

ENVIRONMENTAL DEFENDERS AND THEIR RECOGNITION UNDER INTERNATIONAL AND REGIONAL LAW -AN INTRODUCTION

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Photo: J.J. Stok

1. INTRODUCTION: WHO ARE ENVIRONMENTAL DEFENDERS?

Environmental Defenders are individuals who exercise their human rights – the freedom of speech, freedom of association, freedom of assembly, freedom to participate in decision-making, the right to work – to protect the environment. They are defenders of the environment and defenders of human rights at the same time. After all, the possibility to enjoy basic human rights such as the right to life, the right to health, to water, to education and employment, to freedom of religion, all require the existence of a healthy and safe environment. Without a livable environment, which is the fundament of our existence, we are not able to make use of our human rights.

Environmental Defenders are increasingly recognized as being human right defenders. The Special Rapporteur on Human Rights Defenders has acknowledged that those who defend land rights, the right to natural resources and the right to the environment, fall under the protection of the UN Declaration of Human Rights Defenders. More specifically, according to Hina Jilani, the former UN Special Representative on Human Rights Defenders, Human Rights Defenders working on natural resources and land rights are the second-largest group of Human Rights Defenders at risk of being killed¹.

The reports of the UK-based NGO Global Witness have done much to put the dangerous work of Environmental Defenders in the spotlight. “Deadly Environment”, published in May 2014, “How Many More” (2015) and “On Deadly Ground” brought some shocking numbers to the worlds’ attention. Global Witness’ research into 35 countries shows that between 2002-2015 more than 1100 Environmental Defenders have been murdered. In 2015, this number

reached an average of 3 killings per week in the researched countries. Most victims come from Central and South America and almost 40% of the victims belong to indigenous groups.

Unfortunately, these numbers from Global Witness only reflect the worse form of violence against Environmental Defenders; murder.

Non-lethal forms of violence against Environmental Defenders, such as intimidation, assault, unlawful detention, violations of privacy and family life, limitations of the freedom of speech, freedom of assembly, freedom of association, shrinking of the democratic space, displacements and limitations of access to natural resources and ecosystems, sexual violence, and media branding Environmental Defenders as ‘terrorists’ or ‘subversive elements’ take place every day in countries all over the world.

¹ Implementation of General Assembly resolution 60/251 of March 2006 entitled “Human Rights Council”, Report submitted by the Special Representative of the Secretary-General on Human Rights Defenders, Hina Jilani A/HRC/4/37, paragraph 45, <http://www.humanrights-defenders.org/wp-content/uploads/2010/04/G0710417-UNSRHRD2007HRC.pdf>

2. CONTEXT

Why do Environmental Defenders suffer so much violence for standing up to protect our common good – the environment? How can it be that they are branded ‘terrorists’ and how can it be that only 1% of the perpetrators of the killings documented in “Deadly Environment” were brought to justice?

To answer to this question, we must look at the context in which violence against Environmental Defenders takes place.

Violence against Environmental Defenders occurs in the context of increasing pressure on (already scarce) natural resources.

Environmental Defenders are often “accidental” Human Rights Defenders and unintentional martyrs. They get involved in environmental struggles because they defend their own land, forest and water from polluters, miners, land grabbers, poachers and loggers who want to convert the natural resources into export earnings to feed consumption patterns in predominantly the Western world. Environmental Defenders are confronted with large-scale agriculture, dams, mining and logging taking place in their own ‘backyard’. They witness how the extraction of natural resources often results in the destruction and pollution of their living environment. This pollution and destruction leads to human rights violations of Environmental Defenders and their communities, violating their right to life, to health, to water, to privacy and uninterrupted family life and to a clean and healthy environment. Destruction and pollution furthermore can result in forced displacement, food scarcity and increased conflict among the communities living in the affected territory.

Often these communities are already socially and economically marginalized. They are also the ones

who least contribute to global warming: small scale farmers, fishers, those living in subsistence economies in areas that are rich in natural resources but poor in economic standards. Indigenous peoples and traditional caretaker communities deserve a special mention here. They are on the frontline in the struggle to preserve, protect, restore and defend their “natural commons” (collectively governed and shared natural resources) and, in particular, territories and areas known as ICCAs (Indigenous Peoples’ and Community Conserved Territories and Areas) which they collectively conserve on the basis of their traditional knowledge and customary practices, law and institutions. These natural commons and ICCAs are at risk from extractive industries, infrastructure development, monocultures, poaching, commercial overfishing, land and water grabbing, wars and armed conflicts, imposed cultural change, and the privatisation and monetisation of natural resources in general. Environmental Defenders work to achieve both environmental and social justice for the marginalized and vulnerable communities they belong to. Their environmental advocacy contributes to the realization of the sustainable development goals (SDG’s). They are also global ‘whistleblowers’ who are the first to signal the harmful consequences of exploitative extractive business practices and climate change. By speaking out on behalf of the environment they give priceless information on the externalized or ‘hidden’ costs of unsustainable business practices and contribute to the creation of a more peaceful and sustainable world.

