Submission of EarthRights International to John Knox, United Nations Special Rapporteur on Human Rights and the Environment

EarthRights International (ERI) is pleased to provide this submission to John Knox, the United Nations Special Rapporteur on Human Rights and the Environment, with observations and suggestions on the implementation of his mandate.

ERI is a non-governmental organization based in the United States, the Amazon region, and Southeast Asia that works with communities and local groups around the globe to address issues of corporate accountability and liability for human rights and environmental harms. We have Consultative Status with the UN Economic and Social Council and have engaged with a number of UN Human Rights Council mandate holders, including the former Special Representative of the Secretary General on business and human rights.

In this submission, we propose that the Special Rapporteur should focus on the relative obligations and expectations of state and non-state actors,[1] with particular emphasis on a number of thematic issues:

- The right to a remedy
- The criminalization and intimidation of human rights and environmental defenders
- Transboundary harms
- Conservation refugees
- Free, prior, and informed consent, particularly in the context of context of large-scale development and infrastructure projects

These recommendations are drawn from our experiences on the ground in communities in our areas of focus, and from our expertise as international lawyers and advocates.

[1] We note that the Special Rapporteur has already begun to investigate the differential obligations relating to state and non-state actors. *See, e.g.*, *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: Compilation of good practices*, UN Doc. A/HRC/28/61 ¶79-83 (Feb. 3, 2015).

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1. Right to a remedy

International law is clear that victims of human rights abuses have a right to an adequate, effective, and prompt legal remedy, regardless of the identity of the perpetrator.[2] The need for an adequate remedy is particularly evident in cases of human rights abuse connected with environmental destruction, because the degradation of the lands and natural resources on which vulnerable and disadvantaged populations rely undermines their resilience and deprives them of the resources they might otherwise be able to use to pursue justice or at least rebuild their lives. Moreover, because these cases often involve the economic interests of extremely powerful actors – such as government officials, military and other armed forces, and wealthy corporations – the judicial deck may be stacked against the vulnerable when it comes to seeking a remedy.

There are numerous emblematic cases in which the nexus of human rights and environmental abuse lead to a denial of the right to an effective remedy. To identify just a few:

- More than twenty years after abandoning its pesticide plant in Bhopal, India – the site of a catastrophic gas release that killed thousands and injured tens of thousands – the Union Carbide Corporation (UCC) and its corporate successors have yet to provide effective remedies to the many victims of ongoing water and soil pollution that has spread as a result of ineffective remediation, causing cancer, premature deaths, and other illnesses. UCC escaped local judicial accountability by absconding from India, and concluding a non-transparent settlement with the Indian government.[3]
- Villagers in Berezovka, Kazakhstan, suffered elevated levels of illness and watched their homes disappear into sinkholes for years, as a result of the uncontrolled operations of a natural gas consortium composed of Lukoil, Chevron, British Gas, and a Kazakh state-owned gas company, and backed by the International Finance Corporation (IFC). Years of fruitless attempts to use legal processes and IFC internal accountability procedures to win relocation to a more salubrious location exhausted the villagers. The consortium finally agreed to relocate the villagers in May 2015, but only after a mass gas poisoning in which dozens of children and teachers were simultaneously rendered unconscious and had to be rushed for emergency treatment.[4]
- In a case against Shell in 2005, a Nigerian court ruled that it was an unconstitutional violation of the right to life for oil companies to flare gas in communities, but the judgment has never been enforced and all international companies in Nigeria continue to flare gas. Additional lawsuits have been filed in order to extend the reach of the judgment, but all have been stalled for years in

[2] *See, e.g.*, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGAOR 60/145 (Dec. 16, 2005).
[3] *See generally*, AMNESTY INTERNATIONAL, INJUSTICE INCORPORATED: CORPORATE ABUSES AND THE HUMAN RIGHTS TO REMEDY 33-64 (2014).
[4] See Crude Accountablity, Karachaganak, at http://crudeaccountability.org/campaigns/karachaganak/.

the face of procedural delay and judicial inefficiency.

