Forest Fires and Transboundary Haze

Exploring the International and Regional Avenues of Advocacy and Redress for Victims of Transboundary Haze Pollution in Southeast Asia

Memo 1: Regional avenues of advocacy and redress

Utrecht University Public International Law Legal Clinic

Written by: Annabel Ashworth, Sarah Harrell, and Jesler van Houdt

With support of: Yiokasti Mouratidi, Sofia D'Arcio, Mathilda Schulenburg

Supervised by Dr Brianne McGonigle Leyh

In collaboration with Friends of the Earth groups: SAM, WALHI and Milieudefensie

ACKNOWLEDGEMENTS

This document is part of a series of three memoranda that aim to outline different avenues of redress for those affected by the Indonesian Forest Fires and Haze under regional and international legal systems: addressing the ASEAN system, the UN system, and other international avenues.

The project was undertaken by Utrecht University's Public International Law Legal Clinic 2021-2022 in collaboration with and commissioned by Friends of the Earth groups.

The memoranda in this series were authored by Annabel Ashworth, Sarah Harrell, and Jesler van Houdt. With support of Yiokasti Mouratidi, Sofia D'Arcio, Mathilda Schulenburg. Under the supervision of Dr. Brianne McGonigle Leyh. Special thanks also go to the following for their valuable inputs and enriching support Dr. Lan Nguyen, Dr. Natalie Dobson, Dr. Lucas Roorda, Işık Girgiç, Jia Yaw, and Philip Elders.

Table of Contents

Table of Contents 3
Table of Abbreviations 4
1. Introduction 6
2. Thematic background 8
2.1. Deforestation and forest fires 8
2.2. Haze 9
2.3. Effects of forest fires and haze on the environment and individuals 10
2.3.1. Ecosystem loss 10
2.3.2. Human health 11
2.3.3. Livelihoods, education and financial impacts 11
2.3.4. Driving force of climate change 12
2.4. Stakeholders 12
2.4.1. Small holders 12
2.4.2. (Multi-)National Companies 13
2.4.3. Financers 13
2.4.4. Government 13
2.4.5. Local population 13
3. Human Rights and Environmental Obligations 15
3.1. Substantive human rights and State obligations 17
3.2. Procedural Human Rights and State Obligations 21
3.3. Key Principles and State Obligations in International Environmental Law 23
4. ASEAN 28
4.1. The ASEAN Charter 28
4.1.1. ASEAN's human rights mechanisms 29
4.1.2. National Human Rights Institutions 33
4.1.3. The ASEAN Charter and environmental rights 34
4.2. 2002 ASEAN Agreement on Transboundary Haze Pollution 35
5. 2014 Transboundary Haze Pollution Act of Singapore 37
6. Conclusion 41
7. Recommendations 42
8. Annex 45
8.1. Legal jargon 45

Table of Abbreviations

Table of Abbreviations	
AATHP	ASEAN Agreement on Transboundary Haze Pollution
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
AMME	ASEAN established the ASEAN Ministerial Meeting on the Environment
APP	Asia Pulp and Paper Group
ASEAN	Association of Southeast Asian Nations
CESCR	Committee on Economic, Social and Cultural Rights
COP	Conference of the Parties
CSO	Civil society organisation
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIA	Environmental impact assessment
GDP	Gross domestic product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IPCC	Intergovernmental Panel on Climate Change
Komnas HAM	*Komisi Nasional Hak Asasi Manusia* (Indonesia's National Human Rights Institute)
MEA	Multilateral environmental agreements
NGO	Non-governmental organisation
NHRI	National human rights institution
RSPO	Roundtable on Sustainable Palm Oil
SAM	*Sahabat Alam Malaysia* (Friends of the Earth Malaysia)
SGD	Singaporean Dollars
SUHAKAM	*Suruhanjaya Hak Asasi Manusia Malaysia* (Human Rights Commission of Malaysia)
TAC	Treaty of Amity and Cooperation in Southeast Asia
THPA	Singapore's Transboundary Haze Pollution Act
TOR	Terms of Reference
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNFCCC	United Nations Framework Convention on Climate Change
UPR	Universal Period Review
WALHI	*Wahana Lingkungan Hidup Indonesia* (Friends of the Earth Indonesia)

1. Introduction

Avenues of redress for communities in Indonesia and Malaysia affected by forest fires and haze

Worldwide, there is an increasing demand for palm oil in different economic sectors, spanning from the food sector and beauty care products to biofuel.[1] **Indonesia** and **Malaysia** are **core palm oil suppliers** meeting this increasing demand, covering 86% of the global palm oil supply.[2] Yet, palm oil plantations are repeatedly criticized for their **environmental impacts on ecosystems**, **biodiversity**, and **people's livelihoods**.

One aspect of palm oil cultivation is their link to **wide-spread forest fires** and the resulting **haze** from these fires. This issue has reached wide-spread attention since 2015, the year with the worst fire and haze record so far, due to its transboundary implications. These fires do not only have **repercussions** on Indonesia's and Malaysia's **biodiversity**, but also on their **economies**, **education systems**, and **health care systems**. Additionally, the forest fires and transboundary haze directly affect Indonesia's and Malaysia's **local population**, as further outlined throughout the memoranda.

This report is part of a series of three memoranda that aim to outline different **avenues of redress** for those affected by the Indonesian Forest Fires and Haze under **regional and international legal systems**; divided to examine the **ASEAN system**, the **UN system**, and **other international avenues**.

The memoranda were created through a combination of **legal desk-research** and **semi-structured expert interviews**. The primary sources consulted are the relevant treaties and agreements mentioned throughout the memoranda. The secondary sources consisted of both legal and non-legal documents. These included the official websites of the different avenues of redress, together with policy documents, non-government organisations' (NGO) reports, scholarship, and news articles. The semi-structured expert interviews predominantly had a clarification and guiding purpose. All memoranda were reviewed by (legal) experts in the corresponding fields, who had the opportunity to share their feedback and insights.

The memoranda were written with a **clear hypothetical case study based on real companies in mind** to ensure that the recommendations are practically relevant to civil society organisations (CSOs) in the field. The hypothetical company sells RSPO certified palm oil, owns 150,000 Ha of palm oil plantations and works together with scheme smallholders, contracted smallholders that fall under the company's RSPO certification, and independent smallholders. The hypothetical company has been linked to 1500 fire alerts between August and October 2019, two of which are proven to have sparked large-scale wildfires. A closer analysis of the hypothetical company is not further included in the final memoranda because the majority of avenues of redress that are discussed do not offer case-specific solutions to transboundary haze pollution, but rather encourage long-term advocacy strategies.

[1] Yosuke Shigetomi, Yuichi Ishimura and Yuki Yamamoto, 'Trends in global dependency on the Indonesian palm oil and resultant environmental impacts' [2020] retrieved from https://www.nature.com/articles/s41598-020-77458-4 on 17 January 2022.

[2] Schuster Institute for Investigative Journalism at Brandeis University, 'Indonesia's Palm Oil Industry' [n.d.] retrieved from https://www.schusterinstituteinvestigations.org/indonesias-palm-oil-industry on 06 February 2022.

Chapters 1, 2 and 3 are common to all the reports so that each memo can be read independently from one another. **Chapter 2** outlines the **thematic background**, focusing the analysis on Indonesia as a hot spot of both palm oil production, forest fires and haze. Chapter 2 also introduces the different **stakeholders** in the production of palm oil and their relationship to the reported forest fires. **Chapter 3** then provides an overview of the **international human rights and environmental obligations** that are applicable in the present scenarios. **Chapter 4** will present the ASEAN system, delving into the ASEAN Charter, its human rights mechanisms and then its environmental regime. This chapter will primarily focus on long-term advocacy strategies within ASEAN. **Chapter 5** then focuses on the 2014 Transboundary Haze Pollution Act of Singapore and the civil liability regime that it entails. Finally, the memorandum will conclude with a synthesis on recommendations for CSOs, both legal and non-legal strategies that can be pursued.

2. Thematic background

This chapter focuses on the **effects of forest fires** and the resulting **haze** driven by agricultural and commercial interests. It introduces the **thematic background** of the report, focusing its analysis on Indonesia as the hot spot of both palm oil production and forest fires and haze. As a second step, the different **stakeholders** regarding the production of palm oil are introduced as well as their relationship to reported forest fires.

2.1. Deforestation and forest fires

Due to an **increasing demand for palm oil** on the global market, palm oil plantations in Indonesia are expanding. To do so, large areas of **primary forests** are **cut down** to be replaced with monoculture palm oil plantations. Many palm oil plantations are situated close if not directly next to primary forests and vast ecosystems. Therefore, small man-made **fires originating on plantations** are likely to **spread** over to primary forests and there turn into uncontrollable **wildfires**.

Fires on plantations primarily originate from the usage of the (traditional) method of **'slash-and-burn'** by Indonesian small-holders in their agricultural practices.[3] 'Slash-and-burn' describes the method of first cutting forests and then burning remaining vegetation to create fertile agricultural land.[4] Though this method is in theory **prohibited** under Indonesian law,[5] it remains a widely used practice due to its **traditional roots**, and **fast** and **(cost-)efficient** nature. Other causes for fires are (illegal) fires started by the plantation company and natural causes.

If the fires are spreading out of control, they can cause **wildfires**.[6] Different factors interplay to make the spread of forest fires both more likely and more dangerous. First, already mentioned above, is the close **proximity of many plantations to primary forests**. According to a report from 2019, 47% of the reported fire hot spots were located on wood and palm oil plantations as well as logging concessions. The next biggest locations were conservation areas with 31% and community land with 22%.[7] Second, palm oil plantations create **microclimates that facilitate the spread of fires** by being dryer and hotter than indigenous natural vegetation.[8] Third, Indonesia experiences a **dry season** from April until the end of October. During this naturally dry time, fires on plantations are more likely to spread over to other vegetation and cause wide scale fires. Correspondingly, forest fires are primarily

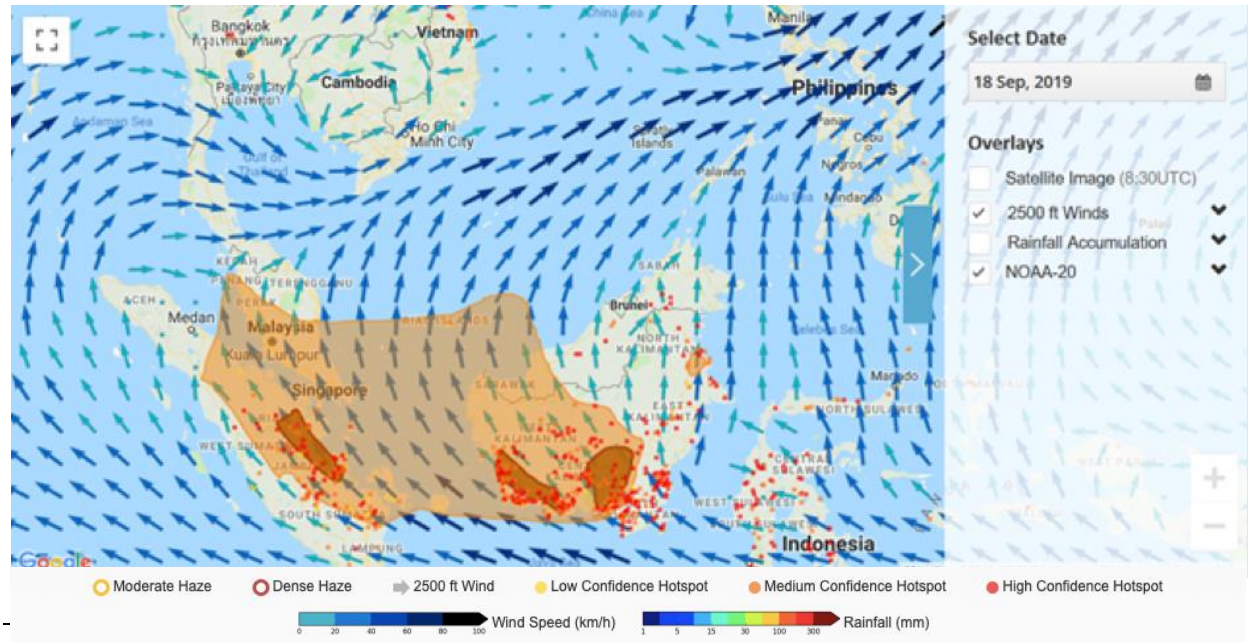
[3] Marco Tulio Garcia, Gerard Rijk, Profundo Matthew Piotrowski, 'Deforestation for Agricultural Commodities a Driver of Fires in Brazil, Indonesia in 2019' [2020] retrieved from https://chainreactionresearch.com/wp-content/uploads/2020/05/Deforestation-driven20fires.pdf on 13 January 2022.
[4] Ibid.
[5] Arief Wijaya, Susan Minnemeyer, Reidinar Juliane, Octavia Payne and Andres Chamorro, 'After Record-Breaking Fires, Can Indonesia's New Policies Turn Down the Heat?' [2016] retrieved from https://www.wri.org/insights/after-record-breaking-fires-can-indonesias-new-policies-turn-down-heat on 22 January 2022 and BBC, 'Indonesia haze: Why do forests keep burning?' [2019] retrieved from https://www.bbc.com/news/world-asia-34265922 on 22 January 2022
[6] Marco Tulio Garcia, Gerard Rijk, Profundo Matthew Piotrowski, 'Deforestation for Agricultural Commodities a Driver of Fires in Brazil, Indonesia in 2019' [2020] retrieved from https://chainreactionresearch.com/wp-content/uploads/2020/05/Deforestation-driven20fires.pdf on 13 January 2022.
[7] Herry Purnomo, Beni Okarda, B. Shantiko, R. Achdiawan, Ahmad Dermawan, H. Kartodihardjo, A.A. Dewayani, 'Forest and land fires, toxic haze and local politics in Indonesia' [2019] retrieved from https://www.cifor.org/knowledge/publication/7425 on 13 January 2022.
[8] Garcia, Rijk, and Piotrowski (n 6).

