The Development of Environmental Human Rights

John H. Knox
UN Independent Expert on Human Rights and the Environment
Henry C. Lauerman Professor of International Law,
Wake Forest University, North Carolina, USA

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of the Declaration on the application of Principle 10
of the Rio Declaration on Environment and Development
in Latin America and the Caribbean

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Thank you very much for the opportunity to speak to you again about the development of human rights and the environment. I am sorry I cannot be there in person, but it is an honor to be able to participate, even long-distance!

This meeting is a highly important event in the developing relationship between human rights and the environment. And t comes at a critical time.

As you are well aware, 2015 will see the transition from the Millennium Development Goals to the Sustainable Development Goals. It will also see, perhaps, an agreement on climate change. The IPCC report just released is a sobering reminder of the threats climate change poses to the entire world. To solve climate change, to adopt and meet the Sustainable Development Goals, and to address all of the other environmental problems we face today, will require us to use all of the tools at our disposal.

I am going to speak about the importance of one of those tools, in particular: the application of human rights obligations to environmental policy-making.

As you may recall, I spoke to the third meeting of the focal points, last year in Lima. I am very impressed by the increasing number of countries that have joined this process, and by the progress you all have made in the last year. The Lima Vision of Lima and the San José Content provide strong bases for your work going forward.

In my time this morning, I will try to put the effort to develop a regional instrument on access rights into a broader context. Specifically, I will describe how a new regional agreement is part of the ongoing development of human rights in an environmental context, and how it can contribute to that development.

I was appointed by the UN Human Rights Council two years ago, to carry out a three-year mandate as the first UN Independent Expert on human rights and the environment. The mandate gives me several tasks. One is to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. In other words, the Council

asked me to clarify how international human rights law applies to the protection of the environment.

To that end, I spent much of 2013 mapping the law in this area. Together with a large number of scholars and attorneys acting on a pro bono basis, we conducted the most thorough study yet undertaken of how human rights law applies to environmental issues. We examined human rights treaties, statements by human rights treaty bodies, decisions of regional human rights tribunals, resolutions of the General Assembly and the Human Rights Council, statements by States in the context of the Universal Periodic Review, reports by Special Rapporteurs, and international environmental instruments. I also held five public consultations in different regions of the world.

The results of the research and consultations were included in 14 reports, each of which describes how a particular international body has applied human rights to environmental protection. These conclusions are summarized in my report to the Human Rights Council, which I presented last March.[1]

Despite the diversity of the sources reviewed, they took remarkably consistent positions. They agreed that environmental harm infringes the enjoyment of a very wide range of human rights. Environmental degradation obviously threatens the right to a healthy environment, which is now recognized by most countries in the world, and in particular by the great majority of the countries in the Latin American and Caribbean region. Environmental harm also interferes with the exercise of many other human rights, including rights to life, health, food, water, and even self-determination.

But the human rights sources we reviewed have done much more than merely describe the effects of environmental harm on the enjoyment of human rights. Together, they have developed a coherent body of environmental human rights obligations, with three principal elements.

- First, the sources agree that human rights law imposes procedural obligations on States in relation to environmental protection.
- Second, they have set out minimum substantive standards.
- Third, they have identified duties relating to vulnerable groups.

I will describe each of these sets of obligations in more detail, focusing on the procedural duties, since those are of special relevance to this meeting.

The procedural obligations identified by UN and regional human rights bodies are:

(a) to assess environmental impacts and make environmental information public;

[1] Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report, UN Doc. A/HRC/25/53 (30 December 2013), available at http://www.ohchr.org/en/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx.

(b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and

(c) to provide access to effective remedies for environmental harm.

Obviously these duties directly correlate to the Principle 10 access rights. But the key point here is that they are also based on human rights law.

Which human rights give rise to these obligations?

Duties to provide information and to facilitate public participation in decision-making are often considered to correspond to civil and political rights, such as the right to freedom of expression and the right to take part in the government of one's country. But in the environmental context, these duties have been derived from the full range of human rights whose enjoyment is threatened by environmental harm, including rights to health, food, and water. In other words, human rights bodies have said that in order to protect rights to a healthy environment, to life, to health, to property, to an adequate standard of living, it is necessary to protect the environment; and to protect the environment, it is necessary to provide rights of access to information about the environment, to participation in environmental decision-making, and to remedies for environmental harm.

