

# UNEP Compendium On Human Rights and the Environment

**Selected international legal materials and cases**

Advance Version

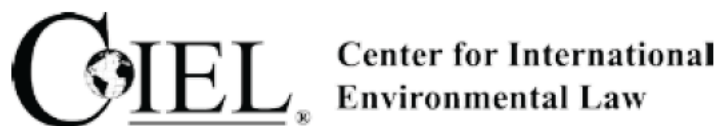


**Center for International  
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# UNEP Compendium on Human Rights and the Environment:

Selected international legal materials and cases



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# Introduction

## OBJECTIVE

In 2009, the UN Environment Programme (UNEP) and the Office of the High Commissioner for Human Rights (OHCHR) jointly organized a High Level Expert Meeting, *the New Future of Human Rights and the Environment: Moving the Global Agenda Forward*.<sup>1</sup> Held at UNEP's headquarters in Nairobi, Kenya, the meeting provided a forum to discuss the series of resolutions adopted by the UN Human Rights Council on the relationship between a safe and healthy environment and the enjoyment of human rights. The diverse range of legal and environmental policy experts who participated agreed that the time was ripe "to deepen understanding of the direct and indirect links between the protection of the environment and the enjoyment of human rights." One of their proposals was to produce a review of law dealing with human rights and environmental linkages. By publishing this compendium, UNEP aims to clarify and increase awareness of the linkage between human rights and environmental law, and ultimately move towards recognition of a fundamental human right to a healthy environment.

## BACKGROUND

In 1972, the Stockholm Declaration on the Human Environment proclaimed that, "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." This proclamation of principle opened a long-standing debate concerning varying formulations of the right to a healthy environment. A number of questions have framed this discussion, including: What is the benefit of formulating a new right to a healthy environment? What is the content of the right? Who are the right-holders and duty-bearers? What are the mechanisms of implementation of the right? Does international law recognize a right to a healthy environment?

These questions are still relevant today. However, after four decades of discussions concerning the linkages between human rights and the environment, key developments have contributed to the international community's understanding of these linkages. A significant number of international instruments, including both treaties and international resolutions and declarations, have elucidated certain aspects of the human rights and the environment connection. The Rio Declaration on Environment and Development, for example, emphasizes the need to integrate environment and development in order to achieve sustainable development and allow for a healthy and productive life in harmony with nature. A number of multilateral environmental agreements (MEAs) recognize the link between the environment and human health and well-being, and many MEAs include provisions regarding disclosure of environmental information and public participation in decision-making. Similarly, human rights treaties in the Americas and Africa explicitly refer to the right to live in a healthy environment in varying formulations. The treaty bodies overseeing the implementation of the universal human rights conventions have produced general comments linking the rights protected under the respective instrument with environmental issues.

Special procedures established under the UN human rights system have also contributed to clarifying certain aspects of the Human rights and the environment linkages, such as with respect to toxic waste, indigenous peoples rights, food, water and climate change. Further, in March 2012, during its 19th session, the UN Human Rights Council created a three-year mandate for an Independent Expert on Human Rights and the Environment. Council

1 <http://www.unep.org/environmentalgovernance/Events/HumanRightsandEnvironment/tabid/2046/language/en-US/Default.aspx>

Resolution 19/10 calls for the Independent Expert to: study the human rights obligations regarding the right to a safe, clean, healthy and sustainable environment; identify, promote and exchange views on best practices relating to human rights commitments; prepare a compendium of best practices; make recommendations that will facilitate the realization of Millennium Development Goal 7, on environmental sustainability; contribute a human rights perspective to follow-up processes of the 2012 UN Conference on Sustainable Development; and take into account a gender perspective by, among other things, considering the particular situation of women and girls and identifying gender-specific discrimination and vulnerabilities.

Resolution 19/10 requests the Independent Expert to submit a report, including conclusions and recommendations, to the Council at its twenty-second session and to report annually thereafter. It also requests the Independent Expert to consult with and take account of the views of a wide range of stakeholders, including Governments, international bodies, national human rights institutions, civil society organizations, the private sector and academic institutions. Moreover, the resolution provides that the Independent Expert shall work in close coordination, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the Human Rights Council, as well as other relevant United Nations bodies and human rights treaty bodies.

In addition to the work of human rights treaty bodies and special procedures, the jurisprudence of universal and regional human rights supervisory mechanisms has tackled the environmental dimension of protected human rights. Human rights supervisory mechanisms have been confronted with applications or petitions involving environmental issues submitted by victims and/or non-governmental organizations. In responding to them, they have had to ascertain whether and/or how the content of a protected right is linked with environmental issues. In this process, environmental realities have been translated into a language of rights. The result has been a robust, albeit still evolving, Human rights and the environment jurisprudence linking the content of protected rights with environmental issues.

Whereas international instruments result largely from inter-State political processes, the case-law of regional human rights courts and commissions responds to applications by victims and civil society organizations seeking reparation for human rights infringements caused by environmental pollution, forced resettlement, unsustainable extraction of natural resources, denial of land title, among other Human rights and the environment issues. Hearing and deciding Human rights and the environment cases has forced regional and universal supervisory mechanisms to address the Human rights and the environment linkage. At times human rights mechanisms have addressed the right to a healthy environment directly, and at other times they have addressed the environmental dimensions of the right to life, the right to culture, the right to property, the right to private life, and the right to access to information, to name a few rights directly implicated in Human rights and the environment case-law. The resulting jurisprudence represents an important contribution to the international community's understanding of the Human rights and the environment linkage.

Environmental law has also evolved to both incorporate and influence human rights law. Environmental instruments and regimes increasingly include human rights protections and principles, including specific procedural rights such as access to information and access to justice and principles of application including non-discrimination and special concern for minorities and marginalized groups such as women and children. Environmental law has also evolved to recognize substantive rights with relation to the environment, such as the rights implied in the common heritage of mankind, the right to be free from toxic pollution, and property rights in valuable genetic material. At the same time, developing environmental norms have influenced human rights law. This can be described as the greening of human rights law. The greening of human rights law is evident in decisions of international tribunals which increasingly take into account environmental threats which undermine human rights and the explicit requirement to consider environmental degradation in instruments safeguarding marginalized groups and refugees.

The UNEP Compendium on Human rights and the environment takes stock of the normative and jurisprudential developments briefly described above. It describes international instruments that relate to Human rights and the environment, such as MEAs, international human rights treaties, and international resolutions and declarations. It also includes summaries of decisions rendered by the human rights supervisory mechanisms in Africa, Europe and the Americas, as well as the Human Rights Committee, the International Court of Justice and the World Bank's Inspection Panel. By way of context, this introduction presents the key Human rights and the environment issues concerning types of protected rights, interpretative approaches, governmental duties, and implementation mechanisms.

## PROTECTED RIGHTS

International law and jurisprudence has elucidated linkages between the natural environment and several different types of protected rights. Environmental conservation and protection is linked to both procedural and substantive rights; civil and political rights as well as cultural, economic and social rights; positive and negative rights; individual rights, collective rights, and rights associated with mankind as a whole; and rights held by the living and rights held by future generations. This section will discuss the main substantive and procedural human rights linked to the natural environment in international law.

### Substantive Rights

International law has addressed environmental aspects of a number of substantive human rights. These include civil and political rights, such as the rights to life, religion and property; and cultural and social rights such as rights to health, water, food, and culture. On occasion, human rights mechanisms have addressed the right to a healthy environment directly, but mainly they have addressed the environmental dimensions of more established rights, though emerging rights such as the right to water and the right to development have played a major role. Environmental regimes have touched on individual rights by providing liability and compensation mechanisms, which imply recognition of legally cognizable interests in property and health. Both human rights law and environmental law recognize collective rights implicated by environmental degradation, such as rights held by indigenous peoples. In addition, environmental instruments and international tribunals have mentioned rights held by future generations, though these rights are not well established or defined.

Both human rights and environmental law have recognized the effect of environmental degradation on human welfare. A number of multilateral environmental agreements recognize the link between the environment and human health and well-being, and many MEAs include provisions regarding civil liability and compensation for damage caused by environmental degradation, particularly in the context of pollution. Human rights tribunals have found violations of recognized rights of life, property, health, and a healthy environment caused by environmental factors. The state of the natural environment has also been discussed in the context of the right to respect for family and private life, the right to healthy working conditions, the right to humane treatment, and the right to development. Where the “right to a healthy environment” actually exists at the regional level, the right has been recognised by courts and tribunals, such as in the cases decided by the African Commission on Human and Peoples Rights based on article 24 of the African Charter, which states that all peoples have the right to a general satisfactory environment.<sup>2</sup>

Indigenous rights comprises an area of overlap between environmental and human rights law. Both regimes provide special protections for indigenous property rights and rights to control over natural resources. Human rights law has also discussed the environmental aspects of indigenous rights to culture and subsistence. Human rights tribunals have specifically dealt with issues of indigenous rights when indigenous people are forcibly removed from their ancestral land, discussing the implications of such displacement on indigenous rights to religion, property, culture, health, food, and housing.<sup>3</sup> Environmental law has also dealt with protection of collective intellectual property rights, through principles of benefit sharing, *i.e.* in the context of genetic resources.

In addition, there is some suggestion in both fields that the disproportionate impact of environmental degradation on certain groups could amount to a violation of rights to freedom from discrimination. This potential has been discussed primarily in the context of discrimination against indigenous peoples,<sup>4</sup> though it has also come up in the context of racial minorities.<sup>5</sup>

2 See *e.g.*, Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria, Afr. Comm’n H. & Peoples’ R., No. 155/96, (May 27, 2002).

3 See *e.g.*, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct., (ser. C) No. 79 (Aug. 31, 2001); Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Afr. Comm’n H. & Peoples’ R., No. 276/2003 (Feb. 4, 2010).

4 Maya Indigenous Communities of the Toledo District v. Belize, Inter-Am. Comm’n H.R., Report No. 40/04, (2004).

5 Mossville Environmental Action Now v. United States, Inter-Am. Comm’n H.R., Report No. 43/10, (Mar. 17, 2010) (admissibility decision).

Finally, environmental law has dealt with concepts of rights held by future generations, and by mankind as a whole, in the form of the concept of the common heritage of humankind and emerging principles of inter and intra-generational equity. These principles are increasingly found in MEAs, though it is not clear what obligations they impose, and they are not often discussed in implementation.

## Procedural Rights

Procedural rights are a key point of intersection between environmental and human rights law. Rights to access to information, participation in decision-making, and access to justice are found in both environmental and human rights instruments, and have been interpreted under both regimes to provide broad protections for environmental interests. The protection and promotion of procedural rights has been, and continues to be, an important tool for the protection of the natural environment.

Principle 10 of the Rio Declaration made a significant impact on the emphasis on procedural rights in an environmental context. This principle declares that “Environmental issues are best handled with participation of all concerned citizens, at the relevant level.” It goes on to state that individuals should have appropriate access to information, the ability to participate in decision-making processes, and effective access to judicial and administrative proceedings, including redress and remedy.

A number of subsequent MEAs adopted in the early 1990s incorporated minimum standards for access to information and participation, though they vary on the extent of participation and whether there were any review procedures or access to remedy. The Aarhus Convention<sup>6</sup> is the most significant international environmental agreement protecting procedural human rights, though it operates mainly at a regional level. The Preamble declares the right of everyone to live in an environment adequate to his or her health and well-being. Article 1 provides for rights of access to information, public participation and access to justice. The Aarhus Compliance Committee operates a relatively effective complaints mechanism, which has interpreted and developed the Convention’s principles.

Procedural rights, including rights of information, participation, and access to justice, have been recognized in the context of regional and global human rights instruments as well. The Inter-American Court has recognized the right to access to information in an environmental context in connection with the freedom of expression provided in Article 13 of the American Convention.<sup>7</sup> The European Court of Justice has found that lengthy administrative proceedings to pursue an environmental right may violate the Article 6 right to fair hearing within a reasonable time.<sup>8</sup> Against the background of oil pipeline finance in Chad, The World Bank Inspection Panel has also acknowledged Human rights and the environment procedural rights. It found that the human rights situation raised questions about the Bank’s compliance with policies on informed and open consultation, and recommended further monitoring.

A special form of procedural protection unique to environmental law is the environmental impact assessment, which has been linked to the rights to information and public participation. This mechanism has been provided for in several global MEAs such as the UN Convention on the Law of the Sea and the Convention on Biological Diversity, as well as human rights agreements such as the ILO Convention 169 concerning Indigenous and Tribal Peoples, and regional agreements, particularly agreements relating to regional seas. The UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) exclusively addresses the procedural requirements of environmental impact assessments, including the requirement of public participation in the assessment process.

Environmental impact assessments have been connected to human rights in regional and global jurisprudence. The African Commission on Human and Peoples Rights found that failure to conduct an environmental impact assessment contributed to a violation of the right to property.<sup>9</sup> The European Court of Human Rights found that an

6 UNECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus, Jun. 25, 1998).

7 *Claude-Reyes v. Chile*, Inter-Am. Ct., (ser. C) No. 151 (Sept. 19, 2006).

8 *Dées v. Hungary*, Eur. Ct. H.R. App. No. 2345/06 (Nov. 9, 2010).

9 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Afr. Comm’n H. & Peoples’ R., No. 276/2003 (Feb. 4, 2010).

environmental impact assessment is important to the determination of an appropriate balance between individual and public interests, and that failure to conduct such an assessment contributed to a violation of the right to respect for privacy and home life.<sup>10</sup> In the *Pulp Mills Case*, the ICJ recognized environmental impact assessment as a practice that has become an obligation of general international law, although it found that international law does not prescribe the scope or content of such assessments.

## INTERPRETATIVE APPROACHES

Human rights and the environment jurisprudence has been marked by interpretative approaches that emphasize the living character of human rights instruments, in light of their object and purpose. Two approaches can be distinguished. First, *pro homine* and evolutionary interpretive techniques have been used to guide the application of human rights instruments in regard to the challenges of the present time. Second, emphasis on the integration of the environmental and human rights legal regimes has allowed for due account of developments in various fora, including international legal instruments, reports by expert bodies and technical standards elaborated by relevant international organizations.<sup>11</sup>

Drafted in 1950, the European Convention on Human Rights was negotiated before the advent of international awareness of the need to protect the environment for present and future generations. The lack of references to the “environment” in the European Convention, however, has not been an obstacle for the European Court of Human Rights to recognize the environmental dimension of protected rights and apply the Convention to Human rights and the environment cases. As noted, this development is a direct consequence of an emphasis on teleological interpretation that stresses the *living* character of international human rights treaties and the need to interpret them in a way that is meaningful to protecting the human rights of individuals (*pro homine*) threatened by present day challenges such as environmental pollution.

At times the emphasis on teleology has been framed as one of *evolutionary* interpretation. This approach seeks to ascertain the meaning of terms as they are used today, in light of developments in human rights law and environmental law. This approach is prominent in the Inter-American Court of Human Rights, particularly in connection with indigenous and tribal peoples’ rights to land, territory and natural resources, in the context of the right to property.<sup>12</sup>

In addition to the *pro homine* and evolutionary interpretive approaches, human rights supervisory mechanisms have utilized integration techniques in the exercise of their jurisdiction. These techniques at times have been anchored in the principle of systemic integration established in the Vienna Convention on the Law of Treaties, and at other times they have been employed by virtue of “systemic integration” provisions found in the relevant regional human rights instrument, such as Article 29(b) of the American Convention on Human Rights.

Integration techniques have operated in two ways. At one level, the emphasis on integration has led regional and universal supervisory mechanisms to look at one another for guidance. For example, the African Commission on Human and People’s Rights has referred to the jurisprudence of the Inter-American Court regarding free and prior informed consent in its interpretation of the African Charter on Human and Peoples’ Rights.<sup>13</sup> Similarly, the Inter-American Court has found support in reports elaborated by the committees overseeing the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), in connection with communal property rights of indigenous and tribal peoples.<sup>14</sup> At another level, human rights bodies have utilized instruments, reports and standards elaborated in the environmental

10 Giacomelli v. Italy, Eur. Ct. H.R. App. No. 59909/00 (2006).

11 The International Law Association’s 2002 Delhi Declaration of Principles of International Law relating to Sustainable Development conceptualizes integration as a principle that serves as the backbone of sustainable development. New Delhi Declaration of Principles of International Law relating to Sustainable Development, Resolution 3/2002 (7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives).

12 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

13 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Afr. Comm’n H. & Peoples’ R., No. 276/2003 (Feb. 4, 2010).

14 Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172 (2007).

field. For example, the European Court has referred to a number of international environmental legal instruments, such as the Stockholm and Rio Declarations, as well as the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.<sup>15</sup>

Integration techniques as well as *pro homine* and evolutionary interpretative approaches have shaped Human rights and the environment jurisprudence. They have provided the lens through which the content of protected rights negatively affected by environmental harm has been ascertained, as well as the prism through which governmental Human rights and the environment duties have been articulated.

## STATE OBLIGATIONS

Human rights and the environment case-law can be distilled to identify particular state obligations relevant in the field. The particular factual setting of cases is nevertheless important in ascertaining state responsibility. In this light, two broad areas can be distinguished in the jurisprudence, namely environmental pollution and natural resource extraction. As noted above, the European Court of Human Rights has dealt with a number of cases involving pollution, including life and health risks from industrial and dangerous activities. Similarly, the African Commission has also addressed pollution resulting from oil exploitation. Further, the human rights systems in Africa and the Americas have dealt with several cases involving exploitation of natural resources in indigenous and tribal peoples lands. The following paragraphs provide a synoptic overview of the key elements of State responsibility in respect of Human rights and the environment.

### Industrial Risks & Pollution

In the face of environmental risks that threaten protected rights, the African and European supervisory mechanisms have articulated duties of prevention. In short, when the State becomes aware of an environmental risk, it must adopt positive measures of protection, including effective regulation as the case may be, in order to prevent infringements of rights. In addition, the State must anticipate potential risks associated with industrial activities permitted in its territory by gathering and disclosing relevant environmental information or requiring an environmental impact assessment (EIA). At a minimum, the State is responsible for ensuring that constitutional rights as well as domestic environmental laws and standards are effectively enforced, and that court orders and decisions are complied with.

The State, in deciding which particular action it will take to address the environmental risk, is afforded a high margin of appreciation in light of the complex technical and scientific issues involved in environmental matters. Still, the margin of appreciation afforded to the State is not absolute, and the State remains responsible for striking a balance of proportionality between the private and public interests at stake. This balance of proportionality demands respect for safeguards that, *inter alia*, secure affected individuals the necessary information, the opportunities to be heard in the decision-making process, and access to judicial remedies for review of adopted measures.

In the particular context of industrial and dangerous activities, the duty to regulate attaches both to State activities as well as to the activities of third parties. This point is particularly relevant in Human rights and the environment cases, since much of the industrial pollution results not from governmental activities, but from private activity. Regulation must deal with licensing, setting up, operation, security and supervision of the activity, as well as with independent scientific monitoring, and needs to be designed to provide effective deterrence against the threats to protected rights, such as the right to life.

### Exploitation of Natural Resources

The supervisory mechanisms in Africa and the Americas have addressed several cases involving exploitation of natural resources, such as logging, mining, and game reserves. In short, the State must recognize the legal personality of indigenous and tribal peoples and their title to lands and territories traditionally owned or used by them. In these lands and territories, the government owes a duty to consult regarding development and investment projects and in certain instances to obtain prior informed consent. In other words, while the government retains the ability to impose restrictions on the right to property, in order to ensure the survival of the group, the State must comply

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<sup>15</sup> Tatar v. Romania, Eur. Ct. H.R. App. No. 67021/01 (Jan. 27, 2009).



with certain safeguards, including prior and independent environmental impact assessments, consultations and FPIC and benefit-sharing arrangements. Concessions or permits granted for the exploitation of natural resources in breach of these duties will engage the international responsibility of the State.

## IMPLEMENTATION MECHANISMS

Implementation and enforcement are major challenges in the international human rights and the international environmental field respectively. There is a large gap between the plethora of general human rights provisions and their implementation; the gap remains when the Human rights and the environment linkage comes into play. But the Compendium illustrates the variety of mechanisms available. Apart from the international and regional courts and tribunals, attention should be paid to the findings of the International Criminal Court, the World Trade Organization, the World Bank, and MEA Secretariats.

The treaty bodies overseeing the implementation of the international human rights conventions produce General Comments linking the rights protected under the respective instrument with environmental issues. For example, the UN Committee on Economic, Social and Cultural Rights found ‘a healthy environment’ was part of the right to health when it interpreted the ICESCR, Article 12.2.<sup>16</sup> As noted above, special procedures established under the UN human rights system have also contributed to the implementation of certain aspects of the Human rights and the environment linkages, including with respect to toxic waste, indigenous peoples rights, food, water and climate change.

In addition to the international instruments concluded in the last 40 years that strengthen the Human rights and the environment linkage, the jurisprudence of universal and regional human rights supervisory mechanisms has tackled the environmental dimension of protected human rights. The case-law of regional human rights courts and commissions responds to applications by victims and civil society organizations seeking reparation for human rights infringements caused by environmental pollution, forced resettlement, unsustainable extraction of natural resources, denial of land title, among other Human rights and the environment issues. Hearing and deciding Human rights and the environment cases has forced regional and universal supervisory mechanisms to address the Human rights and the environment linkage.

There are examples of the regional human rights mechanisms applying enforcement measures. In the *San Mateo Case*, the Inter-American Commission on Human Rights indicated precautionary measures in the form of the immediate removal of the toxic waste from mining that had been dumped in San Mateo de Huanchor, Peru, in order to reduce danger to the health of the members of the local community and the environment. It has been suggested that this decision marks the first inter-American case to formally recognize the Human rights and the environment linkage in a ruling of precautionary measures.

One of the contrasts between the ECtHR and the Inter-American/African systems lies in their approach to rights, remedies and enforcement, influenced by their different political and economic condition. The ECtHR processes many thousands of cases each year brought by individuals; there is a high rate of implementation by State parties and the remedy is “just satisfaction” which may simply be the decision itself or a nominal amount of financial compensation. The Inter-American system has addressed individual *and* collective rights, such as indigenous peoples rights; its resources only allow it to process a relatively small number of cases and compliance is lower. The African Commission’s Human rights and the environment jurisprudence has also focused on complaints brought by and affecting groups, and collective rights such as the right to a healthy environment, but has had no effective means of implementing its decisions. This situation may change with the activity of the African Court of Human Rights.

## STRUCTURE AND SCOPE

The Compendium is divided into two main sections. Part 1 contains the “legislation” comprising international and regional human rights instruments, multilateral environmental agreements (MEAs), and international resolutions and declarations. Part 2 contains the “case-law” from international and regional judicial and quasi-judicial bodies.

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16 ESCR Committee, General Comment No. 14: The Right to the Highest Attainable Standard of Health.

This includes summaries of decisions of the human rights supervisory mechanisms in Africa, Europe and the Americas, as well as the International Court of Justice, the Human Rights Committee, and the World Bank's Inspection Panel.

The Compendium is not an exhaustive list of instruments and jurisprudence touching on the relationship between human rights and the natural environment. It is, instead, a representative selection of key agreements, declarations, judgments, and opinions, binding and non-binding, regional and global, and drawn from a temporal, geographical, and sectoral variety of sources. It is intended to illuminate the vast number of ways in which protection and conservation of the natural environment and promotion and protection of human rights have been linked.

# Part 1:

## Instruments

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This chapter analyzes the linkage between human rights and the environment under existing international human rights and environmental instruments. The close examination of these instruments indicates that human rights and the environment are interrelated. These instruments recognize that the environment plays a critical part in protecting and promoting human rights. The discussion below explores how the linkage between human rights and the environment has been recognized and established under human rights and environmental instruments. This section concludes that human rights and the environment are interrelated under existing human rights and environmental instruments, and that this linkage is in need of reinforcement to promote human rights as well as a healthy environment.

As environmental awareness grows, there is greater understanding that the survival and development of humanity rests on a healthy and safe environment. While human rights instruments recognize rights to basic elements of human welfare, including food, health, and adequate living and working conditions, environmental agreements elaborate the importance of environmental protection to the achievement of those welfare elements. Environmental instruments increasingly emphasize the importance of environmental protection to human cultural, aesthetic, and property interests, core to recognized human rights, while human rights regimes increasingly deal with the environmental dimensions of rights to life, privacy, religion, and freedom from racial or gender discrimination.

In addition to the increasing evidence of the importance of environmental protection to the realization of human rights, there is also increasing employment of human rights protections to ensure adequate environmental conservation. Procedural rights to information, access to justice, and participation in decision-making are increasingly appearing in environmental regimes to ensure adequate protection of the human interest in a healthy environment.

The linkage between the environment and human rights is integrated in the concept of sustainable development, the realization of which requires both improvement of environmental conditions and protection and promotion of human rights. In his Report on the Rule of Law to the General Assembly in March 2012, UN Secretary-General Ban Ki-moon relevantly remarked, “The United Nations supports the development of a holistic sustainable human development agenda that addresses the challenges related to inclusive growth, social protection and the environment” and that the rule of law is essential to ensure equality of protection and opportunities<sup>17</sup>.

Speaking at the UNEP World Congress on Justice, Governance and Law for Environmental Sustainability in Rio in June 2012, UN High Commissioner for Human Rights Navi Pillay similarly emphasized that “the protection of human rights is an essential element of sustainable development.” Concepts based on and relevant to sustainable development are found in both human rights and environmental instruments.

An analysis of instruments also informs the debate over the content and scope of environmental rights. International instruments deal with issues central to this debate, such as the recognition of intrinsic as well as instrumental environmental value, and the ability of future generations to hold rights and be the source of obligations.

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17 Report of the Secretary-General A/66/749, ‘Delivering Justice: programme of action to strengthen the rule of law at the national and international levels’, para. 26

This section presents a selection of important and representative human rights and environmental instruments. It does not include every relevant instrument, but seeks to present an illustrative sample of the ways in which international agreements and declarations treat and pertain to the human rights and environment discussion. It includes both global and regional, binding and non-binding instruments, in an attempt to provide the broadest view of human rights and the environment in international law.

## HUMAN RIGHTS LAW INSTRUMENTS

Since the U.N. Conference on the Human Environment in 1972, the linkage between human rights and the environment has been strengthened. Human rights law has recognized the critical importance of the environment through the elaboration of the normative content that pertains to protected human rights.

More recent international human rights instruments explicitly recognize linkages between human rights and the environment, particularly in the context of the right to food, the right to health, and indigenous rights to property, natural resources, and culture. Some agreements explicitly recognize a human right to a satisfactory environment.

Older human rights treaties drafted and adopted before environmental protection became a matter of international concern often do not include explicit references to environmental issues, but protect interests directly affected by environmental degradation. Human rights treaty-bodies and the regional human rights mechanisms have repeatedly interpreted these instruments in a manner that recognizes the environmental dimension of these protected rights, including the rights to life, health, an adequate standard of living, food, water, housing, self-determination and means of subsistence, among others.

Human rights instruments also establish procedural rights relevant to environmental protection, such as the rights to information, justice and participation in decision-making. These rights are key to allowing individuals and groups to protect their environmental interests.

This section presents a selection of human rights instruments which illustrate the different ways in which human rights and environment linkages manifest in international human rights law. The selected instruments contain explicit references to issues relevant to human rights and the environment or contain provisions that have formed a basis for human rights and environment connections in international jurisprudence. They were selected from a wide variety of human rights-related areas including political and civil rights, cultural and social rights, and rights related to women and minority groups, indigenous groups, refugees, children, and actions during times of war.

### Global Human Rights Instruments

#### *Legally Binding Instruments*

#### **Charter of the United Nations 1 U.N.T.S. XVI (Oct. 24, 1945)**

The UN Charter was adopted on June 26, 1945 and entered into force on October 24, 1945. It sets out the purposes of the United Nations, including the protection of human rights, maintenance of international peace and security, as well as promotion of economic and social co-operation. Article 55 of the Charter requires states' commitments to promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Although environmental issues are not expressly mentioned in the UN Charter, these social and economic provisions lay the foundation for the elaboration of human rights to incorporate environmental protection. Environmental degradation negatively affects standard of living, employment, health, social progress, and making environmental protection central to achieving the Charter's goals. The requirement that states promote respect for these social and economic interests as well as human rights and fundamental freedoms provides a basis for imposing positive state obligations to protect the natural environment.

**Convention relating to the Status of Refugees**  
189 U.N.T.S. 150 (Jul. 28, 1951)

The Convention relating to the Status of Refugees was adopted on July 28, 1951 and entered into force on April 22, 1954. It was initially inspired by the need to protect refugees after World War II, but the 1967 Protocol expanded the Convention's scope to include persons who had fled war or other violence in their home country (Article 1).

In scope, the 1951 Convention and its 1967 Protocol focus on those displaced by political persecution. However, a broad interpretation of the Convention also encompasses those displaced by natural disasters or environmental contamination. Increasing pressures on the environment and impacts of environmental hazards, like loss of ecosystem services, climate change and environmental disasters, are major causes for human displacement, which could potentially be covered by this Convention.

In addition, the UN High Commissioner for Refugees has become increasingly concerned with environmental problems surrounding refugee-affected areas, including the environmental impacts of refugee camps and resettlement areas and the impacts of competition for natural resources on refugees.<sup>18</sup>

**Convention on the Elimination of All Forms of Racial Discrimination**  
660 U.N.T.S. 195 (Dec. 21, 1965)

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted on December 21, 1965, and entered into force on January 4, 1969. CERD requires States Parties to refrain from engaging in acts of racial discrimination (Article 2). CERD also guarantees the right of everyone to equality in the enjoyment of civil and social rights, without distinction as to race, color, or national or ethnic origin (Article 5). These protected rights include the right to freedom of movement and residence, the right to own property "alone as well as in association with others", the right to freedom of religion, the right to favorable conditions of work, the right to housing, and the right to equal participation in cultural activities.

Although CERD does not specially refer to the environment, these protected rights provide a basis for elaboration of concepts of environmental justice. Poor, racially marginalized communities are likely to disproportionately bear the burden of environmental degradation in the form of toxic contamination or exposure to hazardous chemicals.<sup>19</sup> Such patterns implicate the non-discrimination provisions in the Convention.

In addition, the Convention lays the groundwork for the recognition of collective rights of indigenous people, particularly in the provisions providing for religious and cultural rights and rights to own property in association with others. Activities which deprive indigenous groups of access to resources, force such groups to leave their territory, or negatively affect their religious practices or traditional way of life, implicate these economic, social, and property rights. This is particularly evident as a form of discrimination since such activities rarely benefit the indigenous groups themselves, but instead normally benefit those in the racial or ethnic majority or position of control.

<sup>18</sup> Refugees and the Environment, UNHCR, <http://www.unhcr.org/3b039f3c4.html> (Jan 1, 2001).

<sup>19</sup> Michael Heiman, Race, Waste, and Class: New Perspectives on Environmental Justice, 28 Antipode 111 (1996); Michael Dorsey, Toward an Idea of International Environmental Justice, in World Resources 1998-1999: Environmental Change and Human Health (UNEP & World Bank 1998).

### **International Covenant on Civil and Political Rights** 999 U.N.T.S. 171 (Dec. 16, 1966)

The International Covenant on Civil and Political Rights (ICCPR) was adopted by General Assembly resolution 2200A (XXI) of December 16, 1966 and entered into force on March 23, 1976. Parties commit to respect the civil and political rights of individuals within their respective territories and subject to their respective jurisdictions (Article 2). The ICCPR affirms the right to life (Article 6(1)) and recognizes this right as fundamental and non-derogable (Article 4). The Human Rights Committee has broadly interpreted this right to impose obligations on states to take measures to protect human life, including measures to reduce infant mortality, increase life expectancy, and eliminate malnutrition and epidemics.<sup>20</sup> Environmental threats to human life implicate this broad right to life. The Special Rapporteur on Human Rights and Environment stressed that the right to life imposes strict duties on a State Party to prevent and safeguard against the occurrence of environmental hazards that threaten the lives of human beings, meaning that State responsibility arises regardless of whether an act or omission is deliberate, reckless, or merely negligent.<sup>21</sup> Accordingly, the duty to protect the right to life entails an obligation for Parties to establish and operate adequate monitoring and early-warning systems to detect environmental hazards before they threaten human lives.<sup>22</sup>

The ICCPR also affirms the right of self-determination by virtue of which all peoples are able to freely determine their political status and pursue their economic, social, and cultural development, and to dispose of their natural wealth and resources. This grant of a collective right to control over natural resources is particularly relevant in the context of indigenous groups who may be denied access to natural resources by environmentally damaging development activities.

Article 27 of the ICCPR reaffirms the rights of minorities to their own culture. This has been interpreted to require legal protection for particular ways of life negatively impacted by changes to the natural environment, including such traditional activities as fishing or hunting.<sup>23</sup>

The ICCPR provides for relevant procedural rights, including the right to a fair hearing (Article 14), the right to freedom of expression including the right to receive information (Article 19), the right to association (Article 22), and the right to take part in public affairs (Article 25). These rights are relevant in cases of environmental justice no less than in other cases of potential rights violations.

In addition, the Covenant protects other civil and political rights, *inter alia*, right to liberty of movement and freedom to choose residence (Article 12), right to freedom from interference with privacy and family (Article 17), rights of children to special protection (Article 24), and the right to be free from inhuman or degrading treatment (Article 7). Environmental degradation can impact these rights through destruction of actual and potential residences, creation of significant nuisance which interferes with private and family life,<sup>24</sup> disproportionate impacts on the health and welfare of children,<sup>25</sup> and injury and displacement causing significant mental anguish and suffering.<sup>26</sup>

### **International Covenant on Economic, Social and Cultural Rights** 993 U.N.T.S. 3 (Dec. 16, 1966)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the UN General Assembly on December 16, 1966 and entered into force on January 3, 1976. Parties commit to take steps, individually and through international assistance and co-operation, to the maximum of their available resources,

20 Human Rights Committee, General Comment No. 6 adopted at the sixteen session (1982) on Article 6 of ICCPR.

21 Sub-Commission on Prevention of Discrimination and Protection of Minorities, Final Report on Human Rights and the Environment, prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, E/CN.4/Sub.2/1994/9 (July 6 1994).

22 Submission of the Maldives to the Office of High Commissioner for Human Rights under Resolution 7/23, (September 2008), at footnote 152. available at [http://www.ciel.org/Publications/Maldives/Maldives\\_Submission\\_29Sep08.pdf](http://www.ciel.org/Publications/Maldives/Maldives_Submission_29Sep08.pdf).

23 Human Rights Committee, General Comment 23, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (April 26, 1994)

24 E.g., Fadeyeva v. Russia, Eur. Ct. H.R. App. No. 55723/00, #1 (2005); López Ostra v. Spain, Eur. Ct. H.R. App. No. 16798/90 (1994).

25 Convention on the Rights of the Child art. 24(2)(c), Nov. 20, 1989, 1577 U.N.T.S. 3 (1999).

26 Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, 91, 94-97, 101-102 (2005).

with a view to achieving progressively the full realization of economic, social, and cultural rights. Rights protected by the Covenant include the right to adequate standard of living including rights to adequate food, clothing and housing (Article 11), the right to health (Article 12), and the right to culture (Article 15).

Article 11 recognizes “the right of everyone to an adequate standard of living for himself and his family, including adequate food and water, clothing, and housing, to the continuous improvement of living conditions.” Parties, individually and through international co-operation, shall adopt measures necessary to achieve the full realization of the right. For instance, States may adopt specific programs to improve methods of food production and reform agrarian systems to achieve the most efficient development and utilization of natural resources (Article 11(2)(a)).

These components of the right to an adequate standard of living are linked to environmental protection. Realization of the right to food is closely tied to environmental factors such as water, climate, soil quality, air quality, and biological diversity. Pollution and land degradation can impact the right to housing through rendering existing or potential residential areas uninhabitable. At the same time, inadequate housing can leave individuals more vulnerable to environmental threats such as pollution, natural disasters, and low temperatures.<sup>27</sup>

Article 12 recognizes the right to the “enjoyment of the highest attainable standard of physical and mental health.” The steps to be taken by Parties towards the realization of this right shall include, *inter alia*, “the improvement of all aspects of environmental and industrial hygiene” (Article 12(2)(b)). This has been interpreted to require Parties to ensure an adequate supply of safe and potable water and basic sanitation and to take steps to protect its population from exposure to harmful chemicals or other environmental contaminants.<sup>28</sup>

Environmental degradation can affect the right to culture (Article 15) through loss of natural sites and ecosystem services which form part of cultural identity or perform an important cultural role.<sup>29</sup> Displacement as a result of environmental disaster could also implicate the right to culture.

**Protocol Additional to the Geneva Conventions relating to the Protection of  
Victims of International Armed Conflicts (Protocol I)  
1125 UNTS 3 (June 8, 1977)**

Protocol I to the Geneva Conventions addresses environmental destruction resulting from international armed conflicts.<sup>48</sup> Article 54(2) prohibits action “to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installation and supplies and irrigation works.”

Importantly, Article 55 provides for the protection of the natural environment. Article 55 (1) provides that care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage and includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and to prejudice the health or survival of the population. Furthermore, attacks against the natural environment by way of reprisals are prohibited.

27 For example, the WHO estimates that “inadequate housing accounts for over 100,000 deaths per year in the WHO European Region, and causes or contributes to many preventable diseases and injuries, including respiratory, nervous system and cardiovascular diseases and cancer.” WHO European Region, ENVIRONMENTAL BURDEN OF DISEASE ASSOCIATED WITH INADEQUATE HOUSING: A METHOD GUIDE TO THE QUANTIFICATION OF HEALTH EFFECTS OF SELECTED HOUSING RISKS IN THE WHO EUROPEAN REGION (2011).

28 Committee on Economic, Social and Cultural Rights, 22nd Sess., General Comment 14, ¶¶14, 36, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

29 Committee on Economic, Social and Cultural Rights, 43rd Sess., General Comment 21, ¶ 16(a), U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

**Convention on the Elimination of All Forms of Discrimination Against Women**  
1249 U.N.T.S. 13 (Dec. 18, 1979)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted and opened for signature by General Assembly resolution 34/180 of December 18, 1979. CEDAW recognizes the contribution of women to society and the welfare of the family, and recognizes certain economic, social, and cultural rights.

CEDAW obligates Parties to eliminate discrimination against women, particularly in rural areas to ensure that women “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications” (Article 14(2)(h)). In addition, they shall also take all appropriate measures to eliminate discrimination against women in the areas of employment and protection of health (Articles 11 and 12).

Given that many forms of environmental degradation disproportionately affect women, these forms of degradation may raise issues under this convention. In particular, women are more vulnerable to climate change impacts, natural disasters, and forms of local air pollution.<sup>30</sup>

CEDAW was the first Convention to call for equality before the law, the elimination of all forms of discrimination against women, and women’s equal participation in decision-making in public life. Although CEDAW does not specifically address environmental management, Articles 14 (rural women) and 16 (family life) are relevant to equal decision-making for men and women in several aspects of environmental governance, including climate change adaptation and mitigation, sustainable consumption programmes, and livelihood assessments.

**Convention on the Rights of the Child**  
1577 U.N.T.S. 3 (Nov. 20, 1989)

The Convention on the Rights of the Child (CRC) was signed on November 20, 1989 and entered into force on September 2, 1990. The Convention sets out the civil, political, economic, social and cultural rights of children. The UN Committee on the Rights of the Child monitors its compliance.

CRC specifically refers to the environment in connection with the child’s right to health. It recognizes a child’s right to enjoy the highest attainable standard of health in order to combat disease and malnutrition, through, *inter alia*, “the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution” (Article 24(2)(c)). Additionally, CRC states that information and education are to be provided to all segments of society on hygiene and environmental sanitation (Article 24(2)(e)). In interpreting this article, the Committee on the Rights of the Child emphasized that states are required to take all appropriate measures to prevent the damaging effects of environmental pollution and contamination of water supplies on children.<sup>31</sup>

Article 27 provides that Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development. Like the corresponding provision regarding the right to an adequate standard of living in the ICESCR, fulfillment of this provision necessarily requires consideration of prevention of pollution and maintenance of ecosystem services requisite for meeting basic human needs.

**Convention Concerning Indigenous and Tribal Peoples in Independent Countries**  
C169, 72 ILO Official Bull. 59 (Jun. 27, 1989)

The International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No.169) was adopted on June 27, 1989 and entered into force on May 9, 1991. The Convention

30 Summary for Policymakers, Climate Change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change 1, 398 (Solomon et al. eds., 2007); Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, 15, U.N. Doc. A/HRC/10/61 (15 Jan. 2009); World Health Organization, Fuel for Life: Household Energy and Health 10 (2006).

31 Committee on the Rights of the Child, 24th Sess., Concluding Observations: Jordan, ¶150, U.N. Doc. CRC/C/15/Add.125 (June 28, 2000).



outlines the rights of indigenous and tribal peoples and contains numerous references to the lands, resources, and environment of indigenous peoples.

Article 4 requires states to adopt special measures for safeguarding the environment of indigenous peoples consistent with their freely-expressed wishes. Articles 4, 6 and 8 require states to consult indigenous peoples and ensure their participation in formulating national and regional development plans that may affect them. Article 7(3) provides that environmental assessment must be done for planned development activities with the cooperation of the peoples concerned. Article 7(4) requires states to take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.”

Part II of the Convention addresses land issues, including the rights of the peoples concerned to the natural resources on their lands. These rights include the right to participate in the use, management and conservation of these resources (Article 15).

### **Rome Statute of the International Criminal Court 2187 U.N.T.S. 90 (Jul. 17, 2002)**

The Rome Statute was finalized in July 1998 and became effective in July 2002, establishing the International Criminal Court. Article 8 of the Rome Statute addresses elements of war crimes and environmental damage in times of armed conflict. Article 8(2)(b)(iv) deals specifically with situations involving the execution of intentional attacks on civilians despite knowledge that such an attack will lead to injury, the loss of life or long-term and severe damage to the natural environment, where the damage caused is clearly excessive in relation to the military advantage anticipated.

