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 the total which includes 2 killings in 2012) indicated strong evidence that the killings were perpetrated with company or government involvement".

Jane Cohen emphasized that this is a very important issue for Human Rights Watch. She pointed out that environmental human rights defenders are often particularly at risk. Often activists on civil and political rights are scholars or otherwise well versed in human rights issues and laws. They are also often somewhat removed from the violations. For environmental activists, in contrast, people often get involved because they themselves are affected by environmental harm, and their lack of experience in activism leaves them in a vulnerable position. Protecting these people and highlighting

their situations is key to protection of environmental rights moving forward.

She then introduced **Phyllis Omido**, who described her experience as an environmental human rights defender in Mombasa, Kenya.

In 2009, she worked for a smelter in Mombasa. She was a human resource manager and part of her mandate was to undertake community relations with the community surrounding the smelter. During her work there, she was supposed to coordinate and oversee an initial environmental impact assessment. This was strange, because she knew that the EIA should happen before the project starts, but the smelter was already operating. She worked with an environmental expert who stated in his final report that the negative impacts of the project far outweighed the positive impacts. She presented the report to her supervisors and they fired the expert immediately and she was no longer permitted to work on this issue.

At the time her son was breast feeding and got sick, and the hospital said that it was lead poisoning. She approached her employers and requested them to pay the hospital bill. They eventually told her that they would pay, but they made her sign a lot of documents, including a non-disclosure agreement. But she knew that others were working there and were still exposed to these harms. Even after she moved away, she helped the community to obtain information and to challenge the operation of the smelter. She became an environmental human rights defender but she had very little awareness that she was in fact a human rights defender, and little awareness of the tools and laws that she could rely on to pursue her case.

After being harassed, threatened, assaulted, and arrested on multiple occasions, she was able to get assistance from various organisations, including Human Rights Watch. She has now started her own NGO and has become empowered and gained tremendously from the experience. The road ahead is still long and uncertain, but she believes that it is important to share these experiences to build support for her and other defenders who find themselves in these situations.

The discussion following the panel emphasized the importance of international attention, and suggested having an event in Geneva to highlight testimonies of environmental defenders from various regions and to help show the relevance of this mandate to their issues. In response to questions, Phyllis Omido stated that at first she had no knowledge of how to protect herself as a human rights defender, and described how much Human Rights Watch and Frontline Defenders helped her. Jane Cohen said that Phyllis was unusually resourceful, and that many people in her situation are not able to find the people that can help them. Margaret Sekaggya spoke of the importance of international procedures collaborating with one another, and of the need to have international attention followed up by local NGOs and civil society.

SESSION 3 ACCESS TO INFORMATION AND PUBLIC PARTICIPATION

***This session sought to identify what constitutes meaningful and effective participation and regional and country-specific legal frameworks and experiences, including obstacles and good practices. Access to information is vital to effective public participation in decision-making, as well as to monitoring activities that may affect the environment. Meaningful participation and consultation with affected individuals and communities are critical to ensure informed environmental decision-making, including during environmental review processes and for the development of environmental policy, laws and regulations*.**

Moderator: Carole Excell, World Resource Institute (WRI)

Panellist:
Marcos Orellana, Centre for International Environmental Law (CIEL)
Sandra Musoga, Article 19 Kenya
Jeremy Wates, European Environmental Bureau
Achim Halpaap, UNITAR

Sandra Musoga shared her experience of working on these issues for Article 19 in Nairobi. Article 19's work is guided by Article 19 of the ICCPR, which protects the right to hold opinions and the right to freedom of expression.

In Kenya it was thought that the lack of a constitutional right was the major setback in realising participation and access to information. The previous constitution placed environment as part of the right to life, and it was silent on right to information and public participation. It specified the freedom of expression and association, but it was very limited. For a long time, Kenya did not have an integrated framework providing for environmental governance.

Now that the right to environment is embedded in the new Constitution, it has changed things. The Constitution is wide in scope, ranging from components such as elimination of land and air pollution, access to justice, right to water, and access to information and the right to engage in decision making. Also, there is now an overall law dealing with environmental issues- creating an all-embracing agency for management of the environment. It also established structures, like the National Environmental Council and the National Environment Management Authority. Also it created smaller structures that will bring down structures closer to the people.

Article 35 deals with access to information. For example, it states that every citizen has the right of access to information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom. In other world, citizens can ask and the government is obligated to provide it. Article 36 also deals with the right to freedom of association. The Constitution has now provides a

means to hold government accountable.

In practice, all this is new, so there are challenges in implementation. For example, although the right to information is guaranteed, there is no specific law about it.

