

**Abstract**

*The notion to incorporate environmental rights into human rights derives from Principle 1 of the 1972 Stockholm Declaration on the Human Environment and restated in Principle 1 of the 1992 Rio Declaration on Environment and Development. This declarations are soft laws for that the 1998 Aarhus Convention translates Principle 1 in the Declarations above that the environmental human rights were outlined by the access to information, public participation in decision making, and the access to justice in the environmental matters. The 2009 Indonesian Law no.32 on the Protection and Management of Environment have set about the rights relating to environmental human rights as stated in the Aarhus Convention although Indonesia has not a party to that Convention but mechanisms to manifest environmental human rights have not yet implemented into legislation and regulations. As a result, the 2009 Law no. 32 above does not effective to protect people's environmental human rights. On the contrary, the 1999 Indonesian Act No. 39 on Human Rights is in favoured to those environmental rights but still ill formulated. Whilst in the International Convention on Human Rights do not include environmental human rights. State's political will are encouraged to fuse the definition of environmental rights into the existing conventions of human rights. Thus any violation of environmental rights is also considered a violation of human rights. This paper tries to observe and analyse the gap that exists between environmental declarations with international conventions on human rights as well as the gap between the Indonesian environmental laws with the human rights law. The conclusion of this paper suggests that human rights mechanisms should be considered in resolving environmental conflicts that occur in society in Indonesia. Thus, certain modifications or amendments should be made to strengthen the environmental rights in the Human rights Law of 1999 No. 39.*

**Key words:** *environmental rights, human rights, Indonesian laws.*

**INTRODUCTION**

Environmental awareness in Indonesia is quite recent. It was 10 years after the 1972 Stockholm Declaration on Human Environment was echoed all over the world, the Government of Indonesia (hereinafter cited as GOI) promulgated the first environmental management law (the 1982 Law No. 4 on the Basic Provisions of Environmental Management)(hereinafter cited as EMA).<sup>4</sup> The EMA is designed as an "Umbrella provisions" to cover all the legislations and regulations relating to environmental resources management that still in place both promulgated during and after the reformation era. EMA is the product of ambitious from the Government of Indonesia toward the environmental resources management as mandated by the 1945 Indonesian Constitution<sup>5</sup> Due to the inability of the 1982 EMA No. 4 accommodated the rapid increased of people's environmental awareness finally the GOI enacted new EMA of 1997 no. 23 on the Environmental Management. The reformation era brought to the replacement of the EMA of 1997 no. 23 on Environmental Management to the 2009 EMA no. 32 on the Protection of and the Management of the Environment.<sup>6</sup> This paper tries to explore the development of and the implementation of environmental human rights in the Indonesian EMA. Examination also conducted to the notion of environmental human rights in international law, International Bill of Human Rights, international regional law and national laws in other countries and last but not least the definition of that term.

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<sup>5</sup> Article 33 of the Indonesian Constitution of 1945 states that "the State controls the natural resources and is utilized fully for the welfare of all Indonesians." Retrieved: <http://www.humanrights.asia/countries/indonesia/laws/uud1945>

<sup>6</sup> State Gazette 2009 no. 140.

## IS THE NOTIONS OF ENVIRONMENTAL HUMAN RIGHTS IN INTERNATIONAL BILL OF HUMAN RIGHTS?

Actually, long before the 1972 Stockholm Declaration on the Human Environment was echoed all over the world, the duty to protect environment may be found in customary international law by interpreting international cases and convention. For instance the evidence of this duty are the 1946 *Corfu Channel* case<sup>7</sup> and Protocol I of the 1949 Geneva Convention which requires combatant to protect the environment ... and prohibits methods or means of warfare which are intended or may be expected to cause such damage to the natural environment.<sup>8</sup> The concept of environmental protection prior the Stockholm Declaration is based on economic interest provided by the environment. The Stockholm Declaration is a model for environmental protection based on the interest of the environment itself that support human survival both for the present and future generation. Principle 1 of the Stockholm Declaration proclaims that "... man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself".<sup>9</sup> The environmental human rights had been acknowledged in some international conventions, such as the Convention on the Rights of the Child,<sup>10</sup> ILO Convention No. 169.<sup>11</sup> In the regional conventions the environmental human rights embodied in the 1988 San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.<sup>12</sup> The rights above exist in the European Convention on Human Rights in 1976.<sup>13</sup> The notion of environmental human rights are clearly stated in the national constitutions for instance the Brazilian Constitution,<sup>14</sup> the French,<sup>15</sup> the Republic of Belarus,<sup>16</sup> Republic of Georgia,<sup>17</sup> Norway,<sup>18</sup> and Slovenia.<sup>19</sup> Stretching or fusing the value of environmental human rights into national constitutions is strong indicators of national *opinio juris* and represents the highest level of national law operating as a *lex suprema*.<sup>20</sup> Environmental human rights are in the process of growing to international law.

