES/48/13 (18 October 2021), Preamble, rec 11.

²⁹ UNGA, A/RES/76/300 (28 July 2022), Preamble, rec 13.

³⁰ HRC, A/HRC/RES/48/13 (18 October 2021), Preamble, rec 11.

³¹ UNGA, A/RES/76/300 (28 July 2022), Preamble, rec 13; HRC, A/HRC/RES/48/13 (18 October 2021), Preamble, rec 12, which also recognizes the right to participate in environmental decision making.

³² HRC, A/HRC/RES/48/13 (18 October 2021), Preamble, rec 17. See also UNGA, A/RES/76/300 (28 July 2022), Preamble, rec 20, where it is noted that the "vast majority of States" recognize this right in some form.

³³ See e.g., *Additional Protocol to the Inter-American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)* (1988), art 11; *African Charter on Human and Peoples' Rights*, art 24. See also recent discussion: Cantley-Smith, R. (2021).

through expansive interpretations of several human rights including the rights to life and health.

Several States in the Asia-Pacific region include such provisions in their Constitution or national laws.³⁴ In some States, the “right to life” provisions contained in Constitutions or national laws have been interpreted broadly as being including environmental considerations.³⁵ This is consistent with the UN Human Rights Committee’s broad interpretation of the right to life to incorporate environmental concerns.³⁶

Whilst not binding, the Association of Southeast Asian Nations (ASEAN) Declaration on Human Rights expressly recognizes the right to “a safe, clean and sustainable environment” as an integral part of every person’s right to an adequate standard of living.³⁷

The operative paragraphs of the 2022 UN General Assembly resolution 76/300 are as follows:

The General Assembly, ...

1. *Recognizes* the right to a clean, healthy and sustainable environment as a human right;
2. *Notes* that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;
3. *Affirms* that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;
4. *Calls upon* States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-

building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.

The adoption of the both the Human Rights Council and UN General Assembly’s resolutions will in time influence the future development, implementation and interpretation of many aspects of environmental law as well as human rights law at both international and national levels.

This Working Paper recommends that the right to a clean, healthy and sustainable environment be explicitly added to national constitutions across the Asia-Pacific region where such a provision is not yet included.

Where it is not possible to change the national constitution, it is recommended that a similar provision be inserted into appropriate human rights or environmental laws and policies at national, and where appropriate, sub-national levels.

6. United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the United Nations by a resolution in 2007.³⁸

UNDRIP’s Preamble recognizes “that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment”. It also contains a substantive provision on the right to environment, although it does not refer to a level of quality as such. Article 29(1) states:

³⁴ The relevant Asia Pacific States include, Bangladesh, Bhutan, Fiji, India, Indonesia, Maldives, Mongolia, Nepal, the Philippines, South Korea, and Timor Leste. In terms of constitutional rights, for example, the Indonesian formulation is: “Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care”: *Constitution of the Republic of Indonesia* (1945, amended 2002), art 28H(1). In Timor Leste, the provision reads: “Everyone has the right to a humane, healthy and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations”. *Constitution of the Democratic Republic of Timor Leste* (2002), art 61. See further, Boer, B. (2015).

³⁵ In the Asia Pacific, the “right to life” provisions in the constitutions or national laws of several States have been interpreted by the courts to include the right to environment, e.g., Bangladesh, India, Malaysia, Nepal and Pakistan. See e.g., Boer, B., *ibid*, 172-174.

³⁶ UN Human Rights Committee (2019). *General Comment No. 36, Article 6: right to life*. CCPR/C/GC/36 (3 September 2019), paras 26 & 62.

³⁷ Association of Southeast Asian Nations (ASEAN) (2012). *Human Rights Declaration*, art 28(f).

³⁸ UN General Assembly (2007). *United Nations Declaration on the Rights of Indigenous Peoples*.

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

In addition, Article 40 of the Declaration points to procedural access rights, through “just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights”.³⁹ This Declaration is of great importance for Asian and Pacific countries. The maintenance of traditional and cultural knowledge in environmental management is central to the lives of many Asian and Pacific peoples.

With regard to some Asian and Pacific States, it is noted that some use the term “Indigenous” in their laws, e.g., “Indigenous Cultural Communities/ Indigenous Peoples”.⁴⁰ Other States use terms such as “ethnic minorities”,⁴¹ “ethnic diversity”,⁴² “multi-ethnic people”.⁴³



This Working Paper recommends, in the case of Asian and Pacific States where Indigenous people and/or ethnic minorities are not yet legally recognized, that they should provide for appropriate provisions to be inserted into their constitutions and/or their national legislation to give such recognition.

7. United Nations Environment Programme's Defenders Policy and Response Mechanism

There has been a longstanding recognition and concern for the plight of human rights defenders around the world,⁴⁴ many of whom act in defence of their land and the environment. UNEP's Environmental Defenders Policy⁴⁵ is seen to promote the “critical role of the environmental rule of law in environmental matters”. It provides that UNEP will:

- Denounce the attacks, torture, intimidation and murders of environmental defenders.
- Advocate for better protection of environmental rights people standing up for these rights.
- Support the responsible management of natural resources, production and consumption patterns, including in protected areas, through strong institutions, effective law enforcement, and environmental rule of law; and
- Request government and companies' accountability from the different events where environmental defenders have been affected/murdered.⁴⁶

³⁹ See Part III, 5, below, concerning the obligation to seek free, prior and informed consent.

⁴⁰ See e.g., The Philippines *Indigenous Peoples Rights Act* (1997).

⁴¹ Article 5 of the *Constitution of the Socialist Republic of Vietnam* (2013) recognizes “national minorities”, while Article 65(3) refers to “ethnic minority people”.

⁴² The *Constitution of the Independent State of Papua New Guinea* (1975) recognizes the combined heritage and “rich cultural and ethnic diversity” of the peoples of PNG, as well as “traditional ways of life and culture, including language”, and “traditional villages and communities”, drawn from National Goals and Directive Principles in the Constitution.

⁴³ The *Constitution of Laos* (1991, revised in 2003) refers to “multi-ethnic Lao people” in its preamble and to ‘multi-ethnic people’ in Articles 2, 3, 7, 13 and 52.

⁴⁴ See e.g., UN General Assembly (1998). *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*. See also OHCHR (2023a); OHCHR (2023b).

⁴⁵ UNEP (2018).

⁴⁶ Ibid, 2-3.

The UNEP Environmental Defenders Policy includes a Response Mechanism,⁴⁷ the objective of which is to speak out on individual cases and to point towards solutions in the form of technical and legal support to governments and other stakeholders, such as the judiciary and the enforcement community, so that they can strengthen environmental rule of law and governance which will mitigate environmental and human rights abuses.

It states that it is important for UNEP

to enter into dialogue with national leaders who ultimately are responsible for upholding the rule of law in their countries. Importantly, regional offices – including in consultation with the

local/regional presence of the Office of the High Commissioner for Human Rights, civil society actors and others – must play a central role in assessing individual cases, given their proximity and understanding of local sensitivities.⁴⁸

To date, this mechanism has not been used extensively in the Asia-Pacific region, possibly because it is not widely known about, and possibly because of fear of reprisals by individuals or groups that ought to be using it. Better advertising of its existence, and greater encouragement of its use, with appropriate protection mechanisms, is recommended at the end of this Working Paper.



⁴⁷ Ibid, 3-4.