reported to occur between early-August until mid-November (a period of approximately 14 weeks), peaking in mid-September.[9]

Research figures indicate the scope of the problem of forest fires. Indonesia **lost 1.6 million hectares in 2019** as a result of forest fires.[10] Of this land, approximately 76% has been identified as so-called idle land (*lahan terlantar*), referring to land patches that used to be forested up until a few years ago but had degraded as a result of multiple cycles of fires.[11]

2.2. Haze

Especially during the dry season with spikes in forest fires, a thick **haze** hovers over areas of Indonesia, sometimes expanding to additionally cover both Malaysia and Singapore (something well-illustrated by Image 1). The haze is the **result of the forest fires** (both natural and man-made). Two main aspects contribute to the increase in haze during the dry season in Indonesia. Firstly, as a result of the increasing scales of forest fires and vaster plantations, there are **more and more widespread forest fires causing haze**. Secondly, the need for more plantations to meet the increasing demand of palm oil has sparked a practice of **converting peatland into plantations**. Differently from mineral soils, fires on peatlands generate more haze, aggravating the overall problem.[12]



[9] Global Forest Watch, 'Indonesia' [n.d.] retrieved from https://www.globalforestwatch.org on 14 January 2022.
[10] ibid.; Reuters Staff, 'Indonesian fires burnt 1.6 million hectares of land this year: researchers' [2019] retrieved from https://www.reuters.com/article/us-southeast-asia-haze-idUSKBN1Y60VP on January 2022.
[11] The Jakarta Post, 'Fires in Indonesia burn 1.6m ha of land, mostly former forests: Satellite data' [2019] retrieved from https://www.thejakartapost.com/life/2019/12/02/fires-in-indonesia-burn-1-6m-ha-of-land-mostly-former-forests-satellite-data.html on 14 January 2022.
[12] Alan Tay, Helena Varkkey and Yew-Jin Lee, 'Indonesia is burning again, covering east Asia with smoke – a special report' [Podcast, 2016] retrieved from https://www2.cifor.org/fire-and-haze/indonesia-is-burning-again-covering-east-asia-with-smoke-a-special-report/ on 06 February 2022 ; and Fred Stolle, Nigel Sizer, Ariana Alisjahbana, James Anderson, Kemen Austin and Andika Putraditama, 'ASEAN Leaders Can Act to Reduce Fires and Haze' [2013] retrieved from https://www.globalforestwatch.org/blog/fires/asean-leaders-can-act-to-reduce-fires-and-haze/ on 14 January 2022.

Image 1: The effect of wind on the spread of haze originating from forest fires in Indonesia to Singapore and Malaysia.[13]

2.3. Effects of forest fires and haze on the environment and individuals

2.3.1. Ecosystem loss

The local Indonesian vegetation has originally been relatively resilient to fires, as they are not uncommon for the ecosystem. In fact, forest fires are a form of a natural disturbance that can allow forests to rejuvenate and ecosystems to diversify.[14] However, the significant increase in forest fires due to the combination of both natural and man-made fires has taken a **big toll on the ecosystem** as its flora and fauna are no longer able to recover. In combination with deforestation and the change of vegetation as a result of monoculture plantations, Indonesia currently experiences great degrees **of ecosystem loss and disturbances**.[15] Whilst the present report focuses on the effects on individuals (as the analysis focuses on the avenues of redress for these communities), the European Commission commissioned an extensive report on the environmental impact of palm oil consumption.

Substantive Rights and Key Principles Potentially Impacted by Ecosystem Loss

Principles
No harm
Prevention
Precaution

Substantive Rights
Right to a healthy environment
Right to life
Right to an adequate standard of living

[13] ASEAN Specialised Meteorological Centre, 'Regional Haze Situation' [n.d.] retrieved from http://asmc.asean.org/home/ on 15 January 2022 ; Greenpeace Southeast Asia, 'ASEAN Haze 2019: the battle of liability' [2019] retrieved from https://www.greenpeace.org/southeastasia/press/3221/asean-haze-2019-the-battle-of-liability/ on 14 January 2022.
[14] François-Nicolas Robinne, 'Impacts of disasters on forests, in particular forest fires' [2021] Background Paper prepared for the United Nations Forum on Forests Secretariat, page 2. (https://www.un.org/esa/forests/wp-content/uploads/2021/08/UNFF16-Bkgd-paper-disasters-forest-fires_052021.pdf)
[15] Garcia, Rijk, and Piotrowski (n 6) page 6.

Substantive Rights and Key Principles Potentially Impacted by Adverse Human Health Effects

Principles
No harm
Prevention
Precaution

Substantive Rights
Right to a healthy environment
Right to life
Right to an adequate standard of living
Right to development
Right to health

Substantive Rights and Key Principles Potentially Impacted when Livelihoods, Education, and Financial Sectors are Undermined

Principles
No harm
Prevention
Precaution

Substantive Rights
Right to life
Right to health
Right to a healthy environment
Right to equality and non-discrimination

2.3.2. Human health

On 15 September 2019, the Air Quality Index in the capital of central Kalimantan, Palangkaraya, was 2000.[16] In comparison, hazardous air quality levels are considered to start at 301.[17] The air quality was therefore almost seven times worse than what is considered to be hazardous. The effect of these dimensions of air pollution effect individuals' health in numerous ways. First, haze can cause **irritation in the eyes and respiratory tract**. Second, in 2015 – seen as a peak year of forest fires and haze in Indonesia – more than 500,000 people were reported to suffer from **respiratory ailments**.[18] Among other factors, this is caused by the fine particular matter in the haze, including substances like Sulphur dioxide and nitrogen dioxide which affect respiratory systems.[19] An estimate assumes that the repercussions of the 2015 health crises in Indonesia may have led to **26,300 to 174,300 premature adult deaths**. Additionally, there were increasing reports of **infant deaths** during this time.[20] In both Indonesia and Malaysia, public health emergencies have been declared as a result of haze caused by forest fires.[21]

2.3.3. Livelihoods, education and financial impacts

The effects of forest fires and haze on the livelihoods of individuals are considerable. The crisis in 2015 is thought to have **cost** the country **between US$16bn**[22] **and $28bn**[23] as a result of affected economies, redirected air traffic and similar repercussions. Additionally, **schools** had to **close** as a result of the haze and states of emergency were declared as a result of the health impact of the haze.[24] In 2019, $5.2bn in damages and economic loses

[16] BBC (n 5).
[17] ibid.
[18] ibid.
[19] ibid.
[20] BBC, 'Indonesia haze may have led to 100,000 premature deaths, says report' [2016] retrieved from https://www.bbc.com/news/world-asia-37404515 on 15 January 2022.
[21] Jayaprakash Murulitharan and Matthew Ashfold, 'Depoliticising Southeast Asia's forest fire pollution' [2021] retrieved from https://www.eastasiaforum.org/2021/08/17/depoliticising-southeast-asias-forest-fire-pollution/ on 16 January 2022.
[22] BBC (n 20).
[23] L. Kiely, D. V. Spracklen, S. R. Arnold, E. Papargyropoulou, L. Conibear, C. Wiedinmyer, C. Knote and H. A. Adrianto, 'Assessing costs of Indonesian fires and the benefits of restoring peatland' [2021] retrieved from https://www.nature.com/articles/s41467-021-27353-x on 16 January 2022.
[24] Greenpeace Southeast Asia (n 13).

were reported, reflecting 0.5% of Indonesia's GDP.[25] People's ability to self-sustain is impacted, if they lose their food and cash crops, or their land, forests and other natural ecosystems they depend on for clean water, soil retention, gathering of products, such as due to fire.

2.3.4. Driving force of climate change

The effects of forest fires and haze on contributing to climate change is added as a fourth element, as this both has direct repercussions on the environment, as well as indirect effects on the population of Indonesia and more widely the global population. **Forests and vegetation are carbon-storages**. Therefore, the burning of forests contributes to climate change in two significant ways. Firstly, the **carbon** that has been **stored** in the vegetation **is released into the atmosphere**, contributing to the greenhouse effect. Secondly, the **overall level of vegetation** that can capture carbon through photosynthesis is **decreased** as more forests are burned.[26]

Substantive Rights and Key Principles Potentially Impacted by Climate Change

Principles
No harm
Prevention
Precaution

Substantive Rights
Right to life
Right to development
Right to health
Right to a healthy environment
Right to equality and non-discrimination

2.4. Stakeholders

2.4.1. Small holders

Most **small holders** use the **'slash and burn'** technique based on traditional techniques, which can indirectly cause forest fires.[27] There is not one type of small holder because there are vast differences in the amount of land and capital that small holders can own. Overarchingly, however, small holder farms are understood as small-scale (often less than 5 hectares) family farms.[28]

Small holders are important stakeholders, representing 93% of Indonesia's total farmers (calculated per individual).[29] Small holders can either be **independent or so-called scheme (also: plasma) small holders**. In the case of independent small holders, the small holders cooperate with palm oil corporations by planting their own trees on their own land and selling the fruit of the palms to a corporation of their choice. Differently, scheme small holders often also have their own land with their own trees, they are linked to a specific corporation through a contract to which they much sell their products. In exchange, these small holders receive security and supervision.[30]

---

[25] CNBC, 'World Bank says Indonesia forest fires cost $5.2 billion in economic losses' [2019] retrieved from https://www.cnbc.com/2019/12/11/world-bank-says-indonesia-fires-cost-5point2-billion-in-economic-losses.html on 16 January 2022.
[26] Calvin Norman and Melissa Kreye, 'How Forests Store Carbon' (2020) retrieved from https://extension.psu.edu/how-forests-store-carbon on 22 April 2022.
[27] Garcia, Rijk, and Piotrowski (n 6) page 15.
[28] Food and Agriculture Organization of the United Nations, 'Investments to transform smallholders farms and adapt to COVID-19' (n.d.) Retrieved from https://www.fao.org/land-water/overview/covid19/smallholders/en/ on 7 April 2022.
[29] Laura Schenck, 'Small Family Farming in Indonesia - a country specific outlook' [2018] retrieved from https://www.fao.org/family-farming/detail/en/c/1111082/ on 16 January 2022.
[30] Tay, Varkkey and Lee (n 12).

