CONSULTATION REPORT

HUMAN RIGHTS AND THE ENVIRONMENT:

PROCEDURAL RIGHTS RELATED TO ENVIRONMENTAL PROTECTION

22-23 February 2013, Nairobi, Kenya

United Nations Compound

Convened by the United Nations Independent Expert on human rights and the environment with the Office of the High Commissioner for Human Rights and the United Nations Environment Programme

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BACKGROUND

This report summarises the outcomes of the consultation on procedural human rights related to environmental protection convened by the United Nations Independent Expert on human rights and the environment, John Knox, with the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Environment Programme (UNEP). The consultation took place on 22-23 February in Nairobi, Kenya, at the United Nations Office in Nairobi.

The objectives of the consultation were to:

i) Map the basic international human rights law and environmental law obligations relevant to guaranteeing procedural rights and duties;

ii) Identify relevant policies and practices at international, regional and national levels;

iii) Offer a platform of dialogue between participants, including facilitating the exchange of experiences, knowledge, and lessons learned; and

iv) Increase awareness of a human rights based approach to environmental policy development and protection.

The consultation gathered approximately 50 participants from different regions and backgrounds, including civil servants, academics, members of civil society, and staff from international organizations.

Except for the presentations made by the various panellists and moderators, the consultation observed the Chatham House rules (i.e. points raised during the discussion were not ascribed to any specific participants). This was done to encourage those contributing to do so as candidly as possible.

The consultation had six sessions, which addressed (1) sources of obligations; (2) freedom of expression and association; (3) rights of information and participation; (4) remedies; (5) general issues; and (6) conclusions.

SESSION 1: Sources of Obligations

This session sought to provide an overview of the sources of international obligations relevant to procedural rights in international human rights and environmental law. The objective was to help facilitate a common understanding of these obligations for experts and practitioners working in both fields.

Presenter: Professor DINAH SHELTON, George Washington University

Professor Shelton reviewed the development of the connection between human rights and the environment, beginning with the 1972 Stockholm conference. Every one of the global conferences since Stockholm has stepped back in terms of protecting human rights. Thus, the focus has shifted to the human rights institutions.

In terms of advancing the connection between human rights and the environment, what we have seen is more advances at the regional level than the global level, and more advances at the national level than at the regional level. At the same time, we have seen influences in different directions, from national to global and vice versa. We have also seen more development in soft law than hard law.

With procedural rights, in the environmental sector we see three rights lumped together: access to information, effective public participation, and access to justice. In human rights law, we see these procedural rights emerging from different rights in the various human rights institutional mechanisms.

When we look at the treaties, at the environmental side we see weak versions at the global level, such as Article 6 of the UN Framework Convention on Climate Change, and references in the Convention on Biological Diversity. At the regional level, environmental instruments are much stronger. For example, under Article 9 of the Paris Convention for the Protection of the marine Environment of the North-East Atlantic, authorities are required to make “any relevant information available to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months”.

If we turn to human rights instruments, we also see weak and strong versions of the right to information. The weak version can be referred to as the state abstention version, which basically requires not interfering with private parties’ desire to disseminate information. There are no positive duties to acquire and disseminate information under this version. An example is Article 10 of the European Convention on Human Rights. The strongest access to information provisions can be found in the Africa and Inter-American regional mechanisms, which provide for a stronger duty to inform. Overall, however, there is not a lot of detail in hard law instruments with respect to the right to information.

In the Rio Declaration, Principle 10 covers access to information. Principle 10 also uses the term "appropriate", and it is stated not in terms of rights, but in terms of efficiency. Principle 10 states that "at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available."

Agenda 21 provides that major groups should have "access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures."

A number of other soft law instruments refer to access to information. For example, the European Charter on Environment and Health provides that every individual is entitled to information and consultation on the state of the environment. Other instruments include those from the Organisation of Security and Cooperation, the Bangkok statement of 1990, and the Arab Declaration of 1991.

There is also a great deal of jurisprudence. In the Human Rights Committee (HRC) of the ICCPR, there have been many cases from indigenous groups raising issues around decisions taken by government impacting indigenous communities. In the New Zealand case on Maori fishing rights—*Apirana Mahuika et al. v. New Zealand*—the HRC found that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process concerning these measures and whether they will continue to benefit from their traditional economy.