Human rights law thus recognizes that human rights and environmental protection depend on each other. To enjoy human rights fully, it is necessary to have a safe and healthy environment; and to have a safe and healthy environment, it is critical to protect human rights.

As a result, the protection of human rights and the protection of the environment form a virtuous circle; the exercise of human rights such as rights to information and public participation helps to ensure the protection of the environment, and a healthy environment helps to ensure the full enjoyment of human rights. The Lima Vision incorporates this understanding, by stating: "That exercising rights of access to information, participation and justice in environmental matters deepens and strengthens democracy and contributes to better protection of the environment and thus of human rights."

Now I will describe in more detail the bases in human rights law for each of the three access rights.

First, the right to information: The Universal Declaration of Human Rights (art. 19) and the International Covenant on Civil and Political Rights (art. 19) both state that the right to freedom of expression includes the freedom "to seek, receive and impart information". So does the American Convention, which states that "This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers." (art. 13.1)

The right to information, like the right to participation, is also important for the enjoyment of other rights. In the words of the UN Special Rapporteur on toxic substances, the rights to information and participation are "both rights in themselves and essential tools for the

exercise of other rights, such as the right to life, the right to the highest attainable standard of health, the right to adequate housing and others" (A/HRC/7/21, p. 2).

Human rights bodies have repeatedly stated that in order to protect human rights from infringement through environmental harm, States should provide access to environmental information.

For example, in its general comment on the right to water, the Committee on Economic, Social and Cultural Rights stated that individuals should be given full and equal access to information concerning water and the environment (para. 48). Similarly, the Special Rapporteur on the situation of human rights defenders has stated that information relating to large-scale development projects should be publicly available and accessible (A/68/262, para. 62). There are many examples of similar statements by international and regional bodies.

And rights to information are described not only by human rights instruments, but also by many environmental treaties, including the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (art. 15), the Stockholm Convention on Persistent Organic Pollutants (art. 10), and the United Nations Framework Convention on Climate Change (art. 6(a)), all of which require environmental information to be provided to the public.

The second access right, the right of public participation, also has strong bases in human rights law. The baseline rights of everyone to take part in the government of their country and in the conduct of public affairs are recognized in the Universal Declaration of Human Rights (art. 21) and the International Covenant on Civil and Political Rights (art. 25), respectively, as well as in the American Declaration (art. XX) and the American Convention (art. 23.1).

Again, human rights bodies have built on this baseline in the environmental context, elaborating a duty to facilitate public participation in environmental decision-making in order to safeguard a wide spectrum of rights from environmental harm. The Special Rapporteur on hazardous substances and wastes and the Special Rapporteur on the situation of human rights defenders have stated that governments must facilitate the right to participation in environmental decision-making (see A/HRC/7/21 and A/68/262). The Committee on Economic, Social and Cultural Rights has encouraged States to consult with stakeholders in the course of environmental impact assessments, and has underlined that before any action is taken that interferes with the right to water, the relevant authorities must provide an opportunity for "genuine consultation with those affected" (general comment No. 15 (2002), para. 56). Regional human rights tribunals agree that individuals should have meaningful opportunities to participate in decisions concerning their environment.

And, again, the importance of public participation is reflected in many international environmental instruments, following the lead of Principle 10. Environmental treaties that provide for public participation include the Stockholm Convention on Persistent Organic Pollutants (art. 10), the Convention on Biological Diversity (art. 14(1)), the United Nations Convention to Combat Desertification (arts. 3 and 5), and the United Nations Framework Convention on Climate Change (art. 6(a)).

The third access right, the right of effective access to judicial and administrative proceedings, including redress and remedy, also has very deep roots in human rights law. From the Universal Declaration of Human Rights onward, human rights agreements have established the principle that States should provide for an "effective remedy" for violations of their protected rights.

Human rights bodies have regularly applied that principle to human rights infringed by environmental harm. For example, the Committee on Economic, Social and Cultural Rights has urged States to provide for "adequate compensation and/or alternative accommodation and land for cultivation" to indigenous communities and local farmers whose land is flooded by large infrastructure projects, and "just compensation [to] and resettlement" of indigenous peoples displaced by forestation. The Special Rapporteur on the situation of human rights defenders has stated that States must implement mechanisms that allow defenders to communicate their grievances, claim responsibilities, and obtain effective redress for violations, without fear of intimidation (A/68/262, ¶¶ 70–73). Other special rapporteurs, including those for housing, education, and hazardous substances and wastes, have also emphasized the importance of access to remedies within the scope of their mandates.