Environmental human rights emerges after the world awareness of human rights post the Second World War. During the drafting of the Charter of the United Nations in 1945, the world attention focused on how to safeguard mankind from the extinction by war. An investigation of the existence of environmental human rights is as follows: Among 111 articles contained in the Charter of United Nations, only seven articles, in addition to the Preamble, pertain to human rights. Those articles are Articles 1, 13, 55, 56, 62, 68 and 76. Of the seven articles, none deals with the rights of people in terms of a good and healthy environment. These articles of the UN Charter in general only stress the protection of human rights. The UN Charter was formulated as the result of reason against the scourge of war, it is little wonder that those who drafted the

<sup>7</sup> *Corfu Channel* case (U.K. v. Alb), 1949 I.C.J. 4 (judgment of Apr. 9).

<sup>8</sup> Art 55 and 35 (3).

<sup>9</sup> Principle 1 of the 1972 Stockholm Declaration, UN Doc A/CONF. 48/14/Rev. 1., adopted by UNGA Res. 2997 (XXVII) of 1972.

<sup>10</sup> Art. 24 para (2) point (b) Convention on the Rights of the Child, Nov. 20, 1989, GA Res. 44/25, UN GAOR, 44 sess., Supp. No. 49, at 166, UN Doc, A/44/49 (1999).

<sup>11</sup> Art. 4 of ILO Convention No. 169 concerning the Indigenous and Tribal Peoples (Retrieved: [www.ilo.org](http://www.ilo.org)).

<sup>12</sup> Art. 11 of the Protocol states that "everyone shall have the right to live in a healthy environment and to have access to basic public services"

<sup>13</sup> That "right to nature conservation as included among the rights and freedoms guaranteed by the Convention and in particular by Article 2 deals with the right life, Article 3 discusses the right not to be subject to torture, inhuman or degrading treatment and punishment or Article 5 states the right to liberty and security of person" (R. Desgagné, 'Integrating Environmental Values into the European Convention on Human Rights', (1995) 89 *Am. J. Int'l.* pp 263-294. See also: Dona Gomien, *Short Guide to the European Convention on Human Rights*, Council of Europe, Strasbourg 1995; Thomas Buergental, *International Human Rights*, West Publishing Co. 1995, pp. 102- 105).

<sup>14</sup> For example: The Brazilian Constitution .Chapter 6 (Article 225) (Retrieved: [web.mit.edu/12.000/www/m2006/teams/willr3/const.htm](http://web.mit.edu/12.000/www/m2006/teams/willr3/const.htm)).

<sup>15</sup> See: the constitutional amendment incorporating the Charter for the Environment into the French Constitution art. 1- 9 (More detail, see: D. Marrani, "The Second Anniversary of the Constitutionalisation of the French Charter for the Environment: Constitutional and Environmental Implications", (2008) 10 *Envtl.L. Rev.* 9.

<sup>16</sup> Art. 46 (Environment) of the Belarusian Constitution adopted on 1 March 1994 (Retrieved: <http://www.belarusguide.com>).

<sup>17</sup> The Georgia Constitution adopted on 24 August 1995, art. 37 (3) (Retrieved: <http://www.parliament.ge>).

<sup>18</sup> Art. 110 (b) of The Norwegian Constitution (Retrieved: <http://www.stortinget.no>)

<sup>19</sup> Art. 72 (Healthy Living Environment) of The Slovenian Constitution adopted on 23 Dec. 1991 and amended on 14 July 1997, 25 July 2000, 7 March 2003, 15 June 2004, 20 June 2006 (Retrieved: <http://www.servat.unibe.ch>).

<sup>20</sup> O. W. Pedersen, "European Environmental Human Rights and Environmental Rights: A Long Time Coming? (2008) 21 *Geo.Int'l Env'tl.L.Rev.* 73.

Charter paid little attention to environmental rights, but rather emphasized the protection of people *per se*.<sup>21</sup>

The recognition of human rights was more specifically formulated under the Universal Declaration of Human Rights.<sup>22</sup> Among the 30 articles regarding human rights, the Declaration does not discuss the people's environmental rights. This could be understood that the establishment of Declaration was based on the gross violation of human rights committed in, and by, certain countries during, and immediately before, the Second World War. The environment had little priority but the Declaration is considered to be the product of a climax of the world opinion regarding the promotion and the respect human rights and fundamental freedoms for all.