⁴⁸ Ibid, 3.

II. Common Threats to EHRDs

This section summarizes common threats in the Asia-Pacific region with regard to the role played by human rights defenders in general and EHRDs in particular. At the outset it should be noted that these threats do not occur uniformly across the region.

1. Shrinking of Civic Space

The UN Guidance Note on the Protection and Promotion of Civic Space defines civic space as:

the environment that enables people and groups – or “civic space actors” – to participate meaningfully in the political, economic, social and cultural life of their societies. States shape the legal and policy space within which people express views, assemble, associate and engage in dialogue with one another and with authorities about issues that affect their lives, from the quality of basic services to better institutions and respect for fundamental freedoms. Civil society actors – including human rights defenders, women advocates, children, young people, members of minorities and Indigenous people, trade unionists and journalists – should be able to express themselves freely in full security and effect change peacefully and effectively.⁴⁹

The Guidance Note focuses on the “3 Ps” of civic space: Participation, protection, and promotion.⁵⁰ These are defined as follows:

- Participation: Ensure inclusive, diverse, safe, independent and meaningful civil society participation in UN intergovernmental processes.
- Protection: Contribute to protection of civil society actors at risk (including from intimidation and reprisals for cooperating with the UN).

- Promotion: Actively promote inclusive, safe and meaningful civil society participation in and decision-making and open civic space at the country level, including legal and policy frameworks that facilitate debate online and offline and allow civil society to organize freely.⁵¹

A Crucial Gap,⁵² a recent statistical analysis, linked civic space, human rights defenders and the SDGs:

The killing of a human rights defender represents a direct attack on civic space and an affront to the fundamental freedoms that underpin a peaceful, inclusive and sustainable society. Until these individuals and their communities are safe and able to work and live in a secure, enabling environment, progress towards the SDGs cannot be fully realized or considered truly sustainable.⁵³

The analysis also noted that of the 357 human rights defenders (HRDs) that were killed in 2019 around the world, about half could be considered to be land and environmental human rights defenders.⁵⁴ A similar picture is drawn by the Frontline Defenders 2021 Global Analysis Report: “the regular everyday risks faced by HRDs all over the world remained ever-present”, whilst “at least 331 HRDs were killed for carrying out their peaceful human rights work in 2020”, and that “69% of those killed worked on land, environmental or indigenous peoples’ rights”.⁵⁵ A Global Witness Report in 2022, Decade of Defiance, records 200 murders of land and environment defenders, with over 30 of these in the Asia Pacific.⁵⁶

The following are examples of the shrinking of civic space in Asia Pacific States, thereby impacting the environmental rule of law. Some of these examples intersect with the general and specific threats in the ensuing sections:

⁴⁹ United Nations (2020), 3.

⁵⁰ Ibid, 5-14.

⁵¹ OHCHR (1996-2022).

⁵² International Land Coalition (2020).

⁵³ Ibid, 2.

⁵⁴ Ibid, 2.

⁵⁵ Front Line Defenders (2021), 8.

⁵⁶ Global Witness (2022), 9-11.

- Reduction of constitutional guarantees concerning human rights;
- Imposition of emergency measures as a result of the COVID-19 pandemic which limit free assembly and peaceful advocacy;
- Restriction of communication on the Internet through cyber security laws;
- Restricting possibilities for legitimate protest and other activities of civil society organizations involved in environment protection;
- Corporate capture of governmental institutions, police and military;⁵⁷ and
- Restricting public participation in environmental impact assessment processes.

The practice of “doxing” should also be mentioned. Doxing (derived from the idea of posting documents or “dropping documents” on the Internet)⁵⁸ involves the act of revealing identifying information about someone online, such as their real name, photograph, home address and other contact details, usually on the internet, for malicious purposes. In some Asia Pacific States such as Indonesia,⁵⁹ this practice has significantly increased in recent times.⁶⁰

2. Impunity of Government and Private Sector Interests

In many countries in the Asia and Pacific, attacks of various kinds against EHRDs can take place with impunity on the part of government officials as well as private sector interests and such impunity is seen as a key driver for further attacks.⁶¹ In some jurisdictions, such attacks are taking place at the behest of or in connivance with private sector interests. In some states in the region, such attacks may be linked to issues of corruption and short-term financial gain and encouraged by a lack of political

will to enforce environmental and human rights-related laws. For example, the report *Reclaiming the Narrative* notes with respect to various kinds of attack:

The main perpetrators aside from private security forces of corporations are state agents such as the police and military. The government which was supposed to protect its citizens has become a tool to protect profit-making interests. Therefore, impunity persists, and the attacks continue.⁶²

In some Asian and Pacific states, lack of awareness by politicians and governmental officials of the international obligations taken on by their states under the human rights conventions and multilateral environmental agreements of which they are Parties, or disregard for those obligations, are issues that remain to be addressed.

3. Land Grabbing

Large-scale land grabbing, often of traditionally owned land under the management and/or control of Indigenous and local communities, is prevalent in a number of countries in the Asia Pacific. Land may be taken for conversion to other uses, which range from large scale agri-business such as palm oil plantations to infrastructure development such as hydropower, shipyards, or other development projects such as golf courses and urban development.

Land grabbing is carried out by both domestic and international actors and may be associated with coercion, limited access to information, lack of adequate public participation and absence of Free, Prior and Informed Consent processes. Land grabbing is seen to have profound effects on farmers, and particularly on women farmers.⁶³ Those who take action in attempts to stop land grabbing can often clearly be identified as EHRDs. As noted by the Special Rapporteur on Indigenous Peoples:

⁵⁷ See e.g., Center for Constitutional Rights (2019), where a definition of corporate capture is noted: “a phenomenon where private industry uses its political influence to take control of the decision-making apparatus of the state, such as regulatory agencies, law enforcement entities, and legislatures”.

⁵⁸ See for example Fruhking, J. (2020).

⁵⁹ SAFEnet (2021).

⁶⁰ Timmerman, A. (2022).

⁶¹ OHCHR (2021a).

⁶² Asia Pacific Network of Environmental Defenders (APNED) and Center for Environmental Concerns – Philippines (CEC) (2021), 105.

⁶³ See for example, UN Entity for Gender Equality and the Empowerment of Women (UN Women) and the OHCHR (2020); UN Human Rights Special Procedures (2017); Ocasiones, L.G. (2018).

Land-grabbing and activities linked to large-scale development projects (including the construction of hydroelectric dams), extractive industries, monocrop plantations and logging are increasing in the region, which in turn results in the massive displacement of Indigenous peoples, the destruction of their environment and rising poverty.⁶⁴

Specific instances of land grabbing in Cambodia, Indonesia, Myanmar, Thailand, and The Philippines are detailed by the Asia Pacific Network of Environmental Defenders.⁶⁵

4. Violence

The prevalence of violent acts perpetrated against human rights and environmental defenders around the world has been catalogued by intergovernmental and civil society organizations for many years. In 2020 alone, in its global analysis, Global Witness recorded 227 murdered land and environmental defenders, describing it as “the most dangerous year on record for people defending their homes, land and livelihoods, and the ecosystems vital for biodiversity and the climate”.⁶⁶

In the Asia Pacific, the statistics are consistent with the global numbers. While those numbers are already unacceptable, it appears likely that killings were significantly under-reported, because the vast majority of countries (94%) that submitted Voluntary National Reports did not report under SDG Indicator 16.10.1, which records killings of human rights defenders.⁶⁷

As stated in *A Crucial Gap*: “...more than six years after Agenda 2030 was adopted by the United Nations General Assembly, crucial gaps in state reported data severely undermine our ability to monitor the situation of HRDs, particularly those protecting land, the environment and indigenous peoples’ rights”.⁶⁸

5. Judicial Harassment

“Judicial harassment” can take many forms. It has been defined in the Asia Pacific context as “the use of the legal and/or judicial system to silence and intimidate critics”,⁶⁹ including activists defending their land and the environment.