However, Environmental Defenders are particularly vulnerable Human Rights Defenders due to their often limited knowledge about their rights and the lack of information on how to claim them, their lack of awareness of existing protection measures, mechanisms or organizations that could support them, their scarce resources and weak organizational capacity. Many of them may not self-identify as Environmental Defenders. Moreover, they are targeted and branded as “criminals” as a consequence of their peaceful activities to protect natural resources and the livelihood of their communities, by governments but also by the private sector³. Many violations against Environmental Defenders can be directly linked to patriarchy, sexism, racism, xenophobia and chauvinism. This is important in the case of women defenders, who may oppose large-scale development projects but also challenge the systemic power inequality and discrimination deeply rooted in societies and question patriarchy and misogyny. As activists, they face the same threats as other defenders but they are more likely to face gender-specific violence⁴.

But when Environmental Defenders can safely do their work, they contribute enormously to creating conditions for peace and social and environmental wellbeing. Strengthening Environmental Defenders – who act as community leaders – will help create resilience for their entire community, especially for their most vulnerable members such as women and children, who are the first to suffer from environmental degradation.



Photo: Christiaan van der Hoeven

Through their efforts to protect and conserve the environment, Environmental Defenders create the enabling conditions for the enjoyment of civil, political, social and economic rights for current and future generations, for the simple reason that the enjoyment of human rights requires a livable planet⁵. They fulfill a pivotal role in their communities and act as ‘guardians’ who protect the ecological integrity of the ecosystems entrusted to their care. As says the Special Rapporteur on Human Rights Defenders, Michel Forst: “The fulfillment of the international community’s commitment to the protection of the environment is premised on the empowerment of Environmental Defenders. The goals of a more sustainable, prosperous and equitable future – set out, for example, in the 2030 Agenda for Sustainable Development – are doomed to failure if the individuals and groups on the frontline of defending sustainable development are not protected at the national, regional and international level⁶.

2 <http://www.ohchr.org/EN/NewsEvents/Pages/EnvironmentalHumanRightsDefenders.aspxh>

3 We defend the environment, we defend human rights: denouncing violence against environmental defenders from the experience of Friends of the Earth International, Friends of the Earth International report, June 2014, p. 14.

4 Report of the Special Rapporteur on the situation of human rights defenders Michel Forst, transmitted to the General Assembly by the Secretary-General at the 71st session on the promotion and protection of human rights, A/71/281, p. 15.

5 Knox, J. Greening Human Rights on Open Democracy Net: <https://www.opendemocracy.net/openglobalrights/john-knox/greening-human-rights>

6 Report of the Special Rapporteur on the situation of human rights defenders Michel Forst, transmitted to the General Assembly by the Secretary-General at the 71st session on the promotion and protection of human rights, A/71/281, p. 4 & 27.

3. INTERNATIONAL LEGAL FRAMEWORK

3.1 HUMAN RIGHTS FRAMEWORK

In their work to protect the environment, Environmental Defenders use different types of human rights:

- **Procedural environmental human rights** such as the right of access to environmental information, the right to participate in decision-making about the environment and the right of access to a judge when these procedural rights or fundamental rights are violated (the right to an effective remedy). **Principle 10** of the **Rio Declaration** states: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level... Each individual shall have... the opportunity to participate in decision-making processes." **The 1982 World Charter for Nature** states in its **Principle 23**: "All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation." Procedural environmental rights are anchored in 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 regional 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice (**Aarhus Convention**) has particularly detailed requirements in its articles 4-9. **The Aarhus**

Convention not only asks State parties to guarantee those rights, but to also ensure that persons exercising them are not penalized, persecuted or harassed in any way⁷. A recent initiative is the negotiation by 20 States members of the Economic Commission for Latin America and the Caribbean of a regional agreement on the rights to information, participation and remedy relating to the environment. The negotiators hope to conclude the agreement by December 2016⁸.

- **civil and political human rights** such as the right of free speech, association and assembly. These classic, first generation human rights are protected in the **International Covenant on Civil and Political Rights**, the **Universal Declaration of Human Rights** and regional human rights treaties such as the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and People's Rights.
- **the right to a clean and healthy environment.** The first formal recognition of the right to a healthy environment came in the 1972 Declaration of the United Nations Conference on the Human Environment (**Stockholm Declaration**): "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".⁹ In the four decades since the Stockholm Declaration, the right to a healthy environment rapidly migrated around the globe. As of 2012, 177 of the world's 193 UN member nations recognize this right through their constitution, environmental legislation, court decisions, or ratification of an international agreement¹⁰.

7 See www.unece.org/env/pp/contentofaarhus.html

8 A/HRC/31/53, p. 11.

9 Principle 1 of the Declaration of the United Nations Conference on the Human Environment

10 <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html>



The rights of indigenous peoples to own traditional lands and manage their environment and its resources.

However, the right to a clean and healthy environment generally has 'soft law' status (meaning it's not directly enforceable in court) but as an entitlement can be derived from enforceable "first generation" human rights such as the right to life and the right to respect for private and family life.