Proposals to establish and clarify human rights obligations in the environmental context

ERI calls on the Special Rapporteur to address and clarify the human rights principles that apply to both state and non-state actors with regard to a right to remedy in human rights cases that involve environmental destruction, under the elements (a)[5] and (c)[6] of his mandate. The Special Rapporteur has already identified a number of good practices on the right to a remedy;[7] the next step is to establish expectations for all relevant actors.

Applying the lessons learned from the cases listed above and others, as well as studies (such as the 2013 report of the International Corporate Accountability Roundtable[8]) on barriers to remedies, we would suggest that the Special Rapporteur's study and recommendations should include at a minimum the following:

- Attention to the obligations of the state in which the injury occurred, such as the need to provide access to judicial processes in a language and form that the claimants can understand; the essential role of legal aid; and the need to act speedily to secure assets in order to ensure that any eventual judgment is executable;
- Attention to the obligations of the state in which any responsible actor (a multinational enterprise, for example) is domiciled, such as the need to both regulate and exercise jurisdiction over the extraterritorial acts of domiciliary companies and the need for a flexible and fact-based approach that allows courts to look behind the corporate veil where a foreign operating subsidiary is completely owned by and acts at the direction of its domiciliary parent;
- Attention to the obligations of non-state actors with respect to remedy, such as the impropriety of interfering with access to judicial mechanisms; a prohibition on intimidating, criminalizing, or otherwise persecuting lawyers and other defenders; and the need to provide appropriate non-judicial grievance mechanisms that comport with international standards and are consistent with the needs, aspirations, and capacities of affected communities; and
- Reiteration of the essential elements of an appropriate remedy in the human rights and environmental context, as consistent with the Basic Principles on the

[5] UN Human Rts. Council, Resolution 19/10, *Human rights and the environment*, UN Doc. A/HRC/RES/19/10 ¶2(a) ("study . . . human rights obligations, including nondiscrimination obligations, relating to the enjoyment of a safe, clean, healthy and sustainable environment").
[6] *Id.* ¶2(c) ("make recommendations . . . that could help the realization of the Millennium Development Goals, in particular Goal 7").
[7] UN Doc. A/HRC/28/61 ¶¶ 55 – 71.
[8] Gwynne Skinner, Robert McCorquodale, & Olivier de Schutter, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (December 2013), *available at* http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf.

Right to a Remedy and United Nations treaty body jurisprudence.[9]

2. Environmental and Human Rights Defenders

As the Special Rapporteur has highlighted in conferences and his commentary on the obligation to protect the rights of expression and association,[10] environmental defenders are increasingly at risk of killings, criminalization, forced disappearances, police violence, and other forms of silencing. Global Witness now reports that at least two environmental defenders are killed per week,[11] while countless others are subject to arbitrary detention or other methods of intimidation. These defenders help illuminate and protect crucial human and environmental rights in countries with weak rule of law that are at high risk for resource exploitation. In certain areas of the world, they routinely have their rights of access to information, participation in environmental matters, and freedom of expression and association violated and denied by State and non-State actors alike.

Central and South America has the highest reported regional number of killings of environmental defenders, while Southeast Asia has the second largest number.[12] The former Special Rapporteur on the situation of human rights defenders has highlighted the particular risks that environmental human rights defenders face,[13] including the fact that indigenous peoples and women are particularly vulnerable within the group.[14] As States find new ways to criminalize the behavior of environmental defenders, ERI has witnessed its staff and partners in the Mekong and Amazon regions subject to such intimidation tactics and discrimination.

The situation continues to worsen, despite increasing international attention. Emblematic cases abound. As but one example, nearly three years ago Sombath Somphone, a peaceful environmental, civil society, and community development worker in Lao PDR – who had received international recognition for his tireless work in supporting the rural poor in agricultural endeavors and offering training opportunities to youth – disappeared on his way home one night. Obtained CCTV footage shows Sombath being stopped by police on the night of his disappearance. Despite significant international pressure and outcry, including during this year's Universal Periodic

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[9] See discussion in *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 ¶ 41 (Dec. 30, 2013).