Judicial harassment can include civil lawsuits, including for defamation, criminal cases, legal tactics such as abusive subpoenas; unfair trials initiated by either government or private actors, including companies. It should be noted that the term judicial harassment does not refer directly to the actions of courts and decisions of judges, but to government and private sector entities that use the court system to harass EHRDs.

6. Strategic Lawsuits Against Public Participation

Strategic Lawsuits Against Public Participation, known as SLAAPs, are a particular form of judicial harassment. SLAPPs can have a chilling effect on free expression and disrupt legitimate collective action by civil society groups.

SLAPPs are often aimed at environmental activists defending their land and environment. It can include civil lawsuits, including for defamation; arbitrary detention and arrest on trumped-up charges, resulting in criminal prosecutions; legal tactics such as abusive subpoenas; and unfair trials initiated by government, sometimes prompted by private actors (i.e., companies).

The Philippines Supreme Court Rules of Procedure of Environmental Cases define SLAPP as any civil, criminal, or administrative action that has been:

- Brought against any person, institution or any government agency or local government unit or its officials and employees; and
- With the intent to harass, vex, exert undue pressure or stifle any legal recourse that any

⁶⁴ United Nations (2020).

⁶⁵ APNED and CEC (2021).

⁶⁶ Global Witness (2021), 10.

⁶⁷ United States, National Statistics for the United Nations Sustainable Development Goals (2023), *Indicator 16.a.1*. See also

UN Department of Economic and Social Affairs (DESA) (2023), *SDG Indicators Database*.

⁶⁸ International Land Coalition (2020); UNEP (2018), 7; Excell, C. and Hershaw, E., (2021).

⁶⁹ Business and Human Rights Centre (2020), 5.

person, institution or government agency has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights.⁷⁰

As noted by the Business and Human Rights Resource Centre, SLAPPs are:

Filed or initiated by a private party with the intent to intimidate and harass HRDs [Human Rights Defenders] who are engaged in acts of public participation, including criticism or opposition concerning business activities. This includes civil cases brought by companies, as well as criminal cases when and if the company has initiated the criminal complaint. In criminal prosecutions – which are typically brought by the state – it can be challenging to demonstrate the company’s involvement, making it harder to identify these cases as a SLAPP.⁷¹

7. Criminalization

The criminalization of activities of human rights defenders has increased over the past decade.⁷² Criminalization can take the form of individual judicial harassment as well as collective measures, such as the use of anti-terrorism laws, restrictions on freedom of expression and the right to protest.⁷³

One specific form of criminalization is the use of criminal libel laws, applied in a number of Asian countries against human rights defenders and other activists in efforts to stifle complaints concerning human rights abuses. The US Department of State, in its regular reports on human rights in states around the world, identifies a number of Asian states where such laws are used, such as Bangladesh, Cambodia, India, Indonesia, Malaysia, Thailand, and Vietnam.⁷⁴

In a special study on Thailand, the civil society organization Article 19 identified specific instances

of such laws being used against human rights defenders and environmental defenders:

In recent years, companies and powerful individuals have increasingly initiated criminal defamation cases against individuals who have raised concerns about human rights abuses, labour rights violations, corruption, and other matters of public interest. Article 19 identified 58 such cases that have been initiated since 2014. The 116 people who were accused in these cases included workers, activists, journalists, human rights defenders, environmental defenders, whistle blowers, academics, and politicians. Although only nine of the cases have resulted in convictions, scores of individuals have been forced to endure lengthy and burdensome investigations and trials because of their efforts to expose injustice, support marginalized communities, or report on matters of public concern.⁷⁵

A number of other forms of criminalization of legitimate human rights activities have been documented in recent years. They include the use of laws intended to counter terrorism and national security, such as the Computer Crime Act in Thailand, the Official Secrets and Telecommunications law in Myanmar and lèse-majesté laws in Cambodia and Thailand, referred to as “examples of legislation framed so broadly that it enabled almost anything to be interpreted as an offence”.⁷⁶ The phenomenon has been referred to as the “criminalization of dissent”.⁷⁷

8. Enforced or involuntary disappearances

The International Convention for the Protection of All Persons from Enforced Disappearance defines “enforced disappearance” as:

The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the

⁷⁰ The Philippines, Supreme Court (2010). *Philippines Supreme Court Rules of Procedure of Environmental Case*, Rule 1(4)(g).

⁷¹ Business and Human Rights Centre (2020), 5.

⁷² Global Witness (2022).

⁷³ Global Witness (2020); Global Witness (2021).

⁷⁴ US Department of State (2022). *Country Reports on Human Rights Practices*.

⁷⁵ Article 19 (2021), 4.

⁷⁶ Denton, J. (2018).

⁷⁷ Ibid.

authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁷⁸

The International Convention for the Protection of All Persons from Enforced Disappearance provides the basic obligations in its first article:

1. No one shall be subjected to enforced disappearance.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.⁷⁹

Most Asian and Pacific States have not yet become members of the International Convention for the Protection of All Persons from Enforced Disappearance. Experiences across the Asia-Pacific region demonstrate that individuals subjected to forced disappearance include EHRDs. In respect of Southeast Asia, the United Nations has observed that the victims of enforced disappearance “have included human rights defenders, environmental and political activists, government critics, lawyers and journalists”.⁸⁰ The Asia Pacific Network of Environmental Defenders have also reported on the prevalence of forced disappearances, especially women, across several Asia Pacific States.⁸¹

9. Access to justice and lack of enforcement of environmental laws

Many countries in the Asia-Pacific region have comprehensive and up-to-date environmental laws. However, implementation and enforcement of these laws remains a major issue, because of lack of political will and lack of opportunity for the public to

challenge governmental decisions or to address breaches of the laws.

Access rights, namely the right to information, the right to public participation and the right to access to justice in environmental decision-making may be obstructed by complex bureaucracy, systemic intransigence and lack of adequate response. Such obstruction also presents a threat to conduct of legitimate activities by EHRDs.⁸² In several Asia Pacific States, there is no direct right of appeal to the courts by individuals and communities through public interest environmental litigation. In short, lack of access to justice compounds problems relating to criminalization and judicial harassment.

Two Asian states provide specific examples where participation processes have been curtailed by recent changes in rules related to environmental impact assessment (EIA). In India, the Draft Environment Impact Assessment Notification, 2020, issued by the Ministry of Environment, Forests and Climate Change includes “three significant dilutions that have threatened the effectiveness of the Draft EIA Notification”; these are providing for post facto EIA clearance of proposals, that the normal prior EIA clearance requirement, limiting public consultation, and granting exemptions for transboundary projects.⁸³ In Indonesia, the 2020 Job Creation Law attempted to severely restrict public participation provisions with regard to EIA.⁸⁴ Both these cases are clear attempts on the part of government to substantially narrow opportunities for formerly guaranteed participation in environmental decision making.