For this particular type of “war crime” to fall within the jurisdiction of the court (as per Article 5) the identity of the actor must be known and the resultant environmental impacts from the military activities must be foreseeable. A judgment based on Article 8(2)(b)(iv) would require a finding of (a) anticipated civilian damage or injury; (b) anticipated military advantage; and (c) that (a) was “clearly excessive” in relation to (b).

### ***Non-Legally Binding Instruments***

Non-binding international instruments are a controversial source of customary international law. The fact that they are non-binding suggests that the international community does not recognize them as containing legally enforceable obligations.<sup>32</sup> However, the long, careful and often controversial negotiations which lead up to these instruments suggest that States do feel they are important in some way.<sup>33</sup> Moreover, there is some evidence that states comply with these non-binding instruments as much as with binding international law.<sup>34</sup> This would imply that, though not a direct source of binding obligations, non-binding instruments do inform a discussion of the relationship between human rights and the environment.

This section contains a selection of the most important and representative non-binding instruments relevant to human rights and the environment. These instruments generally go beyond binding agreements in explicitly stating both procedural and substantive environmental rights and responsibilities.

32 See, e.g., Günther Handl, Human Rights and Protection of the Environment: A Mildly “Revisionist” View, in HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT 117, 122-23 (Antonio Trindade ed., 1992)

33 Luis E. Rodriguez-Rivera, Is the Human Right to Environment Recognized under International Law? It Depends on the Source, 12 COLO. J. INT’L ENVTL. L. & POL’Y 1, 41-42 (2001).

34 Edith Brown Weiss, Introduction, in International Compliance with Non-Binding Accords 1 (Edith Brown Weiss ed., 1997).

**Universal Declaration of Human Rights**  
G.A. Res. 217A, U.N. Doc. A/810 (Dec. 12, 1948)

On December 10, 1948 the General Assembly adopted the text of the UDHR, which articulates the fundamental rights and freedoms of all people. Many of its provisions are reasserted in several international legal instruments, and the UDHR is generally regarded as declaratory of customary law.

The UDHR does not expressly reference the environment, but it does proclaim economic, cultural, and social rights which can be dependent on a healthy environment for their realization. These include the right to life (Article 3), the right to freedom from arbitrary interference with privacy, family, or home (Article 12), the right to own property (Article 17), the freedom of religion, including the freedom to manifest religion in practice (Article 18), the right to favourable conditions of work (Article 23), the right to participate in cultural life (Article 27), and the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and social services" (Article 25).

Environmental degradation implicates all of these rights. Environmental contamination and resource degradation can cause death or destruction of the home or property, or unsafe, unhealthy or degrading working conditions; destruction of culturally or religiously valuable natural sites can obstruct freedom of religion and the right to participate in culture; and loss of vital ecosystem services can prevent the achievement of adequate standard of living through impacts on health, food security, and livelihoods.

The UDHR also declares procedural rights fundamental to the protection of all human rights as well as environmental interests. These include a right to an effective remedy for acts violating the fundamental rights (Article 8), a right to a fair and public hearing (Article 10), the freedom to seek, receive, and impart information and ideas (Article 19), and the right to take part in government (Article 21).

**Declaration on the Right to Development 1986**  
G.A. Res. 41/128, UN Doc. A/RES/41/128 (Dec. 4, 1986)

In 1986, the U.N. General Assembly adopted the Declaration on the Right to Development (DRD). The DRD states that "all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" (Article 1 (1)). It also sets forth the obligations of Parties to ensure these rights. Article 8(1) of the DRD says that "states should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources..."

In interpreting the DRD, the General Assembly clarified and reaffirmed that, in the full realization of the right to development, "the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national governments and for the international community."<sup>35</sup>

**Vienna Declaration and Programme of Action 1993**  
UN Doc. A/CONF.157/23 (Jun. 25, 1993)

The Vienna Declaration and Programme of Action were adopted by consensus at the 1993 World Conference on Human Rights. The Declaration acknowledges that "the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations" (para. 11). It "recognizes that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone." It calls on all Parties to adopt and vigorously implement existing conventions relating to the dumping of toxic and dangerous products and waste and to cooperate in the prevention of illicit dumping.

In the Programme of Action, the World Conference urges all nations to adopt national action plans prioritizing providing access to safe drinking water, and including plans to combat emergencies resulting from natural disasters (para. 47).

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<sup>35</sup> A/RES/54/175 (February 15 2000), para. 12 (a).

**Beijing Declaration and Platform for Action 1995**  
U.N. Doc. A/CONF.177/20 (Oct. 17, 1995)

The Beijing Declaration and its Platform for Action was adopted by the Fourth World Conference on Women in Beijing on September 15, 1995. It aims to “advance the goals of equality, development and peace for all women everywhere in the interest of all humanity” (Preamble, para. 3).

The Beijing Platform for Action provided a specific section on “Women and the environment” (section K, paras. 246 to 258). It states that human beings are “entitled to a healthy and productive life in harmony with nature,” and that women have an essential role in the “development of sustainable and ecologically sound consumption and production patterns and approaches to natural resource management” (para. 246). Further, it affirms that actions taken by governments should “ensure opportunities for women, including indigenous women, to participate in environmental decision-making at all levels,” and “facilitate and increase women’s access to information and education, including in the areas of science, technology and economics” (para. 253).

**Declaration on the Rights of Indigenous Peoples 2007**  
G.A. Res. 61/295, UN Doc. A/RES/61/295 (Sep. 13, 2007)

The Declaration on the Rights of Indigenous Peoples was adopted by General Assembly Resolution 61/295 on September 13, 2007. The Declaration recognizes the need to respect and promote the rights of indigenous peoples affirmed in international agreements, as well as to encourage harmonious and cooperative relations between Parties and indigenous peoples (Preamble). The Declaration promotes the full and effective participation of indigenous people in all matters that affect them. It also ensures their right to remain distinct and to pursue their own priorities in economic, social and cultural development (Article 25). Article 26 provides that indigenous peoples “have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”

The Declaration contains specific references to environmental issues. The Declaration’s Preamble recognizes that “respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.” The Declaration also provides that “indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources”, and that “States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent” (Article 29).

## **Regional Human Rights Instruments**

**American Declaration of the Rights and Duties of Man 1948**  
O.A.S. Res. XXX, 9<sup>th</sup> International Conference (May 2, 1948)

The American Declaration of the Rights and Duties of Man was adopted in Bogotá by the 9<sup>th</sup> International Conference of American States. Though it is not a treaty, both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have established that the Declaration does constitute a source of binding obligations for Members of the Organization of American States.<sup>36</sup>

The American Declaration establishes civil, social, and cultural rights similar to those of subsequent human rights instruments, including the right to life (Article I), the right to equality before the law (Article II) the right to religious freedom and worship (Article III), the right to protection of private and family life (Article V), the right to preservation of health “through sanitary and social measures relating to food, clothing, housing and medical care” (Article XI), the right to take part in cultural life (Article XIII), and the right to property (Article XXIII).

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<sup>36</sup> IACHR, Resolution No. 3/87, Case 9647, Sept. 22, 1987, paras. 46-49; I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, July 14, 1989. Series A No. 10, paras. 35-45.

Each of these rights is potentially implicated by environmental degradation. The Inter-American Commission on Human Rights has held that Article I of the Declaration can be violated by severe environmental pollution if such pollution causes serious physical illness, impairment and suffering on the part of the local populace. The Commission stated: "The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated."<sup>37</sup> The Commission has found that the Article II right to equality before the law prohibits distinctions, exclusions, restrictions, or preferences that have a discriminatory effect.<sup>38</sup> The Commission has applied this definition to allow actions alleging disparate impact of pollution on minority groups under this Article.<sup>39</sup> The Commission has also found that environmental degradation can affect the Article XI right to health,<sup>40</sup> and the Article XXIII right to property.<sup>41</sup>

The rights to religion, culture, protection of private and family life, and measures relating to food, clothing, housing, and medical care could potentially relate to environmental degradation in the same way as the articles contained in the ICCPR and ICESCR and other instruments described above, in that a decline in environmental quality could affect or prevent the enjoyment of those rights.

The Declaration also establishes procedural rights relevant to environmental protection. Article XVIII – the right to a fair trial – declares that every person has the right to go to court to ensure his legal rights are respected and that there must be a procedure for the courts to protect people whose fundamental rights are endangered by acts of authority. This right has been upheld in cases involving environmental degradation.<sup>42</sup>

### **American Convention on Human Rights** O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (Nov. 22, 1969)

The American Convention, which was adopted in 1969 and entered into force in 1978, created the Inter-American Commission and Court of Human Rights. This has become a core forum to which American States can bring cases regarding human rights violations. The Convention itself provides substantive and procedural rights which can be related to environmental protection, including the rights to life (Article 4), humane treatment (Article 5), personal liberty and security (Article 7), a fair trial (Article 8), privacy (Article 11), freedom of expression and access to information (Article 13), use and enjoyment of property (Article 21), participation in government (Article 23), equal protection under the law (Article 24), and judicial protection (Article 25).

The rights to life,<sup>43</sup> humane treatment,<sup>44</sup> fair trial,<sup>45</sup> freedom of expression and access to information,<sup>46</sup> property,<sup>47</sup> participation in government,<sup>48</sup> and judicial protection<sup>49</sup> have all been discussed by the Commission or the Court, and have been found to be relevant in cases involving environmental degradation. The rights to personal liberty, privacy, and equal protection may also be relevant to cases of environmental degradation, by analogy to the Commission's and Court's decisions involving similar provisions in the American Declaration of the Rights and Duties of Man.

37 Inter-Am. Comm'n H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.LV/II.96, doc. 10, rev. 1 (1997).

38 *Mossville Environmental Action Now v. United States*, Inter-Am. Comm'n H.R. Report No. 43/10 (17 Mar. 2010) (Admissibility).

39 *Id.*

40 *Yanomami v. Brazil*, Inter Am. Comm'n H.R. Res. No. 12/85 (1985).

41 *Maya Indigenous Communities of the Toledo District v. Belize*, Inter-Am. Comm'n H.R., Report No. 40/04, (2004).

42 *Maya Indigenous Communities of the Toledo District v. Belize*, Inter-Am. Comm'n H.R., Report No. 40/04, (2004);

43 *Kichwa Peoples of the Sarayaku Community and its Members v. Ecuador*, Inter-Am. Comm'n H.R. Report No. 62/04 (2004); *Community of La Oroya, Peru*, Inter-Am. Comm'n H.R. Report No. 76/09 (2009) (Admissibility).

44 *Moiwana Community v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 124 (2005).

45 *Sawhoyamaya Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 146 (2006).

46 Inter-Am. Comm'n H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.LV/II.96, doc. 10, rev. 1 (1997).

47 *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172 (2007).

48 Inter-Am. Comm'n H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.LV/II.96, doc. 10, rev. 1 (1997).

49 Inter-Am. Comm'n H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.LV/II.96, doc. 10, rev. 1 (1997).

**Additional Protocol to the American Convention on Human Rights in the Area of  
Economic, Social and Cultural Rights (Protocol of San Salvador)**  
OAS Treaty Series No. 69, 28 I.L.M. 156, (Nov. 17, 1988)

The Protocol of San Salvador was signed in San Salvador on November 17, 1988, and entered into force on November 16, 1999. The Protocol expressly links human rights and the environment. Article 11 proclaims that “everyone shall have the right to live in a healthy environment and to have access to basic public services”. It also affirms that Parties shall promote the protection, preservation and improvement of the environment (Article 11).

In addition, article 10 recognizes the right to health, and stipulates that Parties must adopt certain specified measures in order to provide the highest level of physical, mental and social well-being, with particular regard for those who are made more vulnerable due to poverty. Article 12 recognizes a right to food, and Article 14 provides for a right to the benefits of culture. Each of these rights could be implicated by environmental degradation.

**European Convention for the Protection of Human Rights and Fundamental Freedoms**  
E.T.S. 5, 213 U.N.T.S. 221 (Nov. 4, 1950)

The European Convention on Human Rights was signed on November 4, 1950 by the founding States of the Council of Europe, and entered into force on September 3, 1953. The Convention focuses on individual liberties, including civil and political rights and freedoms in Europe.

Fourteen protocols have been added to the convention. These protocols have added rights to the Convention, but are only binding on States that have signed and ratified them.

The Convention does not expressly link human rights and the environment, but the European Court on Human Rights has determined that environmental degradation can interfere with the enjoyment of protected rights, including the right to life (Article 2);<sup>50</sup> respect for private and family life (Article 8);<sup>51</sup> fair trial (Article 6);<sup>52</sup> information (Article 10);<sup>53</sup> and effective remedy (Article 13); and peaceful enjoyment of property (Article 1 of Protocol No.1).<sup>54</sup>

**European Social Charter**  
E.T.S. No. 163 (May 3, 1996)

The European Social Charter was first adopted in 1961, and revised in 1996. The revised version entered into force in 1999. The Charter contains guarantees for social and economic human rights. The European Committee of Social Rights (ECSR) monitors State compliance with the Charter. The Charter provides a number of provisions which, like similar provisions in the ICESCR, may depend on consideration of the quality natural environment for their effective implementation.

Article 3 provides for the right to safe and healthy working conditions. Parties undertake, *inter alia*, to minimize the causes of hazards inherent in the working environment. On its face, this provision would seem to cover hazards caused by degradation or pollution of the natural environment, such as exposure to hazardous substances in the course of employment.

Article 7 states a special right of children and young persons to protection. Under this article, Parties undertake “to ensure special protection against physical and moral dangers to which children and young persons are exposed”. Again, physical dangers should include dangers caused by environmental degradation.

50 Öneriyildiz v. Turkey, Eur. Ct. H.R. App. No. 48939/99 (2004).

51 Taşkin and Others v. Turkey, Eur. Ct. H.R. App. No. 46117/99, (2004).

52 E.g., Zimmerman and Steiner v. Switzerland, Eur. Ct. H.R. App. No. 8737/79 (1983); Zander v. Sweden, Eur. Ct. H.R. App. No. 14282/88 (1993); Kyrtatos v. Greece, Eur. Ct. H.R. App. No. 41666/98 (2003).

53 Öneriyildiz v. Turkey, Eur. Ct. H.R. App. No. 48939/99 (2004). [DOUBLE CHECK THIS].

54 Öneriyildiz v. Turkey, Eur. Ct. H.R. App. No. 48939/99 (2004).

Article 11 provides for a right to protection of health. Pursuant to this right, the Parties undertake “to take appropriate measures designed, *inter alia*, to remove as far as possible the causes of ill-health;” and “to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.” Diseases and epidemics are often linked to environmental degradation. Air and water pollution, loss of biodiversity, land degradation, climate change, and other environmental hazards have all been linked to increases in the spread of disease.<sup>55</sup>

Finally, Article 31 recognizes the right to adequate housing. Natural disasters, toxic pollution, and climate change can all destroy existing housing or render potential housing sites unsuitable, creating obstacles to the implementation of this right.

### **Charter of Fundamental Rights of the European Union** O.J. 2000/C 364/01 (Dec. 7, 2000)

On December 7 2000, the Nice Summit of the European Union adopted the Charter of Fundamental Rights of the European Union. In December 2009, the Charter was given binding legal effect by the entry into force of the Lisbon Treaty.

Article 37 of the Charter concerns environmental protection. It provides that “a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”

### **African Charter on Human and Peoples’ Rights** 1520 U.N.T.S. 217 (Jun. 26, 1981)

The African Charter on Human and Peoples’ Rights was signed in Banjul on June 26, 1981. In Article 24, the Charter explicitly states that “all peoples shall have the right to a general satisfactory environment favorable to their development.” Article 21 provides that “all peoples shall freely dispose of their wealth and natural resources” and adds that this right shall be exercised in the “exclusive interest of the people.”

The Charter contains several additional provisions related to environmental rights. Article 8 provides for freedom of conscience and religion, including the “right to worship, engage in rituals, observe days of rest, and wear religious garb.” This has been interpreted to include a right to access to natural ceremonial sites.<sup>56</sup> The Commission has also found connections between environmental degradation and the right to property (Article 14).<sup>57</sup>

Article 16 guarantees to every individual the right to enjoy the best attainable state of physical and mental health. In addition, Article 7 addresses procedural rights and provides that “every individual shall have the right to have his cause heard.” Both of these rights are relevant in the environmental context, given the links between environmental quality and human health, and the role of procedural rights in protecting environmental rights.

## **ENVIRONMENTAL LAW INSTRUMENTS**

International environmental regimes necessarily involve a tension between ideals of national sovereignty over natural resources, and the necessity of obligation-backed cooperation to adequately protect the global environment. Principle 21 of the 1972 Stockholm Declaration<sup>58</sup> has emerged as the customary description of the relationship between sovereignty and international obligation in the field of international law. It provides that States have the sovereign right to exploit their own resources but have the responsibility to ensure that activities within their

55 UNEP, GLOBAL ENVIRONMENT OUTLOOK 4, 52, 87, 92, 131-32, 135, 167 (2007); Confalonieri et al., Human Health, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 391, 398-99 (M.L. Parry et al. eds., 2007).

56 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Afr. Comm’n H. & Peoples’ R. No. 276/2003 (2010).

57 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Afr. Comm’n H. & Peoples’ R. No. 276/2003 (2010).

58 United Nations Conference on the Human Environment, Stockholm, June 5-16, 1972, Declaration of the United Nations Conference on the Human Environment Principle 21, U.N. Doc. A/CONF.48/14/Rev.1 (1972).

jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Many environmental instruments go beyond this, in recognizing aspects of the environment as components of the common heritage of humankind. This concept appears as the concept of “common heritage of mankind” and “world heritage of mankind as a whole” in UNCLOS and the World Heritage Convention, respectively, and is related to the concept of “common interest of mankind” stated in the Outer Space Treaty and the “common concern of humankind” stated in the United Nations Framework Convention on Climate Change. Each of these provisions characterizes protection of the natural environment as a legally cognizable interest or concern held collectively by all people on the planet in their capacity as humans, rather than as components of a particular state. This creates an obligation on the part of all States to conserve the common heritage resources within their territories even when they do not cross national boundaries.

Many environmental instruments frame environmental protection in terms of preservation of environmental value, both intrinsic and instrumental. Instruments recognize the importance of environmental issues to human health, welfare, and economic development. They deal with the relationship between environmental conservation and property rights and cultural rights, particularly in the context of indigenous cultures. This recognition of the relationship between environmental conservation and human welfare provides a basis for an argument for the necessity of conserving the environment to protect human rights.

Some environmental instruments contain explicit human rights language, particularly with regards to procedural rights including rights to information, justice, and participation in decision-making. Many recognize legally protected individual interests by providing for liability and compensation mechanisms. The imposition of civil liability for environmental damage presupposes a right not to be subject to such damage.

This section presents a selection of environmental instruments relevant to the discussion of human rights and the environment. These instruments were selected based on their treatment of relevant issues including common heritage and sovereignty issues, recognition of links between the environment and human health and welfare and recognition of intrinsic environmental value, special treatment of indigenous groups and minority groups, procedural rights and liability and compensation mechanisms, and discussions of state responsibility to present and future generations.

## **Global Environmental Law Instruments**

### ***Legally Binding Instruments***

#### **Antarctic Treaty System 402 U.N.T.S. 71 (Dec. 1, 1959)**

The Antarctic Treaty was adopted in 1959 and entered into force in 1961. Article IV(2) of the Antarctic Treaty of 1959 provides that “no acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica.” Therefore, “[n]o new claim[s], or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.”

The Antarctic Treaty also requires States to cooperate and share information and scientific results. Under Article III, the Parties agree to share information regarding plans for scientific programs and to make freely available scientific observations and results. Parties further agree to give advance notice to the other Parties of “all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica proceeding from its territory.” (Article VII).

Since 1959, states entered into various related agreements known as the “Antarctic treaty system.” The system includes the 1972 Convention for the Conservation of Antarctic Seals (entered into force in 1978);<sup>59</sup> the 1980 Convention on the Conservation of Antarctic Marine Living Resources (entered into force in 1982);<sup>60</sup> the 1988

59 Convention for the Conservation of Antarctic Seals, June 1, 1972, 1080 U.N.T.S. 175 (1978).

60 Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 1329 U.N.T.S. 47 (1983).

Convention on the Regulation of Antarctic Mineral Resource Activities (signed and adopted, but not in force);<sup>61</sup> and the 1991 Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol).<sup>62</sup>

The Madrid Protocol entered into force in 1998. The goal of the Protocol is to ensure the comprehensive protection of the Antarctic environment and its ecosystems, including “the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment (Article 2). Under the Protocol, all mineral resource activities, except scientific research, are prohibited.<sup>63</sup> The Preamble proclaims that the protection of the Antarctic environment is in the interest of mankind as a whole.

The Protocol contains several provisions requiring information to be prepared and made available. Reports by the Committee on Environmental Protection on their sessions, reports on inspections of the Antarctic environment, and annual reports of the Parties regarding implementation must all be made publicly available (Articles 11(5); 14(4); 17(2)). Article 8 requires Parties to use environmental assessment procedures specified in Annex I in planning any activities for which notice would be required under VII(5), including all expeditions to and within Antarctica. Article 5 of Annex II on Conservation of Antarctic Fauna and Flora requires parties to make available information on Specially Protected Species and Protected Areas. Annex V on Area Protection Management requires information on the location of Specially Protected Areas, Specially Managed Areas, Historic Sites and Monuments, and Management Plans (Article 9(1)).

**The Treaty on Principles Governing the Activities of States in the Exploration and  
Use of Outer Space, Including the Moon and Other Celestial Bodies**  
610 U.N.T.S. 205 (Jan 27, 1967)

The Outer Space Treaty was opened for signature in 1967 and entered into force in the same year. The Preamble of the Treaty recognizes “the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes.” Article I elaborates: “The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.” Article II further states: “Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” These provisions describe a concept of outer space and celestial bodies as belonging to no state but to be explored and used to the benefit of all mankind, a concept clearly related to the “common heritage of mankind” articulated in subsequent agreements.

Within this framework of the common interest of mankind, the Treaty lays out provisions that have important implications for environmental protection. Article IV prevents states from installing weapons in space, such as stationing nuclear or other weapons of mass destruction in outer space. In addition, Article IX requires states to avoid the harmful contamination of the Moon and other celestial bodies and also adverse changes in the environment of earth. It states that if necessary, States should adopt appropriate measures to avoid such harmful contamination and adverse changes (Article IX).

The Treaty provides procedural mechanisms to back up these provisions. Article IX requires States to undertake appropriate international consultations before proceeding with activities or experiments in outer space that it has reason to believe would cause potentially harmful interference with activities of other States. It also allows a State which has reason to believe that activities or experiments planned by another State Party will cause potentially harmful interference with activities in the peaceful exploration and use of outer space to require consultation. These provisions are predicated on ideas about the importance of procedural protections in equitable and nondestructive development of natural resources – in this case, those resources located in outer space.

61 Convention on the Regulation of Antarctic Mineral Resource Activities, June 2, 1988. The 1988 Convention on the Regulation of Antarctic Mineral resource Activities has not entered into force and has been effectively replaced by the 1991 Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol).

62 Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455 (1991).

63 Id. at art. 7.



**International Convention on Civil Liability for Oil Pollution Damage**  
973 U.N.T.S. 3 (Nov. 29, 1969)

The International Convention on Civil Liability for Oil Pollution Damage (IMO CLC) was adopted by the International Maritime Organization in 1969, and entered into force in 1975. It laid out a civil liability regime for compensation of loss or damage caused by oil pollution, under which the owner of a ship at the time of an incident was liable for any pollution damage (Article III). In doing so, it set up a corresponding right of those affected by oil pollution to recover, even in the absence of fault on the part of the owner.

The IMO CLC was amended by the Protocol of 1992, which entered into force in 1996.<sup>64</sup> The Protocol entirely replaces the Convention for those countries which have ratified it. The Protocol increased the limits on liability set by the Convention (Article 6), and widened its scope to include damage in a Party's Exclusive Economic Zone or equivalent area, as well as in a Party's territorial seas (Article 3(a)). It also provides for loss or damage caused by contamination other than loss of profit, but provides that such compensation be limited to the costs of reasonable measures of reinstatement (Article 2(3)). Neither the CLC nor the Protocol allow for compensation if the ship responsible for the spill was owned or operated by a State and used only for non-commercial purposes (CLC Article XI).

**International Convention on the Establishment of an International Fund for  
Compensation for Oil Pollution Damage**  
1110 U.N.T.S. 57 (Dec. 18, 1971)

The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IMO FUND) exists to ensure compensation for oil pollution damage in cases where the IMO CLC is inadequate, and to shift some of the burden of liability from shipowners themselves. IMO FUND establishes an International Fund, which will pay compensation to any person suffering pollution damage if that person has been unable to obtain adequate compensation under the IMO CLC because the damage falls into one of the exceptions to liability outlined in that Convention, the damage exceeds the limit on liability, or the liable party is financially unable to pay the compensation owed (Article 4). The owner of a ship may also be entitled to compensation for reasonable expenses or sacrifices to prevent or mitigate pollution (Article 4(1)).

IMO FUND was also modified by a Protocol adopted in 1992, which entered into force in 1996.<sup>65</sup> This Protocol expands the amount of compensation available, and sets up the International Oil Pollution Compensation Fund as an independent entity, separate from the IMO. The amount was once again raised by Amendments adopted in 2000, which entered into force in 2003.

**Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat**  
996 U.N.T.S. 245 (Feb. 2, 1971)

The Ramsar Convention was adopted in February 1971, and entered into force in December 1975. It aims to protect the world's wetlands, through the identification and designation of wetlands of international importance, and the creation of parks and reserves around important wetlands, both designated and undesignated. Its primary mechanism is the publication of a list of designated sites.

The Convention recognizes "the interdependence of Man and his environment" (Preamble). The preamble acknowledges wetlands as "a resource of great economic, cultural, scientific, and recreational value, the loss of which would be irreparable."

Though the preamble recognizes that migratory waterfowl may constitute an international resource, the Convention also deals with conservation of resources existing entirely within the boundaries of a single State's territory. This raises issues of State sovereignty. Article 2 provides "The inclusion of a wetland in the List does not prejudice the exclusive sovereign right of the Contracting Party in whose territory the wetland is situated." Despite this, the Convention requires each State to designate at least one wetland in order to become a Party (Article 2(4)). It has

64 1956 U.N.T.S. 255 (Nov. 27, 1992)

65 1953 U.N.T.S. 330 (Nov. 27, 1992)

additional obligations to promote conservation, and to compensate for any loss of listed wetlands by created additional nature reserves for protection of waterfowl habitat.

### **Convention for the Protection of World Cultural and Natural Heritage** 1037 U.N.T.S. 151 (Nov. 16, 1972)

The World Heritage Convention was adopted by the General Conference of UNESCO in November of 1972 and entered into force on December 17, 1975. The preamble of the Convention recognizes that “deterioration or disappearance of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world.” In addition, it states that “parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole.”

Article 2 of the Convention defines “natural heritage” as “natural features consisting of physical and biological information or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiological formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.”

Several provisions of the convention illuminate aspects of the concept of “world heritage of mankind” as applied to the natural environment. Article 4 provides that each Party “recognizes the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State.” This provision clarifies the duty associated with human heritage: this duty falls primarily on the State in which the site lies, it encompasses obligations to identify and protect such heritage, and it is owed not only to present but also to future generations. In pursuance of this duty, each Party “will do all it can . . . to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain” (Article 4).

Article 6 extends the duty beyond the State in whose territory the site exists, recognizing “that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.” Further, each Party “undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention” (Article 6(3)). Given the potentially devastating impacts of global environmental harms such as climate change on natural and cultural areas of “outstanding universal value”, this provision could be ultimately far-reaching.

The primary mechanism for safeguarding natural heritage in the Convention is the World Heritage List and the List of World Heritage in Danger, which the World Heritage Committee is charged with keeping and publishing (Article 11). It is important to note that Article 12 specifically provides that “the fact that a property belonging to the cultural or natural heritage has not been included in either of the two lists mentioned in paragraphs 2 and 4 of Article 11 shall in no way be construed to mean that it does not have an outstanding universal value.” This means that the provisions regarding the duties of Parties (Articles 4 and 6), described above, are not limited to sites included on the lists. Article 27 further provides that parties “shall undertake to keep the public broadly informed of the dangers threatening this heritage and of the activities carried on in pursuance of this Convention.”

### **Convention on International Trade in Endangered Species of Wild Fauna and Flora** 993 UNTS 243 (Mar. 3, 1973)

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is an international treaty designed to ensure that international trade in wild animals and plants is carried out in a sustainable way so as not to threaten their survival (Preamble). It is the result of a conference of 80 states that took place in March 1973 in Washington, D.C. CITES now has one of the largest memberships with 175 Parties. CITES currently protects approximately 33,000 species, some included in the Appendices by their name specifically, others merely referred to as all species within a higher taxon (i.e., genera, family or order).

CITES contains provisions requiring information on the trade in specimens of species to be collected and made available to the public. Article VIII(6) requires each Party to maintain records on the names and addresses of exporters and importers, as well as the permits granted, the States with which trade occurred, the quantities and types of specimens traded, the names of species and, where applicable, the sex and size of the specimen. Article VIII(7) requires each Party to prepare periodic reports on the implementation of CITES to transmit to the Secretariat. According to Article VIII(8), this information must be made available to the general public, unless making such information available would be inconsistent with the law of the Party concerned. Though careful not to intrude on State Sovereignty, this provision does provide an obligation to share information relevant to endangered species with the public, if a limited one.

### **United Nations Convention on the Law of the Sea** 1833 U.N.T.S. 397 (Dec. 10, 1982)

The United Nations Convention on the Law of the Sea (UNCLOS) and its implementing agreements codify a regime covering all aspects of the law of the seas. The Convention was opened for signature in December of 1982, and entered into force on November 16, 1994.

UNCLOS explicitly provides: “States have the obligation to protect and preserve the marine environment.” (Article 192). It elaborates: “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as to not cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention” (Article 194). Further, States should adopt laws to “prevent, reduce and control pollution of the marine environment from land-based sources” (Article 207).

These clear substantive obligations to protect the environment are backed by procedural mechanisms. Article 204 requires States to “keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.” They must publish the results of this surveillance or make them available to all States (Article 5). In addition, when “States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate the results of such assessments” (Article 206).

Part XI UNCLOS covers the deep seabed, termed “The Area”. UNCLOS declares the seabed and its resources to be “the common heritage of mankind” (Article 136). It provides that “No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources” and that “All rights in the resources of the Area are vested in mankind as a whole” (Article 137). It goes on to specify that activities in the Area “be carried out for the benefit of mankind as a whole” (Article 140). In this context, UNCLOS provides specific obligations for prevention of pollution of the marine environment from activities in the Area (Articles 145, 209), and protection and conservation of the natural resources of the Area (Article 145).

### **Vienna Convention for the Protection of the Ozone Layer** 1513 U.N.T.S. 293 (Mar. 22, 1985)

The Vienna Convention for the Protection of the Ozone Layer (Ozone Convention) was adopted in 1985 and entered into force in 1988. The Convention recognizes linkages between environmental conservation and human health. One of the goals of the Ozone Convention is “to protect human health and the environment against adverse effects resulting from modifications of the ozone layer” (Preamble). Article 2 provides that Parties shall take measures “to protect human health and the environment” from the effects of anthropogenic ozone degradation. To this end, Parties are obligated to participate in research and information exchange “in order to better understand and assess the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone layer” (Article 2(2)).

**Montreal Protocol on Substances that Deplete the Ozone Layer**  
1522 U.N.T.S. 3 (Sep. 16, 1987)

The Protocol on Substances that Deplete the Ozone Layer to the Vienna Convention for the Protection of the Ozone Layer (Montreal Protocol) requires states to phase out the production of numerous substances believed to be responsible for ozone depletion to protect the ozone layer. The Protocol was adopted in 1987 and entered into force in 1989.

The Protocol further recognizes the connection between environmental conservation and human health. The preamble recognizes “that world-wide emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment.”

In addition to the substantive obligations regarding specific substances, the Protocol contains obligations to share information with other countries, and to promote public awareness of the effects of ozone-depleting substances (Article 9).

**Basel Convention on the Control of Transboundary Movements of  
Hazardous Wastes and Their Disposal**  
1673 U.N.T.S. 57 (Mar. 22, 1989)

The Basel Convention was adopted in 1989 and entered into force in 1992. The Basel Convention emphasizes the link between human health and hazardous wastes. The preamble acknowledges “the risk of damage to human health and the environment caused by hazardous wastes and other wastes and the transboundary movement thereof” and “the growing threat to human health and the environment posed by the increased generation and complexity, and transboundary movement of hazardous wastes and other wastes.” It states that the “most effective way of protecting human health and the environment from the dangers posed by such wastes is the reduction of their generation to a minimum” and that “States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment.”

The Basel Convention sets up a system of rights and obligations between Parties, whereby Parties have a right to prohibit the import of hazardous wastes and an obligation to inform other Parties when they choose to exercise this right (Article 4(1)(a)). Parties are in turn obligated to prohibit or not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing (Article 4(1)(c)).

In addition, the Convention requires that Parties take appropriate measures to ensure that hazardous and other waste production be reduced to a minimum and that states parties ensure adequate disposal facilities are available (Article 4(2)(a)-(b)). The Convention criminalizes illegal trade in hazardous and other wastes (Article 4(3)). The Convention also contains detailed provisions on information exchange between parties (Article 13).

In 1999 the Basel Conference of the Parties adopted a Protocol on Liability and Compensation. This protocol was designed to establish a comprehensive regime of liability and compensation covering damage caused by transboundary movement of waste. The regime would apply to both States and private parties, who could bring claim in domestic courts for compensation under the Protocol. The Protocol has not entered into force.

**United Nations Framework Convention on Climate Change**  
1771 U.N.T.S. 107 (June 5, 1992)

The UN Framework Convention on Climate Change (UNFCCC) was adopted in May 1992 and opened for signature in June 1992. The goal of the UNFCCC is to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system (Article 2). The Convention has 195 Parties (which includes one regional economic integration organization) making it one of the most widely accepted international treaties. The UNFCCC contains provisions relating to the concept of common concern of humankind, the principle of common but differentiated responsibilities, the relationship between climate change and human welfare, the relationship between state sovereignty and environmental obligations, and the existence of obligations to future generations. All of these are relevant to a discussion of

the linkages between human rights and environmental protection. In addition, the UNFCCC includes procedural obligations relevant to discussions of procedural rights.

The scheme of interests and obligations laid out in the UNFCCC confronts issues of sovereignty. The preamble reaffirms “the principle of sovereignty of States in international cooperation to address climate change.” The preamble also states that “States have . . . the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” This statement is a clear reference to Principle 21 of the Stockholm Declaration. However, the Preamble to the UNFCCC begins with an acknowledgment that “change in the Earth’s climate and its adverse effects are a common concern of humankind.” This goes beyond Principle 21, in imposing an obligation not only to other States, but to humankind as a whole.

The UNFCCC also recognizes the relationship between climate degradation and human welfare. The Preamble states a concern that the warming caused by anthropogenic emissions “may adversely affect natural ecosystems and humankind.” Article 2 states that stabilization of greenhouse gas concentrations in the atmosphere should be achieved within a time frame sufficient “to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.” In addition to the effect of climate change on economic development, the Convention recognizes that “economic development is essential for adopting measures to address climate change” (Article 3(4)).

The UNFCCC suggests obligations not only to the present community of humankind but also to future generations (Preamble, Article 3). Under Article 3, “The Parties shall protect the climate system for the benefit of present and future generations of humankind” (Article 3(1)). This inclusion of an obligation to take action for the benefit of future generations raises questions of whether future people could potentially also hold legally protected rights.

In addressing climate change, the Convention sets out the principle of common but differentiated responsibilities (Preamble, Articles 3(1), 4). This principle is significant in that it recognizes a universal obligation on the part of all States to address a common concern of humankind, and that it differentiates the substance of this obligation based on the particular situation and capacity of each individual State. Moreover the Convention recognizes that the effectiveness of commitments of developing country Parties depends on financial assistance and technology transfer provided by developed country Parties and that both economic and social development and poverty eradication constitute ‘first and overriding priorities’ for developing country Parties (Article 4(7)).

Finally, the UNFCCC contains procedural obligations to individuals as well as to other parties. Article 4(1)(i) requires Parties to promote and cooperate in education, training and public awareness of climate change, and encourage participation in the process, including participation by NGOs. Under Article 6, “parties shall promote and facilitate . . . public access to information on climate change and its effects;” and “public participation in addressing climate change and its effects and developing adequate responses” (Article 6(a)(ii)-(iii)). Any non-confidential information relating to implementation that is given to the Secretariat by the parties must be made publicly available (Article 12(10)). These provisions relate to potential rights to information and participation in the context of climate change.

### **Kyoto Protocol to the United Nations Framework Convention on Climate Change** 2303 U.N.T.S. 148 (Dec. 11, 1997)

The Kyoto Protocol was adopted in Kyoto in December 1997 and opened for signature in March 1998. It entered into force in February 2005. The Kyoto Protocol commits thirty-seven industrialized countries and the European Community to reduce greenhouse gas emissions an average of five percent compared to 1990 levels over the five-year period 2008-2012.<sup>66</sup>

In Article 2, the Protocol requires Parties included in Annex I (developed countries) to take certain measures and cooperate with other Parties to reduce emissions “in order to promote sustainable development” (Article 2(1)). This characterization of the object of the Protocol emphasizes the relationship between climate change and economic development established in the UNFCCC.

<sup>66</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148 (2005).

The Protocol places a heavier burden on developed nations under the principle of “common but differentiated responsibilities” (Article 10). It thus specifically recognizes the national and regional development priorities of developing nations and makes reference to the objective of sustainable development. It also establishes a clean development mechanism “to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention” (Article 12).

Like the UNFCCC, it requires that Parties facilitate public awareness and access to information on climate change (Article 10(e)).

### **United Nations Convention on Biological Diversity** 1760 U.N.T.S. 79 (June 5, 1992)

The Convention on Biological Diversity (CBD) was opened for signature at the Rio de Janeiro Earth Summit in June 1992 and entered into force in December 1993. The three main goals of the Convention are: “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources” (Article 1).

The Preamble of the CBD affirms that “the conservation of biological diversity is a common concern of humankind.” This conception of biological diversity as a “common concern” and its interaction with concepts of State sovereignty provide the basis for the regime established by the Convention. Article 3 restates the principle that States have “the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” Several other parts of the Convention echo this interaction between sovereign rights and international responsibility. The Preamble reaffirms that States have “sovereign rights over their own biological resources”, and goes on to reaffirm “also that States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner.” Notably, this responsibility goes beyond a responsibility to prevent harm to the environment of other States or of areas beyond the limits of national jurisdiction. Article 4 specifically states that the Convention applies in areas within the limits of each Contracting Party’s national jurisdiction. Article 8 establishes obligations for *in-situ* conservation, including obligations to establish a system of protected areas and to regulate important biological resources.

The Convention justifies these obligations to conserve biological resources, including entirely intra-national resources, by emphasizing the value of these resources, as not limited to a particular country. The Convention recognizes “the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere” and notes that “ultimately, the conservation and sustainable use of biological diversity will strengthen friendly relations among States and contribute to peace for humankind” (Preamble). The Convention describes “the intrinsic value of biological diversity and . . . the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components.” It goes on to acknowledge “that substantial investments are required to conserve biological diversity and that there is the expectation of a broad range of environmental, economic and social benefits from those investments” and that “conservation and sustainable use of biological diversity is of critical importance for meeting the food, health and other needs of the growing world population.” This emphasis on the importance of biological diversity in its own right and to human welfare and survival supports treating it as a “common concern”, and therefore susceptible to being the object of international obligations.

Though the Convention affirms the responsibility to conserve as belonging to all States, it recognizes differences in capacity and situation between Parties. Article 6 describes general measures for conservation which each State shall carry out “in accordance with its particular conditions and capabilities.” The beneficiaries of these obligations include both present and future generations (Preamble).

There are also special protections for indigenous groups. States have a responsibility to “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements” (Article 10(c)).

In pursuance of its third goal, the fair and equitable sharing of benefits arising out of utilization of genetic resources, the Convention set up a framework regarding access to genetic resources and benefit-sharing (Article 15). "Recognizing the sovereign rights of States over their natural resources", the framework provides, "the authority to determine access to genetic resources rests with the national governments" (Article 15(1)). Access is encouraged, but shall be on "mutually agreed terms" and subject to "prior informed consent" of the Contracting Party (Article 15(4)-(5)). Benefits should be shared with the Contracting Party providing the resources "in a fair and equitable way", also on "mutually agreed terms" (Article 15(7)). A similar framework applies in the context of indigenous groups. Each State shall, as far as possible and as appropriate, subject to its national legislation, "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities . . . with the approval and involvement of the holders of such knowledge, innovations and practices . . . and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices" (Article 8(j)). These provisions show an emphasis on notification, consent, and equity, and recognize rights to national resources on the national and indigenous levels.

The Convention also provides for information exchange and participation, both between and within States (Articles 13, 14, 17). CBD requires the Parties to promote and encourage understanding of the conservation of biological diversity and to cooperate with other States and international organizations in developing educational and public awareness programs on conservation and sustainable use of biological diversity (Article 13). Under Article 14, parties shall introduce appropriate environmental impact assessment procedures and allow for public participation in such procedures (Article 14(1)(a)). The Convention specifically emphasizes participation of all relevant groups, including indigenous people and women (Preamble and Article 8(j)).

Article 14 provides that "the Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter. The Convention's work on liability is ongoing, but it has not yet formalized a liability regime. However, the suggestion of the possibility of such a regime for compensation for damage to biological diversity may be significant to a discussion of human rights and the environment.

#### **Cartagena Protocol on Biosafety to the Convention on Biological Diversity** 2226 U.N.T.S. 208 (Jan. 29, 2000)

The Cartagena Protocol was adopted in January 2000 to supplement the Convention on Biological Diversity. It entered into force in September 2003. The Protocol's goal is to reduce all potential threats to biological diversity posed by modified organisms created by biotechnology. To that end, the Protocol seeks to ensure safe transfer, handling and use of such living modified organisms, taking into account risks to human health (Article 1).