[10] *See* John H. Knox, Environmental Human Rights Defenders: The Front Line of Environmental Protection (April 5, 2014), *available at* http://srenvironment.org/wp-content/uploads/2013/05/Chico-Vive-conference-talk-final.docx ("Chico Vive speech"); UN Doc. A/HRC/28/61 ¶¶ 50-54.

[11] Global Witness, HOW MANY MORE? 4 (April 2015).

[12] *Id.*

[13] *Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya*, UN Doc. A/HRC/19/55 ¶ 63 (Dec. 21, 2011).

[14] *IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF 15 MARCH 2006 ENTITLED "HUMAN RIGHTS COUNCIL": Report submitted by the Special Representative of the Secretary General on the situation of human rights defenders, Hina Jilani*, UN Doc. A/HRC/4/37 ¶¶ 41-42.

Review of Laos, the Lao government continues to deny involvement in his disappearance, while refusing to conduct open, transparent, and independent investigations or provide further information.

Protection under international law and standards

Cases like that of Sombath Somphone work to instill fear into other community campaigners and environmental defenders. Upholding civil, political, and procedural rights for environmental defenders is essential to the protection of the environment and environmental rights, and is grounded in international human rights law and standards. Activists cannot properly defend the environment without access to information, freedom of speech, and guarantees of non-discrimination, and States have the duty to protect these rights as well as the rights to life, liberty, and security of environmental defenders, and protection from arbitrary arrest and detention as enshrined in the Universal Declaration[15] and ICCPR.[16] As the Special Rapporteur has previously recognized in his role as Independent Expert, States have the procedural obligation to "to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association."[17] The importance of public participation is further enshrined in the Rio Declaration as well as other prominent documents.

In addition to these traditional procedural and substantive rights, the act of being a human rights defender itself is increasingly protected. The right to uphold human rights as a defender is safeguarded in the UN Declaration on Human Rights Defenders, and regional courts are beginning to expand upon this right. In the 2009 *Kawas Fernández* v. *Honduras* decision by the Inter-American Court of Human Rights, involving the death of an environmental defender, the court 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."[18]

Proposals to protect environmental defenders

While there is a positive shift towards legal and textual protection, more needs to be done in the face of countries with corrupt politicians and weak rule of law and transparency. In support of the Special Rapporteur's identification of an "urgent need for good practices in the protection of environmental human rights defenders,"[19] ERI would like to offer the following proposals with the aim of addressing the above issue

[15] Universal Declaration of Human Rights art. 9, G.A. Res. 217A(III), U.N. Doc. A/810 (Dec. 12, 1948).
[16] International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171.
[17] Chico Vive speech, *supra* note 10.
[18] *Kawas Fernández v. Honduras,* Merits, Reparations, and Costs, April 3, 2009, No. 196.
[19] UN Doc. A/HRC/28/61, para. 52.

and implementing element (a) of the Special Rapporteur's mandate:

- Conduct a comprehensive global study that monitors and investigates the criminalization and intimidation of environmental defenders that expands beyond the focus on killings of Global Witness and other organizations' excellent research. ERI recommends that the study identify the State and non-State actors that are involved as perpetrators, institutional deficits that lead to a lack of protection, violations of international law, and domestic laws that allow for targeting of environmental defenders.
- Create an environmental rights defender database to track and make defenders more visible, to centralize the efforts of organizations that are keeping track of incidents, and to publicly detail their ordeals so that international attention can facilitate their safety.
- Develop a unified international protection mechanism that is in line with the advances of the *EU Guidelines on Human Rights Defenders*, the Inter-American Human Rights Commission's efforts, and independent organizations' efforts on the issue of environmental defenders, that contains investigative powers and security apparatus.
- Call for a UN Human Rights Council resolution to address the criminalization and intimidation of environmental defenders.