⁷⁸ *International Convention for the Protection of All Persons from Enforced Disappearance* (2006), art 2.

⁷⁹ *Ibid*, art 1.

⁸⁰ United Nations, Viet Nam (2020).

⁸¹ APNED and CEC (2021).

⁸² See e.g., UN Human Rights Council, Special Procedures (2022).

⁸³ See Jolly, S. and Singh, S. 2020.

⁸⁴ Widyaningsih, G.A. and Sembiring, R. (2021), where the authors note that parts of the Job Creation Law, including those on environment protection, were struck down as unconstitutional by the Supreme Court of Indonesia in November 2021. See also Reuters (2021).



III. Good Practices to Promote the Environmental Rule of Law

This section sets out a range of “good practices” that could be built on in the Asia-Pacific region with respect to promotion of the environmental rule of law in the context of human rights and the environment, with particular regard to the recognition and protection of environmental human rights defenders. The analysis is not intended to be exhaustive. However, as an initial point, with the knowledge that women environmental defenders face intersecting and multiple forms of discrimination, it is crucial for policy makers to formulate gender-responsive and rights-based environmental strategies, policies, practices and laws. This will help to ensure that women and girls as well as other vulnerable parts of populations exercise their human rights through the enjoyment of a safe, clean, healthy and sustainable environment.

1. Bolstering national human rights institutions

Under the list of indicators that show achievement of the obligations taken on under the Sustainable Development Goals, Goal 16.a.1 specifies the indicator with regard to compliance with the Paris Principles.⁸⁵ The Paris Principles are regarded as the minimum standards that should be met for the recognition of national human rights institutions, as set out by the Global Alliance of National Human Rights Institutions (GANHRI).⁸⁶

In the Asia-Pacific region, the establishment of national human rights institutions has been inconsistent, as shown by membership of the regionally based Asia Pacific Forum of National

⁸⁵ United States, National Statistics for the United Nations Sustainable Development Goals (2023). *Indicator 16.a.1*: See also UN DESA (2023), SDG Indicators Database.

⁸⁶ The Paris Principles include six main criteria: a clearly defined and broadly based mandate predicated on universal human rights;

autonomy from government; independence guaranteed by legislation or the constitution; pluralism, including membership that broadly reflects their society; adequate resources; and adequate powers of investigation. UN General Assembly (1993).

Human Rights Institutions, established in 1996.⁸⁷ Membership is divided into full and associate memberships. Full membership means that the national human rights commission of that state conforms with the Paris Principles; associate membership means that they do not yet comply with the Paris Principles. The forum encourages the establishment of further national human rights institutions (NHRIs).⁸⁸

UN Country Teams can play a significant role in promoting the establishment and ongoing support of NHRIs.

2. Expanding the protection offered by regional human rights commissions

Several regional human rights bodies have been established in the Asia-Pacific region in recent years. The ASEAN Intergovernmental Commission on Human Rights (AICHR) was established in 2009 as “an inter-governmental body and an integral part of the ASEAN organizational structure”.⁸⁹ The AICHR was the first major institutional effort to address general human rights in the Asia-Pacific region. While the ASEAN Intergovernmental Commission on Human Rights has developed considerably, issues of implementation still remain, as noted by one commentator:

Over the last 10 years, AICHR has generated regional human rights debates on different issues and engaged civil society and wider stakeholders, built capacity, and conducted studies on human rights. The adoption of the ASEAN Human Rights Declaration in 2012 enabled the region to further promote human rights in ASEAN regionalism. While AICHR has gradually become an important institution for human rights in the region, it continues to struggle in performing its work of human rights protection due to the lack of a formal

protection mandate and the political will of member states.⁹⁰

The ASEAN Intergovernmental Commission on Human Rights Work Plan 2021–2025 includes a section on the Sustainable Development Goals and human rights. This is a significant evolution of the work of Commission, as noted in a recent article:

Sustainable Development Goals (SDGs), notably goal 16, will serve as a complementary human rights protection process in Southeast Asia. This will occur gradually and is contingent upon close collaboration between elements of the regional human rights architecture — the ASEAN Intergovernmental Commission on Human Rights (AICHR), national human rights institutions (NHRIs), civil society organizations (CSOs), and global rights mechanisms.⁹¹

Given the issues concerning environmental human rights defenders in Asia Pacific states, the ASEAN Intergovernmental Commission on Human Rights should consider following the lead of the Inter-American human rights system to provide emergency protection measures for EHRDs.

The ASEAN Intergovernmental Commission on Human Rights has commenced a self-assessment which would result in the development of rules of procedure in 2021.⁹² This process is ongoing and should be strongly encouraged.



⁸⁷ As noted by Asia Pacific Forum (2023): Current members of the Forum include Afghanistan, Australia, Bahrain, Bangladesh, India, Indonesia, Iraq, Jordan, Kazakhstan, Kyrgyz Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, New Zealand, Oman, Palestine, Philippines, Qatar, Samoa, South Korea, Sri Lanka, Thailand, and Timor Leste.

⁸⁸ For example, the development of a draft law to establish a human rights institution in Cambodia is discussed in Asia Pacific Forum (2021a).

⁸⁹ ASEAN Intergovernmental Commission on Human Rights (AICHR) (2009).

⁹⁰ Wahyuningrum, Y. (2021).

⁹¹ Ramcharan, R. (2021).

⁹² AICHR (2021a).

An earlier body, the Asian Human Rights Commission, was established in 1984 as “an independent, non-governmental body, which seeks to promote greater awareness and realization of Asian and international public opinion to obtain relief and redress for the victims of human rights violations”.⁹³ Current members are drawn from Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka in South Asia, Myanmar, Cambodia Indonesia, Philippines, Thailand and Vietnam in Southeast Asia, and China and South Korea in East Asia. It produces regular reports on various human rights violations to its members.⁹⁴ This body has an important role to play in providing objective and independent comment on current and emerging issues and trends.

3. Promotion of regional human rights instruments relevant to the environment

3.1. Aarhus Convention

The 1998 Aarhus Convention marked the beginning of a regional trend to recognize the procedural rights of access to information, public participation in decision-making and access to justice in environmental issues.⁹⁵ It is based largely on Principle 10 of the 1992 Rio Declaration,⁹⁶ which sets out three fundamental rights - access to information, access to public participation and access to justice - as the key pillars of sound environmental governance.⁹⁷

3.2. Escazú Agreement

Building on, and extending, the concepts in the Aarhus Convention, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) was finalized in 2018 and entered into force in April 2021.⁹⁸ The Escazú Agreement makes important

contributions to human rights law and environmental protection.⁹⁹ It is of particular importance in the context of this Working Paper with regard to EHRDs. The agreement obliges each State party to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity” (Article 9 (1)). They must also “take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights” (Article 9(2)). Further, each Party must “take appropriate, effective, and timely measures to prevent, investigate and punish attacks, threats, or intimidations that human rights defenders in environmental matters may suffer while exercising their rights (Article 9(3)). These provisions mirror Article 3 (8) of the 1998 Aarhus Convention, which states in part: “Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement”.

Importantly, the Escazú Agreement requires national legislative, regulatory administrative or other measures “in the framework of its domestic provisions, to guarantee the implementation of the provisions of the present Agreement” (Article 4(3)).

