

**IES Prototype EnviroSecurity Assessments Project
Promoting Environmental Security and
Poverty Alleviation in Three Case Study Areas**

Introduction to the Legal Analyses

Serge Bronkhorst
October 2005

The Institute for Environmental Security (IES) requested Bronkhorst International Law Services (BILS) to conduct research which puts the environmental threats occurring in Kalimantan, Indonesia and in the Great Lakes region of Africa in an international law perspective. The *Fundación Gaia Amazonas* in Colombia was asked to analyse the situation in the Matavén area, in the eastern part of Colombia on the border with Venezuela. Both the legal research conducted by BILS and the legal analysis by *Fundación Gaia Amazonas* do not stand alone but is part of the more comprehensive EnviroSecurity Assessments carried out by the IES.

The Kalimantan Report

The aim of the Kalimantan report (“International Law of Sustainable Development: Legal Aspects of Environmental Security on the Indonesian Island of Kalimantan”) is to indicate how international public law can be directly applied to the current situation in Kalimantan, in order to contribute to a sustainable development of its resources. In this study on the Kalimantan forest fires a rather standard or traditional research method is applied. Since the problems (in contrast to their effects) in question occur within the boundaries of a single state the research can be concentrated on this single state.

In the legal analysis an attempt is made to indicate those international legal norms as well as developments and soft law that can serve as part of a solution, or at least of giving an insight of the various legal aspects to be dealt with. In essence, the research is concentrated on the question of which relevant international legal norms – environmental and human rights norms – are applicable to the situation in Kalimantan, Indonesia. In this respect several relevant treaties have been examined, such as the Convention on Biological Diversity, the Kyoto Protocol of the UNFCCC, the ASEAN Haze Agreement and the International Covenant on Civil and Political Rights. However, since there is no such thing as universal international law (apart from *jus cogens*) that is binding on all states, it is examined to what extent the relevant international legal norms actually apply to Indonesia. In relation to the environmental or human rights treaties it is explored to which treaties Indonesia has become a party and thus which international treaty obligations Indonesia is bound to adhere to. It is furthermore examined whether these treaties contain provisions that actually relate to the problems on Kalimantan, whether these provisions include legal obligations which are sufficient to prevent large scale envirosecurity problems, and whether Indonesia has complied with these obligations.

In the report it is considered that the forest fires on Kalimantan falls within the scope of the Convention on Biological Diversity (CBD) since the deforestation by forest fires causes a loss of global biodiversity and because of this deforestation it is no longer a matter of exclusive domestic policy on which States can operate unilaterally, it is a common concern of mankind.

It is concluded that Indonesia is required to adopt and to apply the CBD's ecosystem approach which is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way and the purpose of which is to reach a balance between the three objectives of the Convention: conservation; sustainable use; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Another obligation of the CBD which is relevant for Indonesia's envirosecurity concerns is the adoption of a National Biodiversity Strategy and Action Plan (NBSAP). In the report it is concluded that the Indonesian NBSAP is not legally binding and that it is hardly implemented.

Another international mechanism that is examined in the report is the Clean Development Mechanism (CDM) of the Kyoto Protocol to the United Framework Convention on Climate Change Climate Change Convention. In the report it is explained that the CDM is one of most promising international mechanisms to balance conflicting interests on Kalimantan. A real challenge lies in the CDM project type of afforestation / reforestation where industrialized countries can help re-grow Indonesia's forests that are disappearing at the rate of 3.5 million hectares per year due to uncontrolled logging.

The ASEAN Agreement on Transboundary Haze Pollution of 2002 is a third international convention which is dealt with in the report. The aim of this important regional agreement is to provide a legal framework to better facilitate regional and international co-operation in addressing the transboundary haze pollution problem more effectively. In the report it is strongly recommended for Indonesia to promptly ratify this binding agreement since it especially applies to forest fires and obliges the parties to undertake measures to prevent and control activities related to land and/or forest fires that may lead to transboundary haze pollution.