Article 23(1)(a) requires the Parties to promote awareness, education, and participation among the public concerning the safe transfer, handling, and use of living modified organisms in relation to conservation and sustainable use. Article 23(1)(b) requires that access to information and public consultation in the decision-making process regarding such organisms be ensured. Each Party is also required under Article 23 to inform the public about means of public access to the Biosafety Clearing-House (Article 23(3)).

#### **Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety** 50 I.L.M. 105 (Oct. 29, 2011) (*Not in force*)

The Nagoya – Kuala Lumpur Supplementary Protocol was adopted in October 2010 at the tenth meeting of the Conference of the Parties to supplement the Cartagena Protocol on Biosafety, adopted in September of 2000. The Protocol is intended to contribute to the safe transfer, handling, and use of living modified organisms that may have adverse effects on biological diversity, specifically with regards to transboundary movements, whilst taking into account risks to human health. To that end, the Protocol provides international rules and procedure for liability and redress from damage to biodiversity resulting from living modified organisms.

In the event of damage to biodiversity, Parties must require the appropriate operators within their jurisdiction to immediately inform competent authorities, evaluate the damage, and take appropriate response measures, except in the event of acts of God or force majeure and acts of war or civil unrest, as provided for in domestic law (Articles 5, 6). The Protocol also sets forth a State obligation to develop civil liability laws to address damage, standards of liability, including strict or fault-based liability, the channeling of liability, where appropriate, and the right to bring claims for material and personal damage resulting from the transfer of living modified organisms (Article 12).

The Protocol will enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Protocol.

**Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing  
of Benefits Arising from their Utilization to the Convention on Biological Diversity  
(October 29, 2010) (*Not in force*)**

The Nagoya Protocol was adopted at the tenth meeting of the Conference of the Parties in October of 2010 to create an international regime within the Convention on Biological Diversity to promote and safeguard the fair and equitable sharing of benefits arising from utilization of genetic resources.

One of the most important accomplishments of the Protocol is the inclusion of provisions regarding access to traditional knowledge. The Protocol emphasizes “the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components,” and recognizes “the right of indigenous and local communities to identify the rightful holders of their traditional knowledge associated with genetic resources, within their communities” (Preamble). To this end, access to traditional knowledge held by indigenous and local communities when it is associated with genetic resources must be premised on the prior and informed consent or approval and involvement of these indigenous and local communities, on the basis of established mutually agreed terms (Article 7). Furthermore, Parties are required, with the effective participation of the indigenous and local communities concerned, to establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations (Article 12).

As part of the institutional framework for such a regime, the Protocol creates national focal points, responsible for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms regarding the access of genetic resources (Article 13). The Protocol contains a provision on the monitoring of the utilization of genetic resources by, inter alia, requiring Parties to designate checkpoints that are responsible for collecting or receiving, as appropriate, relevant information related to prior informed consent, the source of the genetic resource, the establishment of mutually agreed terms, and/or the utilization of genetic resources. The protocol also foresees the issuance of internationally recognized certificates of compliance which serve as evidence that the genetic resources covered by the certificate have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, in line with relevant national legislation (Article 17). The Protocol further provides for the creation of an Access and Benefit-Sharing Clearing House that serves as a means for providing public access to information collected (Article 14). Additionally, each Party must ensure that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdictional requirements, in cases of disputes arising from mutually agreed terms (Article 18).

The Protocol will enter into force on the ninetieth day after the fiftieth instrument of ratification is deposited.

**United Nations Convention to Combat Desertification in Those Countries  
Experiencing Drought and/or Desertification, Particularly in Africa  
1954 U.N.T.S. 3 (Oct. 14, 1994)**

The UN Convention to Combat Desertification (UNCCD) was adopted in Paris in June 1994 and opened for signature in October 1994. It entered into force in December 1996. Its aim is to combat desertification and mitigate the effects of drought through long-term action supported by international cooperation and partnerships (Article 2(1)).



The Preamble to the Convention emphasizes the relationship between desertification and human wellbeing. It begins by affirming “that human beings in affected or threatened areas are at the centre of concerns to combat desertification and mitigate the effects of drought.” It goes on to acknowledge that arid, semi-arid, and dry sub-human areas “are the habitat and source of livelihood for a large segment of [Earth’s] population” and that “desertification and drought affect sustainable development through their interrelationships with important social problems such as poverty, poor health and nutrition, lack of food security, and those arising from migration, displacement of persons and demographic dynamics.”

The Convention reaffirms the principle that “States have . . . the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction” (Preamble).

One of the guiding principles of the Convention is that local communities should participate in the design and implementation of programmes to combat desertification (Articles 3(a); 5(d); 10(2)(e)-(f)). The Convention particularly emphasizes the importance of facilitating the participation of women and youth (Article 5).

Parties also have obligations regarding collection and exchange of information. Under Article 15, they must “ensure that the collection, analysis and exchange of information address the needs of local communities . . . and that local communities are involved in these activities.” (Article 15(b)). They must also “exchange and make fully, openly and promptly available information from all publicly available sources” (Article 15).

The Parties must cooperate with landholders to better understand the nature and value of land water resources in the affected areas and to work towards efficient and sustainable use of resources (Article 3(c)). The Parties must support research activities that address the needs of local communities to improve their standards of living (Article 17(1)(b)). Parties undertake to “protect, integrate, enhance and validate traditional and local knowledge, know-how and practices, ensuring, subject to their respective national legislation and/or policies, that the owners of that knowledge will directly benefit on an equitable basis and on mutually agreed terms from any commercial utilization of it or from any technological development derived from that knowledge” (Article 17(1)(c)).

**IAEA Joint Convention on the Safety of Spent Fuel Management  
and on the Safety of Radioactive Waste Management  
36 I.L.M. 1436 (Sep. 29, 1997)**

The Convention, largely based on principles contained in the IAEA document “The Principles of Radioactive Waste Management,” was both adopted and opened for signature in Vienna in September 1997 and entered into force in June 2001. It is the first legal instrument to directly address the safety of spent fuel and radioactive waste management on a global scale. Its aim is to maintain a high level of safety in this industry worldwide (Article 1).

The Preamble recognizes the importance of informing the public on issues regarding the safety of spent fuel and radioactive waste management. Articles 6 and 13 reinforce the importance of an informed public when siting proposed facilities; each Party is required to take steps to ensure that procedures are established and implemented to make information available to members of the public on the safety of any proposed spent fuel management facility or radioactive waste management facility.

**Convention on the Law of the Non-Navigational Uses of International Watercourses  
36 I.L.M. 700 (May 21, 1997)**

This Convention, adopted in May 1997 but not yet in force, seeks to protect, preserve and manage shared freshwater resources. It requires that watercourses be used in an equitable and reasonable manner (Article 5), taking into account various factors enumerated in Article 6, including the population dependent on the watercourse in each State. There is also an obligation not to cause significant harm to other watercourse States (Article 7). The Convention also concerns freedom from discrimination with respect to remedies: Article 32 states that watercourse States shall not discriminate against those who have suffered or are under a serious threat of suffering significant

transboundary harm on the basis of nationality or residence or place where the injury occurred, when granting access to judicial or other procedures, or a right to claim compensation or relief.

**Rotterdam Convention on the Prior Informed Consent Procedure for  
Certain Hazardous Chemicals and Pesticides in International Trade**  
2244 U.N.T.S. 337 (Sep. 10, 1998)

The Rotterdam Convention was adopted and opened for signature in September 1998 in Rotterdam. It entered into force in February 2004. The goal of the convention is to protect human health and the environment from potential harm by promoting shared responsibilities and cooperative efforts in the international trade of certain hazardous chemicals and to contribute to the environmentally sound use of those hazardous chemicals by facilitating information exchange about their characteristics (Article 1).

The Rotterdam Convention's primary mechanism is a prior informed consent procedure, whereby Parties may decide whether or not to consent to import substances listed in Annex III of the Convention (Article 10). Each exporting country is then obligated to ensure that exporters within its jurisdiction comply with these decisions (Article 11). Parties must also ensure that when exporters within their jurisdiction export chemicals banned or restricted in their own territory or included in Annex III of the Convention, the importing country is notified and supplied with relevant information about the chemical, and the chemical is labeled according to specified labelling requirements (Articles 12, 13).

Parties must facilitate the "exchange of scientific, technical, economic, and legal information concerning the chemicals within the scope of this Convention, including toxicological, ecotoxicological and safety information" (Article 14). Article 15(2) further requires each party to ensure, "to the extent practicable," that the public has "appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III to the Convention."

**Stockholm Convention on Persistent Organic Pollutants**  
2256 U.N.T.S. 119 (May 22, 2001)

The goal of the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention) is to protect human health and the environment from persistent organic pollutants by restricting and ultimately eliminating their production, use, trade, release and storage. Persistent Organic Pollutants (POPs) are chemicals that remain intact for long periods, becoming widespread and building up in the fatty tissue of humans and wildlife where they cause adverse effects to health and the environment. The Convention was adopted in Stockholm in May 2001 and entered into force in May 2004.

The Convention requires each Party, to the extent it is capable, to promote and facilitate providing the public with all available information on persistent organic pollutants and ensure that the public has access to public information and that the information is kept up to date (Article 10(1)(b), (2)). Additionally, Parties are required to develop educational and public awareness programs directed towards women, children, and the least educated (Article 10(1)(c)). Parties are also required to make available to the public information regarding the results of their research, development, and monitoring activities pertaining to persistent organic pollutants (Article 11(2) (e)). Confidential information should be protected, but information on health and safety of humans and the environment may not be regarded as confidential (Article 9(5)).

Article 25 "prohibits discrimination against indigenous peoples," and "promotes their full and effective participation in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development." Article 26 also provides that indigenous peoples "have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Under Article 29, the Declaration provides that "indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources", and that "States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent."

### **Minamata Convention on Mercury** (opened for signatures October 10, 2013)

This Convention was adopted on January 19, 2013, but will not enter into force until it has been ratified by fifty signatory states. The objective of the Minamata Convention, delineated in Article 1, is to safeguard human health and the environment from the negative effects of mercury exposure through reducing emissions and releases of mercury into the atmosphere, land, or water. Article 3(3, 4) prohibits primary mining of mercury; however, mercury mines currently in operation may continue for fifteen more years before they will be disallowed. Additionally, under Article 7(2), state parties are to decrease, and where practicable eliminate, the use and release of mercury from artisanal and small-scale gold mining. Furthermore, Article 8(1) and Annex D delineate that state parties are to control, and where practicable decrease, mercury air emissions from coal-fired power plants, coal-fired industrial boilers, specific types of non-ferrous metals production, waste incineration, and cement production. Under Articles 4(1) and 5(2) and Annexes A and B, state parties are compelled to phase-out, or take steps to lessen, mercury use in particular products such as batteries, lights, cosmetics, and pesticides, as well as phase-out or diminish the use of mercury in manufacturing processes such as chlor-alkali or acetaldehyde production.

### ***Non-Legally Binding Instruments***

#### **Declaration of the United Nations Conference on the Human Environment** 11 I.L.M. 1416 (Jun. 16, 1972)

In 1972, the Stockholm Declaration became the first international environmental instrument to state a connection between environmental protection and human rights. It states that “man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights and the right to life itself” (Proclamation 1).

Throughout the Stockholm Declaration there are other explicit references to the link between environmental protection and human rights. Principle 1 states: “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.” Principle 21 provides: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

#### **Rio Declaration on Environment and Development** 31 I.L.M. 874 (Jun. 13, 1992)

The Rio Declaration was adopted in Rio de Janeiro in June 1992. It built on the Stockholm Declaration with the goal of “establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people” (Preamble).

Although the Rio Declaration does not explicitly address human rights, it contains several relevant provisions. Principle 1 states that human beings are entitled to a healthy and productive life in harmony with nature. Principle 3 provides that the right to development must be fulfilled in such a way as to meet developmental and environmental needs of both present and future generations. Principle 10 of the Rio Declaration provides that “each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.” Principle 7 provides that states should cooperate through global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem, while pointing out differentiated responsibilities that developed countries bear in light of the pressures their societies place on the global environment and of the technologies and financial resources, they command.

**Agenda 21**  
**U.N. Doc. A/Conf.151/26 (Jun. 14, 1992)**

Agenda 21 was adopted by over 178 Governments in June 1992 in Rio de Janeiro. Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which humans impact on the environment.

The Preamble to Section III states that broad public participation in decision-making is a “fundamental prerequisite for the achievement of sustainable development” (Chapter 23, paragraph 2). It recognizes that individuals, groups, and organizations should be able to participate in environmental impact assessment procedures and to know about and participate in decisions affecting the communities in which they live and work. Thus they require access to information relevant to environment and development that may be held by the authorities. Chapters 24 to 32 stress that participation as detailed above is particularly needed from women, youth, indigenous and local populations, non-governmental organizations, local authorities, workers, business and industry, scientists and farmers.

**UNESCO Declaration on the Responsibilities of the Present Generation  
towards Future Generations**  
**Nov. 12, 1997<sup>67</sup>**

The Declaration on the Responsibilities of the Present Generation towards Future Generations was adopted in Paris by the General Conference of UNESCO in November 1997. The Preamble of the Declaration acknowledges that “the very existence of humankind and its environment are threatened.” Article 1 states that present generations have an obligation to protect the needs and interests of both present and future generations, and Article 5 focuses on the protection of the environment.

Specifically, in order to protect the environment, present generations must work towards sustainable development of the environment, reduce pollution, and take into account possible consequences of major projects before they begin (Article 5). The Declaration recognizes that education is an important tool for meeting this obligation (Article 10).

**Rio+20 Outcome Document ‘The Future We Want’**  
**U.N. Doc. A/CONF.216/L.1\* (Jun. 19, 2012)**

The Outcome Document of the Rio+20 United Nations Conference on Sustainable Development was adopted in Rio de Janeiro in June 2012, twenty years after the landmark Rio Earth Summit in 1992. It builds on the Rio Declaration and Agenda 21 and reaffirms many of the 27 Rio principles.

The Outcome Document sets out a common vision aimed at “ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations” (Section I, para. 1). Further, it makes explicit reference to the need for human rights protection including the right to development set out in Principle 3 of the 1992 Rio Declaration and to intergenerational equity (Section II C, para. 39).

The two main themes of the Rio+20 Conference now enshrined in the Outcome Document are a) a green economy in the context of sustainable development and poverty eradication; and b) the institutional framework for sustainable development. Pertinently, the Document clarifies that green economy policies should “promote sustained and inclusive growth, foster innovation and provide opportunities, benefits, and empowerment for all and respect for all human rights” (Section III, para. 58(d)).

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67 Full text of the Declaration is available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13178&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13178&URL_DO=DO_TOPIC&URL_SECTION=201.html)

## Regional Environmental Law Instruments

### *Legally Binding Instruments*

#### *Africa*

##### **African Convention on the Conservation of Nature and Natural Resources** 1001 U.N.T.S. 3 (Sep. 15, 1968)

The African Convention on the Conservation of Nature and Natural Resources was adopted in September of 1968 and entered into force less than a year later, in June of 1969. The Convention emphasizes the importance of the natural environment to human welfare and development. The preamble recognizes that “soil, water, flora and faunal resources constitute a capital of vital importance to mankind”, and “the ever-growing importance of natural resources from an economic, nutritional, scientific, educational, cultural and aesthetic point of view.” The Convention outlines specific measures which countries should take to protect soil, water, flora and fauna, with specific provisions on protected species and the establishment of conservation areas.

In 2003, the Member States of the African Union adopted a revised Convention which explicitly acknowledges “the right of all peoples to a satisfactory environment favorable to their development” and a corresponding duty of States to ensure the enjoyment of that right (Article III). It also provides for procedural rights, requiring Parties to ensure public access to information, public participation in decision-making, and access to justice in matters related to the environment and natural resources (Article XVI). Finally, it requires Parties to take measures to protect rights of local communities, including intellectual property rights, and to require that access to indigenous knowledge be subject to prior informed consent, and to enable active participation by local communities in planning and managing natural resources upon which those communities depend (Article XVII). However, this Convention is not yet in force.

##### **Abidjan Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region** 20 I.L.M. 746 (Mar. 23, 1981)

The Abidjan Convention was adopted in 1981 and entered into force in 1984. The Convention focuses on preventing, reducing and controlling pollution and erosion of the marine and coastal environment of West and Central Africa. It comprises part of the UNEP Regional Seas Programme.

The preamble of the Convention recognizes the “economic, social and health value of the marine environment and coastal areas.” It acknowledges States’ responsibility “to preserve their natural heritage for the benefit and enjoyment of present and future generations.”

The Convention provides for creation of protected areas within Parties’ territories, within which activities likely to have adverse effects on species, ecosystems, or biological processes in those areas would be prohibited or controlled (Article 11).

Article 13 provides for environmental impact assessments in planning any projects that may cause substantial pollution or significant harm. It further provides that the Parties shall “develop procedures for the dissemination of information concerning the assessment”.

Article 15 provides for the “formulation and adoption of appropriate rules and procedures for the determination of liability and the payment of adequate and prompt compensation for damage resulting from pollution of the Convention area.”

**Nairobi Convention for the Protection, Management and Development  
of the Marine and Coastal Environment of the East African Region**  
June 21, 1985<sup>68</sup>

The Nairobi Convention, also a component of the UNEP Regional Seas Programme, was adopted in 1985, and entered into force in 1996. It focuses on control of pollution of marine and coastal areas from a variety of sources. The Nairobi Convention contains many of the same provisions as the Abidjan Convention, including provisions on establishment of protected areas (Article 10), dissemination of information from environmental impact assessments (Article 13), and liability and establishment of liability and compensation mechanisms (Article 15).

At the time of adoption of the Convention, Parties also adopted the Protocol Concerning Protected Areas and Wild Fauna and Flora, which entered into force in 1996. The Preamble of the Protocol recognizes “that natural resources constitute a heritage of scientific, cultural, educational, recreational and economic value that needs to be effectively protected.” The Protocol provides for States to prohibit activities having adverse effects on protected species of wild flora or fauna, including destruction of habitats, and collecting, cutting, capture, keeping, or killing such species (Articles 3-4). It also provides for States to regulate harvest of harvestable species to maintain populations, and to establish protected areas within their territories (Articles 5, 8).

The Protocol touches on the issue of indigenous people; it states that Parties should “take into account the traditional activities of their local populations in the areas to be protected” (Article 12). Articles 14 and 15 deal with public access to information and public participation. Article 14 provides that the Parties “shall give appropriate publicity to the establishment of protected areas.” Article 15 provides that the Parties “shall endeavour to inform the public as widely as possible of the significance and interest of protected areas and the protection of wild fauna and flora” particularly through education programmes. It goes on to provide that Parties “should also endeavour to promote the participation of their public and their nature conservation organizations in the protection of the areas and wild fauna and flora concerned.”

**Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary  
Movement and Management of Hazardous Wastes within Africa**  
2101 U.N.T.S. 177 (Jan. 30, 1991)

The Bamako Convention was adopted in January, 1991 and entered into force in March, 1999. The Convention aims to protect human health and the environment through reduction in the transboundary movement of hazardous waste. The Convention prohibits the import of all hazardous wastes into Africa from non-Contracting Parties and makes such import illegal and a criminal offense (Article 4(1)). It also obligates states to prevent export of waste to states which have prohibited it, and to prevent export if they have reason to believe the waste would not be managed in an environmentally sound manner in the country of import, or if the state of import does not have adequate facilities to dispose of the waste in an environmentally sound manner (Article 4(3)). Article 13 provides that Parties, “consistent with national laws and regulations, shall set up information collection and dissemination mechanisms on hazardous wastes” (Article 13(3)).

**Protocols on Shared Watercourse Systems, Wildlife Conservation and Law Enforcement,  
and Forestry to the Treaty of the Southern African Development Community**  
August 17, 1992<sup>69</sup>

The SADC Treaty was adopted in 1992, and entered into force in 1993. The Treaty has provided a framework for a set of protocols, including environmental protocols, governing the Southern African region. The Treaty's objectives include, *inter alia*, the promotion of sustainable development in order to achieve poverty alleviation and enhancement of living standards, and effective protection of the environment (Article 5). In pursuance of these objectives, the SADC “shall seek to involve fully the people of the Region and key stakeholders” (Article 23). In addition, States agree to co-operate in the areas of food security, land and agriculture, natural resources, and the environment, among others (Article 21(3)).

68 The full text of the convention and its protocols is available at: [http://www.unep.org/NairobiConvention/docs/Final\\_Act\\_Protocol&Text\\_Protocol\\_Nairobi\\_Convention.pdf](http://www.unep.org/NairobiConvention/docs/Final_Act_Protocol&Text_Protocol_Nairobi_Convention.pdf)

69 The complete texts of the treaty and protocols are available at <http://www.sadc.int/english/key-documents/>

In 1995, Parties adopted the Protocol on Shared Watercourse Systems, which entered into force in 1998. The Protocol provides a set of guidelines for balancing development and conservation, and for equitable sharing of watercourse resources taking into account several factors including social and economic needs (Article 2(3,6-7)). The Protocol also provides for the establishment of River Basin Management Institutions, the duties of which include “Collecting, analysing, storing, retrieving, disseminating, exchanging and utilising data”, and “Stimulating public awareness and participation in the sound management and development of the environment including human resources development.

The Protocol on Wildlife Conservation and Law Enforcement, adopted in 1999 and entered into force in 2003, imposes on States a “responsibility to sustainably use and conserve [wildlife] resources” corresponding to a “sovereign right to manage their wildlife resources” (Preamble). This responsibility extends to internal as well as transboundary resources. Article 3(1) provides “Each State Party shall ensure the conservation and sustainable use of wildlife resources under its jurisdiction. Each State Party shall ensure that activities within its jurisdiction or control do not cause damage to the wildlife resources of other states or in areas beyond the limits of national jurisdiction.” The second sentence, a nod to Principle 21, covers the issue of transboundary harm. The first sentence seems to cover intrastate wildlife resources. The Protocol elaborates on this with specific obligations regarding management and conservation, including restrictions on taking and trade, protection of habitats (Article 7). The Protocol also provides for the establishment of a regional database on the status and management of wildlife, which should be accessible to the general public (Article 8).

Finally, in 2002 the Parties adopted the Protocol on Forestry, which has not yet entered into force. The Protocol deals with many issues relevant to Human Rights and the Environment, including the intrinsic value of forests (Preamble, Article 3(h)), the value of forests to humanity “including their role in maintaining the earth’s climate, in controlling floods and erosion, as sources of clean water, food, wood and other forest products as well as having spiritual, cultural and aesthetic value to humans” and the relationship between forests and livelihoods (Preamble, Article 3(h)), equitable access to and sharing of benefits derived from forest resources, including but not limited to genetic resources (Preamble, Article 3(1)(j)), 12(a), 17(1)), protection of rights over traditional knowledge (Preamble, Article 15), and responsibility to future generations (Preamble, Articles 3(1)(c), 4). The Protocol also provides for the right to access to information (Article 3(2)(c), 11(1)(c)) and the right to participate in forest management (Articles 3(2)(g), 4, 11(1)(c), 12(a)), with emphasis on enabling the effective participation of women (Preamble, Article 13). It provides for establishment of a regional database for sharing data on the status and trends, management, and use of forest resources (Article 10(1)). The Protocol also discusses issues of ownership and occupancy rights of parties managing or using forest resources (Article 5).

**Treaty for the Establishment of the East African Community**  
**2144 U.N.T.S. 255 (Nov. 30, 1999) (amended Dec. 14, 2006; Aug. 20, 2007)<sup>70</sup>**

The Treaty for the Establishment of the East African Community was signed on November 30, 1999, and entered into force on July 7, 2000. It was twice amended, once in December of 2006, once in August of 2007.

In addition to containing an entire chapter on environmental and natural resources management, the Treaty recognizes linkages between environmental conservation and food security and development. Article 105 states that States undertake to adopt a scheme with a view to promoting the sustainability of national agricultural programs in order to achieve the objective of food security and rational agricultural production. In pursuance of the same objective, States undertake to cooperate to combat droughts and desertification, two of the main forms of land degradation affecting Africa (Article 105(2)). Under Article 109, States commit to “adopt and promote the use of environmentally safe methods of land use” as part of an effort to improve water catchment management and irrigation. Article 111 recognizes that “a clean and healthy environment is a prerequisite for sustainable development.”

These explicit links between environmental quality and food security and development are relevant to the intersection of human rights and the environment in that they support the inference that the right to food or the right to development, imply the necessity of environmental conservation and protection.

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<sup>70</sup> The complete amended treaty is available at: <http://www.eac.int/>.

In 2005, the Members of the East African Community adopted a Protocol on Environment and Natural Resources, which has not yet entered into force.<sup>71</sup> Article 4 of the Protocol provides that States undertake to observe “the principle of the fundamental right of the people to live in a clean and healthy environment” (Article 4(2)(a)).

## **Europe**

### **UNECE Convention on Long-Range Transboundary Air Pollution 1302 U.N.T.C. 217 (Nov. 13, 1979)**

The Convention on Long-Range Transboundary Air Pollution (LRTAP) aims “to protect man and his environment against air pollution.” It was adopted in November, 1979, and entered into force in March, 1983. The Convention provides a framework under which parties can adopt protocols to establish specific measures. As of April 2012, eight such protocols have entered into force.

Many of these protocols provide for dissemination of information on specific pollutants and measures taken to reduce risk and concentration of those pollutants to the general public, “consistent with their laws, regulations and practices. These include the 1998 Aarhus Protocol on Persistent Organic Pollutants (entered into force 2003) (Article 6), and the 1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (entered into force 2005)(Article 5).

In addition, the 1991 Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes (entered into force 1997) requires each Party to “foster public participation in emission control programmes through public announcements, encouraging the best use of all modes of transportation and promoting traffic management schemes” within two years after the Protocol comes into force (Article 2(3)(a)(iv)).

### **UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1989 U.N.T.S. 309 (Feb. 25, 1991)**

The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) was adopted in Espoo in February 1991 during preparations for the Rio Conference, and it entered into force in September 1997. It guarantees non-discriminatory public participation in environmental impact procedures for activities that may create significant adverse transboundary environmental impact. Specifically, States are required to notify the public (Article 3(1)) and to provide an opportunity for public participation in EIA procedures regarding proposed activities in any area that is likely to be affected by transboundary harm (Article 2(2)).

Espoo makes public participation obligatory with respect to pre-existing State legislation – the public must be informed of and provided with possibilities for making comments or objections on proposed activities and that these comments or objections must be transmitted to the appropriate authority (Article 3(8)). Article 2(6) provides that the “Party of origin shall provide an opportunity to the public in areas likely to be affected to participate in relevant impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the Party of origin.”

### **Convention on the Protection of the Alps 1917 U.N.T.S. 135 (Mar. 7, 1991)**

The Alpine Convention was adopted in Salzburg in 1991. The Convention entered into force for the European community in April 1998. It has been supplemented by nine protocols, which collectively contain broad guarantees of public information (requiring training and provision of information to the public concerning objectives, measures and implementation of the agreed rules). Its objective is to preserve and protect the Alps and use Alpine resources sustainably (Article 2(1)).

71 The text of the protocol is available at: [http://www.eac.int/legal/index.php?option=com\\_docman&task=doc\\_download&gid=174&Itemid=28](http://www.eac.int/legal/index.php?option=com_docman&task=doc_download&gid=174&Itemid=28)



In taking measures to achieve the objective, the Parties must “respect, preserve and promote the cultural and social independence of the indigenous population and ... guarantee the basis for their living standards, in particular environmentally sound settlement and economic development” (Article 2(2)(a)) and reduce air pollution to a level that will not harm humans, flora and fauna (Article 2(2)(c)), among other things. Additionally, the Convention requires Parties to ensure that the public is regularly kept informed about the results of research, monitoring and action taken (Article 4(4)).

### **UNECE Convention on the Transboundary Effects of Industrial Accidents** Mar. 17, 1991

The Convention on the Transboundary Effects of Industrial Accidents was adopted in Helsinki in March 1992 and entered into force in April 2000. Its goal is to protect both people and the environment from industrial accidents. It seeks to do this through preventing accidents from occurring or reducing their frequency and effects (Article 3). This convention contains three procedural obligations involving the general public: provision of information, participation in decision-making, and access to remedies.

Parties are required to ensure that adequate information is given to the public in all areas capable of being affected by an industrial accident arising out of a hazardous activity (Article 9(1)). This information must include identification and explanation of the hazardous activity and the risks involved, potential effects on the population and environment of possible industrial accidents, information on special regulations of the hazardous activity and measures to mitigate the effects of industrial accidents (Annex VIII).

Parties are also required to give the public in the areas cable of being affected, an opportunity to participate in relevant procedures regarding prevention and preparedness measures. The Party of origin must ensure that the public of the affected Party is afforded an opportunity to participate equivalent to that given to the public of the Party of origin (Article 9(2)).

Finally, Parties must provide access to administrative and judicial proceedings to real and potential victims of transboundary industrial accidents. Parties must provide these legal remedies to transboundary victims equivalent to those available to persons within their own jurisdiction (Article 9(3)).

### **UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes** 1936 U.N.T.S. 269 (Mar. 17, 1992)

The UNECE Convention on the Protection and Use of Transboundary Watercourses (UNECE Watercourses Convention) was adopted in Helsinki in March 1992 and entered into force in October 1996. The goal of the UNECE Watercourses Convention is to strengthen national measures for the protection and ecologically sound management of transboundary surface waters and groundwater to prevent, control and reduce transboundary impact (Article 2(1)-(2)).

The Convention requires the “widest exchange of information” possible, subject to maintaining the confidentiality of protected information” (Articles 6 and 8). Specifically, it declares that information on the conditions of transboundary waters, measures taken or planned to prevent, control and reduce transboundary environmental impact, and the effectiveness of those measures, must be made available to the public at all reasonable times for inspection free of charge; there must also be reasonable facilities for members of the public to obtain copies of such information at a reasonable charge (Article 16).

In 1999, Parties to the UNECE Watercourses Convention adopted the Protocol on Water and Health, which came into force in August 2005<sup>72</sup>. The goal of the protocol is to improve water management in order to protect human health and well-being (Article 1). The Protocol recognizes that access to information and public participation

72 Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, U.N. Doc. MP.WAT/2000/1 (Jun. 17, 1999)

in decision-making concerning water and health are needed “to enhance the quality and implementation of decisions, to build public awareness of issues, to give the public the opportunity to express its concerns and to enable public authorities to take due account of such concerns” (Article 5(i)).

Article 10(1) of the Protocol requires Parties to make available to the public information that is needed to inform the public of: “(a) The establishment of targets and of target dates for their achievement and the development of water-management plans...; (b) The establishment, improvement or maintenance of surveillance and early-warning systems and contingency plans...; (c) The promotion of public awareness, education, training, research, development and information...” Additionally, Parties are required to respond to information requests within a reasonable time and must provide the public with reasonable facilities for obtaining from the Parties copies of such information (Article 10(2) and (3)), although confidential information and information relating to national defense or public security does not have to be provided (Article 10(5)).

### **Helsinki Convention for the Protection of the Marine Environment of the Baltic Sea (Apr. 9, 1992), supersedes 1974 Convention, 13 I.L.M. 546**

The Helsinki Convention was adopted in April 1992 because of political changes and developments in international environmental and maritime law since the original Helsinki Convention was adopted in 1974. It entered into force in January 2000. The Convention covers the Baltic Sea Area, which includes internal waters as well as the sea and seabed itself (Article 1). The Convention’s objective is to prevent and eliminate pollution in order to promote the ecological restoration of the Baltic Sea Area and the preservation of its ecological balance (Article 3).

Article 17 requires that the public have access to information “on the condition of the Baltic Sea and the waters in its catchment area, measures taken or planned to be taken to prevent and eliminate pollution and effectiveness of those measures.” Article 18 provides that Parties do not have to provide confidential information. However, Article 17 requires that certain information be made available: permits issued and the requirements that had to be met for those permits; the results of water and effluent sampling and the results of checking compliance with water quality objectives or permit conditions; and water-quality objectives.

### **Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution 1102 U.N.T.S. 27 (Feb. 16, 1976)**

The Barcelona Convention is a regional convention aimed at preventing and abating pollution from ships, aircraft and land based sources in the Mediterranean Sea. It is part of UNEP’s Regional Seas Programme. It was amended in June 1995. Its objective is to “prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in that area so as to contribute towards its sustainable development” (Article 4(1)).

Article 15 concerns public information and participation. It requires that the Parties ensure their authorities allow members of the public to access information on the environmental state of the area, and on any measures which will affect or are affecting the area, as well as measures taken pursuant to the Convention (Article 15(1)) – unless for a reason listed in Article 15(3). It also requires that the public be allowed to participate in decision-making processes relating to the Convention (Article 15(2)).

Article 16 deals with liability and compensation, specifying that the Parties must cooperate in the formulation and adoption of appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment. Article 17 concerns the institutional arrangements for the Convention and provides that UNEP, as Secretariat, must receive, consider and reply to Convention-related inquiries and information from non-governmental organizations and the public.

**Bucharest Convention on the Protection of the Black Sea against Pollution**  
32 I.L.M. 1101 (Apr. 21, 1992)

The Bucharest Convention was adopted in April 1992 in Bucharest. Along with its protocols, the Bucharest Convention aims to prevent, reduce and control pollution from various sources to preserve the environment of the Black Sea (Article V).

The Convention contains a remedies provision in Article XVI, which requires each Party to adopt rules and regulations on the liability for damage caused by natural or legal persons and to ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or relief for damage caused by pollution of the Black Sea.

**OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic**  
32 I.L.M. 1069 (Sep. 22, 1992)

The OSPAR Convention was opened for signature in Paris in September 1992, and entered into force in March 1998. It prescribes international cooperation through individual and joint programmes and measures to prevent and eliminate pollution in the North-East Atlantic (Article 2(1)).

Article 9(1) requires Parties to ensure that their competent authorities make available relevant information to any natural or legal person, in response to any reasonable request, without the person having to prove an interest, without unreasonable charges, and within two months of the request (unless it is a confidential issues or relates to public security, as exempted by Article 9(3)).

**Convention on Co-operation for the Protection and Sustainable Use of the River Danube**  
Jun. 29, 1994<sup>73</sup>

The Danube River Protection Convention was adopted in Sofia in June 1994 and came into force in October 1998. The Convention provides for cooperation on transboundary water management in the Danube River Basin, and aims to ensure that surface waters and ground water are conserved, improved and used rationally and sustainably (Article 2).

Article 14 requires that Parties' authorities respond to any reasonable request by a natural or legal person for information concerning the state or quality of the riverine environment in the basin. Such a person may be charged a reasonable fee for such information, but need not prove an interest in that information. Authorities may refuse to provide the requested information, but must do so in writing and must base their decision on reasons specified in Article 14(3).

**Energy Charter Treaty**  
34 I.L.M. 360 (Dec. 17, 1994)

The goal of the Energy Charter Treaty, opened for signature in Lisbon in December 1994, is to strengthen the rule of law on energy issues. It seeks to do this by creating a set of rules which will promote long-term cooperation in the energy field (Article 2) in order to mitigate the risks associated with energy-related investments and trade.

Article 19(1)(f) calls on the Parties to promote public awareness of the Environmental Impact of energy systems, of the scope for the prevention or abatement of their adverse Environmental Impacts, and of the costs associated with various prevention or abatement measures. Article 19(1)(i) requires promotion of transparent assessment at an early stage and prior to decision, and subsequent monitoring, of Environmental Impacts of environmentally significant energy investment projects. Article 20(2) requires Parties to publish all laws, regulations, judicial decisions and administrative rulings of general agreements in force between Parties which affect other matters covered by the Treaty, so that the Parties and Investors can become acquainted with them.

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73 Full text of the Convention is available at <http://www.icpdr.org/icpdr-pages/drpc.htm>.

**Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)**  
38 I.L.M. 517 (Jun. 25, 1998)

The Aarhus Convention was the first international legal instrument in Europe to explicitly recognize the right to a healthy environment. It is a comprehensive treaty, serving as both an environmental agreement and a human rights agreement focused on government accountability and transparency. The Aarhus Convention requires Parties to provide access to information and public participation and access to justice to their citizens. It was adopted in Aarhus in June 1998 and entered into force in October 2001.

The recognition of a right to a healthy environment is evident throughout the Aarhus Convention. The Convention's Preamble states that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations." Article 1 states the Convention's objective: "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well being each Party shall guarantee the rights of access to information, public participation in decision making, and access to justice in environmental matters."

The Convention requires Parties to collect and publicly disseminate information, and respond to specific requests (Articles 4 to 5). Each party is required to prepare and disseminate a national report on the state of the environment at three to four year intervals. In addition, it is to disseminate legislative and policy documents, treaties, and other international instruments relating to the environment. Each Party must ensure that public authorities, upon request, provide environmental information to a requesting person without the latter having to state an interest. In addition to providing information on request, each Party must be pro-active ensuring that public authorities collect and update environmental information relevant to their functions. This requires that each Party establish mandatory systems to obtain information on proposed and existing activities which could significantly affect the environment.

Article 4(4) contains several exceptions to the duty to inform, in the light of other political, economic and legal interests. Where non-exempt information can be separated from exempt information, it must be disclosed (Article 4(6)). The government is also required to disclose any information regarding any imminent threat to human health or the environment (Article 5(1)(c)).

Article 5(6) requires Parties to encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, through eco-labeling, eco-auditing or similar means. Parties are also to ensure that consumer information on products is made available.

Articles 6 to 8 guarantee public participation and require it when decisions are made on whether to permit or renew permission for industrial, agricultural, and construction activities listed in an Annex to the Convention as well as other activities which may have a significant impact on the environment. Specifically, the public must be informed early on in the process and be given adequate time to prepare and make public comments. During the process, the public must have access to all relevant information on the project. Public participation can occur in writing, in hearings, or through inquiries. All public comments, information, analyses, and opinions must be taken into account when making a decision. All decisions must be made public along with the reasons and considerations on which the decision is based. Additionally, the Convention calls for public participation in the preparation of environmental plans, programs, policies, laws, and regulations.

Article 9 enables access to justice by requiring that proceedings are held before an independent and impartial body established by law. Each Party must provide judicial review for any denial of requested information, a remedy for any act or omission concerning the permitting of activities and "acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment." Standing to challenge permitting procedures or results is limited to members of the public having a sufficient interest or maintaining impairment of a right; however, the Convention provides that environmental non-governmental organizations "shall be deemed" to have sufficient interest of this purpose.

## **Americas**

### **North-American Agreement on Environmental Cooperation 32 I.L.M. 1480 (Sep. 14, 1993)**

The North-American Agreement on Environmental Cooperation (NAAEC), which was negotiated in parallel to NAFTA, was adopted by the United States, Mexico, and Canada in September 1993 and entered into force in January 1994. Its goal is to better conserve, protect and enhance the North American environment through cooperation and the development and effective enforcement of environmental laws (Article 1).

The Agreement requires the Parties to make reports on the state of the environment available to the public and promote education in environmental matters (Article 2), as well as all laws, regulations, procedures and administrative rulings relating to the Agreement (Article 4). It also establishes a procedure under Article 6 by which interested persons can request investigations into alleged violations of environmental laws and regulations, with associated remedies available.

The NAAEC creates a permanent trilateral body, the Commission for Environmental Cooperation, part of which is composed of a Joint Public Advisory Committee (JPAC), a Council, and a Secretariat (Article 8). The JPAC consists of 15 members of the public, 5 from each member country, and provides technical, scientific, and other information to the Secretariat as well as serving an advisory role to the Council (Article 16).

### **Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region 1506 U.N.T.S. 157 (Mar. 24, 1983)**

The Cartagena Convention was adopted in March of 1983 as part of the UNEP Regional Seas Programme. It entered into force on October 11, 1986. Like other UNEP Regional Seas Conventions, the Cartagena Convention establishes a framework of cooperation for Parties to manage pollution and marine degradation.

The Cartagena Convention contains specific provisions on addressing pollution from ships, dumping, land-based sources, seabed activities, or air pollution (Articles 5-9), and on the establishment of protected areas (Article 10). It provides for State Parties to conduct Environmental Impact Assessments and “develop procedures for the dissemination of information” gained from such assessments (Article 12(3)). Article 14 provides for Parties to cooperate to adopt rules and procedures for liability and compensation for damage resulting from pollution.

On January 18, 1990, the Parties adopted the Protocol Concerning Specially Protected Areas and Wildlife, which entered into force on June 17, 2000.<sup>74</sup> The Protocol recognizes the “overwhelming ecological, economic, aesthetic, scientific, cultural, nutritional and recreational value of rare or fragile ecosystems and native flora and fauna”, and that “protection and maintenance of the environment . . . are essential to sustainable development within the region” (Preamble). It further recognizes that “the establishment and management of such protected areas, and the protection of threatened and endangered species will enhance the cultural heritage and values of the countries and territories in the Wider Caribbean Region, and bring increased economic and ecological benefits to them.”

The Protocol provides for the establishment of protected areas, in order to conserve, maintain and restore representative ecosystems, habitats, resources “upon which the welfare of local inhabitants is dependent,” and “areas of special biological, ecological, educational, scientific, historic, cultural, recreational, archaeological, aesthetic, or economic value” (Article 4). As part of the planning and management of protected areas, the Protocol provides that Parties should develop public awareness and actively involve local communities (Article 6(1)(d)-(e)). Article 16 elaborates that “each Party shall endeavour to inform the public, as widely as possible, of the significance and value of the protected areas and species”, and “each Party shall also endeavor to promote the participation of its public and its conservation organizations in measures that are necessary for the protection of the areas and species concerned.”

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74 2180 U.N.T.S. 101 (2004)

## ***Asia and the Pacific***

### **Jeddah Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment Feb. 14, 1982<sup>75</sup>**

The Jeddah, negotiated under the auspices of the UNEP Regional Seas Programme, was adopted in February 1982 and entered into force in August of 1985.

The Convention recognizes the connection between marine pollution and human health and welfare, stating that “pollution of the marine environment . . . presents a growing threat to marine life, fisheries, human health, recreational uses of beaches and other amenities” (Preamble).