Another international legal source of human rights is The International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>23</sup> The Covenant has 31 articles which elaborate upon most of the economic, social and cultural rights set forth in the Universal Declaration. There is no provision that deals explicitly with environmental rights of people. Another legal source of human rights under international law is The International Covenant on Civil and Political Rights (ICCPR).<sup>24</sup> The Covenant consists of 53 articles but this Covenant like the UDHR of 1948 and the ICESCR does not mention any concept of, or stipulate any provision relating to environmental rights. The essential elements of human rights concept under international law are the notions of liberty, freedom and equality. René Cassin advocated in his Haque Academy lecture that the "existing concept of human rights protection should be extended in order to include the right to a good and healthy environment, i.e., freedom from pollution and the corresponding rights to pure air and water".<sup>25</sup> An obstacle may arise in formulating the concept of environmental rights as an element of human rights under international law, is the fact that international organizations such as the United Nations, are not in a position to actively protect such rights. Its rules and resolutions include no binding force to make the international community respect environmental rights. Therefore, the formulation of the concept of human rights in terms of good and healthy environmental might best be attained at a more limited regional and national level.

## IS THE NOTIONS OF ENVIRONMENTAL HUMAN RIGHTS IN THE ENVIRONMENTAL DECLARATIONS?

Disparity of natural resources in some parts of the world has led to the birth of rich and poor countries.<sup>26</sup> Nevertheless, they all face environmental problems either caused by the advancement of technology or economic backward.<sup>27</sup> Air, water and land based pollution, the depletion of ozone layer threaten the existence of human race. A new era of environmental awareness began twenty-seven years after the Second World War ended when the United Nations arranged an international conference in Stockholm Sweden in 1972. The conference called The UN Conference on the Human Environment had opened the world's eye that there is a strong bond of human's activities to their environment.<sup>28</sup> Human beings, flora and fauna have indispensable rights although they have some similarities and some differences.<sup>29</sup> Evidence for this linkage has been formulated in Principle 1 and Principle 2 of the 1972 Stockholm Declaration<sup>30</sup> and Principle 1 of the Rio Declaration.<sup>31</sup> Many articles support this

<sup>21</sup> See Preamble of the UN Charter.

<sup>22</sup> G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>23</sup> (UN doc. A/HRC/8/L.2/Rev.1

<sup>24</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966)

<sup>25</sup> W. Paul Gormley, 1976 *Human Rights and Environment: The Need for International Cooperation*, Sijthoff/Leiden, p 1.

<sup>26</sup> Mochtar Kusumaatmadja, 1978 *Pengantar Hukum Internasional, Buku I- Bagian Umum*, Penerbit Binacipta, Bandung, Indonesia, p

<sup>27</sup> Point (4) of the 1972 Stockholm Declaration, UN Doc A/CONF. 48/14/Rev. 1., adopted by UNGA Res. 2997 (XXVII) of 1972.

<sup>28</sup> Point (1) of the 1972 Stockholm Declaration, UN Doc A/CONF. 48/14/Rev. 1., adopted by UNGA Res. 2997 (XXVII) of 1972.

<sup>29</sup> From human rights perspective the environmental conservation and the environmental quality improvement enhances the quality of human life. Whilst from the ecological perspective the protection of human rights will automatically protect the environment (Richard Desgagné, "Integrating Environmental Values into the European Convention on Human Rights", (1995) 89 *Am. J. Int'l L.* 263).

<sup>30</sup> UN Doc. A/CONF.48/14/Rev.1).

<sup>31</sup> A/CONF.151/26 (Vol. I).

argument such as Mrs. Fatma Zohra Kesentini,<sup>32</sup> Mohammed Sahnoun,<sup>33</sup> Hill, Wolfson, and Targ,<sup>34</sup> and Sumudu Appattu,<sup>35</sup> Ruppel,<sup>36</sup> and Giorgetta.<sup>37</sup> The question is how to make that link into reality since the current human rights norms and the increased number of environmental cases around the globe is no longer adequate.