2.4.2. (Multi-)National Companies

The palm oil companies both buy palm oil from small holders as well as produce it themselves on land either owned by the companies or rented from small holders. The biggest players in the palm oil market are **big private enterprises** either registered in Singapore or Indonesia. Most companies have adopted **fire prevention policies and sustainability targets**, and some of the biggest palm oil producing companies are **RSPO certified**. Nevertheless, despite these policies, these companies have often been **linked to forest fires and land burning**. Most companies respond to these accusations by arguing that any fires on their plantations would have been started by small holders and carried to the company's land through strong winds.[31] Additionally, palm oil companies closely **cooperate with small holders** in sourcing their products, with one major player – Astra Agro Lestari – cooperating with more than 64.000 small holders in 300+ villages that collectively own more than 266,000 Ha of plantation land.[32]

2.4.3. Financers

Financers have a **financial stake** in the palm oil companies. Most major companies in Indonesia are either registered on the Singaporean or Indonesia Stock exchange and are related to international investors. Considering the increasing global demand for palm oil, palm oil companies are arguably a **good investment** for financers. Unfortunately, analysing financers in the present report would go beyond its scope. Nonetheless, this is an important avenue meriting further exploration. For further information on the role (Dutch) investors play currently, refer to *Milieudefensie*'s 'deforestation portfolio of the Dutch financial sector' report and Global Witness's 'Deforestation Dividents' report.

2.4.4. Government

The Indonesian government plays a **controversial role** regarding the palm oil industry. On the one hand, it has attempted to both **halt and criminalize deforestation and slash-and-burn techniques** in the past. On the other hand, it aims to **increase the cultivation of palm oil** through, for example, passing the B30 program that started in 2020. This program requires biodiesel to contain a minimum of 30% palm oil (rather than the 20% required previously). This requirement increases the demand for palm oil, **which incentivises more deforestation** and threatens the occurrence of more forest fires. Additionally, the government is criticized for neither incentivizing alternative techniques of land preparation nor enforcing existing laws consistently.[33] This **lack of political will** to (effectively) target the problems arising from oil palm cultivation may be due to the industry's considerable impact on the country's GDP, having been estimated to lie between 1.5% and 2.5%.[34]

2.4.5. Local population

The role of the local population is twofold as they are both **stakeholders** and **'right-holders'** (such as individual human rights, as well as customary cultural and community rights, further discussed in Chapter 3). In other words, the local population can be both positively and negatively affected by palm

[31] Indonesia Investments, 'Palm Oil' [n.d.] retrieved from https://www.indonesia-investments.com/business/commodities/palm-oil/item166 on 16 January 2022.
[32] PT Astra Agro Lestari Tbk, 'Company Profile' [n.d.] retrieved from https://www.astra-agro.co.id/en/milestone/ on 16 January 2022.
[33] Garcia, Rijk, and Piotrowski (n 6).
[34] Indonesia Investments (n 31).

oil production, which is one of the main contributors to forest fires and haze. On the one hand, the production of palm oil has the potential to **bring profits** to areas that were previously more cut off from economic opportunities. On the other hand, the **benefits are not evenly distributed** amongst the local population, and they are the **first to feel the adverse effects** of the industry. The adverse impact of the palm oil industry on the local population has already been elaborated on above regarding the effects of forest fires and haze on the environment and individuals (see 2.3). Therefore, this section emphasizes the incentives local farmer have to enter the palm oil industry. For more information about palm oil plantations' environmental and social impacts, refer to an article written by representatives of the Center for International Forestry Research.

In 2011, 3.7 million people in Indonesia were estimated to work in the palm oil industry,[35] a number that can only be considered to have increased over the years. Given the fact that palm oil cultivation brings a higher return per square kilometre than other crops (such as rice or rubber), farmers are said to earn more per square kilometre as well. This has been reported to have significantly contributed to the **welfare of local farmers** as well as local infrastructure.[36] According to the ASEAN Post, "the palm oil industry has helped lift millions of people out of poverty, both in Indonesia and Malaysia".[37] This has been achieved thanks to the creation of **well-paying jobs** and **local ownership of plantations** (through the small holder system).[38] Dono Boestami (President Director of the Indonesian Oil Palm Estate Fund) argues that when one assumes that one worker is able to support two to three more people as a result of their work and earnings, the palm oil sector contributes to the livelihoods of 20% of the entire Indonesian population.[39]

[35] Joshua Levin, 'Profitability and Sustainability in Palm Oil Production' [2012] retrieved from http://awsassets.panda.org/downloads/profitability_and_sustainability_in_palm_oil_production__update_.pdf on 16 January 2022.
[36] Yosuke Shigetomi, Yuichi Ishimura and Yuki Yamamoto, 'Trends in global dependency on the Indonesian palm oil and resultant environmental impacts' [2020] retrieved from https://www.nature.com/articles/s41598-020-77458-4 on 17 January 2022.
[37] Try Ananto Wicaksono, 'Tackling Indonesia's Poverty With Palm Oil' [2021] retrieved from https://theaseanpost.com/article/tackling-indonesias-poverty-palm-oil on 17 January 2022.
[38] Ibid.
[39] BPDPKS, 'Palm Oil Support 20 Percent of Indonesia Population' [2018] retrieved from https://www.bpdp.or.id/en/palm-oil-support-20-percent-of-indonesia-population on 17 January 2022.

3. Human Rights and Environmental Obligations

Human rights are universal entitlements that protect the dignity, freedom and equality of all human beings. In 1948, the United Nations (UN) lay the foundations for the universal protection of fundamental rights of every individual and adopted the Universal Declaration of Human Rights (UDHR).[40] The UDHR is not a legally binding document, however, many of the human rights expressed in it have been widely accepted as forming part of customary international law or found in domestic constitutional law settings.[41] The rights of the UDHR have since been split into two separate categories of rights and provided for in two separate Covenants; civil and political rights (International Covenant on Civil and Political Rights, ICCPR), and economic, social and cultural rights (International Covenant on Economic, Social and Cultural Rights, ICESCR). The three documents combined comprise the Universal Bill of Rights and recognise that all human rights, be they civil and political, or economic, social and cultural, are **indivisible** and **interdependent**. This means that they all apply to individuals in a **fair and equal manner**, without discrimination.[42]

All human rights impose a spectrum of obligations on States. Broadly speaking, States have an obligation to "respect and ensure rights [of]all individuals".[43] In practice, the UN human rights treaty bodies have adopted a more specific tripartite typology of how State should secure human rights obligations. Namely, the duties to **respect**, **protect**, and **fulfil** human rights. The duty to respect human rights entails a negative obligation upon States not to take any measures that result in a violation of a right.[44] In other words, the State has a duty to not directly interfere with the enjoyment of human rights. The duty to protect human rights requires States to be more proactive and take measures to prevent third parties (e.g., corporations, individuals) from interfering with the rights of others.[45] Finally, the obligation to fulfil human rights demands an active role by the State, wherein the State is required to take positive measures to facilitate and provide for the enjoyment of human rights. For example, States are obliged to adopt appropriate laws to implement their international (human rights) obligations.[46]

There are several differences between civil and political rights compared to economic, social and cultural rights in the obligations they impose on States. Although both types of rights imply duties to respect, protect and fulfil, the State obligations relating to economic, social and cultural rights are described as follows in the ICESCR:

> Each State Party to the present Covenant **undertakes to take steps**, individually and through **international assistance and co-operation**, especially economic and technical, to the **maximum of its available resources**, with a view to **achieving progressively the full**

[40] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).
[41] Eibe Riedel, '7. Economic, Social and Cultural Rights' in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (2nd, rev. ed., Åbo Akademi University Institute for Human Rights, 2012), 132.
[42] UN World Conference on Human Rights, Vienna, 14–25 June 1993, UN doc. A/CONF.157/23, adopted by 171 states, Vienna Declaration 1993, Part I, paragraph 5.
[43] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3 (hereafter ICESCR), Article 2.
[44] Daniel Moeckli, *International Human Rights Law* (3rd edn., Oxford University Press 2017) 97.
[45] ibid.
[46] ibid, 99.

> **realization** of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[47]

This specification acknowledges that not all States currently have the capabilities or the necessary level of development to realise economic, social and cultural rights, and takes time to realise these rights. In that view, this Article introduces two qualifiers for implementation of State obligations on economic, social and cultural rights. The first is **progressive realisation**. This entails that the obligations on States do not require immediate implementation, and rather need to be worked towards.[48] The second is "to the **maximum of its [the State's] available resources**". This phrase indicates that, in achieving progressively the full realisation of the rights, States need to take steps on the basis of their available resources. States with low resource availability need to make serious efforts to improve the fulfilment of economic, social and cultural rights, but States with more available resources can and must protect the rights to a greater degree.[49] There needs to be progress from the starting position of every individual State, and the Committee on Economic, Social and Cultural Rights (CESCR) assesses whether the steps taken by States are adequate and reasonable.

Although the immediate implementation of economic, social and cultural rights is reduced by these qualifiers, the CESCR has also identified several 'hard' obligations relating to economic, social and cultural rights that apply immediately. First, as described above, States have an obligation to take *some* steps towards fulfilment of the rights. This obligation is immediate, although the steps taken do not immediately need to ensure the full realisation of the right. Second, if full realisation of rights is not provided, States need to indicate why they are unable to further ensure this realisation.[50] Third, there can be no retrogressive measures:[51] the level of rights enjoyment may only be improved, not diminished. Fourth, the requirements of non-discrimination and gender equality in the exercise and enjoyment of rights, to be found in Article 2(2) and Article 3 of ICESCR, are of immediate application. Finally, States are required to protect the 'minimum core obligations' of each of the rights.[52] The 'minimum core obligations' are central aspects of each right, defined by the CESCR. This 'minimum core' standard sets a universal floor of immediate and full compliance by all States. For more information, see General Comment 3 of the CESCR.

Generally, governments owe human rights obligations to people within their country's borders, thus entailing a territorial scope, or within their jurisdiction. However, States do not exist in isolation and transboundary haze pollution is an issue that inherently knows no borders. It has been affirmed that States obligations to respect, protect and fulfil human rights can have an **extraterritorial scope** in exceptional circumstances. For example, the UN's Human Rights Committee[53] has confirmed that Article 2(1) of the ICCPR's reference to 'jurisdiction' extends a State's human rights obligations to "anyone within the power or effective control" of the State, even if they are not within the State's

---

[47] ICESCR (n 43) Article 2(1).
[48] United Nations Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No.3: The nature f States Parties' obligations (Art. 2, Para.1, of the Covenant)' (1990) UN Doc E/1991/23, paragraph 9.
[49] ibid, paragraph 10.
[50] ibid, paragraph 4.
[51] ibid, paragraph 9.
[52] ibid, paragraph 10.
[53] The Human Rights Committee is a treaty body established in accordance with the ICCPR and is comprised of independent experts tasked with monitoring the implementation of the ICCPR by States.

territory.[54] This limits the State's extraterritorial responsibility for civil and political rights by the extent to which the State's control impacts an individual's enjoyment of their civil and political rights.

The ICESCR, however, does not include a similar provision. Article 2(1) of the ICESCR instead requires the State to progressively realise economic, social and cultural rights through steps taken individually by the State or through international assistance and cooperation. This implies that States, at minimum, have a requirement to refrain from taking actions that would harm the rights of individuals abroad – States at least have an extraterritorial duty to respect ICESCR rights beyond their borders. This is a general summary of the extraterritorial application of human rights, the subsections will deal with the extraterritorial application of rights where necessary (for example, in regard to the no-harm principle).

Unlike human rights law, **international environmental law does not provide for a 'universal bill of environmental rights'** nor one authoritative document outlining foundational environmental rights and principles. Rather, international environmental law initially focused on the regulation of three categories of environmental issues; namely, the exploitation of certain resources, transboundary harm and the use of shared watercourses.[55] The 'precedents' of modern international environmental law are thus case law where courts have interpreted existing rules of international law to affirm environmental principles (for example, see the no harm principle). One of the first environmental law treaties was the UN General Assembly on 14 December 1962 of Resolution 1803 (XVII) on 'Permanent Sovereignty over Natural Resources', soon followed by the 1972 Stockholm Declaration on the Human Environment and many other multilateral environmental agreements. Soft law also plays a major role in international environmental law, as demonstrated by the fact that two of the field's founding documents are soft law instruments; the 1972 Stockholm Declaration and the 1992 Rio Declaration. The instruments themselves and the conferences and institutions that create them have an important normative role as catalysts of new international norms.[56]

This chapter outlines some of the main human rights and environmental obligations that have emerged from our research and are particularly prevalent for victims of forest fires and transboundary haze pollution. Different rights and obligations under international law are outlined, which have mostly been derived from the ICESCR, the ICCPR, and relevant multilateral environmental agreements (MEAs) such as the Aarhus Convention, the Rio Declaration, and relevant case law.

