

# 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 3: Other international avenues of advocacy and redress

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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.

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## Table of Contents

Table of Contents.....	3
Table of Abbreviations .....	5
1. Introduction.....	7
2. Thematic background .....	9
2.1 Deforestation and forest fires .....	9
2.2 Haze.....	10
2.3 Effects of forest fires and haze on the environment and individuals .....	11
2.3.1 Ecosystem loss.....	11
2.3.2 Human health .....	11
2.3.3 Livelihoods, education and financial impacts .....	12
2.3.4 Driving force of climate change.....	12
2.4 Stakeholders .....	13
2.4.1 Small holders.....	13
2.4.2 (Multi-)National Companies.....	13
2.4.3 Financers .....	14
2.4.4 Government.....	14
2.4.5 Local population.....	14
3. Human Rights and Environmental Obligations .....	16
3.1 Substantive Human Rights and State Obligations .....	18
3.2 Procedural Human Rights and State Obligations .....	22
3.3 Key Principles and State Obligations in International Environmental Law .....	24
4. United Nations Framework Convention on Climate Change .....	29
4.1 Transboundary haze pollution and climate change .....	29
4.2 Institutional Structure .....	30
4.3 National Communications.....	32
4.4 The 2016 Paris Agreement .....	33
5. Sustainable Development Goals .....	37
5.1 Voluntary National Reviews.....	38
6. UN Guiding Principles on Business and Human Rights .....	40
6.1 Framework created under Guiding Principles on Business and Human Rights .....	40
6.2 Practical Application .....	42
6.3 CSO Engagement.....	44

6.4	Recommendations.....	45
7.	Conclusion .....	47
8.	Recommendations.....	48
9.	Annex .....	51
9.1	Legal jargon.....	51

## Table of Abbreviations

Table of Abbreviations	
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>BUR</b>	Biennial update reports
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>CH<sub>4</sub></b>	Methane
<b>CMA</b>	Conference of the Parties serving as the meeting of the Parties to the Paris Agreement
<b>CMP</b>	Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol
<b>CO<sub>2</sub></b>	Carbon dioxide
<b>COP</b>	Conference of the Parties
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>EIA</b>	Environmental impact assessment
<b>EIT</b>	Economies in transition
<b>EU</b>	European Union
<b>GDP</b>	Gross domestic product
<b>GHG</b>	Greenhouse gas
<b>HLPF</b>	High Level Political forum
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IEL</b>	International environmental law
<b>INDC</b>	Intended nationally determined contributions
<b>IPCC</b>	Intergovernmental Panel on Climate Change
<b>MDG</b>	Millennium Development Goals
<b>MEA</b>	Multilateral environmental agreements
<b>NAP</b>	National Action Plan
<b>NC</b>	National Communication
<b>NDC</b>	Nationally Determined Contributions
<b>NO<sub>2</sub></b>	Nitrous oxide
<b>O<sub>3</sub></b>	Ozone
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>RSPO</b>	Roundtable on Sustainable Palm Oil
<b>SDG</b>	Sustainable Development Goals
<b>SUHAKAM</b>	<i>Suruhanjaya Hak Asasi Manusia Malaysia</i> (Human Rights Commission of Malaysia)
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change

<b>WALHI</b>	<i>Wabana Lingkungan Hidup Indonesia</i> (Friends of the Earth Indonesia)
<b>VNR</b>	Voluntary National Review

# 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.<sup>1</sup> **Indonesia** and **Malaysia** are **core palm oil suppliers** meeting this increasing demand, covering 86% of the global palm oil supply.<sup>2</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> 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** presents the **United Nations Framework Convention on Climate Change**. Due to the brevity of this Framework Convention, the memorandum focuses on providing brief explanations of the relevant protocols and mechanisms of reporting, monitoring or redress and how the issue of transnational haze pollution can be understood within the framework of 'climate change'. **Chapter 5** then briefly explores the **Sustainable Development Goals** and how it presents a universal language and monitoring opportunities for CSOs. **Chapter 6** presents the **UN Guiding Principles on Business and Human Rights**. Finally, the memo concludes 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.<sup>3</sup> ‘Slash-and-burn’ describes the method of first cutting forests and then burning remaining vegetation to create fertile agricultural land.<sup>4</sup> Though this method is in theory **prohibited** under Indonesian law,<sup>5</sup> 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**.<sup>6</sup> 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%.<sup>7</sup> Second, palm oil plantations create **microclimates that facilitate the spread of fires** by being dryer and hotter than indigenous natural vegetation.<sup>8</sup> 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

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<sup>3</sup> 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.

<sup>4</sup> Ibid.

<sup>5</sup> 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

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

## 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.<sup>12</sup>

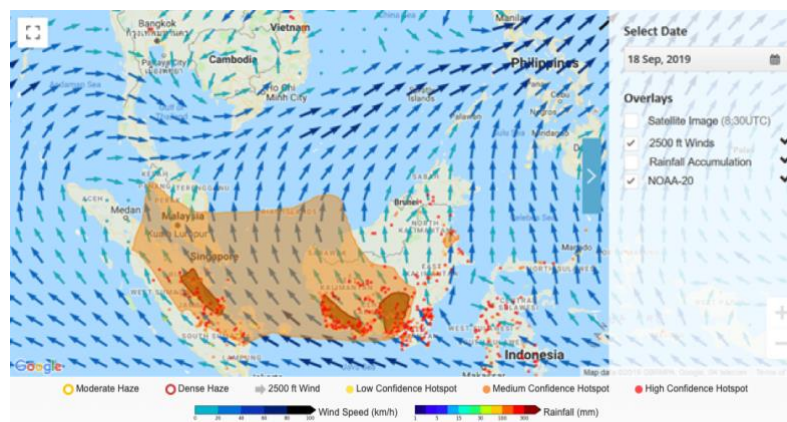


Image 1: The effect of wind on the spread of haze originating from forest fires in Indonesia to Singapore and Malaysia.<sup>13</sup>

<sup>9</sup> Global Forest Watch, 'Indonesia' [n.d.] retrieved from <https://www.globalforestwatch.org> on 14 January 2022.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> 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.

## 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.<sup>14</sup> 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**.<sup>15</sup> 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*

### 2.3.2 Human health

On 15 September 2019, the Air Quality Index in the capital of central Kalimantan, Palangkaraya, was 2000.<sup>16</sup> In comparison, hazardous air quality levels are considered to start at 301.<sup>17</sup> 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**.<sup>18</sup> 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.<sup>19</sup> An estimate assumes that the repercussions of the 2015 health crises in Indonesia may have led to **26,300**

#### 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*

<sup>14</sup> 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](https://www.un.org/esa/forests/wp-content/uploads/2021/08/UNFF16-Bkgd-paper-disasters-forest-fires_052021.pdf))

<sup>15</sup> Garcia, Rijk, and Piotrowski (n 6) page 6.

<sup>16</sup> BBC (n 5).

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

to **174,300 premature adult deaths**. Additionally, there were increasing reports of **infant deaths** during this time.<sup>20</sup> In both Indonesia and Malaysia, public health emergencies have been declared as a result of haze caused by forest fires.<sup>21</sup>

### 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<sup>22</sup> and \$28bn<sup>23</sup>** 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.<sup>24</sup> In 2019, \$5.2bn in damages and economic losses were reported, reflecting 0.5% of Indonesia's GDP.<sup>25</sup> 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.

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*

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*

<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> BBC (n 20).

<sup>23</sup> 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.

<sup>24</sup> Greenpeace Southeast Asia (n 13).

<sup>25</sup> 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.

Secondly, the **overall level of vegetation** that can capture carbon through photosynthesis is **decreased** as more forests are burned.<sup>26</sup>

## 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.<sup>27</sup> 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.<sup>28</sup>

Small holders are important stakeholders, representing 93% of Indonesia's total farmers (calculated per individual).<sup>29</sup> 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.<sup>30</sup>

### 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.<sup>31</sup> 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.<sup>32</sup>

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<sup>26</sup> Calvin Norman and Melissa Kreye, 'How Forests Store Carbon' (2020) retrieved from <https://extension.psu.edu/how-forests-store-carbon> on 22 April 2022.

<sup>27</sup> Garcia, Rijk, and Piotrowski (n 6) page 15.

<sup>28</sup> 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.

<sup>29</sup> 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.

<sup>30</sup> Tay, Varkkey and Lee (n 12).

<sup>31</sup> Indonesia Investments, 'Palm Oil' [n.d.] retrieved from <https://www.indonesia-investments.com/business/commodities/palm-oil/item166> on 16 January 2022.

<sup>32</sup> PT Astra Agro Lestari Tbk, 'Company Profile' [n.d.] retrieved from <https://www.astra-agro.co.id/en/milestone/> on 16 January 2022.



### 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 [Miliendefensie's 'deforestation portfolio of the Dutch financial sector' report](#) and [Global Witness's 'Deforestation Dividends' 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.<sup>33</sup> 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%.<sup>34</sup>

### 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 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,<sup>35</sup> 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

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<sup>33</sup> Garcia, Rijk, and Piotrowski (n 6).

<sup>34</sup> Indonesia Investments (n 31).

<sup>35</sup> 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](http://awsassets.panda.org/downloads/profitability_and_sustainability_in_palm_oil_production_update.pdf) on 16 January 2022.

the **welfare of local farmers** as well as local infrastructure.<sup>36</sup> According to the ASEAN Post, “the palm oil industry has helped lift millions of people out of poverty, both in Indonesia and Malaysia”.<sup>37</sup> This has been achieved thanks to the creation of **well-paying jobs** and **local ownership of plantations** (through the small holder system).<sup>38</sup> 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.<sup>39</sup>

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<sup>36</sup> 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.

