

**LATIN AMERICA AND CARIBBEAN REGIONAL CONSULTATION REPORT**

**HUMAN RIGHTS AND THE ENVIRONMENT:**

**ENVIRONMENTAL PROTECTION RELATED TO GROUPS IN VULNERABLE SITUATIONS**

**26-27 JULY 2013, Panama City, PANAMA**

**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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برنامج الأمم المتحدة للبيئة

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## BACKGROUND

This report summarises the outcomes of the regional consultation on the relationship between environmental protection and groups in vulnerable situations in Latin America and the Caribbean, which took place in Panama City on 26 and 27 July 2013. The consultation is one of a series of multi-stakeholder consultations the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Environment Programme (UNEP) and the United Nations Independent Expert on Human Rights and the Environment are convening with Governments, international organizations, human rights bodies, environmental and human rights civil society, and legal experts. Each consultation seeks to address a particular thematic issue with the objectives of clarifying human rights obligations relating to the enjoyment of a safe, healthy, secure, and sustainable environment, and of identifying, promoting and exchanging views on good practices in the use of rights-based approaches to environmental issues.

These consultations form part of a larger good practices project being implemented by UNEP, OHCHR, and the Independent Expert, with the first being held in Nairobi on 22-23 February 2013 and focused on procedural rights and duties, followed by a consultation in Geneva on 21-22 June on the relation between environmental protection and substantive rights and duties. The Panama consultation builds on the outcomes of these previous consultations and will help to inform the final report the UN Independent Expert is mandated to submit to the Human Rights Council in March 2015 pursuant to HRC resolution 19/10.<sup>1</sup>

The regional consultations are organized within the framework of a joint project between UNEP, OHCHR, and the UN Independent Expert on human rights and the environment, which aims to identify and promote good practices relating to human rights and the environment. In this framework, OHCHR has funded the consultation in Panama while UNEP will fund the next regional consultation, which is scheduled to take place in South Africa in January 2014.

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<sup>1</sup> In particular, Resolution 19/10 requests the Independent Expert to submit a report, including conclusions and recommendations, to the Human Rights Council at its twenty-second session, in March 2013, and to report annually thereafter. As part of the mandate, the Independent Expert is to study the human rights obligations, including non-discrimination obligations, relating to the enjoyment of a safe, clean, healthy and sustainable environment, and to identify, promote and exchange views on best practices relating to the use of human rights obligations and commitments to inform, support and strengthen environmental policymaking, especially in the area of environmental protection, and, in that regard, to prepare a compendium of best practices. Resolution 19/10 also requests the Independent Expert to consult with and take account of the views of a wide range of stakeholders, including Governments, international bodies, national human rights institutions, civil society organizations, the private sector and academic institutions. Moreover, the resolution provides that the Independent Expert shall work in close coordination, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the Human Rights Council, as well as other relevant United Nations bodies and human rights treaty bodies.

The objectives of the consultation were to:

- i) Interrogate the relationship between the protection of vulnerable groups and the sustainable use of natural resources in the region;
- 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 for people in vulnerable situations.

The consultation gathered approximately 28 participants from the Latin America and Caribbean region with different backgrounds, including civil servants, academics, and members of civil society.

The first part of the report details the general discussions from the floor on the issue of a rights-based approach to environmental protection and people in vulnerable situations while the second part discusses good practices therein. The consultation observed the Chatham House rules (i.e. points raised during the discussion were not ascribed to any specific participants) in order to encourage open dialogue.

## **DAY 1**

### **SESSION 1. Defining vulnerability in the context of environmental protection and harm**

**Moderator: Prof. CESAR RODRIGUEZ-GARAVITO, Director-Programa de Justicia Global y Derechos Humanos, Universidad de los Andes, Bogota, Colombia**

This session reflected on how to define groups in vulnerable situations in the context of international human rights law and environmental protection.