Efforts have been made to keep the language as simple and clear as possible, while at the same time remaining legally accurate and faithful to the meaning of the sources of the laws. In instances where technical language is unavoidable, the reader will find concise definitions in an appended glossary (Annex I) as well as in textboxes throughout the memorandum.

3.1. Substantive human rights and State obligations

Substantive human rights comprise civil and political rights as well as economic, social, and cultural rights. With rights come corresponding State obligations to protect individuals against environmental

[54] HRC, 'General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), paragraph 10.
[55] Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (2nd edn., Cambridge University Press 2018), 4.
[56] ibid, 41.

harm which interfere with human rights, and adopt and implement legal frameworks to that effect.[57] The following human rights are relevant when discussing transboundary haze pollution.

Right to life

The human right to life is an inherent right of all human beings.[58] All States have committed to respect, protect, and fulfil the right to life. This entails, at the very least, that States should take effective measures against foreseeable and preventable loss of life.[59] In their General Comment No. 36, the Human Rights Committee emphasised that **environmental degradation, climate change and unsustainable development constitute serious threats to the right to life** of both present and future generations. In respecting the right to life, States should also consider their obligations under international environmental law. Specifically, the Committee clarifies that States have a positive obligation to take measures to preserve the environment and protect it against harm caused by public and private actors. These measures include environmental impact assessments, consultation and cooperation with other States, providing access to information on environmental hazards and efforts to incorporate the precautionary approach in their activities (see more information on these obligations in the following section).

As a cause and consequence of climate change, transboundary haze pollution exacerbates threats to life. For example, following the haze event of 2015, Indonesia recorded increasing numbers of infant deaths and premature adult deaths. Representatives from Malaysia, Myanmar, Singapore, and Thailand have urged the Association of Southeast Asian Nations' (ASEAN) Member States to acknowledge transboundary haze as a danger to basic human rights, including

> [T]he *right to life* and the right to the highest attainable standard of health and an adequate standard of living, which includes the right to a safe, clean and sustainable environment.[60]

To protect the right to life, States have a **positive obligation to take measures to mitigate transboundary haze pollution** and prevent foreseeable loss of life.

Right to health

The human right to health is articulated in Article 12 of the ICESCR which provides that all persons have the right "to the enjoyment of the **highest attainable standard of physical and mental health**."[61] The impacts of transboundary haze pollution have been highlighted in the previous section and include increasingly high rates of malnutrition, vector-borne diseases, and respiratory disorders.

---

[57] Ben Boer, *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015) 3.

[58] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereafter ICCPR), Article 6.

[59] OHCHR, 'Understanding Human Rights and Climate Change' (2015) <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> accessed 6 January 2022.

[60] Daniel Dzulkifly, 'ASEAN human rights body urges member nations to commit to transboundary haze agreement' *Malay Mail* (Malaysia, 14 October 2019) <https://sg.news.yahoo.com/asean-human-rights-body-urges-025638858.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAABjvZOBMvefF3xahAvI4MRZiRitI9jyuCugt1AFd_nHcphWBkwc_E0CQ3-C8Ww0TfT_DJifvDY_UVPrBQIYsx3wWxIOTnahW6eJy7dCn9CkFus6UEIyf8rrhOZ6_M_OFLHpOCNwCMjZ-GD8iFfxHquZZ8EL8_y5sNn8h3BT035Dt> accessed 2 February 2022. [own emphasis added]

[61] ICESCR (n 43) Article 12.

In their General Comment No. 14, the Committee on Economic, Social and Cultural Rights stated that the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services, and conditions necessary for the realisation of the highest attainable standard of health. This means that the right to health should not be interpreted as the right to be healthy, rather a right to health-care facilities, goods and services that have the following elements;

- Quality: scientifically and medically appropriate and of a good quality.
- Availability: functioning and available in sufficient quantities.
- Accessibility: financially affordable and physically accessible to all, without discrimination.
- Acceptability: respectful of medical ethics and culturally appropriate.

As for all economic, social and cultural rights, States are obliged to **expend maximum available resources for the progressive realization** of the right to health for all persons.[62] However, States have **minimum core obligations** in realising the right to health, including essential primary health care.[63]

Right to adequate standards of living

The right to an adequate standard of living is found in Article 25 of the non-binding Universal Declaration of Human Rights and in Article 11 of the legally binding ICESCR;

> The States Parties to the present Covenant recognize the right of everyone to **an adequate standard of living for himself and his family**, including adequate food, clothing and housing, and to the continuous improvement of living conditions.[64]

From this right, the rights to food, housing and a healthy environment can be derived. The scope and application of the right to housing is elaborated upon in General Comment No. 4 of the Committee on Economic, Social and Cultural Rights, which states that "the human right to adequate housing… is of central importance for the enjoyment of all economic, social and cultural rights."[65] Similarly to the previous right, States are obliged to **expend maximum available resources for the progressive realization** of the right to food and housing for all persons.

Legal nature of declarations
Declarations are not legally binding instruments but carry considerable moral weight and provide a clear indication of the aspirations of the international community. An example of this is the Stockholm Declaration or the UDHR.

Right to a healthy environment

The right to a healthy environment has developed gradually since the 1970s when it was first alluded to by the 1972 Stockholm Declaration Principle 1 of the Stockholm Declaration states, "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a

[62] Progressive realisation and this specific State obligation will be discussed in further detail in the memo on International Avenues of Redress: UN Bodies.
[63] See United Nations Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 14: The right to the highest attainable standard of health (article 12)' (2000) UN Doc E/C.12/2000/4, paragraph 43.
[64] ibid, Article 11.
[65] United Nations Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 4: The right to adequate housing (Art. 11(1) of the Covenant)' (1991) UN Doc E/1992/23, paragraph 1.

life of dignity and well-being".[66] The right has also gained constitutional recognition and protection in more than 150 countries, including the Indonesian Constitution.[67]

The right to a healthy environment has been interpreted to **entail clean air, safe drinking water, and adequate sanitation;[68] to live and work in a nontoxic environment;[69] and to a safe climate to ensure healthy populations**.[70] The right as found in many national Constitutions entails a State obligation to set clear standards for pollutants, ensure planning for the prevention of pollution, and fairly enforce environmental laws.[71]

On 8 October 2021, the UN Human Rights Council adopted a resolution recognizing that the right to a clean, healthy and sustainable environment is a human right. Although not legally binding, its near-unanimous adoption shows consensus on the formulation, content, and importance of this human right.[72]

Right to equality and non-discrimination

States have a duty to guarantee that **rights will be exercised without discrimination** and ensure that all persons receive **equal and effective protection** against discrimination on any grounds.[73] This also means that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law".[74]

The Intergovernmental Panel on Climate Change (IPCC) has repeatedly stated that people who are socially, economically, politically, institutionally or otherwise marginalized are especially vulnerable to climate change. In regard to transboundary haze pollution, some groups of peoples are affected to a greater extent because they have been denied sufficient resources to adapt to these impacts, including children, adolescents, elderly and women.[75] The haze therefore implicates the right to non-discrimination. It is important to note that both the ICCPR and the ICESCR include a non-discrimination clause relating to the rights included in the Covenants (Article 2(1) of both Covenants). This clause states that the rights recognised in the Covenant will be respect and ensured "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Any discrimination in the State's implementation of its obligations to protect, respect and fulfil the rights implicated by the haze is thus not allowed.

Right to development

---

[66] UNGA, 'United Nations Conference on the Human Environment' (December 1972) UN Doc. A/RES/2994 (hereafter Stockholm Declaration), Principle 1.
[67] *Undang-undang Dasar Negara Republik Indonesia Tahun 1945* (Constitution of the Republic of Indonesia of 1945, reinstated in 1959, with amendments through 2002) [1945] (hereafter Indonesian Constitution), article 28H.
[68] Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1 (Afr. Comm'n Hum. & Peoples' Rts. May 27, 2002).
[69] *Guerra and others v Italy*, Judgment, Merits and Just Satisfaction, App No 14967/89, [1998] ECHR 7, ECHR 1998.
[70] David Boyd, 'The Constitutional Right to a Healthy Environment' (2012) 54 Environment Science and Policy for Sustainable Development 3, 6.
[71] Indonesian Constitution (n 67), Article 28H.
[72] HRC, 'Resolution adopted by the Human Rights Council on 8 October 2021: The human right to a clean, healthy and sustainable environment' (2021) UN Doc A/HRC/RES/48/13.
[73] ICESCR (n 43) Article 2.
[74] ICCPR (n 58) Article 26.
[75] IPCC, *AR6 Climate Change 2022: Impacts, Adaptation and Vulnerability, Summary for Policymakers* (2022), 17.

Pursuant to Article 55 of the UN Charter, States should promote "conditions of economic and social progress and development".[76] The ICESCR and the ICCPR also state that all peoples should "freely determine their political status and freely pursue their economic, social and cultural development".[77] In particular, States should take steps individually and collectively to **guarantee all persons the ability to enjoy economic, social, cultural and political development**.

Climate change poses an existential threat to people's enjoyment of this right.[78] Transboundary haze pollution sparked by agricultural practices that aim to meet the global palm oil demand thereby plays a dual role in this. On the one hand, the transboundary haze pollution is often sparked by agricultural activities which bring income and, arguably, welfare to local farmers. On the other hand, it can have serious effects on the realisation of this right for victims of pollution, especially if governments expenditures are diverted from poverty alleviation measures to emergency response measures dealing with climate change-related disaster events.[79] All individuals and peoples have a right to development and States have a **positive obligation to take urgent action to prevent transboundary haze pollution** and promote the realisation of the right to development for everyone.

3.2. Procedural Human Rights and State Obligations

In human rights law, procedural rights and obligations prescribe formal steps that must be taken to enforce substantive rights such as the ones elaborated on in the previous section. In international environmental law, procedural obligations are recognised as stand-alone obligations that are not necessarily there to fulfil substantive obligations. This section provides a non-exhaustive list of procedural rights and obligations that can be considered by right-holders when asserting claims of violations against perpetrators.

Access to information

Access to information is the **foundation of public participation and accountability**. The lack of meaningful access to pollution information is a significant problem for local communities, civil societies and individuals or NGOs seeking to hold actors accountable for environmental harm. Information can be released by governments through reactive and proactive disclosure.[80] Reactive disclosure refers to the process of obtaining environmental information through formal requests of information to the government, whilst proactive disclosure refers to information that is made publicly available by public authorities without a request.[81]

[76] United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) (1945) 1 UNTS XVI (hereafter UN Charter), Article 55.
[77] ICESCR (n 43) Article 1; ICCPR (n 58) Article 1.
[78] OHCHR (n 59) 15.
[79] Vivek Mukherjee and Faizan Mustafa, 'Climate Change and the Right to Development' (2019) 5 Management and Economics Research Journal 1, 4.
[80] World Resources Institute, 'A Community Action Toolkit: A roadmap for using environmental rights to fight pollution'.
[81] ibid, 17.

Domestically, the right to access information can be found in national constitutions, thereby directly enforceable by national courts. Administrative laws or environmental regulations will also contain information disclosure requirements, particularly regarding environmental impact assessments.[82]

The international legal right to access information found in the Aarhus Convention, Article 19 of the ICCPR,[83] and Principle 10 of the Rio Declaration, which recognizes the importance of access to environmental information and participation in decision-making about pollution.[84]

Right to public participation

The right to public participation is widely expressed in human rights instruments as part of democratic governance and the rule of law.[85] Article 25 of the ICCPR specifically provides that citizens have the right, without unreasonable restrictions "to **take part in the conduct of public affairs**, directly or through freely chosen representatives".[86] Public participation includes a range of activities and actions that allow people to engage in environmental decision-making around issues that affect them. The right to participate has two components: the **right to be heard** and the **right to affect decisions**.[87] Participation is not a single event but a process or mechanism that allows local communities to learn about, provide input, and potentially influence government regulatory decisions.[88] Most recent multilateral and many bilateral agreements contain references to or guarantees of public participation.[89]

The right to access public participation **can also trigger State obligations to carry out environmental impact assessments (EIAs)**. For example, the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) requires States parties to notify the public and to provide an opportunity for public participation in relevant environmental impact assessment procedures regarding proposed activities in any area likely to be affected by transboundary environmental harm.[90]

Access to justice and Right to remedy

The right of access to justice, considered broadly, encompasses, amongst others, the right to access courts or tribunals and the right to an effective remedy. International human rights law recognises that

---

[82] For example, see *Undang Undang No. 32 tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup* [Law No. 32 of 2009 concerning Protection and Management of Environment] LN. 2009/ No. 140, TLN NO. 5059, LL SETNEG : 71 HLM refers to environmental impact assessments (AMDAL).

