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Implementing international procedural rights and obligations: serving the environment and poor communities

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I. INTRODUCTION

Environmental laws, such as those regulating forestry, fisheries and water resources, can play an important role in the life and livelihoods of poor communities. Environmental laws and processes can have positive impacts on the quality of the environment in which poor communities live and work. However, the same laws and processes can also deprive poor communities of their livelihoods if they are developed, implemented and enforced in a manner that fails to take account of those communities' interests. If, for example, a government's pollution control laws force the closure of small factories, the law will

1. Jona Razzaque, FIELD (the Foundation for International Environmental Law and Development); see http://www.field.org.uk/).

adversely affect factory workers for whom there might be no alternative livelihood available.[2] If a government prescribes a maximum residue level of pesticide in agricultural products without ensuring that the technical capacity necessary to comply with the maximum residue level is available to small-scale farmers, that policy is likely to affect disproportionately those small-scale farmers lacking the resources needed for compliance.[3] If a government decides to build a dam without adequate and timely consultation and agreement reached with those to be displaced or otherwise affected, communities might suffer as a result of displacement and loss of livelihoods.[4]

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Poorer communities might be deprived of their livelihoods as a result of environmental rules and processes developed without their input and without taking account of their interests. This can also happen as a result of inadequate public participation in decisions taken to implement the laws, lack of relevant information about rights and obligations, or the absence of mechanisms for seeking justice and redress. If implemented, recent developments in international environmental law which emphasize the importance of access to information, public participation and access to justice in environmental matters can help to ensure that local environmental laws and processes work for poor communities and help to achieve the Millennium Development Goals.[5]

How do international law and institutions influence domestic environmental law? Is the translation of recent trends in international environmental law into domestic environmental law serving the interests of poorer communities and helping to achieve the Millennium Development Goals?

2. *M. C. Mehta v Union of India* (1995), 4 SCALE 789; (1996) 4 SCC 750; (1997) 11 SCC 327.
3. Hortex Foundation (2004), "National case study on environmental requirement market access/entry & export competitiveness in horticulture in Bangladesh" presented at *FIELD/UNCTAD Training Workshop on Environmental Requirements, Market Access/Entry and Export Competitiveness in the Horticultural Sector in Bangladesh*, Dhaka, Bangladesh (website: http://r0.unctad.org/trade_env/test1/openF1.htm).
4. The World Commission on Dams estimates the overall global level of displacement by dams to be between 40 and 80 million people, a large proportion of which are from poor communities; WWF (2004), *Rivers at Risk: Dams and the Future of Freshwater Ecosystems* (website: www.panda.org/dams).
5. See *Conclusions and Recommendations of the Roundtable Dialogue on Advancing the Millennium Development Goals through the Rule of Law*, Held at UNEP Headquarters, Nairobi, 16–17 February 2005 (http://www.rolac.unep.org/cprensa/cpb53i/cpb53i.htm).

II. INTERNATIONAL ENVIRONMENTAL PROCEDURAL RIGHTS AND OBLIGATIONS

Principle 10 of the 1992 Rio Declaration that came out of the United Nations Earth Summit states that "(e)nvironmental issues are best handled with participation of all concerned citizens, at the relevant level".

Principle 10 of the Rio Declaration has subsequently been translated into binding commitments recognized in international and regional agreements requiring public access and participation in processes of environmental decision-making and policy-making.[6] For instance, the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) elaborates Principle 10 of the Rio Declaration and provides standards for participation in the decision-making processes. These participatory rules relate to activities that may significantly affect the environment (e.g. construction of a power plant), or policies, programmes and plans relating to the environment (Articles 6 and 7). Of the 55 States members of the Economic Commission for Europe (ECE), 36 are parties to the Aarhus Convention and other states with ECE "consultative status" are also eligible to become parties to the agreement in the future.[7]

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The right of communities to participate in discussions on major new projects is strongly rooted in the environmental impact assessment (EIA) processes that integrate economic, social and ecological objectives in the decision-making. Regional agreements, such as the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), provide for public participation in EIA. Members of the public in one

6. For a list of these agreements, see Pring, George (Rock) and Susan Y Noe (2002), "The emerging international law of public participation affecting global mining, energy and resource development" in Zillman, D et al., *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, Oxford University Press, Oxford.