There is a contradiction between Principle 1 and Principle 21 of the 1972 Stockholm Declaration. Principle 1 proclaims that the enjoyment of environmental rights is equal with the enjoyment of human rights whilst Principle 21 declares that "the States have sovereign right to exploit their own resources pursuant to their own environmental policies". This contradictory, however, has been eliminated by Principle 22 requires "cooperation among the States to develop further international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such State to areas beyond their jurisdiction". Notwithstanding, the environmental declarations are complimentary to each other. For that the States are recommended to bridge the cooperation with other States to develop national law regarding liability and compensation for the victims of pollution and other environmental damage and so forth.<sup>38</sup>

The Stockholm Declaration stresses on the protection of individual person rather than human beings whereas pollution, especially air and water pollution and environmental degradation may affect the whole people and eventually may also affect the sustainability of the development. That is the reason the second environmental declaration conducted in Rio de Janeiro conducted from 3 to 14 June 1992 entitled "Environment and Development".<sup>39</sup> Although the Rio Declaration does not specifically define the environmental human rights but statement contained in Principle 1 says that "human beings is the centre of concerns for sustainable development and is entitled to a healthy and productive life in harmony with nature"<sup>40</sup> implies the link between human right and environmental rights. Violation to environmental rights will impair human rights. Sustainable development will not be attained if the development implementation infringes human rights.

The strong indication of the respect of environmental human rights has been in several regional law and national laws as discussed above, likewise the Brazilian Constitution, the French, the Republic of Belarus, Republic of Georgia, Norway,<sup>41</sup> Slovenia and Indonesia.<sup>42</sup> The constitutions of these countries have adopted the spirit of environmental human rights in the Stockholm and the Rio Declarations. Although the Stockholm and the Rio Declaration is designed as an idealistic model for the States for their regulations of environmental management, for example in the Indonesian EMA of 2009 no. 32 had fused the spirit of the 1972 Stockholm Declaration and also some articles in the Aarhus Convention of 1998 put in the 2009 EMA. Since Indonesia has not yet a Party to the Aarhus Convention of 1998 resulting in the lack of implementing regulations to make the notion of environmental human rights more sounded. Consequently Indonesia has no legal instruments to implement what has been regulated in the Aarhus Convention<sup>43</sup> Such as legislation or regulations on people's right to access to information, public participation in decision making and access to justice in environmental matters. The weakness of international law centres

<sup>32</sup> See: Fatma Zohra Kesentini's report entitle "Review of Further Developments in the Fields of Human Rights and the Environment" submitted to the Forty-sixth session of the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities (between year 1992 and 2001).

<sup>33</sup> Mohammed Sahnoun, "Environnement et développement", *Revue algérienne des relations internationales*, No. 8, 1987, OPU, Algies in: Mrs. Fatma Zohra Kesentini Report in E/CN.4/Sub.2/1994/9 6 July 1994.

<sup>34</sup> B. Hill, S. Wolfson, & N. Targ, Human Rights and the Environment: A Synopsis and Some Predictions, (2004) 16 *Geo. Int'l Envtl. L. Rev.* 359, 399-400.

<sup>35</sup> Sumudu Atapattu, "The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Rights to a Healthy Environment Under International Law, (2002) 16 *Tul. Envtl. L. J.* 65, 68.

<sup>36</sup> A. Kiss & D. Shelton. 2004. *International environmental law*. Ardsley, NY: Transnational Publishers, p 12ff, in: O.C Ruppel, *Third-generation of human rights and the protection of the environment in Namibia*' (<http://scholar.google.com.my/scholar>).

<sup>37</sup> S. Giorgetta, "The right to a healthy environment, human rights and sustainable development" (2002) 2 *International Environmental Agreements: Politics, Law and Economic* pp. 173-194.

<sup>38</sup> Principle 13, (A/CONF.151/26 (Vol. I))

<sup>39</sup> A/CONF. 151/26 (Vol. I)

<sup>40</sup> Principle 1 of the Rio Declaration (A/CONF.151/26 (Vol. I)).

<sup>41</sup> Art. 110 (b) of The Norwegian Constitution (Retrieved: <http://www.stortinget.no>)

<sup>42</sup> See: notes 14-19 *supra*.

<sup>43</sup> ECE/CEP/43 (1998)

on the moral binding elements, no wonder if some scholars came to the opinion that international law is not real law, but a code of rules of conduct of moral force only.<sup>44</sup>

