

STUDY

Requested by the DROI subcommittee



# Biodiversity as a Human Right and its Implications for the EU's External Action



Policy Department for External Relations  
Directorate General for External Policies of the Union  
PE 603.491 - April 2020

EN

## STUDY

# Biodiversity as a Human Right and its implications for the EU's External Action

### ABSTRACT

This study provides an in-depth and accessible analysis on biodiversity as a human right to inform the European Parliament's work on how the European Union's external action can best contribute to a holistic and human rights-based approach aimed at stopping biodiversity loss and degradation. After a brief overview of empirical data regarding the impacts of biodiversity loss on human rights and the limitations of available sources, the study assesses the status and content of existing international obligations on biodiversity and human rights. The study then assesses existing initiatives' (potential) legal and political impact at international and regional levels for the EU to address biodiversity and human rights in a mutually supportive manner, within a variety of multilateral fora. Additionally, the study assesses the EU's (unilateral and bilateral) external action tools that have addressed or could address the human rights dimensions of biodiversity in the context of development, trade and other areas of international cooperation. It provides a series of recommendations on how the European Parliament and other EU institutions can support the development of a holistic and human rights-based approach to the conservation and sustainable use of biodiversity in external action, including as part of the fight against climate change.

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This paper was requested by the European Parliament's Subcommittee on Human Rights..

English-language manuscript was completed on 06 April 2020

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Printed in Belgium.

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ISBN: 978-92-846-6477-1 (pdf)

ISBN: 978-92-846-6489-4 (paper)

doi: 10.2861/60672 (pdf)

doi: 10.2861/104569 (paper)

Catalogue number: QA-02-20-214-EN-N (pdf)

Catalogue number: QA-02-20-214-EN-C (paper)

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# 1 Executive summary

- Current negative trends in biodiversity and ecosystems will undermine progress towards 80 % of the assessed targets for the Sustainable Development Goals (SDGs) related to poverty, hunger, health, water, cities, climate, oceans and land;
- Everyone's ability to enjoy human rights to life, health, food and water depends on healthy ecosystems and their benefits to people; this concerns particularly the rights of children, women, indigenous peoples and local communities;
- States' international obligations on biodiversity and human rights are both procedural and substantive; there are specific obligations for vulnerable groups. All these obligations extend to the context of inter-State cooperation;
- The Convention on Biological Diversity (CBD) has been relied upon most frequently by international human rights bodies with respect to indigenous people's rights in the context of extractives, agriculture, or conservation;
- The CBD Parties also produced guidance on what States, business enterprises and others need to do regarding the human right to health, women's rights, as well as integrating human rights and biodiversity considerations into climate change adaptation and mitigation. So far, little progress has been made under the CBD on the rights of the child and on procedural rights, notably access to justice;
- Whilst the CBD articles are legally binding, there is significant room for States' discretion to decide on implementation measures; interpreting the CBD in a mutually supportive manner with international human rights law clarifies the limits to States' discretion under the CBD, thereby enhancing justiciability;
- Guidelines adopted under the CBD provide interpretative guidance on binding obligations contained within the CBD. In addition, CBD decisions can be recognised as relevant interpretative guidance under international human rights treaties, so international human rights bodies may play a role in assessing compliance with the CBD and its guidance;
- For EU Member States, biodiversity as a human right is the object of legally binding international obligations, given the participation of all EU Member States in the CBD and core international human rights treaties. Policy coherence in external action is also an EU treaty obligation. Equally, biodiversity as a human right has the potential to support well-established EU priorities related to the partnership approach with other countries, mainstreaming of climate change and respect for human rights in different policy areas, effective and coherent aid delivery together with support for a rule-based international order and effective multilateralism.
- The EU has a great opportunity to play a global leadership role on biodiversity as a human right at the multilateral level, as well as bilaterally and unilaterally. This can be done both through implementation of existing instruments, the development of new ones and a more strategic approach to the interactions of different tools that the EU can bring to bear in its external relations.
- The recommendations for the EU and the European Parliament arising from this study range from the funding of research and learning approaches on biodiversity as a human right, to the EU position in ongoing international negotiations (notably in 2020/2021, but also beyond) and the use of EU bilateral trade agreements, the use of impact assessments for external relations instruments and other instruments with extraterritorial implications, more extensive use of good practices identified in EU bilateral and unilateral measures, as well as the prioritisation and safeguarding of external funding.

## 2 Introduction

This study aims to provide an in-depth and accessible analysis on biodiversity as a human right to inform the European Parliament's work on how the European Union's external action can best contribute – at an international level, as well as through bilateral and unilateral external relations and internal instruments with extraterritorial application – to a holistic and human rights-based approach aimed at stopping biodiversity loss and degradation. The role of biodiversity as a human right in the context of EU contributions to the fight against climate change through such an approach will also be featured.

The study starts with a brief overview of empirical data regarding the impacts of biodiversity loss on human rights, highlighting data gaps and limitations in currently available sources. The study will assess the status and content of existing international obligations on biodiversity and human rights. It will also consider the levels of detail and significance provided by international guidance on implementation not just for States, but also business and conservation organisations. Attention will focus equally on: procedural and substantive rights; the rights of people generally and specifically on the rights of groups at heightened risk (particularly children, women, indigenous peoples and local communities); as well as justiciability and everyday accountability (Part I). In this part, it will be explained that the term 'biodiversity as a human right' is used as shorthand for existing international obligations at the nexus of international biodiversity law and international human rights law (in other words, to discuss what international law currently says on the protection of biodiversity-dependent human rights).

The study will then assess existing initiatives' (potential) legal and political impact at international and regional levels for addressing biodiversity and human rights in a mutually supportive manner, including – but not limited to – the post-2020 biodiversity framework and United Nations (UN) negotiations towards a new international instrument on marine biodiversity of areas beyond national jurisdiction. This will lead to the identification of opportunities for the EU and its Member States to play a leadership role in a variety of multilateral fora. This part will include a short reflection on the benefits of supporting the international recognition for the human right to a healthy environment as including healthy biodiversity and ecosystems, in order to enhance the visibility, clarity and justiciability of biodiversity as a human right. That said, it should be emphasised that international, legally binding obligations on biodiversity-dependent human rights already exist independently of the international recognition of the human right to a healthy environment. (Part II). Additionally, the study will assess the EU's (unilateral and bilateral) external action tools that have addressed or could address biodiversity as a human right in the context of development, trade and other areas of international cooperation. This will lead to the identification of areas for improvement and innovation in EU agreements, external funding, impact assessments and legislation with extraterritorial implications (Part III). Parts II and III, therefore, distil recommendations for the EU and the European Parliament on how to develop a holistic and human rights-based approach to the conservation and sustainable use of biodiversity in external action. All recommendations will then be summarised in the study's Conclusions.

### 3 Methodology and sources

There is little academic literature on biodiversity as a human right, particularly with regard to the content and status of relevant international standards. This study has, therefore, mainly focused (in Part I) on the analysis of international legal instruments, drawing from the author's own findings from over 15 years of independent research on the CBD, including participant observation in CBD meetings from 2005 to the present day and exchanges with community representatives, activists, conservation organisations, researchers and government officials in Argentina, Malaysia, Namibia and South Africa<sup>1</sup>. However, several studies have been published on EU external initiatives that are relevant for biodiversity as a human right, although most do not assess these initiatives specifically or systematically from international biodiversity and human rights perspectives. For this reason, Part I is longer than the others, which cover material that is better known to the intended audience of this study. Parts II and III analyse recent academic literature on EU external action (2015-2019), taking into consideration the author's own academic research on the integration of biodiversity and human rights concerns in the EU's external relations, which contained a review of relevant literature until 2014. Part II also refers to the EU's position in multilateral processes on the basis of independent reporting by the *Earth Negotiations Bulletin* (<https://enb.iisd.org>). Part III covers primary EU external relations material as well, notably bilateral treaties and EU law with external relations relevance.

Against this background, the methodology followed in this report is mainly doctrinal (desk-based analysis of legal instruments according to general rules of legal interpretation), but inspired by an understanding of the mutual interactions among international, EU, national and subnational law instruments (global environmental law: Kulolesi et al, 2019; Morgera, 2012). The report draws on over a decade of regular interactions with experts involved in international biodiversity and human rights issues (including relevant UN bodies, such as UN Special Rapporteurs, the UN Food and Agriculture Organisation (FAO) and the UN Environment Programme) together with EU delegation members in the CBD processes as well as negotiations on a new UN instrument on marine biodiversity of areas beyond national jurisdiction. In addition, the author has been in contact with the European Parliament and the EEAS before finalising this study.

The study's main limitation, due to constraints in length and the compressed timeframe, is that additional primary material could not be consulted. This would have facilitated a greater understanding of the implementation of EU external action (declarations arising from policy dialogues, country strategy papers, EU positions in international human rights processes, etc). Moreover, the situation is compounded by the scarcity of empirical studies independently assessing the implementation of EU external action in relation to biodiversity, notably with regard to understanding the interactions between different instruments (for instance, bilateral trade agreements, financing and dialogues).

<sup>1</sup> In the context of the following research projects led by the author of this study: European Research Council-funded project BENELEX: 'Benefit-sharing for an Equitable Transition to the Green Economy: The Role of Law' - European Research Council Starting Grant 335592 (2013-2018); UK Ecosystem Services for Poverty Alleviation-funded project MARINE BENEFITS: 'Sharing the benefits of sustainable fisheries: from global to local legal approaches to marine ecosystem services for poverty alleviation' Grant NE/M007650/1 (2015-2017); and UK Research and Innovation (UKRI) through the Global Challenges Research Fund (GCRF)-funded One Ocean Hub (2019-2024).



## 4 Part I - Biodiversity and human rights

### 4.1 What is biodiversity? Why is it linked to human rights?

Broadly speaking, the term 'biodiversity' captures a complex understanding of nature as

- the variety of life forms on the planet;
- the dynamic interactions and inter-dependencies among living organisms, as well as between living organisms and non-living resources (ecosystems); and
- the benefits that humans derive from ecosystems for their wellbeing (ecosystem services).

Biodiversity is internationally defined as 'the variability among living organisms' across terrestrial, marine and freshwater ecosystems.' It refers to diversity within species and between species, including at the genetic level. It also includes diversity of ecosystems, which are internationally defined as 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit'<sup>2</sup>. The benefits that humans derive from ecosystems are the result of ecological functions and processes of ecosystems, including purification of water and air, pest and disease control, pollination, soil fertility and resilience to climate change.

*Box 1: Overview of the link between biodiversity and human rights*

The relation between biodiversity and human rights is summarised and illustrated below, as a guide for understanding the current trends in biodiversity loss which are increasingly related to human well-being:

- **Right to life:** loss of coastal habitats and coral reefs has increased the risk to life and property for 100-300 million people from floods and hurricanes (Diaz et al, 2019);
- **Right to health:** biodiversity continues to remain a critical source for medicinal development; for instance, '10 of 14 major classes of antibiotics are derived from microorganisms' (Knox, 2017);
- **Right to food:** the stability and resilience of food sources are reliant on biodiversity: for instance, between USD 235-577 billion in annual global crop output is at risk as a result of the decline of pollinators (bees, birds, etc: Diaz et al, 2019);
- **Right to water:** forest areas improve water flow regulation, reducing runoff and providing greater water storage; diverse animal, plant and algae species help to draw excess nitrogen and phosphorus from aquatic ecosystems (Knox, 2017);
- **Rights of indigenous peoples and other natural resource-dependent communities:** biodiversity loss decreases access to natural resources on which their life, health and culture depend, reducing their freedom of choice and action (Knox, 2017);
- **Children's rights:** biodiversity loss interferes with children's normal development and may prevent them from enjoying their rights in the future (Knox, 2018b);
- **Women's rights:** biodiversity loss places a disproportionate burden on women by increasing the time they spend to obtain water, fuel wood and medicinal plants, thereby reducing the time they can spend on income-generating activities and education (Roe et al. 2019).

<sup>2</sup> United Nations, 1992, CBD Article 2.

Our understanding about how much human well-being depends on biodiversity and ecosystems has increased, while conversely our efforts to protect biodiversity have continued to fall short. The 2019 Global Assessment of Biodiversity and Ecosystems Services underscored that '[m]ost of nature's contributions to people are not fully replaceable and some are irreplaceable,' and that the rate of global biodiversity degradation during the past 50 years is unprecedented in human history. For instance, the average abundance of native species in most major terrestrial biomes has fallen by at least 20 %, potentially affecting ecosystem processes and nature's contributions to human wellbeing. In addition, 66 % of the ocean area is experiencing increasing cumulative impacts (with over-fishing being a main contributor and marine plastic pollution having increased tenfold since 1980, affecting at least 267 species) (Diaz et al., 2019). In fact, the 2019 Global Sustainable Development Report points to a negative long-term trend for the biodiversity-related SDGs 14 ('life below water') and 15 ('life on land').

As a result, current negative trends in biodiversity and ecosystems will undermine progress towards 80 % (35 out of 44) of targets assessed within the Sustainable Development Goals (SDGs) related to poverty, hunger, health, water, cities, climate, oceans and land (SDGs 1, 2, 3, 6, 11, 13, 14 and 15). The direct drivers of biodiversity loss have been: changes in land and sea use (such as unsustainable agriculture); direct exploitation of organisms (such as overfishing); climate change; pollution; and invasion of alien species, with climate change also increasingly exacerbating the impact of other drivers. The Global Chemicals Outlook (2013) indicated that at least 27 % of total ecosystem losses are due to chemical pollution in particular, which is significant as chemicals are often managed in isolation from biodiversity.

The Global Assessment report also noted that biodiversity is generally declining less rapidly in indigenous peoples' lands than elsewhere, which cover at least a quarter of the global land area, including approximately 35 % of formally protected and approximately 35 % of all remaining terrestrial areas with very low human intervention. At the same time, areas of the world projected to experience significant negative effects from global changes in climate, biodiversity, ecosystem functions and nature's contributions to human wellbeing are also home to large concentrations of indigenous peoples and many of the world's poorest communities.

For that reason, the Global Assessment report underscored the need for transformative processes to address climate change and biodiversity loss. It is also vital to address human rights concerns such as inequalities, especially regarding income and gender, which undermine: the capacity for sustainability; inclusive decision-making as well as the fair and equitable sharing of benefits arising from the use of biodiversity and its conservation; together with the recognition and respectful inclusion of the knowledge and innovations of indigenous peoples and local communities in environmental governance (Diaz et al., 2019). These findings have already led the EU Council to underline that 'biodiversity and healthy ecosystems and their services support the full enjoyment of human rights'. The Council Conclusions also reiterate support for 'nature-based solutions in support of biodiversity protection, restoration and sustainable use, as well as climate change mitigation and adaptation' (Council of the EU, 2019)

More specifically, the factual relationship between biodiversity and the right to food is well understood, with the result that biodiversity has featured prominently in the reports of the UN Special Rapporteur on the Right to Food. Most recently, the Rapporteur has drawn attention to the first report on the state of the world's biodiversity for food and agriculture, released in 2019 by the Food and Agriculture Organization of the UN (FAO), which indicated that 'fewer than 200 plant species make major contributions to food production and just three crops – wheat, maize and rice – account for more than half the world's plant-based calories' and that '[n]early one third of fish stocks are overfished and nearly 26 per cent of the 7,745 local livestock breeds are at risk of extinction.' (Elver, 2020). She called for 'new production methods that enhance, rather than degrade, biodiversity' with a view to 'sustainably increasing food outputs to meet the world's energy and nutritional needs requires.'

Clarity on the factual relationship between biodiversity and the human right to health is a more recent international development. In 2018, the Assembly of the World Health Organization has emphasised the complex and non-linear linkages specifically between human health, biodiversity (species and genotypes of organisms providing diverse foods, essential nutrients and medicines) and ecosystem services (WHO, 2018). It has increasingly underscored how:

- exposure to biodiverse green spaces, particularly in urban settings, can improve psychological, cognitive and physiological health (serving as a treatment for depression, anxiety and behavioural problems, as well as reducing recuperation times and improving recovery outcomes in hospital patients with non-communicable diseases) (WHO, 2018);
- exposure to biodiverse green spaces also provides health benefits for children's development, as well as encourages regular physical activity and improves life expectancy (WHO, 2018);
- Reduced human contact with biodiversity, alternatively, may lead to reduced diversity in the human microbiota, weakening of the human microbiome's immune-regulatory role and onset of non-communicable diseases (type 1 diabetes, multiple sclerosis, inflammatory bowel diseases) (WHO, 2016 and 2017).

This acknowledgement built on the 2016 *State of Knowledge Review on Biodiversity and Health* (WHO/CBD, 2016), which identified biodiversity as a key environmental determinant of human health due to links on various spatial (from planetary to microbial) and temporal scales, such as:

- all terrestrial and freshwater ecosystems play a role in underpinning the water cycle, including regulating nutrient cycling and soil erosion. Many ecosystems (such as mountain ecosystems) can also play a role in managing pollution; the water purification services they provide underpin water quality;
- ecosystems can affect air quality in three main ways: by directly removing air pollution (absorption or intake of gases through leaves, direct deposition of particulate matter on plant surfaces); by affecting meteorological patterns (local temperature, precipitation, air flows); and by emitting volatile organic carbons that affect atmospheric chemistry and air-quality regulation;
- components of biodiversity can be used as bio-indicators of known human health stressors, as well as in air- and water-quality mapping, monitoring and regulation. For instance, lichens are making headway as reliable indicators for air quality regulation. In addition, long-term trends in freshwater ecosystems (water quality) are arguably better monitored using the diversity of aquatic organisms;
- a diversity of species, varieties and breeds, as well as wild sources (plants, bush meat, insects and fungi) underpin dietary diversity and good nutrition. Global decline in various species will present major public health challenges for resource-dependent human populations, particularly in low- and middle-income countries (significantly increasing clinical levels of energy, protein, certain vitamins, iron, zinc, magnesium and fatty acids). Conservation measures that deny access to bush meat and other wild sources of food and medicines can thus have negative impacts on human health;
- human-caused changes in ecosystems, such as modified landscapes, intensive agriculture and antimicrobial use, are increasing the risk and impact of infectious disease transmission, because they result in enhanced opportunities for contact at the human/animal/environment interface and through changing vector abundance, composition, and/or distribution; and
- biodiversity has been an irreplaceable resource for the discovery of medicines and biomedical breakthroughs. Between 1981 and 2010, 75 % of anti-bacterials newly approved by the United States Food and Drug Administration can be traced back to natural product origins. Percentages of anti-virals and anti-parasitics derived from natural products approved during that same period are similar or higher. Reliance upon biodiversity for new drugs occurs in nearly every domain of medicine.

In the light of all these different inter-dependencies between biodiversity and human health, vulnerable people and groups (such as women and the poor) suffer disproportionately from biodiversity loss and have less access to social protection mechanisms (for example, access to health care). In addition, indigenous peoples and local communities' traditional medicine, which is developed on the basis of close interaction with nature and has contributed also to 'modern' medicinal development, is threatened by biodiversity loss (WHO, 2016b).

While the inter-linkages between biodiversity and human health are increasingly understood, including those from an explicit human rights perspective, more general assessments regarding the impacts of biodiversity loss on human rights are still limited. Assessments of evidence on the inter-dependencies between biodiversity and human well-being tend not to engage with human rights (Diz and Morgera, 2018). In addition, 'lack of disaggregated data on biodiversity access, use and control hampers efforts to design and implement measures that appropriately respond to [...] vulnerabilities' (Knox, 2017). This is compounded by the fact that we still do not fully understand 'what the thresholds and tipping points are, how long it might take for the full impacts of [biodiversity] loss to be felt, how much biodiversity is sufficient to support well-functioning ecosystems, or what impact different levels of biodiversity loss will have on the resilience of ecosystem functions' (Roe et al, 2019).

#### **Key messages:**

- biodiversity is being lost at an unprecedented pace and our efforts to protect it are not sufficient;
- nature protection is traditionally seen in opposition to economic and social development; but the growing understanding of the inter-dependencies of biodiversity and human rights shows that decisions on nature protection itself have socio-economic and cultural dimensions, which may lead to widespread negative impacts and to disproportionate impacts on the vulnerable;
- there is insufficient research and data on the human rights impacts of biodiversity loss.

#### **Recommendations:**

- The European Parliament could commission an independent study to assess global data availability on biodiversity loss and human rights;
- The EU could prioritise funding for inter-disciplinary research that directly engages with the inter-linkages between biodiversity and human rights. The European Parliament could use its budgetary powers to that end.

## **4.2 International biodiversity law: the status and content of obligations and guidelines**

Biodiversity is addressed in international law through a series of independent treaties<sup>3</sup>, that differ in terms of membership, approaches and compliance mechanisms, due to the diverse history, ideological premises and scope of each instrument's application (Cardesa-Salzmann, 2017). In addition to global treaties, there are others at regional level which are focussed on biodiversity. Despite this multiplicity of international

<sup>3</sup> Including, at the global level, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <http://www.cites.org>; Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <http://www.cms.int>; Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <http://www.biodiv.org>; International Plant Protection Convention, Rome, 6 December 1951, into force 3 April 1952, 150 *United Nations Treaty Series* 67; International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, in force 29 June 2004, <http://www.planttreaty.org/>; Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <http://www.ramsar.org>; and Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <http://whc.unesco.org>.

legal instruments, all have as their objective the conservation and sustainable use of biological resources. Moreover, they are all aligned with the overarching normative framework provided by the UN Convention on Biological Diversity (CBD), to which the EU and its Member States are party. The CBD was adopted in 1992 and entered into force in 1993. It currently counts 196 Parties (so it has universal membership, with the notable exception of the United States). The CBD has three objectives: the conservation of biodiversity, the sustainable use of biological resources (in other words, of living natural resources) and the equitable sharing of benefits arising from utilisation of genetic resources<sup>4</sup>.