Article 10 of the European Convention has a weak version of the right to information, but courts have expanded its requirements. *Guerra and Others v. Italy* 116/1996/735/932, 19 February 1998, dealt with the failure to provide a local population with information about risk factors and how to proceed in the event of an accident at nearby chemical factory. The European Court of Human Rights found that Article 8 (the right to respect for a person's private and family life, his home and his correspondence) places positive procedural obligations on the state to share information that will allow individual to determine whether there is a risk to their enjoyment of article 8 rights. The Court thus found that the state had a positive duty to disseminate information to allow the petitioners to determine the risks from the chemical factory. In *Oneryildiz v. Turkey*, 48939/99 [2004] ECHR 657, 30 November 2004, the Court took a similar approach to the right to life. The Court imported many environmental regulations to determine whether state was complying with the obligations, including the Aarhus convention and other major treaties, such as on hazardous waste management.

In the Inter-American context, the Inter-American Court of Human Rights addressed the

right to environmental information in *Claude Reyes et al. v. Chile.* That case dealt with the denial by the country's foreign investment committee of information about the environmental effects of a certain project on the ground of confidentiality. The Court referred to various sources for the right to information, including as part of the right to freedom of expression in the ICCPR and the Universal Declaration of Human Rights. It also mentioned the UN Convention against Corruption and the Aarhus Convention. The Court found that there had been a violation of the victims' right to receive information. Unlike the European Court, the Court here found a positive duty to seek and disseminate information, not just share it. The Court found that in order to withhold information, the state bears the burden of proving a compelling a state interest. Also in contrast to the European Court, which has taken the position it may award compensation to someone whose rights has been violated but may not force a government to disclose or disseminate information, the Inter-American Court in *Claude Reyes* allows for ordering dissemination of information, thus setting out a strong duty on the right to information.

In the landmark *Social and Economic Rights Action Centre (SERAC) v Nigeria* decision, (2001) AHRLR 60, the African Commission on Human and Peoples' Rights stated that compliance with the right to health and the right to a clean environment must include, among other things, publicizing environmental and social impact studies prior to any major industrial development. These rights also require that the state must undertake appropriate monitoring, provide information to the communities exposed to hazardous materials and activities, and guarantee meaningful opportunities for individuals to be heard and participate in development decisions affecting their communities.

In addition to the regional mechanisms, UN Human Rights Council mechanisms, such as the Special Procedures, have weighed in on this issue. The work of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, is particularly relevant.

Another aspect of this issue has to do with the protection of those who are trying to disseminate environmental information. Several cases in the European context involve law suits against journalists critical of government decisions. In every instance, the European Court has overturned the decisions, referring to the watchdog functions of media, and thus providing very strong protections for journalists.

With respect to public participation, there is less case law, but still a considerable number of references in international instruments. In the environmental law context, it is linked with the right to information and often linked to the participation of specific groups.

In human rights texts, the right to participation is generally under the heading of the right to participate in democratic governance and sometimes as part of the right to vote. It is essentially the right to take part in the conduct of public affairs. Such a right includes situations where action may have an impact on right of individuals or communities.

The UN convention to combat desertification goes the furthest in taking a bottom up approach rather than top down. Article 3 provides that the Parties should ensure that decisions are taken with the participation of populations and local communities and that an enabling environment is created at higher levels to facilitate action at national and local levels and that Parties should develop, in a spirit of partnership, cooperation among all levels of government, communities, non-governmental organizations and landholders to establish a better understanding of the nature and value of land and scarce water resources in affected areas and to work towards their sustainable use.

Turning to access to justice and remedies, it is significant to note that jurisprudence extends beyond the enforcement of rights contained in international instruments. In Inter-American and European contexts, and other treaties, the right of access to justice covers access to justice regardless of national or international laws. If countries are violating a right, individuals have access to courts at the national level, but also at international level.

In the case of *Okyay and others v. Turkey*, 36220/97 [2005] ECHR 476 (12 July 2005), national authorities refused to implement an order from their domestic court closing down power plants which were causing pollutions. The Court held that there had been a violation of Article 6(1) of the Convention (the right to a fair hearing), and that implicit to the right to have access to justice is to have a judgment that has effect.

There are similar cases where a failure to implement international or domestic norms gives rise to a finding of violation of right to remedy.

WHERE ARE THE FAULT LINES WE ARE SEEING?

1. What are the procedural requirements that apply to non-state actors and inter-governmental actors, such as the World Bank and other financial institutions? Here there are grey areas and disagreement.