- **The rights of indigenous peoples to own traditional lands and manage their environment and its resources.**

3.2 INDIGENOUS PEOPLES RIGHTS AND THE ENVIRONMENT

Indigenous Peoples' often play an important role in the conservation of the environment as defenders or 'guardians' of the natural commons. Governments that have adopted the 1992 **Convention on Biological Diversity** are obliged to introduce domestic legislation, or amend their constitutions, to ensure the participation of indigenous peoples in the conservation and sustainable use of their environment. The right of indigenous peoples to participate in the use, management and conservation of natural resources is also recognized in the 1989 **International Labor Organization (ILO) Convention No. 169** Concerning Indigenous and Tribal Peoples in Independent Countries, and the 2007 **UN Declaration on the Rights of Indigenous Peoples**. The Declaration provides for the right of indigenous peoples to own traditional lands and manage their

environment and its resources. An important element in the UN Declaration on the Rights of Indigenous Peoples is **the right to free, prior and informed consent (FPIC)**. Indigenous Peoples have the right to make free and informed choices about the development of their land and resources. This right of free, prior and informed consent is derived from the right to self-determination which is articulated in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states that: "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." As such, groups or communities of indigenous peoples, as peoples, have the right to self-determination.

It is argued that in order to be meaningful, self-determination must include economic self-determination, which ultimately involves the control over traditional lands, territories and resources. **As an extension of these rights, indigenous peoples must have the right to grant or withhold consent to certain development projects within their lands, and which impact their resources.**

3.3 UN DECLARATION ON HUMAN RIGHTS DEFENDERS & THE SPECIAL RAPPORTEUR

An important development for the protection of Environmental Defenders has been **the official definition of the 'defense' of human rights as a right in itself and the recognition of the category of 'human rights defenders' in the 1998 United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms**. This Declaration establishes that 'everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international level' (art. 1) and that each State 'shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed' (Art. 2). For these purposes, and in accordance with **Article 5**:

'everyone has the rights, individually and in association with others, at the national and international levels, (a) To meet or assemble peacefully (b) To form, join and participate in non-governmental organizations, associations or groups (c) To communicate with non-governmental or intergovernmental organizations.'

Article 9 recognizes, among other things, that: 'Everyone has the right to complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay.'

Article 12 states:

'1. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.

2. The State shall take all necessary measures to **ensure the protection** by the competent authorities of **everyone**, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action **as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration**.

3. In this connection, **everyone is entitled, individually and in association with others, to be protected** effectively under national law **in reacting against or opposing**, through peaceful means, **activities and acts**, including those by omission, attributable to States **that result in violations of human rights and fundamental freedoms**, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.'

In 2000 the UN Human Rights Commission created the figure of the **UN Special Representative (which in 2008 became the Special Rapporteur) on Human Rights Defenders**. The main roles of the Special Rapporteur are to:

- seek, receive, examine and respond to information on the situation of human rights defenders - individual environmental defenders can submit allegations of violations of their rights;
- establish cooperation and conduct dialogue with governments and other interested actors on the promotion and effective implementation of the Declaration;
- recommend effective strategies better to protect human rights defenders and follow up on these recommendations;
- integrate a gender perspective throughout her work

In the fulfillment of the mandate, the mandate holder:

- Presents **annual reports to the Human Rights Council and the General Assembly** on particular topics or situations of special

importance regarding the promotion and protection of the rights of human rights defenders;

- Undertakes **country visits**;
- **Take up individual cases of concern with Governments**

In 2012, Special Rapporteur on Human Rights Defenders **Margaret Sekaggya** recognized that **Environmental Defenders are Human Rights Defenders**. She said: “human rights defenders include defenders carrying out a vast range of activities related to land and environmental rights, including those working on issues related to extractive industries, and construction and development projects; those working for the rights of indigenous and minority communities; women human rights defenders; and journalists.”¹¹

Ms. Sekaggya in her 2013 report to the Human Rights Council also said that human rights defenders and the communities whose rights they defend are free to oppose development projects through the exercise of their fundamental rights and that restrictions on those rights have to be applied in accordance with national legislation and the State’s international human rights obligations.¹²

In its resolution of 28 March 2014 on human rights and the environment, the **Human Rights Council** recognized that human rights defenders play an important role ‘in the promotion and protection of human rights as they relate to the enjoyment of a safe, clean, healthy and sustainable environment’.

The General Assembly adopted a resolution on Human Rights Defenders on 17 December 2015.

In it, it reaffirms the urgent need to respect, protect, facilitate and promote the work of human rights defenders, **including as they relate to environmental and land issues**. The General Assembly calls upon all States to ensure that, among others, the promotion and protection of human rights are not criminalized, that measures to combat terrorism and preserve national security do not jeopardize the safety or arbitrarily hinder the work of individuals, groups or organizations engaged in protecting and defending human rights, and that legislation and procedures governing the registration and funding of civil society organizations be transparent, non-discriminatory, inexpensive, allow for appeal and are in compliance with international human rights law. The Assembly also underscores the responsibility of all transnational and other business enterprises to respect human rights, including the rights of human rights defenders to freedom of expression, peaceful assembly and association and participation in public affairs.