This section of the in-depth analysis will focus mainly on the CBD, as this is the treaty that has been relied upon most frequently by international human rights bodies, notably with respect to indigenous peoples' rights in the context of extractives, agriculture and conservation (Morgera, 2019). Because of its broad coverage and openness to inputs from non-State actors (including indigenous peoples' and local communities' representatives), the CBD has functioned as a 'catch-all regime' that has addressed a variety of new threats to biodiversity and indigenous peoples' as well as local communities' livelihoods far beyond the expectation of its drafters (Morgera and Tsioumani, 2011). As such, it influences how other international biodiversity treaties have been interpreted. Accordingly, the discussion in this section on relevant developments under the CBD serves to inform opportunities for the EU to address biodiversity as a human right in other biodiversity treaties, which are discussed in Part II. CBD Parties also regularly consider the relevance of other international treaties, such as those in the areas of climate change and laws of the sea, so opportunities for the EU to address biodiversity as a human right in other international treaties are also discussed in Part II.

#### 4.2.1 Treaty obligations under the CBD

Obligations enshrined in the CBD include:

- the identification and monitoring of biodiversity, biodiversity changes and threats to biodiversity;
- the adoption of national biodiversity-specific plans;
- the mainstreaming of biodiversity in other policy areas;
- the creation of protected areas and the adoption of other conservation measures both where biological resources naturally occur (in their habitats) and elsewhere, as a safety net (this is referred to as 'ex situ conservation', as in gene banks, zoos, botanical gardens);
- the sustainable use of living resources;
- the conduct of impact assessments;
- the rehabilitation of degraded ecosystems;
- prevention of the spread of invasive alien species;
- the provision of incentives for conservation and sustainable use; and
- respect for indigenous peoples' and local communities' traditional knowledge, as well as support for their sustainable use practices.

All these provisions are framed in open-ended terms. On the one hand, this has allowed a variety of flexible approaches for implementation at national and local levels (which could support bottom-up and contextual human rights processes). On the other hand, though, this has allowed a wide margin of discretion in implementation for governments (which could support tokenistic or minimalistic approaches

<sup>4</sup> United Nations, 1992, CBD Article 1.



to human rights and biodiversity). As provisions contained in the CBD are often qualified (by terms such as 'as far as possible and appropriate'), the question has been raised as to whether or not it may in practice be impossible to identify an actual breach of obligations (Boyle and Chinkin, 2007; and Harrop and Pritchard, 2011). In the author's opinion, the correct understanding of the CBD content's status is that **all articles therein are legally binding**, as they are contained in a legally binding treaty and use legally binding language. Their qualifications pertain to **how the obligations will be implemented, not whether or not** they need to be implemented. Similar reasoning has been deployed, for instance, by the High Court of Australia (1983) when looking at similarly qualified language in the World Heritage Convention. The Court, in that case, held that:

*these articles impose a legally binding obligation that is 'real' and 'substantive' and could not be read as a mere statement of intention: it was expressed in the form of a command requiring each party to endeavour to bring about the matters dealt with — although there is an element of discretion and value judgment on the part of the State to decide what measures are necessary and appropriate, the discretion only concerns the manner of performance — not the issue of whether to perform or not.*

This is exactly where understanding the relevance of biodiversity as a human right makes a difference: **international human rights law clarifies the limits for States' discretion in implementing the CBD and other international biodiversity obligations**, thereby enhancing their justiciability (Morgera, 2019). For instance, in a case concerning the creation of a protected area in lands traditionally occupied by indigenous peoples, the Inter-American Court of Human Rights clarified that States' obligations under the CBD to respect indigenous peoples' customary sustainable practices imply the need to ensure the effective participation of indigenous peoples in the creation of protected areas, their continued access and use of traditional territories including those within the protected areas and their sharing in the benefits arising from conservation initiatives. In doing so, the Court emphasised that these obligations are also a matter of respect for indigenous peoples' human rights to a dignified life and cultural identity (IACHR, 2018, para 181 and 193).

That said, the CBD has yet to develop a systematic or credible system for monitoring implementation by States, so the opportunity to assess compliance with the CBD as part of international human rights monitoring systems has already been identified in the literature (Morgera, 2017; Savaresi, 2013). This is yet another instance in which understanding the relevance of biodiversity as a human right makes a difference: **international human rights law can provide international mechanisms to assess compliance under the CBD (Morgera, 2019)**. For instance, the Committee on the Elimination of Racial Discrimination underscored that Suriname had not yet ensured adequate socio-cultural and environmental impact assessments in accordance with relevant CBD guidance as part of its obligations to respect indigenous and tribal peoples' human rights (CERD Committee, 2015, para. 26).

A potential avenue for assessing compliance at the interface of international biodiversity law and human rights law could be the compliance mechanism under the CBD *Nagoya Protocol on Access to Genetic Resources and Benefit-sharing*, albeit this would have limited subject-matter application focused on bio-based innovation (Morgera, 2017). The Compliance Committee's composition includes two observers from indigenous peoples and local communities, who enjoy full participation but have no voting rights. In addition, indigenous peoples and local communities may submit information on alleged non-compliance by Parties to the Protocol's Secretariat, which will decide whether or not to trigger the compliance procedures. The Secretariat, before triggering this procedure, should attempt to solve the issue among that indigenous people/local community and the state concerned. Furthermore, in examining the cases brought to its attention, the Compliance Committee may seek, receive and consider information from relevant sources, including that from affected communities (so long as the reliability of this information can be ensured); seek advice from independent experts, including a community expert, particularly where

communities are directly affected; and undertake, upon invitation of the Party concerned, information-gathering in the territory of that Party. In addition, the Compliance Committee will consider the need for and modalities to provide advice and assistance to indigenous peoples and local communities to address cases of non-compliance (CBD, Dec NP-1/4).

## 4.2.2 Guidance adopted under the CBD

The Convention has developed a multitude of sub-processes for the further refinement of its provisions<sup>5</sup>, which have led to the inter-governmental development of guidelines for national implementation, often recommending reforms of national laws, policies and administrative practices (Morgera 2013b). Some international guidelines developed under the CBD have been repeatedly recognised by international human rights bodies to provide interpretative guidance or international standards to clarify how to implement the CBD together with relevant international human rights law. This is significant because guidance developed under the CBD can provide more detailed indications of what States, business enterprises and others need to do in the context of complex biodiversity governance processes together with other relevant policy and decision-making processes, as well as impact assessments. These are details that are not usually provided by international human rights bodies. **Understanding the extent and level of detail within existing international guidance is important for considering the EU's options in adopting a holistic human rights-based approach to biodiversity conservation and sustainable use.**

While not all the CBD guidance discussed in this study has yet been referred to by international human rights bodies, several guidelines are compatible with guidance developed by international human rights bodies. Hence, some of the sections below will show how they should be read together. This approach is also confirmed by other international processes focused on business responsibility to respect human rights, which have distilled how CBD guidance and international human rights law can be read together for the purposes of clarifying the expected standards of conduct for private companies.

In terms of the legal status of these international guidelines, CBD Parties often emphasise their voluntary nature, but only in two exceptional cases they have expressed the intention to limit their implications from the perspective of treaty interpretation (either as subsequent agreement or subsequent practice)<sup>6</sup>, in order to pre-empt limitations to States' discretion in developing national legislation<sup>7</sup>. In general, therefore, CBD decisions can be considered to be the expression of subsequent agreement or subsequent practice related to obligations – in other words, their **legal value as interpretative tools is derived from the obligatory nature of CBD provisions that they clarify**. Even in the few exceptional cases in which Parties have excluded their value as treaty interpretation tools, CBD guidelines could be considered as **'best practices' that serve to 'facilitate the implementation' of existing international obligations and should be 'adopt[ed] as expeditiously as possible.'**<sup>8</sup> This is because it becomes increasingly difficult for a State to

<sup>5</sup> The CBD COP has established seven thematic work programmes, namely on agricultural biodiversity, dry and sub-humid lands biodiversity, forest biodiversity, inland waters biodiversity, island biodiversity, marine and coastal biodiversity, as well as mountain biodiversity; and five crosscutting work programmes on incentive measures, the Global Taxonomy Initiative, protected areas, Article 8(j) (traditional knowledge), and technology transfer and cooperation. Work has also been undertaken on a series of other crosscutting issues, including climate change and biodiversity, the ecosystem approach, and sustainable use of biodiversity. See <http://www.cbd.int/programmes/>.

<sup>6</sup> CBD Dec. VII/12, F, para 2(c), with reference to Vienna Convention on the Law of Treaties (VCLT) article 31(3)(a) and (b) or special meaning as provided for in VCLT article 31(4). This is without prejudice to the interpretation or application of the Convention in accordance with VCLT Article 31(3)(c).

<sup>7</sup> The Mo'otz Kuxtal Voluntary Guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the 'prior and informed consent,' 'free, prior and informed consent,' or 'approval and involvement,' depending on national circumstances, of indigenous peoples and local communities for accessing their knowledge, innovations and practices, for fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge. (CBD Dec. XIII/18, 2016).

<sup>8</sup> This applies by analogy the reasoning in (Knox, 2018).

defend any sub-standard approach, particularly when the State has joined the consensus in accepting these guidelines after its participation in intergovernmental negotiations. Consensus adoption by 196 State Parties to the CBD had in practical terms a 'powerful law-making effect' with its 'securing widespread support for a text that legitimises and promotes consistent State practice' (Boyle and Chinkin, 2007).

An additional argument about the legal value of these guidelines is derived from international human rights law: **to the extent that their interpretative value is also recognised from an international human rights perspective, their legal value can also be derived from the legally binding human rights obligations to the interpretation of which they are considered relevant.** For instance, the Inter-American Court of Human Rights indicated that the creation of specific mechanisms that guarantee fair and equitable benefit-sharing from the use of biological resources with indigenous peoples, on the basis of the CBD, was a matter of international law on political rights. (IACHR, 2018, para 197) So the CBD and its decisions can be considered relevant in interpreting the international legally binding obligations of the EU Member States, that are all party to the Convention on the Elimination of All Forms of Racial Discrimination (with regard to indigenous peoples' rights and biodiversity<sup>9</sup>), the International Covenant on Economic, Social and Cultural Rights (with regard to everyone's right to health, food and water and biodiversity), the Convention on the Elimination of All Forms of Discrimination against Women (with regard to women's rights and biodiversity) and the Convention on the Rights of the Child (with regard to the rights of the child and biodiversity).

As the CBD guidelines and principles are explicitly aimed at influencing not only the conduct of CBD State Parties, but also inter-governmental organisations, as well as private companies, indigenous peoples and local communities, they have also been relied upon in international corporate accountability standard-setting and monitoring initiatives, for the purpose of complementing the UN Framework and Guiding Principles on Business and Human Rights (Morgera, forthcoming 2020). The EU and its Member States should also rely on CBD guidance to regulate and monitor businesses' conduct, to contribute to international initiatives on business responsibility to respect humans and in the context of climate change mitigation and adaptation.

On the whole, CBD guidance can provide a significant level of **legitimacy for EU external relations**: the EU and its Member States have contributed to developing guidance under the CBD as part of intergovernmental negotiations concluded by consensus and with contributions from indigenous peoples' and local communities' representatives, among other right holders.

Two examples will be provided here to demonstrate the relevance of CBD guidance. One notable case concerns the **CBD 'Akwé: Kon Guidelines on environmental and socio-cultural impact assessments'** (CBD Dec VII/16F (2004)), which provide step-by-step guidance on how to include biodiversity and socio-cultural impacts on indigenous peoples and local communities in environmental impact assessments (EIAs). Without using human rights terminology, these and other EIA-related guidance adopted under the CBD have identified **opportunities for EIAs to incorporate socio-cultural considerations that relate to human rights to subsistence, health and culture** (Craik, 2017; and Romppanen, 2017), **as well as to women's rights** (Craik, 2017). For example, the UK National Contact Point for the OECD Guidelines for Multinational Enterprises relied on the CBD Akwé: Kon Guidelines to interpret the OECD Guidelines and the UN Framework on Business and Human Rights. It found that a mining company did not adequately assess the socio-cultural and environmental impacts of mine construction on a forest-dependent

<sup>9</sup> Note that indigenous peoples' rights have been recognised (and their respect is invoked) under a variety of international human rights treaties, increasingly interpreted in line with the UN Declaration on the Rights of Indigenous Peoples (Morgera, 2018).



community and did not employ the local language or means of communication other than in written form for consultations with communities possessing very high illiteracy rates.<sup>10</sup>

Furthermore, the CBD Parties have adopted decisions on the **ecosystem approach**, which can be considered as the landmark regulatory strategy for the CBD and other biodiversity-related conventions<sup>11</sup>. Firstly, the ecosystem approach concerns *integration*: it is aimed at integrating the management of land, water and living resources, as well as balancing the three objectives of the Convention – conservation, sustainable use, together with access and benefit-sharing (CBD Dec., V/6, 2000). Hence, this approach fundamentally challenges the long-embedded sectoral and fragmented approach to environmental law-making and implementation at national and international levels (Finlayson et al., 2011, para. 196; and Platjouw, 2013, para. 158). Secondly, the ecosystem approach aims to integrate modern science and the traditional knowledge of indigenous peoples and local communities in adaptive management. Whilst balancing the CBD's different objectives, the ecosystem approach prioritises *conservation* with a view to ensuring ecosystem functioning and resilience. It conditions sustainable use so as to take into account the limits of ecosystem functioning and promotes connectivity. Another key dimension of this approach is its emphasis on *equity*, recognising that human beings and their cultural diversity are an integral component of many ecosystems. From this perspective, the ecosystem approach entails a decentralised, social process. It underscores the need for understanding and factoring in societal choices, rights and interests of indigenous peoples and local communities, along with intrinsic as well as tangible and intangible values attached to biodiversity, ultimately leading to a balance between local interests and the wider public interest. It also points to the challenge of ensuring appropriate representation of community interests in the decision-making process (CBD Dec., V/6, 2000). This is expected to enhance the responsibility, ownership, accountability and participation of different stakeholders in achieving the Convention's objectives and facilitating the use of local knowledge. From a normative perspective, the ecosystem approach should thus be understood as a consensus-building process, which requires good-faith efforts and a considerable investment of time and resources (CBD Dec., VII/11, 2004). **Equity provides an entry point for the consideration of human rights in biodiversity decision-making and management, along with the application of procedural human rights.** For instance, CBD Parties have agreed that ensuring equity in protected areas' governance entails appropriate mechanisms for: the full and effective participation of indigenous peoples and local communities; ensuring gender equality in the establishment, governance, planning, monitoring and reporting of protected and conserved areas on their traditional territories (lands and waters); the recognition of customary tenure and governance systems in protected areas; transparency and accountability; and fair dispute or conflict resolution (CBD, Decision XIV/8, 2018, Annex II,).

Finally, as our knowledge of ecosystem functioning is incomplete, the ecosystem approach is tightly linked with precaution: it is predicated on the application of appropriate scientific methodologies and on the adoption of adaptive management to deal with the complex and dynamic nature of ecosystems. It also calls for a prudent approach in respecting the limits of ecosystem functioning. (CBD, Dec. V/6, paras 2, 4, 6). The precautionary principle is thus interwoven with the ecosystem approach by taking into account the environment's vulnerability, the limitations of science, the availability of alternatives and the need for long-term, holistic environmental considerations, thus operating as a safeguard against asymmetric information and imperfect monitoring (Burns, 2007). As discussed below (section 4.3.6), this explains why CBD guidance on the ecosystem-based approaches to climate mitigation and adaptation has provided an understanding of how precaution and human rights interact.

<sup>10</sup> UK NCP, *Final Statement on the Complaint from Survival International against Vedanta Resources plc* (25 September 2009) available at <<http://www.oecd.org/corporate/mne/43884129.pdf>> accessed 27 February 2020, paras 44-46 and 79.

<sup>11</sup> As underlined by Council of the EU (2019), paras 12-13.

### Key messages:

- The CBD has been relied upon most frequently by international human rights bodies with respect to indigenous people's rights in the context of extractives, agriculture, conservation;
- Whilst the CBD articles are legally binding, there is significant room for States' discretion to decide on implementation measures; interpreting the CBD in a mutually supportive manner with international human rights law clarifies the limits of States' discretion under the CBD, thereby enhancing justiciability;
- Decisions adopted under the CBD provide interpretative guidance on the binding obligations contained in the CBD;
- In both cases discussed above, CBD decisions can be recognised as relevant interpretative guidance under international human rights treaties and international human rights bodies may contribute to assess compliance with the CBD and its guidance;
- CBD guidance is important for adopting a *holistic* and sufficiently detailed human rights-based approach to biodiversity conservation and sustainable use of living natural resources;
- Reliance on CBD guidance can lend legitimacy to EU external relations initiatives because such guidance is the result of consensus among 196 Parties and has benefitted (to varying extents) from contributions made by indigenous peoples' and local communities' representatives, among other right holders.

## 4.3 The extent and content of existing international obligations on biodiversity and human rights

Even if the CBD and its guidelines do not engage explicitly with human rights language and concepts, (e.g. Birnie et al., 2009; United Nations, 2011; and Anaya, 2012), they have made significant conceptual and normative contributions to the relationship between human rights and the environment, specifically with regard to indigenous peoples' rights to natural resources (Morgera, 2014). As a result, the CBD and its instruments have been increasingly relied upon by international human rights bodies (the Committee on the Elimination of Racial Discrimination, the UN Expert Mechanism on Indigenous Peoples' Rights, the UN Special Rapporteur on Indigenous Peoples' Rights and the Inter-American Court of Human Rights: see Morgera, 2018).

These developments have been summarised by the UN Special Rapporteur on Human Rights and the Environment, so as to clarify in a more systematic manner the role of the CBD in ensuring the protection, respect and realisation of human rights in its 2017 report on biodiversity and ecosystem services (Knox, 2017). That report for the first time authoritatively assessed CBD obligations as a matter of international human rights law, based on the unequivocal understanding that the full enjoyment of **everyone's human rights to life, health, food and water** depend on healthy ecosystems and their benefits to people (Knox, 2017, para 5). In other words, the protection and realisation of basic human rights depend on successful efforts to prevent biodiversity loss (Knox, 2017, para 5). This acknowledgment has the following implications that serve to clarify the limits of State discretion (thereby clarifying justiciability) in pursuing the CBD objectives relating to biodiversity conservation and sustainable use (Knox, 2017, para 34):

- States must develop laws and institutions that effectively '**regulate harm to biodiversity from private actors as well as government entities in a way that is 'non-retrogressive and non-discriminatory'**' (Knox, 2017, para 69). The State must establish and maintain substantive, non-discriminatory and non-retrogressive biodiversity policies and laws, including additional measures to protect the human rights of the most vulnerable, including children and communities that have a

close relationship with lands and resources on which they depend for their material needs and cultural life<sup>12</sup>.

- States **authorising any activity, either conservation or sustainable use of biodiversity, must ensure that no unjustified, foreseeable infringements of human rights may arise from their decisions** (Knox, 2017, para 69) by conducting **prior assessments of possible socio-cultural and environmental impacts of projects or policies that may affect biodiversity**<sup>13</sup>. This is based both on potential public interventions that may infringe biodiversity-dependent human rights and on States' obligation to prevent business entities from violating these rights (Knox, 2017, paras 33-34) in the context of extractives, agriculture, the creation of protected areas, climate change response measures, or renewables development. As further specified in the Framework Principles on Human Rights and the Environment presented by the UN Special Rapporteur in 2017, these assessments 'must include a careful examination of the impacts on the most vulnerable,' to avoid discrimination (Knox, 2017b) and ensure fulfilment of the obligations owed to those who are particularly vulnerable to environmental harm (Knox, 2017b, Principles 14 and 15).
- States must **protect biodiversity defenders as human rights defenders**, including activists that 'protect components of ecosystems whose benefits to humans may be less obvious, such as endangered species' (Knox, 2017, paras 31-32 and 68). This means that the UN Declaration on human rights defenders (United Nations, 1999) is applicable to biodiversity activists. Knox also recommended following international guidance on providing a safe and enabling environment for human rights defenders and generally protecting rights of freedom of expression, association and peaceful assembly in relation to biodiversity (Knox, 2017, para 68).
- States must ensure: **affordable, effective and timely public access to information** on biodiversity, in a language understandable to those affected; **public participation in decision-making** on biodiversity taking public views, including children's views, into account; access to **effective remedies** for violations of human rights and biodiversity laws by private and public actors (Knox, 2017, paras 27–32)<sup>14</sup>. These clarifications are particularly significant in promoting a move away from understanding the procedural dimensions of biodiversity conservation and sustainable use (Knox, 2017, para 67) as mere good governance<sup>15</sup>, towards regarding these dimensions rather as legally binding limitations to the discretion of CBD Parties. (de Silva, 2017)

**Inter-State cooperation also has implications for biodiversity as a human right** (Knox, 2017, paras 36-48). This means that States' duties to support biodiversity efforts in developing countries are relevant to realise human rights dependent on biodiversity and that such support should not be carried out in a way that may lead to violations of other human rights (Knox, 2017, paras 36-48). This therefore entails:

- As **donors**, States should require that conservation organisations: adopt human rights policies and monitor the application of human rights-based conservation programmes, notably in relation to indigenous peoples' rights; and provide direct funding to better support indigenous peoples' own initiatives for conservation (Knox, 2017, paras 83-84). In addition, CBD Parties have developed

<sup>12</sup> As reflected in more general environmental terms in the UN Framework Principles on Environment and Human Rights 11 and 14-15.