Participants suggested various types of criteria for determining vulnerable groups, including:

1) Sociological criteria: as in other areas of domestic and international law (e.g., socio-economic rights), vulnerable groups can be defined in terms of their location in socio-economic structures that disadvantage them (e.g., patterns of land ownership that disadvantage landless peasants, patterns of labour relations that disadvantage workers). For purposes of environment and human rights standards, the same criteria can be used to single out marginalized populations (e.g., peasant communities that are

vulnerable to climate change, indigenous peoples that are vulnerable to predatory development projects).

2) Contextual criteria: vulnerability can also be the result of local or societal contexts that facilitate violations of human rights related to the environment. Special emphasis was placed on armed conflict as a situation that drastically increases the likelihood of this type of violation.

3) Project-specific criteria: even sectors of the population that would not classify as vulnerable populations according to the previous criteria (e.g., urban middle classes) can be vulnerable due to the disproportionate impact of certain types of economic projects with profound environmental effects (e.g., relocation of waste dumping sites to their neighborhoods).

4) Biological criteria: some groups can be vulnerable due to their lower biological capacity to fend off environmental harm (e.g., children's exposure to lead).

The discussion pointed that, in determining vulnerability, consideration should be given to structural aspects as well as to international standards setting out anti-discrimination provisions and to instruments such as ILO 169.

It was also noted that international norms are more fully developed with respect to some situations than others. For example, indigenous peoples have a more comprehensive international law framework within which victims of environmental violations can anchor their rights. More generally, it was noted that where human rights law primarily focuses on vulnerability from a sociological categorization (e.g., setting out more specific rights for groups such as women and indigenous people), assessing environmental vulnerability often has to include biological aspects (e.g., the greater effects of toxic substances such as mercury on children).

Additionally, it was suggested that human rights duties are more localized, whereas environment issues often have a wider reach and audience. As a result, it was suggested that greater recognition was needed of the fact that where the environment is concerned, there may be adverse long-term effects even though there may not be an apparent harm to people in the short-term.

It was suggested that the common definition of vulnerability is the capacity and the tolerance of an individual to certain situations, and that the same people may find themselves vulnerable in certain times and not others. For example, if people have a lack of access to information or access to justice with respect to a particular environmental problem, the denial of these rights may cause them to become vulnerable to that threat. It was stated that the Inter-American system has been flexible in its interpretation of the notion of vulnerability in relation to environmental protection,

and has held that a people's limited resources and inability to access justice contributed to its vulnerability.<sup>2</sup>

Participants also explored the vulnerability of groups subject to constant and sustained environmental threats, including those threats arising from the social interventions of States resulting in the inability of such communities to withstand such impacts.

Suggestions were made that there is a need to consider the relationship of the size of the population to vulnerability. For example, is vulnerability elevated by numbers or scale? Is vulnerability elevated by geography or geology? Is vulnerability elevated by future economic activities and is the size of the harm parallel to the size of the project or the size of the population? It was observed that the element of environmental risk is an important indicator to assess vulnerability including regard for people living near flood prone areas to be considered vulnerable.

Further remarks were made on the necessity of acknowledging that poverty, hunger, language, and lack of education were also sources of vulnerability. In particular, it was emphasized that a structural analysis of poverty-induced vulnerability was essential. Additionally, armed conflict was mentioned as an increasing source of vulnerability and that these situations present opportunities within which entities such as multi-national corporations and mercenaries exploit communities for economic motives. With respect to the broader issues of development, it was suggested that vulnerability will prevail for so long as there is tension between the predatory model of development within which we find enterprises dealing with extraction of resources and capitalism viz-a-vis the social development model within which we find social nets such as social benefits.

Some observations were made that States were lapsing in regard to international standards, including ILO 169 and the UN Declaration on the Rights of Indigenous Peoples. Observations were shared on some specific situations; for example, that: the challenge in the Caribbean is that the region does not have the concept of indigenous; in Guatemala, some communities maintain that they are not groups but are peoples and there is a challenge when this group is the majority in a country; in Peru and Mexico, a similar challenge of who are indigenous people exists and now some groups are choosing to identify themselves as indigenous people in order to receive more comprehensive protection, with Peru having to interrogate whom to ascribe these rights to between the people in the Amazon who are duly recognised, as opposed to the people in the mountains.