7. Article 17 provides that the Aarhus Convention is open to "States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations". As of August 2005, there were 36 parties out of a total of 40 signatories to the Aarhus Convention (http://www.unece.org/env/pp/ctreaty.htm).

state (the area likely to be affected) have the right to participate in decision-making about activities proposed to be conducted in another state (the state of origin). Although, historically, expert specialists dominated EIA procedures, in many jurisdictions these procedures have evolved to allow for public input in the assessment process.[8]

Both the 1998 Aarhus Convention and the 2003 UNECE Protocol on Strategic Environmental Assessment (SEA Protocol) provide for extensive public participation in government policy-making in numerous development sectors. Some countries in Africa, Asia, Latin America and the Caribbean are "experimenting" with SEA, and some regulatory structures are developed to integrate SEA elements.[9]

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III. DOMESTIC IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL PROCEDURAL RIGHTS AND OBLIGATIONS

International instruments are known by many names (including treaty, convention, protocol, declaration, charter, action plan, programme of action) and may create binding or non-binding obligations for the states that sign up to them. If the instrument is a "declaration", it may not be legally binding,[10] as this term generally indicates that the states parties do not intend to create binding obligations but merely want to declare certain aspirations. Examples are the 1992 Rio Declaration on Environment and Development, the 2000 UN Millennium Declaration and the 2002 Johannesburg Declaration on Sustainable Development. On the other hand, a "treaty" is an international agreement between states that creates binding obligations, and countries ratifying treaties become bound

8. See Holder, J (2004), *Environmental Assessment: the Regulation of Decision Making*, Oxford University Press, Oxford.
9. Dalal-Clayton, B and B Sadler (2005), *Strategic Environmental Assessment: a Sourcebook and Reference Guide to International Experience*, Earthscan, London, chapter 6.
10. There are examples of "declarations" which were not originally intended to have binding force, but their provisions may have reflected customary international law or may have gained binding character as customary law at a later stage, as is the case with the 1948 Universal Declaration of Human Rights.

to implement the obligations created under the treaty at the national level.[11]

Such national implementing measures include legislation and policies in low- and middle-income countries. For example, the Kenya Wildlife (Conservation and Management) Act (1976) has adopted the provisions of 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) by banning all hunting of game animals, and revoking all licences to trade in wildlife products. The influence of the 1989 Basel Convention was evident in Hazardous Wastes (Management & Handling) Rules (1989) in India.[12] In addition to laws, a number of countries are preparing national strategies and plans to implement international environmental laws, such as the 1992 Convention on Biological Diversity (CBD), 1992 UN Framework Convention on Climate Change (UNFCCC) and the 1994 UN Convention to Combat Desertification.[13] National implementation plans can identify legal, policy and institutional strengths and weaknesses; and assist countries in evaluating the costs of implementation. Each of these national plans stresses the importance of consultation and participation of communities in its preparation and implementation.[14]

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When environmental laws are developed and implemented it is important that they do not undermine the interests of poorer communities. The creation of green spaces or the protection of nature reserves needs to take account of those communities, especially poorer communities, that use or live in those areas. (See Chapters 3 and 6 for examples of how this has been achieved.)