## INDONESIAN ENVIRONMENTAL HUMAN RIGHTS

As discussed above, the 1972 Stockholm Declaration had inspired the changing pattern of the development-oriented environment program both in developed and developing countries. Indonesia is one of amongst the countries whose progressively produced laws related environment after the establishment of the State Ministry office for Population and Environment in 1978.<sup>45</sup> Since then, task forced had been created to invent laws and regulations related environment both produced during the colonial times and early independent in 1945.<sup>46</sup> Finally in 1982 the GOI enacted the 1982 Law no. 4 on the Basic Provisions of Environmental Management.<sup>47</sup> This law is a product of GOI's political ambition for it tries to criminalize activities that pollute or degrade the environment. Many scholars argued about the effectiveness of that Article in handling the pollution and environmental degradation. Other question deals with the legal remedy provided for reducing environmental problems, the term of "basic provisions" and the term "umbrella provisions, the legal standing of the Environmental Organization and how to make the people comply the EMA. The *PT. Inti Indo Rayon Pulp and Paper vs. Walhi* case in 1989 was a famous case amongst the many cases brought to the Court and was the test case whether the 1982 EMA recognises the right of the Environmental NGOs (*WALHI*) as the representative of the people whose their environmental rights had been violated by *PT. Inti Indo Rayon Utama* in North Sumatra. The increased demand of people to have decent environment<sup>48</sup> at one side and the other side the 1982 Law no. 4 was unable to accommodate that demand eventually the GOI replaced it with the 1997 Law no. 23 on the Environmental Management.<sup>49</sup>

Massive violation of human rights during Suharto's administration had led to the fall of this regime in 1998. The Habibis' administration brought new changed for Indonesians through the enactment of the 1999 Law no. 39 on Human Rights.<sup>50</sup> The respect of human rights proclaims in point (b) of the Preamble declares that "human rights are basic rights bestowed by God and are universal and eternal, and therefore must be protected, respected, maintained, and should not be ignored, minimized, or taken away by anyone". Whilst the respect of environmental rights stated in point (a) of the Preamble<sup>51</sup> declares that "that humans, as creatures of God Almighty who carry the task of man-aging and maintaining the universe with full devotion and full responsibility for the welfare of man-kind, endowed by his creator rights to ensure the existence of dignity and glory of himself and harmonious environment". This statement is actualized into Article 3 para 3 that "Everyone has the right to a good and healthy environment". For that human rights and environmental rights are indispensable, especially the right to life.<sup>52</sup> The article above is legal evidence of the GOI has admitted that linkage between human and their environment. On the contrary, there is no explanation in the Human Rights Act no. 39 of 1999 on that term whether it is similar with safe environment, satisfactory, healthy, healthful, decent, adequate, clean, pure, natural, viable, ecological sound, ecologically balanced.<sup>53</sup> Theories advanced by scholars deal with the right to a good and healthy environment are still ill-developed. In Art.5 (1) of the EMA of 1997 no. 32<sup>54</sup> has no explanation dealing with that term. The EMA 1997 was substituted by the 2009 EMA no. 32 and in Article 3 (g) clearly stated one of the objectives of the protection and the management of environment is "to assure the fulfilment of and the protection of rights over the environment as part of human rights".

<sup>44</sup> Dennis Lloyd, 1970 *The Idea of Law*, in J. G. Starke, 1984 *Introduction to International Law*, London Butterworth, p 17.

<sup>45</sup> St. Munadjat Danusaputro, 1978 *Hukum Lingkungan, Buku I*, Penerbit Binacipta Bandung.

<sup>46</sup> St. Munadjat Danusaputro, 1980 *Hukum Lingkungan, Buku II: Nasional*, Penerbit Binacipta Bandung, pp 29-141.

<sup>47</sup> State Gazette 1982 no. 12 Supplement State Gazettes no. 3215.

<sup>48</sup> Art. 5 (State Gazette 1982 no. no. 12 Supplement State Gazette no. 3215).

<sup>49</sup> State Gazette 1997 no 68.

<sup>50</sup> State Gazette 1999 no 165.

<sup>51</sup> Art 104 para. (1) State Gazette 1999 no 165.

<sup>52</sup> Art 9 (1) (State Gazette 1999 no 165).

<sup>53</sup> L.E.R. Rivera, 'Is the human rights to environment recognised under international law? It depends on the source' (Winter 2001) 12 *Colo. J. Int'l Envtl.L. & Pol'y* 1.

<sup>54</sup> Art 5 para.1 declares that "Everyone has equal right to a good and healthy environment" (State Gazette 1999 no 165).