The Great Lakes Report

The Great Lakes study "The Virunga Volcanoes and the Bwindi Impenetrable National Park: Cooperation in the management of shared natural resources and the concept of Transboundary Protected Area's" provides legal tools for protecting the habitat of the Mountain Gorilla which is located in the border area of the Democratic Republic of Congo, Rwanda and Uganda: the Virunga-Bwindi region. Instead of using a traditional research method, which considers the applicable international norms per country and which requires to assess the separate international legal regimes each of the countries involved adheres to, the existing problems and threats in the Virunga-Bwindi region are addressed in a more comprehensive way which takes account of the transboundary characteristics of the research area and its environmental problems and which considers the research area as an indivisible ecosystem.

The Great Lakes report advocates the establishment of a Transboundary Protected Area which promotes the cooperation of the States sharing the ecosystem in question. The report emphasizes that cooperation is the key to effective management in the protection and preservation of the natural habitat of the Mountain Gorilla. Since the region in question is located in the border area of three individual states, the threats that affect the ecosystem may come from any of these countries. Moreover, threats coming from one country will not only affect the part of the ecosystem situated in that country but will impact the entire ecosystem. The case study on the Virunga-Bwindi ecosystem explores – with a view to a more effective protection of the natural habitat of the Mountain Gorilla – the desirability and the possibility

of setting up an international legal regime for a transboundary protected area in the Virunga-Bwindi region.

The Matavén Report

The Matavén report “Informe de Investigación desarrollado por la Fundación Gaia Amazonas para el IES Prototype EnviroSecurity Assessments Project” considers legal questions relating to the Colombia’s Matavén forest to prevent that indigenous communities are driven off their lands by guerrilla and paramilitary warfare and by the cultivation or eradication of illegal crops, which also involves large-scale forest deforestation.

One of main legal issues discussed in the report is the compatibility of the new Colombian Forest Law with international legal instruments such as the Convention on Biological Diversity and the ILO Convention No. 169 on Indigenous Peoples. Even though the Colombian Constitution gives precedence to international law over domestic law and although the report affirms that in general the domestic legal system of Colombia is a modern system which in theory is well equipped to address the country’s problems adequately, a number of serious legal defects are revealed in the report. It is common knowledge that in many parts of Colombia effective enforcement of the law is lacking due to problems relating to the armed conflicts in large parts of the country and the resulting lack of effective authority in these areas. According to the report important parts of the new national forest law must be considered to be incompatible with international obligations. In the forest law forests are not considered to be ecosystems, which in itself is in violation with the purpose of the Convention of Biological Diversity which promotes the ecosystem approach. In Article 2 of the CBD the term ecosystem is described and the Conference of the Parties have agreed to adopt ecosystems as the primary framework for implementing the CBD. Another violation of international legal obligations that is considered in the report is the inconsistency of the new forest law with ILO Convention No. 169 concerning Indigenous Peoples because the forest law does not take account of the rights of indigenous peoples especially their rights over land. According to article 14 (1) of the ILO Convention No. 169 the rights of ownership and possession of the indigenous peoples concerned over the lands which they traditionally occupy must be recognised by Colombia. This means that Colombia is obliged to take account of these rights in their forest law.

The proposed law “decouples” the timber stands from the soil, so that while one may be the owner of the territory, one has to accept timber companies operating in the territory. This clearly is in violation of the CBD’s ecosystem approach and of the land and economic rights as defined by ILO 169.

Copyright © 2005 by **Institute for Environmental Security**
Anna Paulownastraat 103, 2518 BC The Hague, The Netherlands
Tel +31 70 365 2299 • Fax +31 70 365 1948 • info@envirosecurity.org • www.envirosecurity.org

Except where indicated otherwise, reproduction of material from this publication is authorised for educational and other non-commercial purposes without prior permission from the copyright holder provided the source is fully acknowledged. Reproduction for sale or other commercial purposes is not authorised without written permission.