<sup>37</sup> 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.

<sup>38</sup> Ibid.

<sup>39</sup> BPD PKS, ‘Palm Oil Support 20 Percent of Indonesia Population’ [2018] retrieved from <https://www.bpd.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).<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup>

All human rights impose a spectrum of obligations on States. Broadly speaking, States have an obligation to “respect and ensure rights [of] all individuals”.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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**

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<sup>40</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

<sup>41</sup> 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.

<sup>42</sup> 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.

<sup>43</sup> 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.

<sup>44</sup> Daniel Moeckli, *International Human Rights Law* (3<sup>rd</sup> edn., Oxford University Press 2017) 97.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*, 99.



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

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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> Third, there can be no retrogressive measures:<sup>51</sup> 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.<sup>52</sup> 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<sup>53</sup> 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

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<sup>47</sup> ICESCR (n 43) Article 2(1).

<sup>48</sup> United Nations Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No.3: The nature of States Parties’ obligations (Art. 2, Para.1, of the Covenant)’ (1990) UN Doc E/1991/23, paragraph 9.

<sup>49</sup> *ibid*, paragraph 10.

<sup>50</sup> *ibid*, paragraph 4.

<sup>51</sup> *ibid*, paragraph 9.

<sup>52</sup> *ibid*, paragraph 10.

<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

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

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<sup>54</sup> 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.

<sup>55</sup> Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (2<sup>nd</sup> edn., Cambridge University Press 2018), 4.

<sup>56</sup> *ibid*, 41.

harm which interfere with human rights, and adopt and implement legal frameworks to that effect.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup>

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**.”<sup>61</sup> 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.

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<sup>57</sup> Ben Boer, *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015) 3.

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

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

<sup>60</sup> 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=aHR0cHM6Ly93d3cuZ29vZ2x1LnNvbS8&guce\\_referrer\\_sig=AQAAA-BjvZOBMvefF3xahAvI4MRZiRitI9jyuCugt1AFd\\_nHcphWBkwc\\_E0CQ3-C8Ww0TfT\\_DJifvDY\\_UVPPrBQIYsx3wWxIOtnahW6eJy7dCn9CkFus6UEIyf8rrhOZ6\\_M\\_OFLHpOCNwCMjZ-GD8iFfxHquZZ8EL8\\_y5sNn8h3BT035Dt](https://sg.news.yahoo.com/asean-human-rights-body-urges-025638858.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LnNvbS8&guce_referrer_sig=AQAAA-BjvZOBMvefF3xahAvI4MRZiRitI9jyuCugt1AFd_nHcphWBkwc_E0CQ3-C8Ww0TfT_DJifvDY_UVPPrBQIYsx3wWxIOtnahW6eJy7dCn9CkFus6UEIyf8rrhOZ6_M_OFLHpOCNwCMjZ-GD8iFfxHquZZ8EL8_y5sNn8h3BT035Dt)> accessed 2 February 2022. [own emphasis added]

<sup>61</sup> 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.<sup>62</sup> However, States have **minimum core obligations** in realising the right to health, including essential primary health care.<sup>63</sup>

#### *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.<sup>64</sup>

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.”<sup>65</sup> 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.

#### *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

#### 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.

<sup>62</sup> Progressive realisation and this specific State obligation will be discussed in further detail in the memo on International Avenues of Redress: UN Bodies.

<sup>63</sup> 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.

<sup>64</sup> *ibid*, Article 11.

<sup>65</sup> 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”.<sup>66</sup> The right has also gained constitutional recognition and protection in more than 150 countries, including the Indonesian Constitution.<sup>67</sup>

The right to a healthy environment has been interpreted to **entail clean air, safe drinking water, and adequate sanitation;**<sup>68</sup> **to live and work in a nontoxic environment;**<sup>69</sup> **and to a safe climate to ensure healthy populations.**<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup>

### *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.<sup>73</sup> This also means that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”.<sup>74</sup>

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.<sup>75</sup> 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.

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<sup>66</sup> UNGA, ‘United Nations Conference on the Human Environment’ (December 1972) UN Doc. A/RES/2994 (hereafter Stockholm Declaration), Principle 1.

<sup>67</sup> *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.

<sup>68</sup> 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).

<sup>69</sup> *Guerra and others v Italy*, Judgment, Merits and Just Satisfaction, App No 14967/89, [1998] ECHR 7, ECHR 1998.

<sup>70</sup> David Boyd, ‘The Constitutional Right to a Healthy Environment’ (2012) 54 *Environment Science and Policy for Sustainable Development* 3, 6.

<sup>71</sup> Indonesian Constitution (n 67), Article 28H.

<sup>72</sup> 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.

<sup>73</sup> ICESCR (n 43) Article 2.

<sup>74</sup> ICCPR (n 58) Article 26.

<sup>75</sup> IPCC, *AR6 Climate Change 2022: Impacts, Adaptation and Vulnerability, Summary for Policymakers* (2022), 17.

### *Right to development*

Pursuant to Article 55 of the UN Charter, States should promote “conditions of economic and social progress and development”.<sup>76</sup> 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”.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup>

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<sup>76</sup> United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) (1945) 1 UNTS XVI (hereafter UN Charter), Article 55.

<sup>77</sup> ICESCR (n 43) Article 1; ICCPR (n 58) Article 1.

<sup>78</sup> OHCHR (n 59) 15.

<sup>79</sup> Vivek Mukherjee and Faizan Mustafa, ‘Climate Change and the Right to Development’ (2019) 5 Management and Economics Research Journal 1, 4.

<sup>80</sup> World Resources Institute, ‘A Community Action Toolkit: A roadmap for using environmental rights to fight pollution’.

<sup>81</sup> *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.<sup>82</sup>

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

#### *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.<sup>85</sup> 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".<sup>86</sup> 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**.<sup>87</sup> 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.<sup>88</sup> Most recent multilateral and many bilateral agreements contain references to or guarantees of public participation.<sup>89</sup>

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.<sup>90</sup>

#### *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

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<sup>82</sup> 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).

<sup>83</sup> ICCPR (n 58) Article 19.

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

<sup>85</sup> See UDHR (n 40) Article 21; ICCPR (n 58) Article 25.

<sup>86</sup> ICCPR (n 58) Article 25.

<sup>87</sup> 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.

<sup>88</sup> World Resources Institute (n 80), 18.

<sup>89</sup> 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).

<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup>

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**.<sup>94</sup>

### **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:

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<sup>91</sup> CESCR, ‘General Comment No. 9: The domestic application of the Covenant’ (1998) UN Doc E/C.12/1998/24, paragraph 2.

<sup>92</sup> *ibid*, paragraphs 2 and 3.

<sup>93</sup> 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.

<sup>94</sup> ICCPR (n 58) Article 14.



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

The **customary** nature of this principle was confirmed by the International Court of Justice (ICJ) in the 1949 *Corfu Channel* case.<sup>96</sup> 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;<sup>97</sup> 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<sup>98</sup> and affirmed by the ICJ as codified customary international law.<sup>99</sup> 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.<sup>100</sup>

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.

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<sup>95</sup> *Trail Smelter Arbitration*, RIAA, vol. III, pp. 1905–82 (*Trail Smelter*), 1965.

<sup>96</sup> *Corfu Channel* case (UK v. Albania), ICJ Reports 1949, p. 4 (*Corfu Channel*), 22.

<sup>97</sup> Stockholm Declaration (n 66) Principle 21.

<sup>98</sup> Rio Declaration (n 84) Principle 2.

<sup>99</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 226 (*Legality of Nuclear Weapons*).

<sup>100</sup> *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,<sup>101</sup> whilst others, including the ICJ, argue that it is an approach.<sup>102</sup> 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,<sup>103</sup> whilst Principle 15 of the Rio Declaration provides that States “shall” take a precautionary approach to protect the environment.<sup>104</sup> 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”.<sup>105</sup> 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.<sup>106</sup> 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).<sup>107</sup>

#### *Obligation to conduct environmental impact assessments*

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

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<sup>101</sup> Dupuy and Viñuales (n 55) 70.

<sup>102</sup> *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.

<sup>103</sup> UNGA, ‘United Nations Framework Convention on Climate Change’ (1994) UN Doc A/RES/48/189 (UNFCCC), Article 3(3).

<sup>104</sup> Rio Declaration (n 84), Principle 15.

<sup>105</sup> *Pulp Mills* (n 102) paragraph 164.

<sup>106</sup> *Tatar v. Romania*, ECtHR Application No. 67021/01, Judgment (27 January 2009, Final 6 July 2009) (*Tatar v. Romania*), paragraph 120.

<sup>107</sup> *ibid*, paragraph 125.

<sup>108</sup> UNEP, ‘Environmental Impact Assessment and Strategic Environmental Assessment: Towards an integrated approach’ (2004).

<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup> 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.<sup>112</sup>

This was also confirmed by the Arbitral Tribunal in the *South China Sea Arbitration*,<sup>113</sup> 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”.<sup>114</sup> 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**.<sup>115</sup>
2. As a general matter of **prevention and due diligence**, the contents of the EIA be appropriate to the circumstances of the envisioned activity.<sup>116</sup>
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.<sup>117</sup>

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<sup>110</sup> Rio Declaration (n 84) Principle 17.