The Jeddah Convention states that Contracting Parties shall, “take all appropriate measures . . . for the conservation of the Red Sea and Gulf of Aden environment.” (Article III). It defines “conservation” as “Rational use by man of living and non-living marine and coastal resources in a manner ensuring optimum benefit for the present generation while maintaining the potential of that environment to satisfy the needs and aspirations of future generations.” (Article I(1)). Together, these provisions add up to an explicit obligation on the part of States to conserve the environment for the benefit of future generations.

### **Agreement Establishing the South Pacific Regional Environment Programme 1982 U.N.T.S. 3 (June 15, 1993)**

The Agreement Establishing the South Pacific Regional Environment Programme (SPREP) was adopted in 1993 and entered into force in 1995. SPREP was established with the goal of promoting cooperation in conservation and improvement of the environment of the South Pacific.

The Agreement recognizes concepts of heritage, and obligations to future generations. The Preamble recognizes the Parties’ “responsibility to preserve their natural heritage for the benefit and enjoyment of present and future generations and their role as custodians of natural resources of global importance.” Article 2(1) provides that one of the purposes of SPREP is “to ensure sustainable development for present and future generations.”

### **Waigani Convention to Ban the Importation into Forum Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movements and Management of Hazardous Wastes within the South Pacific Region 2161 U.N.T.S. 91 (Sep. 16, 1995)**

The Waigani Convention was adopted in September of 1995 and entered into force in October 2001. The Convention bans and criminalizes import and export of hazardous and radioactive wastes to all territories in the Convention Area except the territories of Australia and New Zealand (Article 4). It also sets up a system for regulating the transboundary movement of hazardous waste between Parties, relying on specified notification and consent procedures (Article 6).

The Convention recognizes Parties’ “responsibility to protect, preserve and improve the environment of the South Pacific for the good health, benefit and enjoyment of present and future generations of the people of the South Pacific” (Preamble). It provides for public access to information. Under Article 7, Parties “consistent with national laws and regulations, shall set up information collection and dissemination mechanisms on hazardous wastes.” Article 10 provides that “Parties shall encourage cooperation with international organisations in order to promote, among other things, public awareness.” Finally, Article 12 provides that the Conference of the Parties shall “consider the preparation and adoption of appropriate arrangements in the field of liability and compensation arising from transboundary movements of hazardous wastes in the Convention Area.”

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75 Full text available at: [http://www.persga.org/Documents/Doc\\_62\\_20090211112825.pdf](http://www.persga.org/Documents/Doc_62_20090211112825.pdf)

**Convention on the Conservation and Management of Highly Migratory Fish Stocks  
in the Western and Central Pacific Ocean**  
2275 U.N.T.C. 43 (Sep. 5, 2000)

The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPF) was opened for signature in Honolulu in September 2000 and came into force in June 2004. The Convention seeks to address problems in the management of high seas fisheries resulting from unregulated fishing, over-capitalization, excessive fleet capacity, vessel re-flagging to escape controls, insufficiently selective gear, unreliable databases and insufficient multilateral cooperation in order to ensure the conservation and sustainability of highly migratory fish stocks (Article 2).

Article 21 calls on the Commission to “promote transparency in its decision-making processes and other activities.” Thus, intergovernmental and non-governmental organizations concerned with the Convention’s implementation must be able to participate in Commission meetings and meetings of its subsidiary bodies. Such organizations are also to be given timely access to relevant information.

**Convention on Civil Liability for Damage Resulting from Activities Dangerous  
to the Environment (Council of Europe)**  
32 I.L.M. 1228 (Jun. 21, 1993) (*Not in force*)

The Convention was adopted in June 1993 in Lugano, though it has not yet entered into force. The primary focus of the Convention is on providing access to remedies for damage resulting from certain activities dangerous to the environment (Article 1). Additionally, environmental protection foundations or associations can request a Party to prohibit a dangerous, unlawful activity that poses a grave threat of damage to the environment, or to take measures to prevent damage (Article 18(1)).

There is a three-year statute of limitations that runs from the date on which the claimant knew or reasonably should have known of the damage and of the identity of the operator (Article 17(1)), but in no case may an action be brought after thirty years from the date the incident occurred (Article 17(2)). There is jurisdiction where the damage was suffered, where the dangerous activity was conducted, and where the defendant has his habitual residence (Article 19(1)).

Chapter III deals with access to information. Public authorities, and bodies with public responsibilities for the environment, are required within two months to provide access to information to any person upon request (with specified exceptions), subject to paying a reasonable price (Articles 14 and 15). A person suffering damage may request the court to order an operator to provide specific information in so far as this is necessary to establish a claim for compensation (Article 16).

**Convention on the Protection of Environment through Criminal Law (Council of Europe)**  
E.T.S. No. 172 (Nov. 4, 1998) (*Not in force*)

The Convention was adopted by the Council of Europe in Strasbourg in November 1998, but has not yet come into force. Its objective is to have all members with a common criminal policy aimed at protecting the environment, and it is meant to create measures to ensure that the perpetrators of environmental violations do not escape prosecution and punishment (Preamble).

Article 11 provides that each Party may “declare that it will, in accordance with domestic law, grant any group, foundation or association which, according to its statutes, aims at the protection of the environment, the right to participate in criminal proceedings concerning offences established in accordance with this Convention” (Article 11).

**UNECE Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents (Protocol on Civil Liability)**  
U.N. Doc. ECE/MP.WAT/11-ECE/CP.TEIA/9 (May 21, 2003) (*Not in force*)

The Protocol on Civil Liability was adopted in Kiev in May 2003. The negotiation process for the Protocol involved all relevant actors, from governments and the private sector (such as various industries) to inter-governmental and non-governmental organizations. The Protocol resulted from the first joint special session of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Parties to the Convention on the Transboundary Effects of Industrial Accidents.

The Protocol gives those affected by the transboundary impact of industrial accidents on international waterways the legal means for adequate and prompt compensation (Article 1). Those who are victims of transboundary accidents will not be discriminated against or treated less favorably than victims from the country where the accident took place (Article 8(3)).

***Non-Legally Binding Instruments***

**Ministerial Declaration on Environmentally Sound and Sustainable Development  
in Asia and the Pacific**  
U.N. Doc. A/CONF.151/PC/38 (Oct. 16, 1990)

The Bangkok Declaration, adopted on October 16, 1990, affirms the right of individuals and non-governmental organizations to be informed of environmental problems, have access to information, and participate in the formulation and implementation of decisions likely to affect their environment (para. 27).

**Arab Declaration on Environment and Development and Future Perspectives**  
U.N. Doc. A/46/632 (Sep. 12, 1991)

The Arab Declaration on Environment and Development and Future Perspectives was adopted by the Arab Ministerial Conference on Environment and Development in Cairo, in September 1991. The Declaration speaks of the right of individuals and non-governmental organizations to acquire information about environmental issues relevant to them.

**Joint Communiqué and Declaration on the Establishment of the Arctic Council**  
35 I.L.M.1382 (Sep. 19, 1996)

The Joint Communiqué and Declaration on the Establishment of the Arctic Council was adopted in Ottawa (Canada), on September 19, 1996. It recognized rights of participation of indigenous communities of the circumpolar region in its Preamble and Articles 1(a), 2, and 3(c).



## Part 2:

# Decisions of international tribunals and other bodies

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The relationship between human right and environmental protection has been developed by jurisprudence on the regional and global level. Courts and other international bodies have interpreted substantive human rights to incorporate, imply, or implicate adequate environmental protection. International tribunals have also developed and elaborated procedural rights, which are potentially powerful in combating environmental degradation.

Cases can illuminate linkages between human rights and the environment which are not always obvious. For example, a number of cases have addressed protections for environmental advocates and defenders. Though these cases have centered on questions of a State's duty to protect its citizens and investigate crimes, they shine a global spotlight on the work of these environmentalists in the face of extreme opposition, and impose a duty on governments to respect and protect that work.

Finally, international tribunals have dealt with human-rights based challenges to environmental regulation, in cases where measures designed to protect the natural environment or provide clean energy alternatives conflict with individual interests, particularly property interests. These cases show willingness of international judges to consider the special importance of environmental goals in weighing government action against private claims.

## DECISIONS OF REGIONAL BODIES

The jurisprudence on environmental issues that has emerged from the African, European and Inter-American human rights monitoring systems has contributed to clarifying how environmental degradation affects human rights. This chapter explores in detail the case law of the three regional human rights mechanisms, namely the African Commission on Human and Peoples Rights, the European Court of Human Rights, and the Inter-American Human Rights System.

The three regional human rights monitoring systems have addressed cases involving environmental issues and developed a jurisprudence linking human rights and the environment. This body of law has identified how environmental issues relate to the rights protected under the relevant regional human rights instruments, such as the right to life, the right to privacy, and the right to property. This body of law has also clarified State responsibilities with respect to issues concerning human rights and the environment, such as duties to address environmental risks once they become known and duties to disclose information to the public regarding environmental risks.

### African Commission on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights established the African Commission on Human and Peoples' Rights ("African Commission") in 1981.<sup>76</sup> The African Commission officially began in November 1987 in Ethiopia.<sup>77</sup> The African Commission interprets the African Charter on Human Rights for citizens of the member States of the Organisation of African Unity.<sup>78</sup> While it has addressed many issues over its tenure, the Commission has especially focused on the rights of indigenous peoples and tribes under numerous articles of the African Charter on Human Rights.

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76 History, African Commission on Human and Peoples' Rights, <http://www.achpr.org/english/info/history/en.html> (last visited 19 Aug. 2011).

77 Id.

78 Id.

**Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria**  
No. 155/96, (May 27, 2002)

***Basic Facts***

The Government of Nigeria failed to provide substantive responses to the complainants' allegations, and thus the Commission decided the case on the facts provided by the complainants and accepted them as given (paras. 40 and 49).

The military government of Nigeria was involved in oil production through the state oil company, the Nigerian National Petroleum Development Company, which was the majority shareholder in a consortium with Shell Petroleum Development Corporation. The oil consortium exploited oil reserves in Ogoniland with no regard for the health and environment of the local communities. Toxic wastes were disposed into the environment and local waterways, in violation of applicable international environmental standards. Numerous avoidable spills resulted from the consortium's failure to maintain its facilities. The government neither monitored operations of the oil companies nor required standard safety measures. Further, the government failed to conduct basic health and environmental impact studies regarding the operations, and even refused to permit scientists from entering Ogoniland to undertake such studies. The resulting contamination from the oil operations caused environmental degradation and health problems, including skin infections, gastrointestinal and respiratory ailments, and the increased risk of cancers, and neurological and reproductive problems, among the Ogoni People.

The Nigerian government placed the security forces of the State at the disposal of the oil companies. Nigerian security forces admitted to attacking, burning and destroying several Ogoni villages and homes in response to a non-violent campaign in opposition to the consortium by the Movement for the Survival of Ogoni People. Additional attacks had been conducted by unidentified gunmen, mostly at night. The attacks were not investigated and the perpetrators were not punished.

The applicants alleged violation of the African Charter on Human and Peoples' Rights, Article 2 (right to non-discrimination), Article 4 (right to life), Article 14 (right to property), Article 16 (right to health), Article 18(1) (right to family), Article 21 (right to natural resources), Article 24 (right to clean environment). The applicants also alleged violations of the rights to food and housing, as implied, but not expressly stated, in the African Charter.

***Key Findings and Holdings***

In approaching the facts and allegations, the Commission first clarified the duties of States with respect to protected rights. It noted that both civil and political rights and social and economic rights generate at least four levels of duties, namely duties to "respect, protect, promote, and fulfill" human rights (para. 44). The four levels require States to both positively and negatively adhere to these duties and can be found in the African Charter.

The Commission found that the right to a general satisfactory environment imposes clear obligations upon a government, requiring the State "to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources" (para. 52). The Commission also noted that government compliance with the right to health and the right to a clean environment must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities, and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities (para. 53).

In connection with the right to natural resources, the Commission found that the Nigerian government had failed in properly monitoring the oil production activities that led to pollution and degradation. Additionally, the Nigerian government had failed in including the Ogoni in the decision-making process, which ultimately violated their right to freely dispose of their wealth and natural resources (para. 55). The Commission further noted that the origins of this provision may be traced to colonialism and its aftermath, which have left Africa's people and resources vulnerable to foreign misappropriation. The Commission also highlighted the government's duty to protect its

citizens from damaging acts that may be perpetrated by private parties (para. 57), and in this respect concluded that the Government of Nigeria facilitated the destruction of Ogoniland (para. 58).

With respect to the right to housing, the Commission stated that although the African Charter does not specifically provide for the right to housing, this right is a corollary of the rights to health, to family, and to property. Thus, the right to housing is implicit in the Charter and results from the combined effects of Articles 14, 16 and 18(1). The Commission found that the right to housing was violated as a result of the destruction of Ogoni houses and forceful evictions, as well as from its security forces having obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who had attempted to return to rebuild their homes (para. 62).

The Commission also found that the right to food is implied in the rights to life, health, and economic, social and cultural development. As a minimum, States have the duty to not interfere in the provision or production of food. The Commission further noted that the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation. The Commission concluded that the Nigerian government violated its duties relating to the right of food by destroying food sources through its security forces and by allowing private oil companies to destroy crops. With respect to the right to life, the Commission noted that Nigerian security forces were responsible for wide spread terrorizing and killing (para. 67). The Commission also noted that pollution and environmental degradation made living in Ogoniland a nightmare, and affected the life of the Ogoni society as a whole.

The Commission appealed to the Nigerian government to cease attacks on the Ogoni people, to investigate and prosecute those responsible for attacks, to provide compensation to victims, to prepare environmental and social impact assessments in the future and to provide public information on health and environmental risks, access to justice for environmental harm, and monitoring of potentially harmful activities.

Ultimately, the Commission found that the Nigerian government had violated Articles 2, 4, 16, 18(1), 21, 22 and 24 of the African Charter, and appealed to the government to ensure protection of the environment, health and livelihood of the people of Ogoniland.

### **Commentary**

This case marked the first time that an international tribunal interpreted and gave effect to the right to live in a healthy environment. Much of the debate over this right has dealt with its normative content. In this regard, the Commission referred to the Nigerian government's failure to adhere to its duties by not protecting the Ogoni population in the affected area from the harmful actions of the Oil Consortium. In this sense, the Commission highlighted both substantive and procedural dimensions of the right to a healthy environment. On substantive issues, the Commission noted the need to take measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. On procedural issues, the Commission observed the need to monitor, in a scientific and independent manner: the health risks and environmental impacts resulting from the pollution; the need to undertake prior environmental and social impact studies; the need to provide information to communities; and the need to provide meaningful opportunities for individuals to be heard.

The procedural dimensions of the right to a healthy environment articulated in the *Ogoni* case may have influenced the development of jurisprudence in other regional monitoring mechanisms. The linkages between access to environmental information and the right to private and family life have been particularly developed by the European Court of Human Rights. Similarly, the role of environmental impact assessments (EIAs) and effective participation has been key to the evolution of the case-law on indigenous peoples' rights by the Inter-American Court of Human Rights.

In *Ogoni*, the Commission clarified that governments are under the positive duty to protect their citizens from harmful acts that originate from private entities. This construct is significant in environmental matters, since most often pollution that affects individuals and communities results from the activities of private corporations. The State may be held responsible for the deleterious impacts of such private activities if it has failed in its duties to protect the population.

In *Ogoni*, the Commission was also willing to look within and beyond the African Charter to provide protection to the right to housing and the right to food. These rights are not explicitly included in the catalog of protected rights under the Charter. Nevertheless, the Commission found sufficient linkages among protected rights to imply the presence of the right to housing and the right to food.

The Communication in the Ogoni case was brought before the Commission by two non-governmental organizations, one in Nigeria and another in the United States. The Commission explicitly noted the usefulness of *actio popularis*, as expressly allowed under the African Charter (para. 49). The ability of NGOs to bring forth complaints before international tribunals contributes to the empowerment of affected communities and provides an important mechanism to ensure redress to the victims.

**Centre for Minority Rights Development (Kenya) and Minority Rights Group International  
on behalf of Endorois Welfare Council v. Kenya  
No. 276/2003 (Feb. 4, 2010)**

***Basic Facts***

In 1973 the Government of Kenya created the Lake Hannington Game Reserve and forcibly removed the Endorois pastoralist community from their ancestral lands. The Endorois' practice of pastoralism has consisted of grazing their animals in the lowlands around Lake Bogoria in the rainy season, and turning to the Monchongoi Forest during the dry season. These sites are central to the community's ceremonial and traditional practice, including prayer, circumcision rituals, and cultural festivities. In 1978, the Lake Bogoria Game Reserve was re-gazetted and the Endorois were subsequently denied access to their land. Then in 2002, the government granted ruby mining concessions on Endorois traditional lands, which led to the construction of a road and mining operations posing pollution risks.

The complainants alleged that the forced eviction from their lands prevented the Endorois from freely practicing their religion and culture. Moreover, they were relocated to an area that was not suitable to their pastoral way of life. The Endorois were not adequately compensated for their lands, nor did they share the benefits from the proceeds derived from the game reserve.

The complainants' allegations include violations of rights protected by the African Charter: Article 8 (right to practice their religion); Article 14 (right to property); Article 17 (right to culture); Article 21 (right to freely dispose of wealth and natural resources); and Article 22 (right to development).

***Key Findings and Holdings***

The African Commission on Human and Peoples' Rights found that the government of Kenya violated Articles 1 (obligation of states parties), 8 (right to practice religion), 14 (right to property), 17 (right to culture), 21 (right to freely dispose of wealth and natural resources) and 22 (right to development) of the African Charter on Human and Peoples' Rights.

The Commission agreed that the Endorois are an indigenous community, a "people" under the African Charter (para. 162). The Commission observed that the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion. As a people, the Endorois are entitled to benefit from provisions in the African Charter that protect collective rights, which "go to the heart of indigenous rights---the right to preserve one's identity" (para. 162).

The Commission recognized the Endorois' rights to the lands that they traditionally occupied and used, and found that their lands had been encroached upon (para. 209). In addition, the Commission found that the right to property had been violated as a result of the lack of effective participation, the lack of any reasonable benefit enjoyed by the community, and the absence of a prior environment and social impact assessment (para. 228).

In connection with the Endorois' right to natural resources, the Commission concluded that the Kenyan government violated the said right because they never received adequate compensation or restitution for their land (para. 268). And in regard to the right to development, the Commission found that right is closely allied with the issue of

participation, and in this connection, it observed that in relation to any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions (para. 291).

The Commission also concluded that the Endorois' spiritual beliefs and ceremonial practices constitute a religion under the African Charter and international law (para. 168). In reaching this finding, it observed that religion is often linked to land, cultural beliefs and practices, and that the Endorois' cultural and religious practices are centered around Lake Bogoria and the Monchogoi Forest (paras. 166). After discussing permissible restrictions to the right to religion, the African Commission found that the removal of the Endorois from the sacred grounds essential to the practice of their religion was not necessitated by any significant public security interest or other justification (para. 173).

The Commission found that the Kenyan government had interfered with the Endorois' enjoyment of their human rights by means of forced evictions, denial of access to ancestral lands, and use of the land for the game reserve and sales of portions of the land. Although the Kenyan government presented the game reserve and subsequent uses as a public need, the Commission found the Kenyan government's actions to be disproportionate to the public need fulfilled by the game reserve.

The Commission recommended that the Government of Kenya acknowledge the Endorois' ownership rights, return the traditional and ancestral lands to the Endorois, and compensate them for their displacement and other disruptions in their pastoral way of life.

### **Commentary**

At the heart of the *Endorois* decision was the determination of whether the Endorois are a people. The Commission noted that the terms "peoples" and "indigenous peoples / communities" are contested terms and recalled the drafting difficulties of the African Charter (para. 147). The Commission observed that the term "indigenous" is not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities (para. 149). Further, the Commission noted that the African Charter, in Articles 20-24, provides for peoples to retain rights as peoples, that is, as collectives (para. 150).

In its analysis of the definitional issue concerning peoples and indigenous peoples / communities, the Commission also referred to the work of UN Special Procedures, the ILO Convention No. 169 on Indigenous and Tribal Peoples of the International Labor Organisation (ILO Convention 169), and Inter-American Court decisions, particularly the *Saramaka* case (see below). In its analysis, the Commission also referenced the criteria proposed by its Working Group of Experts on Indigenous Populations/Communities for the identification of indigenous people. These criteria are: (1) the occupation and use of a specific territory; (2) the voluntary perpetuation of cultural distinctiveness; (3) self-identification as a distinct collectivity, as well as recognition by other groups; and (4) an experience of subjugation, marginalization, dispossession, exclusion or discrimination (para. 150). Commenting on these criteria, the Commission noted that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as "peoples", and concluded: "What is clear is that all attempts to define the concept of indigenous peoples recognize the linkages between peoples, their land, and culture and that such a group express its desire to be identified as a people or have the consciousness that they are a people" (para. 151).

The *Endorois* case also involved an inquiry into the relationship between the right to religion and access to ancestral lands, including their use in ceremonial and cultural practices. In regards to the facts, the culture of the Endorois, including their religion and pastoralist way of life, was linked to Lake Bogoria, the Monchongoi Forest and surrounding areas (the Endorois' ancestral lands). Access to their ancestral lands was thus vital to the Endorois' ability to fully engage in their cultural and religious traditions.

The assessment of the right of religion led the Commission to explain that States can place limitations on the practice of religion; however such restrictions must be based in law and the burden is on the Respondent State to prove that severe interference with a group's practice of religion is proportionate to the specific need on which the restrictions are based (e.g., public security interests, ecological protection or economic development).

The Commission's analysis of the right to property and the right to natural resources, including with respect to permissible restrictions, was undertaken under the basic frames provided by the *Saramaka* case. This shows a cross-pollination of human rights and environment jurisprudence between the various regional monitoring systems. Further, the use by the Commission of General Comments by the Committee on Economic, Social and Cultural Rights, the UN Declaration of Indigenous Peoples Rights, and other universal instruments also shows an attempt at systemic integration within human rights law, particularly as it concerns indigenous peoples' rights.

The case is also significant in the way it deals with the right of property (and by extension, the rights of indigenous groups), especially as it relates to ownership rights held in the collective (by the Endorois community). The Commission rejected the Government of Kenya's argument that the fact that a certain part of the Endorois population lives in a modern way and has moved away from the traditional customary way of life means that they can no longer be considered to be a people. The Commission rejected the Government of Kenya's argument that the Endorois had to establish formal title to the land (denied to them by British and Kenyan authorities) and it stated that the area that was converted to the Game Reserve is indeed, what constituted the ancestral lands of the Endorois.

Finally, the Commission's treatment of the right to development, and particularly its links with standards of participation, highlights the recognition and importance of the right to free, prior and informed consent.

## **African Court on Human and Peoples' Rights**

The African Court on Human and Peoples' Rights was established by Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights which was adopted in 1998 and entered into force on January 25, 2004, after its ratification by fifteen states.<sup>79</sup> Under Article 3 of the Protocol, the Court has jurisdiction over all cases and disputes submitted to it addressing the interpretation and application of the African Charter on Human and Peoples' Rights, the Protocol, and any other relevant human rights instrument ratified by the relevant states.<sup>80</sup>

### **The African Commission on Human and People's Rights v. Kenya** Application No. 006/2012, (July 12, 2012)

#### ***Basic Facts***

The indigenous Ogiek people is composed of approximately 20,000 members, "about 15,000 of whom inhabit the greater Mau Forest . . . a land area of about 400,000 hectares... In spite of the near universal acknowledgement of their dependence on the Mau Forest as a space for the exercise of traditional livelihoods and as a source of their sacred identity," the Kenyan government, without consulting with the Ogiek people, issued an eviction notice to those living in the Mau Forest in October 2009 (para. 3). The Ogiek people believe that the government is acting under the guise of protecting the environment but that the true purpose of the eviction is to initiate large-scale logging.<sup>81</sup> After attempting to fight the eviction through domestic channels, the Ogiek - through NGOs including Minority Rights Group International, the Ogiek Peoples' Development Programme, and the Centre for Minority Rights- filed a case with the African Commission on Human and Peoples' Rights (ACHR).<sup>82</sup> The ACHR referred the case to the African Court on Human and Peoples' Rights "for alleged serious and massive violations of human rights" (para. 1). In particular, the ACHR noted that "eviction will lead to the destruction of their [Ogieks] means of survival, their livelihoods, culture, religion and identity, which amounts to serious and massive violations of the rights enshrined in Articles 1, 2, 4, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights" (para. 4). The ACHR requested that the Court halt the eviction and order the Kenyan government to issue the Ogiek people legal title to their historic lands, change their laws to accommodate communal ownership, and compensate the community for losses suffered (para. 5).

79 *Establishment of the Court*, AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS, <http://www.african-court.org/en/index.php/about-the-court/court-establishment> (last visited Dec. 9, 2013).

80 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights art. 3(1), June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), available at <http://www.african-court.org/en/index.php/about-the-court/court-establishment>.

81 *African Court issues historic ruling protecting rights of Kenya's Ogiek Community*, MINORITY RIGHTS (March 20, 2013), <http://www.minorityrights.org/?lid=11822>.

82 *Id.*

### **Key Findings and Holdings**

Finding that “there is a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Ogiek of the Mau Forest,” the Court ordered provisional measures requiring the government of Kenya to stop parceling out land in the disputed Mau forest area until the Court issues a judgment on the matter (paras. 22, 25(1)). The Court also ruled that the Kenyan government must refrain “from any act or thing that would or might irreparably prejudice the main application before the court” before a decision is reached (para. 25(1)). The Court highlighted its concern that the government’s actions may have violated the Ogiek people’s rights under the African Charter to enjoyment of their cultural and traditional values, to protection before the law, to integrity of person, to property, and to economic, social, and cultural development (para. 20).

### **Commentary**

This case marked the first time that the “African Court, in operation since 2006, has intervened to protect the rights of an indigenous community.”<sup>83</sup>

## **Economic Community of West African States: Community Court of Justice**

The Economic Community of West African States (ECOWAS), a regional group of fifteen African states, was established in 1975 to promote economic integration.<sup>84</sup> The Community Court of Justice (ECCJ) was created pursuant to Articles 6 and 15 of the 1993 Revised Treaty of the ECOWAS, and its powers, organization, and functions are delineated in Protocol A/P1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005, Supplementary Protocol A/SP.2/06/06 of 14 June 2006, Regulation of 3 June 2002, and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.<sup>85</sup> The ECCJ has jurisdiction, *inter alia*, over cases of alleged human rights violations occurring within the territory of an ECOWAS Member State and of alleged violations of ECOWAS law by Member States.<sup>86</sup>

### **Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria** Judgment N° ECW/CCJ/JUD/18/12, (December 14, 2012)

#### **Basic Facts**

SERAP asserted that the “Niger Delta has suffered for decades from oil spills, which destroy crops and damage the quality and productivity of soil that communities use for farming, and contaminates water that people use for fishing, drinking and other domestic and economic purposes . . . [T]hese spills which result from poor maintenance of infrastructure, human error and a consequence of deliberate vandalism or theft of oil . . . continue to damage the health and livelihoods of the people of the area who are denied basic necessities of life such as adequate access to clean water, education, healthcare, food and a clean and healthy environment” (paras. 13-14). SERAP further maintained that while “Nigerian government regulations require the swift and effective clean-up of oil spills this is never done timorously and is always inadequate and that the lack of effective clean-up greatly exacerbates the human rights and environmental impacts of such spills... [The] government’s obligation to protect the right to health requires it to investigate and monitor the possible health impacts of gas flaring and the failure of the government to take the concerns of the communities seriously and take steps to ensure independent investigation into the health impacts of gas flaring and ensure that the community has reliable information, is a breach of international standards” (paras. 15, 17).

SERAP specifically averred that two oil spills in 2001 and 2008 from Shell-owned pipelines caused the contamination of local waterways in Ogbobo and Ogoniland (para. 18). This contamination of local water supplies resulted in the depletion of edible fish, which the local community relied upon for adequate nutrition and livelihoods, as well as respiratory health problems (para. 18). Additionally, since the oil spills devastated crops and soil quality in certain areas, poverty in those locations has been amplified as persons lack opportunities to earn a living (para. 18).

83 *Id.*

84 *ECOWAS in Brief*, ECOWAS (2007), [http://www.comm.ecowas.int/sec/index.php?id=about\\_a&lang=en](http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en).

85 *About Us*, COMMUNITY COURT OF JUSTICE – ECOWAS (2012), [http://www.courtecowas.org/site2012/index.php?option=com\\_content&view=article&id=2&Itemid=5](http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5).

86 *Id.*

Therefore, SERAP put forth in its 2009 complaint to the ECCJ that the Nigerian government and seven different oil companies violated the rights to health, an adequate standard of living (sufficient nutritious food and water), a healthy environment, and economic and social development of the people of Niger Delta and also alleged the failure of the Nigerian government to enforce its laws and regulations to safeguard the environment and reduce/stop pollution (para. 19(a – c)).

SERAP asked the court to, *inter alia*, “direct[] the government of Nigeria to establish adequate regulations for the operations of multinationals in the Niger Delta, and to effectively clean-up and prevent pollution and damage to human rights” and order compensation of \$1 billion U.S. dollars (USD) to the victims (para. 19 (h, j)).

### **Key Findings and Holdings**

While the ECCJ had concluded in preliminary proceedings that SERAP was a legal person with standing to bring an action, it had also determined that it did not have jurisdiction over the corporation defendants and struck their names from the suit (paras. 7-8). In its 2012 decision on the merits, the ECCJ first addressed the preliminary question raised by Nigeria that the ECCJ could not rule on instruments outside of the treaties, conventions, and protocols of ECOWAS (para. 24). The ECCJ concluded that, under Article 1(h) of the 2001 Protocol on Democracy and Good Governance which allows for external international human rights instruments to govern the human rights obligations of ECOWAS Member States, the Court’s “human rights protection mandate is exercised with regard to all the international instruments, including the African Charter on Human and Peoples’ Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc. to which the Member States of ECOWAS are parties” (paras. 27–28).

In reaching a decision on the merits of the human rights violations, the ECCJ limited its judgment to Articles 1 and 24 of the African Charter since their provisions addressed the “heart of the dispute:” Article 24 explains that “[a]ll peoples shall have the right to a general satisfactory environment favourable to their development,” while Article 1 delineates that OAS Member States “shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them” (paras. 98-99). Furthermore, the Court highlighted that “Article 24 of the Charter thus requires every State to take every measure to maintain the quality of the environment understood as an integrated whole, such that the state of the environment may satisfy the human beings who live there, and enhance their sustainable development. It is by examining the state of the environment and entirely objective factors, that one judges, by the result, whether the State has fulfilled this obligation. If the State is taking all the appropriate legislative, administrative and other measures, it must ensure that vigilance and diligence are being applied and observed towards attaining concrete results” (para. 101). However, the ECCJ cited how Nigeria had failed to hold any of the “perpetrators of the many acts of environmental degradation” accountable; thus, “[f]rom what emerges from the evidence produced before this Court, the core of the problem in tackling the environmental degradation in the Region of Niger Delta resides in lack of enforcement of the legislation and regulation in force, by the Regulatory Authorities of the Federal Republic of Nigeria in charge of supervision of the oil industry” (paras. 108, 110).

The ECCJ unanimously held that Nigeria had breached its international human rights obligations under the African Charter to give effect to human rights through regulations and accountability measures but dismissed the claim for \$1 billion USD in compensation, reasoning that “the compensation shall come not as an individual pecuniary advantage, but as a collective benefit adequate to repair, as completely as possible, the collective harm that a violation of a collective right causes” (paras. 112, 116–17, 124). The Court ordered Nigeria to take all necessary steps to halt the occurrence of future damage to the environment, hold perpetrators accountable, and restore the environment of the Niger Delta (para. 121).

### **Commentary**

The ECCJ’s decision emphasized “the duty assigned by Article 24 to each State Party of the Charter is both an obligation of attitude and of result” (para. 100). Although the Court acknowledged the passage of numerous Nigerian laws aimed at regulating extractive industries and safeguarding the environment, it emphasized that “the adoption of legislation, no matter how advanced it might be . . . may still fall short of compliance with international obligations in matters of environmental protection if these measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with



the effective reparation of the environmental damage suffered” (paras. 103, 105). With this decision, the ECCJ has shown that it will hold Member States of ECOWAS to their obligations to protect the rights of citizens under Article 1 of the African Charter, including by enforcing existing legislation—a step some Member States are reluctant to take against foreign companies.”<sup>87</sup> Additionally, the ECCJ has made clear that it will hold ECOWAS Member States responsible for human rights violations of international companies operating within the State, declaring that “the damage caused by the oil industry to a vital resource of such importance to all mankind, such as the environment, cannot be left to the mere discretion of oil companies and possible agreements on compensation they may establish with the people affected by the devastating effects of this polluting industry” (para. 109).

## European Committee on Social Rights

The European Social Charter established the European Committee on Social Rights (“European Committee”) in 1961.<sup>88</sup> The Committee is responsible for monitoring the compliance of member States with the European Social Charter.<sup>89</sup> Citizens of member States can also file collective complaints for the Committee to review and decide on the merits.<sup>90</sup>

### Marangopoulos Foundation for Human Rights v. Greece Collective Complaint No. 30/2005 (Dec. 6, 2006)

#### Basic Facts

At the time of the complaint, Greece had used lignite as its principal source of domestic- produced energy for over forty years. The government was the majority shareholder in the Public Power Corporation (DEH), a privatized corporation which it authorized to operate open cast lignite coal mines and power stations, fuelled by lignite. Lignite mining causes air pollution derived from gas emissions and fine particles, including sulfur dioxide (SO<sub>2</sub>) and nitrogen oxide (NO<sub>x</sub>). The use of lignite for generating electricity was responsible for 42% of total carbon dioxide (CO<sub>2</sub>) emissions in Greece in 1997. Most of Greece’s lignite-fired power plants were built with older technology, creating more pollution than newer plants.

The Marangopoulos Foundation for Human Rights (MFHR), a Greek non-governmental organization with consultative status before the Council of Europe (enabling it to bring a collective complaint to European Committee of Social Rights under the 1995 Protocol Providing for a System of Collective Complaints of 18 June 1998) complained that Greece had failed to comply with European Social Charter (the Charter) 1961, Article 2(4) (right to just conditions at work including the elimination of hazards in inherently dangerous or unhealthy occupations and the provision of reduced hours or additional holidays): Article 3(1) and 3(2) (right to safe and healthy working conditions) and Article 11 (right to the protection of health).

The complaint concerned the negative effects of heavy environmental pollution on the health of persons working or living in communities near to areas where lignite was extracted, transported, stockpiled and consumed for the generation of electricity in Greece. It also concerned the lack of measures adopted by the Greek State to eliminate or reduce these negative effects and to ensure the full enjoyment of the right to the protection of health, and to safe and healthy working conditions.

#### Key Findings and Holdings

The Committee found that the complaint was admissible, and that Greece had violated Article 2(4), Article 3(2) and Article 11(1)-(3) in failing to adequately protect against the occupational risk, failure to monitor the enforcement of workplace health and safety regulations, and in failing to adequately protect persons living in the lignite mining area from the effects of pollution.

87 Brittany West, *ECOWAS Community Court of Justice Holds Nigerian Government Liable for Human Rights Violations by Oil Companies*, HUMAN RIGHTS BRIEF (March 7, 2013), <http://hrbrief.org/2013/03/ecowas-community-court-of-justice-holds-nigerian-government-liable-for-human-rights-violations-by-oil-companies/>.

88 The European Social Charter, COUNCIL OF EUROPE, <http://www.coe.int/socialcharter> (last visited 02/28/14)

89 European Committee of Social Rights (ECSR), COUNCIL OF EUROPE, [http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault\\_EN.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault_EN.asp) (last visited 02/28/14).

90 Id.

When considering the admissibility of the complaint, the Committee addressed the issue of *ratione temporis*--the fact that adverse health effects and environmental damage might appear gradually over a period of many years. The Committee referred to the International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts, 2001 (UN Doc. A/56/10, adopted by the International Law Commission at its fifty-third session (2001)). In particular it relied on Article 14 of the draft Articles, which provides that when a State is obligated to take preventative measures against a certain event which then occurs, the State still remains in breach for the entire period of time in which the event continues. The Committee found that there could be a breach of Greece's obligation to prevent damage stemming from air pollution for as long as the pollution continued, thus compounding the degree of the breach.

The Committee dismissed the Article 3(1) complaint because general insurance was available for occupational risks. However, it found a violation of Article 3(2) due to the failure to monitor the enforcement of regulations on health and safety at work. The Committee found that the State as controlling manager of DEH and as national standard-setter had breached Article 2(4) in failing to provide shorter working hours and extra paid holidays or a collective labor agreement to protect against the well-established occupational risk.

In addressing the Article 11 allegation, the Committee rejected Greece's argument that because the mining activities were undertaken by a private entity, it could not be held responsible for the resultant pollution. It also rejected their argument that the lignite pollution was justified because the mining served many legitimate objectives including that of providing electricity at a sensible price, energy independence and economic growth. It found that Greece had failed to strike a reasonable balance between the health interests of the affected community and the general interest in lignite mining. The Committee concluded that Greece had failed to fulfill its Article 11 obligation by failing to protect the right to health of those affected by environmental degradation caused by the lignite mines and plants.

In reaching this decision, the Committee noted that Greece's national plan for greenhouse gas emissions was not compliant with its Kyoto Protocol target. It also found that State sanctions for air pollution were too low to have a deterrent effect and the DEH had been slow to adapt plant and mining equipment to the "best available techniques".

The Committee explicitly interpreted Article 11 to incorporate a right to a healthy environment. It stated:

195. The Committee has therefore taken account of the growing link that states party to the Charter and other international bodies (see below) now make between the protection of health and a healthy environment, and has interpreted Article 11 of the Charter (right to protection of health) as including the right to a healthy environment.

### **Commentary**

This decision explicitly recognizes a "right to a healthy environment," founded on the Charter's Article 11 right to health, and linked to the right to life under Article 2 of the European Convention on Human Rights (para. 195). Although the Committee's decision is not binding, its approach may inform domestic rights interpretation within the European Union (EU). Its references to the case law of the European Court of Human Rights may also assist in placing the decision within a body of relevant interpretative law. It also clarifies the Committee's temporal jurisdiction in relation to Charter obligations, ensuring that States cannot use a *ratione temporis* argument to avoid responsibility for environmental harm.

In finding that Greece violated this right by failing to fight air pollution, the Committee relied on a wide range of internationally recognized environmental standards, such as the United Nations Framework Convention on Climate Change, the Kyoto Protocol, the International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts, and various EU provisions and directives. This sets a precedent for the role of international environmental law instruments in the interpretation and application of human rights law.<sup>91</sup>

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91 The International Law Commission Articles on State Responsibility for Internationally Wrongful Acts were also cited in the *Gab ikovo-Nagymaros Project Case* (see below), at 7.

The ruling is also significant in the threshold it sets for the margin of discretion afforded to States when regulating environmental pollution and the threshold for meeting their commitments to protect the environment.

By finding that Greece had the duty to ensure environmental compliance regardless of the legal status (private or otherwise) of those parties whose conduct was at issue, the Committee interpreted Greece's obligation to protect the right to health (and indirectly the environment) as including an obligation to regulate third parties.

## European Court of Human Rights

The European Court of Human Rights (ECHR) was established in 1959 to hear cases regarding the European Convention on Human Rights.<sup>92</sup> In November 1950, the member States of the Council of Europe signed the European Convention on Human Rights and promised to protect the civil and political rights of persons within their jurisdiction.<sup>93</sup> The Convention entered into force in 1953.<sup>94</sup> Since then, fourteen protocols have been added to the convention.<sup>95</sup> These protocols have added rights to the Convention, but are only binding on States that have signed and ratified them.<sup>96</sup> The Court's first session began in February 1959 and since then it has heard more than 10,000 cases on human rights issues.<sup>97</sup>

### **Zander v. Sweden** App. No. 14282/88 (1993)

#### **Basic Facts**

The applicants were property owners in the area of Gryta, which was close to land where a company stored and treated household and industrial waste. The company had been granted a license to engage in this activity by the National Licensing Board for Protection of the Environment. Refuse containing cyanide seeped into nearby drinking water supplies, which revealed excessive levels of cyanide. Initially, the municipality supplied nearby areas with water from alternative, non-contaminated sources, but after it considered the level of cyanide was reduced to a lawful level, it stopped providing alternative water.

After the incident, the company tried to obtain another license to dispose of untreated household refuse and to store ash and slag from waste incineration plants. The applicants appealed to the Licensing Board asking for the license to include a clause requiring the company to supply drinking water to the eleven property owners dependent on the affected wells.

The Licensing Board granted the company's request for a license and dismissed the applicants' claim, stating that there was no connection between the company's activities and the contamination of the wells that the applicants relied on for drinking water. Instead the Board ordered that the wells be analyzed at regular periods with the owners being informed of the results; if the analysis disclosed pollution, the company would have a duty to supply the applicants with drinking water.

The applicants appealed the Licensing Board's decision and this was, once again, dismissed. The applicants complained to the European Commission of a violation of European Convention Article 6 (right to a fair trial), based on a denial of the opportunity to have their civil rights determined by a court. They pointed to the absence of any remedy of judicial review of the Licensing Board's authorization of the company to increase its activities.

#### **Key Findings and Holdings**

The European Court found that there had been a violation of Article 6(1) because at the material time it was not possible for the applicants to have the relevant decision regarding their claim about the environmental conditions

92 *European Court of Human Rights, The Court in Brief*, available at [http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure\\_en\\_bref\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_en_bref_EN.pdf).

93 *Id.*

94 *Id.*

95 *European Court of Human Rights, The ECHR in 50 Questions*, available at [http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ\\_COUL\\_ENG\\_A5\\_OCT2010.pdf](http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_COUL_ENG_A5_OCT2010.pdf).

96 *Id.*

97 *Id.*

of the property reviewed by a court. The Court found the applicants' claim was connected to their ability to use the water in their well for drinking purposes, a facet of their right of property, so bringing it within the meaning of "civil right" under Article 6(1).

The Court was satisfied that the applicants "could arguably maintain that they were entitled under Swedish law to protection against the water in their well from being polluted" (para. 24). The Court awarded damages for non-pecuniary loss.