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<sup>2</sup> The case cited was *Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights Ser. C No. 146, 2006.

## **SESSION 2. Elaborating procedural rights in the context of protecting people in vulnerable situations from violations arising from environmental harm**

**Moderator: Mr. MARCOS ORELLANA, Attorney, Center for International Environmental Law, Washington, US**

This session addressed procedural rights of relevance to environmental protection, including rights to freedom of expression and association, to information, to participation in decision making, and to remedies. Discussions included considerations of how these rights apply to vulnerable groups and of whether the concept of free, prior and informed consent applies to groups in vulnerable situations other than indigenous people. It was emphasised that it was key to recognize that tribal and indigenous people are not the only ones entitled to the guarantees of procedural rights. Also, participants stressed that while there may be many opportunities for participation in the environmental process including an Environmental Impact Assessment, but often participation is not available in the actual decision itself.

Concerns were raised at the privatising of the guarantees of procedural rights, where governments are delegating their obligations to companies and it is the companies that are the ones consulting the indigenous or affected people. Critically, it was maintained that there is a need for civil society to work together with governments in identifying the obstacles States may have in the protection of people in vulnerable situations who are not indigenous. It was also averred that most human rights advocates have a challenge in identify environmental treaties as human rights tools.

Freedom of association and of expression were highlighted as essential aspects on the issue of vulnerability, especially that according to the UN Special Rapporteur on human rights defenders, environmental human rights defenders are currently receiving the most threats among all human rights defenders. Since these people often advocate for the environment as well as for those people who are in situations of vulnerability, the protection of these rights in themselves would highlight the plight of these affected people or environments to stimulate appropriate responses.

It was also emphasized that access to information, including through Environmental Impact Assessments, is critical in order to protect people and the environment, and that the access is of particular importance to those who are likely to be the most affected. Additionally, it was stated that there is a need to identify obstacles that hinder vulnerable groups from access to environmental information. It was noted that access at local level is often not the same as access at the national and regional levels, that the level of education determines who will receive information, and that girls and women often do not have the same access to environmental information as men and boys, especially in rural areas.

Discussions underlined that participation means being involved in decisions that affect people as individuals. In essence, the right to participate should be the strongest application of the exercise of the right to access justice. It was suggested that the Inter-American system provides for direct participation of indigenous people. It was emphasized that efforts should be strengthened to foster more participation in matters of environmental protection not just for indigenous communities, but also to all affected people. There was a call to use the experience of indigenous people in regards to the direct participation mechanism and see to what extent it could be transposed in other settings including rural and urban areas. The suggestion was also made that some communities or people choose not to participate in the decision making process because they do not want their participation to be regarded as an endorsement of other people's choices.

Some concerns were raised that EIAs are not working nor serving their purpose of informing the public and that EIAs for larger projects often do not exist due to lack of capacity of States.

Some mention was made of the hindrance the cost of information can have on effective participation and it was stressed that ways should be explored geared towards communicating information to indigenous communities about the projects that may affect them. It was stated that the Inter-American case of *Claude Reyes et al. v. Chile*, Ser. C No. 151 (2006), dealt with the issue of access to environmental information and held that if environmental information does not exist, it is the responsibility of the government to generate such information.

Participants addressed the issue of how affected communities should be informed in view of the possibility that some companies will make the information available but the information may be difficult to access (e.g., accessible only on the internet) or highly complex (e.g., composed of chemical and mathematical data). The discussion affirmed therefore that the right to information should entail that the person who provides the information should do so in a manner that is understandable to the person to whom the information is directed, including taking into account language. In addition, the procedure should clearly indicate time lines for the proposal. It was expressed that the greatest challenge of the Inter-American system was that the court decisions were against governments and not companies and that more flexibility is needed so that judges may be able to resort to precautionary measures.