<sup>111</sup> Espoo Convention (n 90) Article 2(3).

<sup>112</sup> *Pulp Mills* (n 102), paragraph 104.

<sup>113</sup> *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.

<sup>114</sup> *ibid*, paragraph 940.

<sup>115</sup> *Pulp Mills* (n 102) paragraph 205.

<sup>116</sup> *ibid*.

<sup>117</sup> *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.<sup>118</sup>

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).

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<sup>118</sup> Dupuy and Viñuales (n 55) 80.

## 4. United Nations Framework Convention on Climate Change

### Terminology

**Intergenerational equity** presupposes the right of future generations of human beings to benefit from cultural and natural resources of the past generation as well as the obligation of current generations to preserve such resources for future generations.

The principle of **common but differentiated responsibilities** recognises that all States have a collective obligation to tackle climate change but considers the historical and present contribution of developed States as giving them more responsibilities for climate change mitigation than developing countries.

**Sustainable development** is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

The [UNFCCC](#) was adopted in May 1992, providing a foundation for **intergovernmental efforts to address climate change**. The UNFCCC was open for signature at the UN Conference on Environment and Development and entered into force in March 1994. Today, 197 parties, including all the UN Member States and the European Union (EU), are Parties to the Convention. The objective of the UNFCCC is to **achieve “stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”**.<sup>119</sup> It holds that precautionary measures should be taken to anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects.<sup>120</sup>

The UNFCCC is a **legally binding multilateral treaty** which establishes fundamental principles and general obligations. Fundamental principles of the regime can be found in Article 3 and include principles such as intergenerational equity, common but differentiated responsibilities, cooperation and sustainable development. Article 4 outlines various obligations, including

reduction of emissions and the collection and reporting of information.

The detailed implementation of the UNFCCC is provided for in **subsequent detailed agreements or protocols, or even national legislation**. Both the framework convention and protocol instruments are legally binding, as they are ratified by national governments, which are then required to adopt implementing legislation.

Before looking deeper into the UNFCCC, its protocols, and its potential for this project, the following section first contextualises the transboundary haze pollution in relation to climate change.

### 4.1 Transboundary haze pollution and climate change

In order for the UNFCCC to be invoked in advocacy campaigns, transboundary haze pollution must be conceptualised as an issue of climate change. The UNFCCC defines ‘climate change’ in Article 1 as:

[A] change of climate which is **attributed directly or indirectly to human activity that alters the composition of the global atmosphere** and which is in addition to natural climate variability observed over comparable time periods.<sup>121</sup>

<sup>119</sup> UNGA, ‘United Nations Framework Convention on Climate Change’ (1994) UN Doc A/RES/48/189, Article 2. Hereafter UNFCCC.

<sup>120</sup> *ibid*, Article 3(3).

<sup>121</sup> *ibid*, Article 1.

## Terminology

**Biomass burning** is the combustion of world's living and dead vegetation, including grasslands, forests and agricultural lands following the harvest for land clearing and land-use change. The 'slash-and-burn' method used in Indonesian palm oil plantations includes biomass burning.

**Carbon sinks** are reservoirs that absorb and store carbon, lowering the concentration of CO<sub>2</sub> in the atmosphere.

**Carbon sources** include burning fossil fuels, forest fires and respiration – processes that release more CO<sub>2</sub> into the atmosphere.

**Tropospheric ozone** refers to ground-level ozone which is created by chemical reactions between nitrogen oxide gases and volatile organic compounds.

In combatting climate change, the UNFCCC has predominantly focused on **reducing greenhouse gas emissions** in the atmosphere, specifically carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and nitrous oxide (NO<sub>2</sub>). These greenhouse gases are emitted when biomass burning occurs and additionally results in transboundary haze pollution.<sup>122</sup> In addition, biomass burning produces the precursors of tropospheric ozone (O<sub>3</sub>) which has impacts for plant growth, photosynthesis, and long-term effects on ecosystem services. It can also reduce the capacity of land to act as a carbon sink. As transboundary haze pollution increases and reduces the capacity of peatlands to perform their functions as carbon sinks, the ecosystem switches from a carbon sink to a carbon source. This means that instead of absorbing CO<sub>2</sub>, the ecosystem releases more into the atmosphere and exacerbates global warming. The increasing vulnerability of peatlands to fires generates regional haze pollution and negatively impact regional biodiversity and human health. Consequently, **haze pollution, as a major impact of biomass burning, is thus a contributor to climate change and global warming** but is also **exacerbated by other impacts of climate change**, such as changes in wind patterns and increased drought episodes. Unanticipated irregularities in the climate systems have caused some of the worse haze events in the Southeast Asian region, such as the one in 2015.<sup>123</sup>

The ASEAN Secretariat projects a progressive increase in CO<sub>2</sub> emission levels of around 61% from 2014 to 2025, with more than 90% of transboundary haze to result from large-scale commercial plantations alone.<sup>124</sup> With **Southeast Asia poised as one of the most rapidly growing contributors of global emissions**, deforestation and land use change have accounted for the majority of the regions CO<sub>2</sub> contribution. The implications of this deforestation and transboundary haze pollution are profound for global climate cooperation and presents an obstacle to the achievement of the UNFCCC's emissions-reductions goals, hindering the possibility of mitigating climate change impacts.

## 4.2 Institutional Structure

The UNFCCC supports a complex overview of bodies and institutional arrangements. Before moving onto specific mechanisms and provisions that are accessible to civil society organisations, it is first important to understand where non-party stakeholders fit in the UNFCCC's structure.

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<sup>122</sup> Ade Andini, Sébastien Bonnet, Patrick Rousset and Udin Hasanudin, 'Impact of open burning of crop residues on air pollution and climate change in Indonesia' (2018) 115 *Current Science* 2259, 2259.

<sup>123</sup> Ishani Mukherjee, 'Policy Design for Sustainability at Multiple Scales: The Case of Transboundary Haze Pollution in Southeast Asia' in Robert Brinkmann and Sandra J Garren (eds.) *The Palgrave Handbook of Sustainability* (Palgrave Macmillan, 2018), 43.

<sup>124</sup> ASEAN, *Climate Change: The time to act is now* (The ASEAN Secretariat, 2020).

Parties to the Convention meet annually at a **Conference of the Parties (COP)**,<sup>125</sup> thus regularly **reviewing the implementation of the Convention** and any related legal instruments that the COP may adopt. Under their mandate, COPs may also take decisions to **promote effective implementation of the Convention**.<sup>126</sup> For example, the monumental Paris Agreement was adopted at COP21 and the rulebook to the Agreement, with more detailed instructions on implementation of the Agreement, was adopted at COP26 in Glasgow. The next session of the COP is COP 27 and will take place in Sharm El-Sheikh, Egypt from 7-18 November 2022.

The Convention established a [Secretariat](#), a [Subsidiary Body for Scientific and Technological Advice](#), a [Subsidiary Body for Implementation](#), and a financial mechanism to provide financial resources to developing country Parties to assist them in their climate change actions.<sup>127</sup> This financial support is mostly channelled through the Global Environmental Facility.<sup>128</sup> Further support structures have been established by COP decisions, such as the [Adaptation Committee](#), a [technology mechanism](#), and the Paris Committee on Capacity Building.

Under the UNFCCC, the COPs can adopt **protocols which provide further details and specific targets to implement the UNFCCC**. The **Kyoto Protocol** was adopted in December 1997 and entered into force in 2005, comprising of an obligation and individual legally binding emission reduction targets for developed countries specifically. This is grounded in their historical responsibility for and status as major emitters of greenhouse gas emissions. The Kyoto Protocol established the [Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol](#) (CMP), whose meetings have been held in conjunction with the annual COP to review the implementation of the Protocol. In December 2015, the COPs adopted the **Paris Agreement** as the successor to the Kyoto Protocol, which entered into force in November 2016 and established the [Conference of the Parties serving as the meeting of the Parties to the Paris Agreement](#) (CMA). The COP, CMP, and CMA were all supported by the [Bureau](#) who coordinates the implementation work under the UNFCCC, the Kyoto Protocol and the Paris Agreement. Kyoto is no longer an active protocol, and the CMP no longer holds regular meetings. The Bureau may also advise and guide the Secretariat on relevant matters.

The UNFCCC divided countries into two main groups: [Annex I Parties](#) and [non-Annex I Parties](#). **Annex I Parties are industrialized countries** that were members of the Organisation for Economic Co-operation and Development (OECD) in 1992 and countries with economies in transition (EIT). **Non-Annex I Parties are mostly developing countries**, recognised by the Convention as especially vulnerable to the adverse impacts of climate change. The Convention places the **onus of action on developed countries** as the primary source of historic and current greenhouse gas emissions.<sup>129</sup> Some Annex I Parties may also be listed as Annex II Parties, which consists of exclusively OECD Members.

Annex II Parties are required to **provide financial resources to developing countries**, assisting them in their **emissions reduction activities** and to **adapt** to adverse effects of climate change.<sup>130</sup> In

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<sup>125</sup> UNFCCC (n 119) Article 7.

<sup>126</sup> *ibid*, Article 7(2).

<sup>127</sup> *ibid*, Article 11.

<sup>128</sup> *ibid*, Article 21(3).

<sup>129</sup> *ibid*, Article 4(2).