<sup>13</sup> As reflected in more general environmental terms in the UN Framework Principles on Environment and Human Rights (Framework Principle 8).

<sup>14</sup> Reiterated, in general terms, in the UN Framework Principles on Human Rights and the Environment, 7-10, 12 and 4-5.

<sup>15</sup> This is how it is framed by the Council of the EU: conclusions - Preparation of the post-2020 global biodiversity framework Convention on Biological Diversity (CBD) - 15272/19, 2019: promoting good governance for the integration of biodiversity in all relevant sectors, including by fostering public participation in decision-making processes, and improving the effectiveness of access to justice.

guidance for integrating certain human rights considerations into biodiversity finance (CBD, Dec. XII/3, 2014; Ituarte-Lima et al, 2012.)

- States should ensure that **multilateral biodiversity finance** (such as that included under the Global Environment Facility) have appropriate human rights safeguards. CBD Parties have developed guidance for integrating certain human rights considerations into biodiversity finance (CBD, Dec. XII/3, 2014; Ituarte-Lima et al, 2012.) While most multilateral environmental financial mechanisms, as well as multilateral development financial bodies, have already adopted safeguards that address potential negative impacts on indigenous peoples' rights and women's rights, these safeguards remain to be scrutinised in light of the most recent international developments on biodiversity and human rights. Their implementation and effects in practice also remain a matter of investigation;
- States should integrate human rights considerations in relation to biodiversity-related **technology transfer, capacity building, information sharing and scientific cooperation** (which could also be linked to current efforts to clarify the normative content of the human right to science), for instance by setting priorities that benefit the most vulnerable and safeguarding against negative impacts on human rights (Morgera, 2015; and Morgera and Ntona, 2018); and
- considering the linkages between international biodiversity law and human rights in the context of **international trade and investment agreements** (Knox, 2017, paras 36-39). The extent to which the EU has included these considerations in its bilateral trade agreements is discussed in Part III, together with a set of recommendations for ensuring that sufficient attention is given to biodiversity as a human right in the implementation of existing agreements and negotiations of new ones.

The following subsections will discuss specifically: the human right to health; the human rights of the child, of indigenous peoples and local communities and of women; climate change and human rights, business responsibility to respect human rights. The following subsections will thus provide a sense of the various dimensions of a holistic human rights-based approach to biodiversity loss.

### 4.3.1 Human right to health

CBD Guidance on the human right to health and biodiversity has explicitly highlighted the right to health as a fundamental right of every human being *and* the need to consider all dimensions of health and human well-being (food and nutrition security, infectious and non-communicable diseases as well as the psychological and biocultural dimensions of health). It has also identified the following obligations for States to be honoured through inclusive, support-adaptive approaches:

- Addressing the unintended negative impacts of health interventions on biodiversity (for example, antibiotic resistance, contamination from pharmaceuticals) and incorporating ecosystem concerns into public health policies;
- addressing the unintended negative impacts of biodiversity interventions on human health (for example, negative effects from the creation of protected areas or hunting bans on access to traditional food and medicinal plants);
- considering relevant health-biodiversity linkages in developing and updating relevant national policies, risk analyses, vulnerability assessments along with integrated impact and strategic assessments in order to target a broader spectrum of issues threatening health outcomes, including antimicrobial resistance, vector-borne and waterborne diseases, food security and malnutrition, as well as interactions with other drivers of biodiversity loss and ill health, including climate change (WHO, 2018; CBD, Dec. XIII/6, 2016);
- adopting preventive measures for human health based on strengthening the resilience of socio-ecological systems (CBD, Dec. XIV/4, 2018).

**Recommendations:** The EU could develop a holistic human rights-based approach to biodiversity loss by:

- raising the nexus between biodiversity and everyone's right to health in other relevant international environmental and human rights processes on the basis of the CBD guidance and the evidence base compiled by the CBD Secretariat and the WHO (see Part II);
- integrating the nexus between the human right to health and biodiversity in external relations tools that already address health and/or the environment (see Part III).

### 4.3.2 Women's Rights

Biodiversity concerns women's rights in the ownership, acquisition, management, administration, enjoyment and disposition of land (United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, art 16(1)(h)), non-discrimination in rural areas, as well as women's participation in and benefit-sharing from rural development (CEDAW, art 14(2)). These represent entry points for ensuring the respect and full realisation of women's rights in regard to conservation along with the use of biological and genetic resources (Kenney and Schroder, 2016; and Jenkins 2017), particularly in the context of rural development (which is understood to comprise agricultural and water policies, forestry, livestock, fisheries and aquaculture).

Guidance provided by the Committee of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Committee 2016) is, therefore, relevant in interpreting State obligations under the CBD, such as:

- establishing gender-responsive enabling institutional, legal and policy frameworks, that are adequately budgeted, on rural development, agriculture, water, forestry, livestock, fisheries and aquaculture;
- mainstreaming a gender perspective in all rural development policies, strategies, plans and programmes, with a view to enhancing women's agency, their fair and equitable participation along with their leadership; and
- developing and implementing temporary special measures to enable rural women to benefit from the public distribution, lease or use of land, water bodies, fisheries, forests and from agrarian reform policies, rural investments and management of natural resources in rural areas, giving priority to landless rural women in the allocation of public lands, fisheries and forests.

These clarifications on States' obligations under CEDAW help delimit States' discretion under the CBD, including under the CBD 2015-2020 Gender Plan of Action, which aims to mainstream a gender perspective in implementing the Convention and promote gender equality in achieving the objectives of the Convention. While the CBD Action Plan merely refers to a list of 'possible actions for State Parties,' States that are both party to CEDAW and the CBD should consider the following as legally binding obligations:

- Ensuring that women are effectively consulted during national biodiversity strategy and action plan development;
- Incorporating national gender policies into national biodiversity strategies and action plans;
- Assessing how biodiversity considerations, including national biodiversity strategies and action plans, can be mainstreamed into national gender policies and action plans;
- adopting gender-responsive budgeting when assigning resources for implementation of the Convention; and
- considering the different risks faced by men and women as a result of actions under the Convention.



In turn, the CBD 2015-2020 Gender Plan of Action identifies helpful practical steps to ensure implementation of the human rights of women in the context of biodiversity policy, such as:

- requesting that gender experts review draft national biodiversity strategies and action plans in order to assess gender sensitivity and provide guidance on improvements;
- identifying indigenous and local communities' experts on diversity and gender mainstreaming to support the integration of gender considerations into national biodiversity strategies and action plans;
- establishing a gender review body or agreement, including indigenous and local communities, that can provide input on the gender sensitivity of documents and plans prepared to support implementation of the Convention; and
- identifying which sectors are already gathering and using gender-disaggregated data.

Finally, the CEDAW Committee recommended ensuring that rural development projects (including actions for the conservation and sustainable use of biodiversity) are implemented only after: 1) conducting participatory gender and environmental impact assessments with full participation of rural women; and 2) obtaining rural women's FPIC and ensuring benefit-sharing (for instance, in revenues generated by large-scale development projects: CEDAW/C/ARG/CO/7). More clarity on the obligations on EIAs, FPIC and benefit-sharing for rural women could be derived by analogy from the CBD guidance on indigenous peoples and local communities (discussed at 4.3.4 below). This guidance is also relevant for agri-business, as highlighted in the Committee on Food Security's Principles on Responsible Investment in Agriculture and Food Systems and the FAO-OECD Guidance on Responsible Agricultural Supply Chains.

**Recommendations:** The EU could develop a holistic human rights-based approach to biodiversity loss by:

- exploring how the CBD can serve as a forum in which to 'vigorously promote and scale-up international efforts towards gender equality' as well as gender analysis and gender mainstreaming, as highlighted by the Council conclusions on priorities in UN human rights for a decade during 2020 (see recommendations in Part II);
- raising the nexus between biodiversity and gender equality and the opportunities for gender and biodiversity mainstreaming, in relevant international environmental and human rights processes (see Part II);
- integrating the nexus between women's rights and biodiversity in external relations tools that already address human rights and/or the environment, including EU initiatives on human rights and environmental defenders (see Part III).

### 4.3.3 Human rights of the child

While CBD Parties have not focused explicitly on biodiversity and the human rights of children, the clarifications of the UN Special Rapporteur on Human Rights and the Environment on the relationships between the **human rights of children** and the environment can be read **in the specific context of biodiversity** as States' obligations to:

- establish and maintain substantive non-regressive and precautionary biodiversity standards that should include the best interests of the child as a primary consideration;
- collect and make publicly accessible information about biodiversity loss and how it may harm children;
- include children in biodiversity decision-making and impact assessment, ensuring that the effects of proposed measures on children's rights, specifically those children most at risk, are assessed before the measures are taken or approved;

- integrate the rights of children in international discussions on biodiversity and future generations;
- ensure that educational programmes increase children's understanding of biodiversity and strengthen their capacity to respond to biodiversity loss;
- protect children from reprisals resulting from their participation or otherwise expressing their views on biodiversity;
- remove barriers for children to access justice for biodiversity loss to the full extent and enjoyment of their human rights; and
- as donors, ensure through the use of appropriate safeguards that funded projects do not cause biodiversity loss that adversely affect the rights of children (Knox, 2018, paras 33 (d), 67-68, 72 and 76-78).

That said, more work could be done internationally to further develop (and raise awareness about) the **evidence base** of the inter-linkages between the human rights of the child and biodiversity (building, *inter alia*, on the evidence base on human right to health and biodiversity) and to clarify **State obligations, as well as business and civil society responsibility** to respect biodiversity-dependent children's rights. The need for this work is evidenced by the lack of a specific section on biodiversity in the 2020 Report of the UN High Commissioner for Human Rights on Realizing the Rights of the Child through a Healthy Environment (United Nations, 2020). More systematic factual and legal evidence on biodiversity-dependent human rights of the child would make a significant difference in current international biodiversity negotiations, by **taking seriously inter-generational equity as part of the ecosystem approach and recognizing that inter-generational equity already has a hard legal edge in as far as the human rights of the child are at stake.**

**Recommendations:** The EU could develop a holistic human rights-based approach to biodiversity loss by:

- considering the CBD as an international forum in which to promote the protection and fulfilment of all children's human rights, particularly those in vulnerable situations and supporting initiatives aimed at realising the rights of the child through a healthy environment, as highlighted by the Council conclusions on priorities in UN human rights fora during 2020 (see recommendations in Part II);
- raising the nexus between biodiversity and children's rights and the need to include children's views, in relevant international environmental and human rights processes (see Part II);
- integrating children's rights and biodiversity in external relations tools that already address human rights and/or the environment, including EU initiatives on human rights and environmental defenders (see Part III).

#### 4.3.4 Human rights of indigenous peoples

UN Special Rapporteurs on Human Rights and the Environment as well as Indigenous Peoples' Rights have clarified more specifically inter-connected obligations concerning the **use of lands, territories and resources that are traditionally owned, occupied, or used by indigenous peoples**. These include those lands to which they have had access for their subsistence and traditional activities, even when they do not have formal recognition of property rights or delimitation and demarcation of boundaries (Knox, 2017b, paras 53 and 48). State obligations are to:

- Respect and protect indigenous peoples' traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories, resources (Knox, 2017b, para 52), including biological and genetic resources; assist indigenous peoples' conservation efforts (Knox, 2017b, para 52);
- ensure indigenous peoples' full and effective participation in decision-making on legislative or administrative measures, or proposed projects that may affect them directly, in relation to biodiversity

conservation, the use of biological or genetic resources, the use of their knowledge, or the use of non-living resources that may affect biodiversity or their traditional knowledge; this applies also to proposals for alienating lands and territories or otherwise transferring their rights<sup>16</sup>;

- consult with indigenous peoples to obtain their free, prior and informed consent (FPIC) before taking or approving any measures that may affect their lands, territories, or resources, on the basis of access to all relevant information in understandable and accessible forms<sup>17</sup>;
- carry out prior assessments of the environmental and social impacts of proposed measures in accordance with the CBD Akwé: Kon Guidelines (Knox, 2017b, para 20 and 43); and
- ensure that indigenous peoples 'fairly and equitably share the benefits from activities relating to their lands, territories or resources.' (Knox, 2017b, para 18).

With regard to the **creation of protected areas** (Knox, 2017b, paras 178, 214 and 247; CBD, Dec. VII/28, 2004), safeguards comprise effective participation, access and use of their traditional territories as well as benefit-sharing, provided that they are compatible with protection and sustainable use (Inter American Court of Human Rights, 2015, para 181). In addition, States are to respect and protect indigenous as well as local efforts to protect biodiversity, including Indigenous and Community Conserved Areas (ICCAs) (Knox, 2017, para. 71), on which the CBD has provided guidance (Jonas, 2017).

On that basis, the UN Special Rapporteurs on Human Rights and the Environment as well as on Indigenous Peoples' Rights have clarified the **responsibilities of conservation organisations** to take a rights-based approach by (Knox, 2017, para. 73; and Tauli-Corpuz, 2016, paras 77-82):

- Conducting human rights impact assessments, improve monitoring and include compliance with indigenous peoples' rights in regular project assessments, ensuring that information obtained through these processes is transparent and accessible;
- establishing effective and culturally appropriate grievance mechanisms together with supporting initiatives for indigenous peoples' right to remedy in cases where conservation activities have generally impacted their rights negatively;
- developing mechanisms to establish solid partnerships for regular and continuous engagement with indigenous peoples, including ensuring their full and effective participation in designing, implementing and monitoring conservation initiatives; and
- supporting indigenous peoples in developing and sustaining their own conservation initiatives as well as exchanging conservation management experiences with them, so as to learn from indigenous traditional conservation measures as well as transferring technical skills by engaging indigenous peoples in protected areas management.

In addition, conservation organisations are expected to share good practices and build partnerships with human rights organisations (Knox, 2017, para. 73).

Furthermore, the UN Special Rapporteurs on Human Rights and the Environment as well as on Indigenous Peoples' Rights have clarified that in all activities which may affect biodiversity **business enterprises** should:

- conduct impact assessments and consultation with potentially affected groups and stakeholders following the CBD Akwé: Kon Guidelines (Knox, 2017, para. 72) and examine specifically impacts on children (Knox, 2018, para. 79);

<sup>16</sup>. Applying by analogy the reasoning in (Knox, 2017b, para 50).

<sup>17</sup>. Which is linked to UN Framework Principles 7 and 8 (Knox, 2017b, paras 11-12).



- take appropriate action with regard to 'any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships' in accordance with the [UN Guiding Principles on Business and Human Rights](#);
- avoid seeking or exploiting indigenous and community conserved areas (ICCAs) or protected areas; and
- seek prior informed consent, ensuring fair and equitable benefit-sharing, in accordance with guidance from the UN Special Rapporteur on Indigenous Peoples' Rights (Knox, 2017, para. 72 and Anaya, 2013).

A closer analysis of relevant CBD guidance can provide even more clarity on the interface between impact assessment obligations, FPIC along with fair and equitable benefit-sharing to ensure the respect of indigenous peoples' human rights.

On **EIAs**, the Akwé: Kon Guidelines provide a step-by-step approach to the inclusion of inter-linked socio-cultural and biodiversity concerns in environmental impact assessments, calling for specific attention to: beliefs systems, languages and customs, traditional systems of natural resource use, maintenance of genetic diversity through indigenous customary management, exercise of customary laws regarding land tenure, as well as distribution of resources and benefits from transgenerational aspects, including opportunities for elders to pass on their knowledge to youths. The Akwé: Kon Guidelines clarify that processes should be established for recording indigenous communities' views, for example when they are unable to attend public meetings because of remoteness or poor health, as well as the usage of nonwritten forms. In addition, governments should provide sufficient human, financial, technical and legal resources to support indigenous expertise proportionally to the scale of any proposed development. Indigenous communities should also be involved in the development's financial auditing processes so that the resources invested are used effectively (CBD Dec VII/16F, 2004, para. 18, 24, 49).

On **FPIC**, the 2016 CBD Mo'otz Kuxtal Voluntary Guidelines on consent and benefit-sharing from the use of traditional knowledge (CBD, Dec. XIII/18, 2016) arose from a remarkably frank exchange of ideas between CBD parties and indigenous peoples' representatives (Morgera, 2015b). While these guidelines focus on access to the traditional knowledge of indigenous peoples and local communities, their clarifications of FPIC and benefit-sharing obligations can also be considered relevant for other contexts (extractives or creation of protected areas, for instance), both because of the guidance's general nature and the inextricable links between indigenous peoples' lands, resources and knowledge (Knox, 2017b, para 53).

Firstly, while the Guidelines fall short of aligning unequivocally with human rights terminology (notably due to the inability of national delegations to find consensus on referring to 'free prior informed consent' - FPIC in accordance with the UN Declaration on the Rights of Indigenous Peoples), nonetheless they contain several elements that serve to explain what FPIC and benefit-sharing obligations entail that go beyond any guidance available under international human rights. FPIC conveys that indigenous peoples should not be 'pressured, intimidated, manipulated or unduly influenced.' Secondly, the understanding of 'prior' underscores the need to take into account the time requirements for indigenous peoples' own decision-making procedures. Thirdly, the understanding of 'consent or approval' includes the right *not* to grant consent and to allow the temporary use of traditional knowledge only for the purpose that it was granted, unless it was otherwise mutually agreed. (CBD, Dec. XIII/18, 2016, para 7) More fundamentally, the Guidelines emphasise that FPIC is a '*continual* process of building mutually beneficial, *ongoing* arrangements between users and holders of traditional knowledge, in order to build trust, good relations, mutual understanding, intercultural spaces, knowledge exchanges and to create new knowledge and reconciliation'. This clearly clarifies that consent or approval is an iterative process, not a one-off exercise, which 'should underpin and be an integral part of developing a relationship between users and providers of traditional knowledge.' (CBD, Dec. XIII/18, 2016, para 8; Morgera, 2018).

In addition, the Mo'otz Kuxtal Guidelines provide step-by-step guidance to implement FPIC through:

- the provision of adequate and balanced information from a variety of sources that is made available in indigenous or local languages, to ensure that all parties have the same understanding of information and terms provided;
- the submission of a written application in a manner and language comprehensible to the traditional knowledge holder; and
- a legitimate and culturally appropriate form of decision-making process, including consideration of possible social, cultural and economic impacts (CBD, Dec. XIII/18, 2016, para 7(b)).

The aim and content of international obligations regarding **fair and equitable benefit-sharing** in international human rights law remain more elusive than EIA and FPIC. First of all, UN Special Rapporteur on Indigenous Peoples' Rights James Anaya emphasised that the preferred model for natural resource development is 'one which indigenous peoples themselves initiate and engage in.' Extractive projects are to be carried out by outside companies or the State only if indigenous peoples are not able to do so themselves and in that case an agreement is needed to fully protect their rights and make indigenous peoples genuine partners in natural resource development projects (for instance, through a minority ownership interest in the extractive operations) to participate in project decision-making *and* share in profits (Anaya, 2013, para, 75). This points to the usefulness of benefit-sharing arrangements that at the same time provide enhanced participation opportunities and income generation for indigenous peoples. In addition, Anaya emphasized that 'benefit sharing must go beyond restrictive approaches based solely on financial payments which, depending on the specific circumstances, may not be adequate for the communities receiving them.' He referred to documented experience showing that monetary benefits to indigenous peoples may have negative (including divisive) effects on communities and lead to the exercise of undue influence and even bribery. Accordingly, he recommended giving consideration to 'the development of benefit-sharing mechanisms which genuinely strengthen the capacity of indigenous peoples to establish and follow up their development priorities and which help to make their own decision-making mechanisms and institutions more effective' (Anaya 2010, para. 80). Anaya thus encouraged indigenous peoples to use consultations with governments and other stakeholders as mechanisms to reach 'agreements that are in keeping with their own priorities and strategies for development, bring them tangible benefits and, moreover, advance the enjoyment of their human rights' (Anaya, 2013, para. 59). Other international human rights processes have been significant in clarifying that it must be consistent with indigenous peoples' and traditional communities' own priorities (Knox, 2017b para 53 and 47-49). Moreover, the absence of explicit mechanisms that guarantee benefit-sharing from conservation measures constitutes a violation of political rights. (IACHR, 2018)

In turn, CBD guidance provides more detail on how fair and equitable benefit-sharing supports the agency of beneficiaries and the need to build a genuine partnership among actors whose relationship is characterised by power asymmetries (Morgera, 2019, para.8). The Akwé: Kon Guidelines call for the integration of benefit-sharing as part of any assessment, which can help move away from an exclusive focus on 'damage control' issues that tend to characterise these exercises (Morgera, 2019). Carefully thinking about benefits from indigenous peoples' viewpoint at the early stage of scoping for impacts, in and of itself requires a systematic consideration of not only of negative impacts (such as potential damage to ways of life, livelihoods, well-being and traditional knowledge) but also of positive impacts on food, health, environmental sustainability, together with community well-being, vitality and viability (employment levels and opportunities, welfare, education and its availability as well as standards of housing, infrastructure, services) (CBD, Dec VII/16F, 2004, para. 40). With that, the Guidelines may 'open up' assessment to different worldviews so as to take into account, in an integrated manner, indigenous peoples' rights over lands and waters traditionally occupied or used by them together with their associated biodiversity (Morgera, 2019).