Although the 1999 Law no. 39 on Human Rights has acknowledged the right to a good and healthy environment for everybody" and restated in the 2009 EMA no. 32, there were seven environmental conflicts<sup>55</sup> occurred between 1999-2000 and had not been brought to Human Rights Court but District Court. The reason behind this was perhaps those cases were not considered as the violation of environmental rights as stated in the Human Rights Act of 1999 no. 39. Another problem might hamper environmental rights case to be the human rights violation must be based on the legal statement issued by the National Commission of Human Rights (KOMNAS HAM). Therefore, an *ad hoc* Human Rights Court will be established after that case matches the requirement of Art. 104.<sup>56</sup> Notwithstanding the creation of *ad hoc* Human Rights Court is only for the severe human rights violation. Is environmental rights violation the violation of human rights? There must be political consensus of the member of the People's Representative (DPR/Dewan Perwakilan Rakyat) to reform the 1999 Human Rights Act and redefine the elements of human rights that right to decent environment is part of human rights. However, this is something very difficult to do, since there are many human rights violation cases have political nuances where the intellectual actors behind those case are still hanging around. The Tragedy of *Semangi I* and *II*,<sup>57</sup> the *Trisakti* Tragedy,<sup>58</sup> the *Tanjung Periok*,<sup>59</sup> the enforced disappearance of the Aceh people during the DOM, and the killing of human rights activists are example of human rights violation where the police and other legal enforcers failed to drag the actors behind the tragedies to the court.

Environmental human rights is new thing for Indonesian but it is quite old at the international level for it derives from the 1972 Stockholm Declaration on Human Environment<sup>60</sup> and the 1992 Rio Declaration on Environment and Development.<sup>61</sup> The environmental declarations are soft law and have no legal binding for the States to comply<sup>62</sup> on the contrary many countries have already adopted the spirit of those declarations.<sup>63</sup> The Aarhus Convention of 1998<sup>64</sup> empowered the environmental declarations above came to reality for it links environmental rights to human rights through the access of information, public participation in decision-making and access to justice in environmental matters. This Convention is open for the States' ratification, acceptance, approval and accession.<sup>65</sup>

## CAN ENVIRONMENTAL CASES BROUGHT TO HUMAN RIGHTS COURT?

The European Convention on Human Rights, the European Social Charter and Additional Protocols do not provided for the provision on environmental rights. As a result, there are a number of cases in regard with environmental rights submitted to the Commission of the European Council were rejected as being incompatible with the Convention, such as *Dr S. v. the*

<sup>55</sup> Those cases were PT. Sumber Sehat (Kudus, 1999), PT. Pura Kusus (1999), Kansritex (Semarang, 1999), the Banger River (1999), the Kalimantan Peat Land (1999), the Tawang Mas (2000) and the Kelian Equatorial Mining (2001).

<sup>56</sup> See: Art 104 (State Gazette 1999 no 165).

<sup>57</sup> In November 1998 the transitional government of Indonesia held a Special Session to determine the next election and discussed the agendas of government. Students did not recognize the rule B. J. Habibie and did not believe the members of the People's Representative (DPR) / of People's Consultative Board (MPR) of New Order established during Suharto took in power. They were also urged to remove the military from politics, the military dual function and the cleaning of government than those of the New Order. The Semangi Tragedy took 17 civilians died and 217 injured ([www.semanggipedul.com/Sejarah/frame/semanggi.html](http://www.semanggipedul.com/Sejarah/frame/semanggi.html))

<sup>58</sup> Trisakti tragedy was a shooting, on May 12, 1998, to the students during a demonstration demanding Suharto stepped down from office. This incident killed four students at Trisakti University in Jakarta, Indonesia as well as dozens of others injured. Those students killed were Eland Julia Leman, Heir Hermantown, Hasidim Roan and Hendriawan Sie. They were shot dead on campus, hit by bullets in vital places like the head, neck, and chest ([http://id.wikipedia.org/wiki/Tragedi\\_Triskakti](http://id.wikipedia.org/wiki/Tragedi_Triskakti)).

<sup>59</sup> The Tanjung Periok Tragedy was a massacre of the Islamic followers by the Indonesian Military Forces (ABRI/TNI) in 1984.

<sup>60</sup> UN Doc. A/CONF. 48/14/Rev.1.

<sup>61</sup> A/CONF.151/26 (Vol.1).

<sup>62</sup> Piere- Marie Dupuy, "Soft Law and the International of the Environment", (1990-1991) 12 *Mitch. J. Int'lL.* 420.

<sup>63</sup> For example: Indonesian Environmental management Act of 2009 No. 32 (State Gazette 2009 No. 140), Brazilian Constitution (art. 225), the French Environmental Code art. 1-9), the Portuguese Constitution (art. 66), the Constitution of Georgia (art. 37:3), Slovenia Constitution (art. 72: 1,2), Belarusian Constitution (art. 46) and many more.

<sup>64</sup> ECE/CEP/43 (1998)

<sup>65</sup> Art.19 (ECE/CEP/43 (1998)). As of July 2009 there are 40 European and Central Asian countries and the European Union and ratified by 41 countries. This Convention has also been ratified by the European Community into their national laws.