Participants also discussed the availability of remedies and rights to recourse as well as the obligation of the state to make the information on the availability of these remedies known to people. Concerns were raised that generally, however, structural issues often weakened the effectiveness of procedural rights for the protection of the environment and reparation for victims. The manner of reparations were also viewed as frequently

inadequate because compensation for environmental harm is often made by imposing fines that may not necessarily reflect the extent of damage. Additionally, it was noted that in some jurisdictions the environmental justice process is inordinately lengthy, and that there is difficulty to access courts because of lack of resources making the cost of litigation prohibitive. More generally, it was suggested that while there is a significant recognition by people of their rights, the challenge remains largely with the enforcement and application of these rights.

It was affirmed that indigenous peoples have well established frameworks such as the UN Declaration and ILO 169, and that in some cases these produce additional procedural protections beyond the baseline that indigenous people are entitled to resulting in protective benefits accruing to all other sectors of the populations. For example, the UN Declaration requires free, prior and informed consent. It was suggested that there may be opportunities to see how these additional protections apply in the context of other vulnerable groups, such that such practices can go beyond the minimum level required for all people in vulnerable situations.

The discussion asserted that because environmental issues often involve very large economic interests, there is often a resultant imbalance of power to the detriment of the affected population, which has fewer resources. As a result, there were calls for higher representation of these people in the environmental decision-making process, in order to ensure due process. Furthermore, it was stated that when there is no flexibility found in some rights, such as the right to life, arguments for applications of law in environmental protection may be anchored on rights with permissible restrictions such as the right to health to achieve broader avenues for protection.

It was stated that the best environmental harm is the one that never takes place but that global systems are not adequately geared towards prevention.

### **SESSION 3. Substantive rights**

#### **Moderator: Ms. Astrid Puentes, AIDA**

The session observed that much of the progress achieved in the work on substantive rights has been done at the regional level, although there is a general acceptance at all levels that environmental harm can adversely affect a wide variety of human rights. The session tackled the issue of what substantive duties these human rights give rise to and what do they in turn require States to do. Emphasis was placed on the importance of assisting governments in the interpretation of these duties, including what obligations accrue to meet environmental standards. It was observed that there are different assumptions about the right to a healthy environment and there is hesitation on the part



of many States to embrace the right because of concern about its scope and implications. Essentially it was contended that governments should follow procedural rights in order to fulfil substantive rights. State representatives alluded to the challenges of implementing international environmental treaties. Also, it was noted domestic implementation of substantive rights is not consistent, although the judiciary may promote consistency by overseeing the realization of the rights.

The discussions elaborated further that the protection of substantive rights can also contribute to the protection of the environment. Furthermore that the notion of giving rights to the environment itself – a personification of the environment as it were-is worth some consideration in order that the environment can have a legal status in very much the same way that companies do. For example, in New Zealand rivers have a legal status and the State acts as guardians of rivers; in Ecuador forests and rivers have a legal standing and the society has a responsibility to enforce rights on behalf of the environment; and in Bolivia there is a recognition of the rights of the earth and of its ecosystems as an expression of human needs. Incorporating the right to a healthy environment was acknowledged as one of the most substantive ways that environmental protection can be assured and examples included the recent constitutional amendments by Jamaica and Guyana, recognizing that the right to a healthy environment must have a constitutional framework.

However it was noted that in several of the jurisdictions that actually do have these provisions as part of their constitutional framework, one has to be personally affected in order to bring a suit before court, which thereby limits access to justice. Furthermore, the situation is compounded by the uncertainty of which entity the action can be brought against because it is usually against the State or State entity with no possibility to bring the constitutional challenge against a private individual. The implications of this are that the private institutions who are usually the perpetrators of the unconstitutional actions are not held accountable. Observations were made that even where the right to a healthy environment is not a constitutional guarantee; some courts have recognized the right to the environment as a basic human right, for example, in Peru. Other jurisdictions will approach the application of the right to a healthy environment in a broadly comprehensive manner, including establishments of tribunals specifically set up to deal with environmental matters, for example, in Bolivia.