Another significant aspect of the Escazú Agreement is the recognition of the rights of Indigenous peoples and local communities. Article 15 states: “In the implementation of the present Agreement, each Party shall guarantee that its domestic legislation and international obligations in relation to the rights of Indigenous peoples and local communities are observed”.

⁹³ Asian Human Rights Commission (AHRC) (2023a).

⁹⁴ AHRC (2023b).

⁹⁵ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998). (Aarhus Convention).

⁹⁶ UN General Assembly (1992). *Rio Declaration on Environment and Development*.

⁹⁷ UNEP (2023).

⁹⁸ *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* (2018). (Escazú Agreement).

⁹⁹ World Resources Institute (2021). See further, Boer, B. and Mwanza, R. (2018), 19.

Given the variable recognition of Indigenous peoples and local communities (including ethnic communities) from one state to another in the Asia Pacific, such a provision at domestic level, as well as in a regional instrument would be very significant.

3.3. Regional Agreements on the Environment in the Asia Pacific, including on EHRDs

On reviewing the activities and reports of the international,¹⁰⁰ regional and national organizations concerned with human rights defenders in general, and environmental human rights defenders in particular, it becomes clear that there is an urgent need for a coordinated approach across the Asia-Pacific region.

One way forward is the negotiation of one or more agreements on the recognition of substantive environmental rights and procedural access rights including rights to protection of EHRDs in the Asia-Pacific region. The two existing regional treaties – Aarhus Convention and the Escazú Agreement mentioned above - would provide excellent guides for such agreement or agreements.

The considerable body of jurisprudence of the Aarhus Compliance Committee would also provide practical, useful insights into the operative reach and effectiveness of such instruments.¹⁰¹

3.4. An ASEAN Regional Agreement on the Environment

At present, the only regional human rights instrument in the Asia-Pacific region is the ASEAN Human Rights Declaration, referred to above, which was adopted by the heads of the ten ASEAN member countries in 2012.¹⁰² It can be considered as a landmark in the development of human rights protection for the citizens of these countries. Although it is not legally binding, it affirms all of the internationally accepted human rights and purports to guarantee enforceable remedies at national level.

It lists all of the civil and political rights as well as the economic, social, and cultural rights as found in the 1966 International Human Rights Covenants.¹⁰³

The Declaration 2012 already contains a similar right to that of the 2021 Human Rights Council Resolution and the 2022 UNGA Resolution on a clean, healthy and sustainable environment.¹⁰⁴ Article 28 states:

“Every person has the right to an adequate standard of living for himself or herself and his or her family including: ...

(f.) The right to a safe, clean and sustainable environment.”

However, specific rights such as the right to safe drinking water, sanitation and health can also be regarded as part of substantive environmental rights. The ASEAN Human Rights Declaration 2012 includes such rights,¹⁰⁵ although it does not identify them specifically as environmental rights. As with Article 28(f), it places them under the “right to an adequate standard of living”.

In 2022 and 2023, momentum has been building amongst environmental and legal stakeholders in the ASEAN region to develop a regional framework on environmental rights.¹⁰⁶ Any such agreement would desirably follow the operative provisions of the 2022 UNGA Resolution to a clean, healthy and sustainable environment.¹⁰⁷ Such an agreement should also include specific provisions on the recognition and protection of EHRDs.

Finally, it should be noted that in mid-July 2022, the Aarhus Convention Meeting of the Parties elected a Special Rapporteur on environmental defenders.¹⁰⁸ The role of the Special Rapporteur is “to take measures to protect any person experiencing or at imminent threat of penalization, persecution, or harassment for seeking to exercise their rights under the Aarhus Convention”. This appointment is a significant precedent for human rights bodies concerned with environmental issues in other of the worlds regions. If an ASEAN Regional Agreement on

¹⁰⁰ In addition to the UN bodies, UNEP and OHCHR, the most prominent, non-governmental international organizations include Global Witness, Front Line Defenders, Article 19, and Amnesty International.

¹⁰¹ United Nations Economic Commission for Europe (UNECE) (2021); UNECE (2019).

¹⁰² ASEAN (2012). Human Rights Declaration.

¹⁰³ *International Covenant on Economic, Social and Cultural Rights* (1966); *International Covenant on Civil and Political Rights* (1966).

¹⁰⁴ See HRC, A/HRC/Res/48/13 (8 October 2021); UNGA, A/RES/76/300 (28 July 2022).

¹⁰⁵ ASEAN (2012). *Human Rights Declaration*, arts 28(e) and 29(1).

¹⁰⁶ ASEAN (2022).

¹⁰⁷ UNGA, A/RES/76/300 (28 July 2022).

¹⁰⁸ UNECE (2022).

the Environment on the environment, including provisions on EHRDs, discussed above, were to be finalized, it would be a logical and necessary step the parties to the agreement to appoint such a Special Rapporteur for the ASEAN region.

4. Drafting national provisions on EHRDs

Two Asia Pacific States have generated specific national legislation that is intended to protect human rights defenders. These are the Legal Status of Human Rights Defenders in Mongolia in 2021, and Philippines Human Rights Defenders Protection Bill. Other states have introduced more limited measures to protect human rights defenders, these are dealt with below

4.1. The Philippines Human Rights Defenders Protection Bill

An overview of the Philippines Human Rights Defenders Protection Bill is set out Box 5 (below). The Human Rights Defenders Protection Bill spells out 17 rights and freedoms to be enjoyed by human rights defenders.¹⁰⁹ These include freedom from intimidation and reprisal on the grounds of their work and also the right to communicate with organizations, including international and regional bodies.¹¹⁰

The Human Rights Defenders Protection Bill also sets out state obligations. Public authorities must take the necessary measures to ensure “that the rights and freedoms of defenders are guaranteed and protected, and that they work in a ‘safe and enabling environment without restrictions”.

A Human Rights Defenders Protection Committee, composed of members nominated by civil society organizations and appointed by the Philippines Commission on Human Rights, will be established

through this Bill. The committee is to ensure that the rights and freedoms of human rights defenders are protected and will also be able to investigate incidents of abuses or violations, instigated by itself or via a complaint filed by victims.

Box 5

Philippines Human Rights Defenders Protection Bill

The Human Rights Defenders Protection Act (House Bill No. 10576) was passed with 200 votes, with no votes against and no abstentions. The Bill defines a human rights defender as “any person who, individually or in association with others, acts or seeks to act to protect, promote or strive for the protection and realization of human rights and fundamental freedoms and welfare of the people, at the local, national, regional and international levels”. The Bill contains sufficiently robust and comprehensive provisions which, if enacted and adequately implemented, would result in a significant reduction in the instances of violence, intimidation and other breaches of human rights. As the definition of “human rights defender” is broad, it clearly covers the activities of those who seek to defend their land and the environment.

Currently, the Human Rights Defenders Protection Bill must still be approved by the Philippines Senate.¹¹¹ However, some substantial opposition to it remains from the within the Philippines government.¹¹² Despite the urging of the Special Rapporteur on the situation of human rights defenders, there is no clear timeline as to when the Philippines Human Rights Defenders Protection Bill may fully pass through the legislative process into law.¹¹³

¹⁰⁹ The summary is drawn from Gavilan, J. (2022).