[83] ICCPR (n 58) Article 19.

[84] Rio Declaration on Environment and Development (adopted 14 June 1992, entered into force 29 December 1993) UN Doc A/CONF.151/26, Principle 10.

[85] See UDHR (n 40) Article 21; ICCPR (n 58) Article 25.

[86] ICCPR (n 58) Article 25.

[87] Dinah Shelton, 'Human Rights and the Environment: What specific environmental rights have been recognised?' (2006) 35 Denver Journal of International Law and Policy 129, 139.

[88] World Resources Institute (n 80), 18.

[89] See Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes (adopted 18 November 1991) 31 I.L.M 568, Article 2(3)(a)(4), Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 I.L.M. 22, Article 6(3) and Stockholm Convention on Persistent Organic Pollutants (adopted 22 September 2001) 40 I.L.M. 532, Article 10(1)(d).

[90] Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 2 September 1991) 30 I.L.M., Article 3. Hereafter Espoo Convention.

the respect and protection of human rights can only be guaranteed by the availability of justice and effective judicial remedies.

Article 2(3) of the ICCPR states that, in respecting and ensuring the rights to all individuals, States Parties must also ensure that **individuals whose rights have been violated will have an effective remedy**. Similarly, Article 8 of the UDHR provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". In regard to economic, social and cultural rights, the CESCR has affirmed that appropriate measures to implement the ICESCR must include appropriate means of redress, or remedies, made available to any aggrieved individual or group.[91] The provision of domestic legal remedies for violations of Covenant rights is also included under the States' obligations in Article 2(1) of the ICESCR; in taking all 'appropriate means' to realise Covenant rights, States have a positive obligation to complement the rights with judicial remedies.[92] An **'effective' remedy** should lead to the cessation of the violation and to reparations. These **reparations** can include

> restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.[93]

The right to access justice may also entail a **right to access courts**. As a corollary to this, all persons must be seen as **equal before the courts and tribunals**. Furthermore, individuals are entitled to a **fair and public hearing** before a **competent, independent and impartial tribunal established by law**.[94]

3.3. Key Principles and State Obligations in International Environmental Law

The environmental principles discussed in this section do not reflect an exhaustive list of all environmental law principles. The following discussion focuses on those principles with a transnational aspect and thus pertinent to our research on transboundary haze pollution. Furthermore, these principles have been linked in the works of human rights bodies to the realisation of human rights (see the earlier discussion on the right to life and States' positive obligations to take measures to protect it against harm caused by public and private actors).

No harm principle

The principle of no harm was the first international environmental law principle to emerge and entails a substantive duty under customary law to prevent environmental harm. The principle first appeared in the environmental context in the *Trail Smelter* case, where the arbitration tribunal established for the case by the United States and Canada stated that:

> **[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons**

[91] CESCR, 'General Comment No. 9: The domestic application of the Covenant' (1998) UN Doc E/C.12/1998/24, paragraph 2.
[92] ibid, paragraphs 2 and 3.
[93] HRC, 'General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), paragraph 16.
[94] ICCPR (n 58) Article 14.

> **therein**, when the case is of serious consequence and the injury is established by clear and convincing evidence.[95]

The **customary** nature of this principle was confirmed by the International Court of Justice (ICJ) in the 1949 *Corfu Channel* case.[96] In both *Trail Smelter* and *Corfu Channel*, no-harm is used as a primary norm to determine State responsibility for damage caused to another State. No-harm also presents a limit to the principle of permanent sovereignty over natural resources;[97] States have a sovereign right to exploit their own resources, but they are also obliged to ensure that exploitative activities within their jurisdiction or control do not cause damage to the environment of other States.

No-harm is an obligation of **due diligence**. This means that, if the State of origin has exercised full diligence, but harm still occurs, then the principle is not violated. The magnitude of the effect or 'damage' must be assessed based on criteria such as the likelihood of significant harmful effects on the environment or the impact on other States' capacity to use their natural wealth and resources in a similar way. Damage that does not reach the threshold of significance will not breach the no-harm principle, but States will remain bound by the due diligence duty to prevent it (see prevention principle).

Principle of Prevention

The principle of prevention develops the no-harm principle by encompassing protection of the environment *per se* rather than protection of the interests of other States. It is introduced in Principle 21 of Stockholm, which was later confirmed by Principle 2 of the 1992 Rio Declaration[98] and affirmed by the ICJ as codified customary international law.[99] The principle of prevention thus provides an **obligation to prevent damage to the environment in general** and is particularly important as environmental damage can be irreversible, as recognised by the ICJ in the *Gabčíkovo-Nagymaros* case:

> [I]n the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.[100]

As a corollary to the principle of prevention, States also have a **duty to cooperate** (through notification and consultation) and to **conduct an EIA** where the proposed activity is likely to have a significant adverse impact (these are procedural obligations and discussed in the following subsection).

Principle of Precaution

The lack of scientific certainty about the actual or potential effects of an activity must not prevent States from taking appropriate measures when such effects may be serious or irreversible.

---

[95] *Trail Smelter Arbitration*, RIAA, vol. III, pp. 1905–82 (*Trail Smelter*), 1965.
[96] *Corfu Channel* case (*UK v. Albania*), ICJ Reports 1949, p. 4 (*Corfu Channel*), 22.
[97] Stockholm Declaration (n 66) Principle 21.
[98] Rio Declaration (n 84) Principle 2.
[99] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 226 (*Legality of Nuclear Weapons*).
[100] *Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*), Judgment, ICJ Reports 1997, p. 7 (*Gabčíkovo-Nagymaros Project*), paragraph 140.

The nature of precaution is **still debated in international environmental law**; some see it as a principle,[101] whilst others, including the ICJ, argue that it is an approach.[102] Interpreting precaution as **a principle concurs legal consequences upon entities that violate it**, whereas precaution as an approach carries less legal weight. For example, Article 3(3) of the UN Framework Convention on Climate Change (UNFCCC) provides that States Parties "should" take precautionary measures to anticipate, prevent or minimise the causes of climate change and its adverse effects,[103] whilst Principle 15 of the Rio Declaration provides that States "shall" take a precautionary approach to protect the environment.[104] The Rio Declaration's use of 'shall' signifies an obligatory nature to precaution, whereas the UNFCCC's Article 3(3) is a strong recommendation to States. Similarly, in *Pulp Mills*, the ICJ observed that "while **a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute**, it does not follow that it operates as a reversal of the burden of proof".[105] These examples negate the legal weight that precaution would have as a principle, rendering it a recommendatory approach to be taken by States in actions they take to protect the environment.

On the other hand, the European Court of Human Rights (ECtHR) contrasts this finding and recognises the importance of the precautionary principle.[106] The ECtHR's decision thus establishes a high level of protection to the environment and human health, arguing that the Romanian State had a positive obligation to adopt precautionary, reasonable and sufficient measures to protect the rights of the interested parties to respect for their private lives and their home and, more generally, a healthy, protected environment – the Court found Romania failing to uphold this obligation and in violation of Article 8 (protection of private and family life) of the European Convention on Human Rights (ECHR).[107]

Obligation to conduct environmental impact assessments

EIAs are used by most governments to **evaluate the likely environmental impacts of proposed projects**.[108] EIAs are conducted to examine anticipated environmental effects of a proposed project and manage and prevent pollution control.[109] Principle 17 of the Rio Declaration provides that:

---

[101] Dupuy and Viñuales (n 55) 70.
[102] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14 (*Pulp Mills*), paragraph 204. This was also confirmed in *Certain activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Construction of a road in Costa Rica along the river San Juan (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015 (ICJ) (*Costa Rica/Nicaragua*), paragraph 104.
[103] UNGA, 'United Nations Framework Convention on Climate Change' (1994) UN Doc A/RES/48/189 (UNFCCC), Article 3(3).
[104] Rio Declaration (n 84), Principle 15.
[105] *Pulp Mills* (n 102) paragraph 164.
[106] *Tatar v. Romania*, ECtHR Application No. 67021/01, Judgment (27 January 2009, Final 6 July 2009) (*Tatar v. Romania*), paragraph 120.
[107] ibid, paragraph 125.
[108] UNEP, 'Environmental Impact Assessment and Strategic Environmental Assessment: Towards an integrated approach' (2004).
[109] Shelton (n 87) 139.

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a **significant adverse impact on the environment** and are subject to a decision of a competent national authority.[110]

As aforementioned, the Espoo Convention is an example of treaty law which provides for an obligation to conduct EIAs. Appendix I of the Convention lists certain activities that require EIAs before they can be authorised, on the basis of their significant adverse transboundary impact.[111] Whilst the Espoo Convention is referred to in this overview to inform readers of the substance of obligations, practically, Indonesia and Malaysia are not bound to the Convention's provisions as they are not signatories to it. Nonetheless, in the *Pulp Mills* case, the ICJ also recognised that the obligation to conduct an EIA has achieved **customary status**:

> [I]t may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.[112]

This was also confirmed by the Arbitral Tribunal in the *South China Sea Arbitration*,[113] which also stated that this applied "to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it".[114] In the context of this report, the transboundary consideration of the environmental impact is particularly pertinent to EIAs. Consequently, the obligation to conduct EIAs can be seen to complement the State obligation to prevent transboundary environmental harm (see no-harm principle).

The **content of the EIA is set by domestic law of States**, but customary international law does set some **minimal requirements**:

1. The EIA must be conducted **before the activity is allowed to proceed** and the effects of the EIA must be **consistently monitored**.[115]
2. As a general matter of **prevention and due diligence**, the contents of the EIA be appropriate to the circumstances of the envisioned activity.[116]
3. The EIA must meet **international standards required by due diligence and prevention** and its adequacy can be reviewed by an international court and deemed deficient.[117]

---

[110] Rio Declaration (n 84) Principle 17.
[111] Espoo Convention (n 90) Article 2(3).
[112] *Pulp Mills* (n 102), paragraph 104.
[113] *In the matter of the South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v. People's Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016) (*South China Sea Arbitration*), paragraphs 947-8. The *South China Sea Arbitration* did not specifically address EIA in this paragraph, but all obligations under Part XII of the Law of the Sea Convention, which includes Article 206 on EIA.
[114] ibid, paragraph 940.
[115] *Pulp Mills* (n 102) paragraph 205.
[116] ibid.
[117] *Costa Rica/Nicaragua* (n 102) paragraph 157-161.

Regarding whether the customary law on EIAs also entail consultation with potentially affected populations, the issue is unsettled, and it is not yet clear whether an obligation to consult the public exists in general public international law. [118]

The rules governing EIAs are important to examine because they contain information provided to the regulator that outlines the anticipated environmental effects of a proposed project and the activities that will be used for pollution control. This can include suggestions related to the approval of the siting of the facility and its impact on human health and the environment, the amount and type of the discharge of emissions, the monitoring frequency of specific pollutants in the ambient environment, specific discharges, the frequency of monitoring, as well as rules in emergencies. EIAs also typically include opportunities for public participation (see right to public participation).

[118] Dupuy and Viñuales (n 55) 80.

4. ASEAN

The **Association of Southeast Asian Nations (ASEAN)** is a regional inter-governmental organisation which **facilitates economic, political and sociocultural integration** between its Member States, but also between Member States and other States in Asia. ASEAN is comprised of ten Member States: Brunei Darussalam, Myanmar, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Philippines, Singapore, Thailand, and Vietnam.[119] Timor-Leste currently holds observer status.[120] ASEAN was established on 8 August 1967 with the signing of the ASEAN Declaration.[121]

ASEAN emerged out of the regional contentions and security concerns amongst ASEAN leaders, thus its initial concerns and purpose focused on **political security and economic growth**. ASEAN stressed the need to ensure stability and security,[122] freedom from external interference,[123] and the safeguarding of sovereignty and territorial integrity[124]. These principles were first reflected in the 1976 Treaty of Amity and Cooperation in Southeast Asia (hereafter TAC), the precursor to the ASEAN Charter. TAC emphasises **fundamental principles** that have collectively come to be known as the "**ASEAN Way**";[125] **sovereignty, non-use of force, peaceful settlement of disputes, non-interference and decision-making by consultation and consensus**[126]. The ASEAN Way has promoted identity-building and mutual trust and cooperation between Member States,[127] but has also been criticised by political scholars and civil society as a major obstacle to ASEAN's goal of achieving human rights and fundamental freedoms, democracy, the rule of law and good governance.[128] This criticism particularly emerges in response to ASEAN's preferred (and only) method of dispute settlement, which focuses on a high degree of consultation and consensus,[129] as will be discussed further on.