3. Transboundary environmental harms and human rights

Development and infrastructure projects have the potential to cause wide-ranging impacts to the environment, with implications for a broad range of human rights. Where such projects are developed near country borders, or affect shared watercourses, wetlands or other resources, there can be significant human rights risks to communities across borders. Similarly, polluting activities and those involving hazardous substances and wastes can have extensive effects on human health, well-being and rights that transcend national boundaries, thereby complicating prevention, enforcement, and provision of remedies.[20]

Industrial, agricultural, and technical activities with potential for harmful transboundary effects are increasing, including in less developed countries where the regulatory controls to protect against or mitigate the harm from such activities are weak or ill-enforced. Many such projects are developed and financed by private corporate actors or as public-private partnerships, raising issues of liability for transboundary harm. In Southeast Asia, out-of-control forest fires in Indonesia are currently causing extensive haze pollution, threatening the health and well-being of

[20] This falls within the scope of the mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes. www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx.

over 500,000 people, including in neighbouring countries of Singapore and Malaysia.[21] The fires are primarily due to slash-and-burn land clearance by corporate actors and contractors to make way for commercial palm oil plantations, as well as poor land conversion and management practices not properly addressed in environmental impact assessments.[22]

The lower stretches of the Mekong River, a transboundary watercourse passing through six countries and sustaining the livelihoods of over 60 million people, are facing rapid development through a proposed cascade of hydropower dams. The first dams of the cascade, the Xayaburi and Don Sahong projects in Lao PDR, are now under development and have ignited serious concerns over transboundary impacts, especially on the wild-capture fisheries that are an essential food supply for many of the region's poorest people.[23] Existing regional water governance arrangements, including the Mekong River Commission and 1995 Mekong Agreement,[24] have been subject to criticism due to lack of clear procedures for prior consultation, failure to require transboundary environmental impact assessments, the absence of a right to public participation in decision-making, and insufficient access to remedy for the hundreds of thousands of people who may be adversely affected by the impacts of the dams.[25]

Transboundary harm in international law

The issue of transboundary harm has been addressed in international environmental law, but is less explored or understood in connection with the fundamental human rights obligations of state and non-state actors.[26] According to Principle 21 of the 1972 Stockholm Declaration: "States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[27] From the duty to prevent

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[21] Kate Lamb, "Indonesia's fires labelled a 'crime against humanity' as 500,000 suffer," *The Guardian* (Oct. 26, 2015, *available at* www.theguardian.com/world/2015/oct/26/indonesias-fires-crime-against-humanity-hundreds-of-thousands-suffer.

[22] H.M. Varkkey, *Plantation Land Management, Fires and Haze in Southeast Asia*, 12 MALAYSIAN JOURNAL OF ENVIRONMENTAL MANAGEMENT 2, 33-41 (2011).

[23] *See, e.g.,* International Center for Environmental Management (ICEM), *MRC Strategic Environmental Assessment (SEA) of hydropower on the Mekong mainstream* (2010).

[24] Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, 34 ILM 864 (1995). Signed on 5 April 1995 between Thailand, Lao PDR, Cambodia and Vietnam.

[25] In June 2014, the Thai Administrative Court accepted jurisdiction in a lawsuit filed by a network of Thai communities challenging the Power Purchase Agreement signed by the Electricity Generating Authority of Thailand (EGAT) for the Xayaburi dam in Laos, citing the lack of a transboundary environmental impact assessment on the dam's impacts in Thailand and the lack of consultation with affected communities in Thailand. The lawsuit is ongoing. *See* Amy Savitta Lefevre, *Thai court takes villagers' case against power firm, Laos dam*, REUTERS (June 24, 2014), *available at* http://uk.reuters.com/article/2014/06/24/thailand-laos-lawsuit-dam-idUKL4N0P51PN20140624.

[26] Various bilateral and multilateral treaties address different aspects of transboundary damage, yet most contain only general provisions regarding state responsibility and liability and do not cover detailed issues of implementation.