### ***Commentary***

The case is significant in confirming that Article 6 treats an environmental right as a "civil right," providing an entitlement to determination of that right, and thereby affirming the right to access to court in environmental disputes. Sweden had argued that if Article 6 were to be found applicable to the proceedings at issue, this might require States to introduce a multitude of comprehensive court remedies, on a wide range of environmental matters, to deal with complaints about exposure to potential, not just actual, risks of damage. The Court rejected this "floodgates" argument.

### **López Ostra v. Spain** **App. No. 16798/90 (1994)**

### ***Basic Facts***

A tannery waste treatment plant was opened in Lorca, Spain, in July 1988, without the required license. The plant malfunctioned when it began operations, releasing gas fumes and contamination, which immediately caused health problems and nuisance to people living in the district. The applicant lived next door with her husband and two daughters, one of whom suffered serious health problems as a result of the pollution.

After the Lorca residents complained of stinking smells, fumes and contamination, the Municipal Council relocated them for three months. They also ordered cessation of one of the plant's activities—the settling of chemical and organic residues in water tanks—but permitted the treatment of wastewater contaminated with chromium to continue.

When the applicant and her family returned to their flat after the relocation, there were continuing problems. The applicant applied to the district administrative court for protection of her fundamental rights, including those related to the unlawful interference with her home and her peaceful enjoyment of it. The court dismissed her case, stating that her rights had not been interfered with because the annoyances from the plant were not serious enough to have seriously affected the family's health, but merely impaired their quality of life. The applicant appealed the decision, which was later affirmed by the Supreme Tribunal in July 1989. In February 1990, a complaint was submitted to the Constitutional Tribunal, which was dismissed as manifestly ill-founded. Two years later, the applicant was moved to another area and later on, she managed to buy a house so she could move permanently out of the area affected by the station's operations.

The applicant made a complaint under European Convention, Article 3 (inhuman and degrading treatment), and Article 8 (right to respect for private and family life), based on Spain's failure to take measures to remedy the smell, noise and contaminating smoke from the plant.

### ***Key Findings and Holdings***

The European Court found a violation of Article 8. It rejected the claim with regards to Article 3, finding that the conditions in which the applicant and her family lived for a number of years were very difficult, but did not amount to inhuman and degrading treatment within the meaning of Article 3.

The Court rejected the State's argument that the applicant had not exhausted all of the local remedies, approaching the issue with "a certain degree of flexibility and without excessive regard for matters of form." They considered that the domestic proceedings the applicant had engaged in were effective and rapid, and could have resulted in

the closing of the plant. They did not consider that the applicant should have been required to engage in other proceedings that would have been less effective or wait for the conclusion of pending administrative and penal proceedings initiated by other residents of her neighborhood before applying to the European Court, since her neighbors' objectives were slightly different.

The Court rejected the State's argument that the Applicant could not bring a claim because she was no longer a victim, as someone "who had been forced by environmental conditions to abandon her home and subsequently to buy another house". The Court also reasoned that the municipality's relocation of the residents (including the applicant), and her subsequent move away from the neighborhood, reflected rather than negated the severity of the harm.

The Court noted that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health" (para. 51). They acknowledged that the family had to bear the nuisance caused by the plant for over three years before moving house with all the attendant inconveniences. The Court accepted the family had only moved when it became apparent that the situation could continue indefinitely, and on medical advice.

The Court considered that the determination of whether an Article 8 violation had occurred should be tested by striking a fair balance between the interest of the town's economic well-being and the applicant's effective enjoyment of the right to respect for their home, private and family life. In doing so, the Court found that the "margin of appreciation," which allows the State certain discretion in determining the appropriate balance, had been exceeded (paras. 52-58).

### ***Commentary***

*López Ostra v. Spain* was the first major decision of the European Court on the relationship between the right to a healthy environment and the Article 8 right to respect for private life and home and family life. It also confirmed previous decisions on third party accountability, opening the door to findings of State accountability for (polluting) actions by private companies in its jurisdiction.

## **L.C.B. v. United Kingdom** **App. No. 23413/94 (1998)**

### ***Basic Facts***

The United Kingdom conducted a series of nuclear tests on Christmas Island in 1957 and 1958. During this time period, the applicant's father was working as a catering assistant in the Royal Air Force. During the Christmas Island tests, service personnel were ordered to line up in the open and to face away from the explosions with their eyes closed and covered until twenty seconds after the blast. The applicant alleged that the purpose of this procedure was deliberately to expose servicemen to radiation for experimental purposes.

The applicant, born in 1966, was diagnosed with leukemia in 1970. Her hospital records indicated that her father's radiation exposure was a possible cause of her cancer. In December 1992, the applicant became aware of the contents of a report prepared by the British Nuclear Tests Veterans' Association, showing a high incidence of cancers, including leukemia in the children of Christmas Island veterans.

The applicant brought a claim raising violations of the European Convention, Article 2 (right to life); Article 3 (prohibition of torture/inhuman and degrading treatment); Article 8 (right to respect for private and family life); and Article 13 (right to an effective remedy). The Court was asked to examine, whether the UK could be held responsible for breaches of the Convention that occurred before the State's recognition of the jurisdiction of the Commission and its competence to hear individual petitions.

### ***Key Findings and Holdings***

The Commission found the Article 2 and 3 complaints admissible in relation to the lack of a warning, but concluded there were no violations. It found the applicant had not demonstrated that earlier diagnosis and treatment of her disease could have altered its fatal nature or alleviated her physical or mental suffering in any way.

When the claim was transferred to the European Court, the Government submitted that they could not be held responsible for alleged breaches of the Convention which occurred prior to January 14, 1966, when the UK recognized the competence of the Commission to receive individual petitions and the jurisdiction of the Court. As a result the Court found that it had no jurisdiction to consider the applicant's complaints under Articles 2 and 3 prior to that date. They went on to consider whether the State authorities had a duty to give advice or information to her parents from that date until October 1970, when the applicant was diagnosed with leukemia. The Court examined the first sentence of Article 2(1), which requires the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. However it found that the applicant had not established a causal link between the exposure of her father to radiation and leukemia in a child subsequently conceived (para. 39). It concluded that it was not reasonable to hold that, in the late 1960s, the United Kingdom authorities could or should have taken action in respect of the applicant (*id*).

Having rejected the Article 2 complaint, the Court did not consider the Article 3 complaint since it was based on the same facts.

Because they had not been raised with the Commission, the Court found it lacked jurisdiction to consider the applicant's complaints under Articles 8 and 13 concerning the State's failure to create individual dose records of her father's exposure to radiation and the withholding of contemporaneous records of levels of radiation on Christmas Island.

### ***Commentary***

The case is authority for the State's obligation under Article 2 to take preventative measures to protect life, subject of course to proving a causal link. The obligation should be read in the light of the scientific knowledge available at the time, and evidence made available to the Court.

## **Pialopoulos and Others v. Greece** App. No. 37095/97 (2001)

### ***Basic Facts***

The applicants were four Greek citizens, who had bought land in the area of Neo Psihiko in Greece. The first two applicants had bought plots of land in 1987 and had applied for a permit to build a multistory shopping center.

The municipality of Neo Psihiko did not approve of the proposed development for environmental reasons, and proposed that the land should be used for a park and car park, but local legislation prevented them from simply refusing planning permission. In June 1987, the Prefect of Eastern Attika decided, after a few months, not to issue permits for the building of commercial sites of a certain size, a decision that also affected the area that the applicants wanted to build on. In the ten-year period which followed there was a complex series of administrative and judicial proceedings. In essence, the local administration prevented the applicants from developing the land, but was unable to finance compensation ordered by the court for expropriation.

On March 7, 1997, the applicants complained to the European Commission that their property had been expropriated contrary to European Convention, Article 1 of Protocol No. 1 (the right to property) and Article 6 (1) and Article 13. They claimed that they had been unable to enjoy their property since 1987, as a result of a series of building prohibitions and attempted expropriations and that the authorities failed to comply with a court decision revoking one of the expropriations and ordering compensation. They disputed that the reason for the expropriation was the public interest, arguing that a fair balance had not been struck between the act of interference and any legitimate aim pursued.

### ***Key Findings and Holdings***

The Greek Government referred to a decision by the Prefect of 21 May 1990, which provided that the applicants' plot could only be used as a park and for underground parking, as a reasonable measure taken in good faith in order to protect the environment. They argued that States enjoy a broad margin of appreciation in the "difficult area of town planning". They contended that they had complied with domestic law, and a proper balance had been struck between the public interest and individual rights.

The Court held there were violations of Article 1 of Protocol No. 1, and Article 6(1) of the Convention, and so it was not necessary to examine the case under Article 13 of the Convention. Article 1 of Protocol No. 1 provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." The Court looked to the second sentence of this Article, finding that the applicants had not suffered a deprivation of property within its meaning since the property right of the applicants as owners remained in place. However, the Court found that the measures implemented by the Prefect fell under the first sentence of the first paragraph of Article 1 because the measures impeded the applicants' rights to use their possessions.

The Court recalled that Article 1, which guarantees in substance the right of property, comprises three distinct rules. The first, expressed in the first sentence of the first paragraph is of a general nature, and lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule. The Court stressed the importance of establishing a fair balance between the demands stemming from public general interest and the need to protect individuals' fundamental rights and found that this fair balancing had not taken place in the instant case.

The Court paid close attention to the fact that the applicants could not enjoy the use of their properties since 1987 and they had not received compensation for that. There was a breach of Article 6(1) because the judgment for compensation for the expropriation had not been enforced. Expropriation would have been in accordance with the Convention, if the applicants had been paid adequate compensation.

### ***Commentary***

The case is authority for the principle that property rights may be interfered with to provide environmental protection, but compensation should be provided. Administrative and judicial procedures must ensure that the compensation is actually paid, and that there is not excessive delay.

### **Kyrtatos v. Greece App. no. 41666/98 (2003)**

### ***Basic Facts***

The applicants, mother and son were Greek nationals who lived in Munich, but owned property in the southeastern part of the Greek island of Tinos, where they spent part of their time. The property included a swamp adjoining the coast. In 1985, the Prefect in charge redrew the boundaries of the settlement and building permits were then granted to build on neighboring land.

The applicants filed an application with the Supreme Administrative Court for the judicial review of the Prefect's decisions and of the building permits. The applicants argued that the decisions, and consequently the building permits, were illegal because in the area affected, there was a swamp and Article 24 of the Greek Constitution, which protected the environment, provided that no settlement should be built in such a place. They contended that the urban development in the affected area, which had led to the destruction of the swamp, had also led to the loss of the scenic beauty surrounding their home (para. 51). They further complained of the noise pollution and night-lights coming from the activities conducted by enterprises in the area.

The Supreme Administrative Court found that the building permits were unlawful because the redrawing of the boundaries of the settlements put in jeopardy an important natural habitat for various protected species, and the buildings should be demolished. But the local authorities failed to implement the judgment. Meanwhile the local administration issued an order for the demolition of the applicants' house in relation to which proceedings were pending. Civil proceedings brought by the applicants against their neighbor in the same dispute were continuing after eight years.

The applicants lodged an application before the European Court raising violations of European Convention, Article 6(1) (right to a fair trial), and Article 8 (right to respect for their private and family life).

### ***Key Findings and Holdings***

The Court found a violation of Article 6(1) because the length of the proceedings was excessive and failed to satisfy the "reasonable time" requirement (paras. 40-43). It rejected the claims regarding violation of Article 8.

The Court noted that that proceedings brought by the applicants regarding the demolition of their home started in October 1994 and lasted for more than eight years, at one level of jurisdiction. The Court listed the factors to be taken into account in assessing the reasonableness of the length of proceedings. These included in the particular circumstances of the case, the complexity of the case, the conduct of the parties, the conduct of the authorities dealing with the case, and what was at stake for the applicant in the dispute (para. 40). In applying this standard to the present case, the Court found that there had been a violation of Article 6(1) as the length of the proceedings had been excessive.

The Court rejected the claim of an Article 8 violation. It found that the applicants' main claim concerning interference with the conditions of animal life in the swamp, could not constitute an attack on their private or family life (para. 53). The Court stated that "neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such" (para. 52). The Court also found that the disturbances coming from the applicants' neighborhood as a result of the urban development of the area (noises, night-lights, etc.) had not reached a sufficient degree of seriousness to be taken into account for Article 8 purposes (para. 54).

### ***Commentary***

The decision applies a restrictive approach to Article 8, excluding its extension to animal life or general environmental concerns. It introduces a requirement of a link between the environmental interference and a serious impact on the applicants' private and family life.

The judgment provides further authority for challenging delays in environmental disputes under Article 6. However the delays in this case were excessive. The proceedings against the neighbor had lasted more than twelve years for two levels of jurisdiction and the proceedings in connection with the threatened demolition of the first applicant's house more than eight years for one level of jurisdiction.

## **Hatton and Others v. The United Kingdom** **App. No. 36022/97 (2003)**

### ***Basic Facts***

There were eight applicants who all lived in the area around Heathrow airport and were members of the Heathrow Association for Aircraft Noise. To varying degrees, they and their families were disturbed by nighttime and early morning noise from aircraft which disrupted their sleep. At that time, Heathrow was the busiest international airport in the world.

The applicants could not bring a private civil action in nuisance in respect of excessive noise authorities because this is precluded by s76, Civil Aviation Act 1982. Under section 78(3) of the Act, the Secretary of State had power to restrict take-offs and landings during specified periods, either by prohibitions on aircraft or by the imposition of quotas.



Prior to October 1993, night-noise in the area was controlled through a series of restrictions on the total number of allowable take-offs and landings. After an intensive consultation period, the government introduced a new system of noise quotas in October 1993, which, essentially, gave each type of aircraft a “Quota Count” – meaning that the noisier the aircraft was, the higher the designated Quota Count.

The Quota system was implemented as way to allow aircraft operators to choose a wider number of quieter airplanes, as long as the noise quota was not exceeded. In the new system, the restrictions were setup to operate between 11:30pm and 6:00am with more permissive periods allowed from 11:00-11:30pm and 6:00-7:00am. In October 1999, following various governmental reviews and consultation papers (which incorporated new research results on sleep deprivation and interruption caused by the noise), the government introduced further reductions on the noise quotas at Heathrow.

Local authorities for the areas around the main London airports applied for judicial review on four occasions, challenging the 1993 noise quota scheme, and there were two appeals. The High Court granted a declaration that the 1993 scheme was unlawful under section 78(3) of the Civil Aviation Act 1982, because it did not specify the maximum number of landings or take-offs, instead referring to levels of noise exposure. The UK government then decided to retain the Quota system but added a limit on the number of aircraft movements that could be made in one night. This was accepted by the High Court in a second application for judicial review, but they found the consultation process was flawed. The Court of Appeals allowed the government’s appeal, finding errors in the consultation process had been corrected and that the government had provided sufficient reasons and justification for the decision that it was reasonable to run the risk of reducing local people’s ability to sleep at night because of countervailing considerations.

The applicants complained to the European Commission under Article 8, about the impact on them of the 1993 scheme, which led to an increase in night-time noise, interfering with their right to respect for their private and family lives and their homes. They also claimed that judicial review was not an effective remedy within the meaning of Article 13, as it failed to examine the merits of decisions by public authorities and was prohibitively expensive for individuals.

### ***Key Findings and Holdings***

In a first decision by the Chamber of the European Court in 2001, it found there was a breach of Article 8, because a State had a positive duty “to take reasonable and appropriate measures to secure the applicants’ rights under Article 8(1).” States should minimize as far as possible interference with Article 8 rights by trying to seek alternative solutions and by seeking to achieve their aims in the least onerous way. To comply with this requirement, the relevant project should have been preceded by a thorough investigation to strike the right balance.

The UK appealed to the Grand Chamber, which substituted a decision that there was no violation of Article 8, but there was a violation of Article 13. The government pointed to the wide margin of appreciation in cases such as this, involving a balancing of various competing interests; in the absence of an arbitrary decision or clearly inadequate investigation, the European Court’s role was merely supervisory. The applicants drew an analogy between deprivation of sleep by exposure to excessive noise, and inhuman and degrading treatment under Article 3. The NGO, Friends of the Earth, which was permitted to make submissions, argued that the Chamber’s approach to Article 8 in the first decision was consistent with international law requirement, of a full investigation to achieve a balance between individual human/environmental rights on the one hand, and the State’s economic interests on the other.

The Grand Chamber reiterated that although there is no *explicit* Convention right to a clean and quiet environment, Article 8 is engaged where an individual is directly and seriously affected by noise or other pollution. But it considered this was a context where the State must be afforded a wide margin of appreciation. The Court stated that when reviewing cases involving environmental issues, it was required to assess “all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals ... [are] taken into account throughout the decision-making procedure, and the procedural safeguards available” (para. 104). The Court made it clear that it did not consider that it should adopt a special approach to environmental human rights cases.

Noting that Heathrow was owned by private operators, not the State, the Court found it made no difference whether the interference was characterized as arising from the decision to introduce the 1993 scheme or the failure to regulate. The same principles should be applied to State obligations in this and other environmental cases (para.119).

The Court took note of the government's research showing that there was no risk of substantial sleep disturbance for the majority of those living near the airport, but found that sensitivity to noise involves a subjective element and it was necessary to look at the effect on the particular individuals. It was clear that there was an interference with the applicants' Article 8 rights. The question was whether the 1993 policy struck a fair balance between those individuals and the community as a whole (para. 119).

The Court concluded its supervisory role was limited to reviewing whether the UK had struck a fair balance between the right of the applicants to respect for their private life and home and the conflicting interests of others and of the community as a whole. Looking at all the evidence, it did not consider the authorities had overstepped their margin of appreciation; nor did it find fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights (para. 129).

Finally the Court ruled that there was a violation of Article 13 because at the time of the judicial review (prior to the entry into force of the Human Rights Act 1998), English law limited the grounds of challenge to public law points such as irrationality. It was not open to the applicants to raise human rights arguments, e.g., under Article 8, so they had no effective remedy in domestic law.

### ***Commentary***

The Grand Chamber decision provides a useful review of the then case law relating to Article 8 and the environment and the effect of the margin of appreciation (para. 96-104). The decision has been repeatedly cited and relied on in subsequent European Court jurisprudence linked to the right to a healthy environment, particularly in the noise and pollution contexts.

In a strongly-worded, joint dissenting opinion, Judge da Costa and four others reviewed the relevant case-law and found there was an Article 8 violation: "The Court has given clear confirmation that Article 8 of the Convention guarantees the right to a healthy environment..." Judge da Costa was later appointed President of the European Court of Human Rights.

### **Taşkın and Others v. Turkey App. No. 46117/99 (2004)**

#### ***Basic Facts***

The applicants were local farmers and residents who opposed the granting of permits to operate a gold mine in the Bergama region of Turkey, because of environmental damage.

On February 12, 1992, the Ministry of Energy and Natural Resources issued a ten-year operating permit to the Normandy Madencilik A.Ş. company, for the Ovacık gold mine. The permit authorized the use of cyanide leaching as part of the gold extraction process. In October 1992 a public hearing was held as part of the process of preparing an environmental impact report. Those present questioned the tree-felling, the use of sodium cyanide and explosives and voiced concerns about waste seepage in the underground water supply.

The environmental impact assessment was finally submitted over two years later in October 1994. Residents of the Bergama area applied to the İzmir Administrative Court requesting judicial review of the decision to issue a permit. They pointed to health risks including groundwater contamination, and destruction of flora and fauna. In July 1996, the Administrative Court dismissed the application. But in April 1997, due to public protest, the provincial governor ordered suspension of the mine's operation for one month. The applicants had appealed to the Supreme Administrative Court which overturned the lower court's judgment in May 1997. The Court took into account the effects of the mining activity as described in the impact report and other expert reports and found the permit did not serve the public interest due to the long-term risks to the local ecosystem and human health and safety

posed by cyanide use, as well as noise and vibrations. Preventative measures taken by the mine company were insufficient. The legal procedure which then applied was for the Administrative Court to annul the permit decision, which it did in October 1997; the Supreme Administrative Court upheld that judgment in April 1998. In February 1998, the local governor ordered closure of the mine.

In the meantime the local authorities failed to enforce the judgment. The applicants formally wrote to central and local government authorities, requesting that the Supreme Administrative Court's decision be enforced. The applicants then claimed damages from these authorities in the local District Court for failure to enforce the decision. The damages claim was initially rejected, but after lengthy appeal proceedings and remittal the District Court allowed the claim in October 2002.

Meanwhile the gold mining company petitioned various ministries to obtain a permit, claiming that it had developed safer measures that would allow for better mining of gold. In 2001, the Prime Minister intervened and requested that the Turkish Institute of Scientific and Technical Research ("TÜBİTAK") prepare a report examining the risks involved in cyanide use in gold mining. The TÜBİTAK report stated that the environmental concerns stated in the Supreme Administrative Court's decision had been reduced to an acceptable level and so a permit could be authorized. The Prime Minister issued a report stating that the operation of the Ovacık gold mine should be authorized based on the favorable TÜBİTAK report. Eighteen local residents applied for a further judicial review of the decision, and a favorable judgment was given in June 2001, but was then overturned on appeal.

On December 22, 2000, the Ministry of Health adopted a decision authorizing continued use of the cyanidation process at the mine for an experimental one-year period; mining operations followed on 13 April 2001. On March 29, 2002, the Council of Ministers issued a decision that the mine could continue with its mining activities.

Various judicial proceedings were still pending when the applicants petitioned the European Court alleging a violation of Articles 2 (right to life) and Article 8 (right to respect for private and family life). They also alleged that they had been denied a fair hearing/effective judicial protection, in violation of Articles 6(1) and 13 of the Convention respectively.

### ***Key Findings and Holdings***

The Court held that the authorities had violated the applicants' right to respect for private and family life and to a fair trial under Articles 8 and 6(1) respectively, due to the authorization of a permit to operate a gold mine using the cyanide leaching process and the related decision-making processes. The Court also held that the applicants' complaints under Articles 2 and 13 were effectively the same as those submitted under Articles 8 and 6(1), and so there was no need to examine them separately. The Court found violations despite the absence of any accidents or incidents at the mine, which was deemed to present an unacceptable risk.

In reviewing the applicable legal framework, the Court referred to the Rio Declaration, Principle 10, and the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) 1998, as they set out relevant procedural rights. The Court also relied on the European Parliament Assembly Recommendation 1614 (2003) of 27 June 2003, which recommended that member States ensure appropriate protection of life, health, family and private life, physical integrity and private property, taking particular account of the need for environmental protection, and that member States recognize a human right to a healthy, viable and decent environment.

In ruling that there was a violation of Article 8, the Court referred to the fact that Article 8 applies to serious environmental pollution, which can prevent people from enjoying their homes and which, in turn, adversely affects their family and private lives. To engage the Article 8 right to protection of the enjoyment of the private and family life, it is not necessary to show serious endangerment to health.

The Court emphasized two points which must be taken into consideration in reviewing State decisions. Firstly, the European Court can assess the substantive merits of the national authority's decision in order to ensure that it is compatible with Article 8. Secondly, the European Court can examine the decision-making process in order to ensure that the correct amount of consideration has been afforded to the affected individual. The Court placed

great emphasis on the decision-making process being an “informed” process and also on participation, that is, individuals having access to public studies and examinations and the ability to appeal decisions if their interests are not being considered.

Concerning Article 6(1), the Court ruled that in order for the civil aspect of this Article to be applicable, there must be a recognizable civil right under domestic law. The dispute should be genuine and serious and Article 6 can relate to the actual existence of a right as well as its scope and manner of exercise. Accordingly, Article 6 was applicable in this instance.

The Court found that the April 2001 decision to allow the gold mine to operate, based on the Prime Minister’s intervention, was unlawful and was equivalent to the circumvention of a judicial decision.

### ***Commentary***

In this case the European Court demonstrated the increasing convergence between human rights and the environment as it extended its human rights jurisprudence to provide for a healthy environment. In doing so, it cited a number of environmental instruments although not directly legally binding, including the Rio Declaration Principle 10 and the Aarhus Convention to which Turkey was not a party. The Court also quoted from the Parliamentary Assembly resolution on environment and human rights which includes the objective obligation for states to protect the environment in national laws, preferably at the constitutional level. The decision also provides support for an international law right to “informed” involvement in the decision-making process.

### **Öneryildiz v. Turkey App. No. 48939/99 (2004)**

### ***Basic Facts***

The applicant, Mr. Öneryildiz lived in the “slum quarter” of a district of Istanbul with twelve close family members. A collection of slums were haphazardly built on land surrounding a rubbish dump that had been used jointly by four district councils since the 1970s and was under the authority and responsibility of the main City Council of Istanbul. Some decontamination work was commenced in 1989, then stopped by order of a court. An expert report drawn up in May 1991 drew the authorities’ attention to the fact that the tip was in breach of the relevant technical regulations and the Environment Act, and to the lack of any measures to prevent a possible explosion of the methane gas being given off by the decomposing refuse.

On 28 April 1993 a methane explosion occurred at the dump. Following a landslide caused by mounting pressure, the refuse erupted from the mountain of waste and engulfed some ten slum dwellings situated below it, including the one belonging to the applicant. Thirty-nine people died in the accident, including nine members of Mr. Öneryildiz’s family.

After the explosion, experts were sent to the site and confirmed that the landslide was caused by the mounting pressure of the methane gas and the eventual explosion. They noted that there was significant danger to the inhabitants of the area, including from the possibility of spreading diseases and the explosion of methane. The experts concluded that Istanbul City Council was liable because it had failed to act earlier in preventing increasing technical problems that already existed in the area since it was created in 1970, and because their oversight placed the slum dwellers in danger. The public prosecutor said that they should be prosecuted for unintentional homicide and negligence in the exercise of their duties and transmitted the case to the investigating administrative authorities. The two mayors were prosecuted, found to be guilty and sentenced to three months in prison (although these sentences were later commuted) with fines of less than EUR 10 (\$14).

The Istanbul Administrative Court awarded the applicant damages against the two local councils on his own behalf and on behalf of his three surviving children. But no payment was made.

A complaint to the European Court was originally made by two applicants, submitting that the national authorities were responsible for the deaths of their close relatives and for the destruction of their property as a result of the explosion, violating Articles 2 and 8 and Article 1 of Protocol No. 1. They further complained that the administrative

proceedings conducted in their case had not complied with the requirements of fairness and promptness set forth in Article 6(1) or Article 13 of the Convention.

Only the claim by Mr. Öneriyildiz (on behalf of himself and his family) proceeded to be considered by the First Section of the European Court. A majority of the Court upheld the claim of a violation of Article 2 (right to life) and Article 1 of the Protocol No. 1 to the Convention (right to property) and so did not consider it necessary to consider Article 8; the Court also allowed the Article 6(1) claim. Turkey appealed, so the case was referred for consideration by the Grand Chamber.

### ***Key Findings and Holdings***

The Grand Chamber relied on several international instruments as authority for the principle that primary responsibility for the treatment of household waste rests with local authorities, which the governments are obliged to provide with financial and technical assistance (para. 60). These included texts adopted by the Council of Europe relating to waste disposal and the 1998 Convention on the Protection of the Environment through Criminal Law (ETS no. 172) (“Strasbourg Convention”). In particular the Court relied on Articles 2(1)(c)-(d) and 2(7)(a)-(b) of the 1993 Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS no. 150) (“Lugano Convention”) for the proposition that the operation by the public authorities of a site for the permanent deposit of waste was a “dangerous activity”, and “loss of life” resulting from the deposit of waste at such a site was “damage” incurring the liability of the public authorities.

The Court considered the Strasbourg Convention, Articles 2-4, and Article 6 requirements for adequate criminal prosecution and sanctions for “disposal, treatment, storage ... of hazardous waste which causes or is likely to cause death or serious injury to any person ...” (para. 61). Whilst acknowledging the Strasbourg Convention was not in force, the Court stated, “it is very much in keeping with the current trend towards harsher penalties for damage to the environment, an issue inextricably linked with the endangering of human life” (*id*).

In relation to preventive measures, the Court said particular emphasis should be placed on the public’s right to information; although the right was established in the Article 8 context (in *Guerra and Others v. Italy*, Reports 1998-I), it applied equally in the Article 2 context (para. 90). The Court also indicated that where dangerous activities were concerned, public access to clear and full information is viewed as a basic human right, citing Resolution 1087 (1996) which made it clear that the right is not limited to the risks associated with the use of nuclear energy in the civil sector (para. 66).

Applying *L.C.B. v. the United Kingdom*, the Court highlighted a State’s duties to protect its residents. The Court considered that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites (para. 71).

The Court found “[T]he positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life” (para. 89). In ruling that Turkey had violated Article 2, the Court took particular note of the dangerousness of the activity, indicating that when such activities are undertaken, the State must enact regulations governing the licensing, setting up, operation, security and supervision of the activity (para. 90). According to the Court, the State must make compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks (*id*).

In relation to the State’s argument that the applicant had knowingly chosen to break the law and live in the vicinity of the rubbish tip, the Court found that the State’s consistent policy on slum areas in practice encouraged and facilitated the integration of such areas into the urban environment. The local authority’s policy effectively established an amnesty for breaches of town-planning regulations, so creating an uncertain situation in the minds of the occupiers (para. 104). In addition, the Government had not shown that any measures were taken in the instant case to provide the slum inhabitants with information enabling them to assess the risks they might run as a result of living there (para. 104).

The Court decided that the fact that the national authorities were completely aware of the seriousness of the risk of a methane explosion and yet did nothing indicated a substantive violation of Article 2. Also, the lack of criminal proceedings against those responsible for the resulting deaths, amongst the public authorities, indicated a procedural violation of Article 2.

In conclusion, the Grand Chamber found a violation of Article 2 and held Turkey responsible for the deaths under a “negligence” standard (para. 93). In addition, the Court found a violation of the applicant’s right to peaceful enjoyment of his possessions under Article 1 of Protocol No. 1, based on the presence of a causal link between the gross negligence of the State and the property losses suffered by the applicant (para. 135). Finally, the Court found a violation of Article 13 (right to a remedy) because the compensation that was awarded to the applicant by a domestic proceeding had never been paid and rendered ineffective the purported remedy (para. 148). Having found breaches of Article 2 and Article 13, it was not necessary to consider the Article 8 and Article 6 breaches respectively.

### ***Commentary***

The case demonstrates how the Article 2 right to life can be used to compel governments to regulate environmental risks, enforce environmental laws, and/or disclose information. The Court made it clear that the obligation to safeguard life included the licensing, setting up, operation, security and supervision of dangerous activities, and required all those concerned to take “practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks” (para. 90).

The judgment also demonstrates that authorities cannot use a “humanitarian justification” as an argument for leaving shantytown dwellers in life-threatening situations.

The right to information is also an important aspect of the judgment, which develops the duty to disclose information about risks to health or the environment, from the Article 8 to the Article 2 context of the right to life. Without information of risk of hazards from waste or industrial sites, individuals are prevented from protecting their own lives or those of their families. It is significant that the courts opted to use substantive Articles 8 and 2 to uphold a procedural right, demonstrating the importance of the right to information in this context.

## **Fadeyeva v. Russia App. No. 55724/00 (2005)**

### ***Basic Facts***

The applicant was a Russian national who lived in Cherepovets, a steel-producing city in the Russian federation. The local authorities had implemented a buffer zone around the Severstal steel plant, the largest iron smelter in Russia, known as a “sanitary security zone”, to separate the plant from the town’s residential areas, but the applicant, and many others, lived within the zone.

Although the Severstal steel plant was privately owned at the time of the claim, it had been built by and initially run by the State. The plant had malfunctioned from the start, releasing gas fumes and odors, contaminating the area, and causing health problems and nuisance to local people.

In 1995, the applicant filed a complaint against the municipality with the Cherepovets Town Court, seeking resettlement away from her state-owned apartment. The Town Court ruled that although the applicant had the right to be resettled, in reality, the local authorities were only obliged to put her on a priority housing waiting list. Finally, in August 1999, the Town Court dismissed the applicant’s complaint, confirming that she had been placed on a waiting list. In 2000, the local authorities issued a report showing that the concentration of some hazardous substances in the area went beyond the maximum permissible limit established by Russian legislation.

The applicant complained to the European Court of a breach of her rights under Articles 2, 3 and 8, claiming that the concentration of toxic elements, the noise levels, and the environmental situation in the zone around the plant were hazardous for humans.

### ***Key Findings and Holdings***

At the admissibility stage, the Court found the claims raised under Article 2 were more appropriately dealt with under Article 8 of the Convention. The Court also found the Article 3 claim inadmissible, because it considered that there was no evidence to indicate that the applicant's housing conditions amounted to treatment incompatible with Article 3. The Court found the Article 8 claim was admissible.

At the merits stage, both parties accepted there was pollution from the plant; the dispute centered on the level of pollution and its effect on the applicant. The State argued that disease suffered by the applicant was related to her employment. The Court found her medical report did not establish any causal link between environmental pollution and her illnesses. However the Court took note of the fact that the concentration of hazardous elements in the air was above permissible levels and so the pollution was potentially harmful to the residents in the area. It noted that the State had itself referred to increased morbidity rates in the area (para. 83). The Court continued: "the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel plant. Even assuming that the pollution did not cause any quantifiable harm to her health it inevitably made the applicant more vulnerable to various illnesses" (para. 88). The Court therefore decided that the detriment to the applicant's health and well-being engaged her Article 8 rights.

The Court observed that "no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention", so the adverse effects of environmental pollution must have a direct effect on family, home or private life and attain a certain minimum level if they are to fall within the scope of Article 8 (paras. 68-69). In relation to the minimum threshold for finding that environmental conditions are sufficiently severe to be encompassed within the guarantees of Article 8, the Court stated the assessment of the threshold was relative and depended on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The requisite effects or interference need not reach the level of proven injury to health; it is enough if there are serious risks posed. "The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city" (para. 69).

In relation to the State's responsibility, the Court found that although the State did not control or operate the steel plant, a State's responsibility in environmental cases might arise from a failure to regulate private industry (para. 89). Note was taken of the fact that such a polluting enterprise was permitted to be built in a densely populated area (para. 90).

In relation to whether the Article 8 interference was justified under Article 8(2), the Court reiterated the wide margin of appreciation in a technical sphere like environmental protection and its record of avoiding interference with domestic environmental policy in cases such as *Hatton v.U.K.* (para. 104).

Even though the State had implemented a policy stating that a certain portion of the area surrounding the plant would be free of any housing or dwellings, in practice, these measures were ignored. The Court would not go so far as to say the State had a duty to provide free alternative housing, but it found that the State had not given the applicant any solutions that would help her to leave the area, nor had it designed or applied effective measures to stop the polluting steel plant from operating in breach of domestic environmental standards (paras. 133 and 134). The Court found the State had authorized the operation of a plant in a densely populated town, allowed pollution to exceed legal levels and failed to implement the "sanitary security zone" (para. 132). Accordingly, the Court concluded that, despite the wide margin of appreciation left to the respondent State, it had failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. It held, unanimously, that there had been a violation of Article 8.

### ***Commentary***

The decision stands for the State obligation to impose effective regulation on the private sector to prevent environmental pollution where serious potential health risks exist, even where no actual damage can be proven. The applicant succeeded because she was made more vulnerable to various diseases, even though quantifiable harm to her health was not proven (para. 88).

As in the case of *Öneryıldız v. Turkey* (see above), the applicant had moved into the polluted area, knowing the environmental situation was unfavorable, but the Court did not weigh this against her, partly because it was State-owned housing and she may have had no choice, but also again taking into account the limited amount of environmental information available (para. 120).

**Okay and Others v. Turkey**  
**App. No. 36220/97 (2005)**

***Basic Facts***

The applicants were ten Turkish nationals who were lawyers living and practicing in Izmir, south-west Turkey, 250 kilometers from the site of three thermal power stations. These thermal power stations had been polluting the local environment for several years.

The three stations were under the authority of the Ministry of Energy and Natural Resources and a public utility company. In 1993 and 1994, the applicants called on the Ministries of Health, of the Environment and of Energy and Natural resources and on the Mulga Provincial Government to take steps to close the power stations because they had not obtained licenses and posed a threat to public health and the environment. There was no response to the request so applicants challenged the refusal to act in the Aydin Administrative Court, requesting that the decision allowing for the continuation of operation with the plants be set aside. The Administrative Court commissioned an expert report, which stated that the stations were emitting a large amount of nitrogen dioxide (NO<sub>2</sub>) and sulphur dioxide (SO<sub>2</sub>) without the mandatory chimney filters; this posed a great danger to an area spanning 25-30 kilometers in diameter. The report recommended that activities in the Gokova power station cease and that the other two stations should be closed with desulphurization units installed in both stations.

In 1996, the Administrative Court issued an interlocutory injunction for suspension of the power plants' operation. It found that the plants had been operating since 1994 without having obtained the requisite permits for construction, gas emissions and the discharge of wastewater. The Regional Administrative Court dismissed the defendant authorities' appeals. In September 1996, the Council of Ministers (including the Prime Minister and other cabinet ministers) issued a decision stating that the three thermal stations should continue to operate, in opposition to the Administrative Court's rulings. The applicants filed criminal proceedings against the Council of Ministers and other administrative authorities but the local Prosecutors refused to prosecute.

The applicants then applied to the European Court, asserting that the administrative authorities' refusal to comply with or enforce the decisions of the Administrative Courts had infringed their right to effective judicial protection under Articles 6(1).

In its defense, the State submitted that there was no connection between the power plants' operating conditions and the civil rights of the applicants, who had not demonstrated any personal loss or adverse impact (para. 61). The State also argued that in domestic law the applicants would not qualify as "victims" so their complaints were not "civil rights and obligations" within the meaning of Article 6(1). The applicants conceded they had not been personally affected; they countered that Article 56 of the Turkish Constitution gave a constitutional right to life in a healthy and balanced environment.

***Key Findings and Holdings***

After reviewing domestic environmental law, the Court recalled "[r]elevant international law texts on the right to a healthy environment" (para.51). It referred to Rio Declaration, Principle 10 (effective access to judicial and administrative proceedings); and Council of Europe Recommendation 1614 (2003) on environment and human rights which recommends that member States, "recognize a human rights to a healthy, viable and decent environment which includes the objective obligation for States to protect the environment, in national laws, preferably at constitutional level" (para. 52). The Recommendation also recommends that member States, "safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention".



The Court rejected the State's arguments, finding that Article 6(1) could not be construed as limited to an enforceable right in domestic law (para. 68). It found there was a constitutional right in Turkish law to live in a healthy and balanced environment, enabling the applicants to claim that they were entitled to protection under domestic law against damage to the environment caused by the power plants' hazardous activities (para. 65). The Court noted that the Administrative Court experts had indicated the hazardous gas could extend for an area of 2,350 kilometers in diameter and that this covered the area where the applicants lived. The Court decided that this "brings into play their right to the protection of physical integrity, despite the fact that the risk which they run is not as serious, specific and imminent as that run by those living in the immediate vicinity of the plants" (para. 66). The Court found that the applicants, under Turkish law, were entitled to ask the Administrative Courts to issue injunctions for the cessation of hazardous activities in the power stations. As the Administrative Court, in this instant case, had ruled in favor of the applicants, the Court ruled that the failure of the authorities to enforce those decisions had no legal basis and was in effect, a circumvention of judicial decisions. Accordingly, the Court found that the national authorities had failed to comply in a reasonable time with the Administrative Court's December 1996 judgment.

### **Commentary**

The decision demonstrates that the European Court will take a domestic constitutional right to environmental protection into consideration, and requires the State to at least comply with its domestic environmental standards (see also *Kyrtatos v. Greece* above). The European Court's role is to review governmental actions in the light of any such domestic law.

In relation to the substantive findings, the European Court's approach to victims and risk is noteworthy; it found in favor of the lawyers who had filed the claim despite the fact that they had no evidence of direct or imminent harm. In relation to procedural findings, the Court's reference to Council of Europe Recommendation 1614 (2003) on environment and human rights enabled it to highlight the procedural requirements of the Aarhus Convention (para 52).

The remedy awarded in this case was a finding of a violation of Article 6 and damages of EUR1,000 (approximately US\$1300) per applicant, rather than a remedy related to the substantive issue. This could be seen as an inherent difficulty in using a procedurally-based challenge in the European Court in an attempt to address a wider environmental goal.

### **Giacomelli v. Italy** **App. No. 59909/00 (2006)**

#### **Basic Facts**

The case involved persistent noise and harmful emissions generated by a storage and treatment facility of special waste. The applicant had lived, since 1950, in a house 30 meters away from a plant for storage and treatment of "special waste" classified as either hazardous or non-hazardous. The plant was opened in 1982 when the Lombardy Regional Council granted the company Ecoservizi a license to start operating it. Ecoservizi was given authorization in 1989 to treat toxic waste through the use of "detoxification," a process that required the use of chemicals. In 1991, Ecoservizi was authorized to increase the annual amount of waste treated to 192,000 cubic meters and the annual amount of toxic waste for detoxification to 75,000 cubic meters. The license was renewed for successive five-year periods in 1994, 1999 and 2004.

From 1994, the applicant, unhappy about the operation of the plant close to her property, engaged in a series of domestic legal challenges against Ecoservizi. The applicant argued that the increases authorized by the Lombardy Regional Council were an increase in activity, requiring a new licensing process and an environmental impact assessment (EIA). In 1996, the applicant's challenges were dismissed by the Lombardy Regional Court and the decision was upheld by the *Consiglio di Stato* (constitutional review body).

The applicant also brought two other sets of proceedings against Ecoservizi, with the first resulting in a decision ordering the suspension of the plant's operation (which was not implemented) and the second set continuing through the Italian administrative courts. Between 1993 and 1995, the local health authority cited several breaches

of environmental regulations by Ecoservizi. In July 1997, a complaint was filed against Ecoservizi for failing to comply with the conditions accompanying its license. Additionally, Ecoservizi was required to file an EIA.

Even though Ministry of the Environment found the plant did not comply with environmental regulations, it was allowed to operate (subject to some special conditions set up by the government) until the expiration of the license in April 1999. In August 2000, the Lombardy regional Administrative Court ordered that a new EIA be conducted due to Ecoservizi's appeal against the order that it had not complied with environmental regulations. Ecoservizi's license was renewed for another five-year period, subject to the EIA. The applicant successfully challenged this ruling. In April 2004, the *Consiglio di Stato* upheld the judgment, requiring an EIA before operations could continue in the Ecoservizi plant.