Shortly after the murder of Goldman Environmental Prize winner and environmental activist Bertha Caceres (followed a few days later by the murder of fellow Honduran activist Nelson Garcia), the **Human Rights Council** during its 31st session in March 2016 adopted resolution A/HRC/31/L.28 **“Protecting human rights defenders addressing economic, social and cultural rights”**.

11 Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, 21 December 2011, U.N. Doc. A/HRC/19/55, ¶ 64.

12 Sekaggya, Margaret, Report to the 19th session of the Human Rights Council, A/HRC/19/55(2011), p. 12.

In a 2014 judgment, Czech courts ruled that environmental defenders who had blocked loggers in the Sumava national park in 2011 had acted peacefully, legitimately and in complete accordance with the law when they non-violently prevented illegal logging by chaining themselves to trees, before being violently removed by police. The court ruled that “civil society groups active in nature conservation were completely deprived of the ability to pursue nature conservation interests in the decision-making process [leading up to the logging]. It is not surprising that a blockade was chosen as a last resort to confront the authorities’ blinkered decision to illegally log.” It also criticized the police for its violent crackdown on protesters, and deemed the police intervention and the tree-felling illegal. We defend the environment, we defend human rights: denouncing violence against environmental defenders from the experience of Friends of the Earth International, Friends of the Earth International report, June 2014, paragraph 4.8.

In it, the Council expresses **grave concern that human rights defenders addressing (...) environmental and land issue, corporate responsibility and violence at the hands of States, business enterprises and other non-State actors are among those human rights defenders who are most exposed and at risk.** It stresses that the right to promote and strive for the protection and realization of all human rights and fundamental freedoms is an **essential element in building and maintaining sustainable and open and democratic societies, and reaffirms the urgent need to respect, protect, promote and facilitate the work of those defending rights, including as they relate to environmental and land issues, and calls upon States to take all measures necessary to ensure the rights and safety of human rights defenders.**

3.4 DUTY OF STATES AND MULTINATIONALS TO PROTECT ENVIRONMENTAL DEFENDERS

Both the current Special Rapporteur on the situation of Human Rights Defenders **Michel Forst** and the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, **John Knox**, are paying special attention to the situation of Environmental Defenders in their recent reports¹³. In his important 2013 Mapping Report¹⁴, John Knox emphasizes that under international law, States not only have the obligation to refrain from violating the rights of free expression and association of human rights defenders directly, but **also have the obligation to protect the life, liberty and security of individuals exercising those rights.**¹⁵ **He says: “There can be no doubt that these obligations apply to those exercising their rights in connection with environmental concerns.” This**

means that States have the obligation to protect Environmental Defenders. The Special Rapporteur on the situation of human rights defenders has underlined these obligations (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 Rights¹⁶, the Inter-American Court of Human Rights¹⁷, and the Commission on Human Rights (the precursor of the Human Rights Council), 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).”

This obligation to protect Environmental Defenders may not be limited to the State’s own citizens. According to the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural rights (“Maastricht Principles”), compounded by international law specialists, all States have obligations to respect, protect and fulfill human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially.¹⁸ These extraterritorial obligations find concrete expression in the duty to take action through international cooperation to fulfill the human right to health, a right which is at the core of the environmental advocacy of Environmental Defenders.

According to Michel Forst in his **2016 report on the situation of human rights defenders**, States need to review regularly the adequacy of laws, policies, regulations and enforcement measures to ensure that businesses respect human rights and that Environmental Defenders are protected. States should address a key challenge that Environmental Defenders face in exercising their right to participate in environmental and sustainable development decision-making: the lack of transparency and accountability by State and non-State actors in decision-making.

¹³ See A/HRC/28/61, A/HRC/31/55, A/HRC/31/53.

¹⁴ A/HRC/25/53

¹⁵ International Covenant on Civil and Political Rights, art. 2; Declaration on the Right

and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, arts. 2, 9 and 12.

¹⁶ ICESCR report, sect. III.A.4.

¹⁷ For example, *Kawas Fernández v. Honduras*, Merits, Reparations and Costs, Judgement dated 3 April 2009 (Ser. C No. 196). For other cases, see Inter-American report, sect. III.A.4.

¹⁸ The Maastricht Principles are a restatement of applicable international law adopted by 40 international experts in international law and human rights, including current and former UN Special Rapporteurs of the Human Rights Council and human rights treaty body members. The ETO Consortium, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (January 2013), available at <http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/>

The right of participation requires access to information and Defenders often struggle to obtain information about negotiations and agreements between State authorities and companies that affect their land, livelihoods and local environment. Confidentiality clauses in agreements between corporations and State actors, such as those on investor-State dispute settlements, can also hinder access to information and should therefore be reviewed. States should establish mechanisms for due diligence concerning the protection of Environmental Defenders and the Environment. They should formulate national action plans on business and human rights and ensure that they, as well as environmental impact assessments, are developed in full transparency and with meaningful participation prior to the granting of permission or concessions for any business or development project. States should also guarantee the effective implementation of any precautionary measures granted to Environmental Defenders by regional human rights mechanisms. On the international level, States should keep the situation of Environmental Defenders on the agenda of bilateral and international discussions, including by raising specific cases of defenders at risk through high-level visits, political dialogue, démarches and “quiet diplomacy”, using the universal periodic review process to make recommendations to States on the protection of Defenders, supporting strong Human Rights Council resolutions on the protection of defenders and developing and implementing guidelines for the protection of Defenders. And since some of the abuses against Environmental Defenders are international in nature (for example, transnational companies in one State directing and controlling the harm that is inflicted upon defenders in another State), the international community must address the transboundary dimension of such violations by considering the application of existing international criminal law frameworks, including those related to transnational criminal activity, to the perpetrators of violations committed against Environmental Defenders. The international community also should