In many low- and middle-income countries, laws and policies are influenced by Principle 10 of the 1992 Rio

11. In countries with "monist" systems, the treaty has the force of law within the country; while countries with "dualist" systems require implementing legislation for the treaty to have legal effect. In both cases, changes to national laws and institutions are often required to reflect the new commitments. See Shaw, M (1997), *International Law,* Cambridge University Press, Cambridge.
12. For examples, see: UNEP (2004), *Draft Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (website: http://www.unep.org/DEPI/programmes/law_implementation.html).
13. A list of those countries which have prepared a National Biodiversity Strategy and Action Plan (NBSAP), National Adaptation Programme of Action (NAPA) and National Action Programme (NAP) are available on the Convention websites: www.biodiv.org; www.unfccc.int; www.unccd.int.
14. UNEP 2004, op. cit.

Declaration, and mirror the commitments set out in agreements to which they are not a party, such as the Aarhus Convention. A large number of national regulations and policies accommodate the right to information and public participation. For example, the Constitutions of Uganda, South Africa and Thailand guarantee the right of the public to information. In addition, by 2004, over 50 countries worldwide had passed legislation on access to information.[15] Access to information empowers the public to take a more active role in the decision-making processes. Broad access to information promotes better decisions by mobilizing demand for sustainable solutions to problems.[16] It is important for the public to have information of a high quality, setting out how data were collected and what they cover.[17] It is also essential that information is accessible to the public, as measured by how easy it is for the public to access and understand the information, and the expenses and time involved to obtain the information.[18] Also, the language of the information affects accessibility; for many projects supported by international agencies, much or all of the project documentation is in the working language of the international agency.

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Overall, the Aarhus Convention provides a useful framework for public participation in low- and middle-income countries that are parties and non-parties alike. A number of low- and middle-income countries in the UNECE region have incorporated this convention into their legal system.[19] However, poor implementation by public authorities at the local and provincial levels is a major obstacle to achieving the objectives of the Aarhus Convention on the ground. Some low- and middle-income countries that are parties to

15. Banisar, D (2004), *Global Survey: Freedom of Information and Access to Government Record Laws around the World, May*, available online: http://www.freedominfo.org/survey/global_survey2004.pdf.
16. Robinson, J R et al. (1996), "Public access to environmental information: a means to what end?", *Journal of Environmental Law*, Vol 8 No 1, pages 19–42.
17. Petkova, E et al. (2002), *Closing the Gap: Information, Participation and Justice in Decision-Making for the Environment*, World Resources Institute, Washington DC, pages 38–40.
18. Ibid., pages 37–38.
19. For example, according to the Constitution in Armenia, Azerbaijan and Tajikistan, provisions of the Convention were part of their national legal systems and took precedence over national law. Although in a very preliminary stage, Armenia, Azerbaijan, Belarus, Georgia and Ukraine have initiated the implementation of the public participation pillar in several countries through the adoption of legislative and regulatory measures; *Synthesis Report on the Status of Implementation of the Convention* (2005), ECE/MP.PP/2005/18 (12 April) (website: http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.18.e.pdf).

the 1991 Espoo Convention have also adopted legal and policy instruments to implement Espoo Convention provisions at the national level.[20] Consistent with commitments under the 1998 Aarhus Convention and the 2003 SEA Protocol, communities are also participating in strategic environmental assessment (SEA), intended to allow people to participate at the policy-making or planning level of specific development projects. SEA is a procedure integrated in the political decision-making process that is intended to ensure that the long-term environmental effect of various plans are identified and assessed before the plans are adopted.[21]

Following the participation agenda in environmental matters at the international level, there are provisions on local community involvement in development planning and poverty alleviation projects in many low- and middle-income countries. Recent development policies have sought to decentralize decision-making and enhance local institutional capacities (through strengthening local government and NGOs) to create a more participatory approach.[22] These trends have been accentuated by recent global policy initiatives, such as the Local Agenda 21 movement for sustainable development. Local Agenda 21 aims to build upon existing local government strategies and resources to integrate environmental, economic and social goals. Community consultation and participation is a core principle in Local Agenda 21 programmes.[23] A survey in 2002 indicated that in the past ten years, more than 6,000 local governments in 113 countries have embraced Local Agenda 21 as a framework for good governance, and