The CBD Mo'otz Kuxtal Guidelines, in addition, emphasise that benefit-sharing is about iterative partnership building, rather than a top-down, one-off or unilateral flow of benefits where indigenous peoples are passive beneficiaries (Morgera, 2019). These guidelines make reference to partnership and cooperation as principles which guide the process for establishing mutually agreed terms, so as to ensure fair and equitable benefit-sharing with and among traditional knowledge holders. In addition, they indicate that 'benefits should, as far as possible, be shared in understandable and culturally appropriate formats, with a view to building enduring relationships, promoting intercultural exchanges, knowledge and technology transfer, synergies, complementarity and respect.' (CBD, Dec. XIII/18, 2016, para 23) Furthermore, the Mo'otz Kuxtal Guidelines draw attention to the role of benefit-sharing in supporting cultural reproduction, by stating that 'benefit-sharing could include a way of recognising and strengthening the contribution of indigenous peoples and local communities to the conservation and sustainable use of biological diversity, including support for the intergenerational transmission of traditional knowledge.' (CBD, Dec. XIII/18, 2016, para 13) Finally, concerns about potential inequities at the level of intracommunity benefit-sharing that have already been encapsulated in other international guidelines—notably the Committee on Food Security's Guidance for Responsible Agricultural Investment (Bruoni, 2015)—are also addressed. The Mo'otz Kuxtal Guidelines note that 'benefit-sharing should be fair and equitable within and among relevant groups, taking into account relevant community level procedures and as appropriate gender and age/intergenerational considerations.' (CBD, Dec. XIII/18, 2016, para 14)

This more specific international guidance can be relied upon in the EU's support for the respect of indigenous peoples' FPIC, including on the basis of appropriate EIAs and fair and equitable benefit-sharing, in implementing the EU priorities set out in the May 2017 Council conclusions on Indigenous peoples and the European Parliament's Resolution of 3 July 2018 to violation of the rights of indigenous peoples in the world. The continued relevance of this area of EU external action has been confirmed by the 2019 Global Assessment of Biodiversity and Ecosystems Services and at the EU Roundtable with indigenous peoples' experts and representatives that took place on 24-25 February 2020 in Brussels<sup>18</sup>. This international guidance can inform enhanced dialogue with indigenous peoples at all levels of EU cooperation, including in EU funded programmes and projects, to secure their FPIC in a meaningful and systematic way, with a view to supporting effective actions taken to address the threats to indigenous peoples and individuals as well as to human rights defenders, in the context of land and natural resources, as well as in the protection of the environment, biodiversity and the climate.

**Recommendations:** The EU could develop a holistic human rights-based approach to biodiversity loss by:

- promoting in the context of the CBD the implementation of the UN Declaration on the Rights of Indigenous Peoples and of the UN Guiding Principles on Business and Human Rights, as well as supporting indigenous peoples' active engagement – in line with the Council conclusions on priorities in UN human rights fora in 2020, adopted on 17 February 2020;
- relying on CBD guidance on EIA, FPIC and benefit-sharing to support the recognition and protection of indigenous peoples' rights in other relevant international environmental and human rights processes (see Part II);
- relying on CBD guidance on EIA, FPIC and benefit-sharing in external relations tools geared towards ensuring the respect of indigenous peoples' biodiversity-dependent human rights; and
- ensuring respect of CBD guidance on EIA, FPIC and benefit-sharing in the context of the EU funded projects and activities (see Part III).

<sup>18</sup> Please see [https://eeas.europa.eu/topics/human-rights-democracy/75160/eu-committed-enhance-opportunities-dialogue-indigenous-peoples\\_en](https://eeas.europa.eu/topics/human-rights-democracy/75160/eu-committed-enhance-opportunities-dialogue-indigenous-peoples_en).

### 4.3.5 Local communities

The international obligations with regard to indigenous peoples described above are also increasingly expected to be applied to other local or traditional communities, a term that could include farmers under the International Treaty on Plant Genetic Resources for Food and Agriculture (Article 9 (2)), peasants under the UN Declaration on the Rights of Peasants (United Nations 2019), small-scale fishing communities (FAO 2013, para. 5.1 and De Schutter 2012) and ‘tenure right holders’ (i.e., those having a formal or informal right to access land and other natural resources for the realisation of their human right to adequate standard of living and well-being). (CBD Decision XII/5, year). As Knox has explained, these communities may be comparable to indigenous peoples with regard to vulnerability in that whilst not self-identifying as indigenous peoples they nevertheless have a similarly close relationship with territories and ‘depend directly on nature for their material needs and cultural life’ (Knox, 2017b, para. 48). These groups would benefit from protection for the general application of human rights (such as those related to property, subsistence and culture) (Bessa 2012), which may be negatively affected by interference to their customary relations with land and biological resources (De Schutter, 2010). Accordingly, ‘additional measures [are needed] to protect those who are most vulnerable to, or at particular risk from,’ biodiversity loss, as well as ‘effective measures against the underlying conditions that cause or help to perpetuate discrimination, such as those measures that have disproportionately severe effects on communities that rely on the ecosystems (such as mining and logging concessions) or historical or persistent prejudice against groups of individuals that can be reinforced by environmental harm.’ (Knox, 2017b, para. 9)

Another piece of CBD guidance, the Voluntary Guidelines on Biodiversity-inclusive Impact Assessments (CBD, 2006), support incorporating biodiversity-related issues into EIAs beyond cases in which sacred sites or lands traditionally used by indigenous peoples are concerned. These guidelines call for an assessment of several human rights-related issues for non-indigenous communities, such as: inter-related ‘socio-economic, cultural and human-health’ impacts; changes in access to and rights over biological resources; social change processes resulting from a proposed project; sensitive species that may be important for local livelihoods and cultures; activities leading to displacement of people; along with impacts on societal benefits and values related to land-use function<sup>5</sup> (CBD, Dec. VI/7, 2002). In this connection, the UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) – which have been considered relevant to address poverty in implementing the CBD (CBD, Dec. XII/5, 2014, Annex, section 2, para. (b) and Decision XIII/3, 2016, para. 7) – call for states to ensure responsible governance of tenure because land, fisheries and forests are central for the realisation of human rights (FAO, 2012, Appendix D (VGGT), para. 4.1). The VGGT call for the recognition and respect of all legitimate tenure rights, as well as the rights of indigenous peoples, other communities with customary tenure systems, including vulnerable groups and women’s rights (FAO, 2016a).

**Recommendations:** The EU could develop a holistic human rights-based approach to biodiversity loss by:

- supporting work on non-indigenous communities’ human rights and biodiversity under the CBD and other relevant international fora (see Part II); and
- relying on CBD guidance on EIA, FPIC and benefit-sharing in external relations tools to ensure the protection of the human rights of non-indigenous local/traditional communities whose rights are biodiversity-dependent (see Part III).

### 4.3.6 Climate Change and human rights

CBD Parties have systematically identified potential and actual threats that climate change and climate change response measures pose to the conservation and sustainable use of biodiversity, along with ways to assess and prevent negative impacts on biodiversity through mutually supportive interpretation and application of international climate and biodiversity law (Morgera, 2013). These contributions have been based on the CBD ecosystem approach and have (often implicitly) contributed to defining a rights-based

approach to climate change adaptation and mitigation, mainly with regard to the human rights of indigenous peoples and local communities (Morgera, 2018; see section 4.3.3 above).

This is particularly significant as the EU has been involved in renewable energy development projects that have had negative human rights impacts. For instance, in 2010, the European Investment Bank helped to finance extension of the geothermal power plants in Kenya, which forced the [resettlement of around 1000 people from four indigenous Maasai villages](#). In 2018, claiming threats to local livelihoods and ecosystems, representatives of 17 traditional communities in Georgia opposed the development of a hydropower project, which was supported by approved investments of USD 150 and 229 million by the EIB and the EBRD respectively<sup>19</sup>. However, **relevant CBD guidance can support implementation of the European Parliament resolution of 3 July 2018 on violation of the rights of indigenous peoples in the world, including land grabbing (2017/2206(INI)) and the May 2017 Council conclusions on Indigenous peoples, in the context of EU external action on climate change**. It can also support the Council's preference for '**nature-based solutions** in support of biodiversity protection, restoration and sustainable use, as well as climate change mitigation and adaptation<sup>20</sup>.

CBD Parties have committed to (CBD, Dec. XIV/5, 2018):

- Integrating ecosystem-based approaches when updating their nationally determined contributions, where appropriate and pursuing domestic climate action under the Paris Agreement, taking into account the importance of ensuring the integrity and functionality of all ecosystems, including oceans;
- recognising that ecosystems can be managed to limit climate change impacts on biodiversity and support people's resilience, taking into account multiple social, economic and cultural co-benefits for local communities; and
- recognising the role of ICCAs and biodiversity-based livelihoods in the face of climate change.

More specific guidance on the ecosystem-based approach to mitigation has been adopted on:

- **geo-engineering**, where CBD Parties have indicated that in the absence of science-based, global, transparent and effective control as well as regulatory mechanisms for geo-engineering, no geo-engineering activities that may affect biodiversity can take place, until there is an adequate scientific basis on which to justify them. Moreover, appropriate consideration must be given to associated risks for the environment and biodiversity along with associated *social, economic and cultural impacts* (arguably an implicit entry point for human rights considerations) (CBD, Dec. X/33). It must be underlined that CBD Parties have not reported to the CBD on their implementation (CBD, Dec. XI/20 2012, paras 6-7; CBD, Dec. XIII/14 2016, para. 4);
- **biofuels** production together with the production and use of biomass for energy, where CBD Parties have elaborated guidance to avoid or minimise negative impacts on forest biodiversity and indigenous peoples as well as local communities (CBD, Dec. IX/2, 2008). Relevant guidelines were listed in the decision, namely: the Addis Ababa Principles and Guidelines on Sustainable Use (CBD, Dec. VII/12, 2004); the work programme on protected areas (CBD, Dec. VII/28, 2004); the work programme on traditional knowledge (CBD, Dec. V/16, 2000); the Akwé: Kon Guidelines (CBD, Dec. VII/16F, 2004); the Global Strategy for Plant Conservation (Decision VI/9, 2002); the guiding principles on alien invasive species (CBD, Dec. VI/23, 2002). Impact assessments must also be carried out to address relevant land tenure and resource rights and impacts on areas of cultural, religious and heritage interest. Furthermore, there must

<sup>19</sup>Please see <https://bankwatch.org/project/hydropower-development-georgia> .

<sup>20</sup> As underlined by Council of the EU: Council Conclusions - Preparation of the post-2020 global biodiversity framework Convention on Biological Diversity (CBD) - 15272/19 (2019).



be respect for indigenous peoples' and local communities' sustainable agricultural practices, along with food and energy security. (CBD, Dec. X/37, 2010, paras 2, 6 and 8-10);

- **REDD+**, where CBD Parties have elaborated guidance on human rights-related concerns, such as the possible loss of traditional territories and restriction in the rights of indigenous peoples and local communities to have access to, use of and/or ownership of land and natural resources. Other concerns include inadequate tangible livelihood benefits for indigenous peoples and local communities as well as a lack of equitable benefit-sharing; and the need to ensure the full and effective participation of indigenous peoples as well as local communities in relevant policy-making and implementation processes. (CBD, Dec. XI/9, Annex). There appears so far to be little take-up of these guidelines under the climate change regime (Maljean-Dubois and Wemaere, 2017).

With regard to **climate change adaptation**, CBD Parties have adopted voluntary guidelines for the design and effective implementation of ecosystem-based approaches to adaptation and disaster risk reduction. (CBD, Dec. XIV/5) These should be aimed at contributing to the well-being of societies, including indigenous peoples and local communities, together with maintaining as well as increasing the resilience of ecosystems and people. The guidelines should be read in conjunction with the CBD short-term action plan on ecosystem restoration (CBD, Dec. XIII/5). Together, these guidelines call for:

- ensuring transparency throughout planning and implementation;
- promoting fair and equitable benefit-sharing and not exacerbating existing inequities (CBD Dec XIII/5, Annex para 8), thus aiming to prevent and avoid the disproportionate impacts of climate change as well as disaster risk on vulnerable groups, indigenous peoples as well as local communities, women and girls (CBD Decision XIV/5);
- integrating traditional knowledge in identifying and monitoring climatic, weather and biodiversity changes along with impending natural hazards and maintaining/re-introducing customary sustainable use (traditional agricultural practices);
- applying the CBD Akwé Kon Guidelines at the earliest stage of project design (CBD, Dec. XIV/5, 2018);
- seeking prior informed consent through the full and effective participation of indigenous peoples and local communities, as well as the engagement of women and other relevant stakeholders at all stages of ecosystem restoration, particularly in the identification of priority areas for restoration;
- reviewing, improving or establishing a legal and policy framework for land tenure, recognising the rights of indigenous peoples and local communities;
- selecting restoration approaches that allow people to maintain and/or establish sustainable livelihoods; and
- maximising synergies to achieve multiple benefits, for instance in gender equality and human health (CBD, Dec. XIII/5, 2016, Annex para 8-10, 13(3), 14(2), 15(1)).

On **coral reefs and closely associated ecosystems (such as mangroves and seagrasses)**, CBD Parties have adopted voluntary guidelines that can support socio-ecological resilience to the impacts of climate change, as well as respect for substantive and cultural rights, by calling for:

- maintaining sustainable livelihoods and food security in reef-dependent coastal communities, including indigenous and local communities, along with providing for viable alternative livelihoods;
- promoting community-based measures, including community rights-based management, to manage fisheries sustainably; and encouraging as well as supporting community-based marine managed areas;

- managing impacts from large-scale tourism development and consequent habitat loss as well as alteration in coral reefs and closely associated ecosystems, together with support for sustainable tourism, by providing socioeconomic incentives and empowering coastal communities for eco-tourism operations (CBD, Dec. XII/23, para 8.1.b, 8.3.c-g, 8.8c);
- identifying and applying measures to improve the adaptive capacity of coral reef-based socio-ecological systems within the local context, which will ensure sustainable livelihoods of reef-dependent coastal communities and provide for viable alternative livelihoods, on the basis of socio-ecological vulnerability monitoring and assessment protocols in coral reef regions;
- prioritising poverty-reduction programmes for reef-dependent coastal communities and implementing socioeconomic incentives to encourage coastal communities to play a central role in conservation and sustainable use of coral reefs along with closely associated ecosystems (for instance, through community-based conservation trust funds supported by fees from ecotourism and fines for unsustainable use); and empowering coastal communities in reef-management, by providing necessary resources and capacity-building, as well as devolving responsibilities (CBD, Dec. XIV/5, para 9 and 10f).

The EU had been a significant player internationally in having this guidance developed at the CBD and reflecting in its external relations tools, notably with regard to biofuels and REDD+ (Morgera, 2013c), but also in supporting synergies between climate and biodiversity finance. As part of its efforts to mainstreaming human rights and climate change, the EU could further rely on CBD guidance to ensure that biodiversity as a human right is mainstreamed too, particularly in 'new' areas such as the protection of marine environment/blue economy and the growing interest in the role of the ocean in mitigating and adapting to climate change (as highlighted in the EU Green Deal).

**Recommendations:** The EU could develop a holistic human rights-based approach to biodiversity loss by:

- integrating biodiversity as a human right in EU relations 'with other States to step up their ambition and urgently implement their commitments under the Paris Agreement', as highlighted by the Council conclusions on priorities in UN human rights fora during 2020 (see recommendations in Part II);
- raise the opportunities that CBD guidance on climate change provide to ensure respect for biodiversity-dependent human rights, notably those of indigenous peoples and local communities, in external relations tools that prioritise the fight against climate change, including EU initiatives on human rights and environmental defenders (see Part III).

#### 4.3.7 Businesses' responsibility to respect human rights and biodiversity

CBD guidance has also provided detailed indications on how business can respect indigenous peoples' human rights, as well as everybody's human rights that can be affected not only by the creation and management of protected areas, but also by the unsustainable use of biological resources (in the extractives sector, infrastructure, agricultural sector, etc). These clarifications have already been embedded in general international initiatives on business responsibility to respect human rights, such as the Performance Standards of the International Finance Corporation, the UN Global Compact and sector-specific guidance adopted under the Organisation for Economic Co-operation and Development (OECD) (Morgera, forthcoming 2020). On the whole, there is much more international guidance on business responsibility to respect biodiversity-dependent human rights as there is on other environmental issues, such as climate change.

On **indigenous peoples' rights**, various international processes have consistently pointed to the applicability of EIAs, FPIC as well as fair and equitable benefit-sharing to business enterprises in the natural resource sector, albeit to different extents (Seck, 2016), along similar lines to those discussed above for States. The standards for EIA, FPIC and benefit-sharing, can be found in the 2016 OECD-FAO Guidance for

Responsible Agricultural Supply Chains and the IFC 2012 Standards (IFC, 2012, Performance Standard 1, para 35 and 7, paras 18-20). The UN Global Compact developed specific guidance on business responsibility to respect indigenous peoples' rights, which calls upon business to integrate indigenous peoples' views on what activities may or may not impact their rights, in accordance with the CBD's Akwé: Kon Guidelines, as well as the VGGT (United Nations Global Compact Office, 2013, p. 66). Following the CBD Akwé: Kon Guidelines, the UN Special Rapporteur on Indigenous Peoples' Rights Anaya recommended that companies identify, fully incorporate and make operative the norms concerning the rights of indigenous peoples within every aspect of their work carried out within or in close proximity to indigenous lands. In this connection, assessments are also expected to take into account indigenous peoples' and local communities' rights over lands and waters traditionally occupied or used by them together with the associated biodiversity (CBD, Dec. VII/16, 2004, para 57). As part of their due diligence, companies should avoid endorsing or contributing to any act or omission by the State, which amounts to a failure in adequately consulting with any affected indigenous community before proceeding with a project (Anaya, 2009, Section E). As with States' benefit-sharing obligations, Anaya also emphasised that companies should consider benefit-sharing as a tool for creating genuinely equal partnerships with indigenous peoples (Anaya, 2011, paras. 68, 74 and 76). Hence, he criticised common corporate practices envisaging benefit-sharing as compensation, a charitable award or a favour granted to secure social support for a project (Anaya 2010, paras 79, 89 and 91). Anaya instead envisaged that, if indigenous peoples themselves do not wish or are unable to initiate resource extraction, benefit-sharing entitles them to participate in project decision-making *and* share in profits through an agreement with outside companies (for instance, through a minority ownership interest in the extractive operations) (Anaya, 2013, para. 75). This points to the need for both enhanced participation opportunities and income generation for indigenous peoples – the procedural and substantive side of benefit-sharing, as discussed above. Accordingly, this would also imply moving away from an exclusive focus on damage prevention to a proactive and collaborative identification of benefit-sharing opportunities according to indigenous peoples' worldviews.

On **the rights of other communities**, the International Finance Corporation's 2012 Performance Standard includes, within the project's area of influence, indirect project impacts on biodiversity or ecosystem services upon which affected communities' livelihoods are dependent (IFC, 2012, Performance Standard 1, para 8), which is linked to expansion of community consultation requirements (IFC, 2012, Performance Standard 6, paras. 6-7). The IFC Standard further specifies that assessment should take into account the differing values of biodiversity for affected communities and consider threats ranging from 'habitat loss, degradation and fragmentation, invasive alien species, overexploitation, hydrological change, nutrient loading and pollution.' (IFC, 2012, Performance Standard 6, para 6-7) It has also introduced specific requirements for biodiversity offsets, plantations and natural forests, management of renewable natural resources and supply chains. The IFC Performance Standards include a further objective covering the maintenance of ecosystem services (IFC, 2012, Performance Standard 6, Objectives and paras. 2-3), which also appears in the Performance Standard on community health (IFC, 2012, Performance Standard 4, Objectives and para. 8), calling upon business enterprises to determine likely adverse impacts on ecosystem services and in a participatory process systematically identify priority ecosystem services (either those having adverse impacts on affected communities or those on which the project will be directly dependent for its operations). Such action is aimed at avoiding or minimising negative impacts and implementing measures to increase the operations' resource efficiency (IFC, 2012, Performance Standard 4, Objectives and paras. 24-25), including those connected with community health, relocation, indigenous peoples and cultural heritage<sup>21</sup>. The Global Compact's framework on biodiversity and ecosystem services, in turn, introduces the concept of ecosystem linkages at landscape level, to support integrated planning along the value chain, including respect for local stakeholders' land and land-use rights, as well as the

<sup>21</sup> (IFC, 2012, Performance Standard 4, Objectives and para. 25), with reference to Performance Standards 4-5 and 7-8.



livelihoods of local natural resource-dependent communities (United Nations Global Compact and IUCN, 2012, at 12). CBD guidance has already been addressed to business and has informed the development of other international standards on business responsibility to respect human rights.

**Recommendations:** The EU could develop a holistic human rights-based approach to biodiversity loss by:

- referring to CBD guidance in the EU's efforts to promote the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) in the context of extractives, agri-business and conservation sectors; and
- making such reference, for instance, in the context of initiatives on human rights due diligence, access to remedy for victims of corporate abuses, when encouraging the adoption of National Action Plans and in support to environmental and indigenous human rights defenders – as highlighted through Council conclusions on priorities in UN human rights fora during 2020.