*Federal Republic of Germany*,<sup>66</sup> *X and Y v. the Federal Republic of Germany*.<sup>67</sup> The global concern of environment emerged when the United Nations arranged the Stockholm Conference in 1972. The Commission's view changed after realizing that polluted environment also affected the full enjoyment of individual's rights and freedoms as guaranteed by the Convention. Finally, the Commission declared admissible individual application complaining of environmental abused. After that a number of environmental cases brought to European Human Rights Court.<sup>68</sup> For example: *Hakansson and Sturesson v. Sweden* (1987),<sup>69</sup> *Fredin v. Sweden* (1987),<sup>70</sup> *Pine Valley Development Ltd and others v. Ireland* (1987),<sup>71</sup> and *Allan Jacobsson v. Sweden* (1990).<sup>72</sup> Another environmental cases brought to European Human Rights Court was *Arrondelle v. UK* 26 DR 5 (1982)<sup>73</sup> *Zimmerman and Steiner v. Switzerland*, (13 July 1983) in regard with Article 6 on the Right to a fair trial<sup>74</sup> and *Oerlemans v. Netherlands*, (27 November 1991).

The question raised here is in regard with the capability of Indonesian Human Rights Court to examine and adjudicate the environmental complains submitted by individuals, groups or by the Environmental NGOs. The 2009 EMA 32 on the Protection and the Environmental Management does not recognize the individuals' right but only people have right to sue.<sup>75</sup> The provisions regarding the implementation of the people's right to sue must be on the existing regulations.<sup>76</sup> This article is very blur for it does not specifically refer which laws and regulations become the reference of the people whenever they want to submit their case. Whilst Article 92 only regulates the right of the environmental NGOs to submit sue. The only path the people must go through to represent their interest is through environmental NGOs.

Another breakthrough to protect the people's environmental rights is through the 1999 Human Rights Act no. 39. The provision dealing with environmental rights in under Chapter 3 "Human Rights and Fundamental Freedom" in Article 9 para (3) proclaims that "everyone has the right to a good and healthy environment". Although this provision does not explain the definition of a "good and healthy environment", at least the enjoyment of environmental rights is as equal as important as the enjoyment of human rights. Furthermore in Article 100 and Article 1001 of the 1999 Human Rights Act no. 39 state that "everyone, groups, political organizations, the social organizations and other social organizations are entitled to participate in the protection of, enforcement of and the advancement of human rights" and they are entitled to report to the National Commission of Human Rights (*Komnas HAM*) about the violation of human rights". These provisions only regulate about the report of human rights violation. Thus, individuals have no entitlement to report rather than in groups. At the end the Human Rights Court will likely reject all environmental cases submitted to it as it is incompatible *ratione materiae*. The 2000 Law no. 26 on Human Rights Court is only for adjudicating cases involving severe human rights violation such as crimes

<sup>66</sup> Application No. 715/60, Decision of inadmissibility of 5 August 1969 (unpublished), *Decisions and Reports* ("DR") No. 5, p. 16 (quoted from Daniel García San José, 2005 *Environmental Protection and The European Convention on Human Rights*, Council of Europe Publishing, p 7 (Daniel García San José, 2005 *Environmental Protection and The European Convention on Human Rights*, Council of Europe Publishing, p 7)

<sup>67</sup> Application No. 7407/76, Decision of inadmissibility of 13 May 1976

<sup>68</sup> For example: *Arrondelle v. the United Kingdom* (noise), Application No. 7889/77, Decision of 15 July 1980, DR 19, p. 186; *G. and Y. v. Norway* (not specified by applicants), Application No. 9415/81, Decision of 3 October 1983, DR 35, p. 30; *Baggs v. the United Kingdom* (noise), Application No. 9310/81, Decision of 19 January 1985, DR 44, p. 13; *Powell and Rayner v. the United Kingdom* (noise), Application No. 9310/81, Decision of 16 July 1986, DR 47, p. 22; *Vearncombe and others v. the Federal Republic of Germany* (noise), Application No. 2816/87, Decision of 18 January 1989, DR 59, p. 186; *X v. France* (noise and other inconvenience), Application No. 13728, Decision of 17 May 1990; *Zander v. Sweden* (water pollution), Application No. 14282/88, Decision of 14 October 1992 (quoted from: Daniel García San José, 2005 *Environmental Protection and The European Convention on Human Rights*, Council of Europe Publishing, p 7).

<sup>69</sup> Application No. 11855/85, Decision of admissibility of 15 July 1987 (quoted from: Daniel García San José, 2005 *Environmental Protection and The European Convention on Human Rights*, p 8.)