The local health authority produced reports of high concentrations of carbon and other substances in the air in October 2003, finding that the plant's activities could be causing harm to the local citizens. In November 2003 however, the Council approved continuation of operations. In April 2004, the Ministry of the Environment issued another decree mandating an EIA, although it concluded that the criteria submitted by the Regional Council sufficed to lead to improvement in the operation of the plant. Accordingly, the Regional Council renewed the plant's license in April 2004.

The applicant alleged that she was prevented from resting and living comfortably under the continuing issue of noise and odor, in breach of Article 8 (right to respect for private and family life). She also asserted that the activity of the company represented a constant danger to the health and welfare of residents in the vicinity. Additionally, she argued that there was no EIA until several years after the onset of activity of the company. The State admitted that the applicant's Article 8 rights had been interfered with but argued the interference was justified by Article 8(2), balancing individual rights against the public interest.

### ***Key Findings and Holdings***

The Court noted the requirement under European Union law (European Directive 85/337/EEC) for an impact assessment for any project which is likely to have significant effects on the environment (para. 60). It then observed the State had not conducted an EIA, which was necessary for every project with potential harmful environmental consequences as prescribed also by national law (para 94).

The Court observed that Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private-sector activities properly (para. 78). It then considered whether the State had ensured a fair balance between the interests of the community and the rights of those affected. The Court accepted that there should be a wide margin of appreciation, because national authorities "are in principle better placed than an international court to assess the requirements" in a particular local context, and to determine the most appropriate environmental policies and individual measures while taking into account the needs of the local community (para. 80). There was a violation of Article 8 because the applicant, for several years, had her right to respect for her home seriously impaired by the dangerous activities carried out at the plant built thirty meters away from her house (para. 96). The Court found that the State had not struck a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and her private and family life (para. 97).

In ruling that the applicant's Article 8 rights had been violated, the Court noted that the normal procedural safeguards were not available for the applicant due to several factors: (1) the Ministry of Environment had issued two decrees stating that the plant's operations did not comply with environmental regulations; (2) the Regional Administrative Court had indicated that the plant's operations lacked sufficient legal basis and; (3) the granting of the plant's license was done despite the lack of an investigation as mandated by the EIA process. The authorities had not even asked Ecoservizi to undertake such an EIA until 1996, seven years after commencing its activities involving the detoxification of industrial waste.

In terms of the content of an assessment the Court stated: "A governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be

predicted and evaluated in advance and a fair balance may accordingly be struck between the various conflicting interests at stake” (para. 83).

The Court noted that even if the necessary steps had been taken to protect the applicant’s rights after the 2004 environmental impact assessment decree, the seven-year gap in action had led to a serious interference of her Article 8 rights, especially as the dangerous activities were being carried out thirty meters from the applicant’s home.

### **Commentary**

The decision applies, and repeats the principles summarized in *Hatton v. UK* that Article 8 breaches of the right to respect for the home include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. The case stands for the importance of an EIA in protecting Article 8 rights. It has been suggested that the distinction drawn by the court between the substantive and procedural aspects of Article 8, reflects the influence of the Aarhus Convention.

Again the Court emphasizes the role of information in enabling citizens to assess risks for themselves and to make choices (such as whether or not to continue to live near the environmental hazard) based on their assessments: “[T]he importance of public access to . . . information enabling members of the public to assess the danger to which they are exposed is beyond question” (para. 83).

## **Fägerskiöld v. Sweden** **Application 376664/04, (Judgment of February 26, 2008)**

### **Basic Facts**

In the 1980s the applicants bought a property in the municipality of Ödeshög, for recreational purposes (p. 2). In 1991 and 1992 the municipality of Ödeshög granted building permits to erect two wind turbines on a neighboring property (p. 2). The first wind turbine had a delivery of 225 kW (kilowatts) and was built approximately 430 meters from the applicants’ property while the second wind turbine had a delivery of 150 kW and was situated at a distance of roughly 620 meters from the applicants’ property (p. 2). In April 1998 a third wind turbine was erected at a distance of 371 meters from the applicants’ property (p. 2). According to the applicants, the wind turbine “emitted a constant, pulsating noise and light effects, which they found very disturbing and intrusive” (p. 2). On May 20, 1998 the Environment Committee held a meeting, attended by the chairman of the Joint Wind Association, to discuss the situation relating to the wind turbine, and make an assessment, where all property owners within a radius of 500 meters of the wind turbine should be heard, including the applicants, as well as the Swedish Civil Aviation Administration, the Swedish Armed Forces and the Board (p. 3).

On May 20, 1998, the builder of the wind turbine administered noise tests of the three wind turbines, together and separately, which were submitted to the Environment Committee and presented to those, including the applicants, who attended a general meeting on June 4, 1998. (p. 3) The noise levels in respect of the applicants’ property were recorded at 37.7 dB (decibels) from the new wind turbine alone and at 39.4 dB from all three of the turbines together (p. 3). On June 23, 1998 the Environment Committee observed that several of those heard on the matter had issued complaints about the noise made by the wind turbine. However, it also noted that, according to the noise tests, the noise levels did not exceed 40 dB, which was the recommended maximum level (p. 3). The applicants appealed against the decision of June 23, 1998 to the Board and demanded that “all the building permits” be revoked and that the wind turbine be dismantled, claiming that the wind turbine caused serious nuisance to them and that no real noise investigation had been carried out to establish the true level of the noise (p. 4). They further submitted that they had only been provided an opportunity to voice their opinion about the wind turbine after it had been constructed and that the municipality was not impartial with respect to the case since it owned a part of the wind turbine (p. 3). On April 14, 1999 the County Administrative Board rejected their appeal, noting that although the wind turbine’s operation did result in certain sound effects, they were not serious enough to justify dismantling the turbine (p.3).

The applicants then appealed to the County Administrative Court, maintaining their claims (p. 3). On 14 July 2000, after having visited the applicants’ property and held an oral hearing, the County Administrative Court rejected

the appeal, finding that although some sound effects from the wind turbine could be observed on the applicants' property, the disturbance was ultimately tolerable (p. 3). The applicants therefore submitted under Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention that the pulsating noise and light reflections from the turbine interfered with their peaceful enjoyment of their property and private and family life (p. 10).

### ***Key Findings and Holdings***

First, the Court reiterates that the essential object and purpose of Article 8 is to protect the individual against arbitrary interference by public authorities (p.13). With regards to whether a second home can fall within the ambit of Article 8, the Court "considered that it might not always be possible to draw precise distinctions, since a person may divide his time between two houses or form strong emotional ties with a second house, treating it as his home. Therefore, a secondary house, which is fully furnished and equipped and used, inter alia, as a holiday home, can qualify as a 'home' within the meaning of Article 8" (p. 14). With regards to the severity of the pollution, "the Court recalls that there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8" (p. 14). "Specifically, Article 8 of the Convention applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, even without seriously endangering their health" (p. 14).

Although the Court acknowledged that the applicants were directly affected by the noise emitted by the turbine during its operation, the noise level does not exceed the indoor or outdoor level recommended by the WHO's Guidelines for Community Noise and its Fact Sheet No. 258, which sets a value of annoyance at 50 to 55 dB, and only slightly exceeds the recommended maximum level in Sweden (p. 16). Therefore, the Court determined that the nuisance caused by the wind turbine could not be found to reach the threshold where it could be classified as severe environmental pollution (p.16). The Court further determined that, although the applicants' property is used mainly for recreational purposes and is located in a semi-rural area, the noise levels are not such as to seriously affect the applicants or prevent them from enjoying their home and their private and family life (p. 16).

The applicants further maintained that their rights under Article 1 of Protocol No. 1 had been infringed by the noise emanating from that wind turbine and that it had decreased the value of their property (p. 18). First, the Court found that the building permit was granted in accordance with national law, subject to comments from the public, the Swedish Civil Aviation Administration, the Swedish Armed Forces and the Board, and subject to appeals heard by the Board and the County Administrative Court (p. 18). Secondly, in the Court's opinion, "there is no doubt that the operating of the wind turbine is in the general interest as it is an environmentally friendly source of energy which contributes to the sustainable development of natural resources" (p. 18–19).

Lastly, the Court considered whether "a fair balance was struck between the competing interests of the individuals affected by the noise from the wind turbine and the community as a whole" when the building permit for the turbine was granted (p. 19). In light of the finding under Article 8 and the foregoing factors, the Court held that "the nuisance caused to the applicants by the wind turbine cannot be considered so severe as to affect them seriously or impinge on their enjoyment of their property." Moreover, "in relation to the interests of the community as a whole, the Court reiterates that wind power is a renewable source of energy which is beneficial for both the environment and society," and thus found that "the alleged interference was proportionate to the aims pursued" (p. 19).

## **Budayeva and Others v. Russia** **App. No. 15339/02 (2008)**

### ***Basic Facts***

The case involved a severe mudslide in the Russian town of Tyrnauz, resulting in deaths in the village and loss of property. Tyrnauz, which has a population of around 25,000 people, is located in the mountains between the tributaries of two rivers and is prone to mudslides. As a result, the local authorities had constructed a retention collector in 1965 and a mud retention dam in 1999, as a way to protect the residents.

In August 1999, a mudflow damaged the retention dam. In January 2000, the authorities issued a warning of an increased risk of mudslides; it appeared that a timely rebuilding of the dam was not possible. Urgent requests were made to the local administrative authorities for emergency work on the dam and observation posts to warn the residents of impending mudslides.

From July 18 until July 25, 2000, a series of mudslides hit the town and flooded residential areas. There was a dispute as to which steps the local authorities had taken after the first mudslide on July 18. Eight people died, including the husband of Mrs. Budayeva, the first applicant. She brought civil proceedings but the domestic court found no fault attached to the authorities for the damage she had sustained (para. 50).

She then brought a claim before the European Court, together with four other applicants, based on violations of Article 2, Article 8 and Article 1 of Protocol No. 1 of the Convention respectively, in relation to Mr. Budayev's death, for putting their lives at risk, for the destruction of their property as a result of failing to mitigate the consequences of a mudslide, and for the lack of any domestic remedy. The State made a technical argument that the applicants had failed to exhaust domestic remedies, e.g. seeking a criminal prosecution relating to the death of Mr. Budayev. The State contended it had taken steps to deal with the mudslides; it had issued due warnings on the nights of July 18-19 calling on residents to evacuate, and the applicants had returned home in breach of an order to evacuate. This was disputed by the applicants. The State also submitted the local population could have listened to media weather forecasts (para. 121).

### ***Key Findings and Holdings***

The Court rejected the State's argument that the applicants' claims were inadmissible (para. 115). In relation to the first applicant it noted: "where the applicant has a choice of remedies and their comparative effectiveness is not obvious the Court tends to interpret the requirement of exhaustion of domestic remedies in the applicant's favour" (para. 110). The Court also noted the context of a disaster, normally involving a combined failure of a number of officials where the State is already aware of the incident, and where a criminal complaint may not be appropriate (para. 112). In relation to the other four applicants, the Court said it was not clear what the basis of any domestic proceedings would be (para. 114).

The Court recalled the positive obligation contained in Article 2 which "entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life" (para. 129). The obligation applied to any activity where there might be a risk to life, in particular "dangerous activities" (para. 130). Further to its substantive aspects, Article 2 included procedural aspects "notably a positive obligation to take regulatory measures and adequately inform the public about any life-threatening emergency, and to ensure that any occasion of the deaths caused thereby would be followed by a judicial enquiry" (para. 131). Regulations must govern the licensing, setting up, operation, security and supervision of a dangerous activity and make it compulsory for all those concerned to take practical measures to protect the lives of those who might be endangered by inherent risks (para. 132). These regulations should also include public information, and procedures for identifying weaknesses and official errors. In the context of natural disasters the judicial system must provide for a prompt, independent, impartial and effective official investigation with criminal sanctions, initiated by the State (para. 142).

Applying these principles to the facts, the Court noted that the local authorities were aware of the increased risk of mudslides in Tymauz and the measures needed to mitigate the risk. The Court found that despite these warnings and ample time to adequately prepare, the local authorities had, without justification, failed to maintain the defence and warning infrastructure to prevent the residents of Tymauz from suffering harm, resulting in a substantive breach of Article 2 (para. 160). By failing to properly investigate the cause of the death of Mrs. Budayeva's husband, the State had also violated the procedural aspect of Article 2.

Turning to the right to property, the Court decided that in the context of natural disasters such as weather hazards, the positive obligation on the State did not call for the same level of State action as in the case of dangerous activities (paras. 173-174). Similarly there was a wider margin of appreciation in the case of the right to property, which was not an absolute right, than in the case of the right to life, which was an absolute right (para. 175).

Noting that some disaster relief and housing provision had been made by the State, the Court therefore did not find a violation of Article 1 of Protocol No. 1 (para. 185).

The Court observed that in the dangerous activities context, the scope of Article 2 obligations largely overlapped with Article 8 obligations, so the court's case-law on environmental matters affecting private and home life could be relied on for the protection of the right to life (paras. 133 and 201). Ultimately the Article 8 claim fell away because the Court had found a violation of Article 2.

In relation to the right to an effective remedy under Article 13 in the context of disaster relief, the Court outlined the principles, in particular the effective remedy requirement, which were the same as in the dangerous activities context (paras. 189-193). But since the requirement for an effective investigation had been dealt with in relation to Article 2, it was not necessary to consider it under Article 13 (para. 195).

### **Commentary**

The decision could be interpreted as one of the first attempts of the courts to engage with the manifestations of climate change. It extends the *Öneryildiz v. Turkey* approach to dangerous activities to cover natural disasters, applying a similar duty of care. The State's positive obligations following a natural disaster are less than in the context of man-made disasters; in relation to property rights, the State need only take reasonable steps for the protection of possessions. Moreover, the State's substantive obligations increase where protection of the Article 2 right to life is at stake, as do the procedural obligations requiring the State to determine the cause(s) of a breach.

The judgment indicates that in the context of emergency relief following extreme weather events, the wide margin of appreciation applicable in environmental cases tends to be even wider. Consequently, the judgment indicates that the Court will allow the State more discretion in emergency relief cases than in other types of environmental cases.

Turning to procedural obligations, the judgment is additional authority for a State's duty to inform the public of environmental risks. The Court states: "particular emphasis should be placed on the public's right to information" (para. 132).

## **Tătar v. Romania** **App. No. 67021/01 (Jan. 27, 2009)**

### **Basic Facts**

The applicants, Vasile Gheorghe Tătar and Paul Tătar, father and son, lived in Baia Mare (Romania). In 1998 the S.C. Aurul S.A. company, obtained a license to exploit the Baia Mare gold mine. The company's extraction process involved the use of sodium cyanide and part of its activity was located in the vicinity of the applicants' home. On 30 January 2000 an environmental accident occurred at the site. This was followed by a United Nations Environment Program / Office for the Coordination of Humanitarian Affairs (UNEP/OCHA) report that a dam had breached, releasing about 100,000 m<sup>3</sup> of cyanide-contaminated tailings water into the environment. The report stated that S.C. Aurul S.A. had not ceased its operations. The environmental damage was felt locally as well as in Serbia-Montenegro and Hungary. The Romanian government did not take any relevant measures to address the damage.

An impact assessment conducted by the Research Institute of the Ministry of Environment in 1993 showed that the soil and groundwater in the Baia Mare area was already heavily contaminated with levels of industrial powder and sulfur dioxide (causes of acid rain) being much higher than was accepted worldwide. Another study conducted by the Research Institute in 2001 revealed heavily polluted soil, air and groundwater.

In December 2000, a Task Force conducted a study at the behest of the Commissioner for the Environment of the European Union. The Task Force identified three causes of the accident, namely, the use of inadequate design of building ponds used in the extraction of gold, the authorization of inadequate construction plans not adapted to specific climatic conditions of the region and the inadequate monitoring of pond management, operation of the technology and maintenance facilities. The report highlighted the risks coming from abandoned mines and placed the Aurul Company in the category of "high risk mining."

Eight other environmental impact studies were conducted at the request of the *Aurul* Company, each showing that the soil and water were heavily polluted and the potential of cyanide-containing vapors seeping into the vegetation in nearby ponds. “*Concerns for Europe Tomorrow*,” a World Health Organization report, described the Baia Mare region as a ‘hot spot’ for pollution.

After the accident, Vasile Gheorghe Tătar filed an administrative complaint stating that he and his family had been put at risk due to the sodium cyanide pollution from the *Aurul* Company and that there was reason to doubt the validity of the company’s operating license. The Ministry of Environment responded that the company’s activities did not constitute a public health hazard. The first applicant also brought criminal proceedings complaining the mining process was a health hazard for local inhabitants which aggravated his son’s asthma. The proceedings were dismissed on the basis that the facts did not amount to offences.

The applicants then applied to the European Court claiming that the Romanian government’s failure to stop the harmful mining activities by the *Aurul* Company violated their rights under Article 2 (right to life). The European Court had found that the claim was admissible in relation to Article 8 (the right to respect for private and family life), rather than Article 2.

### ***Key Findings and Holdings***

The Court reaffirmed that where pollution or noise interfered with a person’s well-being, a claim could be brought under Article 8 and that the State had a duty to take the necessary steps to control industrial activities, especially those dangerous for the environment and human health, in order to ensure the protection of its citizens. On the facts, the existence of a material risk to the health and well-being of the applicants engaged Article 8.

The Court did not doubt the reality of the medical condition of Paul T tar, who was diagnosed in 1996 and who required medical assistance, nor that of the toxicity of sodium cyanide and of the pollution detected in the vicinity of the applicants’ home following the environmental accident. However, it found that given the state of scientific knowledge, the applicants had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma. Despite the lack of causal link the existence of a serious and material risk for the applicants’ health and well-being entailed a duty on the part of the State to assess the risks, both at the time it granted the operating permit and subsequent to the accident, and to take appropriate measures.

A preliminary impact assessment conducted in 1993 by the Romanian Ministry of the Environment had highlighted the risks entailed by the activity for the environment and human health and that the operating conditions laid down by the Romanian authorities had been insufficient to preclude the possibility of serious harm. Even after the January 2000 accident the company was allowed to continue its industrial operations, in breach of the precautionary principle, according to which the absence of certainty with regard to current scientific and technical knowledge could not justify any delay on the part of the State in adopting effective and proportionate measures.

The Court also stressed the authorities’ duty to inform the public and guarantee the right of its members to participate in the decision-making process concerning environmental issues. The failure of the Romanian Government to inform the public, in particular by not making public the 1993 impact assessment on the basis of which the operating license had been granted, had made it impossible for members of the public to challenge the results of that assessment. This lack of information had continued after the accident of January 2000, despite the probable anxiety of the local people.

The Court concluded that the Romanian authorities had violated the applicants’ rights under Article 8 and more generally their right to a healthy environment by failing in their duty to assess the risks entailed by the activity, and by failing to take the suitable measures to protect the applicants from the interference.

As well as stressing the importance of compliance with domestic environmental laws, the Court referred to accepted norms and principles of international environmental law. The Court relied on Principle 14 of the Rio Declaration on Environment and Development (States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health) and Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment (States have the sovereign right to exploit their own resources pursuant to their own

environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction). In using these two principles, the Court emphasized States' duty to prevent transboundary environmental harm (para. 111).

The Court also pointed to the precautionary principle, which has become binding under the law of the EU (to which Romania is a member) through the Treaty of Maastricht and the jurisprudence of the European Court of Justice. The Court also referred to other international norms enshrined in the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Articles 2, 3 and 9), to which Romania is also a party (in 2000). The Court relied heavily on national and international assessments, which confirmed the excessive levels of pollutants in the soil and underground water.

### ***Commentary***

This decision is further authority for the importance of procedural requirements such as impact assessments, information and consultation, and the substantive obligation of the State to act on the information it receives. The public must be kept informed, have access to judicial remedies and be allowed to participate in the decision-making process. States must regulate hazardous activities with the appropriate level of care and security and they must impose on those performing the activities, the duty to take proper measures to protect people from harm and health risks. Once a risk is identified, even if there is uncertainty, the State has a duty to take measures to address it effectively.

The decision addresses significant substantive principles of international environmental law as guidelines for human rights decisions. It draws on the Stockholm Declaration and the Rio Declaration in holding that states have a duty to prevent transboundary environmental harm under Article 8 of the European Convention on Human Rights. It also emphasizes the importance of the precautionary principle, another fundamental norm of international environmental law, in addressing this harm.

## **Deés v. Hungary App. No. 2345/06 (Nov. 9, 2010)**

### ***Basic Facts***

The applicant claimed that noise, pollution, vibration and smell caused by heavy traffic had made his home almost uninhabitable, in breach of Article 8 of the Convention (right to respect for his private life and home), and that the Hungarian authorities' measures to remedy the situation had been insufficient and/or inadequate. He also complained under Article 6 about the lengthy domestic court proceedings (six years and nine months).

The problem arose after the introduction of a toll on a nearby motorway led to an increase in motorists driving through the town to avoid the payment. The Government had taken steps to reduce the impact of this, including building three bypass roads, introducing a nighttime speed limit and installing traffic lights. But an expert still found noise levels outside the applicant's home of 67(1) and 69db(A), exceeding the statutory maximum of 60db(A). The domestic courts decided the government had carried out every measure that could reasonably be expected in the circumstances to protect the applicant's interest, balancing competing interests of the town's inhabitants against those of users and providers of public and private transport.

### ***Key Findings and Holdings***

The European Court upheld the applicant's Article 8 complaint, finding his right to respect for his home, included the quiet enjoyment of that area. The Court stressed that breaches of the Article 8 right were not limited to concrete breaches such as unauthorized entry of the home, but could include noise, emissions, smells or other similar forms of interference, if they prevented an occupier from enjoying the amenities of his home. The Court also indicated that Article 8 was not limited to State action, but incorporates an obligation on authorities to take steps in relation to third-party breaches (paras. 55 and 57).

Whilst accepting that the State enjoys a certain margin of appreciation when it comes to measures intended to protect Article 8 rights, the Court found the steps taken by the Hungarian government to balance the interests



of road-users with those of the inhabitants of the surrounding areas were insufficient, as a result of which the applicant was exposed to excessive noise disturbance over a substantial period of time. The State had therefore failed to discharge its positive obligation to guarantee the applicant's right to respect for his home and private life. The Court also found that the length of the proceedings was excessive and failed to meet the "reasonable time" requirement, resulting in a breach of Article 6(1).

### **Commentary**

The ruling follows previous decisions such as *Hatton and Others v. U.K.* and *Gómez v. Spain*, which held that noise pollution which impacts on the enjoyment of one's home is capable of violating Article 8. The Court had already concluded that "noise pressure significantly above statutory levels, left unaddressed by appropriate State measures, may amount to a violation of Article 8 of the Convention". The significance of this case is that the State had made substantial, costly efforts to decrease the traffic noise pollution, but those efforts were not an adequate defense to the Article 8 claim.

Although there is no specific right to a quiet and healthy environment to be found in the European Convention, environmental pollution, such as noise, emissions or smells, can amount to an interference with the right to respect for a person's private life and home under Article 8.

Applying this judgment, it is arguable that when environmental pollution significantly exceeds statutory levels, there rests a positive obligation on public authorities to take effective action to reduce it. This approach to Article 8 could have significant implications for projects that have adverse environmental effects, especially infrastructure projects which cause or increase traffic noise pollution.

### **Huoltoasema Matti Eurén and Others v. Finland App. No. 26654/08 (Jan. 19, 2010)**

#### **Basic Facts**

The first applicant was a Finnish company, Huoltoasema Matti Eurén Oy, which ran a service station, owned by the second and third applicants, Matti Vesa Eurén and Ari-Pekka Eurén. After new environmental regulations on the handling and storage of dangerous chemicals (including motor vehicle fuel), came into force, the company applied for an environmental permit to carry out compliance works and to enlarge its fuel storage capacity. After lengthy court proceedings, the environmental permit was refused due to the risk to groundwater posed by the activities, and the service station was ordered to close.

The applicants claimed that the rejection of their application for an environmental permit constituted an unlawful and disproportionate interference with their right to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1. They also claimed that the length of the proceedings violated the Article 6(1) "reasonable time" requirement.

#### **Key Findings and Holdings**

After examining the factual basis of the court proceedings, the Court found that they had lasted six years and six months in total, at two levels of jurisdiction. It concluded the length of the proceedings was excessive, and violated Article 6:

"The applicants pointed out that they had not any stage appealed against any of the decisions taken in their case or contributed to its length in any way. The proceedings had been very important to the applicants as without the environmental permit they had been forced to close down their business. Due to the length of the proceedings the applicants had suffered great financial loss."

The Court went on to dismiss the Article 1 of Protocol No. 1 property rights complaint as manifestly unfounded. After acknowledging the adverse situation suffered by the applicants, the court affirmed that the decision of the domestic court was in conformity with domestic legislation, "[t]he law was sufficiently clear, foreseeable and accessible to the public" (para. 36). It "pursued the general interest, namely protection of the environment" (para. 37). "As polluted groundwater is very difficult, sometimes even impossible, to purify, it is understandable that there

is a strong general interest involved” (para. 39). Further, the applicants did not have any legitimate expectation of being granted the environmental permit because this was their first application, and they “must have been aware of the fact that environmental protection had become increasingly important” (para. 39). In dismissing the Article 1 of Protocol No. 1 claim, the Court confirmed “States enjoy a wide margin of appreciation in this context...” (para. 39). Turning to the claim that the service station had been discriminated against within Article 14, the Court found that Article 14 was violated when States treated differently people in analogous situations; service stations were not in analogous situations so the claim was rejected.

The applicants had claimed 1,858,000 euros (EUR) in respect of pecuniary damage. The Court did not find any causal link between the violation found and the pecuniary damage alleged and therefore rejected the claim, making an award for a small amount of legal costs only.

### ***Commentary***

The decision is significant in affirming the wide margin of appreciation afforded to States in relation to environmental protection, in this case where there was a risk of groundwater pollution. The decision demonstrates that a State may interfere with property rights where the interference is necessary to protect the environment, provided it complies with procedural safeguards. It should be noted that no compensation was payable for the refusal of a permit. Nor was any compensation awarded for the State’s procedural failures, although this may be in part attributable to the size of the claim and the failure to provide evidence linking the loss to the violations.

## **Bacila v. Romania** **App. No. 19234/04 (2010)**

### ***Basic Facts***

The applicant lived in Copsa Mica, Romania, where metal industries causing severe pollution were established. The Sometra factory released high quantities of heavy metals and sulfur dioxide – at times 20 to 30 times higher than the levels authorized – causing contamination of the air, soils, vegetation and streams in the town and its vicinity, as well as acid rain. As a result, the incidence of respiratory diseases in Copsa Mica was seven times higher than in the rest of the country.

Following complaints by the applicant before local and domestic authorities, the Regional Agency for the Protection of the Environment imposed on the factory a system of authorizations regarding pollutant emission levels. In addition, the Regional Agency imposed measures to guarantee that the factory would bring its installations in conformity with environmental legislation. It also put in place a system that measured pollution by the hour and required the factory to reduce or shut down its activity whenever the pollution exceeded the authorized levels of pollution. In addition, the regulatory system provided for fines if the factory exceeded the emissions levels, and the Regional Agency fined the factory an equivalent of 180,000 euros. The Regional Agency argued that shutting down the factory permanently would have heavy social costs.

The applicant was diagnosed with concentrations of lead above the authorized limit. She also suffered from harm to her larynx, the cause of which might have been the fact that she lived in a toxic area and was exposed to toxic vapors.

The applicant filed a claim alleging a violation of Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The applicant complained of the passivity of the authorities to effectively address the pollution resulting from the factory, and argued that the pollution affected her health and her living environment.

### ***Key Holdings and Findings***

The Court rejected the objection to jurisdiction raised by the government, which argued that the applicant had not exhausted all domestic remedies. The Court held that the applicant exhausted all effective domestic remedies available to her.

The government argued that it adopted reasonable and adequate measures in order to protect the environment and the health of the applicant, pointing to the system of authorizations and the other measures imposed to bring the factory in conformity with relevant environmental legislation in order to reduce pollution, as well as reinforced surveillance and enforcement of the emissions levels. The applicant argued that despite those measures the pollution had not decreased.

The Court held that the claims were to be examined under Article 8 of the Convention. The Court, in line with precedents, recognized that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life.” (para. 59). It also considered that the government had “positive obligations to effectively respect an individual’s private and family life” (para. 60), especially when it relates to hazardous activities.

The Court found that Article 8 was applicable because of the clear consequences of the pollution on the applicant’s health, and it concluded that the pollution had directly impacted the right of the applicant to respect for her private and family life. The Court noted that even though the government was not responsible for the emissions of the factory, the applicant complained of the fact that, “the government was unable to force the factory to reduce its pollution to levels compatible with the well-being of the inhabitants of Copsa Mica.” (para. 66). The Court considered that the government was unwilling to sanction the factory because these short term measures would have allegedly been inefficient and it would have had an impact on local employment. The Court recognized the economic interest alleged by the government, but considered that “this interest could not have prevailed over the rights of the inhabitants to enjoy a stable and healthy environment.” (para. 71).

The Court held that the government had “failed to strike a fair balance between the interest in ensuring the economic well-being of the town of Copsa Mica [...] and the effective enjoyment by the applicant of her right to respect for her home and her private and family life” (para. 72). The Court concluded that Romania had violated Article 8.

### ***Commentary***

*Bacila v. Romania* marks a significant contribution to the European Court’s jurisprudence on human rights and environment by recognizing the right to the enjoyment of a stable and healthy environment. The Court restated that States have a positive obligation to ensure the protection of the well-being of individuals with regards to environmental pollution. The Court placed high importance on the enforcement of the right to respect for private and family life when impaired by environmental pollution; a right that has to be protected adequately and reasonably despite the potential economic consequences.

### **Atanasov v. Bulgaria** **App. No. 12853/03 (Dec. 2, 2010)**

### ***Basic Facts***

The applicant, a Bulgarian national, Ivan Atanasov, lived with his family and cultivated agricultural land near a former copper mine. After the mine was decommissioned in 1999, the State permitted a reclamation scheme for a tailings pond connected to the mine. Two rival reclamation schemes had been proposed. One scheme involved laying earth over the pond and planting vegetation over it. The second scheme involved capping the pond’s surface and slopes with soil cement and the use of sludge for biological reclamation. The sludge came from a wastewater treatment plant and appeared to include heavy metals from industrial wastewater. The authorities chose the second scheme and granted a license to allow the transport of sludge in heavy lorries to the pond. The applicant brought judicial review proceedings to challenge this license on the basis that it interfered with his Constitutional right to live in a “healthy and favorable environment”. The Court failed to grant interim measures and ultimately dismissed the claim on the basis that the license had expired. Meanwhile, the local council complained to government authorities about the effect on local people’s health and agriculture and asked for the reclamation scheme to be stopped; the scheme went ahead.

The applicant complained to the European Court that the reclamation scheme adversely affected his private and family life as well as his home, and interfered with the peaceful enjoyment of his possessions, within Article 8. He also complained that the judicial review proceedings he had pursued did not comply with the requirements of Article 6(1).

### ***Key Findings and Holdings***

The Court emphasized that “Article 8 is not engaged every time environmental deterioration occurs” and that “no right to nature preservation as such” is included in the European Convention and Protocols (para. 66). It pointed out that the Council of Europe’s Parliamentary Assembly had proposed supplementing the Convention to fill this gap (*id*). Article 8 was only engaged if there was a direct link between the environmental situation and the applicant’s home or family or private life (*id*). The Court identified the first point for decision as “whether the environmental pollution of which the applicant complains can be regarded as affecting adversely, to a sufficient extent, the enjoyment of the amenities of his home and the quality of his private and family life” (*id*).

The Court then conducted a comprehensive review of its jurisprudence on Article 8 and the environment (paras. 66-78), and concluding by rejecting the applicant’s Article 8 claim. It acknowledged that the laying of sludge from the wastewater treatment plant on the tailings pond created an unpleasant situation, but did not consider that this violated Article 8 for the following reasons (para.76): (a) The considerable distance from the source of the pollution—the applicant’s home was one kilometer and the land he cultivated was four kilometres from the tailings pond; (b) “the pollution emanating from the pond is not the result of active production processes which can lead to the sudden release of large amounts of toxic gases or substances ... This also means there is less risk of a sudden deterioration of the situation...”; (c) there was no evidence of damage to health “or even a short-term health risk” to the applicant or local residents. Finally, unlike in *Hatton v. U.K.*, the applicant did not provide “particulars showing that the degree of disturbance in and around his home had been such as to considerably affect the quality of his private or family life...” (para. 76).

The Court also rejected the applicant’s claim for the loss of value of his property due to the reclamation scheme under Article 1 of Protocol No. 1 which “does not guarantee the right to enjoy one’s possessions in a pleasant environment” (para. 83). The Court accepted that “a severe nuisance may seriously affect the value of real property and thus amount to a partial expropriation”, but found the applicant had not produced evidence of loss of value to his home or agricultural business (*id*). The Court went on to dismiss the Article 6 claim on the basis that it related to the question of the validity of the license and did not involve the “determination” of a “civil right” (paras. 89-95).

### ***Commentary***

At the heart of the Court’s decision lies its view that since “neither Article 8 nor any of [the] other provisions of the Convention or its Protocols were specifically designed to provide protection of the environment, other international instruments and domestic legislation are better suited to address such issues (para. 77). The Court pointed out that the Council of Europe’s Parliamentary Assembly had adopted two recommendations relating to advancing environmental protection as a substantive and procedural right (paras. 55-57). Recommendation 1614 (2003), point 8, called on the Committee of Ministers to:

“draw up, as an interim measure in preparing for the drafting of an additional protocol, a recommendation to member states setting out the ways in which the [Convention] provides individual protection against environmental degradation, proposing the adoption at national level of an individual right to participation in environmental decision making, and indicating a preference, in cases concerning the environment, for a broad interpretation of the right to an effective remedy guaranteed under Article 13.”

The above demonstrates the limitations of relying on Article 8, as an indirect source of environmental rights, as opposed to identifying a freestanding right to a healthy environment. However, the judgment contains a useful review of previous European Court decisions involving environmental issues indicating where Article 8 may come into play (paras. 66-78).

**Dubetska & Others v. Ukraine**  
**Application 30499/03, (Judgment of February 11, 2011)**

***Basic Facts***

The applicants' houses are located in Vilshyna hamlet in the Chervonograd coal-mining basin (para. 9). In 1979 the State opened the Chervonogradska coal-processing factory (para. 11). In the course of its operation the factory has amassed a 60-metre spoil heap approximately 430 meters from the applicants' houses. (para. 12). According to a number of studies by governmental and non-governmental entities, the operation of the factory and the mine had adverse environmental effects (para. 13). Reports documented soot concentrations in ambient air samples that were 1.5 times higher than the maximum permissible under domestic standards, as well as well water in the region that was contaminated with mercury and cadmium, exceeding domestic safety standards twenty-five-fold and fourfold respectively. (para. 23). According to an assessment commissioned by the State Committee for Geology and Mineral Resource Utilisation, the factory was a major contributor to pollution of the ground water, in particular on account of infiltration of water from its spoil heap, exposing the hamlet residents to higher risks of cancer and respiratory and kidney diseases (paras. 15, 23). The applicants allege that their houses sustained damage as a result of soil subsidence caused by mining activities, that they suffered from a lack of drinkable water, and that some of the applicants had developed chronic health conditions associated with the factory operation, especially with air pollution (para. 24–25, 28).

On December 20, 1994 the Sokalskyy Executive Committee noted that eighteen houses, including those of the applicants, were located within 500-metre buffer zone of the factory spoil heap, in violation of applicable sanitary norms (para. 39). The Committee required the company director to resettle the applicants and provide them with new housing by December of 1996. This decision was not implemented (para. 39). The applicants thus submit that the State authorities failed to protect their home, private and family life from excessive pollution generated by two State-owned industrial facilities in violation of Article 8 of the Convention (para. 73).

***Key Findings and Holdings***

In determining whether a State can be held responsible under Article 8 of the Convention, "the Court must examine whether a situation was a result of a sudden and unexpected turn of events or, on the contrary, was long-standing and well known to the State authorities"; "whether the State was or should have been aware that the hazard or the nuisance was affecting the applicant's private life"; "and to what extent the applicant contributed to creating this situation for himself and was in a position to remedy it without a prohibitive outlay" (para. 108). In assessing the effect of the pollution on the applicants' health, "the Court agreed with the Government that there is no evidence making it possible to establish quantifiable harm in the present case. It considers, however, that living in the area marked by pollution in clear excess of applicable safety standards exposed the applicants to an elevated risk to health" (para. 111). In examining to what extent the State owed a duty to the applicants under Article 8 of the Convention, the Court noted that the situation concerned "pollution emanating from the daily operation of the State-owned Vizeyska coal mine and the Chervonogradska coal-processing factory, which was State-owned at least until 2007; its spoil heap has remained in State ownership to the present day. The State should have been, and in fact was, well aware of the environmental effects of the operation of these facilities, as these were the only large industries in the vicinity of the applicant families' households" (para. 120). Additionally, "the Court considers that the applicants were not unreasonable in relying on the State, which owned both the polluters, to support their resettlement." In light of the foregoing, the Court held that the combination of all these factors supported a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's responsibility under Article 8 of the Convention (paras. 122-123).

With regards to the present case, the Court noted that "during the entire period taken into consideration both the mine and the factory have functioned not in compliance with the applicable domestic environmental regulations and the Government have failed either to facilitate the applicants' relocation or to put in place a functioning policy to protect them from environmental risks associated with continuing to live within their immediate proximity" (para. 154). While the Court considered that confronting environmental concerns resulting from the operation of two major industrial polluters that had continuously malfunctioned a stockpiled waste for fifty years was a complex task, requiring time and considerable resources, the Court noted that the facilities were located in a rural area and the applicants were among very small group of residents who were most seriously affected by pollution. In this

specific case, “the Government has failed to adduce sufficient explanation for their failure to either resettle the applicants or find some other kind of effective solution for their individual burden for more than twelve years” (para. 155).

**Di Sarno v. Italy**  
**App. No. 30765/08 (2012)**

***Basic Facts***

Between February 11, 1994 and December 31, 2009, the region of Campania, Italy, was under a state of emergency because of serious dysfunctioning in the disposal of urban solid waste – including a period from late 2007 to May 2008 during which garbage accumulated in the streets. The management of the state of emergency was held by, successively, “deputy commissioners” appointed by the Prime Minister, and the under-Secretary of State to the Presidency of the Council of Ministers, in turn delegated to private contractors. Criminal charges were brought against contractors and civil servants in the region.

Of the 18 applicants, 13 were residents of the municipality of Somma Vesuviana and 5 were working in this municipality, located in Campania. The applicants filed a complaint arguing that the improper functioning of the waste collection, treatment and disposal system in Campania in general and in Somma Vesuviana in particular, and the inadequate prosecution of the persons responsible amounted to a violation of Articles 2 (right to life), 6 (right to a fair trial), 8 (right to respect for private and family life) and 13 (right to an effective remedy).

***Key Holdings and Findings***

The Court rejected the preliminary objection presented by the Italian government pertaining to the status of “victims” of the applicants. The government argued that the general deterioration of the environment did not amount to a violation of the right to respect for private and family life, the right to health and the right to life. The Court held that harm to the environment could be in violation of Article 8 if it has “a harmful effect on a person’s private or family sphere” (para. 80). The Court considered that the municipality of Somma Vesuviana suffered from the waste crisis to such an extent that the resulting “harm to the environment [...] could directly impair the applicants’ well-being” (para. 81), in violation of Article 8. The Court also rejected the preliminary objection pertaining to the exhaustion of domestic remedies.

The applicants argued that by failing to adopt adequate measures to ensure the proper functioning of the disposal of waste and by enforcing inadequate policies, the government had harmed the environment in the region and had impacted their life and their health under Articles 2 and 8. The government argued that the waste crisis lasted only 5 months (between late 2007 and May 2008) and that the municipality of Somma Vesuviana was not impacted by it. It further argued that the difficulties it faced in the management of waste in Campania were due to *force majeure*, an argument rejected by the Court, and that in any case, the authorities had taken adequate measures to respond to the crisis.

The Court began by considering that the complaint of the applicants must be “reviewed under the right to respect for private life and the home” (para. 96), dismissing in effect the claims under Article 2. It also relied on the precedent of *Lopez Ostra v. Italy* and *Guerra v. Italy*, stating that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to adversely affect their private and family life, without, however, seriously endangering their health” (para. 104).

The Court noted that the municipality of Somma Vesuviana had been under the state of emergency and that for at least 5 months between the end of 2007 and May 2008, the applicants had to live in an environment polluted by abandoned waste. The Court held that this situation could have deteriorated the quality of life of the applicants, and especially their right to respect for private life and their home. The Court rejected the claim brought under Article 2 by stating that none of the applicants have suffered any disease because of their exposure to waste, and scientific studies are inconsistent about the relationship between exposure to waste and any increase in diseases, preventing it to conclude that the life and health of the applicants had been threatened. Nonetheless, the Court held that “Article 8 can be invoked even in the absence of a showing of serious harm to the health of the applicants” (para. 108).

The Court further held that the government had a positive obligation, in the case of hazardous activities, to adopt adequate rules with regards to this activity and the risk it entails. Given that the collection, treatment and disposal of waste is a hazardous activity, the government had a “positive obligation to adopt reasonable and adequate measures in order to protect the rights of the applicants to the respect of their private life and their home and, more generally, to the enjoyment of a healthy and protected environment” (para. 110). The government failed to provide an efficient functioning of the system of collection, treatment and disposal of waste, which impaired the right to respect for the private life and the home of the applicants.

The applicants also argued that the government failed to inform them of the risks inherent in the fact that they lived in a polluted area as provided for by Article 8. The Court stated that the government must provide information to the public in order to allow it to assess the risk to which it is exposed. However, it considers that with two studies published in 2005 and 2008 the government had fulfilled its role in providing information to the public.

The applicants further argued that, in violation with Article 13, the Italian legal system lacked an effective remedy by which they could obtain compensation for their harm. Indeed, the Court held that an action in compensation, a representation as civil parties in criminal prosecutions or an application to the Environment Ministry would provide no effective legal remedies.