19 A/71/281, p. 24.

20 A/71/281, p. 19.

21 John H. Knox, Michel Forst and Victoria Tauli-Corpuz, *Protecting those who work to defend the environment is a human rights issue*, *The Guardian*, Sunday 5 June 2016.

ensure that the implementation of the 2030 Agenda for Sustainable Development is guided by a human rights-based approach, guaranteeing meaningful participation of Environmental Defenders. It should ensure that any future bilateral and multilateral trade agreements involving countries where environmental human rights defenders are under threat include measures to prevent and address violations against Defenders and mechanisms to investigate and remedy violations. It should ensure that all development aid and assistance is guided by human rights and by the Declaration on Human Rights Defenders¹⁹. The General Assembly and the Human Rights Council should monitor violations against Environmental Defenders.

In his report, Forst also states that one of the root causes of abuses suffered by Environmental Defenders is the lack of legal recognition of land rights, in particular for indigenous communities and those affected by post-colonialism, conflict and other causes of forced displacement. States should enact laws that recognize the rights of such individuals and communities. Conversely, States need to review and repeal laws that facilitate the exploitation of natural resources, thereby threatening the rights of those affected²⁰.

In a recent joined publication in the Guardian²¹, John Knox and Michel Forst sum up the obligations of states to protect Environmental Defenders: States have the obligation to protect Environmental Defenders’ rights of expression and association by responding rapidly and effectively to threats, by promptly investigating acts of harassment and violence from all parties including business and non-state actors, by protecting the lives of those at risk, and bringing those responsible to justice. States must also adopt and implement mechanisms that allow defenders to communicate their grievances, claim responsibilities, and obtain effective redress for violations without fear of intimidation. They must also take additional steps to safeguard the rights of members of marginalized and vulnerable communities, especially indigenous peoples.

According to Knox and Forst, international financial institutions and multinationals also have obligations with regards to the protection of Environmental Defenders. International financial institutions should explicitly tie their continuing support for development projects to the implementation of safeguards for human rights, including rights of freedom of expression and association. **Multinational businesses should make clear in actions as well as words that they will not undertake projects in countries where these basic protections are not accorded. If they fail to keep their commitments, they should be penalized in their home countries and in the marketplace²².**

3.5 ENVIRONMENTAL DEFENDERS AND ENVIRONMENTAL CRIME

In June 2016, **UNEP and Interpol released a joint report²³** on the devastating impacts of environmental crime on the natural world. Environmental crime is now the world's fourth largest illicit enterprise after drug smuggling, counterfeiting and human trafficking and has outstripped the illegal trade in small arms. The impact on the natural world has been devastating in some cases; for example more than a quarter of the world's elephant population have been killed for their tusks in the last decade alone. Efforts to stem the global crime wave have been thwarted by weak laws, ill-prepared security forces, corruption and chronic underfunding. The report argues that new laws are needed as well as sanctions at national and international levels. Environmental Defenders may play a vital role in the prevention of environmental crime and the creation of resilient communities that are immune to seduction of 'quick money' through (organized) environmental crime:

Ibrahim Thiaw, Unep's deputy director said: "Too often, criminals target poor communities that simply can't afford to feed their families and bring them into the criminal chain. We need to snap this

and create programmes that help people earn a living by protecting, conserving and sustaining the environment (for example) through eco-tourism or agriculture."²⁴

This could mean that States are not only obliged to protect Environmental Defenders, but also to facilitate and finance their work by creating programs that enable community members to become involved in the protection of the environment instead of being pulled into networks of environmental crime. **Linking the conservation work of Environmental Defenders more explicitly to the prevention of environmental crime might fortify their position in their countries of origin and help with the international recognition of Environmental Defenders as partners in the protection of the natural world.**



²² Supra note 21.

²³ <http://www.theguardian.com/environment/2016/jun/03/value-eco-crimes-soars-26-with-devastating-impacts-natural-world>

²⁴ Supra note 21

Another approach is to increase the safety of Environmental Defenders by recognizing the massive damage and destruction of ecosystems - “ecocide”- as a crime under international law.

There is a growing movement of concerned citizens, lawyers and politicians who want to add ecocide to the Rome Statute of the International Criminal Court ²⁵. Examples of ecocide are the Deep Horizon oil spill, the Niger Delta oil spill, the deforestation of the Amazon, large scale fracking, the Fukushima nuclear disaster, the toxic mudslide polluting the Rio Doce in Brasil, or the Althabasca tar sands. These examples of massive damage and destruction of ecosystems result from industrial and extractive activities that are thusfar considered legal, but they lead to the serious disruption of the functioning of ecosystems and threaten the human right to a clean and safe environment, to clean water, to health and even the right to life itself. Environmental Defenders are often “ecocide-whistleblowers”, sounding the alarm that industrial activities are polluting the environment, destroying animal- and plant life and affecting communities’ access to natural resources and clean water.