Main obstacles include:

Lack of awareness: citizens are not aware of their right to environment and that it is difficult to enforce.

Different levels of government- decentralization. Marginalised and vulnerable groups may not be able to gather information and engage with structures.

Culture of secrecy. Information needs to be out there proactively. Social media can meet a wider platform of people. An attitude change needs to take place so that people believe and accept participation.

Achim Halpaap shared five lessons learned around the need to institutionalize procedural rights at the national level:

1. **Access to information**: Principle 10 called for emissions inventories or pollution release and transfer registers (PRTR) that can be disseminated to communities. At UNITAR we helped in the 1990s to develop these PRTR systems, starting in Mexico. These systems can be a driver not just to identify, but to also reduce pollution. It is important to institutionalize these right to know schemes.

2. **Generic participation rights are not sufficient:** We need to do more to spell out what constitutes effective participation. To take an example from South Africa, when it came to concrete participation at the local level, having the general participation law was not enough. It also mattered at what stage environmental groups are brought into the process (e.g. who can speak first, etc.).

3. **Procedural rights alone are not sufficient:** It is necessary to link them to substantive rights. For many years, NGOs were falling in a participation trap, participating, but without any benchmark to hold people accountable. So it is necessary to have pollution control standards.

4.**There are tremendous opportunities for capacity development**: governments are also interested in building stakeholder participation, because they are seeing that development can be delayed at a local level- thus a need to facilitate and engage to create constructive participation. The Bali Guidelines are very helpful- because they set up a framework for what constitutes access to information. But also, we need capacity development in community groups, many ways to create and foster this.

5. **Tremendous opportunities for international knowledge sharing and creating**

new knowledge: It would be nice to create these stories in a systematic way, and also that the stories are researched with a robust methodology so that they are considered reliable.

UNITAR is working with Yale University to put on a conference in 2014 on these issues, as an opportunity to share international knowledge. It will be important to get both the practitioners and academics there.

Marcos Orellana explained that access to information is one of the building blocks of a right to a healthy environment. This raises a few questions:

1. What is the interaction between procedural and substantive approaches?
2. What is the value of Principle 10 instruments?
3. Recognising that the human rights system is designed to evolve, what implications can be drawn from that?

1. One key case in the Americas is *Claude Reyes et al. v. Chile* - a logging concession project in Tierra de Fuego. The information requested was not on the environmental impacts, but on the investor's prior practices in its country of origin. There was no impact on humans per se, so no substantive rights per se at issue. But the procedural rights here allowed a recourse where no substantive rights were necessarily available.

Reyes led to other discussions, such as the link of GMO invasion of wild areas, and the link to human health. That case is before the Inter-American human rights system, which has not yet issued a report on the merits.

2. Principle 10 instruments provide guidance on implementation, and also clarify obligations.

3. The foundation has been built for a general right of access to information, such as Article 19. In the European context, for decades the court rejected the notion that Article 10 had a right of access to information, but building on other rights, departed from this jurisprudence and recognized a general right of information in the EU system, demonstrating that the system is designed to evolve. Also, in the *Endorois* case, the African Commission went beyond the *Saramaka* standard. The human rights systems are designed to evolve over time.

Jeremy Wates described the experience with the Aarhus Convention. The Western European countries came in thinking that they already had strong laws, so it would be easy to influence Eastern Europe. But it became clear that actually the Western European laws were inaccurate and inadequate.

NGO participation was fundamental in the negotiations. They participated in every break-out group, and had a very substantial influence of the content of the Convention.

Aarhus, builds on 3 pillars: Participation, Access to information, and Access to Justice. Other provisions include that there is a rights based approach, as both the Preamble and Article 1 recognise a right to a healthy environment

The Convention sets a floor, not a ceiling. States can make provisions more stringent. The negotiators also recognized that many decisions are taken at the intergovernmental level. We could not bind these bodies to the Convention, but we could bind Aarhus State Parties. Thus a provision was inserted to apply principles of Aarhus convention when States go to international fora.

Aarhus also has a very strong compliance mechanism. In particular, NGOs have the right to nominate candidates to the Compliance committee- this was very important. Also, any member of the public can trigger review of compliance simply by writing a letter. In practice the mechanism has worked, and it is manageable. The public trigger has brought cases of non-compliance that would not typically have come to light.

Although the Aarhus Convention was originally developed in the UNECE region, the United States and Canada have not participated. The United States has taken an obstructive approach.

Aarhus has really made a difference even in the EU, where it has demonstrated holes in EU Principle 10 laws and driven the law forward.