[27] 11 ILM 1416 (1972).

harm flow specific due diligence requirements for states, including obligations to conduct environmental impact assessments, and to notify and enter into consultations with other states before conducting any activity that may cause harm to other states' territories. These procedural obligations have been reaffirmed in international instruments[28] and state practice.[29]

The International Court of Justice has held that the state duty to prevent transboundary harm includes an obligation to conduct a transboundary EIA for projects likely to have significant transboundary effects.[30] The Convention on Environmental Impact Assessment in a Transboundary Context (the "Espoo Convention")[31] contains international best practice for the conduct of transboundary EIAs; this is reflected in standards for private sector projects such as the IFC's Performance Standards, but has not been comprehensively endorsed or implemented. The International Watercourses Convention[32] sets out state duties to conduct assessments, notify and consult with other states around planned uses on shared watercourses; however it does not address the duties of non-state actors or specific obligations with respect to affected populations, such as public participation, free prior and informed consent, and access to remedy.

Proposals regarding transboundary harm and human rights

The Special Rapporteur has in previous reports addressed the essential connection between the protection of procedural and substantive human rights with respect to the right to a healthy environment. Such a link "creates a kind of virtuous circle: strong compliance with procedural duties produces a healthier environment, which in turn contributes to a higher degree of compliance with substantive rights such as rights to life, health, property and privacy."[33]

This analysis can be extended to further clarify the human rights obligations of state and non-state actors with respect to transboundary environmental harm. Emerging developments in international human rights law extend procedural and substantive obligations beyond national boundaries and to encompass non-state actors. The

[28] *See, e.g.*, Rio Declaration on Environment and Development art. 19, June 14, 1992, 31 I.L.M. 874.
[29] *See, e.g.,* Owen McIntyre, *The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources*, 46 NAT. RESOURCES J. 157 (2006).
[30] As the International Court of Justice held in *Pulp Mills on the River Uruguay*, 2010 ICJ Reports 204, there is "a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works."
[31] Espoo, Finland, 25 February 1991. United Nations Treaty Series, vol. 1989, p. 309.
[32] Convention on the Law of the Non-Navigational Uses of International Watercourses, G.A. Res. 51/229, UN Doc A/RES/51/229 (July 8, 1997).
[33] *Report of Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/22/43 ¶ 42 (Dec. 24, 2012).

Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), developed by a group of international jurists, aim to clarify state human rights obligations in the current era of economic and industrial globalization, expanding the scope of obligations beyond borders, including the state responsibility to regulate the conduct of companies operating abroad. The UN Guiding Principles on Business and Human Rights provide guidance on the respective obligations of governments and business in relation to the human rights impacts of business activities, including requirements for human rights due diligence and access to remedy.

ERI would like to offer the following proposals with the aim of implementing element (a) of the Special Rapporteur's mandate:

- Conduct a comprehensive global study to monitor and investigate the human rights implications of transboundary environmental harm, and the existing procedural and substantive protections contained in national and international laws and their implementation, including in less developed states and weak governance zones. The study should identify and examine the role of both state and non-state actors and their respective obligations and liabilities with respect to transboundary harm.
- Clarify the obligations under international human rights and environmental law for state and non-state actors with respect to transboundary environmental harm. Particular attention should be given to important procedural requirements for both state and non-state actors, including due diligence, transboundary environmental impact assessment, requirements for notification and consultation, as well as obligations to ensure non-discrimination, access to information, public participation, free prior and informed consent and access to remedial mechanisms for affected populations.

4. The right to free, prior, and informed consent in the context of development affecting land and human rights

The right to free, prior, and informed consent (FPIC) is the right of communities, particularly indigenous communities, to participate in consultations around proposed projects that may affect their lands and livelihoods, with full access to information, and to freely give or withhold their consent on such projects. Recognized in various sources of international, regional, and domestic-level law (including state constitutions), the right to FPIC is arguably approaching the status of customary international law, especially with respect to indigenous peoples. However, some states' strategic denial of FPIC rights to peoples that have not been "officially" identified as indigenous, a general lack of clarity in what constitutes adequate consent, and a lack of emphasis on obtaining consent altogether, have left significant gaps in protection.