<sup>130</sup> *ibid*, Article 4(5).

addition, they must **“take all practicable steps”** to promote the development and transfer of environmentally friendly technologies to EIT Parties and developing countries. The obligations of all parties are mainly contained in Articles 4 and 12, and include developing, updating and publishing national [greenhouse gas inventories](#), reporting [national efforts](#), and formulating and implementing national and regional programmes to mitigate climate change.

In addition to the States Parties, **some organisations have also been given observer status** and may attend sessions at the COP and its subsidiary bodies. These observer organisations must be [registered](#) and include representatives of the UN’s bodies and specialised agencies, as well as intergovernmental organisations and CSOs. Intervention opportunities are provided by the presiding officers of the respective negotiating bodies but must be communicated by the Secretariat to the [Constituency Focal Points](#). CSOs may also [organise side events and exhibits](#) and can also make [submissions](#) on various issues under negotiation. As an admitted NGO, Friends of the Earth International can nominate and confirm representatives through the [Online Registration System](#) by the given deadlines (yet to be published on the UNFCCC website). Organisations without observer status and interested individuals may also attend or make non-party submissions through [here](#).

Conferences are **not open to the public** and **individuals cannot make submissions**. Consequently, individuals seeking to make a submission on an issue under negotiation cannot do so under Article 7(6).<sup>131</sup>

### 4.3 National Communications

The UNFCCC requires Parties to develop a **national inventory of greenhouse gas (GHG) emissions** and to **report on their mitigation policies and measures**. Parties submit national communications (NCs) and provide information on GHG inventories, measures to mitigate and to facilitate adequate adaptation to climate change, and any other information that the Party considers relevant to the achievement of the objective of the Convention.

In addition to this, Parties shall also submit **biennial update reports (BURs)** that give a **current account of the information contained in the NCs**, particularly on national **GHG inventories, mitigation actions and any challenges or constraints**.

**Indonesia and Malaysia are both considered to be non-Annex I Parties.** All Parties, taking into consideration their common but differentiated responsibilities and specific national development priorities, have commitments under Article 4(1), including the **development and publication of national inventories of anthropogenic emissions**, and the **formulation of national programmes of mitigation and adaptation**.<sup>132</sup> As non-Annex I Parties, Indonesia and Malaysia are qualified to receive financial and technological resources from Annex II Parties. Non-Annex I Parties may also report in more general terms on their plans to address climate change and less regularly than Annex I Parties do. Since 2015, Annex I Parties are obliged to submit their national communications by 15

#### Terminology

**Annex I Parties** are developed countries who were members of the OECD in 1992 and countries with economies in transition.

**Non-Annex I Parties** are developing countries.

**Annex II Parties** are Annex I Parties who were not undergoing the process of transition to a market economy.

<sup>131</sup> *ibid*, Article 7(6).

<sup>132</sup> *ibid*, Article 4(1).



April each year.<sup>133</sup> Non-Annex I countries, on the other hand, only **submit NCs every four years and BURs every two years**. Guidelines for the preparation of NCs by non-Annex I countries were adopted at the 1996 COP 2 in Geneva, which were [revised](#) at COP 8 in New Delhi, 2002. [Guidelines for the preparation of BURs](#) from non-Annex I countries were adopted at COP 17 and may be revised as appropriate.

Indonesia first submitted an NC in 1999 and its [last NC](#) was submitted on 14 February 2018. **Indonesia's fourth NC is due this year**, however, non-Annex I countries have discretion on the date of submission, so it is unclear when exactly they will submit their updated NC. Indonesia's most recent BUR was submitted on 20 December 2021. **Malaysia's** most recent NC was submitted on [27 September 2018](#), with the **next submission due this year**. [Malaysia's](#) most recent BUR was submitted on 31 December 2020 (an updated BUR is expected at the end of 2022).

**Both countries' submissions make little mention of their transboundary haze pollution issue**, Indonesia's BUR only vaguely noted that "forest and peatland fires cause disasters that damaged the environment, health, disrupt the economy, and worsen relations between countries due to haze generated from forest and peatland fires".<sup>134</sup>

## Terminology

**Top-down approach** is one where the State is the driver of climate action and behavioural change is enforced through State policies. This approach is characterised by a strong multilateral institution and legally binding commitments for States.

**Bottom-up approach** emphasises the influence of individual actions and where policy is influenced by the behaviour of non-government entities, including individuals.

### Relevance for CSOs

Reviewing a State's NCs allows CSOs to be kept up to date with the country's most updated GHG inventory. CSOs also need to **be aware of the State's commitments and progress** in achieving these commitments. Importantly, **NCs highlight the State's priorities**. For example, Indonesia's BUR makes few substantial references to transboundary haze pollution, but it does acknowledge deforestation as a key concern and has developed measures to improve land and forest management. These measures will have implications of controlling deforestation and forest degradation.

## 4.4 The 2016 Paris Agreement

At COP 21 in Paris, on 12 December 2015, Parties to the UNFCCC reached a landmark agreement to combat climate change and to accelerate and intensify the actions and investments needed for a sustainable low carbon future, resulting in the [Paris Agreement](#). Following Kyoto, a follow up treaty was needed to continue regulation of greenhouse gas reductions, but also **incorporate** other climate change-related issues not addressed at Kyoto, such as **adaptation, climate financing and a new global commitment on common but differentiated responsibilities** that addressed the changing status of developing countries. **Kyoto's top-down approach** which emphasised a strong multilateral institution and government-based regulation was also no longer appropriate for the greater scope of the Paris Agreement. There was also a general unwillingness by industrialised countries to accept

<sup>133</sup> COP19, 'Decision 24/CP.19: Revision of the UNFCCC reporting guidelines on annual inventories for Parties included in Annex I to the Convention' (2013) UN Doc FCCC/CP/2013/10/Add.3, Article 3.

<sup>134</sup> Syaiful Anwar et al., 'Indonesia: Third biennial update report under the United Nations Framework Convention on Climate Change' (2021) <[https://unfccc.int/sites/default/files/resource/IndonesiaBUR%203\\_FINAL%20REPORT\\_2.pdf](https://unfccc.int/sites/default/files/resource/IndonesiaBUR%203_FINAL%20REPORT_2.pdf)> accessed 24 January 2022.

stringent mitigation commitments and have a stronger international institution controlling their compliance. The **Paris Agreement's bottom-up approach** was thus introduced to allow for accountability of governments to be **monitored by civil society, the private sector, and individuals.**<sup>135</sup>

The Paris Agreement **expands upon the objective of the UNFCCC**, setting a definitive goal of keeping a global temperature rise this century well below a limit of 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.<sup>136</sup> The Paris Agreement also obliges all Parties to submit [nationally determined contributions](#) (NDCs) and intended NDCs (INDCs) and “communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13”,<sup>137</sup> with the first NDC submitted in 2020. **Parties submit new NDCs every five years thereafter**, each submission more ambitious than the last (**ratcheting up mechanism**). Each submission will be reviewed, and progress will be reported through the **global stocktake**. Once shortfalls are identified, Parties must **take action to increase ambition efforts** before INDC can be subscribed. The timeline below by Greenpeace showcases the first two cycles of NDCs.

It is important to note that, although Article 4(2) and the obligation to prepare, communicate and maintain NDCs is a legally binding provision, **the Paris Agreement's compliance mechanisms are not mandated to review the NDCs** themselves as that it within the purview of national legislation. Furthermore, the Paris Agreement requires that the Parties **act in good faith, exercise due diligence and use best efforts** to employ domestic mitigating measures to reduce their greenhouse gas emission based on their NDCs.

Indonesia submitted its first [NDC](#) on 22 July 2021, beginning its first 5-year cycle of reviewing its INDC and increasing its ambitions before the next cycle. In its NDC, Indonesia recognises its role in combatting climate change, considering its extensive tropical rainforests with high biodiversity and high carbon stock values.<sup>138</sup> Furthermore, Indonesia claims to have

[T]aken significant steps in land use sector to reduce emissions by instituting a moratorium on the clearing of primary forests and by reducing deforestation and forest degradation, restoring ecosystem functions, as well as sustainable management of forest.<sup>139</sup>

In its efforts to combat climate change, **Indonesia aims to enhance local participation in climate change mitigation and adaptation** and mainstream the climate agenda into its development planning.<sup>140</sup> Indonesia also aims to **increase its engagement with non-party stakeholders**, such as local government, private sectors, and civil society actors. Indonesia's NDC is quite ambitious, with an unconditional reduction target of 29% by 2030. As almost 98% of its emissions result from the forest-and-land and energy sectors, **Indonesia's NDCs emphasise the intensification of efforts to reduce emissions in these sectors.**

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<sup>135</sup> Dupuy and Viñuales (n 55) 181.

<sup>136</sup> Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740.

<sup>137</sup> *ibid*, Article 3.

<sup>138</sup> Indonesia, 'Updated Nationally Determined Contribution: Republic of Indonesia' (2021) <<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Indonesia%20First/Updated%20NDC%20Indonesia%202021%20-%20corrected%20version.pdf>> accessed 27 January 2022, page 1.

<sup>139</sup> *ibid*, page 2.

<sup>140</sup> *ibid*.