At the regional level, the European Court has stated that individuals must "be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process." The Court of Justice of the Economic Community of West African States has stressed the need for the State to hold accountable actors who infringe human rights through oil pollution, and to ensure adequate reparation for victims.

Most relevantly here, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have stated that the American Convention on Human Rights requires States to provide access to judicial recourse for claims alleging the violation of their rights as a result of environmental harm.

Again, many environmental treaties establish obligations for States to provide for remedies in specific areas. For instance, the United Nations Convention on the Law of the Sea requires States to ensure that recourse is available within their legal systems to natural or juridical persons for prompt and adequate compensation or other relief for damage caused by pollution of the marine environment (art. 235). Some agreements establish detailed liability regimes; a leading example is the International Convention on Civil Liability for Oil Pollution Damage.

In response to my report, the Human Rights Council adopted a resolution on human rights and the environment, which states, among other things, that the Council:

> *Recognizes* that human rights law sets out certain obligations on States that are relevant to the enjoyment of a safe, clean, healthy and sustainable environment, and that the enjoyment of the corresponding human rights and fundamental freedoms can be facilitated by assessing environmental impact,

> making environmental information public and enabling effective participation in environmental decision-making processes, and that in that regard a good practice includes adopting, strengthening and implementing laws and other measures to promote and protect human rights and fundamental freedoms in the context of environmental legislation and policies. (Res. 25/21, ¶ 4.)

In addition to these procedural duties under human rights law, States have substantive obligations to protect against environmental harm that interferes with the enjoyment of human rights. Specifically, States have an obligation to adopt a legal framework that protects against such environmental harm. This obligation includes a duty to protect against such harm when it is caused by corporations and other non-State actors, as well as by State agencies.

Finally, States must take into account the situation of groups particularly vulnerable to environmental harm. States must not discriminate against groups on prohibited grounds in the application of their environmental laws and policies. And they must take additional steps to protect certain groups vulnerable to environmental harm, including women, children, and indigenous peoples.

As I told the Council, work remains to be done to clarify all of these obligations further, for example in relation to transboundary environmental harm. But the obligations are already clear enough to provide guidance to States and all those interested in promoting human rights and environmental protection. My main recommendation, therefore, was that States and others take these obligations into account in the development and implementation of environmental policies.

The ongoing effort by the participants in this meeting to develop access rights in an environmental context is perhaps the clearest current example in international relations of how States are moving forward to develop the relationship between human rights and environmental protection.

I applaud this endeavor. It will be a model for other countries considering how to implement rights to information, participation and remedy in an environmental context.

In my remaining time, I would like to address some specific issues:

- How much flexibility do States have in complying with these obligations?
- How can the agreement facilitate implementation of its provisions?
- Should the agreement include provisions on the protection of those who seek to exercise the rights set out in the agreement?
- What role should the right to a healthy environment play in this agreement?

The first issue is: How much flexibility do States have in complying with these obligations? Here, it is important to distinguish between procedural and substantive obligations.

Human rights law does not require each country to have adopted the same level of substantive environmental protection. The substantive obligation to protect human rights from environmental harm does not require the cessation of all activities that may cause any environmental degradation. States have discretion to strike a balance between environmental protection and other issues of societal importance, such as economic development and the rights of others. But the balance cannot be unreasonable, or result in unjustified, foreseeable infringements of human rights. In determining whether an environmental law has struck a reasonable balance, relevant factors include whether it meets national and international health standards, and whether it is retrogressive. There is a strong presumption that retrogressive measures are not permissible.

But States have less discretion with respect to procedural duties. The duties to provide environmental information, facilitate public participation, and allow access to effective remedies do not depend on the state of development of a country; they should be fulfilled by all countries.

I want to be clear: This does not mean that States have no discretion at all in how they meet obligations relating to access to information, participation, and remedy. Of course they do. This region is not bound to adopt the same provisions that the European region adopted in the Aarhus Convention, for example. But it should ensure that the provisions it does adopt are effective in implementing the obligations human rights law sets out. For example, the obligation to provide information about environmental harms to those who may be affected by them is clear. But governments have some discretion in how that information is provided, and under what conditions.