Failures in FPIC and the implications for human rights and the environment

FPIC is critical for the effective protection of the environment and the human rights of

those whose lives and livelihoods depend on a clean and healthy living environment. This is especially true in the context of large infrastructure, investment, and other development projects, which often have tremendous impacts on the land and natural resources that the most disadvantaged populations need for survival.

International law eschews a bright-line definition of indigeneity; for example, the International Labour Organization's Indigenous and Tribal Peoples Convention (ILO Convention No. 169)[34] relies heavily on "self-identification" of indigenous and tribal peoples, and identifies key factors that are often held by the people the convention intends to protect, such as traditional lifestyles, discrete cultures, languages and social organizations, and living in historical continuity in a particular area. Unfortunately, some states have attempted to limit FPIC rights only to peoples officially or formally recognized as indigenous, based on highly limited criteria that do not reflect international law. For example, during national-level agrarian reform in the 1960s and 1970s, the Peruvian state began categorizing Quechua-speaking Andean peoples that had been historically recognized as natives instead as *campesinos*, thereafter attributing indigeneity only to lowland Amazonian groups. The Peruvian government has thus chosen to ignore *campesinos'* historical claims to their ancestral lands, relying on the position that FPIC rights under Peruvian law do not apply to such peoples because they intermixed with Spanish colonists. This approach has made it convenient for the Peruvian government to green-light mines and other major development projects in resource-rich areas populated by *campesinos* while circumventing inconvenient consultation and consent processes.

States have also failed to fulfill their FPIC obligations by consulting in bad faith or delegating their consultation duties to third parties. In *Kichwa Indigenous People of Sarayaku v. Ecuador*, the Inter-American Court found that Ecuador had violated international law by, among other things, accepting a third party oil company's attempts to obtain a community's acquiescence of its extractive activities on ancestral land through coercion, bribery, misrepresentation, and circumvention the traditional decision-making processes of the community.[35] Similarly, the government of Myanmar (Burma) entrusted the Australian consulting firm SMEC with the task of consulting affected communities around the construction of the Mong Ton Dam. According to villagers, many of whom were ethnic minorities, SMEC had done very little to ensure that the very technical findings of its social and environmental impact assessments were adequately conveyed to participants with limited grasp of the Myanmar language, and earlier this year the consultation ended in protests and a call for an immediate halt to the project.[36]

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[34] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, International Labor Organization Convention No. 169, 72 ILO Official Bull. 59 (1991) (entered into force Sept. 5. 1991).
[35] Merits and Reparations, Judgment of June 27, 2012, I/A Court H.R., Series C No. 245 (2012).
[36] *See* Lun Min Mang, *Dam public consultation ends in protest, criticism*, MYANMAR TIMES (Mar. 11, 2015), *at* http://www.mmtimes.com/index.php/national-news/13453-dam-public-consultation-ends-in-protest-criticism.html.

States cannot present that fact that consultations occurred as determinative evidence of their compliance with FPIC obligations. Indeed, many governments treat consultations as a mere formality, another box on the administrative checklist, without taking seriously the right to *consent*. For several years, ERI has been working closely with the U'wa people of northeastern Colombia, who have been fighting oil development on their land for more than two decades. After a series of unsuccessful meetings with the Colombian government and inadequate consultations with oil companies, the U'wa have rejected the concept of prior consultations altogether. According to the U'wa, their right to deny exploration on their lands stems from Colombia's recognition of indigenous peoples' right to self-determination and their inalienable ownership and management rights of collective property. The situation of the U'wa, among others, therefore underlines the need for states to recognize that FPIC rights afford communities not only the right to prior consultations, but the right to consent to or reject proposed development altogether if it undermines their collective interests, right to self-determination, and physical or cultural integrity.