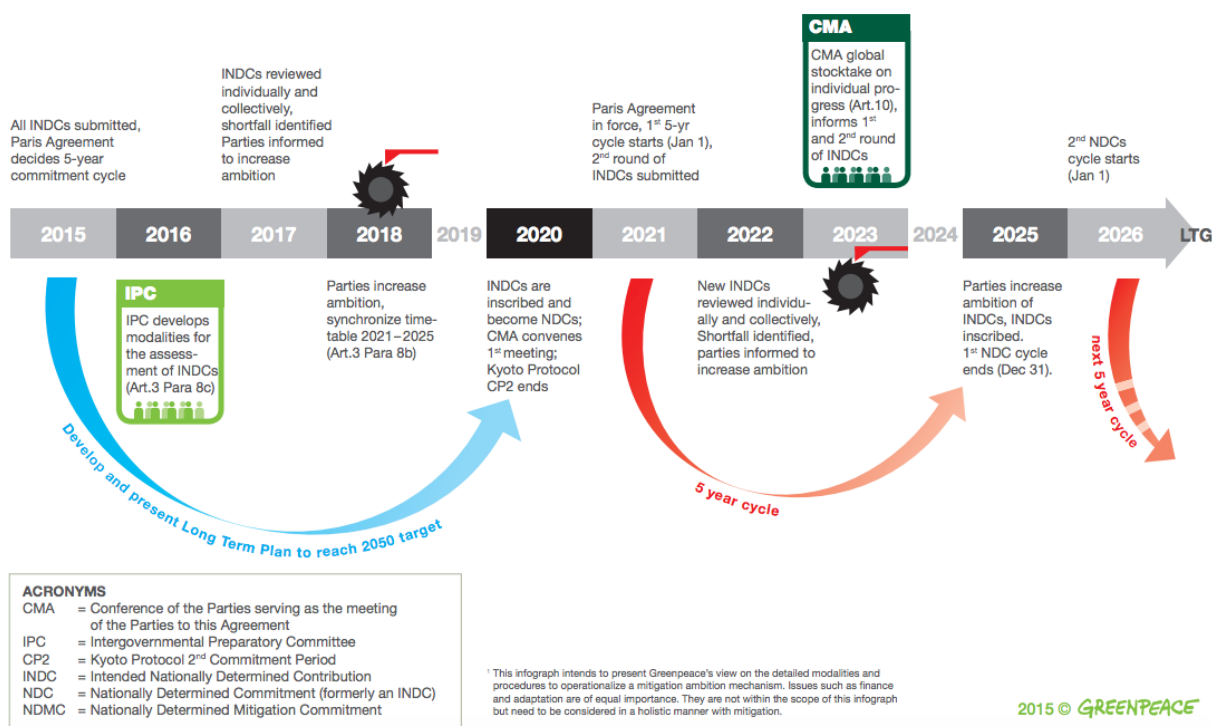


Figure 1 The NDC and global stocktake process.

Malaysia submitted its first [NDC](#) on 30 July 2021. Compared to Indonesia's NDC, **Malaysia's emission reduction goals are more ambitious**, with an unconditional reduction target of 45%. Malaysia also **focuses much of its adaptation efforts on enhancing sustainable forest management**, with increasing efforts to **collaborate with the private sector** in preservation of its biodiversity.

Recommendation	Legal/ Advocacy	Impact Potential	Victims' redress?
<i>Engage with</i> designated government actors responsible for NDC implementation.	Advocacy	Creating a channel of communication with high-level actors responsible for NDC implementation will provide opportunities for the CSO to advocate for and support better NDC implementation and review. The CSO can also facilitate input from citizens and provide technical support where the designated bodies may be lacking.	No
<i>Produce</i> a non-party stakeholder submission.	Advocacy	CSOs are invited to send their submissions, as per the <a href="#">guidelines</a> , to the UNFCCC Secretariat by email. These submissions are particularly important as CSOs may be more adept at data collection and ensuring transparency.	No
<i>Attend and engage</i> in COP27 at Sharm El-Sheik, Egypt, including organising a side event.	Advocacy	CSO-organised side events are the most visible venue for CSO involvement in international climate negotiations. These side events provide an important opportunity for information dissemination, capacity building and benefit negotiations by enhancing access to information and ideas presented by CSOs and other engaged parties, outside the formal negotiations. Furthermore, side events can emphasise and raise awareness for certain policy areas.	No

## 5. Sustainable Development Goals

Another international framework that CSOs could use in their efforts to **show greater integration between climate change and air pollution** is the **2030 Agenda on Sustainable Development** and its **17 Sustainable Development Goals (SDGs)**. The SDGs provide countries with an **integrated and indivisible framework for sustainable development**, with **quantitative objectives** incorporating social, economic, and environmental aspects of sustainable development – all to be achieved by 2030. The goals provide a **framework for shared action** “for people, planet and prosperity,” to be implemented by “all countries and all stakeholders, acting in collaborative partnership”.<sup>141</sup> These targets are “global in nature and universally applicable, considering different national realities, capacities and levels of development and respecting national policies and priorities”.<sup>142</sup>



Figure 2 The SDGs and descriptions of what the goals entail. For the SDGs in Bahasa Indonesia, click [here](#).

In relation to transboundary haze pollution, there are several relevant SDGs; SDG 3 on healthy lives and wellbeing, SDG 11 on sustainable cities, SDG 12 on responsible consumption and production,

<sup>141</sup> The United Nations. (2015). Transforming our world: the 2030 Agenda for Sustainable Development. <<https://sdgs.un.org/2030agenda>> accessed 8 February 2022.

<sup>142</sup> *ibid*.

SDG 13 on climate change, SDG 15 on protection, restoration, and promotion of sustainable use of terrestrial ecosystems, and SDG 16 on providing access to justice.

The SDG Agenda builds upon the success of the 8 Millennium Development Goals (MDGs), which focused on the most vulnerable populations, and address extreme poverty, hunger, disease, gender equality, education, and environmental sustainability. Whilst the MDGs demonstrated the success in organising a framework for development cooperation and some countries made significant progress in achieving their goals, many did not make sufficient progress, particularly on environmental sustainability. **The SDG Agenda, recognising the limitations of the MDGs, takes on a broader and more complex scope than the MDGs and adopts sustainable development as the organizing principle for global cooperation,** meaning the combination of economic development, social inclusion, and environmental sustainability.

Similar to the MDGs, **the 2030 Agenda is a political declaration** that is **not legally binding** for Member States. However, the **SDGs importantly offer a globally recognised framework** and a **universal language to meet commitments** on a wide range of sustainable development issues. The SDGs also commit to **engaging multiple stakeholders at all levels of society** to actualise the agenda. Participatory processes will allow stakeholders to give voice to the needs and interests of the people they represent, enabling better planned and better-informed initiatives.

CSOs can **promote people's active involvement in generating accountability** for the 2030 Agenda in several ways, primarily realised through the **Voluntary National Review (VNR) process**, described below.

## 5.1 Voluntary National Reviews

VNR is a process through which **countries assess and present progress** made in achieving the global goals and the pledge to leave no one behind. The VNRs provide a **stocktake of the country's progress in implementing the SDGs**, with a view to help accelerate progress through experience sharing, peer-learning, identifying gaps and good practices, and mobilizing partnerships. As of 2021, 44 countries have signed up to conduct a VNR review. **Each year, they present at the annual High Level Political Forum (HLPF).** [Indonesia](#) and [Malaysia](#) have both signed up for the VNR.

VNRs typically consist of the following broad phases: initial preparation and organization; preparation of the VNR report; presentation at the HLPF; and follow-up after the HLPF. Stakeholder engagement may occur throughout all phases. The main guidance for countries preparing for VNRs is the updated [UN Secretary-General's voluntary common reporting guidelines](#), which provide a framework for common elements for the reviews. **There is no mandatory frequency for reporting of VNRs**, but the UN Secretary-General has recommended that all countries conduct at least two VNRs during the 15-year period of the SDGs.



Recommendation	Legal/ Advocacy	Impact Potential	Victims' redress?
<p><i>Review</i> the draft VNR report, if available. In some cases, CSOs and other stakeholders may have the opportunity to provide feedback and comments on a draft VNR report. Where CSOs have this opportunity, they should ensure that the report contains the following information:</p> <ul style="list-style-type: none"> <li>a. A review of all 17 SDGs</li> <li>b. An overview of stakeholder engagement</li> <li>c. A summary of national-level accountability processes</li> <li>d. A dedicated section on and/or cross-cutting approach to the pledge to 'leave no one behind'</li> <li>e. Recommendations or information from existing human rights reporting</li> <li>f. Provide independent contributions to VNR reports</li> </ul>	Advocacy	The impact potential lies in strengthening the national ownership of the SDGs. The VNR process is a tool for accountability, promoting transparency, inclusivity, and participation in reporting on the SDGs. However, given that the SDGs are non-binding aspirations and the voluntary nature of the 2030 Agenda, the impact of the VNR process is primarily norm-building and standard-setting for the regional community.	No
<p><i>Produce</i> a civil society shadow report. These reports are particularly important where civil society has little or no opportunity to engage in official VNR processes at the national level. Shadow reports may be produced in partnership with civil society coalitions, National Human Rights Institutions (NHRIs), academia or other stakeholders</p>	Advocacy	The impact of the shadow report will, again, be primarily norm-building. However, if the shadow report is written in partnership with other CSOs or the NHRIs, it can support the creation of a coalition against transboundary haze pollution, thereby creating bottom-up pressure on governments to act in preventing and mitigation this pollution.	No
<p><i>Pursue</i> follow-up activities after the VNR, including disseminating the national report and outcome of the VNR, providing an assessment of the country's review, holding a conference or meeting with other CSOs, and engaging with the government to follow-up the main findings of the VNR.</p>	Advocacy	Once a VNR report is available, follow-up activities will be important to support the norm-building process, especially as they relate to information dissemination and increasing public participation and awareness of the State's progress in achieving the SDGs.	No

Importantly, **the SDGs do not provide a formal avenue of redress** like the UN human rights mechanisms. However, similarly to the UNFCCC, **the SDGs provide a universal language** that can be used in engagements with governments, other CSOs and the private sector. The SDGs also provide **quantifiable indicators of each goal and targets**, and this is an aspect of data collection and technological support where CSOs may play a greater role. **SDGs as soft law instruments** can be used to **interpret obligations under MEAs and human rights law** as they are **indicative of the State's commitment to the achievement of certain goals**, including the protection of the environment.