¹¹⁰ In addition, the Bill includes the following rights: to promote and protect human rights and fundamental freedoms; to form groups, associations, and organizations; to solicit, receive, and utilize resources; to seek, receive, and disseminate information; to develop and advocate for human rights ideas; to communicate with non-governmental, governmental, and intergovernmental organizations; against vilification; to access, communicate, and cooperate with international and regional human rights bodies and mechanisms; to participate in public affairs; to peaceful

assembly; to represent and advocate; to freedom and movement; to privacy; freedom from intimidation and reprisal; to establish a sanctuary for human rights victims and/or their families; freedom from defamation and stigmatization; to exercise cultural rights and to development of personality; to effective remedy and full reparation.

¹¹¹ International Service for Human Rights (2022).

¹¹² Nepomuceno, P. (2022).

¹¹³ Khaliq, R.U. (2021).

In the meantime, this Bill stands as a model of the type of law that is also urgently required in other Asian and Pacific jurisdictions to address the needs of human rights defenders, including EHRDs.

4.2. Legal Status of Human Rights Defenders in Mongolia

An overview of Mongolia's Legal Status of Human Rights Defenders is set out below. On the enactment of this law, the former UN High Commissioner for Human Rights, Michelle Bachelet stated: "This is a major achievement for Mongolia, signaling its clear commitment to human rights. As the first country in Asia to enact such important legislation, the law will resonate within and beyond Mongolia's borders".¹¹⁴

Taking the lead from the Philippines Environmental Defence Bill and the Legal Status of Human Rights Defenders of Mongolia, this Working Paper recommends that other Asia Pacific states also consider the enactment of a similar law, with specific provisions included on the recognition and protection of EHRDs.

4.2.1. Legal Status of Human Rights Defenders Law 2021

In April 2021, Mongolia enacted a law on the Legal Status of Human Rights Defenders, which came into force on July 1, 2021.¹ The objective of the law is "to establish legal grounds for respect, protection, promotion, and fulfillment of the rights of human rights defenders". A "human rights defender" is defined as "any individual who acts separately or in association with others to promote the realization of human rights and freedoms and takes part in respecting and protecting the human dignity and commonly recognized principles and norms of international law through non-violent and peaceful means".

The Mongolian law sets out a wide range of rights, including those to protest, discussion of new human

rights ideas and principles, assembly, participation in public affairs, criticize, lodge complaints, or cooperate with national and international bodies. A violation of these rights includes "forms of insult, defamation, deception, fraud, any discriminative act, violence, dissemination of false rumors, or refusal of activities of human rights defenders or call for such refusal, coercion, use of force or threatening by use of force, unlawful surveillance, harming life and damaging health or property". Violation of rights can result in either criminal or civil liability. Given the breadth of these provisions, many of the listed violations would necessarily include actions against environmental human rights defenders.

5. Drafting procedural environmental rights laws

Procedural rights and processes encompass such matters as access to information, public participation and access to the courts ("access rights") and legal rules on issues such as standing to sue (*locus standi*) developed by legislatures and judiciaries. Freedom of information legislation has become an important element in environmental decision making in a number of Asian and Pacific states.¹¹⁵ Some states are still working on such enactments.¹¹⁶

Administrative law rules of procedural fairness are also relevant. Procedural rights and processes have become particularly important in the sphere of environmental decision-making. Procedural environmental rights, and especially access rights, can be regarded as vehicles developed to support the achievement of substantive environmental rights. Guidelines have been prepared on public participation in EIA in the Mekong region,¹¹⁷ and a regional consultation has been held on a rights-based framework by the ASEAN Intergovernmental Commission on Human Rights.¹¹⁸

¹¹⁴ OHCHR (2021b).

¹¹⁵ For example, in the Philippines, Executive Order No. 2 (2016), *Operationalizing in the executive branch the people's constitutional right to information and the state policies to full public disclosure and transparency in the public service and providing guidelines*, put into practice the provisions of the Philippines Constitution relating to access to information. It notes in its preamble that "the State adopts and implements a policy of full public disclosure of all its transactions involving public interest, subject to reasonable

conditions prescribed by law". India's *Right to Information Act* was passed in 2005.

¹¹⁶ For example, in Papua New Guinea, the next steps for a *Freedom of Information Act* are set out in the Government's 2021 *National Right to Information Policy 2020-2030*: Papua New Guinea Government (2021). See further discussion at Open Government Partnership Papua New Guinea (2022), which also canvasses the *Digital Government Act 2022*.

¹¹⁷ Mekong Partnership for the Environment (2017).

¹¹⁸ AIHR (2021b)

5.1. Providing for Free, prior and informed consent

The concept of free, prior and informed consent has become an important part procedural rights in ensuring the unimpeded participation of individuals and communities in environmental and natural resource decision making. The principle can be traced to the recognition of equal rights and self-determination of peoples as found in Article 1(2) of the Charter of the United Nations,¹¹⁹ and Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR)¹²⁰ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹²¹ It is also found in ILO Convention 169¹²² and the Convention on Biological Diversity.¹²³

The most prominent manifestation of FPIC is in the United Nations Declaration on the Rights of Indigenous Peoples of 2007,¹²⁴ where it is specifically associated with decision-making concerning Indigenous peoples.¹²⁵ The principle is spelled out in several articles of the Declaration concerned with decision making on a variety of topics. The relevant articles are summarized in Box 6 (below).

Since many communities in the Asia and Pacific region identify, and are referred to, as Indigenous peoples, the principle is relevant to a large proportion of national populations. Even in circumstances where communities do not identify, or are not officially recognized, as Indigenous peoples, such local groups may be vested with rights over their lands and other related resources.¹²⁶

Box 6

Examples of FPIC in the UN Declaration on the Rights of Indigenous Peoples (2007)

Article 10: Preventing relocation without free, prior and informed consent.

Article 11(2): redress for the taking of cultural, intellectual, religious and spiritual property without free, prior and informed consent.

Article 19: adoption of legislative or administrative measures.

Article 28(1): right to redress for the confiscation, taking, occupation, use or damage of lands, territories and resources without free, prior and informed consent.

Article 29(2): storage or disposal of hazardous materials.

Article 32(2): approval of any projects affecting lands or territories and other resources, particularly concerning development, utilization or exploitation of mineral, water or other resources.

Hamman et al note examples of incorporation of FPIC in the laws of several Pacific states under article 29 of the Declaration:

Article 29(2) provides similar protective ambit for the proposed “storage or disposal of hazardous materials” on the lands or territories of Indigenous Peoples and the requirement to seek FPIC. There are some contemporary instances in Pacific Island mining law, for example, under Kiribati’s Seabed Minerals Act 2017, whereby the

¹¹⁹ *Charter of the United Nations* (1945).

¹²⁰ *International Covenant on Civil and Political Rights* (1966).

¹²¹ *International Covenant on Economic, Social and Cultural Rights* (1966).

¹²² International Labour Organization (ILO) (1989). *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), art 16 (2).

¹²³ UN Convention on Biological Diversity (1992), art 15(2), concerning access to genetic resources. See also for e.g., Conference of the Parties to the Convention on Biological Diversity (2017). Decision XIII/18. This decision refers to the adoption of the Mo’otz Kuxtal voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the “prior and informed consent”, “free, prior and informed consent”, or “approval and involvement”, depending on national circumstances, of indigenous peoples and local communities for accessing their knowledge, innovations and

practices, for fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge.

¹²⁴ UN General Assembly (2007). *United Nations Declaration on the Rights of Indigenous Peoples*.