FPIC in International Law

The foundations for FPIC can be found in various sources of international law. Perhaps the most heavily cited instrument expressly asserting the right is ILO Convention No. 169, which deals specifically with the rights of tribal and indigenous peoples. However, the bases for FPIC also lie in sources of law that are more universally applicable: Articles 1 and 25 of the ICESCR (right to self-determination, protection of a people's means to subsist; right of all peoples to enjoy and utilize fully and freely their natural wealth and resources);[37] Articles 7 and 25 of the Universal Declaration (freedom from arbitrary deprivation of property; right to an adequate standard of living);[38] and Article 27 of the ICCPR (right to develop and maintain cultures);[39] among others. The content of FPIC rights is also reinforced by and developed in the UN Declaration on the Rights of Indigenous Peoples.

Proposals to enhance understanding of FPIC in particular contexts

ERI would therefore like to offer the following proposals with the aim of addressing the above issue and implementing elements (a), (b), and (c) of the Special Rapporteur's mandate:

- Create and publish a best practice compendium surrounding FPIC, including a diagnosis of minimum elements for adequate FPIC rights implementation. Ensure that any compendium highlights the need for states to adhere to these FPIC best practices at every stage of a project's life-cycle, from initial planning and project construction to the operation and post-project dismantling stages. Furthermore, ensure that the compendium distinguishes situations where FPIC

[37] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.
[38] G.A. Res. 217A(III), U.N. Doc. A/810.
[39] 999 U.N.T.S. 171.

consultations cannot cure the defects of an illegal state action, such as instances where the proposed development and its impact on local communities would constitute a prima facie violation of international law.

- Make recommendations based on studies and investigation about how to afford FPIC rights to all communities and peoples whose environment and human rights could be affected by development or extractive industry projects, regardless of whether they have been officially recognized as indigenous or tribal peoples.
- Make recommendations based on studies and investigation relevant to the state practice in contexts where the community lacks formal title to the land in question.

5. Conservation Refugees: Forced Displacement in the Name of the Environment

"Conservation refugees" are individuals or groups of people who have been displaced from their homelands to make way for conservation projects such as national parks, ecotourism reserves, and other protected areas. Advocates of people-free parks argue that the full range of the genetic, species, and ecosystem diversity in a conservation area can only be maintained if virtually no significant anthropogenic activity is tolerated, despite ample evidence pointing to the contrary. This misguided approach often results in the criminalization and violent evictions of local peoples, or subjects those residing within a conservation zone to such stringent regulations that they are no longer able to subsist according to their traditional customs.

A broad range of actors can be complicit in creating conservation refugees. In addition to the government agencies (protected area management authorities, armed forces, etc.) and private ecotourism operators directly involved in establishing and managing conservation areas, international financial institutions and major international non-government organizations have contributed to the crisis through their roles as funders of and primary consultants on conservation projects. Earlier this year, for example, the World Bank received international criticism for its financial backing of a forest conservation program in the Cherangani Hills of western Kenya, an area traditionally occupied by the indigenous forest-dwelling Sengwer.[40] According to reports, since the World Bank began funding the project in 2007, Kenyan forest rangers have burned down at least one thousand Sengwer homes in a violent eviction campaign, and arrested dozens of Sengwer people for farming without permits and trespassing on public lands. A report by the Inspection Panel observed that the Bank could have prevented abuses by requiring a more rights-based approach to the project that would have recognized the special protections that were due to the Sengwer as an indigenous people, and by

[40] *See* Jacob Kushner et al., *Burned Out: World Bank Projects Leave Trail of Misery Around Globe*, HUFFINGTON POST (April 15, 2015), *at* http://projects.huffingtonpost.com/worldbank-evicted-abandoned/worldbank-projects-leave-trail-misery-around-globe-kenya.

enforcing lender accountability.[41] In Thailand, World Bank-funded national parks have resulted in similarly violent displacement of entire Karen villages.[42]