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20. ECE (2004), *Report of the Third Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context* (June), ECE/MP.EIA/6 (website: http://www.unece.org/env/documents/2004/eia/ece.mp.eia.6.e.pdf).
21. Therivel, R and M R Partidario (editors) (1996), *The Practice of Strategic Environmental Assessment*, Earthscan, London.
22. Donor agencies consider decentralization as a crucial ingredient of "good governance"; however, any decentralization agenda would be unsustainable if it is "top down" and imposed on the community and local institutions. See discussion in: McGranahan, G et al (2001), *Striving for Good Governance in Urban Areas: the Role of Local Agenda 21s in Africa, Asia and Latin America* (May) (website: http://www.iied.org/docs/wssd/bp_loc21s_ftxt.pdf).
23. In the Johannesburg Plan of Implementation arising from the 2002 World Summit on Sustainable Development, the governments agreed to "(e)nhance the role and capacity of local authorities as well as stakeholders in implementing Agenda 21 and the outcomes of the Summit and in strengthening the continuing support for Local Agenda 21 programmes and associated initiatives and partnerships" (Para 167) (website: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIchapter11.htm).

around 18 of the 49 "least-developed countries" have introduced Local Agenda 21.[24] Although Local Agenda 21 processes are in the early stages in many municipalities, and weak in implementation, some evidence of community participation can be found in the water sector (supply and quality) in Africa and Latin America, and concerning natural resource management in the Asia-Pacific region.[25]

Along with the changes in the law and policy-making processes, judiciaries in many low- and middle-income countries have become willing to hear arguments from environmental groups and concerned individuals who have no direct economic or other interests at stake. For example, the Indian judiciary, since the 1970s, has permitted actions by any member of the public who had not suffered any violation of their own rights but who had brought an action on behalf of those who had suffered a legal wrong or injury under the constitution or some other law (known as public interest litigation, or PIL). According to cost rules typically applied in common-law countries, the loser pays the cost. This rule acts as a major deterrent for people who might be considering initiating public interest litigation. However, in several public interest cases in India, there was no cost order against the petitioners, who were largely from low-income communities or local NGOs. These cases dealt with livelihood, possession of tribal land, destruction of vegetation, encroachment of wetlands and construction of dams.[26] Examples of public interest litigation and judicial activism can be found in Africa (Uganda, Tanzania), Asia (Pakistan, Philippines, Nepal, Sri Lanka) and Latin America (Argentina, Chile, Peru), enabling poorer sections of the community to access the courts. [27]

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24. International Council for Local Environmental Initiatives (2002), *Local Government's Response to Agenda 21: Summary Report of Local Agenda 21 Survey with Regional Focus,* ICLEI, Toronto. According to the survey, there are around 151 LA21 in 28 countries in Africa, 674 LA21 in 17 countries in Asia, and 119 LA21 in 17 countries in Latin America (website: http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN007066.pdf).
25. Ibid.
26. Examples and citation of these cases can be found in Ahuja, S (1997), *People, Law and Justice: a Casebook of Public Interest Litigation,* Orient Longman, Vol 1, Chapter 8.

IV. ASSESSMENT OF THE DOMESTIC IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL PROCEDURAL RIGHTS AND OBLIGATIONS

If laws are developed and implemented without the participation of those affected by them, they will be ineffective, or even harmful to the very communities they are intended to benefit. For example, if crucial decisions about "water privatization" and "cost-recovery" are made without the knowledge, participation and consent of those served, or those who should be served, by water systems, the regulation and the policy are bound to be ineffective. An inclusive system of governance and local community participation and partnership between local government, community-based organizations and water utilities could offer some solutions to make drinking water accessible to all. That partnership and any negotiated solution will have to be supported by a legal and institutional framework that defines the nature of the "participatory right" and the scope of participation. In most water privatizations, this has been neglected.[28]