4.1. The ASEAN Charter

The Charter of ASEAN establishes the framework and structure of ASEAN, providing the guiding principles of ASEAN and the foundations for the establishment of its bodies. The Charter reaffirms the principles first reflected in TAC and defines ASEAN's purpose, institutional structure, functions and decision-making processes. Importantly, it includes specific provisions on human rights,

---

[119] Nazia Nazeer and Fumitaka Furuoka, 'Overview of ASEAN Environment, Transboundary Haze Pollution Agreement and Public Health' [2017] 13 IJAPS 73, 74.
[120] It is anticipated that Timor Leste will become a member when its membership is approved by current Member States, as per Article 6 of the ASEAN Charter.
[121] ASEAN Declaration (entered into force 8 August 1967) (1967).
[122] Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) (2008) (hereafter ASEAN Charter), Article 1(1).
[123] ibid, Article 2(2)(e).
[124] ibid, Article 2(2)(a).
[125] Dalina Prasertsri, Huong Tran, Nina Somera and Sunee Singh, 'ASEAN Handbook for women's rights activists' [2013] APWLD 1, 12.
[126] ASEAN Charter (n 122) Article 2(2).
[127] Paruedee Nguitragool, 'ASEAN regionalism and the politics of the environment' in P. Nguitragool (eds.), *Environmental Cooperation in Southeast Asia: ASEAN's regime for transboundary haze pollution* (Routledge 2011), 28.
[128] Apichai Sunchindah, 'Transboundary Haze Pollution Problem in Southeast Asia: Reframing ASEAN's response' [2015] ERIA Discussion Paper Series 1.
[129] Nguitragool (n 127) 28.

environmental protection and the participation of civil society. Not only does the Charter confirm the respect for the "fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity non-interference, consensus and unity in diversity"[130] it specifically confirms ASEAN's goal to

> **ensure sustainable development** for the **benefit of present and future generations** and to **place the wellbeing, livelihood and welfare of the peoples at the centre** of the ASEAN community building process.[131]

Within this preambular statement, it is clear that Member States are encouraged to act in accordance with the fundamental principles of ASEAN and incorporate human rights and environmental concerns into their domestic and regional policies.

The Charter established the ASEAN Secretariat responsible for the implementation of policies, projects, and activities as well as for the coordination of the ASEAN bodies. The Charter also established Community Councils. These Councils are comprised of representatives from each Member State and has a mandate to ensure the implementation of the relevant Summit decisions, coordinate cross-sectoral work and submit reports and recommendations to the Summit.[132] There are three Community Councils on Political-Security, Economic, and Socio-Cultural matters.[133] Under the mandate of the Socio-Cultural Council, ASEAN established the ASEAN Ministerial Meeting on the Environment (AMME) and the Conference of the Parties (COP) to the ASEAN Agreement on Transboundary Haze Pollution (AATHP) as well as the Committee under the COP to the AATHP.[134]

4.1.1. ASEAN's human rights mechanisms

The **ASEAN Intergovernmental Commission on Human Rights (AICHR)** was inaugurated on 29 October 2009, pursuant to Article 14 of the ASEAN Charter. The primary function of the AICHR is to **promote and protect human rights**, **develop and clarify human rights standards** and **promote constructive cooperation** for the realisation of human rights.[135] The Terms of Reference (TOR) of AICHR sets out its mandate, composition, modalities and funding.

The cross-cutting mandate of the AICHR includes developing strategies for the promotion and protection of human rights. Further, it includes developing an **ASEAN Human Rights Declaration** with a view towards establishing a **framework for human rights cooperation**; **promoting capacity building** for effective implementation of international human rights treaty obligations undertaken by Member States; **conducting and publishing thematic studies** on human rights issues in ASEAN; and **engaging in dialogue and consultation** with other ASEAN bodies, national regional and international human rights institutions and accredited CSOs concerned with the promotion and protection of human rights.

In realising its mandate, AICHR has identified areas for thematic studies include corporate social responsibility, business and human rights, migration, right to life, right to health, right to education

[130] ASEAN Charter (n 122) Preamble.
[131] ibid.
[132] ibid, Article 9.
[133] ibid, Article 9(1).
[134] ibid, Annex 1(III).
[135] ibid, Article 14.

and legal aid. Further, AICHR developed the ASEAN Human Rights Declaration (AHRD), which was adopted in 2012.[136] The AHRD incorporates civil and political rights found in the ICCPR, economic, social and cultural rights of the ICESCR and other rights found in the UDHR.

Relevance for CSOs

It is important to note that the AHRD is ***not*** a legally binding document. It is a declaration, similar to the UDHR and (ideally) has normative value instead. It refers to human rights found in international human rights treaties that ASEAN Member States are parties to, which is a stronger avenue of redress and can be invoked in legal cases. For more information on international human rights instruments that ASEAN Member States are party to and have ratified, see our memo on UN Bodies.

AICHR is comprised of ten representatives, with one from each ASEAN Member State and appointed for a term of three years, renewable once. The independence of AICHR and its Representatives is crucial to having an effective regional human rights mechanism. Unfortunately, the TOR does not provide adequate requirements to ensure this; Member States need to consult with appropriate stakeholders in the appointment of their AICHR Representative only "if required by their respective internal processes".[137] Very few Member States have followed this requirement as it is not necessary to do so if the requirement is not found in their internal processes; Indonesia is one of two Member States that have held open and consultative selection processes and thus their AICHR Representatives are independent from their government and some of the most actively engaged with civil society. The remaining eight AICHR Representatives are government officials. Each AICHR Representative is accountable to their appointing government,[138] which may decide, at its discretion, to replace the representative before their term is due to expire.[139]

Relevance for CSOs

Indonesia's current AICHR Representative is H.E. Yuyun Wahyuningrum, who has recently been appointed for her second term (2022-2024).

In addition to the **lack of transparency and independence of AICHR Representatives**, another limitation of the AICHR is its **lack of a clear mandate**, specifically the **absence of a protection mandate for human rights**. On the one hand, this may point to the nature of the AICHR as the product of a regional integration project guided by the ASEAN Way and its emphasis on non-interference in domestic affairs, including human rights matters. On the other hand, the TOR marks the beginning of human rights institutionalisation in ASEAN and the introduction of the language of human rights into the region.

Wahyuningrum considers Article 4.10 of the TOR to be the manifestation of AICHR's mandate of protection; "To obtain information from ASEAN Member States on the promotion and protection of human rights".[140] In pursuit of this, Indonesia organised a **human rights dialogue** with AICHR in 2013, in hopes that the AICHR would consider adopting similar practice and take leadership of similar dialogues in the future. In this dialogue, the AICHR was briefed on Indonesia's human rights

[136] ASEAN, 'ASEAN Human Rights Declaration' (February 2013) (AHRD).
[137] ASEAN, 'ASEAN Intergovernmental Commission for Human Rights Term of Reference' (July 2009) (TOR), Article 5(4).
[138] ibid, Article 5(2).
[139] ibid, Article 5(6).
[140] AICHR TOR (n 120) Article 4.10.

protection activities from 1998-2013, including an overview of its 5-year national action plans on human rights for the years 1998-2003 and 2004-2009. Indonesia hoped this would result in a process within AICHR akin to the Universal Periodic Review at the UN Human Rights Council, wherein States' human rights records are reviewed every 4.5 years. However, very few dialogues have continued after 2014. The most recent dialogue was held in September 2021 and attended by ten Member States over video conference.

Relevance for CSOs

For more information on the **Universal Periodic Review** process, please see the second memorandum of this series, on UN-based Avenues of Redress.

Notably, the AICHR **does not have a formal complaints mechanism** to receive or investigate human rights violations, and issue findings and recommendations. Rather, the AICHR has an **informal way of handling complaints** that has only recently been agreed upon. Since 2019, the AICHR agreed to receive and respond to human rights complaints. In practice, however, this means does not necessarily mean that the AICHR as a whole will address the complaint. Letters of complaints can be sent to the AICHR for discussion at its next meeting and then **forwarded to the concerned country representative**, who then has the onus of addressing the complaint.[141]

Thus far, it is uncertain whether any concrete objectives will result from consultation processes between the AICHR and CSOs. This may be due to the lack of compliance mechanism within the AICHR and speaks to one of its functions as providing a platform for information-sharing. However, sustained engagement with the AICHR is nonetheless worthwhile because it is a way to ensure key issues are raised in specific fora. The AICHR has adopted its Guidelines on the AICHR's Relations with Civil Society Organisations and recognises ASEAN's Guidelines on the Accreditation of Civil Society Organisations.

Relevance for CSOs

Importantly, CSOs accredited with ASEAN are not automatically affiliated with the AICHR. CSOs interested in becoming affiliated with the AICHR must also be approved by the AICHR for consultative status. Applications to receive consultative status with AICHR can be done here.

Despite its requirement under Article 6.6 of its TOR to share information with the public, the AICHR has been criticised for its lack of willingness to present its own information in consultative processes with CSOs. In comparing the AICHR and national representatives, the representatives are more open to and do have regular national consultations with stakeholders. In regard to national consultations, an example of this can be seen in the annual meetings held by Indonesia's Coordinating Ministry for Politic, Law and Security for the AICHR Representative of Indonesia to engage with stakeholders concerned with issues under the ASEAN Political Security Cooperation.

[141] Yuyun Wahyuningrum, 'A decade of institutionalizing human rights in ASEAN: Progress and challenges' (2021) 20 Journal of Human Rights 158, 163.

Recommendation	Legal/ Advocacy	Impact Potential	Victims' redress?
Make a submission to the AICHR or the AICHR Representative of the concerned country. This submission can be a report based on field-research of the situation, an overview of corporations involved in activities leading to transboundary harm pollution, or even proposals for consultation events or new areas for thematic studies.	Advocacy	The AICHR's new mandate to assess complaints and forward them to AICHR Representatives for action allows CSOs to raise issues of transboundary haze pollution with a regional human rights body. These complaints are discussed at the next meeting of the Representatives. Action taken can range from contribution to the AICHR's working plans, programmes, and recommendations to other ASEAN Sectoral Bodies. Although it has not been realised it, AICHR does have a mandate to request information from Member States on the promotion and protection of human rights. Complaints can also be made with the view of leading AICHR to make these requests.	No
Engage in the AICHR's thematic studies, particular studies on business and human rights, corporate social responsibility and environmental rights. Although these do not provide avenues for redress, ideally, the thematic studies should incentivize States to improve their human rights situations. Unlike the UN's UPR process, it is unlikely these studies will apply regional pressure. Nonetheless, these studies can bring awareness to potential human rights violations at a regional level.	Advocacy	Including human rights concerns on the basis of forest fires and transboundary haze pollution in thematic studies can increase regional awareness about related ongoing human rights violations and incentivize policies to address these.	No
Apply to have consultative status with the AICHR.	Advocacy	Consultative status has the benefit of engaging with AICHR on a deeper level and, presumably, increased access to AICHR's network and resources. On the other hand, this is also reliant on the AICHR remaining open and willing to CSO engagement. In the last few years, this has only come to fruition after pressure from countries' Representatives – Indonesia and Thailand's in particular.	No

4.1.2.National Human Rights Institutions

National human rights institutions (NHRIs) are "State bodies with a constitutional and/or legislative mandate to protect and promote human rights[,] part of the State apparatus and are funded by the State."[142] **NHRIs can come in many forms**, some have quasi-judicial functions (such as considering complaints and seeking a peaceful settlement through conciliation or through binding decisions) but others may not.[143] The mandate of an NHRI will be **clearly defined in the State's constitution or another legislative text**. Indonesia's NHRI (*Komisi Nasional Hak Asasi Manusia* or *Komnas HAM*), for example, was established through a presidential decree[144] and Law No. 39 of 1999 (*Undang-undang no. 39 tahun 1999 tentang Hak Asasi Manusia*) sets out its functions.