## 6. UN Guiding Principles on Business and Human Rights

### Terminology

The [UN Guiding Principles on Business and Human Rights](#) were introduced by the then-Special Representative on Human Rights and Transnational Corporations and other Business Enterprises, Professor John G. Ruggie, in 2011. The Guiding Principles thereby **codified previously existing duties under international law**. The Human Rights Council **unanimously endorsed** these Guiding Principles in its resolution 17/4 (16 June 2011). In subsequent years, the Guiding Principles on Business and Human Rights have been further endorsed by numerous States, multinational corporations, and international bodies, such as the **OECD** which **aligned its Guidelines for Multinational Enterprises** with the Guiding Principles.<sup>143</sup> As such, they can be considered **soft law**, meaning that whilst they do not create legally binding obligations for States and businesses, they can be used by courts to interpret obligations under other agreements and human rights law.<sup>144</sup>

The Guiding Principles on Business and Human Rights consist of **three core pillars**. These are (1) that States are responsible to **protect** human rights, such as through preventing, investigating, and punishing human rights abuses; (2) that corporations/businesses are responsible for **respecting** human rights by means of policy commitments, due diligence, and offering remediation when abuses have occurred; and (3) that States must ensure access to **remedy** as a response to violations (including judicial and non-judicial means, but with an emphasis on operation-level grievance mechanisms driven by corporations).<sup>145</sup>

### 6.1 Framework created under Guiding Principles on Business and Human Rights

Overall, the Guiding Principles provide a framework to identify human rights violations by businesses and a common framework to **clarify the duties corporations** have towards the communities that are adversely affected by their policies and activities.

Principles 13 and 19b outline three core ways in which **companies** can be **associated with negative human rights impacts** so that duties arise under the framework of the Guiding Principles. These three ways are that companies are either **causing**, **contributing to**, or **directly linked to** human rights violations. Companies' responsibilities (hence, duties under soft law, not legally binding obligations) under the Guiding Principles are dependent on how they are associated with the negative human rights impact. Therefore, the following will address all three in turn.

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<sup>143</sup> Michael K. Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 Hum Rts L Rev 133, page 143.;

John Gerard Ruggie, 'The Social Construction of the UN Guiding Principles on Business & Human Rights' (2017) Faculty Research Working Paper Series (HARVARD Kennedy School) Retrieved from <https://www.hks.harvard.edu/publications/social-construction-un-guiding-principles-business-human-rights> on 04 April 2022, page 18.

<sup>144</sup> Barnali Choudhury, 'Balancing Soft And Hard Law For Business And Human Rights' (2018) 67 ICLQ 961.

<sup>145</sup> United Nations, 'Guiding Principles on Business and Human Rights' [2011] retrieved from [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf) on 14 February 2022.



First, a company is **causing** a negative human rights impact when there is a **direct causal link** between the company's actions and the human rights violation. An example of this is when a palm oil company recklessly causes forest fires and thus haze pollution through its agricultural practices. It must be a sole polluter. Whilst third parties may be involved, this can only be in the form of pressure or other contributions applied on the corporation. In these circumstances, a corporation is required to **cease the impact** that gives rise to the violation, **mitigate the consequences**, and **organise or cooperate** with effective **remedy processes**.<sup>146</sup>

Second, a company can **contribute to** a negative human rights impact when it violates the human rights of affected persons either **directly together with a third party**, or **through a third party**. For example, multiple palm oil corporations engaging in slash-and-burn practices the haze of which affects a community adversely would each contribute to this violation. Similarly, a palm oil corporation employing small holders that use slash-and-burn practices and cause hazardous haze could additionally be seen as contributing to the human rights violations of affected persons. When a company is contributing to human rights violations, the Guiding Principles require it to **cease their own contribution** as well as **mitigate** that of any **third party** involved. Additionally, they are required to ensure legitimate **remediation** to affected persons.

#### Terminology

A **remedy** is a legal mechanism with which victims of a legal wrong can be compensated for their losses.

Third, when a company is **directly linked to** human rights violations, it is either related to the affected persons **through the products or services** they sell, or those they sell or supply to third parties that directly cause the human rights violations. One example of this direct linkage is the role taken on by investors, that often benefit from the human rights abuses in monetary terms and fail to assume their position of influence to demand change. When a company is directly linked to human rights violations, it is required to **mitigate the impact** of the third party based on its leverage with its business partners.

Once a company has become aware that it either causes, contributes to, or is directly linked to a human rights violation, it must respond to this appropriately. **Appropriate responses** include conducting a

#### Terminology

The **Human Rights Impact Assessment** under the Guiding Principles (a form of *Human Rights Due Diligence*) analyses the effects of companies and their policies on different rights-holders affected, including employees, local populations, and consumers. Guidance on how to conduct successful assessments as referenced by the [Business & Human Rights Resource Centre](#) can be found [here](#).

**human rights impact assessment**, engaging in **dialogue** with the affected persons, mitigating present and future impact through creating and implementing concrete **action plans** (aka. company policies) accompanied by a clear **assessment of the outcomes** of these plans, offering **remedy** to affected individuals (this does not apply in cases of 'directly linked to'), and finally being **transparent** about all listed processes. If a business fails to respond appropriately to the identified human rights violations once it has been made aware of these, this is also in breach of the Guiding Principles. Companies

that were previously 'directly linked to' human rights violations are then considered to 'contribute to' these. This scenario is illustrated by the [Milieudefensie et al vs. ING complaint under the OECD](#), a case further outlined below.

<sup>146</sup> *ibid.*

## 6.2 Practical Application

As mentioned above, the Guiding Principles on Business and Human Rights are *soft law* principles and thus **do not create legal obligations for States or corporations** in theory. However, in practice, it is notable that they have been endorsed unanimously by the Human Rights Council and accepted as relevant by multiple States and corporations. An example of the translation of the General Principles into domestic law is the Singaporean Transboundary Haze Pollution Act, which replaces the soft language of the Guiding Principles with a civil liability regime with legal consequences for caused harm.<sup>147</sup> Therefore, the Guiding Principles can be relevant in **guiding judges** interpreting the obligations under binding national or international laws (such as international human rights law) and the Guiding Principles may even be **translated into hard law** by either being translated into domestic judicial systems or through domestic jurisprudence. The following section takes a closer look at the influence the Guiding Principles can have on domestic legislation as well as on the creation of National Action Plans.

As widely accepted international principles, judges can use the Guiding Principles to **interpret national or international obligations under national law**. The first and most notable case where this happened is the judgement on the *Miliendefensie et al v Royal Dutch Shell* case of 26 May 2021 in The Hague, the Netherlands. Effectively, the Court in this case used the Guiding Principles to interpret the unwritten ‘standard of care’ requirement under Dutch domestic tort law.<sup>148</sup> The Court concluded that since the Guiding Principles authoritatively reflect an international consensus regarding the duties businesses have vis-à-vis human rights, they could be used to determine whether Royal Dutch Shell – the company in question – had lived up to its obligations under domestic law.<sup>149</sup> It is important to stress that the Court did not rule that the Guiding Principles were legally binding themselves, but rather that they were a means to interpret the domestically binding obligation of ‘standard of care’.<sup>150</sup> The Court defined two human rights duties of companies based on the Guiding Principles, namely a duty to respect human rights in relation to their own enterprises, and in relation to their operations.<sup>151</sup>

The *Miliendefensie et al v Royal Dutch Shell* is a good example of how the Guiding Principles can be invoked by plaintiffs and used by judges to **interpret and potentially modify domestic duties of care**. The debate around business and human rights and publication of the Guiding Principles additionally sparked a greater awareness of implementing respective policies into domestic legislation.

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<sup>147</sup> For more information about the Singaporean Transboundary Haze Pollution Act, refer to memorandum 1 created together with the present memorandum.

<sup>148</sup> David Ollivier de Leth and Manon Wolfkamp, ‘The Shell climate verdict: a major win for mandatory due diligence and corporate accountability’ (2021) Business & Human Rights Resource Centre, Retrieved from <https://www.business-humanrights.org/en/blog/the-shell-climate-verdict-a-major-win-for-mandatory-due-diligence-and-corporate-accountability/> on 4 April 2022, paragraph 4.;

Jochem de Hoop, ‘The Responsibility of Royal Dutch Shell to comply with human rights obligations and environmental law through the unwritten standard of care’ (2021) PILPG, Retrieved from <https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2021/8/2/the-responsibility-of-royal-dutch-shell-to-comply-with-human-rights-obligations-and-environmental-law-through-the-unwritten-standard-of-care> on 4 April 2022, paragraph 7.

<sup>149</sup> De Leth and Wolfkamp (n 149) paragraph 4.;

De Hoop (n 149) paragraph 7.

<sup>150</sup> De Hoop (n 149) paragraph 7.