**Fig1: Legal Sources for Biodiversity implications on various human rights**



## 4.4 The EU's strategic framework post 2020: The Green Deal and the Biodiversity Strategy

In 2020, the European Commission will present a new [Communication](#) on Biodiversity including a Strategy until 2030 and its position with a view to the Conference of the Parties in October 2020.<sup>22</sup> It will be embedded in the Commission's 2019 strategy on '**A European Green Deal**', which however conveys a relatively unambitious and disjoint approach to biodiversity and human rights:

- The relevant section on biodiversity in the Green Deal does not mention the relevance of biodiversity for human rights, or the need to significantly step up ambition to prevent further biodiversity loss in similar terms to those of the climate change section.
- The Green Deal does discuss a more ambitious and integrated approach to fisheries and agriculture in line with the 'Farm to Fork Strategy' to strengthen efforts to tackle climate change, protect biodiversity, address chemical pollution and promote affordable healthy food for all. There is also a reference to the introduction of market access-based restrictions on food imports that could be similar to the unilateral measures discussed in section below. While the relevance of human rights is not explicitly mentioned, the legislative proposals that will arise in the fisheries and agricultural sectors will have implications for the right to food, the subsistence and cultural rights of indigenous and small-scale farmers and fisherfolk and women's rights, as well as long-term implications for everyone's right to health and the rights of children. The UN Special Rapporteur on the Right to Food has already pointed out the need to prevent negative impacts on small-scale farmers from certification schemes (De Schutter, 2011).
- Furthermore, the section on biodiversity in the Green Deal discusses briefly the challenges of marine biodiversity and the blue economy, with specific reference to the role of the ocean in climate change mitigation and adaptation and the development of marine renewables. It does not, however, acknowledge the challenges of competing uses of the ocean and cumulative threats to marine biodiversity (which include renewables) and their knock-on effects on human rights, or the significance of procedural human rights for inclusive and sustainable blue economy approaches. While the relevance of human rights is not explicitly mentioned, the legislative proposals that will arise in relation to the blue economy will have implications for everybody's right to health and right to food and for procedural environmental rights, as well as specific implications for the rights of children, women, indigenous peoples and local communities.
- On the whole, it remains to be seen to what extent the latest international developments on biodiversity as a human right will be reflected in the new EU Biodiversity Strategy for 2021-2030.

### Recommendations:

- The **European Parliament**, in assessing the new EU Biodiversity Strategy (as well as, in due course, assessing its mid-term review), could rely more systematically on international developments on biodiversity as a human right in assessing the implications of proposed policies (well beyond specific questions related to forest biodiversity and the rights of indigenous peoples<sup>23</sup>).
- The **European Parliament**, in its co-legislative role, should rely on international developments on biodiversity as a human right in relation to the legislative proposals arising from the Green Deal on climate change, biodiversity, chemicals, the 'Farm to Fork Strategy' and the blue economy in the light of

<sup>22</sup> At the time of writing, the [Communication](#) was not yet published, and the publication date was postponed due to the impacts of the Coronavirus crisis.

<sup>23</sup> See EP resolution of 2 February 2016 on the mid-term review of the EU's Biodiversity Strategy, para 44.

everybody's right to life, health and food, procedural environmental rights, as well as the rights of children, women, indigenous peoples and local communities.

- The **EEAS** should support the Commission in mainstreaming biodiversity as a human right in external action arising from the Green Deal and the new EU biodiversity strategy.

## 5 Part II - Opportunities in International Fora

This section will identify a series of opportunities for the EU and its Member States to play a leadership role in supporting a holistic rights-based approach to biodiversity conservation and sustainable use in multilateral environmental and international human rights processes. While each opportunity would require an in-depth discussion that is beyond the scope of this study, for all opportunities the same policy and legal considerations apply. In effect, it is hard to predict in the abstract which initiative may be more promising (as, for instance, reliance on CBD guidance by international human rights bodies could not have been anticipated five years ago) (Morgera, 2014). Hence, it is assumed that the combined influence from many multilateral initiatives and their mutual interactions may enhance the chances of creating actual impacts.

Accordingly, the recommended EU action in the following multilateral processes would have likely impacts in terms of:

- contributing to policy coherence across multilateral environmental governance (biodiversity, ocean, climate change, chemicals), as well as between multilateral environmental governance and international human rights processes, with – as singled out in the EU's Action Plan on Human Rights and Democracy 2015-2019<sup>24</sup> – a particular focus on economic, social and cultural rights, women's rights, children's rights, non-discrimination, business and human rights, impact assessments and reliance on best practices for the purposes of contributing to multilateralism;
- clarifying further the extent and scope of international obligations on biodiversity and human rights in different sectors and contexts, that can contribute to their justiciability nationally and internationally;
- raising awareness for a diverse group of policy-makers, duty-bearers and rights holders about existing international obligations on biodiversity and human rights, that can per se contribute to policy coherence at national level and increasing capacity to participate in relevant national processes to ensure every-day accountability, as well as seeking access to courts;
- identifying good practices and lessons learnt that can support mutual learning at multilateral level and feed into ongoing international law-making as well as guidance-development processes. These good practices could also contribute to the 'good human rights stories event' organized by the EEAS on the margins of Human Rights Council and UN General Assembly ([www.goodhumanrightstories.net](http://www.goodhumanrightstories.net)); and
- ensuring that the EU and its Member States comply with their international obligations on biodiversity and human rights in good faith and with mutual support, alongside their EU law obligations on policy coherence in external action (in line with the obligation under the EU Charter of Fundamental Rights to integrate a high level of environmental protection and the improvement of the quality of the environment into the policies of the Union and in accordance with the principle of sustainable development).

Notably, the following recommendations are in line with and can provide specific opportunities for implementing the Council conclusions on priorities in UN human rights fora during 2020 regarding: human rights and the environment in general, along with human rights and climate change; the rights of the child

<sup>24</sup> At the time of finalising this draft version of the study, the Action Plan 2020-2024 was not yet publicly available.

and the environment; the rights of indigenous peoples; human rights defenders; and business responsibility to respect human rights.

## 5.1 Multilateral biodiversity treaty processes

Looking at the **Convention on Biological Diversity**, the EU and its Member States have already made some contributions to ensure consideration of human rights issues, notably in the case of biofuels, REDD+ (Morgera 2013c; Morgera and Kulovesi, 2014), safeguards in biodiversity financing and the development of guidelines under Article 8(j) on indigenous peoples and local communities. There have been instances, though, where the EU has taken a very limited approach to the protection of indigenous peoples' and local communities' rights to traditional knowledge, under the Nagoya Protocol on Access to Genetic Resources and Benefit-sharing, for instance (which was reflected in relevant EU implementing measures and picked up by the European Parliament<sup>25</sup>; Morgera, 2014b; Savaresi, 2012).

Two major opportunities exist for the EU and its Member States to address more consistently biodiversity as a human right **at the 2020 Conference of the Parties (COP) in October 2020**. Firstly, the EU and its Member States could promote the integration of human rights into the **post-2020 global biodiversity framework** to guide international cooperation together with country- and local-level implementation (CBD, Dec. XIII/1, 2016, preambular recital). CBD Parties already agreed in 2018 to develop a gender-responsive and gender-balanced post-2020 global biodiversity framework (CBD, Dec. XIV/34, 2018, Annex, para 2.c). The available 'zero draft' of the post-2020 Framework acknowledges under its 'theory of change' the need for 'appropriate recognition of gender equality, women's empowerment, youth, gender-responsive approaches and the full and effective participation of indigenous peoples and local communities in the implementation of the framework.' It further indicates that the framework will be implemented 'taking a rights-based approach and recognising the principle of intergenerational equity.'

### Recommendations:

- The EU should argue for consistent reference to 'right-holders' and not only to 'stakeholders,' under the section titled '**Enabling Conditions**', which currently refers to the 'participation of indigenous peoples and local communities and a recognition of their rights in the implementation of the framework' but otherwise refers to women, youth and civil society as 'stakeholders', instead of singling out the human rights of women, children and environmental defenders.
- The EU should argue for a more holistic reference under the '**action targets 2030**' on the nexus between biodiversity and human rights. Currently there is mention of action to 'Promote the full and effective participation of indigenous peoples and local communities and of women and girls as well as youth, in decision-making related to the conservation and sustainable use of biodiversity, ensuring by 2030 equitable participation and rights over relevant resources.' But there are no references to the relevance of biodiversity for everyone's right to life, health, food and water.
- The EU should argue for reference, among the '**action targets 2030**', to the relevance for biodiversity-dependent human rights in the draft target on mainstreaming biodiversity values by 2030 across all sectors and biodiversity-inclusive strategic environmental assessments and environmental impact assessments.

Secondly, the EU and its Member States should promote integration of human rights language into the revised work programme on Article 8(j) and related provisions on indigenous peoples and local communities (in line with the Council conclusions on priorities in UN human rights fora during 2020

<sup>25</sup> Amendments adopted by the European Parliament on 12 December 2013 on the proposal for a regulation of the European Parliament and of the Council on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union.

concerning promotion of the UN Declaration on the Rights of Indigenous Peoples and active engagement in those fora where the rights of indigenous peoples will be discussed): this is the CBD section that has already contributed the most to international human rights law, but also the section in which State Parties express their opposition to engaging directly in human rights language. The current draft (CBD, CBD/WG8J/REC/11/2, 2019) contains reference to the following issues around biodiversity as a human right:

- keeping under review the programme of work on Article 8(j) and reprioritise its elements to ensure a human rights approach;
- exploring ways to protect environmental defenders;
- developing various sets of guidance on indigenous and community conserved areas (ICCAs).

There are several inter-connected opportunities for the EU and its Member States to address more consistently under the CBD biodiversity as a human right **beyond 2020**, by:

- at the very least, ensuring that **new guidelines and processes on Article 8(j)** and related provisions do not undermine international human rights standards<sup>26</sup>, as well as committing to the incorporation of key human rights concepts (even if not expressed in rights language) into any future decisions on Article 8(j) and related provisions;
- explicitly considering contributions from the CBD guidance to human rights in the development and implementation of a **long-term, strategic approach to mainstreaming biodiversity** into various production sectors (agriculture, fisheries, forestry, infrastructure, energy, mining and health), to support the realisation of multiple SDGs (CBD Dec. XIV/3 (2018), para 17) in a manner grounded in international human rights (UN Human Rights Council, 2018 and 2018b);
- explicitly considering human rights in the implementation of the **Nagoya Protocol** on Access to Genetic Resources and Benefit-sharing, including its compliance mechanism; and
- integrating procedural human rights, women's rights and the rights of the child, as well as business responsibility to respect human rights, into **relevant CBD work programmes**, notably in the area of marine, freshwater and island biodiversity (that appear to lag behind in terms of human rights considerations, when compared to agricultural and forest biodiversity, as well as the work programme on protected areas).

The EU and its Member States should also ensure that biodiversity-related human rights are not undermined but rather more systematically upheld in other international biodiversity processes, such as:

- the **International Treaty on Plant Genetic Resources for Food and Agriculture**, notably under its work on farmers' rights. The Treaty sets out the measures a Party should take to protect and promote farmers, including the protection of traditional knowledge, the right to participate equitably in the sharing of benefits arising from the utilisation of plant genetic resources and the right to participate in national-level decision-making (Tsioumani, 2014; and FAO, 2019). Regrettably, little progress has been made on developing guidance for national legislation, which could also benefit work under the UN Declaration on the Rights of Peasants;
- the **Convention on International Trade in Endangered Species** (CITES), where the EU should support the integration of human rights considerations into the existing stream of work on **livelihoods**, to ensure that CITES decisions do not negatively affect human rights to subsistence, as well as procedural

<sup>26</sup> See (CBD, UNEP/WG8J/REC/10/3, 2017).

environmental rights. Similar contributions could be made by the EU under the **Convention on Migratory Species**;

- the **World Heritage Convention**, where the EU should support implementation of the recommendation by the UN Special Rapporteur on Indigenous Peoples' Rights (Tauli-Corpuz, 2016, para 85) for reforming the **Operational Guidelines**, in light of relevant guidance under the CBD and international human rights law on impact assessments, FPIC and fair and equitable benefit-sharing with indigenous peoples and local communities (section 4.4.4 above); and
- the **Ramsar Convention on Wetlands of International Importance**, where the EU should support an even more explicit discussion of the human right to water, procedural environmental rights, women's and children's rights, as well as indigenous peoples' and local communities' human rights.

## 5.2 Other multilateral environmental treaty processes

The EU and its Member States should also ensure that other multilateral environmental processes do not undermine, but instead explicitly or systematically uphold biodiversity as a human right. The EU has already supported integrating biodiversity and human rights concerns into the international climate change regime (Morgera 2013c; Morgera and Kulovesi, 2014), but it has not done so, for instance, in the negotiations towards a new treaty on marine biodiversity of areas beyond national jurisdiction (Morgera, 2018-2019).

### Recommendations:

There are, therefore, opportunities for the EU to address more consistently the question of biodiversity as a human right in other multilateral environmental processes, notably under:

- **The Paris Agreement:** The agreement refers to the importance of ensuring the integrity of all ecosystems in its preamble, while Article 5 calls upon Parties to take action on the conservation and enhancement of sinks and reservoirs of greenhouse gases (which implicitly refers to the role of certain ecosystems in acting as sinks and reservoirs), its Article 7 recognises the role of adaptation in protecting livelihoods and ecosystems, whilst its Article 8 on loss and damage includes reference to the resilience of livelihoods, communities and ecosystems.<sup>27</sup> So in principle there are opportunities for the Paris Agreement and the CBD to be implemented in a mutually supportive manner and thereby contribute to human rights protection. But to date there has been very little take-up under the international climate change regime of CBD guidance that can contribute to a human rights-based approach to climate change mitigation and adaptation. Hence, the EU and its Member States should support the application of:
  - the 2018 CBD guidelines on an ecosystem-based and human rights-based approach to climate change **adaptation** under the Paris Agreement;
  - the CBD Mo'tz Kuxtal Guidelines on the use of traditional knowledge as part of global climate science efforts (Morgera, 2017b; and Savaresi 2017 and 2018) (notably, the indigenous peoples and local communities' platform for the exchange of experiences and sharing of best practices on mitigation and adaptation) (UNFCCC, 2016, paras. 135-136);
  - CBD guidance on climate change and marine biodiversity, in part concerned consideration of the **ocean** under the international climate change regime. Notably, in 2019 the importance of the ocean as an integral part of the Earth's climate system and the integrity of ocean and coastal ecosystems in the context of climate change was underscored. Moreover, an intersessional dialogue in 2020 on the ocean and climate change considering how to strengthen mitigation and adaptation action in this context is expected to lead to

<sup>27</sup> Dec XIII/4, para 1 and fn 11.



more detailed negotiations in the near future (UNFCCC, 2019). The Green Deal also underscored the ocean's growing importance within action on climate change.

- the negotiations of a new treaty on **marine biodiversity of areas beyond national jurisdiction**, where the EU and its Member States should re-assess current negotiating positions on all aspects of the package from biodiversity and human rights perspectives. This should aim to identify new options that can support multilateral benefits (notably the realisation of multiple SDGs) through a global partnership approach to the implementation of existing international obligations on marine scientific research, capacity building, marine technology transfer and protection of the marine environment. (Morgera, 2018-19) It has been notable that these negotiations have so far mentioned only sporadically and superficially the ocean's importance for the realisation of most SDGs and have never mentioned its importance for the protection and realisation of human rights;
- the relevance of marine biodiversity for human rights, which could also be raised (including a view to integrating human rights considerations in the marine biodiversity treaty) at the **2020 UN Ocean Conference** (Lisbon, 2-6 June 2020), which will focus on science's role in the implementation of SDG14. The EU and its Member States should emphasise the importance of marine biodiversity science for human rights and particularly the gaps identified in section 4.1 above by way of: identifying thresholds and tipping points for marine biodiversity and assessing the impacts of marine biodiversity loss on human rights, with disaggregated data to understand impacts on the most vulnerable. The Green Deal identified the UN Ocean Conference an 'opportunity for the EU to highlight the importance of action on ocean issues,' including climate change considerations;
- the **wastes and chemicals agreements**, where the EU and its Member States should support consideration of international guidance on biodiversity and human health, including implications for the human rights of women and children. In addition, the EU and its Member States should ensure a linkage between these agreements and the post-2020 biodiversity framework, with a view to monitoring under that framework the contribution of wastes and chemicals agreements to the protection of biodiversity as a human right;
- the **Aarhus Convention** on Access to Environmental Information, Participation in Decision Making and Access to Justice in Environmental Matters, where the EU and its Member States could support monitoring the implementation of the obligation and Almaty guidance to 'promote the application of the principles of this Convention in international environmental decision-making processes'<sup>28</sup> in the context of the CBD and other multilateral environmental agreements mentioned above (as part of the proposed 'thematic sessions' during the meetings of the Working Group of the Parties that oversees progress in promoting application of the Almaty Guidelines, with a view to providing opportunities for Parties and stakeholders to exchange experiences about other international fora of particular priority, in-depth workshop or group of experts. At the moment, the Parties have not singled out biodiversity, but have focused on 'climate change, chemicals and waste, biosafety and trade negotiations': Aarhus Decision VI/4, 2017: para 6(a)).

### 5.3 International human rights processes

The EU's positions in international human rights processes have traditionally been studied separately from its stances in multilateral environmental processes. Nevertheless, given the recent international clarifications on biodiversity as a human right and the breadth of international guidance that is relevant to adopt a holistic human rights-based approach to biodiversity conservation, general recommendations on

<sup>28</sup> Aarhus Convention, Article 3(7). Almaty Guidelines on promoting the application of the principles of the Aarhus Convention in International Forums (2005) UN Doc. ECE/MP.PP/2005/2/Add.5, para. 9.

the EU's role in multilateral human rights processes can be formulated. While the Council conclusions on priorities in UN human rights fora during 2020 does not mention biodiversity explicitly, it highlights several biodiversity-dependent human rights and generally refers to continuing engagement in on-going discussions concerning the right to a healthy environment, the substantive content of which include, as discussed below, healthy biodiversity and ecosystems.

### Recommendations:

The EU Member States should in the context of:

- **international human rights monitoring mechanisms**, support monitoring the impacts of conservation measures on indigenous peoples' and local communities' rights (Tauli-Corpuz, 2016, para 86), as well as the impact of any other measure on biodiversity and human rights (of everyone, but particularly women and children). This could be recommended in the context of the Universal Periodic Review, which could support cooperation, dialogue along with an exchange of lessons learnt and good practices among States, UN bodies, regional mechanisms, national human rights institutions and civil society. In this way, concrete steps could be taken to advance the promotion and protection of biodiversity-dependent human rights. It could also help identify priorities for donors, including the EU (see section 5.4 below), in supporting capability building through the Office of the United Nations High Commissioner for Human Rights to consider biodiversity as a human right, by assisting efforts to realise Sustainable Development Goals at country level, including the strengthening of capacities for national human rights institutions, national parliamentarians, national judiciaries and civil society (United Nations, 2019b);
- the **UN Working Group on Business and Human Rights**, ensure that its normative and monitoring activities take into account international guidance on biodiversity as a human right, notably in the context of indigenous peoples' rights to impact assessments, FPIC and benefit-sharing, as the Working Group's current practice is considered to be below international standards by scholars and activists (Rodríguez-Garavito, 2017, p. 20). This is in line with a specific commitment in the Council conclusions on priorities in UN human rights fora during 2020, which refers to continuing support for implementation of the UN Guiding Principles on Business and Human Rights. It can build on pre-existing EU practice by submitting contributions to the UN Working Group, engaging in consultations and participating in the Annual Forum on Business and Human Rights (European Commission, 2019);
- the ongoing **negotiations of a new international treaty on business and human rights**, where the EU and its Member States has so far taken a hesitant position, support reference to international guidance on biodiversity and human rights for States along with business entities, as well as all bodies that may contribute to enhancing access to justice. The Council conclusions on priorities in UN human rights fora during 2020 indicate that the EU will follow closely discussions about a legally binding instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights; and
- **multilateral peace-building processes** (at the Security Council through its Member States represented and at the UN Peace-Building Commission), support the application of international guidance on biodiversity and human rights, to prevent negative impacts on indigenous peoples' and local communities' rights.

### 5.3.1 International recognition of the human right to a healthy environment

As pointed out above, everyone's ability to enjoy human rights to life, health, food and water depends on healthy ecosystems and their benefits to people, particularly children, women, indigenous peoples and local communities; States' obligations on biodiversity and human rights are both procedural and substantive; there are specific obligations for vulnerable groups and these obligations extend to the context of inter-State cooperation; Thus, the expression 'biodiversity as a human right' conveys that there are already *existing* international *legally binding* obligations at the nexus of international biodiversity and

international human rights law. While from a legal perspective States already have international legally binding obligations on the nexus between biodiversity and human rights, these obligations are still not well known to biodiversity experts and advocates, or to human rights experts and advocates. There is as yet no comparable mobilisation around biodiversity as a human right as there is in the case of climate change and human rights.

However, both the previous and the current UN Special Rapporteur on Human Rights and the Environment have been advocating international recognition of the human right to a healthy environment (Knox, 2018; Boyd, 2019). Notably, Special Rapporteur Boyd clarified that from a substantive perspective the right to a healthy environment comprises: 'clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play and *healthy biodiversity and ecosystems.*' (Boyd, 2019). International recognition of the human right to a healthy environment (for instance, through the adoption of a Resolution of the General Assembly) is expected to contribute to the visibility, clarity and justiciability of existing international obligations on biodiversity as a human right. This is based on empirical evidence that explicit recognition of the right to a healthy environment in national constitutions has led to the enactment of stronger environmental laws, better access to justice and increased ability for the judiciary to protect against legislative gaps (Knox, 2018; Boyd, 2019).