As seen in the analysis above, the AICHR is still in development and cannot be fully relied on for human rights protection in the region. **NHRIs, on the other hand, have an existing network and well-established relationships with stakeholders and other NHRIs**. More importantly, NHRIs have a **clearer mandate that includes protection of human rights**, receiving complaints and investigating national human rights issues. An example of this can be seen in the work of Malaysia's NHRI (*Suruhanjaya Hak Asasi Manusia Malaysia* or SUHAKAM); following a complaint submitted by the CERAH Anti-Haze Action Coalition (includes Greenpeace Malaysia and Sahabat Alam Malaysia (SAM)), SUHAKAM conducted a public inquiry into haze pollution. CSOs expect the inquiry to result in recommendations to the Malaysian government under the following four themes: recognition of environmental rights in Malaysia, the governance of air quality in Malaysia, governance of transboundary pollution and strengthening the Business and Human Rights framework in Malaysia. Furthermore, a Roundtable Discussion was organised by the SUHAKAM, in collaboration with the CERAH Anti-Haze Action Coalition to gather diverse perspectives from experts, legal advisors and key stakeholders, with a view to develop concrete plans to address domestic and transboundary haze pollution. Indonesia's Komnas HAM, similarly, has a mandate to receive complaints, investigate national human rights issues, and submit recommendations to the government which may be followed up on. Indonesia's Komnas HAM also has quasi-judicial competence, in that they can function as mediators and seek amicable settlement through consultation, negotiation, mediation, conciliation and expert evaluation.[145]

Relevance for CSOs
Business and Human Rights framework: for more information, please see our third memorandum on 'Other International Avenues of Redress'.

A detailed review of NHRIs does not fall within the scope of this research project, however, it is recommended that CSOs identify and engage with NHRIs to bring complaints on human rights grounds and carry out follow-up research on relevant NHRIs.

---

[142] OHCHR, "National Human Rights Instruments: History, Principles, Roles and Responsibilities", 2010. Available at http://www.ohchr. org/Documents/Publications/ PTS-4Rev1-NHRI_en.pdf.
[143] OHCHR, "Principles relating to the Status of National Institutions (The Paris Principles)", 1993. Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris.
[144] Presidential Decree No. 50 of 1993 on the National Commission for Human Rights (*Keputusan President Republik Indonesia No. 50 tahun 1993 tentang Komisi Nasional Hak Asasi Manusia*) [1993].
[145] Law No. 39 of 1999 concerning Human Rights (*Undang-undang Republik Indonesia No. 39 Tahun 1999 tentang Hak Asasi Manusia*) [1999], Article 89.

Recommendation	Legal/ Advocacy	Impact Potential	Victims' reparation?
File a complaint or request for enquiry under the NHRI. *Refer* to the SUHAKAM complaint as a similar course of action.	Advocacy	Upon receiving the complaint, NHRIs have the mandate to conduct an initial assessment, investigate and make recommendations to the government with a view to resolve the dispute. Bringing a complaint to an NHRI is a quasi-judicial avenue and can have the impact of raising awareness for the alleged human rights violations and pressure the government to take action, upon the NHRI's recommendation. In the complaint to the NHRI, recommendations to the NHRI can be included that may inspire the NHRI's own recommendations. Bear in mind that the potential impact of this avenue also depends on the willingness of the government to consider the NHRI's recommendations and take action.	No

4.1.3.The ASEAN Charter and environmental rights

Initially, ASEAN's work did not centre around the promotion and protection of human rights; the protection of the environment was even less prominent. Therefore, the inclusion of environmental obligations in the Charter marks a significant step forward for environmental protection and human rights in the region. However, the Charter's focus on economic stability is reflected in its market-oriented language and emphasis on government action, as opposed to incorporating local communities and civil society. Notably, the Charter was drafted without a participatory drafting process, resulting in vague descriptions of civil society participation.

In relation to environmental issues, **the Charter established the AMME and the ASEAN Senior Officials on the Environment**, under the auspices of the Socio-Cultural Community Council. A range of working groups have been set up relating to environmental matters, including nature conservation and biodiversity, marine and coastal environment, multilateral environmental agreements, environmentally sustainable cities, water resources management, disaster management, and the Haze Technical Task Force. However, **the lack of mandatory wording and the weak provisions on implementation and enforcement** mean that the Charter is unlikely to facilitate the development of stronger regional environmental legal regulation or more robust national environmental law regimes. ASEAN and transboundary haze pollution

Forest fires in the logged-over forests of Kalimantan led to a number of major episodes of significant transboundary pollution; these triggered several national and regional initiatives. ASEAN's 1985 Agreement on Conservation of Nature and Natural Resources is one of these initiatives, Article 20 of which stresses the international principle of state responsibility that is encapsulated in Principle 21 of

the 1972 Stockholm Declaration.[146] Collective action on transboundary haze pollution did not substantially develop until the 1992 Fourth ASEAN Summit in Singapore; transboundary pollution and forest fires were for the first time acknowledged as major environmental concerns to ASEAN.[147]

In 1994, ASEAN held an informal Ministerial Meeting in Kuching, Malaysia. ASEAN Environment Ministers agreed that member countries should collaborate actively to build up expertise and capacity to address the problems as well as to minimize the effects of fires.[148] Furthermore, it was important to enhance cooperation 'to manage natural resources and to control transboundary pollution within ASEAN region as "one eco-system", such as destruction of coral reefs, illegal fishing, haze pollution, etc. [...]'.[149] Following this meeting, a series of regional initiatives have been carried out. The most relevant initiative for this study is the 2002 ASEAN Agreement on Transboundary Haze Pollution (AATHP).

4.2. 2002 ASEAN Agreement on Transboundary Haze Pollution

The most recent turning point for ASEAN cooperation on the haze problem is the 2002 AATHP. In October 2000, the ASEAN Ministers of Environment commenced negotiations on the AATHP and it was open for signature in June 2002. The agreement states a precise objective of **preventing and monitoring "transboundary haze pollution** as a result of land and/or forest fires which should be mitigated, through **concerted national efforts** and **intensified regional and international cooperation**".[150] The AATHP clearly defines transboundary haze pollution as

> haze pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one Member State and which is transported into the area under the jurisdiction of another Member State.[151]

The AATHP also has clear implications for the rights to life, human health, and livelihood, even though in the ASEAN context it is regarded more as an environmental problem than a human rights problem. Although the AATHP does not address these rights explicitly, action taken under this Agreement to prevent and mitigate effects of transboundary haze pollution will, ideally, have positive implications on the realisation of the aforementioned rights.

The AATHP recognises several principles of international environmental law in Article 3,[152] specifically the **sovereign right to exploit their own resources** pursuant to their own environmental and developmental policies,[153] the **no-harm principle** preventing States from causing damage to the environment of other States or areas beyond national jurisdiction and cooperation. Article 9 of the

---

[146] Principle 21 of the Stockholm Declaration states that 'States have, in accordance with the Charter of the United Nations and the principles of international law, *the sovereign right to exploit their own resources pursuant to their own environmental policies*, and the responsibility to ensure that *activities within their jurisdiction or control do not cause damage to the environment of other states* or of areas beyond the limits of national jurisdiction' [own emphasis added].
[147] Nguitragool (n 127) 58.
[148] ibid.
[149] ASEAN, 'Press Statements of the 1st Informal ASEAN Ministerial Meeting on the Environment' (1994) <https://asean.org/book/table-of-contents-asean-documents-series-1994-/> accessed 4 January 2022.
[150] ASEAN, ASEAN Agreement on Transboundary Haze Pollution (adopted 10 June 2002, entered into force 25 November 2003) (2003) (hereafter AATHP), Article 2.
[151] ibid, Article 1(13).
[152] ibid, Article 3.
[153] Permanent Sovereignty Over Natural Resources (adopted 14 December 1962) UNGA Res 1803 (XVII).

AATHP provides for the **prevention principle** under which States are obligated to undertake measures to prevent and control activities that may lead to transboundary haze pollution.[154]

The integration of these principles into the AATHP reflects ASEAN's progress in incorporating internationally recognised environmental law principles into ASEAN's regime. Alternatively, the emphasis placed on sovereign rights over natural resources explains the AATHP's **weak dispute resolution mechanism of only consultation or negotiation**.[155] The AATHP does not contain any provision that encourages disputes to be referred to international courts or arbitration tribunals. Rather, the AATHP stresses the **principles of non-intervention and non-interference**. Hence, assistance from other States Parties can only be provided "at the request of and with the consent of the requesting Party, or when offered by another Party or Parties, with the consent of the receiving Party".[156]

The agreement also establishes an ASEAN Coordinating Centre for Transboundary Haze Pollution Control to facilitate cooperation and coordination in managing the impact of land and forest fires and the particular haze pollution arising from such fires.[157] Its function primarily consists of data and information collection and analysis, networking and capacity building. However, the Centre also does not have any enforcement power and primarily works with national authorities.

Despite the lack of redress mechanism, transboundary haze pollution and the AATHP are still critical points on ASEAN's agenda. This is demonstrated by the creation of the Roadmap on ASEAN Cooperation Towards Transboundary Haze Pollution Control with Means of Implementation (Roadmap). The Roadmap serves as a strategic framework for the implementation of collaborative actions to control transboundary haze pollution in the ASEAN region.[158] Unfortunately, the Roadmap only mentions "implementation of the AATHP" as a key strategic component, and repeats the need to fully operationalise the Coordinating Centre, without substantive measures for implementation or guidelines on how this would occur.

For CSOs, the most important aspect of the AATHP is the inclusion of the recommendation to States parties to involve "as appropriate, all stakeholders, including local communities, non-governmental organisations, farmers, and private enterprises".[159] This provision is specifically phrased as "should involve", a more recommendatory term than 'shall'. Unfortunately, whilst ASEAN is keen to collaborate with the business sector, in practice, the public sector and non-profits have had little engagement with ASEAN's policy development.

[154] AATHP (n 150) Article 9.
[155] ibid, Article 27.
[156] ibid, Article 12.
[157] ibid, Article 5.
[158] ASEAN, 'Roadmap on ASEAN Cooperation Towards Transboundary Haze Pollution Control with Means of Implementation' (2016).
[159] ASEAN Charter (n 122), Article 3(5).

5. 2014 Transboundary Haze Pollution Act of Singapore

The ASEAN regime's adherence to non-interference and preference for diplomacy and negotiation over judicial avenues of redress aligns with its promotion for national legislation and action. One such example of this is the 2014 Transboundary Haze Pollution Act of Singapore (TPHA),[160] a statute under which **companies may be financially penalized for haze affecting Singapore** in circumstances where the haze originates from activities outside Singapore's political boundaries.[161] Although this constitutes a domestic avenue of redress, its **extraterritorial implications** and potential as a **civil liability alternative** to state-based avenues is of particular interest to this research.

The THPA prescribes a civil liability regime. Within it, affected parties may bring civil suits against entities causing or contributing to haze pollution in Singapore. The THPA defines "affected parties" as:

> [A]ny **person in Singapore** who, in consequence of that breach (a) sustains any **personal injury**, contracts any disease or sustains any mental or physical incapacity **in Singapore**, or **dies in Singapore** from that personal injury, disease or incapacity; (b) sustains any **physical damage to property in Singapore**; or (c) sustains any **economic loss, including a loss of profits, in Singapore**.[162]

The THPA targets entities guilty of:

1) engaging in conduct (in or outside of Singapore) that causes or contributes to haze pollution in Singapore,
2) engages in conduct (in or outside of Singapore) that condones any conduct (whether in or outside Singapore) by another entity or individual which causes or contributes to any haze pollution in Singapore,[163]
3) participates in the management of another entity,
4) owns or occupied the land where the haze pollution originates (in or outside of Singapore).[164]

Entities found guilty of these offences can be fined up to SGD 100,000 for every day or part of a day that there is haze pollution in Singapore occurring at or about the time of the entity's conduct[165] or an aggregate fine up to SGD 2 million.[166] The suit can also arise regardless of whether the conduct is an offence in the foreign jurisdiction where that conduct occurred.[167]

The THPA "**extends to and in relation to any conduct or thing outside Singapore** which causes or contributes to any haze pollution in Singapore"[168] and thus applies extraterritorially, allowing Singapore to bring civil liability claims against entities in any land outside Singapore "which causes or

---

[160] Transboundary Haze Pollution Act of Singapore (No 24 of 2014) (hereafter THPA).
[161] Lee et al., 'Toward Clear Skies: Challenges in regulating transboundary haze in Southeast Asia' (2016) 55 Environ Sci Policy 87, 88.
[162] THPA (n 160) Article 6(3). [own emphasis added].
[163] ibid, Article 1(2).
[164] ibid, Article 1(3).
[165] ibid, Article 1(2) and 1(4).
[166] ibid, Article 1(5).
[167] ibid, Article 6(4).
[168] ibid, Article 4.

contributes to any haze pollution in Singapore".[169] The crux of the THPA is that, although it can (theoretically) apply extraterritorially, **the harm or injury suffered must occur in Singapore and to a person physically present in Singapore at the time the injury occurred**.