If ecocide were to be acknowledged as a crime under the International Criminal Court, next to the existing crimes of genocide, crimes of aggression, war crimes and crimes against humanity, Environmental Defenders would have the law at their side when they stand up to defend the environment. Instead of being labeled ‘enemies of progress’ or ‘subversive elements’, they would be acknowledged for playing their part in the prevention of ecocide and enforcement of ecocide legislation. Currently, the work that Environmental Defenders do to keep the environment clean, healthy and safe is not recognized nor honoured, because the law ultimately puts corporate interests above the health and wellbeing of the Earth community and its inhabitants. **Ecocide law would go a long way in re-adjusting these values by drawing a clear boundary and making industrial activities that result in the**

massive damage and destruction of ecosystems illegal ²⁶.

3.6 (NON-JUDICIAL) GRIEVANCE MECHANISMS

When Multinational corporate activity contributes to or causes environmental abuses and the violation of individuals and communities’ human rights, access to justice is not always available, particularly in the Global South. When taking legal action to hold companies accountable for their misconduct, victims are often confronted with weak governance, inadequate legal frameworks, and/or poor implementation of regulation and court decisions. Although grievance mechanisms are not a substitute for legal action such as court cases, they can be used by victims of human rights abuses and other violations by companies as a way to seek remedy. Grievance mechanisms offer a means of access to remedy for people who have suffered business-related human rights violations, such violations of their right to health, displacement, or destruction of sources of livelihood.

On the **international** level, the following grievance mechanisms exist:

- World Bank’s Inspection Panel
- OECD Guidelines for Multinational Enterprises
- International Labour Organization’s Committee on Freedom of Association which receives complaints from workers/employers organizations that allege ILO member states have violated worker’s rights.
- International Finance Corporation/Multilateral Investment Guarantee Agency’s Compliance Advisor Ombudsman (CAO)

²⁵ See www.endecocide.org and www.eradicatingecocide.com

²⁶ For more information on ecocide, visit <https://newint.org/features/2016/05/01/make-ecocide-a-crime/>

On the **regional level**, the following grievance mechanisms exist with regards to finance institutions:

- African Development Bank's Independent Review Mechanism
- Asian Development Bank's Accountability Mechanism
- Inter-American Development Bank's
- Independent Consultation and Investigation Mechanism
- European Bank for Reconstruction and Development's Project Complaint Mechanism
- European Investment Bank's Complaints Mechanism

Of these grievance mechanisms, the OECD Guidelines for Multinational Enterprises are most well-known. **The Organisation for Economic Co-operation and Development (OECD)** is an intergovernmental organisation that develops and promotes social and economic policies. The OECD's 'Guidelines for Multinational Enterprises' (OECD Guidelines) are recommendations from 34 OECD and 12 adhering countries to enterprises regarding responsible business conduct in their worldwide operations. They cover a range of topics, including human rights and the environment.

A 'Specific Instance' (complaint) can be filed against companies from, or operating in, an OECD or adhering country concerning their worldwide activities with the relevant National Contact Point (NCP). This includes adverse impact through their supply chains and business relationships for alleged breach covered in the Guidelines. The 'specific instance' complaint procedure is focused on finding a resolution between the parties **through mediated dialogue**. If mediation fails, NCPs can make statements determining whether the Guidelines have been breached and make **recommendations** to promote better observance of the Guidelines. Complaints should be filed at the NCP of the country in which the alleged violation occurred. If the host country does not have an NCP, the complaint should be submitted to the NCP of the home country where the offending company has its headquarters.

Colombia and Peru have a NCP but DRC, Philippines and Indonesia do not. This brochures explains the practical steps of filing a complaint under the OECD Guidelines: <http://grievancemechanisms.org/attachments/oecd-brochure/view>



Photo: J.J. Stok

3.7 AN INTERNATIONAL BINDING HUMAN RIGHTS TREATY FOR TRANSNATIONAL CORPORATIONS

In June 2014, the Human Rights Council issued a resolution establishing the Open-Ended Intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. This Open-Ended working group held its second session in October 2016 and is mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations with regards to human rights. Up until now, transnational corporations and other business enterprises are not subject to binding human rights norms. Human rights norms addressed at corporations, such as the Guiding Principles for Business and Human Rights (Ruggie principles) and the OECD-guidelines are non-binding. These principles ask corporations to respect human rights and act with due diligence to avoid infringing on human rights. They function more as voluntary guidelines or self-regulation, and cannot be enforced in courts of law.

The Open-ended working group is investigating ways to create a human rights treaty by which corporations would be bound. The heightened risk posed by business activities to Environmental Defenders means that Environmental Defenders deserve explicit protection under this treaty-to-be. While the Working Group is still in the phase of exploring the content, scope, nature and form of the future international instrument, submissions by civil society, such as the NGO Friends of the Earth, urge the Working Group to include in the future treaty extra territorial obligations of (home) States to protect Environmental Defenders

in (host) States, in case of the home State's direct involvement with public financing of development projects or industrial activities in the host States that could threaten the human rights of Environmental Defenders ²⁷.