Discussion after the presentations in Session 3 addressed: the need to engage the judiciary and public interest lawyers; the opportunities and obstacles to replicating the Aarhus experience elsewhere; the need to operationalize the new Kenyan framework; the importance of building understanding of the benefits of a rights-based approach, including through studies showing the environmental benefits; the need to help marginalised groups; the implementation of the BALI guidelines; and the utility of clear guidelines on free prior and informed consent.

SESSION 4- RIGHT OF ACCESS TO JUSTICE AND REMEDIES

Access to justice and adequate remedy are imperative to guarantee all human rights related to environmental protection: not only procedural rights such as the rights to freedom of expression and association, access to information and public participation, but also substantive human rights vulnerable to environmental harm. Without adequate access to justice and remedy, violations of human rights go unaddressed. This session sought to identify regional and country-specific frameworks and experiences, including obstacles and good practices relevant to access to justice and remedies.

Moderator: Marc Limon, Universal Rights Group, Geneva

Panellists:

Naseema Fakir, Legal Resource Centre, South Africa

Ritwick Dutta, Lawyers Initiative for Forest and Environment, India

Jane Cohen, Human Rights Watch

Marc Limon said that establishment of this mandate is a key moment – it can really help clarify how principles for different areas of law can interact with each other.

He also noted that without effective remedies, the rights in the ICCPR have no meaning. The key question is the degree to which those people or groups who are subject to environmental harm are able to have access to justice and remedy.

There is a need to put oneself in the place of a person whose rights are violated? Will she or he know what rights are being violated? Would they feel an environmental harm? Can they have access to any recourse, are they aware of those issues?

Naseema Fakir described the law in South Africa on remedies. The Constitution is the foundation of all the laws in South Africa, including those dealing with human rights and environmental protection.

Section 24 of the Constitution states a right to a healthy environment. Most of the litigation under section 24 is precedent setting and treading into new territory. Section 32 concerns access to information, Section 33 the right to just administrative action, and Section 34 access to courts.

The National Environmental Management Act (NEMA) is the framework environmental legislation that has been enacted pursuant to the constitutional dispensation. NEMA section 28 puts forth a duty of care that encapsulates the polluter pays principle; Section 32 states a broad standing provision.

The National Water Act provides for applications for water licenses, but the minister has disbanded the water tribunal, which means that there is no administrative process in place to review participation issues related to the issuance of water licenses.

Ritwick Dutta described the situation in India. The Indian courts have emphasized substantive rights, including the right to life. In the 1990s, the courts began to focus on environmental protection, and in 1997 India set up its first environmental court. Very few people knew about the Green Tribunal, and many cases are dismissed for not complying with the statute of limitations, which requires that claims must be filed within 90 days after a government decision.

Now the Tribunal is issuing important decisions, and many more judgments than the

volume of judgments coming from the High Court. A recent case expanded *locus standi* so that there is no direct requirement of residency or personal injury. Any person can approach the Green Tribunal- not just citizens.

Jane Cohen described how Human Rights Watch was able to get to a remedy with respect to lead poisoning in Nigeria. This case demonstrates non-legal approaches to remedies.

Medicins sans Frontieres found mass graves of children in Nigeria due to lead poisoning from artisanal gold mining. People were processing gold with flour grinders in their homes, resulting in the release of lead, which had severe impacts on children. There have been hundreds of child deaths- at the very least 400 but probably many more. The UN initially remediated 7 villages, but the money ran out and there was still rampant contamination. The problem is that one cannot treat lead poisoning without remediating first.

Environmental groups and medical groups did not want Human Rights Watch to be involved at first. They took the line that this is a technical and environmental issue that does not have anything to do with human rights. Their concern was that a human rights focus would put too much pressure on the government, but Human Rights Watch thought that it would be able to help to effectively spotlight issues. It helped to start a broader media campaign, including by producing a video that brought the voices of the people in the conversation. This allowed people to understand the real impacts on people. In the end, we ended up creating a working relation with the environmental groups and MSF, and the Nigerian Government recently released the money for remediation.

The discussion after Session 4 addressed, among other issues, the Guiding Principles on business and human rights; the importance of training judges and lawyers dealing with the environment; and the need to avoid conflicts between human rights and environmental groups, so that they can work together without mistrust.

SESSION 5: OPEN DISCUSSION

This session, moderated by Dan Magraw, sought to allow participants to raise issues that were not been raised in the previous sessions or to explore issues that were raised in more detail. The issues included:

- With respect to the right of access to justice, the focus is often on the *access* (i.e., a fair hearing before a tribunal that comports with certain standards). However, the outcome of that hearing is equally important. In order to have this right be effective, there has to be some consequence for violations. It is not clear what the remedy is if the procedural rights are not afforded -- does the project stop, or does it restart?