<sup>70</sup> Application No. 12033/86, Decision of admissibility of 14 December 1987/1987 (quoted from: Daniel García San José, 2005 *Environmental Protection and The European Convention on Human Rights*, p 8.)

<sup>71</sup> Application No. 12742/87, Decision of admissibility of 3 May 1989/1987 (quoted from: Daniel García San José, 2005 *Environmental Protection and The European Convention on Human Rights*, p 8.)

<sup>72</sup> Application No. 16970/90, Decision of admissibility of 15 October 1995 1987 (quoted from: Daniel García San José, 2005 *Environmental Protection and The European Convention on Human Rights*, p 8.)

<sup>73</sup> This case was about the interference with an individual's right to private life and home as well as the peaceful enjoyment of his property through aircraft noise from increased flights and extension of flight paths at Heathrow Airport (Source: <http://www.righttoenvironment.org/default.asp?pid=91>).

<sup>74</sup> Retrieved from <http://www.righttoenvironment.org/default.asp?pid=91>.

<sup>75</sup> Art 91 of the 2009 EMA no. 32 (State Gazette 2009 no 140).

<sup>76</sup> Art 91 para 3, State Gazette 2009 no 140.



against humanity and genocide<sup>77</sup> and does not include environmental cases. There must be a political commitment of the Indonesian National Commission of Human Rights (*Komnas HAM*) to consider that bad environment could intervene the effective enjoyment of individual's right and freedom as guaranteed by the 1999 Law no. 39 on Human Rights. This is the time for the Indonesian National Commission of Human Rights (*Komnas HAM*) to begin to declare individuals, groups, environmental NGOs and peoples' application complaining of environmental abused. In other words, 50.000 people the victims of the volcano mudflows in *Porong, Sidoarjo*, East Java, Indonesia, resulted from the failure made by *PT. Lapindo* during gas exploration in 2006 could have been protected and defended.<sup>78</sup>

## CLOSING REMARKS

Although the environmental declarations provide no obligation for the States' ratification but they have caused to the changing views of the countries in the world of environmental resources and economic development patterns of these countries. The notion of environmental human rights contained in the 1972 Stockholm Declaration indicates that there is a strong bond between human being and their environment. The right to live, the right to health, the right to form family and have children may be able to realize if the environment is free from pollution and environmental degradation.

Since the environmental declarations are soft law therefore the Aarhus Convention of 1998 empowered those declarations into reality. The notion of environmental human rights may be able to perform if people have accessed to environmental information, have accessed to participate in environmental decision-making processes, and have accessed to environmental justice. Many countries have that requirement in their domestic laws. In contrast, many countries, such as Indonesia, also have not yet ratified the Aarhus Convention resulting in the lack of legal instruments to implement the Aarhus Convention.

The notion of environmental human rights, the combination of environmental rights with human rights values, is not in existence in the International Bill of Human Rights but it progressively develops in regional and national laws of human rights and national laws. At regional level the submission of environmental cases to human rights court is admissible under the European Convention on Human Rights. The submission of environmental cases to Human Rights Court is incompatible *ratione materiae* to the Indonesian law of the 2000 Law no. 26 on Human Rights Court as well as under the 2009 Law no. 32 on Environmental Management Act. The Human Rights Law of 1999 no. 39 only recognizes the severe human rights violation such as crimes against humanity and genocide. Whilst environmental rights violations are not yet considered as crimes against human rights. It needs political commitment of the Indonesian Member of People's Representative Council to include the rights to a good and healthy environment is one of the human rights elements and also political declaration of the National Commission of Human Rights and the Indonesian Human Rights court to admit environmental rights violation is the violation of human rights.

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<sup>77</sup> Serious human rights violation as defined in Art 7 of the 2000 Law on Human Rights Court include an act that was committed as part of a widespread or systematic attacks that he or she knows that attacks are directed against civilians, in forms: murder, extermination, slavery, expulsion or forcible transfer of population, deprivation of liberty or other deprivation of physical liberty arbitrarily violation of (the principles) of international law, torture, rape, sexual slavery, forced prostitution, forced pregnancy, sterilization or sterilization by force or other forms of sexual violence, persecution of a particular group or association that is based common political beliefs, race, nationality, ethnicity, culture, religion, sex or other grounds that are universally recognized as contravening according to international law, enforced disappearances and crime of apartheid (uncertified translation) (State Gazette 2000 no. 208).

<sup>78</sup> Friends of the Earth International, "A Background paper prepared for Friends of the Earth International and Friends of the Earth Europe". June 15, 2007.



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