27 FOEI paper to the 2nd session of the Open-ended Intergovernmental working group on TNC's taking place on 24-28 October 2016 in Geneva.

4. REGIONAL PROTECTION OF HUMAN RIGHTS DEFENDERS

4.1 EUROPE

In December 2008, the European Union Council adopted the EU Guidelines on Human Rights Defenders²⁸. Through these guidelines, the EU aims to improve its action in protecting defenders of human rights within the context of its Common Foreign and Security Policy (CFSP).

The Council Working Party on Human Rights (COHOM) and the other competent groups identify the situations in which the EU is called upon to intervene on the basis of specialist reports:

- periodic reports of EU Heads of Mission (HoMs) on the human rights situation in their countries of accreditation, which must also include information on the situation of human rights defenders;
- recommendations from HoMs based on their meetings with local human rights working groups or on their urgent local level action;
- reports and recommendations from the United Nations (UN) Special Rapporteur on Human Rights Defenders, other UN Special Rapporteurs and Treaty Bodies, the Commissioner for Human Rights of the Council of Europe and non-governmental organisations.

In particular, EU missions are called upon to:

- prepare local strategies for the application of the EU Guidelines on Human Rights Defenders in the host country;
- organise at least annually a meeting between human right defenders and diplomats to discuss their situation and the EU policy to support their work;

- appoint an EU Liaison Officer on human rights defenders in order to provide an easily identifiable interlocutor for the human rights defenders community in the host country;
- coordinate closely and share information on human rights defenders;
- maintain suitable contacts with human rights defenders;
- provide visible recognition to human rights defenders and their work through the media, publicity, visits or invitations;
- visit human rights defenders in custody and attend their trials.

4.2 AFRICA

The African Commission on Human and Peoples' Rights adopted its first Resolution on the Protection of Human Rights Defenders in African in 2004²⁹. It appointed a Special Rapporteur on Human Rights Defenders in Africa for a period of two years with the following mandate:

- to seek, receive, examine and to act upon information on the situation of human rights defenders in Africa – individual environmental defenders can submit allegations of violations of their rights;
- to submit reports at every Ordinary Session of the African Commission;
- to cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental bodies, international and regional mechanisms of protection of human rights defenders, human rights defenders and other stake holders;

28 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l33601>

29 <http://www.achpr.org/sessions/35th/resolutions/69/>. Other resolutions on Human Rights Defenders were ACHPR/Res.119(XXXII), 28 November 2007 and ACHPR/Res.196(L), 5 November 2011.

- to develop and recommend effective strategies to better protect human rights defenders and to follow up on his/her recommendations;
- to raise awareness and promote the implementation of the UN Declaration on Human Rights Defenders in Africa.

The Rapporteur has collaborated with civil society networks to develop recommendations that address the underlying conditions for a safe and enabling environment.

4.3 AMERICA

The regional system for the protection of human rights most sensitive to environmental defenders has proven to be the **Inter-American system of human rights. The Organization of American States adopted its first Resolution on Human Rights Defenders in 1999³⁰. It instituted the Office of the Rapporteur on Human Rights Defenders**, which provides support in the specialized analysis of petitions presented to the Inter-American Commission regarding alleged violations of the human rights of human rights defenders and of those who have a role in the justice system (justice operators). The **Inter-American Commission** has held a number of **thematic hearings** in relation to the situation of human rights defenders working on environmental issues. In 2015 it held a hearing on the situation of environmental defenders in relation to extractive industries and another hearing on the situation of defenders of women's rights and the environment. In the past few years, the Commission has also held many hearings in relation to defenders working on environmental issues in specific countries. The Commission has also held hearings on the effects that extractive industries have on the enjoyment of human rights, such as access

to water. The Commission expresses concern over clear instances of the persecution of environmental defenders and often issues precautionary measures (measures to prevent grave and imminent danger to persons) to protect the lives of environmental defenders, such as in the recent case of Kevin Donaldo Ramirez and family v. Honduras (2015) in which the Commission requested the State to adopt measures to protect an environmental defender and his family, who had been harassed and subjected to acts of violence for his activities.

The Inter-American Court of Human Rights in its 2009 **Kawas Fernandez v. Honduras-case** ruled that **states have the duty to provide the necessary means for human rights defenders - including environmental activists** - 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. Impunity of Environmental Defenders' assassinations generates a context of violence against environmentalists and creates individual and social discouragement, causing serious harm to the community as a whole. Given the importance of the role that human rights defenders play in democratic societies, the free and full exercise of this right to defend human rights places a duty on States to create legal and real conditions in which they can freely carry out their activities³¹.