In 2020 Special Rapporteur Boyd will devote his thematic report to healthy biodiversity and ecosystems as a substantive component of the human right to a healthy environment, as a contribution to the development of the post-2020 global biodiversity framework.

### Recommendations:

- The **EU** should support international recognition of a human right to a healthy environment, comprising a right to healthy biodiversity and ecosystems, by adopting a Resolution of the General Assembly – as the Council conclusions on priorities in UN human rights fora during 2020 indicate that 'the EU will continue engaging in the on-going discussions on a right to a healthy environment and reaffirm its steadfast commitment to the relevant UN mandates.'
- The **EEAS** could develop Human Rights Guidelines on a Human Right to a Healthy Environment, following the example of the 2019 EU Human Rights Guidelines on Safe Drinking Water and Sanitation. This could support the role of EEAS in supporting human rights mainstreaming in the multilateral environmental processes in which the EU is active, as well as the mainstreaming of climate change, biodiversity and other environmental issues on which human rights depend in multilateral human rights processes. In addition, it could support EU Delegations in engaging in dialogue on biodiversity as a human right and in protecting biodiversity human rights defenders at the national and regional levels.

## 5.4 Specific recommendations to the European Parliament

The **European Parliament** could:

- commission independent studies to assess to what extent the EU and its Member States have integrated environmental concerns (including biodiversity-specific ones) into its international human rights initiatives in multilateral fora, as well as to what extent they have integrated biodiversity as a human right in other multilateral environmental negotiations;
- invoke its power of consent before a new international agreement is concluded by the Council to support the integration of biodiversity as a human right in the EU and its Member States' negotiating positions concerning a new international treaty on business and human rights and a new treaty on marine biodiversity of areas beyond national jurisdiction; and

- call for more coordinated and ambitious approaches to biodiversity as a human right in its periodic resolution on the EU at the UN.
- In its forthcoming recommendations on climate change and human rights, the EP should:
  - support the international recognition of a human right to a healthy environment, comprising a right to healthy biodiversity and ecosystems, through the adoption of a Resolution of the General Assembly, noting the relevance of biodiversity also from the perspective of climate change and human rights;
  - require the respect of relevant CBD guidance on an ecosystem-based approach to climate change mitigation and adaptation, with a view to contributing also to a human rights-based approach in the context of agriculture, forestry and fisheries;
  - underscore that CBD guidance on an ecosystem-based approach to climate change mitigation and adaptation also clarifies the due diligence standards for business responsibility to respect human rights; and
  - emphasise the implications of climate change initiatives that may lead to biodiversity loss for everyone's right to health, the human rights of children and the human rights of women.

## 6 Part III - Opportunities in the EU's unilateral and bilateral external action tools

This section turns now to identifying opportunities for improvement and innovation across the EU's unilateral and bilateral external action tools to address the human rights dimensions of biodiversity. It will focus on maximising the potential of EU bilateral agreements and other external relations tools for creating genuine partnerships that can enhance every-day accountability vis-à-vis biodiversity as a human right. Accordingly, both the EU and partner countries can:

- better understand national and local dynamics affecting, both positively and negatively, biodiversity as a human right notably with regard to economic, social and cultural rights, women's rights, children's rights, non-discrimination, business and human rights, human rights and peace-building, as well as the use of impact assessments (in line with the EU's Action Plan on Human Rights and Democracy 2015-2019);
- support contextual and bottom-up approaches for the protection and realisation of biodiversity-related human rights (in line with a focus on 'local ownership'), with a view also to sharing best practices and lessons learnt in relevant multilateral fora (see Part II above);
- enhance participation and capacity to collaborate on human rights with biodiversity experts and other constituencies (also in the context of climate change, ocean and chemicals), as they still remain relatively isolated from each other; and
- ensure that the EU and its Member States comply with their international obligations on biodiversity and human rights in good faith and in a mutually supportive manner, whilst at the same time honouring their EU law obligations on policy coherence in external action. It has been noted that the European Parliament can exert significant influence on EU development cooperation with a view to ensuring policy coherence (Cardwell and Jancic, 2019).

This approach can ultimately serve to prove the genuine character of EU support for environmental multilateralism through bilateral external relations tools, which should thus be openly discussed with third countries and stakeholders (Morgera, 2012). It could also obviate any criticism suggesting that the EU may expect partner countries to have higher standards on biodiversity and human rights than the EU itself has

achieved internally (Morgera, 2012b; Gaglia Bareli et al, forthcoming), by focusing on opportunities for mutual learning in implementing international obligations that are challenging both for developed and developing countries (policy coherence, ecosystem and human rights-based approach). Such an approach could also offer an effective response to criticism of the EU's underlying agenda aimed at protecting competitive interests and preventing WTO challenges by exporting EU regulation (Kelemen, 2009) or ensuring access to raw materials in third countries<sup>29</sup>. While to some extent the competing agendas of environmental sustainability and economic development are an inevitable characteristic of the EU and its external relations (and indeed of any other bilateral partner), a truly cooperative approach can make a difference through a commitment to testing and fine-tuning the EU's positions in partnership with third countries through mutual learning and sharing new insights at the multilateral level.

The following sections will firstly provide an assessment of existing approaches in the EU's external relations and then present recommendations for improvement and innovation.

## 6.1 Bilateral trade agreements

Compared with EU support for the international climate change regime, which epitomises the most advanced interaction between the Union's multilateral stances (Kulovesi, 2012), the integration of biodiversity in the EU's external relations tools has yet to reach the same level of sophistication, remaining quite *ad hoc* until the 2020 Biodiversity Strategy, adopted in 2011. This is arguably due to the significantly lesser dynamism in EU biodiversity law compared to EU climate law (Morgera, 2012b).

According to the EU's 2020 Biodiversity Strategy, the Union has committed to: including biodiversity systematically as part of trade negotiations and dialogues with third countries; identifying and evaluating potential impacts on biodiversity resulting from the liberalisation of trade and investment through ex-ante Sustainability Impact Assessments (SIAs) and ex-post evaluations; as well as seeking inclusion of substantial provisions concerning trade and biodiversity goals in all new bilateral trade agreements. As a result, most recent EU bilateral agreements refer in their Trade and Sustainable Development Chapters to the CBD and CITES<sup>30</sup>. In addition, they include more detailed provisions related to biodiversity cooperation<sup>31</sup>, as well as climate change<sup>32</sup>, forestry<sup>33</sup> and fisheries<sup>34</sup> along with environmental cooperation,<sup>35</sup> which all have biodiversity relevance. Provisions on corporate accountability, responsible supply chains and business

<sup>29</sup> (Hall, 2009); and response by (Thompson, 2009).

<sup>30</sup> EU-Central America Association, Articles 285(2) and 287(2); EU-Colombia and Peru (COPE) FTA, Articles 267(2)(b) and 270(2); EU-Korea Agreement, Article 23 and EU-Korea FTA, Article 13.11; EU-Japan, art. 16.6.

<sup>31</sup> E.g., Cotonou Agreement, Article 46(2); EU-Armenia PCA, Article 55(2); EU-Colombia and Peru FTA, Article 272; EU-MERCOSUR art 7; EU-Japan, art 16.4.4; EU-Mexico, art. 6.c of the Trade and Sustainable Development Chapter; EU-Viet Nam, art 13.7.

<sup>32</sup> In particular, Cotonou Agreement (Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part and the European Community and its Member States of the other (2000), OJ L317/3)- Second Revision of the Cotonou Partnership Agreement – Agreed Consolidated Text (11 March 2010):

[www.ec.europa.eu/development/icenter/repository/second\\_revision\\_cotonou\\_agreement\\_20100311.pdf](http://www.ec.europa.eu/development/icenter/repository/second_revision_cotonou_agreement_20100311.pdf), Articles 1, 8, 11 and 32bis; COPE FTA, Article 275; South Korea FA, Article 24; Agreement establishing an Association between the EU and its Member States, on the one hand, and Central America on the other, (2012), OJ L346/3, Article 63; EU-Mexico, art. 5 of the Trade and Sustainable Development Chapter; EU-Viet Nam, art 13.6; EU-Singapore, Art. 12.6.3.

<sup>33</sup> EU-Japan, art. 16.7; EU-MERCOSUR art 8 of the Trade and Sustainable Development Chapter; EU-Mexico, art. 7 of the Trade and Sustainable Development Chapter; Viet Nam, art 13.8; Singapore, Art. 12.7.

<sup>34</sup> EU-Japan, art. 16.7; EU-MERCOSUR art 9 of the Trade and Sustainable Development Chapter; EU-Mexico, art. 8 of the Trade and Sustainable Development Chapter; EU-Viet Nam, art 13.9; EU-Singapore, Art. 12.8.

<sup>35</sup> EU-Japan, art. 16.2; EU-MERCOSUR art 13 of the Trade and Sustainable Development Chapter; EU-Mexico, art. 13 of the Trade and Sustainable Development Chapter; EU-Viet Nam, art 13.14; EU-Singapore, Art. 12.10.



obligations to respect human rights are also common<sup>36</sup>, but never explicitly linked to biodiversity, let alone to biodiversity as a human right.

Only occasionally do these provisions make reference to human rights implications (Morgera, 2014b), as shown by the following examples:

- ensuring the protection of traditional knowledge<sup>37</sup>. This and access to genetic resources as well as benefit-sharing more generally are areas of cooperation that have the potential to become much more prominent from a human rights perspective (Morgera, Tsioumani and Buck, 2014), but the EU's own implementation of the underlying Nagoya Protocol has created barriers to cooperation through an arguably unilateral interpretation of this treaty's scope (Morgera, 2014b);
- implementing the Paris Agreement 'in a manner that does not threaten food production'<sup>38</sup>;
- promoting, as appropriate and with their prior informed consent, the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products, as a means of enhancing their livelihoods and promoting the conservation and sustainable use of forests<sup>39</sup>;
- contributing to economic, environmental and social objectives of sustainable forest management<sup>40</sup>;
- promoting the development of sustainable and responsible aquaculture, taking into account its economic, social and environmental aspects<sup>41</sup>;
- promoting the long-term conservation and sustainable use of CITES-listed species, including their legal and traceable trade, providing benefits to stakeholders in their value-chain, in particular to the local communities where CITES species are sourced<sup>42</sup>;
- promoting ecosystem-based climate change adaptation and water management approaches<sup>43</sup>; and
- accompanying greenhouse gas reductions with measures to alleviate the social consequences associated with transition to low-carbon fuels<sup>44</sup>.

On the whole, existing EU bilateral trade agreements address different areas of environmental cooperation in isolation from each other and make no explicit reference to human rights, with only occasional implicit

<sup>36</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part (2005), OJ L26/3, Article 86(1); Montenegro Stabilization and Association Agreement (2007), Article 94, Serbia Stabilization and Association Agreement (2008), Article 94, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Bosnia and Herzegovina, 16 June 2008, [www.delbih.ec.europa.eu/files/docs/publications/en/SAP\\_eng.pdf](http://www.delbih.ec.europa.eu/files/docs/publications/en/SAP_eng.pdf) Article 92, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, (2009), OJ L107/166, Article 92; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part (2004), OJ L84/13, Article 85(1); Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part (1999), OJ L311/3, Article 51; EU-Japan, art. 16.5.e; EU-MERCOSUR art 11 of the Trade and Sustainable Development Chapter; EU-Mexico, art. 9 of the Trade and Sustainable Development Chapter; EU-Viet Nam, art 13.10.2.e; Singapore, Art. 12.11.4.

<sup>37</sup> Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other (2008), OJ L289/3 (EU-CARIFORUM EPA), Article 150(1); Free Trade Agreement between the EU and its Member States, on one side, and Colombia and Peru, on the other (2012), OJ L354/3 EU-Colombia and Peru FTA), Article 272.

<sup>38</sup> EU-MERCOSUR art 6.2.b of the Trade and Sustainable Development Chapter.

<sup>39</sup> EU-MERCOSUR art 8.2.b. of the Trade and Sustainable Development Chapter.

<sup>40</sup> EU-Viet Nam, art 13.8.1.

<sup>41</sup> EU-MERCOSUR art 9.2.f. of the Trade and Sustainable Development Chapter.

<sup>42</sup> EU-Mexico, art. 6.3.c of the Trade and Sustainable Development Chapter.

<sup>43</sup> EU-Mexico, art. 13.g of the Trade and Sustainable Development Chapter.

<sup>44</sup> EU-Singapore, Art. 12.11.3.



references to biodiversity-related human rights. These agreements, though, could play a more significant role in promoting cooperation on a holistic human rights-based approach to biodiversity conservation and sustainable use, thereby contributing to international obligations regarding mainstream biodiversity in different sectors (including different environmental sectors) and policy coherence in EU external relations. Thus, SIAs can contribute to the integration of biodiversity as a human right in future bilateral trade agreements. SIAs have already identified the likely impacts of trade liberalisation on biodiversity and more recent examples make reference to impacts on the right to a healthy environment.<sup>45</sup> However, the current approach to SIAs needs improvement so as to enhance their ability to integrate biodiversity concerns<sup>46</sup> and human rights concerns properly (European Ombudsman 1409/2014/MHZ; Hadjiyianni, 2019).

It should be also added that this author does not believe that the introduction of trade sanctions under the Trade and Sustainable Development chapters in EU bilateral agreements would strengthen the EU's external action (European Commission 2018). Rather, as Marin Duran has underlined, there are several reasons why sanctions are not suitable, ranging from 'scant and mixed' empirical evidence on their presumed compliance-inducing effect, to the 'risk of compromising the current value-based purpose and comprehensive scope of [Trade and Sustainable Development chapters in EU bilateral agreements],' and the inherently inequitable approach to enforcement tools that would 'in most cases, translate into an imbalanced one-way enforcement mechanism in favour of the EU.' (Marin Duran, forthcoming) It should be added that sanctions would bear the potential risk for the EU of leading to negative impacts on human rights in partner countries, over and above any such risk that would arise from activities regulated by the EU agreements (Augenstein, 2012). Negative impacts on the rights of indigenous peoples as a result of a partner country's response to trade sanctions related to the implementation of CITES, for instance, have already been documented in the context of United States of America (US) bilateral agreements<sup>47</sup>. That said, introducing incentives based on access to the EU market (as in the case of FLEGT, discussed in section 6.4 below) have proven to be beneficial to generate political will to engage with the EU on sustainable development issues. Commentators have also underscored how the EU may need to develop measures with extraterritorial impacts (discussion in section 6.3 below) with a view to addressing negative impacts on the environment in third countries that derive from the EU's own consumption of raw materials and ecological assets (directly or as embedded in imported products) and the use of raw materials and ecological assets and waste production, in the production of other products destined for the EU Market (Scott, 2019). The EU's ecological footprint abroad may also have adverse impacts on human rights in third countries, notably in relation with biodiversity as a human right.

### **Recommendations:**

Under the Trade and Sustainable Development Chapters of **existing bilateral agreements**, the EU should:

- support the representation of biodiversity-related human rights holders (as a specification to generic references to 'stakeholders') along with biodiversity-and-human-rights experts in institutional mechanisms established by the Trade and Sustainable Development Chapters;

<sup>45</sup> Eg Impact Assessment Accompanying the Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with New Zealand SWD (2017) 289 final.

<sup>46</sup> Ch. 8 (Žvelc), based on European Economic and Social Committee, 'Opinion on Sustainability Impact Assessments (SIA) and EU Trade Policy', 5 May 2011, para. 4.3.

<sup>47</sup> (Jinnah, 2011, p. 208); as discussed in (Morgera, 2012), see also (Jinnah and Morgera, 2013).

- exchange practices and monitor impacts on biodiversity and human rights as part of the general provisions on biodiversity, climate change, forestry, fisheries as well as 'working together on trade and sustainable development'<sup>48</sup>;
- monitor the biodiversity and human rights impacts of European companies operating outside the EU in the framework of ongoing political dialogues and the EU's external funding opportunities (Morgera, 2010); and
- apply relevant standards on biodiversity and human rights in line with the Review of Sustainability Impacts<sup>49</sup>.

The **European Parliament** could:

- commission an independent study on the implementation of existing bilateral trade agreements to identify any existing or potential practices that can support the protection of biodiversity as human rights; and
- discuss the relevance of Trade and Sustainable Development Chapters of existing bilateral agreements in the course of its missions to third countries.

In negotiating the Trade and Sustainable Development Chapters of **new bilateral agreements**, the EU should propose inserting reference to:

- Ecosystem-based and human rights-based approach to climate change mitigation and adaptation, including REDD+ and renewables, as well as disaster risk reduction;
- the need for respecting the rights of indigenous peoples and local communities, women and children, as well as farmers, peasants and small-scale fishing communities in the clauses on biodiversity, fisheries and forestry (with cross-references to relevant provisions on agriculture). Where this is not acceptable, include a commitment to exchange views and identify best practices on biodiversity as a human right under clauses on 'working together on trade and sustainable development'<sup>50</sup>;
- everyone's right to health and/or the question of livelihoods under CITES as specific areas of biodiversity cooperation, as well as all relevant biodiversity-related agreements in that clause;
- international standards on biodiversity as a human right in clauses on corporate accountability/supply chains and eco-labelling, as well as committing in that context to joint monitoring of EU companies' conduct within the partner country;
- procedural environmental rights under clauses on Transparency<sup>51</sup>;
- the representation of biodiversity-related human rights holders (as a specification of generic references to 'stakeholders') and of biodiversity-and-human-rights experts in the institutional mechanisms established by the Trade and Sustainable Development Chapters;
- consideration of the impacts on biodiversity as a human right in the context of the clause on the Review of Sustainability Impacts.

<sup>48</sup> EU-Vietnam, art. 13.14.

<sup>49</sup> EU-Viet Nam art 13.13; Japan, art. 16.11; EU-MERCOSUR art 18 of the Trade and Sustainable Development Chapter; EU-Mexico, art. 18 of the Trade and Sustainable Development Chapter; Singapore, Art. 12.14.

<sup>50</sup> EU-Vietnam, art. 13.14.

<sup>51</sup> EU-MERCOSUR, art. 3; Japan, art. 16.10; EU-Singapore, Art. 12.13.

To demonstrate genuine partnership and mutual learning, the EU should apply the Aarhus Convention obligation and guidance to 'promote the application of the principles of this Convention in international environmental decision-making processes'<sup>52</sup> to decision-making processes under the Trade and Sustainable Development Chapters of EU bilateral agreements. This could provide a basis to exchange experiences with countries that are signatory to the Escazú Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (which contains a similar provision on international processes at Art. 7(12)).

Furthermore, the **Commission** should include biodiversity as a human right in **SIAs**, relying on the CBD guidelines on biodiversity-inclusive, as well as socio-cultural and environmental impact assessments. The **European Parliament** can invoke its power of consent before a new international agreement is concluded by the Council, to support implementation of all the above recommendations related to new bilateral trade agreements.

## 6.2 GSP+

When countries have not concluded a bilateral trade agreement with the EU, the Generalised System of Preferences Plus (GSP+) offers full removal of tariffs on over 66% of EU tariff lines as an incentive for vulnerable, low and lower-middle income countries to implement 27 international conventions, including the Convention on Biological Diversity and CITES, as well as core human rights treaties that underpin biodiversity as a human right. The GSP+ provides an opportunity for the EU and partner countries to assess the 'effective implementation' of these treaties, which mainly focuses on the submission of reports to the relevant international monitoring bodies and the development of national legislation to implement the treaties. The European Commission monitors implementation through 'GSP+ dialogue' with beneficiary countries and 'scorecards' assessing each country's compliance. Whilst non-compliant countries can be removed from the list of GSP+ beneficiaries or suffer a temporary withdrawal of tariff preferences, stakeholders have considered these two options excessively narrow and have instead suggested creating roadmaps and the possibility of tariff increases in non-compliant sectors.<sup>53</sup>

For the purposes of this analysis, it can be observed that at the moment the GSP+:

- addresses compliance of human rights treaties and international biodiversity treaties in isolation from one another. GSP+ dialogues could be used to discuss how implementation of both sets of international obligations contributes or not to the protection of biodiversity as a human right. Involvement of human rights-holders in the GSP+ dialogue could also support this process;
- could focus on biodiversity mainstreaming in different sectors, with a view to addressing environmental challenges that may appear as 'not covered by the fundamental conventions on environmental protection and climate change,' which was underscored in the 2018 mid-term review of the GSP Regulation (Development Solutions, 2018). Biodiversity mainstreaming could facilitate addressing questions of pollution as a driver of biodiversity loss in different sectors, such as agriculture, forestry and textile, that are also sectors in which increased trade with the EU may in itself lead to environmental degradation (also noted in the 2018 mid-term review).
- needs to increase transparency, which was underscored in the 2019 EU-NGO Forum on Human Rights.<sup>54</sup> The 2018 mid-term review suggested publishing issues covered in the scorecards (on which information was not found in the public realm), as well as agendas and summary reports for dialogues.<sup>55</sup>

<sup>52</sup> Aarhus Convention, Article 3(7).

<sup>53</sup> COM(2018) 665 final.

<sup>54</sup> EU-NGO Forum Report - Human Rights: Building a Fair Environmental Future 2-3 December 2019, Brussels (2020).

<sup>55</sup> Executive Summary of the Midterm evaluation of the GSP Regulation (2018).