- Do animals have any role within the IE mandate? For example, in Kenya a breeding ground for elephants has been degraded. Also, the occurrence of poaching is prevalent. The commenter has heard of one country where a judge appointed someone to represent the elephants.

- There is generally a cosy relationship between business and government- very often government turns a blind eye and does not enforce the law. Somehow these industries need to pay for the costs of these violations. Second, there are a lot of common benefits that come from these procedural rights, such as transparency and public participation. Transparency opens up markets, fosters competition, and reduces hostility of host communities. It is difficult for us to get them to agree to open up and be transparent, despite the positive benefits.

- There is a very delicate situation on human rights in Colombia around agrifuels, or biofuels. Paramilitaries have taken a lot of land, killed communities, and own many of the palm oil plantations. They are also involved in land grabbing. Government started instituting land restitution reform, but people are afraid to come back. Often the paramilitary threatens people to leave or buys them off at a cheap price. There is also a push to establish biodiversity and human rights zones, but these areas are too small. There are also a lot of issues around human rights defenders, 66 people have been murdered. We are also worried at the escalation of REDD products- for example the Chiapas communities have been displaced to establish REDD projects.

- The relationship between access to information and other procedural rights needs to be explored -- how can someone participate if they don't know how?

- Does the mandate extend to humanitarian law? The resolution does not specifically mention this, but human rights obligations do not end in war time, so the commenter recommends studying environmental issues during war.

- Future generations do not have rights at the international level but they are mentioned in various national constitutions. What do we do about future generations at the international level? Do they have the right to life, to basic services? There is a fair amount of ambiguity.

  Also a study to define the dimensions of environmental crime can be useful.

- Extraterritorial obligations- it would be good for the IE to look at this issue, including how such obligations apply to development cooperation or development assistance, and obligations of international financial institutions.

- Freedom of information laws have been created in many countries. They should include rights to information from private industries, and a few countries have started to go this way.

- A new protocol under the ICESCR will enter into force in May. This will allow cases to be directly taken to the Committee.

- The importance of criminal law as a form of redress, and the need for authorities to investigate and punish violations. In the *Öneryildiz* case in the European Court of Human Rights this was extended to the negligent failure to investigate a hazardous waste disaster. There, the Istanbul authorities, despite being informed on a number of occasions about the possibility of a methane explosion from a rubbish site, did not take any further action.

- We should consider where there are alternative ways to get remedies with respect to environmental crimes. The judicial system is simply taking too much time. For example arbitration is a really good option sometimes.

- Special Procedures can produce additional reports, and sometimes joint reports on certain issues. The issue of environmental human rights defenders could be very interesting. Also, the post 2015 development agenda is an important hook.

- We need to empower communities to be able to have meaningful participation. The problem is, at least in South Africa, that even if you are given access to all the information, you need to interpret the information and then interrogate it. The problem is that communities do not have experts to look at the information.

SESSION 6- REFLECTION AND WAY FORWARD

This session, which included the moderators from each previous session, sought to allow for a collective reflection of the consultation and a discussion of the way forward. The points included:

- The idea of collecting and disseminating best practices is particularly important. The discussion of gaps with Aarhus and what we learned from Aarhus was extremely valuable.

- While it is important to have constitutional and legislative frameworks to guarantee procedural rights, this is not enough. Unless there is an opportunity to have remedy, the regulatory framework is meaningless.

- Victims of human rights abuses in an environmental context need to perceive their problems as a human rights issue. The victims and their representatives need to know the full range of avenues available. The interconnected nature of human rights law and environmental law needs to be better understood, including by government regulators. There should be help for victims to be able to scale up, such as bringing others in or referring the cases to international or regional mechanisms.

The IE can support these steps through: capacity building and awareness raising; sharing best practices; producing guidelines and tools, such as for environmental human rights defenders; raising the profile of environmental human rights defenders, such as through a side event in Geneva.

- A focus on procedural rights can help to build consensus. It makes sense to start at a conceptual level where there is solid level of jurisprudence. Perhaps focusing on vulnerable groups would allow for identification of the specifics of threats addressing those groups and then allow for the polishing of tools addressing those groups.

- It will be very relevant and useful for those involved for something concrete to come out of the work, such as a database or mechanism for groups who are facing environmental human rights challenges to be linked to each other or a pool of experts.