In its 2013 Luna Lopez v. Honduras-case, the Court confirmed the existence of a situation of special risk for defenders of the environment at the time of the events. It judged that Honduras had failed to adopt effective measures of protection to guarantee

30 www.oas.org/juridico/english/ga-res99/eres1671.htm

31 Inter-American Court of Human Rights, Caso Kawas Fernandez vs. Honduras, Ruling of 3 April 2009, Series C No 196.

Lopez' right to life. Honduras did not act with the due diligence required to counter threats against Carlos Luna Lopez while it had the obligation to do so in face of Mr. Luna Lopez' situation of special risk, taking into account that in this specific case there were sufficient reasons to conclude that het motive of the threat against him was **related to his actions as a public official defending the environment.**



Photo: FPWC

5. GOOD CSO PRACTICES TO PROTECT ENVIRONMENTAL DEFENDERS

Notable good practices adopted by civil society organizations to protect Environmental Defenders include the following:

- Assistance to indigenous peoples and local communities to develop “Community Protocols” that set out their understanding of their customary, national and international rights relating to their land and natural resources by South African NGO Natural Justice;
- The Environmental Law Alliance Worldwide (ELAW), a network of 300 public interest advocates from 70 countries which provides legal and scientific support to grassroots environmental lawyers working in their home countries;
- The Environmental Defender Law Center (EDLC) identifies cases where environmental defenders need and want legal assistance, and helps them without charge by finding lawyers, providing resources and giving grants. EDLC specializes in cases of international significance, where innovative legal strategies can be developed and later replicated to help other environmental defenders. On its website, it has compiled a Resource Directory for Environmental Defenders who face threats or legal actions³².
- The Australian National Environmental Defenders Office, consisting of 9 community environmental legal centers located in each State and Territory in Australia that provide legal support in court cases on environmental matters and lobby on environmental policy matters to strengthen environmental laws;
- Training manuals and sessions developed by Protection International for human rights defenders;
- The Federation Internationale des Droits de l’Homme (FIDH) and L’Organisation Mondiale Contre la Torture (OMCT) have created an **Observatory for the Protection of Human Rights Defenders**, which provides emergency protection to human rights defenders in the field (inc. urgent interventions, international missions and material assistance), cooperates with national and international protection mechanisms, and mobilizes the international community and the media to protect defenders;
- FORUM-ASIA provides urgent assistance and protection to human rights defenders at risk, including by providing relocation support, medical assistance and legal aid;
- Civil society has developed a model law for the protection of human rights defenders which provides useful guidance on the features of a comprehensive national protection regime for Environmental Defenders and for the implementation of the UN Declaration on Human Rights Defenders.³³
- The civil society **Ethics Tribunal against the Criminalization of Defenders of Nature**, Water and Pachamama was held in Ecuador on 22-23 June 2011 and organized by the associations Ecological Action (Accion Ecologica), the Peoples’ Ecological Network (Red de Ecologistas Populares), CEDHU and INREDH. The goal of the tribunal was to hear testimony regarding the criminalization of protest, expand the awareness of the criminalization of nature’s defenders, and issue a verdict that could be applied in national and international cases. Criminalization leads to the stigmatization of defenders, as they are portrayed to the general public as conducting illegal activities.

32 <http://www.edlc.org/our-work/providing-resources/resource-directory/>

33 Model Law for the Recognition and Protection of Human Rights Defenders (June 2016), <http://www.ishr.ch/news/groundbreaking-model-law-recognise-and-protect-human-rights-defenders>



Photo: Clemente Bautista

Forcing defenders to defend themselves in lengthy legal actions against them is exhausting and it distracts from the primary work of defending rights. The Ethics Tribunal ruled that the communities, peoples and social and non-governmental organizations that fight for collective rights and the rights of nature in Ecuador have been extensively and increasingly victimized by criminalization and punishment, encouraged by national and transnational companies – particularly in the extractive sector – and carried out by various judicial, police, military and administrative authorities, as well as by private security forces. The tribunal confirmed the existence of the ‘systematic practice of criminalization as a means to punish and eliminate social protest’, and that the justice system is used to criminalize the defenders of nature, while remaining passive against the human rights violations where these defenders and nature are the victims³⁴.

- The civil society **International Tribunal for the Rights of Nature**, officially established in Paris in December 2015, heard two cases concerning “Defenders of Mother Earth” in its 2015 December session: (1) the criminalization of Defenders in Ecuador and (2) the persecution of Defenders who protest against pollution in Houston, Texas arising from fossil fuels and chemical contamination. The judges ratified the principle that the Tribunal will defend the Defenders of Mother Earth and hear further cases where necessary. It condemned the Government of Ecuador’s criminalization of Defenders of Mother Earth in that country, and demanded the restitution of human rights, liberty and the re-opening of closed institutions in Ecuador. The Tribunal closed the Ecuador case but kept the Texas case open in order to gather new evidence.

34 “Environmental Defenders. The Green Peaceful Resistance” by Antoni Pigrau and Susana Borrás, in: *Ecological Systems Integrity: Governance, Law and Human Rights* (ed. by Laura Westra, Janice Gray and Vasiliki Karageorgou), Routledge 2015, p. 256-271 on p. 266.

**ENVIRONMENTAL DEFENDERS
AND THEIR RECOGNITION
UNDER INTERNATIONAL
AND REGIONAL LAW -AN INTRODUCTION**

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