For this reason, negotiations on a legal text are of great value. I understand that you have reached the point in these talks where you are on the verge of moving toward the negotiation of specific legal language. It is through that negotiation that it will be possible to discuss how to develop procedures that *both* meet the basic requirements of human rights law *and* make sense in the light of the experiences of the negotiating parties.

In this context, it will be important to take into account the experiences and perspectives of civil society as well. Transparency and participation are important not just at the national and local levels, but also at the international levels as well. This does not mean that governments are not responsible for negotiating an international agreement; of course they are. But it does suggest that governments should, in the negotiating process, provide many opportunities for civil society to be able to follow the negotiation and provide inputs in appropriate ways.

Second, I want to stress the importance of including a mechanism to facilitate implementation of the access rights as they are set out in the agreement. Although states have some discretion on how they choose to implement their obligations, once they have reached an agreement, it is of critical importance that they effectively carry out the terms of the agreement.

Efforts to provide access to information, participation and remedy are of little significance if the rights are not made effective in practice. It is therefore of great value to provide for institutions such as compliance committees, which can help ensure effective and full implementation of the rights set out in the agreement.

The third point I want to emphasize is the desirability of including in the text language on the duty to protect those who seek to exercise their access rights. These rights are meaningless if those who try to exercise them face harassment, threats, violence, and even death for trying to do so. My consultations around the world have convinced me that the problem of harassment of environmental advocates is a truly global problem. No country is immune from it.

The Special Rapporteur on the situation of human rights defenders has said that those working on land rights and natural resources are the second-largest group of defenders at risk of being killed (A/HRC/4/37), and that their situation appears to have worsened since 2007 (A/68/262, para. 18). A recent report described the extraordinary risks, including threats, harassment, and physical violence, faced by those defending the rights of local communities when they oppose projects that have a direct impact on natural resources, the land or the environment (A/68/262, para. 15). Another report, released earlier this year by a non-profit group named Global Witness, determined that 908 environmental rights advocates lost their lives as a result of their advocacy between 2002 and 2013.[2]

Human rights law is very clear here. States have obligations not only to refrain from violating the rights of free expression and association directly, but also to protect the life, liberty and security of individuals exercising those rights. There can be no doubt that these obligations apply to those exercising their rights in connection with environmental concerns. The UN Special Rapporteur on the situation of human rights defenders has underlined these obligations in that context (A/68/262, paras. 16 and 30), as has the Special Rapporteur on the rights of indigenous peoples (A/HRC/24/41, para. 21), the Committee on Economic, Social and Cultural Rights, and the United Nations Human Rights Commission, which called upon States "to take all necessary measures to protect the legitimate exercise of everyone's human rights when promoting environmental protection and sustainable development" (resolution 2003/71).

The Inter-American Court of Human Rights has held that "States have the duty to provide the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety; to refrain from placing restrictions that would hinder the performance of their work, and to conduct serious and effective investigations of any violations against them, thus preventing impunity." (*Kawas*, ¶ 145)

This is not a matter of providing special rights to a particular group; it is necessary to ensure that everyone can effectively enjoy the rights of access that are provided to all.

Finally, I want to address the role of the right to a healthy environment. In my report to the Human Rights Council, I did not place great weight on this right, because not all countries recognize it, and because it is important to recognize that even without it, States have obligations relating to the environment, based on rights to life, health, and so forth.

But this region has extensive experience with this right. Many of the countries engaged in this project have long-standing records of accomplishment in implementing this right. So no

[2] Deadly Environment: The Dramatic Rise in Killings of Environmental and Land Defenders (2014), *available at* http://www.globalwitness.org/sites/default/files/library/Deadly%20Environment.pdf.

one here need be alarmed at the prospect of giving this right a legally significant role in the agreement you are preparing! On the contrary, your own experiences with it should help clarify how the right can be used and what its role can be.

I encourage you to draw on those experiences, and learn from one another as you go forward, and then find common ground on which to build a right to a healthy environment into the agreement. This is one of the many ways that the agreement can become a model for other countries and other regions.

At the outset of my remarks, I said that I would describe one tool States need to address environmental issues. But it might be more accurate to describe the use of human rights in this context not as a tool, but rather as the best way to use all of the environmental tools in the box.

So I want to close by thanking all of the participants in this project for your efforts. By developing clear legal norms for the implementation of access rights, you are strengthening democracy and human rights, as well as sustainable development generally. There is no more important task in the world today.