Discrimination was underscored as the main premise from which State and non-state actors such as multinational corporations engage with indigenous communities. Concerns were raised that often governments take into account the interests of multinationals rather more than those of its citizenry and there is a bias that reverberates throughout the institutions that indigenous communities approach in order to assert their human rights.

## **SESSION 4. Transboundary harm**

**Moderator. Mrs CARMEN ROSA VILLA, Representante Regional, Alto Comisionado de las Naciones Unidas para los Derechos Humanos oficina Regional para America Central, Panama**

This session dealt with the application of a rights-based approach to environmental harm, including in particular the types of transboundary harm relevant to people in vulnerable situations.

In general, the participants did not identify many examples of transboundary harm that were specific to people in vulnerable situations. The use of pesticides was identified as one of the most insidious in terms of its harm to vulnerable populations. Observations were made of cases involving transboundary environmental harm in Latin America, including the *Pulp Mills* case before the International Court of Justice. It was suggested that provisions in bilateral agreements may in some instances provide greater protection against transboundary harm than against purely local harm.

## **DAY 2**

### **SESSION 5. Good practices: procedural rights**

The work of the session was organized in break-out groups tasked to identify good practices that related to the procedural rights and associated issues of relevance to members of vulnerable groups

On participatory rights, the Latin American process to develop a regional instrument on the implementation of participatory rights to access to information, public participation and access to justice in environmental matters (implementing Principle 10 of the Rio Declaration on Environment and Development) emerged as a good practice with respect to the protection of vulnerable groups. Following the Declaration on the Application of Principle 10 on Environment and Development adopted by Latin American and Caribbean countries at Rio+20 Conference in June 2012, a group of Latin American and Caribbean countries approved in April 2013 a Plan of Action to promote the signature of a regional convention on the implementation of Rio Principle 10. The Plan includes several actions to be undertaken until 2014, such as: promoting the Declaration and incorporating new signatories to the process; enhancing and highlighting the progress in the region in terms of rights to access to information, public participation and access to justice; promoting the active participation of civil society at the national level; moving towards creating a regional instrument through the

establishment of two working groups, one on capacity building and cooperation, and the other on rights to access to information, consultation and the regional instrument. This includes the organization of workshops and exchanges of good practices to encourage cooperation among countries.

Another example of good practice in the field of access to justice discussed by participants is the establishment of an Inter-American program to support the establishment of a national service of judicial facilitators (*facilitadores judiciales*). The objective of the programme, managed by the Organization of American States, is to reinforce access of justice for citizens who live in remote rural areas by establishing a service with national coverage, administered by the Justice Department. The judicial facilitators are elected by their communities and operate under the supervision of local judges providing a link between local communities and municipal authorities. Their competencies are limited to their community and they provide a variety of legal and judicial services, such as technical assistance in the preparation of claims, dissemination of information of applicable legislation, and mediation services. The programme has been implemented in Nicaragua, Paraguay, Panama, Guatemala, Honduras and Argentina, as of October 2013.

At the national level, the right to public participation has been recognized in the form of “Public Environmental Hearings” (*Audiencias Publicas Ambientales*) in Colombia. Pursuant to Decree 330 of 2007, these hearings are intended to inform social organizations, the community in general, and public and private entities about applications for licenses, permits or concessions, or about the existence of a project, that may adversely impact the environment. The information must include the expected impacts on the environment and proposed measures to prevent mitigate or compensate such impacts. During the hearings, the public is invited to share opinions, information, and documents that environmental authorities must take into consideration during the decision making process.

## **SESSION 6. Good practices: substantive rights**

The work of the session was organized in break-out groups tasked to identify examples of good practices related to substantive rights that protect vulnerable groups in the context of environmental harm and management.