¹²⁵ Food and Agriculture Organization of the United Nations (FAO). (2016).

¹²⁶ For the international legal support of this, see e.g., *International Covenant on Civil and Political Rights* (1966) and *International Covenant on Economic, Social and Cultural Rights* (1966), Common Article 1, Right to Self-determination; UN General Assembly (1986). *Declaration on the Right to Development*, arts 1 and 2.

concept of FPIC has been codified. Section 45 of that Act provides that seabed mining organizations must, if certain marine or coastal users are “likely to be adversely affected” by mining activities, seek to obtain their FPIC, including the payment of compensation. An almost identical provision is provided for in section 45 of Tuvalu’s Seabed Minerals Act 2014 and section 39(1)(l) of Tonga’s Seabed Minerals Act 2014.¹²⁷

In the Philippines, FPIC has long been a feature of decision-making concerning environmental and cultural rights matters. FPIC is embodied in the 1997 Indigenous Peoples Rights Act,¹²⁸ which preceded its recognition in the United Nations Declaration on the Rights of Indigenous Peoples¹²⁹ by some 10 years. Chapter II, section 3(g) states that FPIC as used in this Act shall mean the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.

There has been a range of studies of the effectiveness of the 1997 Indigenous Peoples Rights Act’s FPIC provisions by international and Philippines-based organizations. An Oxfam study



observed in 2013: “Unfortunately, even with strong legislation in place, indigenous peoples in the Philippines have faced considerable challenges in realizing their right to give or withhold FPIC”.¹³⁰

This Working Paper recommends that the principle of free, prior and informed consent be considered by all Asia Pacific States as a fundamental provision in their environmental and natural resources laws.

6. Drafting substantive environment rights laws

Substantive rights include those rights guaranteed under the various international and regional human rights conventions and other instruments, and those recognized in national constitutions and sectoral laws, including environmental and natural resources laws. The right to environment is the most important in this context and, as noted above, was recognized by the UN Human Rights Council in 2021¹³¹ and the UNGA in 2022¹³² as the human right to a clean, healthy and sustainable environment.

This Working Paper recommends that Asian and Pacific states should consider enacting constitutional and legal provisions consistent with Human Rights Council resolution A/HRC/48/13 of 8 October 2021 and UNGA resolution 76/300 of 28 July 2022, on the right to a clean, healthy and sustainable environment, where such provisions are not yet included at a national level.

7. Drafting judicial rules of procedure for environmental cases

Several States in Asia-Pacific region have specialist courts and tribunals that engage in environmental dispute resolution. As noted in United Nations Environment Programme’s 2021 report on environmental courts and tribunals, such specialist bodies include:

- Environmental courts;
- Green chambers;

¹²⁷ Hamman, E., Jaekel, A. and Aonima, C. (2020).

¹²⁸ The Philippines *Indigenous Peoples Rights Act* (1997).

¹²⁹ UN General Assembly (2007). *United Nations Declaration on the Rights of Indigenous Peoples*, articles 10, 19, 23, 28, 29 30 and 32 contain the FPIC provisions that are found to similar effect in the Philippines *Indigenous Peoples Rights Act* (1997).

¹³⁰ Oxfam (2013). See also critical comment of the Philippines National Commission on Indigenous Peoples (2021).

¹³¹ HRC, A/HRC/RES/48/13 (18 October 2021).

¹³² UNGA, A/RES/76/300 (28 July 2022).

- Designated green judges on a general court;
- Independent tribunals;
- Quasi-independent environmental tribunals; and
- Captive tribunals.¹³³

The Philippines *Supreme Court Rules of Procedure for Environmental Cases* were introduced in 2010.¹³⁴

Whilst other jurisdictions have rules of procedure in place, the Philippines rules remain the most comprehensive court rules for environmental cases in developing countries across the Asia-Pacific region. The following sets out their scope and objectives:

Section 2: These Rules shall govern the procedure in civil, criminal and special civil actions before the Regional Trial Courts, Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Courts and Municipal Circuit Trial Courts involving enforcement or violations of environmental and other related laws, rules and regulations...

Section 3. Objectives. - The objectives of these Rules are:

- (a) To protect and advance the constitutional right of the people to a balanced and healthful ecology;
- (b) To provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements;
- (c) To introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and
- (d) To enable the courts to monitor and exact compliance with orders and judgments in environmental cases.

7.1. Drafting Anti-SLAPP provisions

Given the prevalence of the use of Strategic Litigation against Public Participation (SLAPP) in

their jurisdictions,¹³⁵ three Asian States, the Philippines, Thailand, and Indonesia (discussed below) have inserted anti-SLAPP provisions into their Supreme Court Rules or legislation. These are summarized below.

7.1.1. The Philippines

In the Philippines, the *Supreme Court Rules of Procedure of Environmental Cases of 2010* provides for courts to dismiss a SLAPP case in a summary hearing, so that a possibly lengthy and expensive trial can be avoided.

The provisions state that the parties:

Must submit all available evidence in support of their respective positions. The party seeking the dismissal of the case must prove by substantial evidence that his act for the enforcement of environmental law is a legitimate action for the protection, preservation and rehabilitation of the environment. The party filing the action assailed as a SLAPP shall prove by preponderance of evidence that the action is not a SLAPP and is a valid claim.

Section 4 on the resolution of a SLAPP defence states:

The affirmative defense of a SLAPP shall be resolved within thirty (30) days after the summary hearing. If the court dismisses the action, the court may award damages, attorney's fees and costs of suit under a counterclaim if such has been filed. The dismissal shall be with prejudice. If the court rejects the defense of a SLAPP, the evidence adduced during the summary hearing shall be treated as evidence of the parties on the merits of the case. The action shall proceed in accordance with the Rules of Court.

7.1.2. Thailand

In 2019, the *Criminal Procedure Code of Thailand* was amended to enable courts to dismiss SLAPP cases and defendants to challenge the legitimacy of a SLAPP and show the Court the case is without

¹³³ UNEP (2021b), 5, 97-100, where Asia Pacific States with an environmental dispute resolution body are noted as including: Australia, Bangladesh, China, India, Indonesia, Japan, Malaysia, Pakistan, Philippines, Korea (Republic of), Thailand.

¹³⁴ The Philippines Supreme Court (2010). *Rules of Procedure for Environmental Cases*.

¹³⁵ Business and Human Rights Centre (2020).

merit.¹³⁶ These developments are set out in Sections 161/1 and 165/2 below.

Section 161/1 states:

In a case filed by a private complainant, if it appears to the court – or through examination of evidence called at trial – that the complainant has filed the lawsuit in bad faith or distorted facts in order to harass or take undue advantage of a defendant, or to procure any advantage to which the complainant is not rightfully entitled to, the court shall order dismissal of the case, and forbid the complainant to refile such case again.

Section 165/2 states:

During the preliminary hearing, the defendant may submit to the court a significant fact or law which may bring the court to the conclusion that the case before it lacks merit, and may include in the submission as persons, documents or materials to substantiate the defendant's claims provided in the submission. In such case, the court may call such persons, documents or materials to provide evidence in its deliberation of the case as necessary and appropriate, and the complainant and the defendant may examine this evidence with the consent of the court.