Some large international conservation organizations have likewise played a role in the forced displacement of communities from their traditional lands. Historically, these organizations have promoted a "biocentric" approach to environmental protection; critics charge that they have tacitly approved evictions in the name of conservation in certain cases.[43] According to Survival International, the creation of parks and game reserves in southeast Cameroon led to forced displacement of Baka people from their ancestral homes; the displaced Baka now live in impoverished roadside villages.[44] Baka community members described how anti-poaching squads, funded by a conservation organization, routinely arrested, beat, and tortured Baka villagers who entered the protected reserves for subsistence needs, sometimes with deadly results.[45] Similarly, in January, an undercover investigation by a French TV channel reported that Indian forest officials had displaced thousands of indigenous Baiga and Gond from Kanha Tiger Reserve, another park supported by international conservation groups.[46]

Conservation Refugees and International Law

The displacement of local communities in the name of conservation not only is often counterintuitive, but also contrary to numerous international laws and norms. States must afford communities the right to freely give or withhold their free, prior, and informed consent on any decisions affecting their lands and livelihoods not only in the context of traditional development and industrial activities, but also in the creation of national parks and conservation areas.[47] Failure to do so results in violations of fundamental rights and freedoms: the right to self-determination;[48] the right to an adequate standard of living;[49] the right to enjoy and maintain one's own culture;[50] the

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[41] *See* WORLD BANK INSPECTION PANEL, KENYA: NATURAL RESOURCE MANAGEMENT PROJECT INVESTIGATION REPORT 69 (2014), *available at* http://ewebapps.worldbank.org/apps/ip/PanelCases/84%20-%20Investigation%20Report%20%28English%29.pdf.
[42] MARK DOWIE, CONSERVATION REFUGEES: THE HUNDRED-YEAR CONFLICT BETWEEN GLOBAL CONSERVATION AND NATIVE PEOPLES 101-103 (2009).
[43] *Id.* at xxii.
[44] Press Release, Survival International, Cameroon: WWF Complicit in Tribal People's Abuse (Oct. 6, 2014), *available at* http://www.survivalinternational.org/news/10456.
[45] Press Release, Survival International, Tribespeople Call on WWF to Stop Funding Abuse for 'Conservation' (Nov. 26, 2014), *available at* http://www.survivalinternational.org/news/10564.
[46] Nita Bhalla, *India Urged Stop Evicting Tribes from 'Jungle Book' Tiger Reserve*, REUTERS (Jan. 15, 2015), *at* http://www.reuters.com/article/2015/01/15/us-india-landrights-idUSKBN0KO0TL20150115.
[47] *See* ILO Convention No. 169 art. 6 (requiring states to "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly").
[48] *See* ICESCR art. 1, 993 U.N.T.S. 3.
[49] *See id.* art. 11; UDHR art. 25; African Charter on Human and Peoples' Rights art. 20, June 27, 1981, OAU Doc. CAN/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) ("African Charter").
[50] ICCPR art. 27, 999 U.N.T.S. 171; UDHR art. 22; African Charter art. 22.

right to subsist and freedom from arbitrary deprivation of that right;[51] the right to individually- and collectively-owned property and freedom of arbitrary deprivation of such property.[52]

Proposals to address the issue of conservation refugees

ERI would therefore like to offer the following proposals with the aim of implementing element (a) of the Special Rapporteur's mandate:

1. Publish a report highlighting the issue of conservation refugees, identifying international violations and focusing on the actions of states and private actors, including the international financial institutions and international conservation organizations often responsible for funding and overseeing national parks and other conservation-oriented projects.
2. Offer recommendations to various stakeholders on how to pursue the creation of conservation projects with a more rights-based approach, such as through the mandatory inclusion of affected communities in consultations conforming to FPIC standards at every stage of a project's planning and implementation.
3. Create a mechanism through which communities can report human rights abuses associated with conservation projects and submit observations or complaints to the Special Rapporteur regarding inadequacies in the abovementioned consultation processes.

ERI thanks the Special Rapporteur for the opportunity to provide these observations and contacts. We are available for further information and discussion at the Special Rapporteur's convenience.

Sincerely,

Maureen Harris
Acting Mekong Legal Director

Upasana Khatri
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[51] ICESCR art. 1; ICCPR art. 1.
[52] ICCPR art. 7; UDHR art. 17; African Charter art. 14, Organization of American States, American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.