## Recommendations:

The EU could:

- focus the GSP+ on integrated implementation of human rights treaties and international biodiversity treaties; and
- focus on biodiversity mainstreaming in different sectors, with a view to addressing biodiversity as a human right also in sectors (agriculture) or biodiversity loss drivers (pollution) that may not appear to be addressed by the listed agreements.

The **European Commission** could:

- use GSP+ dialogues to discuss the integrated implementation of international environmental and human rights obligations, including specific regard to biodiversity as a human right;
- involve biodiversity-related human rights holders in and enhance the transparency of, GSP+ dialogues;
- emphasise guidance from UN monitoring bodies on biodiversity as a human right to form the basis for a joint assessment of implementation for relevant international human rights and environmental conventions.

The **European Parliament** and **EU Delegations** in the beneficiary countries should rely on international guidance on biodiversity as a human right in assessing implementation of relevant international human rights and environmental conventions. The European Parliament could do so in the context of its scrutiny of status reports on the compliance of GSP+ countries every two years.

## 6.3 Other unilateral measures

The EU has made increasing use of its legislation with extraterritorial implications, often in combination with external relations tools, as part of its contribution towards addressing biodiversity issues abroad (Hadiyianni, 2019; Scott, 2014; Morgera, 2013c). These measures have taken a variety of approaches and have also devoted effort to human rights issues in some regards (albeit, often without necessarily using human rights language). A few notable examples are (for a more extensive list, see Scott 2019):

- The IUU Fishing Regulation (1005/2008), which aims to tackle one cause of marine biodiversity loss by ensuring enforcement of international standards through restricted access to the EU market. Some bilateral trade agreements also make reference to this Regulation. Scholars, though, have indicated that its effect on global efforts on IUU fishing are 'not straightforward' (Van de Marel, 2019);
- The Timber Regulation (1005/2008), which created incentives linked with access to the EU market for third countries to conclude bilateral agreements with the EU as part of the FLEGT initiative (discussed below in more detail); and
- Sustainability criteria for biofuels production, as part of the Renewables Directive 2009/28/EC, which reduced incentives for EU operators to trade with non-complying products from abroad on the basis of sustainability criteria set unilaterally by the EU, but expressly based upon international reference documents including CBD guidance (Morgera, 2013c). With regard to biofuels, the EU has responded to concerns related to reliance on certification by requiring the Commission to report on approved certification schemes, including their independence, transparency and inclusiveness (Hadiyianni, 2019). That said, procedures for consultation and authorisation are certainly not transparent when a certification scheme is found not to comply with sustainability criteria (Hadiyianni, 2019). The EU has also shown responsiveness to concerns in the recast Renewables Directive 2018/2001 about indirect land use change that have both biodiversity and human rights implications, following a review of the latest available data on the status of production expansion for relevant food and feed crops worldwide. The most recent rules

on sustainability for biofuels production can now be found in the revised Renewables Directive (EU) 2018/2001.

Commentators have justified these measures in as far as they serve to: 1) enforce existing international legal standards or serve as a catalyst for their formation; or 2) address the EU's environmental footprint abroad (Scott, 2019). As discussed in the previous sections, both grounds have relevance from the perspective of biodiversity as a human right: in the first instance, EU action can support the enforcement or development of international standards that support the protection of biodiversity as a human right (Part II); and in the latter case, they can help prevent negative impacts on human rights abroad arising from biodiversity loss (Part I). Commentators coming from an environmental law perspective assess these measures against the benchmark of the EU '*moral responsibility* to reduce the scale and harmfulness of its global environmental footprint', in light of 'the increasing sophistication of environmental footprint studies, together with rich case studies compiled by academics and NGOs... and studies that have been prepared on behalf of the EU' (Scott 2019). They have also raised concerns about the legitimacy of these measures from a double-standard perspective. First, there is 'disparity in treatment under EU law of the foreign conduct of third country actors producing goods for sale in the EU market, on the one hand and the foreign conduct of EU corporations on the other hand'. And second, there is bias in regulating the sustainability ('qualitative/efficiency aspects') of third-country production, but not the quantitative aspects of EU consumption (Scott, 2019). What has not yet been fully addressed in the academic literature, however, is that the benchmark should be EU's compliance with binding and soft international legal standards on the nexus between the environment (including, specifically, biodiversity) and human rights, which is in line with the EU's own policy coherence treaty objectives and responds to UN guidance on addressing biodiversity as a human right in inter-state relations (Part I).

The **impact assessments** of EU measures with extraterritorial implications already include, to some extent, impacts on third-country actors. However, these assessments do not currently take sufficiently into account subsequent social, economic and environmental impacts in third countries: for instance, in the case of the IUU Fishing Regulation, the impact assessment did not take into account the detrimental impacts on vulnerable groups' livelihoods (Hadiyianni, 2019). This has also been the case of the Commission's assessments of the effects of implementing measures, which do not focus on potential socio-economic impacts in third countries and particularly for vulnerable groups within those countries such as small-scale fishing communities or vulnerable migrant groups (Scott, 2019). In addition, the European Commission could contract additional studies, following the example of a study that preceded the entry into force of the IUU Regulation, which aimed to examine its consequences in third countries, comprising stakeholder consultations (Oceanic Development, 2009). This would be in line with the requirements of Better Regulation guidelines and take into account the criticism that currently the European Commission's online consultations do not always provide effective participation and representation of third-country vulnerable groups and their impact on the final outcome is unclear (Hadiyianni, 2019).

### Recommendations

- Similarly to SIAs for bilateral trade agreements, more systematic consideration of biodiversity as a human right should be addressed through the **impact assessments** of EU measures with extraterritorial implications; **Human Rights Dialogues** and general **policy dialogues** could provide an avenue for the EU to discuss with partner countries concerns related to biodiversity as a human right that are covered by its unilateral measures, partly with a view to identifying support needs that could be responded to via external financial assistance (discussed in sections 6.5 and 6.6 below).

## 6.4 Governance and trade (FLEGT)

Sustainable forest management has been a long-standing international concern for the EU.<sup>56</sup> The most ambitious approach has included, at internal level, regulations on FLEGT (European Commission, 2003),<sup>57</sup> explicitly drawing on global soft-law commitments<sup>58</sup> and compatible with ongoing, albeit partial, multilateral efforts<sup>59</sup>. To address deforestation by exporter and importer countries, the EU has emphasised clearly its ultimate aim of leading the way in developing multilateral consensual measures, step by step and from the bottom up through a multilateral instrument or the linking of regional agreements (European Commission, 2003, p. 9 and 11). Using existing institutional structures, the EU has chosen specifically to advance its objective through increased dialogue with importing and exporting countries (notably the US and Japan), along with the integration of FLEGT in development cooperation programming at the stage of country strategy papers<sup>60</sup>.

Under FLEGT, the EU has put in place an ongoing specialised parallel track of bilateral negotiations with exporter countries aimed at concluding Voluntary Partnership Agreements (VPA). **A cooperative approach has, therefore, been pursued based on the forest-related legislation of the specific exporting country.** This arguably aims at ensuring the third country's ownership of this initiative, as well as demonstrating respect for its national sovereignty over domestic forest resources<sup>61</sup>. This is then coupled with a commitment from the third country to review its national legal framework if support for 'sustainable' forest management is not already included (European Commission, 2003, p. 5), possibly opening the door for a bilateral dialogue on the definition of this concept using the third country's national legislation as a departure point. Significantly, the review of national forest legislation is **supported by the involvement of an independent, specialised international organisation**, namely the FAO, which is managing a global project funded by the EU to support ACP countries in reviewing their legislation and assisting in the upgrading of their forest governance and law enforcement capacities<sup>62</sup>. As its other strength, the FLEGT approach offers **systematic support for the involvement of third-country stakeholders in defining the legality of timber**: the annex to the VPA includes a provision that the definition of legal harvest needs to be agreed with local stakeholders (including standards of compliance with national forest legislation, social responsibility agreement, relevant cultural norms, as well as occupational and health safety legislation) with a view also to setting out a common understanding about the areas in which national legislation should be improved<sup>63</sup>. However, an NGO report has underscored that EU external assistance programming documents provide insufficient information on involving local communities in the VPA negotiating process. Nor do they help sufficiently in dealing with the impacts of FLEGT initiatives on legal and

<sup>56</sup> The EU advocated the development of a global, legally binding instrument on forests at the United Nations Forum on Forests (e.g., A. Baldwin and others, 'Summary of the Fifth Session of the United Nations Forum on Forests' ENB, 13(133) (2005), at 4).

<sup>57</sup> European Commission, 2003, p. 3 (FLEGT Action Plan). The FLEGT Action Plan was endorsed by the Council, 'Conclusions - Forest Law Enforcement, Governance and Trade (FLEGT)' [2003] OJ C268/1.

<sup>58</sup> WSSD, 'Johannesburg Plan of Implementation' UN Doc. A/CONF.199/20 (2002), Resolution 2, at 5.

<sup>59</sup> Namely, timber species listed under CITES: European Commission, 2003, p. 20.

<sup>60</sup> (European Commission, 2003, pp. 8, 9 and 11); and also ENRTP Thematic Strategy 2011-2013, at 24.

<sup>61</sup> Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (Forest Principles), 31 ILM 881 (1992), para. 1a.

<sup>62</sup> FAO, 'ACP FLEGT Support Programme' at [www.fao.org/forestry/acp-flegt/en](http://www.fao.org/forestry/acp-flegt/en). Note that while there is no formal link between the FAO FLEGT Programme and the VPAs, FAO assistance specifically targets countries depending on 'their level of interest in the FLEGT Action Plan and in negotiating a VPA' through support for national and regional FLEGT/VPA workshops to share information, knowledge and lessons learnt, feasibility studies on VPA-related issues; and support for national multi-stakeholder committees in charge of VPA negotiations and for the participation of local stakeholders (FAO, 'Improving Forest Governance in Africa, the Caribbean and the Pacific).

<sup>63</sup> Ghana VPA.



institutional coherence within the partner country<sup>64</sup>. Nevertheless, under this approach the EU and its partner countries may act as 'co-generators of norms', jointly identifying solutions to multilateral impasses, based on their respective internal frameworks and relevant international instruments<sup>65</sup>, as well as jointly monitoring impacts. VPAs provide a reference point, based on a joint evaluation by the third country and the EU on alignment of third-country national forest law with relevant multilateral standards,<sup>66</sup> aimed at verifying the legality of timber harvests imported into the EU.

Certain human rights concerns were taken into account under FLEGT: The Action Plan foresees that the Commission will 'work to address [...] local and indigenous peoples' rights to the forests they depend on for a living.' (Commission, 2003, p. 21) The VPA signed with Ghana<sup>67</sup>, for instance, including in the definition of legal harvest reference to national legal norms with social, cultural and labour dimensions<sup>68</sup>. This was then coupled with a commitment from the third country to review its national legal framework where it does not support *sustainable* forest management (Commission, 2003, p. 5). This could be interpreted as including interactions between forest protection and human rights, thereby opening the door for a bilateral dialogue on the definition of this concept using the third country's national legislation as a departure point. This understanding seemed to be confirmed by the explicit reference in relevant EU instruments on external thematic funding to the 'promotion on the ground of community-based forest management and respect for local and indigenous peoples' rights over forestland<sup>69</sup>. Experience in Indonesia, though, has revealed that an auditable forest certification standard was not considered suitable to address issues around land use by indigenous peoples (Overdevest and Zeitlin, 2018).

The FLEGT approach has made visible inroads into other EU external relations tools (as demonstrated by the provisions in bilateral trade agreements on sustainable forestry mentioned above), although the negotiation of VPAs remain a separate bilateral process. Institutionalised dialogues have also provided further opportunities to discuss sustainable forest management<sup>70</sup>. In addition, through SIAs the Commission has pointed to the mutual benefits of participating in the FLEGT initiative with regards to combating illegal logging<sup>71</sup>.

Finally, FLEGT provided clear indications that the EU demonstrated **responsiveness to intervening in multilateral developments**: as deforestation issues were increasingly addressed in the context of the negotiations on a post-2012 climate change regime under REDD-plus (UNFCCC, 2010, paras 70-73), the EU proposed using FLEGT to influence forest-related negotiations in the international climate change regime.<sup>72</sup> Specifically, it aimed at capitalising on agreement to key concepts regarding forest governance

<sup>64</sup> WWF, FERN and Birdlife, Environmental Tools in EC Development Cooperation: An Analysis of Country and Regional Environmental Profiles (2009), p. 19.

<sup>65</sup> Morgera (no 7 above).

<sup>66</sup> Recitals 3–4 of the Voluntary Partnership Agreement between the European Community and the Republic of Ghana on Forest Law Enforcement, Governance and Trade in Timber Products into the Community, [2010] OJ L70/3, point to the multilateral instruments of reference.

<sup>67</sup> Voluntary Partnership Agreement between the European Community and the Republic of Ghana on Forest Law Enforcement, Governance and Trade in Timber Products into the Community (20 November 2009) <<http://www.illegal-logging.info/uploads/SignedAgreementECGhanaFLEGTEN.pdf>> accessed 19 April 2010.

<sup>68</sup> Voluntary Partnership Agreement between the European Community and the Republic of Ghana on Forest Law Enforcement, Governance and Trade in Timber Products into the Community (20 November 2009) <<http://www.illegal-logging.info/uploads/SignedAgreementECGhanaFLEGTEN.pdf>> accessed 19 April 2010, Annex II.

<sup>69</sup> ENRTP Thematic Strategy 2007-2010, p. 18; ENRTP Thematic Strategy 2011-2013, p. 24.

<sup>70</sup> Fifth EU- Latin America and Caribbean (LAC) Summit, 'Declaration: Our Peoples' Priorities Together' Lima 16 May 2008 (Lima Declaration), para. 48. See also EU-Japan Summit, 'Shaping Our Common Future: An Action Plan for EU-Japan Cooperation' (2001), at 15-16.

<sup>71</sup> Andean SIA Position Paper, at 8; ASEAN SIA Position Paper, at 8; and MERCOSUR SIA Position Paper, at 6.

<sup>72</sup> European Commission, 'Proposal laying down the obligations of operators who place timber and timber products on the market', COM (2008) 644/3 final, at 5; and Agreement establishing an Association between the EU and its Member States, on the one hand, and Central America on the other [2012] OJ L346/3, Art 20; Free Trade Agreement between the EU and its Member States, on one

emerging from FLEGT, as well as the lessons learnt in related multi-stakeholder processes, as concrete inputs into multilateral negotiations on REDD-plus<sup>73</sup>.

Overall, while the EU has experimented with a variety of approaches in its unilateral and bilateral instruments, FLEGT is markedly the most partnership-oriented by virtue of its reliance on third country legislation, consultation with third-country stakeholders, the involvement of expert and impartial international organisations, integration within the Trade and Sustainable Chapters of bilateral trade agreements and explicit responsiveness to intervening multilateral developments.

### **Recommendations:**

The EU should:

- address explicitly the human rights of indigenous peoples and local communities under FLEGT VPAs and small-scale fishing communities under Bilateral Fisheries Partnerships Agreements<sup>74</sup>;
- address explicitly issues related to biodiversity as a human right in any other unilateral and bilateral measure, particularly when certification is relied upon and require effective participation as well as fair representation of third-country right holders in the institutions mandated to monitor and support the implementation of these measures; and
- use Impact Assessments and other assessments of the effects of implementing measures to address potential effects on biodiversity as a human right for EU unilateral and bilateral external relations tools, ensuring effective participation of third country rights holders, as well as ensure clarity in explaining how consultation has impacted the outcome.

The **European Parliament** can invoke its power of consent before a new international agreement is concluded by the Council and its legislative powers, to support the implementation of these recommendations.

The **European Parliament** could also request an independent study to develop necessary benchmarks for EU unilateral and bilateral measures to ensure compliance with binding and soft international legal standards on the nexus between the environment (including, specifically, biodiversity) and human rights, in light of the growing documentation of the EU's ecological footprint abroad and of the growing international guidance on its relevance from a human rights perspective.

## **6.5 EU external assistance**

Biodiversity in EU external assistance has gradually gained more prominence. Limited attention had been paid to biodiversity in the documentation for the programming of the EU geographic external funding until 2006 (European Parliament 2006 paras. 60-62; and European Commission, 2001). However, more recent legislation (Development Cooperation Instrument 2006) on EU thematic external funding for the environment has included among its specific objectives that of addressing biodiversity loss<sup>75</sup>, with the programming document for 2007-2012 singling out the CBD and CITES<sup>76</sup>. Nevertheless, the Commission still concluded as recently as 2011 that 'biodiversity is [...] a relatively low priority for EU external aid, as it receives less than 1/50 of EU and Member States' total annual development aid budgets.' (European

side, and Colombia and Peru, [2012] OJ L354/3, Art 286; Second Revision of the Cotonou Partnership Agreement – Agreed Consolidated Text (11 March 2010), Art 32 bis.

<sup>73</sup> For a more detailed discussion, see A Savaresi, 'FLEGT and REDD: Interactions between EU Bilateral Cooperation and the Development of International Law' in Morgera (no 2 above) 149.

<sup>74</sup> De Schutter (n 150).

<sup>75</sup> Regulation 1905/2006 [2006] OJ L348/41 (DCI Regulation), Article 2(2).

<sup>76</sup> European Commission (2007); see also European Commission, 2006, pp. 7-8.

Commission, 2011, p. 16) In the decade to 2016, the EU total funding for biodiversity reached EUR 1.67 billion.

For the funding period 2013-2019, the EU has earmarked up to EUR 1 billion for biodiversity and ecosystems, including wildlife conservation, which does not include the biodiversity component of development projects in other sectors, such as agriculture and food, security as well as energy<sup>77</sup>. For the period 2013-2019, the EU co-financed 170 actions/projects where indigenous peoples' rights were either the main or significant objective with a total EU contribution of EUR 207 932 526. 13 % of actions related to lands and environment and 12 % to fundamental rights and freedoms. The current Regulation on implementation of EU external financing instruments (Regulation 236/2014) specifically calls for tracking biodiversity expenditure (Art. 14), involvement of stakeholders of beneficiary countries (art 15) through due consultation and timely access to relevant information in the implementation process, together with a screening of biodiversity impacts (Art. 2.6). However, the individual financing instruments, including the European Instrument for Democracy and Human Rights (EIDHR), do not explicitly request consideration of biodiversity as a human right.

In its recommendations for the post-2020 architecture of the Development Cooperation Instrument and the European Development Fund, the European Parliament has already underlined a need to 'include horizontal and cross-sectoral environmental protection and the opportunities offered by environmental policies in all development policies' (2017/2258(INI)). Programming of the **EU's external financing instruments** for the period from 2021 onwards should mainstream the nexus between biodiversity and human rights in its support of multilateral processes (as outlined above in this section; financing of bilateral processes is discussed in section 6 below), as part of its efforts to ensure policy coherence across multilateral environmental cooperation and between environmental as well as human rights cooperation.

More specifically, the negotiations over the next generation of external financing instruments are ongoing: a proposed [Neighbourhood, Development and International Cooperation Instrument \(NDICI\)](#) will merge most of the EU's current external financing instruments, including [the European Development Fund](#) and will also establish a European Fund for Sustainable Development Plus for external investments intended to raise additional financial resources for sustainable development from the private sector. The European Parliament has already suggested: making gender equality and women's and girl's rights a principal or a significant objective; increasing the budget for the thematic programme 'Global Challenges' by EUR 1.5 billion, reinforcing health and education; including attainment of the Paris Agreement commitments on climate in the objectives of the regulation; and ensuring that 30 % of NDICI funds are used in support of climate change mitigation and adaptation, while an additional 15 % are used to support other environmental objectives (European Parliament, 2019). Each of these suggestions also provide opportunities to address biodiversity as a human right.

In addition, the EU has already devoted an increasing amount of funding to the protection of environmental human rights defenders, which remains a 'major priority of the EU's external policy' according to the *Council conclusions on priorities in UN human rights fora in 2020*. Under the European Instrument for Democracy and Human Rights (EIDHR), the EU allocated to EU human rights defenders mechanism, ProtectDefenders.eu, EUR 20 million for 2015-2019, which has supported more than 30.000 defenders and their families through a combination of short, medium and long-term initiatives (including direct support, training, advocacy and outreach activities). The mechanism is directly managed by the EU and implemented by a consortium of 12 NGOs. It was renewed in November 2019 for another three years with a budget of EUR 15 million, as well as with novel features on enhancing a gender-sensitive approach and on supporting shelter initiatives for defenders at risk, in particular at regional and local levels. In

<sup>77</sup>Please see, [https://ec.europa.eu/international-partnerships/topics/ecosystems-and-biodiversity\\_en](https://ec.europa.eu/international-partnerships/topics/ecosystems-and-biodiversity_en) last consulted on 9 March 2020.

addition, the EIDHR Human Rights Crises Facility provides direct awards, which can exceptionally be granted to civil society and human rights defenders working in extremely difficult conditions and/or where the publication of a call for proposals would be inappropriate. Capacity building of HRDs as their main objective. In addition, the Commission selects projects through global and local calls for proposals designed to reinforce the capacities of human rights defenders both as individuals and organisations. For example, in 2017 a specific lot under the EIDHR global call for proposals was dedicated to supporting human rights defenders in the area of land-related rights and indigenous peoples (Zamfir, 2018). The EIDHR will be subsumed under the proposed NDICI, with the understanding that the specific features of the EIDHR, such as its ability to provide aid flexibly to endangered organisations and individual HRDs, independently of third country governments' assent, will remain (Zamfir, 2018). While EU support is considered 'the largest pro-[human rights defenders] programme worldwide – [that] can provide aid directly to defenders without informing the government of the country in question or demanding its prior consent' (Zamfir, 2018), three shortcomings have been noted at the 2019 EU-NGO Forum on Human Rights, among current EU funding arrangements for environmental human rights defenders:

- dominant position of a few large, mostly European civil society organisations;
- ineffective promotion of collective human rights defenders;
- insufficient attention to women and youth environmental human rights defenders<sup>78</sup>.