<sup>151</sup> *ibid.*

A comprehensive overview of these has been created for the European Parliament under sub-section 3.5 of the policy brief ‘[Implementation of the UN Guiding Principles on Business and Human Rights](#)’.

### Terminology

**Mandatory Human Rights Due Diligence** obligations refers to the obligation businesses have to respect the human rights of people. Businesses are thereby required to assess the negative potential human rights impacts their practices have, and act diligently to prevent and mitigate these.

An example of domestic obligations regarding businesses’ **human rights due diligence**<sup>152</sup> is Indonesia’s Ministerial Regulation No. 2/2017, which imposes human rights obligations on Indonesia’s fishing industry.<sup>153</sup> Companies must obtain a human rights certificate to fish in Indonesian waters – a certificate that is tied to due diligence systems and policies on remediation.<sup>154</sup> Equivalent mandatory due diligence obligations could be imagined regarding palm oil companies, given the political will. Whilst again not a legally

binding obligation on States to create, or businesses to respect this duty of human rights due diligence, the Guiding Principles did **normalise corporate human rights due diligence** and create an **expectation** around businesses to comply.<sup>155</sup>

Regarding the adoption of **National Action Plans** (NAPs) connected to implementing the Guiding Principles, the Guiding Principles themselves do not set requirements for the adoption of NAPs.<sup>156</sup> However, when some EU Member States adopted NAPs in 2014, this was endorsed by the UN Human Rights Council and other countries were encouraged to follow suit.<sup>157</sup> Whilst neither Malaysia nor Indonesia currently have NAPs related to the Guiding Principles, both countries are in the process of developing such NAPs.<sup>158</sup> In Malaysia, [SUHAKAM](#) (the Human Rights Commission of Malaysia; or *Suruhanjaya Hak Asasi Manusia Malaysia*) is thereby a leading power in creating an NAP and cooperating with businesses regarding their implementation.<sup>159</sup> The importance of NAPs as opposed to other strategies to implement human rights duties on businesses as outlined above (domestic legislation and mandatory human rights due diligence, for example) must not be overstated, however.<sup>160</sup>

Despite these positive examples of the utilisation and even implementation of the Guiding Principles into domestic legislations, it must be stressed that the application of the Guiding Principles to specific

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<sup>152</sup> OHCHR, ‘Corporate human rights due diligence – identifying and leveraging emerging practices’ (n.d.) Retrieved from <https://www.ohchr.org/en/special-procedures/wg-business/corporate-human-rights-due-diligence-identifying-and-leveraging-emerging-practices> on 4 April 2022, paragraph 3.; UNGA Note by the Secretary General (16 July 2018) A/73/163, paragraph 2. Refer to paragraphs 13 and 14 for different elements of due diligence.

<sup>153</sup> UNGA Note (n 152) paragraph 65(b).

<sup>154</sup> ‘Indonesia takes action to protect the rights of fishermen’ (n.d.) Retrieved from <https://media.business-humanrights.org/media/documents/files/documents/FIHRREST-Jan-2017.pdf> on 4 April 2022, paragraph 1.

<sup>155</sup> UNGA Note (n 152) paragraph 20.

<sup>156</sup> European Union Directorate-General For External Policies Policy Department, ‘Implementation of the UN Guiding Principles on Business and Human Rights’ (2017) EP/EXPO/B/COMMITTEE/FWC/2013-08/Lot8/09, page 21.

<sup>157</sup> *ibid.*, page 22.

<sup>158</sup> OHCHR Working Group on Business and Human Rights, ‘National action plans on business and human rights’ (n.d.) Retrieved from <https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights> on 4 April 2022.

<sup>159</sup> European Union Directorate-General For External Policies Policy Department (n 156) page 48.

<sup>160</sup> *ibid.*, page 27.

legal cases is very difficult due to its **non-binding** nature.<sup>161</sup> Additionally, their **voluntary nature** reduce their ability to hold States and corporations accountable.<sup>162</sup>

The **pitfalls** of exclusively voluntary mechanisms of coercing corporations to improve their human rights policies are illustrated by the *Milieudefensie et al vs. ING* complaint referenced above. Here, Milieudefensie (Friends of the Earth the Netherlands), WALHI (Friends of the Earth Indonesia) and the Sustainable Development Institute (Friends of the Earth Liberia) submitted a complaint under the OECD Complaint Mechanism against the ING Group. The OECD Complaint Mechanism is an instrument created by the organisation [OECD Watch](#), which aims at increasing businesses accountability for human rights violations based on the OECD Guidelines (which were largely based on the UN Guiding Principles). It depends on the voluntary cooperation between corporations and complaint bearers (CSOs) once a complaint has been filed to improve the human rights commitment of the corporations. The voluntary nature of these complaints as opposed to creating legally binding obligations greatly limits the effect that this mechanism can have, however. In the case of the *Milieudefensie et al vs. ING* complaint, ING unilaterally decided to **withdraw** from the process, **without any consequences**.<sup>163</sup>

### 6.3 CSO Engagement

The Guiding Principles create duties for both States and businesses. For example, according to Optional Principle 26, States must ensure effective judicial avenues to try human rights abuses (including those that are related to businesses).<sup>164</sup> The duties on businesses to investigate potential negative human rights impacts and mitigate these have been outlined above. This leaves the question how CSOs can engage with the Guiding Principles. CSOs can utilise the Guiding Principles in its work in three significant ways. First, regarding States, CSOs can **remind States of their duties** under the Guiding Principles and, if possible, their NAPs. It can additionally **contribute** to the current **creation of NAPs** for Indonesia and Malaysia. In Malaysia, cooperation with SUHAKAM, which is the driving force behind business and human rights policies in Malaysia, is encouraged. Second, regarding businesses, CSOs can **remind corporations of their human rights due diligence duties** and guide them in their process of investigating potential human rights abuses. Third, CSOs can **hold businesses** that fail to address their adverse human rights impacts **accountable** before domestic courts, as *Milieudefensie* has done in the case of Royal Dutch Shell.

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<sup>161</sup> Andreas Rasche and Sandra Waddock, 'The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research' (2021) 6:2 Business and Human Rights Journal 227, page 234.;

Justine Nolan, 'Business and human rights: The challenge of putting principles into practice and regulating global supply chains' (2017) 42:1 Alternative Law Journal 42, page 42.

<sup>162</sup> Rasche and Waddock (n 161) page 237.

<sup>163</sup> Milieudefensie, 'ING withdraws from complaint against the bank's involvement in the palm oil sector' (2022) Retrieved from <https://en.milieudefensie.nl/news/ing-withdraws-from-complaint-against-the-bank2019s-involvement-in-the-palm-oil-sector> on 11 April 2022.

<sup>164</sup> Lucas Roorda and Cedric Ryngaert, 'Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction' (2016) 80 The Rabels Journal 783, page 784.

## 6.4 Recommendations

Recommendation	Legal/ Advocacy	Impact Potential	Victims' redress?
<i>Identify</i> key companies that are either causing, contributing to, or directly linked to negative human rights impacts (as a result of forest fires and haze).	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
<i>Collect all relevant data</i> to prove the relationship between the company's actions and/or policies and the negative human rights impacts. Partnerships with local CSOs and individuals are likely to contribute to creating 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.	No
<i>Analyse</i> whether the companies in question are aware of the negative human rights impacts they are causing, contributing to, or directly linked to. If they are unaware, <i>inform</i> them of their human rights duties.	Advocacy / Legal	Whilst this recommendation may not be relevant in all cases (such as when it can be reasonably assumed that a company is aware of its obligations under international law), ensuring this awareness of companies' adverse human rights impacts is crucial when claiming their inaction in the scope of advocacy campaigns or when building a national litigation case.	No
<i>Expose</i> companies that fail to meet their human rights duties. For this, use the language of the Guiding Principles on Business and Human Rights. These principles clearly outline companies' responsibilities to respect human rights. The Guiding Principles, which are soft law themselves, can be used to interpret hard laws. These hard laws are the company's human rights obligations under national law and their obligation to respect human rights under international systems.	Advocacy	The impact of this strategy is primarily on the respective company's public image as well as the general public's awareness about the adverse human rights impacts caused by the respective company. For victims of transboundary haze pollution, this strategy may bring moral satisfaction, but it will not directly provide legal justice or reparations.	No
<i>Bring a case</i> before either national law or relevant international bodies if the companies in question fail to adequately mitigate their negative human rights impacts. <sup>165</sup> These cases should be based on <i>hard law</i> (human rights law under international or national law), which can be interpreted according to the principles laid out in the Guiding Principles on Business and Human Rights. <i>Refer to the <a href="#">case</a></i> brought	Legal	Bringing a case before national law or international legal bodies that can give legally binding judgements is a double-edged sword: If the case is won, such as in the <i>Miliendefensie et al v Royal Dutch Shell</i> case, this can both set a precedent for future cases as well as change the mere duty companies have to respect human	Yes, if included in the case

<sup>165</sup> The human rights most likely to be negatively impacted are hereby mostly 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.