Whilst the THPA presents a unique approach to addressing transboundary environmental harm by non-governmental actors, concerns have been raised in regard to its effective implementation.[170] For example, in attempting to hold agribusiness companies accountable, the THPA obliges claimants to present **indisputable evidence** of fire burning activities and **establish a causal link** between the initiator of these fires and the transboundary environmental harm.[171] The THPA primarily relies on satellite information, wind velocity and direction, and meteorological information. Therefore, it can be presumed that the THPA relies on cooperation in monitoring between ASEAN Member States, including by the host countries of liable companies.

Another critical challenge that the THPA must face in implementation is its extraterritorial application. In 2015, Singapore invoked the THPA and served notice on six (anonymous) Indonesian companies with direct links to the haze. In May 2015, Singapore issued a court warrant to detain a director of an Indonesian company linked to the haze while he was in the city-state.[172] In response, the Indonesian government indicated that it will not allow the government of Singapore to prosecute Indonesian citizens in the **absence of a ratified extradition treaty** between the two countries. Furthermore, Indonesia has invoked the principles of ASEAN in claiming that Singapore's THPA is an **encroachment on Indonesian sovereignty and interference** into Indonesia's legal domain.[173] The director has left Singapore, but can be detained if he re-enters Singapore.

Alternatively, the THPA contains civil liability provisions that can be **used to target Singaporean companies**. In 2015, Singapore invoked the THPA against APP and ordered them to provide information on its measures to fight fires,[174] requesting evidence of compliance with Article 9 of the THPA. In response, the company claimed that it could not control unauthorized third parties who continue burning on their suppliers' concessions,[175] demonstrating the difficulties in establishing causal links in environmental degradation claims. Nevertheless, a civil liability regime established by the THPA requires the payment of compensation by perpetrator companies, rather than host States, thus **minimizing political tensions** and may be a more feasible means of tackling the effects of transboundary haze pollution.

Whilst the THPA is an example of a potential avenue of redress through civil liability, it is hindered by the fact that it undermines the nature of the relationship between ASEAN Member States and the ASEAN Way. Rather than creating progress towards environmental and human rights protection, the

---

169 ibid, Article 3(b).
170 Shawkat Alam and Laely Nurhidaya, 'The international law on transboundary haze pollution: What can we learn from the Southeast Asia region?' (2017) 26 Review of European, Comparative and International Environmental Law 243, 252.
171 THPA (n 160) Article 5.
172 Editorial, 'Singapore to pursue firms over fires, despite Indonesian ire', *Strait Times* (3 July 2016), <https://www.straitstimes.com/asia/se-asia/singapore-to-pursue-firms-over-fires-despite-indonesian-ire> accessed 20 January 2022.
173 ibid.
174 Alam and Nurhidaya (n 170), 251.
175 ibid.

THPA may destabilise existing progress and is unlikely to be effective, especially considering the lack of extradition agreements with Indonesia or Malaysia. Nonetheless, the THPA does provide an avenue for holding companies liable, including *domestic* companies. Litigation pursued under the THPA would only be ineffective and, potentially, politically contentious if it is pursued with the goal of holding other States responsible. If litigation is instead pursued targeting Singaporean companies and actors, the THPA could be commended for providing an alternative avenue of redress that may hold some private perpetrators accountable, especially considering that avenues at the regional, inter-State level are limited.

Recommendation	Legal/ Advocacy	Impact Potential	Victims' reparation?
Identify key companies or individuals that either participate in the management or operational affairs of other entities contributing to negative human rights impacts (as a result of forest fires and haze), engages in conduct which causes or contributes to any haze pollution in Singapore, or directly linked to the haze in Singapore.	Advocacy	In itself, this recommendation has no impact on halting human rights violations or helping victims. However, it provides the foundation of the following recommendations and can be impactful through this.	No
Collect all relevant data to prove the relationship between one entity, the entity's actions and/or policies and the haze pollution. Partnerships with local CSOs and individuals are likely to contribute to creative a clear, evidence-based overview of these relationships.	Advocacy	Similar to recommendation 1, the collection of data in itself only has a limited impact. It is fundamental to any advocacy campaign or national litigation, however. As aforementioned, there are challenges to be considered in this data collection phase and may entail additional research into stock exchange disclosures or company registration information that requires the company to share information on the land they own or occupy.	No
Bring a case if the entity in question can be proven to be liable for the transboundary harm pollution and if the entity is based and can be located in Singapore.[176] If these individuals do not fall under Singapore's jurisdiction or if there is no extradition treaty in place, the case is unlikely to be successful.	Legal	Bringing a case under the THPA can be beneficial in setting a precedent for future cases and clarify the duties of corporations to respect human rights. Furthermore, if the suit incorporates human rights of victims, it may potentially provide justice for them. On the other hand, regardless of whether the case is successful or unsuccessful, if the case targets an Indonesian corporation or individual based in Singapore, it may be a politically contentious case contrary to the Asian Way and further aggravate political tensions between the two States.	Yes, if included

[176] The human rights most likely to be negatively impacted are the right to health right to life, right to a clean, healthy and sustainable environment, and to a more limited extent right to development, right to adequate standards of housing, and right to equality and non-discrimination.

6. Conclusion

The avenues discussed in the present memorandum are **primarily advocacy strategies**, rather than avenues of redress for victims of forest fires and transboundary haze pollution. Within the ASEAN human rights mechanisms, **complaints can be submitted to the AICHR** and national representatives regarding a country's human rights situation. However, the slow development of the AICHR, its limited mandate and lack of formal complaints mechanism does not provide for a legal avenue of redress. **Both Indonesia and Malaysia's NHRIs have a mandate to receive complaints**, investigate human rights issues and make submissions to the government. These NHRIs may be more effective in responding to complaints, as compared to the AICHR. Nonetheless, there is still room for CSO engagement through advocacy campaigns and participation in the AICHR's thematic studies.

Legal avenues of redress may be pursued under the **Singaporean THPA**, which prescribes a **civil liability regime** where individuals in Singapore can bring suits against entities or persons engaged in activities that result in transboundary haze pollution in Singapore. In considering the recommendations provided in this memorandum, it is important to keep in mind that the ASEAN and matters of its Member States are dominated by the **ASEAN Way**, which may significantly limit any positive results that CSOs can yield from the analysed avenues.

7. Recommendations

Recommendation	Legal/ Advocacy	Impact Potential	Victims' reparation?
Make a submission to the AICHR or the AICHR Representative of the concerned country. This submission can be a report based on field-research of the situation, an overview of corporations involved in activities leading to transboundary harm pollution, or even proposals for consultation events or new areas for thematic studies.	Advocacy	The AICHR's new mandate to assess complaints and forward them to AICHR Representatives for action allows CSOs to raise issues of transboundary haze pollution with a regional human rights body. These complaints are discussed at the next meeting of the Representatives. Action taken can range from contribution to the AICHR's working plans, programmes, and recommendations to other ASEAN Sectoral Bodies. Although it has not been realised it, AICHR does have a mandate to request information from Member States on the promotion and protection of human rights. Complaints can also be made with the view of leading AICHR to make these requests.	No
Engage in the AICHR's thematic studies, particular studies on business and human rights, corporate social responsibility and environmental rights. Although these do not provide avenues for redress, ideally, the thematic studies should incentivize States to improve their human rights situations. Unlike the UN's UPR process, it is unlikely these studies will apply regional pressure. Nonetheless, these studies can bring awareness to potential human rights violations at a regional level.	Advocacy	Including human rights concerns on the basis of forest fires and transboundary haze pollution in thematic studies can increase regional awareness about related ongoing human rights violations and incentivize policies to address these.	No
Apply to have consultative status with the AICHR.	Advocacy	Consultative status has the benefit of engaging with AICHR on a deeper level and, presumably, increased access to AICHR's network and resources. On the other hand, this is also reliant on the AICHR remaining open and willing to CSO engagement. In the last few years, this has only come to fruition after pressure from countries' Representatives – Indonesia and Thailand's in particular.	No
File a complaint or request for enquiry under the NHRI. *Refer* to the SUHAKAM complaint as a similar course of action.	Advocacy	Upon receiving the complaint, NHRIs have the mandate to conduct an initial assessment, investigate and make recommendations to the government with a view to resolve the dispute.	No

		Bringing a complaint to an NHRI is a quasi-judicial avenue and can have the impact of raising awareness for the alleged human rights violations and pressure the government to take action, upon the NHRI's recommendation. In the complaint to the NHRI, recommendations to the NHRI can be included that may inspire the NHRI's own recommendations. Bear in mind that the potential impact of this avenue also depends on the willingness of the government to consider the NHRI's recommendations and take action.	
Identify key companies or individuals that either participate in the management or operational affairs of other entities contributing to negative human rights impacts (as a result of forest fires and haze), engages in conduct which causes or contributes to any haze pollution in Singapore, or directly linked to the haze in Singapore.	Advocacy	In itself, this recommendation has no impact on halting human rights violations or helping victims. However, it provides the foundation of the following recommendations and can be impactful through this.	No
Collect all relevant data to prove the relationship between one entity, the entity's actions and/or policies and the haze pollution. Partnerships with local CSOs and individuals are likely to contribute to creative a clear, evidence-based overview of these relationships.	Advocacy	Similar to recommendation 1, the collection of data in itself only has a limited impact. It is fundamental to any advocacy campaign or national litigation, however. As aforementioned, there are challenges to be considered in this data collection phase and may entail additional research into stock exchange disclosures or company registration information that requires the company to share information on the land they own or occupy.	No
Bring a case if the entity in question can be proven to be liable for the transboundary harm pollution and if the entity is based and can be located in Singapore.[177] If these individuals do not fall under Singapore's jurisdiction or if there is no extradition treaty in place, the case is unlikely to be successful.	Legal	Bringing a case under the THPA can be beneficial in setting a precedent for future cases and clarify the duties of corporations to respect human rights. Furthermore, if the suit incorporates human rights of victims, it may potentially provide justice for them. On the other hand, regardless of whether the case is successful or unsuccessful, if the case targets an Indonesian corporation or	Yes, if included

[177] The human rights most likely to be negatively impacted are the right to health, right to life, right to a clean, healthy and sustainable environment, and to a more limited extent the right to development, right to adequate standards of housing, and right to equality and non-discrimination.

		individual based in Singapore, it may be a politically contentious case contrary to the Asian Way and further aggravate political tensions between the two States.	

8. Annex

8.1. Legal jargon

Legal jargon	Explanation
Declaration	Not legally binding instruments but carry considerable moral weight and provide a clear indication of the aspirations of the international community. An example of this is the Stockholm Declaration or the Universal Declaration of Human Rights (UDHR).
Duty	An obligation, created by law or treaty.
Hard Law	Any treaty, agreement, or declaration that is legally binding on or between its parties.
National Human Rights Institutions	State bodies with a constitutional and/or legislative mandate to protect and promote human rights. They are part of the State apparatus and are funded by the State
Onus	The responsibility or duty to do something.
Principles	Basic rules whose content is very general and abstract and used as subsidiary tools of interpretation. They are also considered integrative tools that fill actual or potential legal gaps.
Procedural obligation	Prescribe formal steps that must be taken to enforce substantive rights
Remedy	A legal mechanism with which victims of a legal wrong can be compensated for their losses.
Soft Law	Any agreement, declaration or principle that is not legally binding.
Substantive	Refers to State obligations to protect against environmental harm which interferes with human rights and adopt and implement legal frameworks to that effect.