A number of good practices were identified by participants with respect to the protection of indigenous people and their participation in environmental management, in particular through the establishment of prior informed consent procedures and mechanisms to guarantee access to and control over natural resources in indigenous territories. The good practices indicate a progressive recognition of the importance of indigenous

peoples in the protection of natural resources and their fair use. These practices include: the 2006 Amerindian Act regulating access and control over natural resources in the Amerindian territories of Guyana; Law no.10 of 1997 on access to natural resources in indigenous territories in Panama; Law no. 70 of 1993 of Colombia on the rights of Afro-Colombians; the 2005 Framework environmental law no. 28611 of Peru establishing protected areas and prior informed procedures for indigenous peoples; Decree no. 2372 of 1 July 2010 establishing a system of national protected areas in Colombia; and Supreme decree no. 001 of 2012 of Peru on the right to prior informed consent for indigenous peoples as recognized in ILO Convention no. 169.

The establishment of community-led sustainable forest management plans in Belize was identified during the consultation as an example of good practice in the field of involvement of indigenous communities in the sustainable management of natural resources. The communities of Conejo and Santa Teresa in Belize - through funding from American People through the United States Agency for International Development (USAID) and technical assistance from WWF (World Wildlife Fund) and the Sarstoon Temash Institute for Indigenous Management (SATIM), a community-based indigenous environmental organization - have each developed a sustainable forest management plan for their communities. The Plans were created with the objective of contributing to the conservation and sustainable management of Sarstoon Temash National Park as well as to the achievement of social and economic benefits for the two indigenous communities.

At the international level, the Inter-American Court of Human Rights (IACHR) case on the Belo Monte hydroelectric dam has been identified as an example of international recognition of the rights to life, health and safety of members of indigenous communities affected by the project. On April 1, 2011, the IACHR granted precautionary measures in favor of indigenous communities in the Xingu River basin. The Commission requested that the Brazilian government immediately suspend construction and all licensing for the Belo Monte dam to protect the rights to life and health of the communities. Subsequently, on July 29, 2011, the Commission modified the aim of the measure to include that the state of Brazil adopt measures to protect the life, health and safety of members of indigenous communities affected by the project, including those in voluntary isolation.

Participants identified as good practices examples of the recognition of the rights of Mother Earth and their implication for vulnerable groups. For example, the 2012 Framework Law No. 300 on Mother Earth and Integrated Development for Human Well-being of Bolivia defines Mother Earth as "a collective subject of public interest" and declares both Mother Earth and life-systems (which combine human communities and ecosystems) as titleholders of inherent rights specified in the law, such as the right to exist, continue life cycles and be free from human alteration, the right to pure water and

clean air, the right to equilibrium, the right not to be polluted or have cellular structures modified and the right not to be affected by development that could impact the balance of ecosystems. In this approach human beings and their communities are considered a part of mother earth, by being integrated in "life systems" defined as "...complex and dynamic communities of plants, animals, micro-organisms and other beings in their environment, in which human communities and the rest of nature interact as a functional unit, under the influence of climatic, physiographic and geologic factors, as well as the productive practices and cultural diversity of Bolivians of both genders, and the world views of Indigenous nations and peoples, intercultural communities and the Afro-Bolivians;. A draft Universal Declaration of the Rights of Mother Earth was also adopted in 2010 by the World People's Conference on Climate Change and the Rights of Mother Earth, in Bolivia.

Linkages between human rights and the environment have also been recognized at the constitutional level. The 2009 Constitution of Bolivia, for example, establishes that everyone has a right to a healthy, protected and balanced environment. Article 30, in particular, recognizes indigenous peoples' right to live in a healthy environment with adequately managed ecosystems, along with other fundamental human rights, such as rights to existence, cultural and religious identity, self-determination, and collective property. The Bolivian constitution also recognizes that water is a fundamental right to sustain life as well as the importance of traditional customs of local communities and indigenous peoples relating the sustainable management of freshwater resources. The Constitution also establishes an Agro-environmental tribunal to resolve, inter alia, claims regarding damages to the fauna, flora, water and the environment as well as to the ecological system and biodiversity. Similarly, the Constitutional Court of Colombia has recognized in its decision T-143/10 of 2010 the right of indigenous communities to drinkable water.

### **Closing remarks**

At the end of the meeting, the Independent Expert and representatives of UNEP and OHCHR thanked the participants for their valuable, informative participation, and also thanked the UNEP regional office for its support of the meeting.