#### **Recommendations:**

The EU should:

- prioritise projects that contribute to the protection and realisation of biodiversity-related human rights or to the documentation of good practices that could be relevant in international fora (see Part II);
- request inclusion of biodiversity-related human right holders in consultations on implementation of externally funded activities; and
- request respect for the CBD safeguards on biodiversity funding.

The **European Parliament** can use its role as co-legislator in the further discussion on the proposed [Neighbourhood, Development and International Cooperation Instrument \(NDICI\)](#), by insisting to include reference to the UN Framework Principles on Human Rights and the Environment and to the need to consider the inter-dependencies of human rights, climate change and biodiversity. In addition, the European Parliament could insist to make reference to due diligence to respect biodiversity as a human right (including in connection to climate change, agriculture and fisheries) under the **European Fund for Sustainable Development Plus**.

The **European Commission and the EEAS** in programming thematic and geographic funding with partner countries could emphasise opportunities to address inter-dependencies of human rights, climate change and biodiversity, including through an ecosystem-based and human rights-based approach to climate change adaptation and mitigation and the mainstreaming of biodiversity and human rights in health and education; and through adequate funding to implement the post-2020 global biodiversity framework with a view to maximizing the opportunities for the next decade to achieve global biodiversity targets. The Commission could also discuss the recommendations contained in this study at the European Development Days Conference, which will focus on *The Green Deal for a Sustainable Future*.

In the implementation phase, the **European Parliament** could:

<sup>78</sup> EU-NGO Forum Report - Human Rights: Building a Fair Environmental Future, 2-3 December 2019, Brussels, 2020.

- commission an independent study to assess whether and to what extent the existing rights-based approach to development is fit to address the specific risks of EU external funding causing negative impacts on biodiversity as a human right;
- scrutinise strategy papers and annual action programmes, as well as the Commission's annual reports and evaluation reports and use its budgetary discharge resolutions (Cardwell and Jančić, 2019) to assess whether EU external funding disregards biodiversity as a human right; and
- discuss in the course of its missions to third countries the extent to which EU external funding contributes to a holistic human rights-based approach to biodiversity, including through an ecosystem-based and human rights-based approach to climate change adaptation and mitigation.

Finally, **EU Delegations** could be trained on the relevance of biodiversity for their work on human rights, including business and human rights, with a view to:

- developing thematic and civil society calls for proposals on biodiversity and as a human right;
- supporting 'smaller NGOs, grassroots and community-based organisations, indigenous peoples and informal civil society groups' that are struggling to directly access EU funding, as suggested at the 2020 EU-NGO Forum<sup>79</sup>; and
- enhancing their role in offering a first point of contact for NGOs, indigenous peoples and youth environmental human rights defenders, as suggested at the 2020 EU-NGO Forum<sup>80</sup>.

## 6.6 Dialogues and human rights defenders

With regard to the implementation of external financing instruments, **Human Rights Dialogues** could provide an avenue for ensuring that sufficient attention is given to biodiversity as a human right. The 2017 EU Guidelines for the Promotion and Protection of the Rights of the Child already underscore the role of these dialogues in addressing various systemic elements which a country needs to strengthen in order to realise the rights of the child (although the Guidelines only refer to climate change but not to biodiversity). These dialogues also focus on discrimination and the protection of human rights defenders, with a view to determining specific needs for assistance from the European Union. They have also occasionally raised links between environmental protection and human rights: for example, on the occasion of the EU-Vietnam Human Rights Dialogue (December 2017), the EU called for the release of environmental activists detained for denouncing an environmental disaster. (Zamfir, 2018) Human Rights Dialogues could, therefore, start to address biodiversity as a human right more systematically. This could be a way of responding to the difficulty identified in the mid-term review of the current external financing instruments<sup>81</sup> that more progress is needed in addressing biodiversity loss and mainstreaming human rights and gender equality.

Human rights dialogues have only been established with a limited number of partner countries, so the opportunities to use the general policy dialogues should also be explored, both in terms of the implementation of external financing instruments and for the protection of human rights defenders. The **human rights component of political dialogues** between the EU and third countries and regional organisations can include the situation of human rights defenders. According to the EU Guidelines on Human Rights Defenders of 2018 EU Heads of Mission provide periodic reports on the human rights situation in their countries and can make recommendations to the Council Working Party on Human Rights for possible EU actions, including condemnation of threats and attacks against human rights defenders, as

<sup>79</sup> EU-NGO Forum Report - Human Rights: Building a Fair Environmental Future, 2-3 December 2019, Brussels, 2020.

<sup>80</sup> EU-NGO Forum Report - Human Rights: Building a Fair Environmental Future, 2-3 December 2019, Brussels, 2020.

<sup>81</sup> COM (2017) 720 final, which was cited in the Commission proposal for a new neighbourhood, development and international cooperation instrument COM(2018)460 final.



well as for demarches and public statements where human rights defenders are at immediate or serious risk. EU Heads of Mission also report on the effectiveness of EU actions. EU Missions are also expected to facilitate exchanges between local human rights defenders and UN thematic mechanisms. Their capacity has been enhanced through Human Rights Focal Points and Human Rights Defenders Liaison Officers. In a 2017 resolution, the Parliament called on the EU and its Member States and delegations to use all available means to raise individual cases of human rights at risk, including those active in the environmental sphere, systematically.<sup>82</sup>

A 2017 study commissioned by the Parliament concluded that the 'most effective part of these EU responses has been the protection offered to human rights defenders', but the EU has not been so effective in dealing with the 'deeper, structural aspects' of the problem involving the 'shrinking space for civil society'. Notably, the report indicated that environmental laws may be used to shrink space for civil society and this is where 'the EU enjoys its most significant influence over other states.' (Youngs and Echagüe, 2017). In a 2017 resolution, the Parliament called for the establishment of an effective system to monitor civil society space, with clear benchmarks and indicators.<sup>83</sup>

**EU civil society roadmaps** have provided a way to address the shrinking space for civil society. A 2020 review (Sanz Corella et al, 2020) of lessons learnt in the development of the second-generation of EU-civil society roadmaps has indicated that these roadmaps have helped structure the dialogue with civil society organizations (and regularly assess how the context evolves and what EU response is required), as well as influence policy and even political dialogue with the government. They have also led to more permanent forms of dialogue and institutionalised follow-up mechanisms through existing coordination spaces for political and policy dialogue (Heads of Mission and Heads of Cooperation/ Development Counsellors' meetings and other relevant sectoral meetings). On the other hand, the review underscored the need to ensure integrated consideration of other EU action (such as bilateral trade agreements). The roadmaps have also influenced the programming of external funding, with the 2020 review emphasizing the need for a more strategic and selective allocation of funds and support for the creation of partnerships among civil society organizations and other actors (Sanz Corella et al, 2020). Consideration of biodiversity as a human right can provide an opportunity to align support from the EU and explore innovative partnerships as part of a holistic human rights-based approach to biodiversity conservation.

### **Recommendations:**

The EU should:

- include explicit consideration of biodiversity as a human right in human rights dialogues and as part of the human rights component of policy dialogues (including as part of the practice of handing over 'an individual cases list' of human rights violations committed against human rights defenders or other individuals), as well as during visits to third-country human rights institutions, with a view to supporting integrated programming of external assistance and protection of human rights defenders;
- ensure consideration of biodiversity as a human right in EU civil society roadmaps;
- support civil society engaged in the protection of biodiversity as a human right, by addressing the recommendations of this report in future annual EU-Human Rights NGO Forum and in other activities to follow up on the 2019 EU-Human Rights NGO Forum that focused on the environment; and

<sup>82</sup> European Parliament resolution of 13 December 2017 on the Annual Report on Human Rights and Democracy in the World 2016 and the European Union's policy on the matter (2017/2122(INI)).

<sup>83</sup> European Parliament resolution of 13 December 2017 on the Annual Report on Human Rights and Democracy in the World 2016 and the European Union's policy on the matter (2017/2122(INI)).



- develop training on the relevance of biodiversity for the EU's human rights diplomacy, including business and human rights and human rights defenders.

The **European Parliament** should:

- use its strategic dialogue with the Commission, its follow-up reviews of the EU Strategic Framework and Action Plan on Human Rights and Democracy and of the Annual Report on Human Rights to lay out the specific impact of EU policies on the shrinking space for civil society also from the perspective of biodiversity as a human right;
- use its monitoring of EU human rights dialogues and of the EEAS follow-up to urgency resolutions to highlight lack of attention to biodiversity as a human right and to biodiversity activists as human rights defenders;
- during visits to third countries, discuss biodiversity as a human right and raise cases of biodiversity-related human rights defenders in meetings with authorities and human rights institutions.

Finally, **EU Delegations** should:

- consider biodiversity as a human right when offering a first point of contact for NGOs, indigenous peoples', women's and youth activists<sup>84</sup>;
- include consideration of biodiversity as a human right in periodic reports on the human rights situation in third countries, including condemnation of threats and attacks against biodiversity activists, as well as for demarches and public statements where they are at immediate or serious risk;
- include consideration of biodiversity as a human right in reports on the effectiveness of EU actions on human rights and human rights defenders; and
- facilitate exchanges between local biodiversity organizations/activists and UN thematic mechanisms on human rights and human rights defenders.

<sup>84</sup> EU-NGO Forum Report - Human Rights: Building a Fair Environmental Future 2-3 December 2019, Brussels, 2020.

## 7 Conclusions: Summary of recommendations

	European Commission and EEAS	European Parliament
<p><b>2020/2021</b> <b>Unilateral and bilateral level</b></p>	<ul style="list-style-type: none"> <li>• Discuss the recommendations of this study at the <b>European Development Days Conference</b>.</li> <li>• Consider mainstreaming biodiversity as a human right in proposals arising from the <b>Green Deal</b> and the new EU biodiversity strategy.</li> <li>• Address the recommendations of this report in a future annual <b>EU-Human Rights NGO Forum</b> and in other activities to follow up on the 2019 EU-Human Rights NGO Forum that focused on the environment.</li> <li>• In the (pre-)programming of external (thematic and geographic) finance:             <ul style="list-style-type: none"> <li>○ Encourage projects that integrate human rights, biodiversity and climate change.</li> <li>○ Ensure consideration of biodiversity as a human right under the European Fund for Sustainable Development Plus.</li> <li>○ Develop thematic and civil society calls for proposals on biodiversity and as a human right.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Request <b>independent studies</b> to assess:             <ul style="list-style-type: none"> <li>○ Global data availability on biodiversity loss and human rights;</li> <li>○ Whether the existing rights-based approach to development is fit to ensure that EU external funding does not risk causing negative impacts on biodiversity as a human right; and</li> <li>○ the EU Biodiversity Strategy 2020-2030 against international developments on biodiversity as a human right.</li> </ul> </li> <li>• Rely on international developments on biodiversity as a human right in relation to the <b>proposals</b> arising from the <b>Green Deal</b>.</li> <li>• Include references to biodiversity as a human right in the <b>resolution on climate change and human rights</b></li> <li>• use its role as co-legislator in further discussion on the <b>proposed <a href="#">Neighbourhood, Development and International Cooperation Instrument (NDICI)</a></b>, and seek to include reference to the need to consider the inter-dependencies of human rights, climate change and biodiversity, as well as to business due diligence to respect biodiversity as a human right (including in connection to climate change, agriculture and fisheries) under the <b>European Fund for Sustainable Development Plus</b>.</li> </ul>

	European Commission and EEAS	European Parliament
<b>2020/2021 Multilateral Fora</b>	<ul style="list-style-type: none"> <li>At the UN <b>Biodiversity Conference</b>, argue for consistent references to 'human rights-holders' and to everyone's right to life, health, food and water, as well as the human rights of women and children in the <b>new global biodiversity framework for 2030</b>; and to the human rights of indigenous peoples and local communities into the elements of a <b>revised work programme on Article 8(j) and related provisions</b></li> <li>At the <b>UN Ocean Conference</b>, link marine biodiversity science with human rights, including in the context of the fight against climate change.</li> <li>Support international recognition of a human right to a healthy environment.</li> </ul>	<ul style="list-style-type: none"> <li>In assessing the new EU Biodiversity Strategy, rely systematically on international developments on biodiversity as a human right.</li> </ul>
<b>Medium-Term</b>	<ul style="list-style-type: none"> <li>Consider biodiversity as a human right in developing proposals under the EU Biodiversity Strategy.</li> <li>Develop <b>Human Rights Guidelines on a Human Right to a Healthy Environment</b>, following the example of the 2019 EU Human Rights Guidelines on Safe Drinking Water and Sanitation.</li> <li>Develop <b>training for EU Delegations</b> on the relevance of biodiversity for their work on human rights, including business and human rights.</li> </ul> <p>In programming external (thematic and geographic) <b>finance</b>:</p>	<ul style="list-style-type: none"> <li>In assessing the mid-term review of EU Biodiversity Strategy, rely systematically on international developments on biodiversity as a human right.</li> <li>Request an independent study on benchmarks for EU unilateral and bilateral measures to ensure compliance with binding and soft international legal standards on the nexus between the environment (including, specifically, biodiversity) and human rights</li> <li>discuss in the course of its missions to third countries the extent to which EU external funding contributes to a holistic human rights-based approach to biodiversity, including through an</li> </ul>

	European Commission and EEAS	European Parliament
	<ul style="list-style-type: none"> <li>• encourage projects that integrate human rights, biodiversity and climate change;</li> <li>• ensure consideration of biodiversity as a human right under the European Fund for Sustainable Development Plus;</li> <li>• ensure adequate funding to implement the post-2020 global biodiversity framework;</li> <li>• request inclusion of biodiversity-related human right holders in consultations on implementation of externally funded activities; and</li> <li>• request respect for the CBD safeguards on biodiversity funding.</li> <li>• develop thematic and civil society calls for proposals on biodiversity and as a human right.</li> </ul> <p>Under the GSP,</p> <ul style="list-style-type: none"> <li>• Use <b>GSP+</b> dialogues, to discuss the integrated implementation of international environmental and human rights obligations, including specific regard to biodiversity as a human right;</li> <li>• Involve biodiversity-related human rights holders in and enhance the transparency of, GSP+ dialogues;</li> <li>• <b>EU Delegations</b> in the beneficiary countries should rely on international guidance on biodiversity as a human right in assessing implementation of relevant international human rights and environmental conventions under <b>GSP+</b>.</li> <li>• Emphasise guidance from UN monitoring bodies on biodiversity as a human right to form the basis for a joint</li> </ul>	<p>ecosystem-based and human rights-based approach to climate change adaptation and mitigation</p> <ul style="list-style-type: none"> <li>• Rely on international guidance on biodiversity as a human right in assessing implementation of relevant international human rights and environmental conventions (including scrutiny of status reports on the compliance of GSP+ countries every two years).</li> </ul>

	European Commission and EEAS	European Parliament
	<p>assessment of implementation for relevant international human rights and environmental conventions.</p> <p>Under the Trade and Sustainable Development Chapters of <b>existing bilateral agreements:</b></p> <ul style="list-style-type: none"> <li>• Support the representation of biodiversity-related human rights holders and experts in institutional mechanisms;</li> <li>• Exchange practices and monitor impacts on biodiversity and human rights of trade and of operations of European companies;</li> <li>• Apply standards on biodiversity and human rights in the Review of Sustainability Impacts.</li> </ul> <p>For new agreements:</p> <ul style="list-style-type: none"> <li>• Reflect the nexus between biodiversity, climate change and human rights in negotiating new bilateral agreements.</li> <li>• Include biodiversity as a human right in SIAs, relying on the CBD guidelines on biodiversity-inclusive as well as socio-cultural and environmental impact assessments.</li> <li>• Address explicitly the human rights of indigenous peoples and local communities under FLEGT VPAs and of small-scale fishing communities under Bilateral Fisheries Partnerships Agreements.</li> <li>• Address explicitly issues related to biodiversity as a human right in any other unilateral and bilateral measure.</li> </ul>	<ul style="list-style-type: none"> <li>• Commission an independent study on the implementation of existing bilateral trade agreements to identify any existing or potential practices that can support the protection of biodiversity as a human right; and</li> <li>• Discuss the relevance of Trade and Sustainable Development Chapters of existing bilateral agreements to biodiversity as a human right in the course of its missions to third countries.</li> <li>• Invoke its power of consent before a new international agreement is concluded by the Council, to support integration of biodiversity as a human right into new bilateral agreements.</li> </ul>

	European Commission and EEAS	European Parliament
	<ul style="list-style-type: none"> <li>• Use Impact Assessments to address potential effects on biodiversity as a human right for EU unilateral and bilateral external relations tools.</li> </ul> <p><b>EU Delegations:</b></p> <ul style="list-style-type: none"> <li>• Offer a first point of contact for NGOs, indigenous peoples' and youth biodiversity defenders.</li> <li>• Identify good practices on biodiversity as a human right for the 'good human rights stories events' on margins of Human Rights Council and UN General Assembly.</li> </ul>	
	<ul style="list-style-type: none"> <li>• Include consideration of biodiversity as a human right in human rights <b>dialogues</b> and as part of the human rights component of policy dialogues, with a view to supporting integrated programming of external assistance and protection of human rights defenders;</li> <li>• Ensure consideration of biodiversity as a human right in EU civil society roadmaps</li> <li>• Include consideration of biodiversity as a human right in periodic reports on the human rights situation in third countries, including condemnation of threats and attacks against biodiversity activists, as well as for demarches and public statements where they are at immediate or serious risk;</li> <li>• Include consideration of biodiversity as a human right in reports on the effectiveness of EU actions on human rights and human rights defenders; and</li> </ul>	<ul style="list-style-type: none"> <li>• Use its strategic dialogue with the Commission, its follow-up reviews of the EU Strategic Framework and Action Plan on Human Rights and Democracy and of the Annual Report on Human Rights to lay out the specific impact of EU policies on the shrinking space for civil society also from the perspective of biodiversity as a human right;</li> <li>• Use its monitoring of EU human rights dialogues and of the EEAS follow-up to urgency resolutions to highlight lack of attention to biodiversity as a human right and to biodiversity activists as human rights defenders;</li> <li>• During visits to third countries, discuss biodiversity as a human right and raise cases of biodiversity-related human rights defenders in meetings with authorities and human rights institutions</li> </ul>



	European Commission and EEAS	European Parliament
	<ul style="list-style-type: none"> <li>Facilitate exchanges between local biodiversity organizations/activists and UN thematic mechanisms on human rights and human rights defenders.</li> </ul>	
<p><b>Medium-term: multilateral fora</b></p>	<ul style="list-style-type: none"> <li>Integrate human rights considerations in the negotiating positions on a new treaty on <b>marine biodiversity of areas beyond national jurisdiction</b>.</li> <li>Under the <b>CBD</b>, respect human rights standards in: new guidelines and processes on Article 8(j); long-term, strategic approach to mainstreaming biodiversity, Nagoya Protocol on Access to Genetic Resources and Benefit-sharing.</li> <li>Generally, consider the CBD a relevant international forum for the human rights of children, women and indigenous peoples.</li> <li>At <b>UN Climate Conferences</b>, support reliance on CBD guidelines on an ecosystem-based and human rights-based approach to climate change <b>adaptation, the use of traditional knowledge</b> as part of global climate science efforts and on climate change and marine biodiversity.</li> <li>Call for respect of human rights under other biodiversity conventions.</li> <li>Address biodiversity as a human right under the Aarhus Convention's Working Group of the Parties on Almaty Guidelines.</li> <li><b>Support integration of biodiversity as a human right</b> in the context of the Universal Periodic Review.</li> </ul>	<ul style="list-style-type: none"> <li>Commission independent studies to assess to what extent the EU and its Member States have integrated environmental concerns (including biodiversity-specific ones) into its international human rights initiatives in multilateral fora, as well as to what extent they have integrated biodiversity as a human right in other multilateral environmental negotiations.</li> <li>Invoke its power of consent before a new international agreement is concluded by the Council to support the integration of biodiversity as a human right in the EU and its Member States' negotiating positions concerning a new international treaty on business and human rights and a new treaty on marine biodiversity of areas beyond national jurisdiction.</li> <li>Call for more coordinated and ambitious approaches to biodiversity as a human right in its periodic resolution on the EU at the UN.</li> </ul>

	European Commission and EEAS	European Parliament
	<ul style="list-style-type: none"> <li>• Support monitoring of biodiversity as a human right under the <b>UN Working Group on Business and Human Rights</b>.</li> <li>• Rely on biodiversity as a human right in the ongoing <b>negotiations of a new international treaty on business and human rights</b>.</li> <li>• Support the application of international guidance on biodiversity and human rights in the context of multilateral <b>peace-building</b> processes.</li> <li>• Support the integration of biodiversity as a human right in international environmental negotiations and international human rights processes.</li> </ul>	

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PE 603.491  
EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/01

Print ISBN 978-92-846-6489-4 doi:10.2861/104569 QA-02-20-214-EN-C  
PDF ISBN 978-92-846-6477-1 doi:10.2861/60672 QA-02-20-214-EN-N