to the SUHAKAM by CERAH, Greenpeace Malaysia, and other CSOs on 7 December 2021 as an example of a case brought before an international body. Refer to <a href="#"><i>Milieudefensie et al v Royal Dutch Shell</i></a> as an example of a domestic case, though keeping in mind that the domestic legal systems within other countries may not follow the Dutch court's example.		rights into a legal obligation. This will have a clear and direct impact on improving the respective human rights situation and, if included in the claim, provide justice for victims. If the case is lost, however, this may undermine future similar cases and weaken the human rights situation for affected groups and victims. Therefore, whilst cases should be brought against companies where possible to enforce compliance with human rights, this should not be done recklessly or carelessly.	
<i>Lobby</i> States to respect their duties under the Guiding Principles to create a mechanism of accountability and redress regarding businesses and their human rights obligations.	Advocacy	Once States have implemented a functioning mechanism of accountability and redress regarding the human rights obligations of businesses, this can have a great impact on enforcing greater compliance of businesses with their obligations as this shifts the pressure from international duties to national obligations. Based on the mechanisms created by States, this can additionally provide an avenue of redress for victims.	Yes, if included
<i>Participate</i> in the drafting processes of the National Action Plans of Malaysia and Indonesia. In this, cooperate with local organisations that lead these processes, such as SUHAKAM in Malaysia.	Advocacy	The impact of this final strategy is indirect and more long-term than some discussed above. It is important because it can shift national priorities and policies to recognise the effects of environmental issues (here: forest fires and transboundary haze) on human rights.	No

## 7. Conclusion

Under international law, there are different **soft law principles** that are important to consider when discussing avenues of advocacy and redress for victims of forest fires and transboundary haze pollution. The avenues discussed in the present memorandum, namely the United Nations Framework Convention on Climate Change, the Sustainable Development Goals, and the UN Guiding Principles on Business and Human Rights, are primarily soft law principles that do not impose legally binding obligations on corporations. Therefore, they are **based on voluntary cooperation and compliance** of businesses, which undermines their relevance to ensuring large-scale change. Nonetheless, they can be important **tools to interpret domestic legal obligations** and other hard law sources through jurisprudence and can be used by CSOs to **advocate for change** and support legal argumentation. Over time, they can influence States' and businesses' environmental and human rights obligations under international and national law.

## 8. Recommendations

Recommendation	Legal/ Advocacy	Impact Potential	Victims' redress?
<i>Engage with</i> designated government actors responsible for NDC implementation.	Advocacy	Creating a channel of communication with high-level actors responsible for NDC implementation will provide opportunities for the CSO to advocate for and support better NDC implementation and review. The CSO can also facilitate input from citizens and provide technical support where the designated bodies may be lacking.	No
<i>Produce</i> a non-party stakeholder submission.	Advocacy	CSOs are invited to send their submissions, as per the <a href="#">guidelines</a> , to the UNFCCC Secretariat by email. These submissions are particularly important as CSOs may be more adept at data collection and ensuring transparency.	No
<i>Attend and engage</i> in COP27 at Sharm El-Sheik, Egypt, including organising a side event.	Advocacy	CSO-organised side events are the most visible venue for CSO involvement in international climate negotiations. These side events provide an important opportunity for information dissemination, capacity building and benefit negotiations by enhancing access to information and ideas presented by CSOs and other engaged parties, outside the formal negotiations. Furthermore, side events can emphasise and raise awareness for certain policy areas.	No
<i>Review</i> the draft VNR report, if available. In some cases, CSOs and other stakeholders may have the opportunity to provide feedback and comments on a draft VNR report. Where CSOs have this opportunity, they should ensure that the report contains the following information: <ul style="list-style-type: none"> <li>a. A review of all 17 SDGs</li> <li>b. An overview of stakeholder engagement</li> <li>c. A summary of national-level accountability processes</li> <li>d. A dedicated section on and/or cross-cutting approach to the pledge to 'leave no one behind'</li> <li>e. Recommendations or information from existing human rights reporting</li> </ul>	Advocacy	The impact potential lies in strengthening the national ownership of the SDGs. The VNR process is a tool for accountability, promoting transparency, inclusivity, and participation in reporting on the SDGs. However, given that the SDGs are non-binding aspirations and the voluntary nature of the 2030 Agenda, the impact of the VNR process is primarily norm-building and standard-setting for the regional community.	No



Provide independent contributions to VNR reports			
<i>Produce</i> a civil society shadow report. These reports are particularly important where civil society has little or no opportunity to engage in official VNR processes at the national level. Shadow reports may be produced in partnership with civil society coalitions, National Human Rights Institutions (NHRIs), academia or other stakeholders	Advocacy	The impact of the shadow report will, again, be primarily norm-building. However, if the shadow report is written in partnership with other CSOs or the NHRIs, it can support the creation of a coalition against transboundary haze pollution, thereby creating bottom-up pressure on governments to act in preventing and mitigation this pollution.	No
<i>Pursue</i> follow-up activities after the VNR, including disseminating the national report and outcome of the VNR, providing an assessment of the country's review, holding a conference or meeting with other CSOs, and engaging with the government to follow-up the main findings of the VNR.	Advocacy	Once a VNR report is available, follow-up activities will be important to support the norm-building process, especially as they relate to information dissemination and increasing public participation and awareness of the State's progress in achieving the SDGs.	No
<i>Identify</i> key companies that are either causing, contributing to, or directly linked to negative human rights impacts (as a result of forest fires and haze).	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
<i>Collect all relevant data</i> to prove the relationship between the company's actions and/or policies and the negative human rights impacts. Partnerships with local CSOs and individuals are likely to contribute to creating 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.	No
<i>Analyse</i> whether the companies in question are aware of the negative human rights impacts they are causing, contributing to, or directly linked to. If they are unaware, <i>inform</i> them of their human rights duties.	Advocacy / Legal	Whilst this recommendation may not be relevant in all cases (such as when it can be reasonably assumed that a company is aware of its obligations under international law), ensuring this awareness of companies' adverse human rights impacts is crucial when claiming their inaction in the scope of advocacy campaigns or when building a national litigation case.	No
<i>Expose</i> companies that fail to meet their human rights duties. For this, use the language of the Guiding Principles on Business and Human Rights. These principles clearly outline companies' responsibilities to respect human rights. The Guiding Principles, which are soft law themselves, can be used to interpret hard laws. These hard laws are the company's human rights obligations under national	Advocacy	The impact of this strategy is primarily on the respective company's public image as well as the general public's awareness about the adverse human rights impacts caused by the respective company. For victims of transboundary haze pollution, this strategy may bring	No

law and their obligation to respect human rights under international systems.		moral satisfaction, but it will not directly provide legal justice or reparations.	
<i>Bring a case</i> before either national law or relevant international bodies if the companies in question fail to adequately mitigate their negative human rights impacts. <sup>166</sup> These cases should be based on <i>hard law</i> (human rights law under international or national law), which can be interpreted according to the principles laid out in the Guiding Principles on Business and Human Rights. Refer to the <a href="#">case</a> brought to the SUHAKAM by CERAH, Greenpeace Malaysia, and other CSOs on 7 December 2021 as an example of a case brought before an international body. Refer to <a href="#">Miliedefensie et al v Royal Dutch Shell</a> as an example of a domestic case, though keeping in mind that the domestic legal systems within other countries may not follow the Dutch court's example.	Legal	Bringing a case before national law or international legal bodies that can give legally binding judgements is a double-edged sword: If the case is won, such as in the <i>Miliedefensie et al v Royal Dutch Shell</i> case, this can both set a precedent for future cases as well as change the mere duty companies have to respect human rights into a legal obligation. This will have a clear and direct impact on improving the respective human rights situation and, if included in the claim, provide justice for victims. If the case is lost, however, this may undermine future similar cases and weaken the human rights situation for affected groups and victims. Therefore, whilst cases should be brought against companies where possible to enforce compliance with human rights, this should not be done recklessly or carelessly.	Yes, if included in the case
<i>Lobby</i> States to respect their duties under the Guiding Principles to create a mechanism of accountability and redress regarding businesses and their human rights obligations.	Advocacy	Once States have implemented a functioning mechanism of accountability and redress regarding the human rights obligations of businesses, this can have a great impact on enforcing greater compliance of businesses with their obligations as this shifts the pressure from international duties to national obligations. Based on the mechanisms created by States, this can additionally provide an avenue of redress for victims.	Yes, if included
<i>Participate</i> in the drafting processes of the National Action Plans of Malaysia and Indonesia. In this, cooperate with local organisations that lead these processes, such as SUHAKAM in Malaysia.	Advocacy	The impact of this final strategy is indirect and more long-term than some discussed above. It is important because it can shift national priorities and policies to recognise the effects of environmental issues (here: forest fires and transboundary haze) on human rights.	No

<sup>166</sup> The human rights most likely to be negatively impacted are hereby mostly 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.

## 9. Annex

### 9.1 Legal jargon

Legal jargon	Explanation
Adapt	Adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.
Common but differentiated responsibilities	Recognises that all States have a collective obligation to tackle climate change but considers the historical and present contribution of developed States as giving them more responsibilities for climate change mitigation than developing countries
Duty	An obligation, created by law or treaty.
Framework convention	A type of legally binding treaty which establishes broader commitments for its parties and leaves the setting of specific targets either to subsequent more detailed agreements (usually called protocols) or to national legislation
Hard Law	Any treaty, agreement, or declaration that is legally binding on or between its parties.
Intergenerational equity	Presupposes the right of future generations of human beings to benefit from cultural and natural resources of the past generation as well as the obligation of current generations to preserve such resources for future generations.
Mitigate	In the context of climate change, a human intervention to reduce the sources or enhance the sinks of greenhouse gases.
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
Protocol	An agreement that supports a framework convention by supplementing or clarifying it.
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.
Sustainable development	Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.