### **Commentary**

*Di Sarno v. Italy* builds on the application, developed in *Lopez Ostra v. Spain* particularly, of the relationship between environmental pollution and the right to respect for private life and home and family life. The Court considers here that a violation can be found if it directly impairs the well-being of an individual, even in the absence of actual harm to health. The Court, following its determination in *Bacila v. Romania*, recognizes the obligation of the State to protect the rights to respect for private life and the home, and to the enjoyment of a healthy and protected environment. The Court’s explicit reference to the right to the enjoyment of a healthy and protected environment significantly strengthens the human rights and environment linkage in European human rights jurisprudence.

The Court also considers, in line with other precedents, that the State has a positive obligation to regulate the risk inherent in hazardous activities to ensure that this activity does not impact the enjoyment of the right to respect for private and family life, and the home.

## **Hardy and Maile v. United Kingdom** **Application 31965/07, (Judgment of February 14, 2012)**

### **Basic Facts**

The applicants (groups of local residents) challenged planning permits which had been granted for the operation of liquefied natural gas (LNG) terminals in the UK, on the grounds that the relevant authorities had failed to properly assess the risks to the marine environment by the operation of these terminals and had also failed to make all relevant information available to the public (paras. 6-8). The applicants brought a complaint under Articles 2 (right to life) and 8 (right to protection of private and family life) of the ECHR (para. 183).

### **Key Findings and Holdings**

The Court chose to only review the case under Article 8 (para. 184). Although no actual pollution was occurring and the risk of an explosion caused by escaped gas was found to be extremely slight, the Court pointed out its reasoning in prior cases that “Article 8 [applies] where the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life” (paras. 189-90). Thus, the Court concluded that the potential risks posed by the LNG terminals stemming from the possibility of a ship collision in the harbor were “such as to establish a sufficiently close link with the applicants’ private lives and homes for the purposes of Article 8” (para. 192).

“The Court reiterates that in a case involving decisions affecting environmental issues there are two aspects to the inquiry which it may carry out. First, the Court may assess the substantive merits of the national authorities’

decision to ensure that it is compatible with Article 8. Second, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual" (para. 217). National authorities, the Court highlighted, are generally better situated to evaluate the requirements regarding LNG transport and processing in the local context, as well as the needs of the local community (para. 218). The Court affirmed that "in cases raising environmental issues the State must be allowed a wide margin of appreciation" (para. 218).

The Court determined there was a comprehensive legislative and regulatory framework in place governing the pertinent activities and that extensive reports and studies had been executed to the satisfaction of the planning and hazardous substances authorities and domestic courts (para. 223). "[C]omprehensive and measurable data," the Court noted, is not requisite in every case (para. 231). It did not appear to the Court "that there has been any manifest error of appreciation by the national authorities in striking a fair balance between the competing interests in the case" (para. 231). Therefore, the Court held that the UK had "fulfilled its obligation to secure the applicants' right to respect for their private lives and homes" and there was no Article 8 violation (para. 232).

Regarding information disclosure, the Court affirmed the principle that where a state engages in hazardous activities which may cause latent negative health consequences, Article 8 requires that "an effective and accessible procedure must be established which enables [potentially affected] persons to seek all relevant and appropriate information" in order to properly evaluate the danger to which it is exposed (para. 246). However, the Court dismissed this complaint, emphasizing that there was an appropriate procedure in place ("provisions of the Environmental Information Regulations and the FOI Act establish an extensive regime to promote and facilitate public access to environmental information") and requested information was made available ("planning and hazardous substances applications were public documents and formed the subject of extensive public consultation . . . The Environmental Statements accompanying the applications were also made available to the public and the applicants do not dispute that they had access to them") (paras. 247-50).

### ***Commentary***

This case reaffirms that a claim may be brought under Article 8 before actual pollution commences in circumstances where the nature of the project presents a potential risk establishing "a sufficiently close link to private life and family life," as evidenced by the requirement of planning permits and hazardous substances consent, regulatory classifications of installations involved, and the severity of the consequences if any release were to occur (para. 191).

### **Kolyadenko & Others v. Russia**

**Applications 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05  
(Judgment of February 28, 2012)**

### ***Basic Facts***

The applicants resided in the Sovetskiy District of Vladivostok close to the Pionerskoye water reservoir, which harbors supplies of drinking water for the city of Vladivostok (para. 9). Historically, the Pionerskaya river floodplain was in an area prevalent to periodic flooding during heavy rains when water was released from the Pionerskoye reservoir to avoid structural damage to the reservoir (para. 9). On separate occasions in 1999, the State-owned Water Company and the Vladivostok Commission for Emergency Situations warned the Vladivostok Administration about the poor condition of the river, particularly noting that "outlet channels and the river channel itself were abundantly overgrown with small trees and bushes, cluttered with debris and household waste and blocked by unlawfully built dams and various structures which all created a threat of flooding over an area of 15 square kilometres, with a population of over 5,000 people, in the event of the urgent release of a large quantity of water from the Pionerskoye reservoir" (para. 16). On August 7, 2001 a heavy amount of rain fell in the area of the Pionerskoye reservoir, totaling 236 to 276 millimetres (para. 26). In response, at 9 a.m. the Water Company began increasing the rate of water release, which reached its maximum rate of 167 cubic metres per second between 12 noon and 2 p.m. causing a flash flood in the area around the reservoir where the applicants lived (paras. 28–30, 32).

In January of 2003 the district prosecutor's office of the Leninskiy District of Vladivostok brought criminal proceedings against officials of the Vladivostok municipal and Primorskiy regional authorities under Article 286 (1) of the Russian Criminal Code (abuse of power) on suspicion on them having, in excess of their power, allocated plots of



land for individual housing construction within a water protection zone of the Pionerskaya river (para. 52). On July 20, 2004 the investigating authorities discontinued the proceedings, concluding that prior to September 4, 2000, “when no water protection zones had been established by the Primorskiy regional authorities, any town planning restrictions concerning construction activities in such zones had been inoperative.” Therefore, it could not be determined that officials of the Vladivostok Administration abused their powers when allocating plots of land on the banks of the Pionerskaya river at that time (paras. 54, 58). On April 21, 2005, the applicants submitted to the Court that the Vladivostok authorities placed their lives at risk, in contravention of Article 3 of the Convention, by releasing a large amount of water, without any prior warning, from the Pionerskoye reservoir into a river which for years they had failed to maintain in a proper state of repair. Additionally, the applicants asserted that no evacuation of the population from the flooded area had been organized following the flood, leaving them to find their own way to safety, and subsequently to cope with the consequences of the flooding on their own (para. 41). They also complained that they had no judicial response in respect of those events (para. 130).

### ***Key Findings and Holdings***

In determining whether the applicants’ claims fell under Article 2, protecting the right to life, the Court affirmed that Article 2 “does not solely concern deaths resulting from the use of force by agents of the State but also ... lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction” (para. 151). Moreover, Article 2 “covers not only situations where certain action or omission on the part of the State led to a death complained of, but also situations where, although an applicant survived, there clearly existed a risk to his or her life” (para. 151). Given that the water arrived and rose very quickly, reaching between 1.20 and 1.50 metres in the applicants’ dwellings, the Court found the level of risk sufficiently high to have placed these applicants’ lives in jeopardy (para. 153).

In examining the State’s obligation to protect the right to life, the Court reiterated that “the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life” (para. 157). The Court considers that “this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake . . . In the particular context of dangerous activities special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks” (para.158).

With this in mind, the Court found the Vladivostok Authorities’ responsibility engaged for three reasons. “Firstly, the authorities failed to establish a clear legislative and administrative framework to enable them effectively to assess the risks inherent in the operation of the Pionerskoye reservoir and to implement town planning policies in the vicinity of the reservoir in compliance with the relevant technical standards. Secondly, there was no coherent supervisory system to encourage those responsible to take steps to ensure adequate protection of the population living in the area, and in particular to keep the Pionerskaya river channel clear enough to cope with urgent releases of water from the reservoir, to set in place an emergency warning system there, and to inform the local population of the potential risks linked to the operation of the reservoir. Lastly, it has not been established that there was sufficient coordination and cooperation between the various administrative authorities to ensure that the risks brought to their attention did not become so serious as to endanger human lives” (para. 185). The Court emphasized that it did not overlook the authorities’ wide margin of appreciation in matters where the State is required to take positive action, but remained convinced, however, that “no impossible or disproportionate burden would have been imposed on the authorities in the circumstances of the present case if they had complied with their own decisions and, in particular, taken the action indicated therein to clean up the Pionerskaya river to increase its throughput capacity and to restore the emergency warning system at the Pionerskoye reservoir” (para. 183). Accordingly, the Court found a violation of Article 2 (para. 187).

Turning towards the State’s procedural obligations under Article 2, the Court emphasized that “where lives have been lost in circumstances potentially engaging the responsibility of the State, Article 2 of the Convention entails a duty for the State to ensure, by all means at its disposal, an adequate response—judicial or otherwise—so that

the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished” (para. 188). “To sum up, the judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost, or put at mortal risk, as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation” (para. 191). Furthermore, “[i]n such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue” (para. 191).

The Court noted that although, according to the decision of July 20, 2004, it was the authorities of the Primorskiy Region and the Water Company who were in charge of securing the safe operation of the Pionerskoye reservoir, “the investigation made no apparent attempts to find out whether any responsibility should be attached to those authorities—let alone to establish the identity of the particular officials responsible—for the poor state of the Pionerskaya river, and in particular its obviously inadequate throughput capacity during the flood of 7 August 2001” (para. 200). Moreover “[c]oncerning town planning policy in the city of Vladivostok, including the area near the Pionerskoye reservoir, the decision of July 20, 2004 listed a number of failings by both the municipal and the regional authorities, in particular their continuous failure to identify flood-prone areas so that suitable planning restrictions could be applied. The Court is struck by the fact that, having detected all those shortcomings, the investigating authorities decided to close the investigation, referring to the absence of evidence of a crime” (para. 201). Thus, “the Court is not persuaded that the manner in which the competent Russian authorities acted in response to the events of 7 August 2001 secured the full accountability of the State officials or the authorities concerned for their role in those events and the effective implementation of the relevant provisions of domestic criminal law guaranteeing respect for the right to life” and therefore found a violation of Article 2 in its procedural aspect (paras. 202–203).

Turning to the applicants’ claims under Article 8 and Article 1 of Protocol No. 1 to the Convention, ensuring the right to respect for home and possessions, the Court determined that, in the present case, the applicants’ complaints concerned damage done by the flood to their homes . . . and to their possessions in and around those homes, rendering it appropriate to examine the applicants’ relevant complaints under both Article 8 of the Convention and Article 1 of Protocol No. 1. (para. 207). The Court, noting the violation of Article 2, stated that it “has no doubt that the causal link established between the negligence attributable to the State and the endangering of the lives of those living in the vicinity of the Pionerskoye reservoir also applies to the damage caused to the applicants’ homes and property by the flood. Similarly, the resulting infringement amounts not to ‘interference’ but to the breach of a positive obligation, since the State officials and authorities failed to do everything in their power to protect the applicants’ rights secured by Article 8 of the Convention and Article 1 of Protocol No. 1.” (para. 216).

### **Commentary**

The Court’s decision lends European Court of Human Rights precedent to claims against public bodies in what is commonly known as the *Rylands v. Fletcher* rule, which holds that proof of negligence is not necessary to find liability for natural damage emanating from non-natural activities. The Court rejected the Government’s submission that their alleged infringement of rights were “the result of natural disaster, in the form of exceptional rain, which they could have not have foreseen and could therefore not be imputed to the State” (paras. 162, 215). The Court concluded that, irrespective of weather conditions, “the authorities had positive obligations under Article 2 of the Convention to assess all the potential risks inherent in the operation of the reservoir, and to take practical measures to ensure the effective protection of those whose lives might be endangered by those risk” (para. 166).

### **Martinez Martinez and María Pino Manzano v. Spain** **Application 61654/08, (Chamber Judgment of July 3, 2012)**

#### **Basic Facts**

The applicants, two Spanish nationals, resided in a house two hundred meters away from a stone quarry (para. 4). The house was built on a site earmarked for industrial use, and a section of the house was employed as a

textile workshop (para. 4). In October 1996, the municipality had issued a permit for a company to exploit the stone quarry; the applicants then lodged several complaints with various authorities about the quarry's noise and dust pollution, which the applicants were exposed to while inside their home (paras. 6–8). In August 1998, they consulted a psychologist, who provided a report delineating that they suffered from sleep disorders likely caused by the nighttime noise from the quarry (para. 9). Additionally, in October 1998 they brought in an expert, who found the night-time noise levels to be in excess of the legally admissible levels and recommended measures to decrease the noise to which they were subjected inside their home" (para. 10). Relying on Articles 2 (right to life) and 8 (right to respect for private and family life), the applicants filed a complaint with the Court on May 22, 2008, alleging psychological disorders caused by the noise from the quarry and that they had received no compensation for the damage they suffered from the noise and dust (para. 24).

### ***Key Findings and Holdings***

The Court concluded "that it can not be considered that the authorities' conduct has caused an infringement on applicants' [rights to] respect for their home and their private and family life" (para. 50). The applicants, the Court highlighted, had established their home on land which had "initially been classified as 'rural', then as 'building land for industrial use', which precluded the construction of a residence or dwelling under any circumstances (para. 47). The Court reiterated that States had broad discretion (wide margin of appreciation) when it came to implementing town and country planning schemes and policies adopted in the interest of the community, and that citizens had certain duties in that regard . . . [Since] the applicants had set up home in an area that was not intended for residential use, they had clearly placed themselves in an unlawful situation from the start, and should accept the consequences. . . [I]ndustrial land d[oes] not enjoy the same level of environmental protection as a residential area" (paras. 47–48).

### ***Commentary***

The Court premised its decision on the illegality of the location of the applicants' residence on industrial land that precluded construction of a residence under any circumstances, reiterating that States have a wide margin of appreciation with regards to implementation of town and country planning schemes and land use regulation (para. 48).

## **Flamenbaum and Others v. France** **Application 3675/04 and 23264/04, (Judgment of December 13, 2012)**

### ***Basic Facts***

The case addressed a runway extension at an airport in Deauville and resultant noise disturbances in residential areas (para. 3). Relying on Article 8 of the ECHR (the right to respect for private and family life) and Article 1 of Protocol 1 to the ECHR (protection of property), the homeowners complained about the noise disturbance; the ensuing decline in the market value of their properties; the need to incur additional costs of increased insulation of their structures; and deficiencies in the decision-making process underlying the runway extension (paras. 3, 84–85, 99).

### ***Key Findings and Holdings***

In its decision, the Court referred to its previous decision regarding the expansion of Heathrow airport, *Hatton and Others v United Kingdom*, Application 36022/97, 2 October 2001, but in this case did not find any violations of the rights claimed by the applicants under the ECHR (paras. 139, 232). The Court did conclude that Article 8 was applicable to the case due to the noise level being within the vicinity of the airport (para. 148). To comply with Article 8, interference with private and family life "must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society" (para. 142). First, the Court highlighted that the national administrative court had determined that the domestic authority's basic decisions were aligned with domestic law (para. 144). Secondly, the Court affirmed the domestic administrative court's ruling that extending the runway to accommodate higher-capacity aircraft supported the region's economic growth, a legitimate aim for the government to pursue (para. 149). Finally, the Court examined whether the authorities, in permitting the runway extension, had fairly balanced the interests of the individual with those of the community at large, keeping in mind the broad discretion afforded to them in this area (para. 154). In determining the proportionality of the interference the Court determined that the extension of the runway did not result in a substantial increase in noise disturbances, as claimed (para. 152). The Court also noted that the authorities had previously decreased the length of the planned runway in their

permitting decision, and halted aerobatic and military flights at the airport (para. 153). Moreover, the authorities had taken measures to reduce noise (such as modifying takeoff/landing tracks and setting time restrictions on takeoffs and landings) (para. 153). Given those measures, the Court determined that a fair balance between the competing interests of the individual and those of the community at large had been reached and that the decision to grant the interference was necessary in a democratic society (para. 154).

Turning to the decision-making process, the Court referenced the detailed impact assessment that was executed before the implementation of the project and which encompassed the project's effects on human activities, the physical and biological environment, city planning, historical preservation, landscaping, and noise disturbances, of which documentation was made available (paras. 156–157). The applicants, as part of the general public, had been afforded an opportunity to participate in each stage of the decision-making process and had been provided access to remedies (paras. 157–158). Even though no one judge had scrutinized the entire plan, the Court held that this did not render the decision fragmented (para. 159). Instead the Court expounded that, while Article 8 of the ECHR obliges states to provide for an opportunity to the public to make their interests heard, the precise methods are left up to the states (para. 159).

Lastly, the applicants claimed that the reductions in their property values caused by the aircraft noise were a violation of their property rights (para. 162). The Court reiterated its view that Article 1 of Protocol 1 of the ECHR does not guarantee the right to keep property in a pleasant environment (para. 184). Moreover, since the applicants did not satisfactorily follow up on the Court's request to supply clarifying information on their calculations and estimates, the Court determined that the applicants failed to prove any effect of the a runway extension on their property and therefore held that Article 1 of Protocol 1 to the ECHR was not violated (paras. 190, 192).

## Court of Justice of the European Union

The EU Court of Justice interprets EU law to ensure that it is applied evenhandedly in all EU states.<sup>98</sup> It also settles legal disputes among EU governments and EU institutions.<sup>99</sup> Individuals, companies, or organizations may submit cases to the Court if they feel their rights have been infringed by an EU institution.<sup>100</sup> The EU Court of Justice is composed of one judge per EU state.<sup>101</sup>

### **Stichting Natuur en Milieu & Pesticide Action Network Europe v. European Commission** Case T-338/08, (Judgment of the General Court (Seventh Chamber), June 14, 2012)

#### **Basic Facts**

The applicants were NGOs established with the objectives of environmental protection and campaigning against the use of chemical pesticides (para. 1). They were concerned about EU Commission regulations which delineated maximum pesticide residue levels in various products, food, and feed (para. 2). The applicants made requests to the Commission for an internal review of these regulations under the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (para. 3). Article 9(3) of the Aarhus Convention puts forth that "each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment" (para. 60).<sup>102</sup> The Commission denied the NGOs' request for internal review, reasoning that Aarhus Regulation (EC) No 1367/2006, which implements the Aarhus Convention into EU law, limits requests for internal review to administrative actions of "individual scope" (para. 4). The NGOs brought

98 *Court of Justice of the European Union, EUROPA EU*, <http://europa.eu/about-eu/institutions-bodies/court-justice/> (last visited Dec. 14, 2012).

99 *Id.*

100 *Id.*

101 *Id.*

102 *United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* art. 9(3), June 25, 1998 (entered into force Oct. 30, 2001), available at <http://ec.europa.eu/environment/aarhus/> [hereinafter *Aarhus Convention*].

their complaint to the Court, arguing that since the Aarhus Convention itself encompassed no such limitation, the Regulation's provision contravenes the Convention (para. 26).

### ***Key Findings and Holdings***

The Court noted that the EU regulation was one of general application and thus was barred from an request for internal review under the EU Regulation (para. 39). However, the Court agreed that the EU Regulation was incompatible with the Aarhus Convention since the latter "cannot be construed as referring exclusively to measures of individual scope" (para. 83). Because the Convention is an international treaty to which the EU is a party, such a treaty provision prevails over secondary EU legislation like this Regulation (para. 54). The Court therefore annulled the decisions not to permit a review of the EU Regulations as they were acts executed by public authorities (which notably do not include "bodies or institutions acting in a judicial or legislative capacity"<sup>103</sup>) (paras. 69, 84).

### ***Commentary***

The General Court's ruling affirms the precedence of the EU's commitments under international law, such as its obligations under the Aarhus Convention, over that of secondary EU law (para. 52). In effect, the General Court's ruling means that procedures of EU decision-making bodies must be comport to Aarhus standards requiring "rights of access to information, public participation in decision-making, and access to justice in environmental matters" (para. 75).

## **Stichting Greenpeace Nederland & PAN Europe v. European Commission T-545/11, Judgment of the General Court (October 13, 2013)**

### ***Basic Facts***

On December 20, 2010, the applicants requested access to several documents relating to the European Commission authorisation of the placing of glyphosate on the market as an active substance, previously granted under Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1) (para. 1). The documents requested included: a copy of the draft assessment report issued by the rapporteur Member State; a complete list of all tests by operators seeking inclusion of glyphosate in Annex A; and all test documents submitted by the operators seeking the inclusion of glyphosate in Annex A, including all long-term toxicity tests, all mutagenicity tests, carcinogenicity tests, neurotoxicity tests and all reproduction studies (para. 2). The applicants based their requests on the State's legal obligations under Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), and under Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13) (para. 1).

In May of 2011, the Secretary General of the Commission granted access to all of the documents except for the complete list of all tests submitted by the operators in anticipation of glyphosate's inclusion in Annex A, stating that the German authorities had refused to disclose the list based on confidentiality concerns (para. 5). On 10 August 2011, the Secretary General of the Commission refused access to the document, relying on the Federal Republic of Germany's opinion that the document at issue contained confidential information relating to the intellectual property rights of the operators who sought the inclusion of glyphosate in Annex I to Directive 91/414. The information Germany deemed confidential included the "detailed chemical composition of the active substance produced by each of them, detailed information concerning the process by which each of them produced the substance, information on the impurities, the composition of the finished products and the contractual relations between the various operators which had sought the inclusion of glyphosate" (para. 7).

Next, the Secretary General examined whether an overriding public interest existed which could justify disclosure, in light of Article 6(1) of Regulation No 1367/2006, which states that grounds for refusal of access to environmental information "shall be interpreted in a restrictive way, taking into account the public interest served by disclosure

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103 *Id. at art. 3.*

and whether the information requested relates to emissions into the environment.” After review, she held that the document did not contain information “relating to emissions into the environment” within the meaning of Article 6(1), rendering it inapplicable (para. 8). Overall, the Secretary General determined that the information in question concerned the glyphosate production process of the operators, and on balance, the need to protect the commercial interests and intellectual property rights of those operators outweighed the public interest in disclosure of the information (para. 9). The applicants thus contended that the Commission acted in breach of the Aarhus Convention, Regulation No 1049/2001, and Regulation No 1367/2006 and requested the Court to annul the decision (para. 13).

### ***Key Findings and Holdings***

In analyzing the Secretary General’s decision, the ECJ noted that Article 6(1) of Regulation No 1367/2006 “lays down a legal presumption that an overriding public interest in disclosure exists where the information requested relates to emissions into the environment” (para. 37). Accordingly, if the institution receives request for access to a document, it is obliged to disclose “where the information requested relates to emissions into the environment, even if such disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person, including that person’s intellectual property” (para. 38).

Turning to the issue of whether the document contained information that was sufficiently related to emissions into the environment, the ECJ noted that the applicants were not requesting access to information on the contractual relationships between operators or the methods of manufacture of that substance (para. 58). At the hearing the applicants further clarified their request, indicating that they sought information “relating to the ‘identity’ and quantity of impurities present in the glyphosate, the analytical profile of the batches, in particular their composition, the ‘identity’ and quantity of chemical substances added during the tests, the duration of those tests and the actual effects on the active substance” (para. 59). The Court noted that a large part of the data in the document concerned the identification and the quantity of various impurities present in the active substance (para. 69). Furthermore, “[s]ince the active substance must be included in a plant protection product, which, it is common ground, will be released into the air, principally by spraying, the ‘identity’ and the quantity of each impurity contained in such a substance constitutes information relating, in a sufficiently direct manner, to emissions into the environment” (para. 69).

The Court therefore determined that the Commission made an error of assessment in denying access to the document at issue, to the extent that the request concerned information relating to emissions into the environment, namely, the ‘identity’ and the quantity of all of the impurities contained in the active substance notified by each operator, the impurities present in the various batches and the minimum, median and maximum quantities of each of those impurities, set out, for each operator and the composition of plant protection products developed by the operators (para. 75).

### ***Commentary***

The ECJ’s decision emphasized that Regulation No. 1049/2001 is intended “to give the fullest possible effect to the right of public access to documents of the institutions” (para. 28). As such, “the first sentence of Article 6(1) of Regulation No 1367/2006 lays down a legal presumption that an overriding public interest in disclosure exists where the information requested relates to emissions into the environment” (para. 37). The Court gave full effect to the presumption, finding that “although that directive contains provisions intended to protect the confidentiality of information, consisting of commercial and industrial secrets, provided in the context of the authorisation procedure for active substances organised by that directive, it suffices to note that the existence of such rules cannot rebut the irrebuttable presumption arising from Article 6(1) of Regulation No 1367/2006” (para. 40).

## **Inter-American Commission on Human Rights**

The Inter-American Commission on Human Rights (“Inter-American Commission”) is one part of the Inter-American human rights system found in Washington, D.C.<sup>104</sup>. The Organization of American States established the

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104 *What is the IACHR?, Inter-American Commission on Human Rights*, available at <http://www.cidh.oas.org/what.htm> (last visited 19 Aug. 2011).

Commission in its Charter and the American Convention on Human Rights.<sup>105</sup> For states within the region that are not a party to the American Convention on Human Rights, the Commission applies the American Declaration on the Rights and Duties of Man.<sup>106</sup> This section focuses on the Inter-American Commission's analysis of rights under the American Declaration of the Rights and Duties of Man and under the American Convention on Human Rights.

**Yanomami v. Brazil**  
**Res. No. 12/85 (1985)**

***Basic Facts***

In 1980, several non-governmental organizations ("the petitioners") presented a petition to the Commission against the Government of Brazil on behalf of the Yanomami Indians. The Yanomami are an indigenous people living in the Amazon regions of Brazil and Venezuela. They have a close relationship with the Amazon lands, on which they rely for subsistence. The background to the complaint was the approval by Brazil in the 1960s of a plan to exploit the resources of the region, followed by the discovery of mineral deposits and the building of a trans-Amazonian highway through Yanomami territory. Legislation to protect the Yanomami Indians, in particular the establishing of a 9,419,108-hectare Yanomami Indian Park had not been implemented.

The Petitioners relied on the American Declaration of the Rights and Duties of Man ("American Declaration"): Article I (right to life, liberty, and personal security); Article II (right to equality before the law); Article III (right to religious freedom and worship); Article XI (right to the preservation of health and to well-being); Article XII (right to education); Article XVII (right to recognition of juridical personality and of civil rights); and Article XXIII (right to property).

The petitioners alleged that the Brazilian government had violated the American Declaration by constructing the trans-Amazonian highway through Yanomami territory and by authorizing exploitation of the territory's resources by private enterprises. They said the influx of outsiders had led to the breakdown of social organization, for example introducing prostitution among the women. The influx of non-indigenous persons had introduced contagious diseases, including sexually transmitted diseases and tuberculosis; these remained untreated due to lack of medical care, resulting in many deaths.

***Key Findings***

The Commission found that Brazil had violated the Yanomamis' rights to life, liberty, and personal security guaranteed by Article I of the American Declaration, as well as their rights of residence and movement (Article VIII) and their right to the preservation of health and well-being (Article XI). The violations arose from the government's failure to implement measures of "prior and adequate protection for the safety and health of the Yanomami Indians". The Commission noted that in the context of international law, ICCPR, Article 27 "recognizes the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and in general, for all those characteristic necessary for the preservation of the cultural identity" (para.7).

The Commission found the main elements of the violations consisted of the State's construction of the highway, the failure to establish the Yanomami Park, allowing exploitation of the subsoil and an influx of outsiders, in failing to provide medical care, and in displacing the Yanomami from their lands. It highlighted the responsibility of government officials towards the indigenous populations and the need for training of relevant officials (para. 8). Whilst acknowledging that Brazil had taken some important measures in the previous few years, it recommended preventive healthcare and treatment, the establishment of the Yanomami Park, education and consultation.

***Commentary***

This was one of the first reports in which the Inter-American Commission acknowledged the need for indigenous people to receive special protection to enable them to preserve their cultural identity and right to health. Equally significant is the Commission's acknowledgement of the link between indigenous peoples' lack of legal title to the land and their vulnerability. The decision also highlighted the confluence between cultural rights and environmental rights, which often arises in cases involving indigenous communities threatened by economic interests.

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105 *Id.*

106 *Id.*

**Report on the Situation of Human Rights in Ecuador**  
OEA/Ser.L/V/II.96, doc. 10, rev. 1 (1997)

***Summary of the Report***

The Inter-American Commission's Report on the Situation of Human Rights in Ecuador includes Chapter 8, "the Human Rights Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities", which addresses environmental issues in the context of development. Chapter 8 concerns the effect of oil exploitation in the Oriente region which is home to 500,000 people, including a number of indigenous tribal peoples. The Commission became aware of human rights issues concerning environment and development in the region as the result of a petition filed with the Inter-American Commission on behalf of the Huaorani people in 1990, alleging that the development threatened their human rights.

Under Ecuadorean law, the State owns the sub-surface minerals, which it exploited through a state-owned oil company or through concessions and contracts with foreign oil companies. The Oriente inhabitants claimed the operations over several years had contaminated the water, air, and soil, damaging their health. Due to the improper treatment and disposal of toxic wastes, the community had been exposed to the toxic wastes in their water, in the air, and in the soil they cultivated for food. An official estimate found that thirty billion gallons of toxic wastes and crude oil had been discharged into the land and waterways of the Oriente since 1972. The contaminants had been documented as adversely affecting human health; local health professionals had reported associated illnesses including skin diseases, chronic infections and fevers, gastro-intestinal problems and persistent diarrhea. The contamination was affecting food security because oil spills had killed crops, domestic animals had died and wildlife had left the area. The government had failed to regulate and supervise the activities of both state-owned and private companies.

Article 19 of the Ecuadorian Constitution on the right to life and personal integrity provides for "the right to live in an environment free from contamination".

The Commission applied the American Declaration Article I (right to life) and Article XI (preservation of health and well-being), and the American Convention on Human Rights ("American Convention") Article 4 (right to life) and Article 5 (right to physical, mental and moral integrity). It also referred to the Article 2 obligation of the State to take corrective measures where those rights were not adequately protected: "Where the right to life, to health and to live in a healthy environment is already protected by law, the Convention requires that the law be effectively applied and enforced." The Commission referred to the government's obligation to investigate and provide redress where the right to life had been violated.

The Commission concluded that in order to guard against environmental conditions which had an adverse effect on human health, individuals should have access to: "information, participation in relevant decision-making processes, and judicial recourse." Expanding on these rights, the Commission found that Article 13 of the American Convention, which established a right to freedom of expression, related to a right to access to information. Similarly it found a link between a right of public participation in decision-making and the Article 23 right to participate in public government. It found the Article 25 right to judicial protection included access to judicial recourse to vindicate the right to live in a safe environment.

The Commission recommended that the Ecuadorian government take steps to remedy the situation and prevent future oil contamination which would threaten the lives and health of the people of Oriente. The recommendations emphasized the need to ensure public participation in the formulation of decisions which directly concern the environment, as well as the dissemination of information.

The Commission recognized that the right to development affords each State the right to exploit its natural resources. However the absence of adequate regulation could cause serious problems with respect to the environment, amounting to human rights violations under the American Convention.



**Mary and Carrie Dann v. United States**  
**Report No. 75/02 (2002)**

***Basic Facts***

The Indian Law Resource Center lodged a petition on behalf of Mary and Carrie Dann, sisters and members of the Western Shoshone indigenous people in Nevada. The petitioners claimed the U.S. government had interfered with the Danns' ancestral lands by appropriating their land by an unfair procedure, physically removing and threatening to remove their livestock, and by permitting or acquiescing in gold prospecting activities within Western Shoshone traditional territory. They claimed violations of the American Declaration, Article II (right to equality under the law), Article III (right to religious freedom), Article VI (right to family and protection thereof), Article XIV (right to take part in the cultural life of the community), Article XVIII (right to a fair trial) and Article XXIII (right to property).

The petitioners asserted that the Danns and their band hunted, grazed and otherwise occupied ancestral lands within the larger ancestral territory of the Western Shoshone people. Since 1863 the United States had gradually expropriated those lands for the benefit of the government and non-indigenous people. From the 1970s, the United States government began actions to impede the Western Shoshone, including the Danns, in the use and occupation of the lands, including parts which they depended on for their living. These actions included legal notices threatening to impound property, arrests for hunting, court actions for trespass, fines and mining permits.

The United States denied the allegations, arguing that the matters raised by the Petitioners involved long-standing and complex land title issues rather than human rights issues. The State said it had not interfered with the lands which formed the Danns' ranch; the Danns could apply for a permit to graze their cattle on public lands around the ranch, but they had allowed over-grazing, leading to the impoundment and other actions against them. The State suggested there were tribal groups within the Western Shoshone peoples, but said they did not recognize the Danns as one of these tribes. The State considered that the Danns and other Western Shoshone people had given up their native lands in 1872. Any land title of the Western Shoshone had been extinguished by proceedings before a quasi-judicial body, the Indian Claims Commission which had led to a compensation award of \$26,145,189.89, being held in trust for the community. The United States government stressed it was not a party to the American Convention or to the ILO Convention No. 169, and the Proposed American Declaration on the Rights of Indigenous People had not been adopted.

The petitioners said the Indian Claims Commission proceedings were disputed because they had been conducted by lawyers who did not represent the Danns or all the Western Shoshone people, and the Danns had not been able to participate. There had then been proceedings in the U.S. Courts which had found at Appeals Court level that the land claim had not been extinguished in 1872, though this was overturned on appeal. The Western Shoshone people had refused to accept the compensation award because they considered it was unfair.

***Key Findings***

The Commission found that the Western Shoshone people have traditionally occupied land now forming the state of Nevada, to which they had formerly had title (para. 100 onwards). The Nation consists of numerous relatively decentralized bands or tribes, based on extended family relationships. The Commission found that the Danns were accepted as members of the Western Shoshone people.

The Commission noted that the complaint was restricted to the American Declaration because the United States is not a party to the American Convention on Human Rights. But it stated that in interpreting the Declaration, it had taken into account international and Inter-American human rights law developments. It suggested the American Convention in many instances could be considered to represent an authoritative expression of the principles in the American Declaration.

The Commission rejected the State's argument that this was simply a land dispute which did not engage human rights: "the broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples...[T]hese norms encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands" (para. 124). The Commission suggested that a review of the treaties, legislation and jurisprudence over more than eighty years

revealed the development of human rights norms and principles applicable to the circumstances and treatment of indigenous peoples. It went on to state, “[C]entral to these norms is that the full enjoyment of these human rights of these communities can only be achieved after carefully paying attention to their historical, cultural, social and economic situation and experience”. The Commission highlighted the principle of “special protection”, which it had developed, referring to the *Yanomami Case* (see above), and which had been recognized in other international and domestic forums.

The Commission particularly emphasized the collective nature of indigenous rights “in the sense of rights that are realized in part or in whole through their guarantee to groups or organizations of people.” Central to this were traditional collective systems for the control and use of territory, which warranted special measures of protection (para 128). The Commission also referred to the material and spiritual relationship to the land as part of a cultural legacy, relying on the *Awasi Tingni Case* (see below). Acknowledging that the Draft American Declaration on the Rights of Indigenous Peoples had not been adopted, the Commission considered that many of its provisions reflected general principles of international law, relevant to interpreting the American Declaration of the Rights and Duties of Man (para 129).

The principles applicable to indigenous human rights included: the right of indigenous peoples to legal recognition of their varied forms of control, ownership, use and enjoyment of land and property; the recognition of their property and ownership rights with respect to land and resources they have historically occupied; and where property rights arose from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title, which could only be changed with full and informed consent and with rights to fair compensation if the right was irrevocably lost.

The Commission accepted the Petitioners’ evidence that the Danns did not authorize or effectively participate in the Indian Claims Commission claim and were refused an opportunity to intervene in the proceedings. In relation to the dispute as to whether the Western Shoshone title was extinguished, the Commission found that although the Indian Claims Commission process was a laudable attempt to remedy the historic deprivations suffered by indigenous communities in the U.S., there had been no judicial finding on the issue. The processes were not fully compliant with human rights norms for determining indigenous property interests.

The Commission found that American Declaration, Articles XVIII and XXIII obliged a member state to ensure that any determination of indigenous land claims was based on full and informed consent by the whole community (para. 140). They found the date taken by United States for the assessment of compensation was arbitrary and noted that no interest was awarded on the compensation.

After considering the U.S. response to its preliminary merits report, the Commission confirmed that it considered the U.S. had failed to ensure the Danns’ right to property under the American Declaration contrary to Articles II (the right to equality), XVIII (the right to a fair trial) and XXIII (right to property). They recommended that the US should: 1) provide the Danns with an effective remedy; and 2) review its laws, procedures and practices to ensure a determination of the property rights of indigenous peoples which complied with the American Declaration, Articles II, XVIII and XXIII.

### **Commentary**

The decision is further evidence of an international law norm requiring free, prior and informed consent. It provides a sophisticated analysis of what this norm entails in the context of indigenous peoples’ rights where both the rights of the individual and the collective need special protection.

The United States rejected the findings of the Commission on grounds which included the view that the American Declaration was not legally binding, and could not be interpreted based on an unadopted draft Declaration on the Rights of Indigenous Peoples rights. It announced it would not implement the Commission’s recommendations.

**San Mateo de Huanchor v. Peru**  
**Report No. 69/04 (Oct. 15, 2004)**

***Basic Facts***

In 2003, a coalition of communities affected by mining activities claimed that Peru had violated the fundamental individual and collective human rights of its members because of the effects of pollution produced by a private mining company. The company had deposited toxic waste sludge containing heavy metals such as arsenic, lead, mercury, and cadmium, in the open air without appropriate precautions.

San Mateo's inhabitants are dependent on subsistence farming for their livelihood. The State had permitted the company to dump toxic mining tailings in the area, although it was foreseeable that this would result in dangerous contamination. Even after scientific findings demonstrated high levels of heavy metal contamination in the air, water and soil, as well as in the blood and urine of San Mateo residents, the State did not intervene. Nor had it established any effective regulatory or legal regime to remedy the violations. The community pointed to its economic situation and the slowness of domestic court proceedings as evidence that it had no effective domestic remedy.

The petitioners claimed violations of the American Convention rights to life (Article 4), humane treatment (Article 5, personal liberty (Article 7), a fair trial (Article 8), privacy (Article 11), freedom of association (Article 16), protection of the family (Article 17), of the child (Article 19), property (Article 21), freedom of movement and residence (Article 22), and participation in government (Article 23) (para. 14). The petitioners also claimed that the State had not provided any effective remedy (Article 25) to ensure observance of human rights of the persons affected by the mining activity in Peru. The State claimed that the complaint was inadmissible because remedies under domestic law had not been exhausted.

The petitioners applied for precautionary measures in the form of immediate removal of the toxic waste to avoid serious danger to the health of indigenous people and children and to the environment. The Commission ordered measures, including a program of public health assistance and an EIA prior to initiating removal of the toxic mining tailings dump. The Petitioners complained that these had not been fully or adequately complied with.

***Key Findings***

On the procedural issues, the Commission pointed out that Article 46(2) of the American Convention guarantees international action when the local remedies are not sufficiently expeditious and effective so as to ensure the respect for the human rights of the victims. It concluded that the administrative and criminal law remedies utilized by the community were not effective, as they did not provide the judicial protection from the mining activity pollution that they required and orders had not been enforced (para. 59).

On the substantive issues, the Commission found admissible the claims of violations of the American Convention rights to life (Article 4); to humane treatment (Article 5); to a fair trial (Article 8); of the family (Article 17); of the child (Article 19); to property (Article 21); and to judicial protection (Article 25). It found the complaints under Articles 7, 11, 16, 22, 23 and 24 were inadmissible.

***Commentary***

This was a landmark decision in its recognition of the connection between the environment and human rights in the Americas. At the time of writing, a final merits decision was pending.

**Maya Indigenous Communities of the Toledo District v. Belize**  
**Report No. 40/04 (2004)**

***Basic Facts***

The Indian Law Resource Center and the Toledo Maya Cultural Council (the petitioners) filed the claim on behalf of the Maya People of the Toledo District of Southern Belize. The petition claimed Belize had violated the Maya

People's rights by granting numerous concessions for logging and oil development, failing to protect the land and their land rights or to provide effective judicial remedies. The petition was brought under the American Declaration alleging violations of: the right to life (Article I), right to equality before the law (Article II), right to religious freedom and worship (Article III), right to a family and protection thereof (Article VI), the right to the preservation of health and to well-being (Article XI), the right to judicial protection (Article XVIII), the right to vote and to participate in government (Article XX), and the right to property (Article XXIII).

The Toledo District covers an area of approximately 1500 square miles, home to about 14000 Mopan and Ke'kchi speaking Maya people. The petition was lodged on behalf of members of thirty-eight different indigenous communities.

The petitioners alleged that the State's contraventions had impacted negatively on the natural environment upon which the Maya people depend for subsistence, had jeopardized the Maya people and their culture, and threatened to cause further damage in the future. The petitioners contended that their "right to consultation" was violated because they were not consulted about any decision that affected their community's interest in lands and natural resources. In response, the State pointed to a consultation committee established in 2001. The State argued before the Commission that the Petitioners had produced insufficient evidence of their title to the land. The State claimed that from 1998 it had taken steps to suspend, reviewed and monitor logging licenses.

### ***Key Findings***

The Commission upheld the claims of violations of the right to property, equal protection under the law, and the right to judicial protection. It began its analysis by stating that it would interpret the American Declaration in the light of current developments in international human rights law (para 85-87). Citing the *Dann* case (see above), the Commission referred to the need for special protection to compensate for the exploitation and discrimination which indigenous people have suffered at the hands of non-indigenous people.

In considering the right to property, the Commission found that it was unclear whether the indigenous people of Belize had title to lands in the Toledo district under domestic constitutional or common law. The Commission found that Inter-American jurisprudence has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, "but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition". It referred to the ILO Convention No. 169 as one of the international law instruments which supported this proposition (para. 117).