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Environmental laws become more sensitive to the needs of poor communities if the government initiates and ensures participation, and involves relevant stakeholders in decision-making processes.[29] The emphasis within these processes should be on effective dialogue and consensus-building on decisions that affect people's livelihoods and living conditions.[30] Building public support is particularly important in societies where development priorities compete with concern for environmental quality, or where there is a general lack of awareness about environmental problems. In these circumstances, community organizations

27. Examples of case laws are available from www.elaw.org.
28. Budds, Jessica and Gordon McGranahan (2003), "Are the debates on water privatization missing the point? Experiences from Africa, Asia and Latin America", *Environment and Urbanization* Vol. 15, No. 2, pages 87–114. See also Hardoy, Ana and Ricardo Schusterman (2000), "New models for the privatization of water and sanitation for the urban poor", *Environment and Urbanization*, Vol 12, No 2, pages 63–75.
29. Examples of such regulations can be found in Brazil and the Philippines; UN-Habitat World Urban Forum (2004), *Dialogue on Civil Society's Contribution to Local Urban Governance* (http://www.unhabitat.org/wuf/2004/documents/K0471975%20WUF2-4.pdf).
30. There are "tools" outlining ways to improve community participation in the decision-making processes, and how local groups can reduce poverty and improve natural resource management. See: IIED, *Power-Tools: for Policy Influence in Natural Resource Management* (website: http://www.policy-powertools.org/whatis.html, visited August 2005).

or NGOs can play an important role by publicizing information to increase public awareness of environmental problems, and building support for the decision.[31]

While domestic environmental laws have changed under the influence of international law, institutions and agencies, enforcement of laws at the national level remains a problem. Environmental laws are not self-executing and they cannot function in the absence of effective implementation, which in turn requires extensive administrative capacities, detailed regulatory mandates, strong government commitment and active civil society participating in the law and decision-making processes. In many low- and middle-income countries, there are few systematic plans to monitor compliance or for enforcing the laws in the event of non-compliance. If legal requirements and enforcement mechanisms are well designed, law is more likely to meet the expectations of the community and achieve its desired results. Domestic environmental laws can be most effective if they have designated an authority and created an appropriate institutional framework to enforce the law, including the establishment of a "watchdog" to monitor and verify that the decision-making process is transparent, participatory and accountable.

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Community engagement in the environmental law-making process is vital to ensure better enforcement of the law. Participation in the law-making process ensures that communities are interested in the enforcement of the legal rules. However, effective community participation requires that legal mechanisms integrate the community views into the final decisions. Otherwise, people become disillusioned with the process as a whole. While adopting a law or policy which affects the lives and livelihoods of communities, local governments should pay special attention to the concerns of vulnerable groups, take specific steps to ensure that their voices are effectively heard, and that the decision reflects their needs and concerns.

31. INECE (1992), *Principles for Environmental Enforcement* (website: http://www.inece.org/enforcementprinciples.html).

How to Make Poverty History: The central role of local organizations in meeting the MDGs

The Millennium Development Goals (MDGs) commit the international community to an expanded vision of poverty reduction and pro-poor growth, one that vigorously places human development at the centre of social and economic progress in all countries. The MDGs also recognise the importance of creating a global partnership for change, as high-income nations must reform their domestic and international policies related to agriculture, trade, and sustainable development; enhance the effectiveness of their aid programmes; and help poor countries to reduce their debt burdens. For their part, low-income nations must address fundamental issues related to governance, rights and social justice. In all cases, countries must set their own strategies and policies, together with their global partners, to ensure that poor people receive their fair share of the benefits of development. As an active member of this partnership, IIED has launched a programme of collaborative research, networking and advocacy on the MDGs. Meeting these ambitious goals requires more local action, local capacity and good governance.

We aim to identify policies and practices that enhance these local development processes. We also aim to challenge inadequate and inaccurate measures of poverty and development progress and increase the influence of civil society on key debates and high-level policy processes.

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