7.1.3. Indonesia

In Indonesia, there are provisions in several laws aimed at protecting EHRDs from judicial harassment and criminalization:

- *Indonesian Law No. 32/2009 on Environmental Protection and Management* (Article 66) provides a general protection against litigation: "Everybody struggling for a right to proper and healthy environment may not be charged with criminal or civil offense".¹³⁷
- *Law No. 18/2013 on the Prevention and Eradication of Forest Destruction* (Article 78 (1) prohibits the filing of criminal or civil cases against reporters and informants who provide information under this law.¹³⁸

The Indonesian Supreme Court has also introduced rules through the *Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number 36/KMA/SK/II/2013 concerning the Enforcement of Guidelines for Handling Environmental Cases*, by which defendants in environmental cases are able to object to the legal proceeding brought against him/her, by alleging that it is a SLAPP suit.

Within the region, these can be regarded as "good practice" at the present time, although this Working Paper notes that the implementation of the provisions should be taken more seriously by the relevant governments.

7.1.4. International Experiences

Moreover, this Working Paper draws attention to the existing body of anti-SLAPP legislative measures and case law in other regions, including the positive experiences in Canada and the USA. More recently, in 2022, both the European Union and the United Kingdom have also drafted anti-SLAPP laws. In response to growing evidence in the use of SLAPPs throughout Europe, the European Commission released a Draft Anti-SLAPP Directive for the European Union in April 2022.¹³⁹ In May-July 2022, the UK Ministry of Justice conducted public consultation on SLAPPs, with a view to also establishing anti-SLAPP legislative and other measures.¹⁴⁰

Notably, in its 2022 proposed EU Anti-SLAPP Directive, the European Commission recognized that "identifying the intent hidden behind" a SLAPP can be challenging. In order to assist with determining a party's intention, Article 3(3)(a)-(c) of the proposed Anti-SLAPP Directive sets out a non-exhaustive list of elements to help identify cases of this kind. These include the "disproportionate, excessive or unreasonable nature of the claim", the "existence of multiple concurrent cases" relating to the same or similar matters; or the "existence of intimidation, harassment or threats on the part of the claimant" or his/her/their representatives. As this recent anti-SLAPP law proposal shows, safeguards can be put in place to enable the Courts and judicial officers to

¹³⁶ See discussion of the *Amendments to the Criminal Procedure Code* (No. 34) B.E. 2562 (2019), discussed in Jayangakula, J. (2019).

¹³⁷ Indonesia. *Law No. 32/2009 on Environmental Protection and Management*.

¹³⁸ Indonesia. *Law No. 18/2013 on the prevention and eradication of Forest Destruction*.

¹³⁹ European Commission (2022).

¹⁴⁰ UK Ministry of Justice (2022a); UK Ministry of Justice (2022b).

inquire into the legitimacy of a case at the interlocutory or pre-trial stage of litigation.

This Working Paper recommends that the existing Asia-Pacific regional examples of anti-SLAPP provisions be drawn on, in conjunction with the considerable body of anti-SLAPP laws in North America and recent advancements in the European Union and United Kingdom to develop best practice model anti-SLAPP laws for Asia-Pacific region

This Working Paper also recommends that anti-SLAPP and anti-criminalization provisions with regard to EHRDs be considered for legislative enactment or introduction by the Supreme Courts of all Asia Pacific jurisdictions. Promoting regional planning and cooperation

The Asia Pacific Forum on National Human Rights Institutions has devised a Regional Action Plan on Human Rights Defenders.¹⁴¹ The Plan sets out a range of regional and national actions that should be taken with respect to human rights defenders. In the

context of this Working Paper, it recognizes “the crucial role of Environmental Human Rights Defenders (EHRDs) and the challenges they face in the defence of the right to a safe and healthy environment”.¹⁴²

It quotes the former UN Special Rapporteur on Human Rights Defenders, Michel Forst, who referred to EHRDs as: “individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna”.¹⁴³

A great deal more cooperation is required between countries in addressing the plight of human rights defenders, including those defending environmental rights. That cooperation could be facilitated by UN Regional Coordination Mechanisms such as the Asia Pacific Issue-Based Coalition on Human Rights, Gender Equality and Women’s Empowerment.



¹⁴¹ Asia Pacific Forum (2021b).

¹⁴² Ibid, 10.

¹⁴³ Ibid.

IV. Recommendations

The following recommendations will advance the protection of EHRDs in the Asia-Pacific region:

1. States should implement the recommendations in the Environmental Human Rights Defenders policy brief, which are directed to states, international organizations, civil society organizations, and to business.¹⁴⁴
2. States should enhance coordinated approaches for the protection of EHRDs across the Asia-Pacific region.
3. States should seek to negotiate one or more agreements for the protection of EHRDs between the Asian and Pacific sub-regions. The Aarhus Convention and the Escazú Agreement can act as a model for such agreements.
4. States should consider enactment of constitutional and legal provisions consistent with Human Rights Council resolution A/HRC/48/13 of 8 October 2021 and UN GA resolution 76/300 of 28 July 2022, on the right to a clean, healthy and sustainable environment, where such provisions are not included at a national level.
5. States should, in the case of Asian and Pacific States where Indigenous people and/or ethnic minorities are not yet recognized, insert provisions for such recognition into their constitutions and/or their national legislation.
6. States should incorporate the principle of free, prior and informed consent as a fundamental provision in their environmental and natural resources laws.
7. States should enact laws similar to the Philippines Environmental Defense Bill and Mongolian Status of Human Rights Defenders law, with specific provisions included on the recognition and protection of EHRDs.
8. States should introduce anti-SLAPP and anti-criminalization provisions, similar to Article 66 of the Law on Environmental Protection and Management in Indonesia, by way of legislative enactment or introduction by the Supreme Courts of all Asia Pacific jurisdictions.
9. States should work collaboratively to develop best practice “model anti-SLAPP laws” for the Asia-Pacific region, drawing on existing anti-SLAPP provisions and experiences in other regions of the world, notably, the considerable body of anti-SLAPP laws in North America and recent advancements in the European Union and United Kingdom.
10. This Working Paper also recommends that anti-SLAPP and anti-criminalization provisions with regard to EHRDs be considered for legislative enactment or introduction by the Supreme Courts of all Asia Pacific jurisdictions.
11. UN agencies should disseminate the Regional Action Plan on Human Rights Defenders 2021 and implement at regional and national level across the Asia Pacific, with a special emphasis on environmental and Indigenous human rights defenders.
12. UNEP and OHCHR should jointly plan and deliver capacity-building programmes on the environmental rule of law (EROL) over a period of years with development partners such as the Asian Development Bank, the International Union for Conservation of Nature (IUCN) and civil society organizations. These programmes should also explore collaboration with other partners to exchange lessons learned and best practices in ensuring environmental rule of law is

¹⁴⁴ Knox, J. (2017).

addressed and strengthened through their lending and technical assistance support.

13. UN Country Teams should coordinate and promote the delivery of advocacy messages and principled programming to increase awareness of the links between human rights, gender equality, socioeconomic factors and the environment including, inter alia, through Sustainable Development Cooperation Frameworks (UNSDCF), Regional Monthly

Reviews (RMRs), Leave No One Behind (LNOB) reports and Common Country Analyses (CCAs).

14. States should pursue gender mainstreaming in all policy contexts, recognizing the disproportionate threats faced by women, youth and children, particularly in the context of the protections of EHRDs.



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United Nations Avenue, Gigiri
P O Box 30552, 00100 Nairobi, Kenya
Tel +254 720 200200
communication@unep.org
www.unep.org