2. The rights of indigenous peoples. In most countries, indigenous peoples do not have title, but their land is treated as state land that can consequently be given away to foreign or domestic development. Because they live on state lands, there are often no procedures set forth for prior consultation and benefit sharing. Enormous harms result. Relevant norms include ILO Convention 169 and the 2007 Declaration on rights of indigenous peoples, as well as decisions from the Inter-American system that the right to property encompasses these procedural rights. The Inter-American Court has said that prior informed consent is required if the proposed project would destroy the maintenance of the culture at issue, but this is a high standard.

3. Who is the beneficiary of rights to information and participation? Is there a transboundary obligation? The ICJ's decision in the *Pulp Mills* case in the ICJ said that there is an obligation of transboundary environmental impact assessment, but left its content to the state of origin.

We are seeing also pushback from States on these issues. For example, in the *Belamonte* case in Brazil, the third largest hydroelectric project was moving ahead with 60,000 indigenous people being displaced. The Inter-American Commission granted a request for precautionary measures, because no consultation was undertaken. Within 24 hours Brazil withdrew its ambassador to OAS and cut its funding.

Discussion following the presentation addressed, among other issues, the gender perspective, the Aarhus Convention and the effort to implement Principle 10 through an agreement in the Latin America and Caribbean region, the role of the World Bank, and obligations pertaining to corporations.

SESSION 2: Freedom of Expression and Association (focus on environmental human rights defenders)

This session sought to examine freedom of expression and association in relation to environmental protection and conservation. It sought to address the importance of protecting environmental human rights defenders and communities who are mobilizing to protect their natural resources.

Moderator: Dr. Hassan Shire Sheikh, Eastern Horn of Africa Human Rights Defenders Project.

Panellists:
Margaret Sekaggya, UN Special Rapporteur on Human Rights Defenders
Jane Cohen, Human Rights Watch
Phyllis Omido, Center for Government and Environmental Justice, Kenya

Special Rapporteur Sekaggya emphasized that human rights defenders are a cross-cutting issue in every aspect of human rights. She described her two recent reports on this topic: one presented to the Human Rights Council that highlights the risks and challenges to selected defenders, including those focusing on land and environmental issues; and a report to the General Assembly highlighting the actions of non-state actors and how they impact on human rights defenders.

Anyone who promotes or protects human rights is a HR defender entitled to be protected by the UN declaration on human rights defenders. People defending environmental rights are also human rights defenders. She has received a large number of communications alleging violations against activists working on land and environmental issues.

All peaceful actions by defenders to call attention to failures by the state to create the conditions for realizing human rights are legitimate actions that fall under the scope of the declaration on human rights defenders. Human rights defenders face countless

challenges: they are harassed, intimidated, stigmatized, and face death threats and physical attacks. In Columbia, 12 indigenous people were killed the day before she arrived. Perpetrators are sometimes the state itself, including police, local authorities, and public officials. There are also many non-state actors involved, including transnational companies, paramilitary groups, private security guards, and armed groups. In the Inter-American region there are many armed groups and it is difficult to tell sometimes who has committed the violations.

The state has the primary responsibility to protect defenders. The state must ensure prompt and impartial investigation and the prosecution of those responsible for those actions. Many defenders are outcast and stigmatized, so the state must ensure that they are not stigmatized.

The special rapporteur recommended some "best practices," including: to involve and consult human rights defenders when carrying out country assessments; to implement measures provided by national and regional mechanisms, and to initiate prompt investigations against alleged human rights violations; to train law enforcers so that they can understand how to handle issues of HRDs; and to use national human rights institutions to receive complaints.

Hassan Shire Sheikh referenced the 2012 Global Witness Report, "*A Hidden Crisis? Increase in killings as tensions rise over land and forests".* He noted that the report states that 711 environmental human rights defenders were killed between 2007 and 2012. Of that number, 106 were killed in 2011 alone. There are also 57 cases that cannot be allocated to specific years and that are attributed to the Philippines and Thailand.

According to the report, "most commonly, those killed were protesting or making grievances against mining operations, agribusiness, logging operations, tree plantations, hydropower dams, urban development and poaching".

Moreover, the report identifies that killings take place by both state and non-state actors. For example, the report states that "in Brazil the cases we looked at included reports of involvement of private interests (land owners, ranchers and loggers) in the killings rather than state authorities. In Cambodia, nine of 11 cases (eleven is

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