The Commission relied on the American Declaration Article II non-discrimination requirement as evidence that "respect for and protection of the private property of indigenous peoples on their territories is equivalent in importance to non-indigenous property" (para. 118). The Commission also linked the protection of property rights with "the protection of the human rights of a collective that bases its economic, social and cultural development upon their relationship with the land."

From the evidence before it, which included witness statements by the Maya and expert reports on the historical land use patterns, the Commission decided the Mopan and Ke'kchi Maya people had demonstrated a communal property right to the lands they occupied in the Toledo District, arising from their longstanding use and occupation of the territory. In its opinion, the Maya people's communal property rights had an autonomous meaning under international law which was independent of domestic judicial decisions (para. 130). Belize had violated the right to property by failing to take effective measures to recognize the Maya people's communal property right to the lands that they had traditionally occupied and used, and by failing to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect the territory on which their right exists (paras. 151-2). Granting logging and oil concessions without consultation was an aspect of this violation.

In relation to the judicial protection right, the Commission referred to the three requirements for assessing whether proceedings had been conducted in a reasonable time: (a) complexity; (b) the procedural activity of the interested party; and (c) the conduct of the judicial authorities. Evaluating the eight years which the proceedings had taken in the light of these factors, the Commission found the main reasons for the delay were systemic delay in Belize's civil justice system and the State's failure to comply with procedural requirements. These amounted to unwarranted delay, violating the Article XVIII judicial protection right.

Applying the approach of the Inter-American Court in *Awas Tingni*, the Commission recommended that the State take measures to demarcate the lands of the Maya peoples. The State had an obligation to conduct *informed* consultation with the Maya and take legislative and administrative measures necessary to provide for collective land rights. They also recommended that the State repair the environmental damage caused by logging on the Maya territory.

### **Commentary**

This decision is one in a line of Inter-American cases (*Yanomami*, *Dann*, *Awas Tingni*) that develop the content and scope of indigenous peoples' rights to special protection and to collective property in international law. Of particular note is the finding that indigenous peoples have property rights over their traditional lands and resources under international human rights law, regardless of whether those rights are recognized under domestic law. Similarly the Commission articulates the responsibility of the State with respect to indigenous peoples' rights including the responsibility to delimit, demarcate and title or otherwise identify their collective and individual land rights.

The Commission's approach to balancing economic and environmental rights is of note:

"As proclaimed in the Inter-American Democratic Charter, '[t]he promotion and observance of economic, social, and cultural rights are inherently linked to integral development, equitable economic growth, and to the consolidation of democracy of the states of the Hemisphere.' At the same time, development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being" (para.150).

### **Kichwa Peoples of the Sarayaku community and its members v. Ecuador Report No. 62/04 (2004)**

#### **Basic Facts**

The Association of Kichwa Peoples of Sarayaku, the Center for Justice and International Law (CEJIL), and the Center for Economic and Social Rights (CDES) jointly lodged a petition on behalf of the indigenous Kichwa people of Sarayaku, a community of about 1200 members. According to the petition, Ecuador entered a contract with an Argentinian company in 1996 for oil exploration on Sarayaku ancestral land in the central southern Amazon, without consulting the community. In defense of their lands, the Sarayaku blocked access to their territory but company employees entered the Sarayaku territory accompanied by heavily armed military patrols. The petitioners alleged that beginning in 2002 oil company employees and guards destroyed woodlands, sources of food and cultural heritage, and there were numerous incidents of harassment, attacks, sexual assaults, illegal detentions and other fundamental human rights abuses. The company's activities included the placing and detonation of explosives, the construction of heliports and camps, and violence against members of the community. The petition said this had had a major impact on the life and development of the people of Sarayaku.

The petitioners alleged that Ecuador was responsible for violating the rights of the Kichwa people, because it had allowed the oil company to carry out these activities on the ancestral land of the Sarayaku community without its consent, it had persecuted community leaders, and had denied the community judicial protection and legal due process. It was further argued that by signing the contract and enabling and supporting the development of extractive activities of their territory, Ecuador had restricted the right of its people to collective ownership. In November 2002, the community filed an *amparo* suit seeking suspension of the oil-related activity, but the courts delayed the processing of the legal action.

In the complaint to the Commission, the petitioners claimed that both individual and collective rights were violated, under the American Convention provisions relating to: juridical personality (Article 3); the right to life (Article 4); personal integrity (Article 5); personal liberty and security (Article 7); due process (Article 8); freedom of conscience and religion (Article 12); freedom of expression (Article 13); freedom of association (Article 16); the rights of the child (Article 19), right to property (Article 21), freedom of movement (Article 22), political participation (Article 23); equality (Article 24), judicial protection (Article 25), and health and culture (Article 26), read in relation to the

American Declaration (Articles XI and XIII). The petitioners also argued that under the ILO Convention No. 169 and the Constitution, Ecuador was obliged to consult with the community, facilitate their participation in decisions and seek their free, prior and informed consent. They asserted that the community's rights to consultation and free and informed consent should have been respected, since the prospecting did not start until 2002, after Ecuador ratified ILO Convention No. 169.

The State responded that the claim was inadmissible because domestic remedies had not been exhausted; a constitutional *amparo* remedy had been pursued rather than an administrative remedy. The State also argued it had no obligations under ILO Convention 169 because it had not yet ratified it at the time that it granted the oil concession contract and so the Convention had not been incorporated into its domestic law (para. 43).

### **Key Findings**

In May 2003, the Commission granted precautionary measures in response to a request by the Petitioners to protect the right to life, personal integrity, due process and private property of the community, and specifically the life and personal integrity of named community leaders. By an order of July 6, 2004, the Inter-American Court ordered provisional measures and resolved to ask the State to "adopt, without delay, all measures necessary to protect the life and personal integrity of the members of the Kichwa indigenous peoples of Sarayaku and those defending them in the required procedures before the authorities, to guarantee the right to freedom of movement of the members of the Sarayaku community, and to investigate the events giving rise to the adoption of provisional measures, so as to identify those responsible and impose corresponding sanctions" (para. 18).

On October 13, 2004, the Commission found the claim admissible in relation to each of the Articles relied on. When considering the question of effective remedy, the Commission found the *amparo* was an effective remedy to address the action of individuals whose conduct seriously or directly harms a community or collective interest; the *amparo* was filed against the oil company as a representative of the State (paras. 64-65). The delay of twenty-three months since the suit was filed was an unwarranted delay within American Convention Article 46, satisfying the Convention exception to the exhaustion rule. The Commission noted that it lacked competence in relation to the Petitioners' claim that the State had not complied with ILO Convention No. 169, but it found that "it can and must use Convention 169 as a guideline for interpreting conventional obligations, in light of the provisions of Article 29 of the American Convention" (para.49).

After upholding the complaint in an unpublished report on the merits in 2009, the Commission referred the complaint to the Inter-American Court due to Ecuador's non-compliance.

### **Commentary**

The case offers an opportunity to fully explore the obligations implied by full, prior, informed consent in environmental and human rights law, particularly given the context of an indigenous community. It also embodies the question of the rights of indigenous communities in relation to natural sub-soil resources such as oil, lying beneath the land, which under Ecuadorian domestic law are owned by the State.

## **Miguel Ignacio Fredes González and Ana Andrea Tuczek Fries v. Chile** **Report No. 14/09 (2009) (admissibility decision)**

### **Basic Facts**

Ana Tuczek Fries (employee of the Chilean Association of Organic Farming, *Tierra Viva*) and Miguel Fredes González (attorney for the Southern Environmental Law Center) ("the victims") had written to the Chilean Agriculture and Livestock Service asking them to disclose information about potential threats to life, human and animal health, or agricultural activities and about the location, zones, areas or plots where genetic modified organisms (GMOs) were being cultivated in Chile. When no information was provided, they applied for "an *amparo* seeking protection of the right of access to public information" and were granted an order in Santiago's 26<sup>th</sup> Civil Court. But the ruling was reversed in the Santiago Court of Appeals on the basis that there was no right to information where the information had been supplied to the government by a private business. The Southern Environmental Law Center and the Human Rights and Public Interest Action Clinic with other Chilean NGOs (the petitioners) then filed a petition on behalf of the two victims "and of all Chilean citizens" to the Inter-American Commission.

The petitioners alleged that the release of transgenic crops to the environment and their use as human and animal food involved certain risks for human health and the environment that were not totally studied or quantified. They argued that the State had violated the rights recognized in the American Convention, Articles 13 (freedom of thought and expression); 23 (right to participate in government); and 25 (judicial protection). They argued that Chile placed unlawful restrictions on the right to seek and receive information on biosafety and GMOs, and thus violated their right to participate in public affairs on those subjects (para. 2).

The State's defense was firstly that domestic remedies had not been exhausted because the victims could have used a Remedy of Protection to challenge the constitutionality of Supreme Decree No. 26 of 2001 instead of pursuing the *amparo* so they had an alternative remedy. Secondly the State argued there was no specific victim of the alleged human rights violations.

### **Key Findings**

The Commission observed that as legally recognized nongovernmental entities, the Petitioners were legitimate parties to lodge petitions. Whilst the Petitioners claimed that "the Chilean State has systematically denied the right of access to information... to [the alleged victims] and thus to the entire Chilean citizenry", the Commission found the petition concerned the rights of the two victims and so was not an "abstract case". It went on to find that the victims had exhausted the available domestic remedies: the *amparo* was the correct remedy in the circumstances of the case and the victims could not have pursued the Remedy of Protection at the same time.

The Commission therefore found the petition under Article 13 admissible both in relation to whether Article 13 was observed in the Chilean appeal court ruling that denied the applicants access to information on GMOs the government had in its possession, and in relation to the compatibility of the underlying law with Article 13 (para. 55). The Commission also decided to consider the right to a fair trial (Article 8(1)) at the merits stage.

However the petition was declared inadmissible with respect to the alleged violations of Article 23(1) and 25 on the right to participate in government and judicial protection respectively.

### **Commentary**

The dispute concerns the public's right to information about health and safety concerns and the environment, in particular in the context of GMOs. Whilst the basic issue in the case concerns access to environmental information, it is significant in raising the GMO question for determination before the Inter-American Commission for the first time. The Inter-American Commission has since been asked to conduct a thematic hearing on GMOs and government transparency in environmental governance. As a major technological advance, GMOs remain subject to scientific uncertainty in relation to their impact on human health and biodiversity. The European Court of Justice has recognized the public's right to know about the location of GMO cultivation sites.

The Center for International Environmental Law submitted an *amicus curiae* brief analyzing the risks and scientific uncertainty associated with GMOs, demonstrating the public interest dimensions of information relating to them. The brief also analyzes the broader international legal framework applicable to GMOs, in order to contextualize the role of the Inter-American Commission of Human Rights in relation to access to information on GMOs. It goes on to highlight the linkages between freedom of expression, access to information, and democratic governance in international human rights law, asserting that international law recognizes a connection between the public's right to access information and environmental risk.

## **Community of La Oroya, Peru Report No. 76/09 (Aug. 5, 2009) (admissibility decision)**

### **Basic Facts**

A number of environmental NGOs ("the petitioners") complained to the Inter-American Commission on behalf of about 65 residents of La Oroya, a town in the Andes mountain of Peru which was contaminated by a metallurgical complex. The smelter operated 24 hours a day, discharging toxic smoke. The petition claimed that the Peruvian government had failed to monitor and regulate the metallurgical complex, resulting in pollution which was seriously damaging the health of the town's inhabitants.

The smelter had been in operation for eighty years. It was built by a United States firm, but in 1974 it was nationalized. In 1997 it was purchased by U.S. parent company, Doe Run. At that time responsibility for implementing an environmental action plan was divided between the company and the State. The petitioners claimed the population, especially expectant mothers and children displayed levels of exposure to harmful mineral concentrates such as lead, arsenic, sulphur dioxide and cadmium significantly above World Health Organization ("WHO") maximum recommended levels. The petitioners referred to international reports listing La Oroya as one of the top ten most polluted cities in the world. Evidence was provided of serious health problems experienced by La Oroya's inhabitants including gastritis, skin and dental problems, vomiting, cardiovascular disease, and neurological problems. All of the alleged victims had experienced serious health problems, in particular serious respiratory problems. One of those affected had died of skin cancer without receiving specialized treatment.

The alleged victims had initiated domestic proceedings in December 2002 against the State authorities, and obtained an order from the Constitutional Court in May 2006, which was not complied with. The order required the State to provide measures to be implemented in 30 days, including providing an emergency health care system for la Oroya's residents.

The petitioners alleged that Peru had violated the American Convention rights to life (Article 4), personal integrity (Article 5), fair trial (Article 8), privacy (Article 11), freedom of thought and expression (Article 13), rights of the child (Article 19) and judicial protection (Article 25). In addition they alleged violations of various Articles of the UN Convention on the Rights of the Child, and of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("the Protocol of San Salvador"), right to health (Article 10) and right to a healthy environment (Article 11). The petitioners alleged that the State had failed to adopt measures to correct and mitigate the situation, such as requiring Doe Run to comply with its obligations, educational campaigns, relocating the most exposed population and providing adequate healthcare.

The State claimed that it had taken effective measures to mitigate the pollution and supervise the Doe Run Company. It said an agreement with the company to defer implementation of environmental measures had included extra obligations and had not adversely affected compliance. The State referred to healthcare provision which it had instituted. It also relied on the technical defense that domestic remedies had not been exhausted because proceedings had not been taken to challenge the failure to execute the judgment, and the alternative remedy of *amparo* had not been pursued.

The petitioners sought precautionary measures on behalf of the alleged victims in the form of specialized medical diagnoses, and the necessary specialized treatment where the diagnoses indicated danger of irreparable harm to their personal well-being or lives.

### *Key Findings*

In August 2007 the Commission granted the precautionary measures requested. In August 2009, the Commission issued its admissibility decision, finding the complaints under Articles 4, 5, 8, 13, 19, and 25 of the American Convention were admissible.

In relation to the argument that effective domestic measures had not been exhausted, the Commission found that an appropriate avenue had been pursued and although the *amparo* remedy could also be a suitable mechanism, it was not necessary for the alleged victims to employ every available domestic remedy (para. 64). In relation to the State's argument that the alleged victims should have awaited completion of the judgment execution process, the Commission indicated that a State must have a reasonable opportunity to carry out a decision and resolve the situation at a national level. It noted the order required action within thirty days; over three years had now elapsed. The Commission found the State was liable for an unjustifiable delay. There was no need for the Petitioners to pursue additional remedies as regards the judgment execution process (para. 69).

The Commission found that "the alleged deaths and/or health effects of alleged victims resulting from acts and omissions by the State in the face of environmental pollution generated by the metallurgical complex operating at La Oroya, if proven could represent violations of the rights enshrined in Articles 4 [life] and 5 [personal integrity] of the American Convention...these events could also constitute violations of Article 19 [rights of the child]..." (para. 74).



The Commission also found that the State's alleged delay/failure in implementing the domestic court judgment could constitute violation of Article 8 (fair trial) and Article 25 (judicial protection). The Commission also found the freedom of expression complaint admissible: "the alleged lack and/or manipulation of information on the environmental pollution pervasive in La Oroya and on its effects on the health of its residents, along with the alleged acts of harassment toward persons who attempt to disseminate information in that regard," could represent violations of Article 13 (para. 75).

The Commission found the Article 11 (privacy) complaint inadmissible. Similarly it rejected the complaints in relation to the UN Convention on the Rights of the Child, and the Protocol of San Salvador on the basis that they were outside its jurisdiction.

In March 2010, the petitioners appeared before the Commission again for another hearing to present evidence that the Peruvian government's actions had failed to comply with the 2007 recommendations. Backed by findings from independent experts, they alleged that the town was still contaminated by heavy metal pollution that causes serious health risks, especially to children. The State continued to deny the claims. At the time of writing, a final hearing and report on the merits are awaited.

### ***Commentary***

Whilst the Commission has agreed to consider procedural complaints about the right to a fair trial and judicial protection in previous cases, it is significant that in this instance it has also found the Article 13 freedom of expression complaint admissible. This will allow a deeper examination of the State's conduct in relation to access to transparent information about the environmental and health implications of the pollution at the merits stage.

### **Mossville Environmental Action Now v. United States Report No. 43/10, (Mar. 17, 2010) (admissibility decision)**

### ***Basic Facts***

In this case, Advocates for Environmental Human Rights ("the Petitioners") filed a petition on behalf of the residents of Mossville, Louisiana and Mossville Environmental Action Now, a community organization whose members were current or former Mossville residents ("the alleged victims"). The petitioners argued that Mossville residents were put at risk of various health problems caused by toxic pollution released from fourteen chemical-producing industrial facilities operating in and around the city. The petitioners pointed to scientific evidence from government and other sources indicating a disproportionate level of chemicals in the blood of Mossville residents, as well as high levels of related respiratory and other diseases.

The petition described Mossville as a historical community of 375 predominantly African-American households. It stated that since the 1930s the State had authorized fourteen industrial facilities to manufacture, process, store and discharge toxic and hazardous substances in close proximity to Mossville damaging the environment and health. The petition said that reports from the facilities themselves indicate that on average annually, they pollute the air, water, and land with a total of over four million pounds of toxic chemicals; further that these chemicals are known to cause cancer and damage to the immune, respiratory, cardiovascular, nervous and reproductive systems.

The petition stated that the administration which was responsible for decision making, Calcasieu Parish, 1,094 square miles in size, was 73.6% white, whereas Mossville, around five square miles, was 68% African-American. More than half of the parish's industrial facilities were located in or around Mossville. The petition compared the level of blood dioxin for Mossville residents, which was three times the national average, with the low levels of the residents in the predominantly white area. A study was produced reporting that the serious health problems experienced by the residents were associated with exposure to toxic pollution. The petitioners argued the alleged victims should be excused from the requirement to exhaust domestic remedies because there was no domestic remedy for life-threatening industrial hazards approved by government or for the racially disproportionate impact of problems like pollution (paras. 15-16).

They alleged that they were subject to “environmental racism,” in breach of their right to equality before the law, guaranteed under Article 2 of the American Declaration because permits for polluting facilities were granted disproportionately for the Mossville area.

Petitioners argued that the State was responsible for violations of Article I (right to life, liberty and security of the person); Article V (right to protection of honor, personal reputation and private and family life); Article IX (right to inviolability of the home); Article XI (right to preservation of health and well-being); and Article XXIII (right to property) of the American Declaration. They also claimed violations of the American Convention, to which the United States is not a party.

In response, the United States argued “there is no such right as the right to a healthy environment, either directly, or as a component of the rights to life, health, privacy and inviolability of the home, or equal protection and freedom from discrimination” (para. 18). The State argued that while the protection of human rights and of the environment were important, there was no substantive right of individuals under international human rights law to a safe or healthy environment, either in the treaties to which the State is a party or as a matter of customary international law. The State argued there was nothing in the American Declaration to regulate the level of toxic pollution, or to prevent the clustering of hazardous facilities in a particular area, in the absence of a clear showing of intentional discrimination. The State also observed that the petitioners had previously successfully challenged environmental regulations and that domestic remedies had not been exhausted.

### ***Key Findings***

The Commission began by observing that it had no jurisdiction to consider claims under the American Convention as the United States was only a signatory which simply obliged the State not to defeat the Convention’s object and purpose. The Commission found that there was no prospect of success in the domestic courts for disproportionate discriminatory effect without showing an intent (to pollute) (para. 34). Similarly it held that there was no domestic remedy for the claim that the approval of the polluting facilities violated the alleged victims’ rights to privacy and to inviolability of the home (para 35). The Commission decided the petitioners could not show there was no prospect of success in domestic claims with regard to the alleged violations of their right to health and right to life; those claims were thus inadmissible (para. 36).

The Commission also responded to the United States arguments that the complaint lacked evidence of a violation of a rights protected by the American Declaration (para. 42 onwards). It rejected the State’s argument that only intentional discrimination is prohibited by the American Declaration and “recall[ed] that the right to equal protection under international human rights law has been interpreted as prohibiting not only intentional discrimination, but also any distinction, exclusion, restriction or preference which has a discriminatory effect” (para. 43). But it accepted the State’s contention that no factual/legal basis had been provided for the American Declaration Article XXIII (right to property) complaint and so decided not to consider that allegation on the merits.

In light of the State’s objection that the petitioner’s claim relied on an “erroneously expansive” interpretation of its obligations, the Commission highlighted the need to interpret the Declaration “in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the instrument was first adopted and with due regard to other relevant rules of international law applicable to member states.”

### ***Commentary***

This is the first case before the Inter-American to consider racial equality in the context of the environment. Should it succeed at the merits stage, it would have significant implications for the past and future siting of polluting facilities in the Americas.

**Inter-American Commission on Human Rights' application to Inter-American Court of Human Rights in the case of Kichwa People of Sarayaku and its members (Case 12.465) v. Ecuador**  
(April 26, 2010)

**Application**

The facts and background to this claim are described in Report No. 62/04 (2004) above. Following the admissibility decision, the order for provisional measures remained in place. The Commission concluded a Merits Report No. 138/09, of December 18, 2009, Kichwa Indigenous Peoples of Sarayaku and its members (Appendix 1 to the application), but the dispute remained outstanding. The Inter-American Court issued an order concerning the continuation of the provisional measures following a public hearing on February 2, 2010. On April 26, 2010, the Inter-American Commission referred the case to the Inter-American Court following its merits decision. Although the Merits Report is unpublished, the referral contains detailed findings of fact (paras. 45-98), and the Commission's analysis of the law and merits (paras. 99-259).

In the referral, the Commission asked the Court to find Ecuador responsible for violations under the following provisions of the American Convention: The right to property (Article 21), in relation to the freedom of expression (Article 13), political participation (Article 23); the right to life (Article 4), due process (Article 8) and judicial protection (Article 25); the right to freedom of movement, (Article 22); the right to personal integrity (Article 5).

The Commission referred to the obligation to respect rights without discrimination (Article 1(1)) in relation to each of the above. Having found that the State had violated Article 2 by not adopting domestic legislative measures, the Commission asked the Court to order the State to carry out extensive remedial action (para. 6). This included protection of communal property; removal of explosives; participation in decision-making and consultation with representative bodies; and full individual and communal compensation (*id*).

**Commentary**

The Commission indicated in its referral of the case to the Court that it believed "the present case is an opportunity for the Inter-American System to elaborate more fully on the matter of prior consultation with indigenous peoples, and the possible effect of the decision on the domestic legal provisions regarding prior consultation and free and informed consent" (para. 4).

**Inter-American Court of Human Rights**

The Inter-American Court on Human Rights ("Inter-American Court") is the other component of the Inter-American human rights framework.<sup>107</sup> The Inter-American Court is based in Costa Rica and held its first hearing in June 1979.<sup>108</sup> Similar to the Inter-American Commission on Human Rights, the Inter-American Court has jurisdiction over claims regarding the American Convention on Human Rights.<sup>109</sup>

**Mayagna (Sumo) Awas Tingni Community v. Nicaragua**  
No. 79 (Aug. 31, 2001)

**Basic Facts**

Jaime Castillo Felipe, the leader of a small indigenous community lodged a petition with the Inter-American Commission on Human Rights in 1995, on behalf of himself and of the community of Awas Tingni, which lives by hunting, fishing and farming in a forested area of about 90,000 hectares. He sought precautionary measures from the Commission because the Nicaraguan authorities planned to grant a concession to a private company for commercial development of the forest. Lengthy domestic proceedings which had been brought by means of the *amparo* remedy, to prevent the grant of the concession/require its suspension, were unsuccessful.

<sup>107</sup> What is the IACHR?, Inter-American Commission on Human Rights, available at <http://www.cidh.oas.org/what.htm>.

<sup>108</sup> Historia, Corte Interamericana de Derechos Humanos, available at <http://www.corteidh.or.cr/historia.cfm>.

<sup>109</sup> *Id*.

After its attempts to reach a friendly settlement failed, the Commission referred the case to the Inter-American Court to decide whether the State had violated American Convention, Article 1 (obligation to respect rights); Article 2 (domestic legal effects); Article 21 (right to property); and Article 25 (right to judicial protection); respectively. The Commission also asked the Court to “declare that the State must establish a legal procedure to allow rapid demarcation and official recognition of the property rights of the Mayagna Community, as well as that it must abstain from granting or considering the granting of any concessions to exploit natural resources on the lands used and occupied by Awas Tingni until the issue of land tenure affecting the community has been resolved” (para. 3). The Commission asked the Court to order the State to pay equitable compensation for material and moral damages suffered by the community.

### ***Key Findings and Holdings***

The Court heard extensive evidence about indigenous land rights in Nicaragua in general and the community in particular. It found as a fact that the Awas Tingni was an indigenous community of about 600 people from the Mayagana or Sumo ethnic group located on the Atlantic coast of Nicaragua.

The Court’s legal analysis began by considering whether the Article 25 right to judicial protection had been complied with, both in relation to land titling procedures and the *amparo* remedy. It went on to find: “there is no effective procedure for delimitation, demarcation, and titling of indigenous communal lands” (para. 127). The Court noted the unjustified delay in processing the numerous *amparo* remedy claims which had been filed in relation to the logging concession; the delay meant this was not an effective remedy. The Court concluded there was a violation of the Article 25 right to judicial protection, linked to the State’s Article 1(1) duty to provide protection in domestic law, and the Article 2 duty to adopt protective administrative and legislative measures (paras. 135-8).

The Court then considered the complaint relating to the Article 21 right to property, defining “property” as “those material things which can be possessed as well as any right which may be a part of a person’s patrimony, that concept includes all movables and immovable, corporeal and incorporeal elements and any other intangible object capable of having value” (para. 144). It decided that Article 21 protected the right to property of “members of the indigenous communities within the framework of communal property” (para. 148). The Court expanded on the meaning of the concept of property in indigenous communities:

“Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land...Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory, the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival” (para. 149).

The Court determined that Nicaragua had “violated the right of the members of the Mayagna Awas Tingni community to the use and enjoyment of their property,” since it had “granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled” (para. 153).

In relation to remedy, the Court declared that the State must adopt “legislative, administrative, and other measures required to create an effective mechanism for delimitation, demarcation and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores.” The court further stated that the State should consult with the Awas Tigni community, and conclude the process within fifteen months. The Court awarded damages to the plaintiffs.

### ***Commentary***

This was a landmark case in recognizing that indigenous communities have fundamental rights to the recognition and protection of their ancestral lands. It was the first time that a human rights court recognized the collective property rights of indigenous groups over the land they have traditionally occupied. The Court defined collective property rights as the tradition among indigenous people which does not place ownership of land in the hands of one individual, but in the whole community. Domestically, the decision compelled Nicaragua to introduce

comprehensive law and policy for the demarcation and titling of indigenous lands. The decision is also significant in finding ILO Convention 169 relevant to the interpretation of Article 21 of the American Convention.

**Moiwana Community v. Suriname**  
**No. 124 (June 15, 2005)**

***Basic Facts***

In 1986, a massacre of in the village of Moiwana killed forty people and displaced the tribal N'djuka Community. In 1997, a petition was filed on behalf of displaced members of the community who were survivors and next of kin of the deceased. An investigator was murdered as he began to uncover the secrets of the massacre, and the State did not complete the investigation (paras. 1-3). Members of the community languished in cities, French Guiana, and a "temporary reception center," feeling it was unsafe to return.

In 2002, the Inter-American Commission referred the application to the Inter-American Court, to decide whether the State had violated the American Convention, Article 1(1) (obligation to respect rights); Article 8 (right to a fair trial); and Article 25 (right to judicial protection). As at the date of the application to the Court, there had not been any adequate investigation of the massacre or any criminal proceedings and the survivors were still displaced. The State's preliminary objection, and principal defense, was that since Suriname only became a party to the American Convention on November 12, 1987, after the massacre, the Court had no jurisdiction *ratione temporis*. The Commission countered that the denial of justice and displacement of the Moiwana community occurred subsequent to the attack and this was the subject matter of the application (para. 3).

***Key Findings and Holdings***

The Court dismissed the preliminary objections. It found that some violations, such as the duty to hold an adequate investigation arose after Suriname ratified the Convention, and others such as the inability of the community to return to their lands were continuing acts or omissions. Various additional procedural objections by the State were also dismissed.

The Court began its findings of fact by observing that Suriname's domestic legislation did not provide for collective property rights (para. 86(5)). Recognizing the N'djuka community's relationship to its traditional land, the Court found: "in order for the culture to maintain its integrity and identity, its members must have access to their homeland." (*id.*). One of the reasons for this was the need to perform death rituals; the failure to bury community members in the appropriate land was considered a moral transgression, which could lead to illness (paras. 86(7)-86(9)). The Court found that in November 1986, "State agents and collaborators killed at least 39 defenseless community members...and forced survivors to flee" (para. 86(15)). Subsequently the village and surrounding traditional lands were then abandoned.

The Court found there was a violation of the Article 5(1) right to physical, mental and moral integrity. Although this was not a right relied on by the Commission, the Court considered it could rely on other Articles, provided the relevant facts were contained in the application (para. 91). The reasons for reaching the Article 5 determination were: obstruction of the community members' efforts to obtain justice (paras. 94-97); the inability of community members to honor their deceased loved ones (paras.98-100); and the separation of community members from their traditional lands (paras. 101-102).

The Court referred to its previous case-law holding, "liberty of movement is an indispensable condition for the free movement of a person," (para.110). It found a violation of Article 22 (freedom of movement and residence) because the State failed to either establish conditions, or provide the means, that would allow the Moiwana community members to return voluntarily, in safety and with dignity, to their traditional lands (para. 120). The most important missing element was an effective criminal investigation to end the impunity for the 1986 attack (*id.*).

The Court based its finding that Suriname had violated the Article 21 right to property on the *Awes Tingni* decision, "in the case of indigenous communities who have occupied the lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition

of their communal ownership.” (para. 131). The Court went on to rule that Suriname had denied the N’djuka the right to their traditional territory because the State never restored their land, and had put the community in fear of returning to their village:

[T]heir traditional occupancy of Moiwana village and its surrounding lands – which has been recognized and respected by neighbouring N’djuka clans and indigenous communities over the years...- should suffice to obtain State recognition of their ownership. The precise boundaries of that territory, however may only be determined after due consultation with said neighbouring communities. (para. 133).

The Court considered that the members of the N’djuka people were the “legitimate owners of their traditional lands” and had been deprived of their property rights as a result of the massacre and failure to investigate (para. 134). Finally the Court found violations of the Article 8(1) due process right, and the Article 25 duty to provide an effective judicial remedy to victims of human rights violations, again due to the lack of any adequate investigation of events.

### **Commentary**

In this decision the Court applied its *Awasi Tigni* ruling, extending it from the indigenous community setting to take into account the traditional beliefs and practices of a tribal community, consistent with the ILO Convention No. 169. Even though the Moiwana community members were not indigenous to the region in the true sense, they had lived in that area for over a century in “strict adherence to N’djuka custom” (para. 132), creating a communal property right protected by Article 21 of the American Convention.

## **Yakye Axa Indigenous Community v. Paraguay** No. 125 (June 17, 2005)

### **Basic Facts**

This case concerned the displacement of the Yakye Axa Indigenous Community of Paraguay from lands which were part of their traditional territory, and which had been commercialized and occupied by third parties. The Community had lodged a land claim with the State in 1993 which had not been processed. The Community also asked for recognition of the representative status of community leaders, which was not granted until 2001. Members of the Community who attempted to hunt on their traditional lands faced criminal charges. Evidence was presented that they lived a destitute existence along a roadside with limited food or medical care and that sixteen people had died. In January 2000, a complaint was lodged on behalf of the Community with the Inter-American Commission under American Convention, Article 25 (right to judicial protection) in relation to Paraguay’s failure to process their land claim. In 2002, the Commission ordered precautionary measures, but Paraguay failed to comply.

In 2003, the Inter-American Commission filed an application with the Inter-American Court, against the State of Paraguay, claiming violations of American Convention, Article 4 (right to life); Article 8 (right to fair trial); Article 21 (right to property); and Article 25 (judicial protection). The Commission alleged that the State had not ensured the Community’s ancestral right over their land, the source of their livelihood. They stated this had made it impossible for the Community and its members to occupy their territory, and the displacement had kept them in a vulnerable situation in terms of access to food and public healthcare.

### **Key Findings and Holdings**

The Court’s found the Yakye Axa was a community of hunter-gatherers which traditionally lived in the Paraguayan Chaco. The Court described lengthy administrative and legal proceedings relating to the community’s attempt to obtain demarcation and registration of their land, as well as eviction and criminal proceedings taken against them. The Court found the community had suffered constant threats and harassment, and experienced extreme and destitute living conditions, being prevented from accessing their traditional lands to fish, hunt and gather fruit and water (para. 50.93). They experienced serious health conditions as a result of the lack of clean water and insanitary conditions and had inadequate access to medical care (paras. 50.97-8). Furthermore, the health and clothing conditions of the children negatively affected their attendance and performance in school (para. 50.99).

The Court prefaced its legal analysis by emphasizing that “States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity” (para. 51). It went on to assert, in the context of the question whether Paraguay had met the Article 25 judicial protection requirement, “As regards indigenous peoples, it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values and customs...” (para. 63). The Court found there was no effective procedure for indigenous land claims. First, the claims for recognition of the Community leaders as representatives and recognizing the Community’s legal status were not complex, so the delay was disproportionate (para. 73). Second, although the land claims themselves were complex, delays arose from systematic delays by State authorities and were incompatible with the American Convention requirement of a reasonable term (para. 98). Since the procedure began on October 5, 1993, the delay was over eleven years at the time of the Inter-American Court consideration, in itself constituting a breach of the Article 8 right to a fair trial (para. 86). The Court concluded that the procedure for land claims made by the community was clearly ineffective, violating both Article 25 and Article 8 (para. 104).

In relation to the Article 21 right to property, the Court reiterated that it would take into account, “the special meaning of communal property of ancestral lands for the indigenous peoples, including the preservation of their cultural identity and its transmission to future generations, as well as the steps that the State has taken to make this right fully effective” (para. 51). The Court referred to its practice of applying the “living instrument” approach adopted by the European Court of Human Rights. In the instant case, in analyzing Article 21: “the Court deems it useful and appropriate to resort to other international treaties, aside from the American Convention, such as ILO Convention No. 169, to interpret its provision in accordance with the evolution of the inter-American system, taking into account related developments in International Human Rights Law.” The Court found that property in this context “must take into account the close ties of indigenous peoples with their traditional territories and the natural resources therein association with their culture, as well as the components derived from them...” (para. 137). This included intangible value (*id*). The Court held that both individual and communal property was covered by Article 21. Moreover “merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established” (para. 143).

Turning to the question of how to balance competing property rights, the Court employed European Court of Human Rights criteria, allowing the State to interfere with property rights where the interference is established by law, necessary, proportional, and “for the purpose of attaining a legitimate goal in a democratic society” (paras. 144-5). In addition, to be compatible with Article 21(1), the restrictions must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right” (para. 145). The State must assess conflicts between private property rights and claims by indigenous communities for ancestral lands on a case by case basis, applying these rules (para. 146). Relevant considerations included the preservation of cultural heritage and the collective right to survival which were linked to territorial rights (*id*). Restriction of individual property rights could be necessary to attain “the collective objective of preserving cultural identities...” (para. 148). Where states were unable to return property either to individuals or to indigenous communities, fair compensation should be paid (para. 148). In conclusion, there was a violation of Article 21, because Paraguay had failed to adopt adequate measures to ensure that its domestic law guaranteed the community’s effective use and enjoyment of their traditional land, thus threatening the “free development and transmission of its culture and traditional practices” (para. 155).

When considering the right to life, the Court referred to the American Convention, Article 26 right to progressive development and ILO Convention No. 169. It also cited the Additional Protocol to the American Convention on Human Rights regarding Economic, Social and Cultural Rights (the Protocol of San Salvador), Article 10 right to health, Article 11 right to a healthy environment, Article 12 right to food, Article 13 right to education and Article 14 right to the benefits of culture (para. 163). The Court concluded that the State had violated the Article 4(1) right to life by preventing the Yakye Axa Community from access to its traditional means of livelihood and “for not taking measures regarding the conditions that affected their possibility of having a decent life” (para. 176). However, in relation to the complaint that the State was responsible for the deaths of sixteen community members which could have been avoided with adequate food and healthcare, the Court did not find an Article 4 violation. The Court’s reparation award included that the State should adapt domestic legislation; it should create a community fund for land purchase or compensation; and it should provide the community with amenities such

as water and sanitation. The Court also proposed a public act acknowledging responsibility, in the community's languages, as well as Spanish (para. 226).

### **Commentary**

At the heart of the decision, was the Court's recognition of the relationship between communal land ownership and indigenous tradition, customs, rituals, values, art and relationships with nature. The community's access to their lands was a pre-requisite for an enjoyment of those rights.

The Court highlighted the collective nature of the indigenous people's right to property. Its analysis of the criteria for balancing individual and collective property rights provide guidance to States faced with this dilemma. When carrying out the balancing test, States must take into account that a loss of indigenous property, may interfere with other basic rights such as the right to cultural identity and to the very survival of the indigenous people and their members. Although the Court found there are circumstances where a community may be divested of its property rights, it emphasized that fair compensation must be provided.

In a key passage of the judgment, the Court referred to ILO Convention No. 169 as a means of interpreting the American Convention Article 21 property right. The Court referred to ILO Convention No. 169, Article 13, which provides that States must respect "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship" (para. 136). Explaining their approach to the American Convention, the Court expanded the *Awes Tigni* approach: "...this Court has underlined that the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations" (para. 131). It highlighted the many aspects of culture which are linked to the land (para. 154).

When considering the right to life, the Court took into account the Article 26 right to progressive development, and the provisions of the Protocol of San Salvador. The Court reaffirming its broad interpretation of the right to life as incorporating the right to health, education and food standards.

### **Sawhoyamaya Indigenous Community v. Paraguay Case, No. 146 (Mar. 29, 2006)**

#### **Basic Facts**

The non-governmental organization, TierraViva a los Pueblos Indigenas del Chaco submitted a petition to the Inter-American Commission on behalf of the Sawhoyamaya Community due to the failure of Paraguay to process their land claim. In the 19<sup>th</sup> century, Paraguay sold land to British businessmen, disregarding the rights of the indigenous communities who occupied it. Missions of the Anglican Church settled the land and employed some of the indigenous people on their cattle estates. As more of the land was sold to private owners, it became increasingly difficult for the community to survive from its traditional hunting, fishing and gathering activities. In 1991, the Community began proceedings to claim title to the lands, resulting in them receiving worse treatment on the cattle estates. This led most members of the Community to leave the estates and settle along a roadside adjoining wire fences of the property claimed. Whilst they lived in a state of destitution, the protracted land claim proceedings were not concluded.

The Commission referred the case to the Inter-American Court, asserting that the Paraguayan Government should be held responsible for failing to protect the ancestral rights of the Community, and making the Community vulnerable to deprivations of food, health, and sanitation. The Commission claimed initially that thirty one people had died but later referred to evidence that the number was higher. The petition alleged that the State violated the American Convention, Articles 4 (right to life); 5 (right to humane treatment); 21 (right to property); 8 (right to a fair trial); and 25 (right to judicial protection).



### ***Key Findings and Holdings***

The Court found that the lands claimed by the Sawhoyamaxa Indigenous Community were lands which they had traditionally occupied, and which would ensure their short and mid-term survival “as well as the beginning of a long-term process of development of alternative activities which will allow their subsistence to become sustainable” (paras. 73(9)-(10)). After describing the exhaustive legal and administrative procedures which the Community had pursued in relation to their land claim (paras. 73(11)-(60)), the Court considered the living conditions. It found:

“On the estates the Sawhoyamaxa Community lived in extreme poverty, which was characterized by poor health conditions and medical care, the working conditions of exploitation to which they were subjected, and the restrictions imposed on them to own crops and cattle and to exercise freely their traditional subsistence activities. This situation worsened when they learned the Community had claimed lands for their own.”

The Court noted that in 1999 the President of the Republic of Paraguay had declared that the Community was in a state of emergency (para. 73(62)). The Court referred to a visit to the Community by state officials in February 2000 “who were able to verify the ‘precarious conditions in which [the Community] live due to the lack of access to the territories they claim in order to develop their traditional subsistence activities...the scarcity of drinking water...the impossibility to grow any crops for their subsistence’...” (para. 73(64)). Within this context the Court found that Community members, particularly children and the elderly had died “from tetanus, pneumonia, and measles, serious dehydration, cachexia, and enterocolitis or alleged traffic and occupational accidents...”. The deaths included thirty named community members within the Court’s jurisdiction (para 73(74)). The Court also found the poor conditions and the State’s failure to guarantee communal property was “detrimental to the preservation of their way of living customs and language” (para. 73(75)). The State had not “adopted the necessary measures for the members of the Community to leave the roadside, and thus abandon the inadequate conditions that endangered, and continue endangering, their right to life” (para. 166). Thus, the Court found that the State had violated Article 4(1) in relation to the deaths of eighteen children, and an adult who died of enterocolitis without any medical care, but not in relation to the deaths due to work and traffic accidents. Having made this finding, the Court found it unnecessary to consider the Article 5 claim relating to physical, mental and moral integrity.

The Court found the period of thirteen years to process the land claim administrative proceedings did not observe the reasonable time principle and the proceedings were ineffective as they failed to allow the Community the possibility of regaining access to their traditional lands, so violating Articles 8 and 25 of the American Convention (paras. 108 and 112).

In finding a violation of the Article 21 right to property, the Court took into account ILO Convention No. 169, which formed part of domestic law (para. 117). It referred in particular to Article 13 of that Convention, which requires States to respect the collective and cultural aspects of indigenous peoples’ relationship with their lands (paras. 118-119). The Court went on to hold that indigenous peoples maintain their property rights even where they have been forced to leave, or have otherwise lost possession of their traditional lands, including where their lands have been expropriated or transferred to third parties, unless this was done in good faith and consensually (para. 128).

In its justification for not providing land restitution to indigenous people, the State had argued that the rights of the private property owners were protected under a bilateral treaty between Paraguay and Germany, which was part of domestic law. The Court roundly rejected the argument that the enforcement of bilateral commercial treaties would justify non-compliance with state obligations under the American Convention, “on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States” (para. 140).

Finally the Court of its own motion found that there had been a violation of the Article 3 right to juridical personality due to the State’s failure to register or officially document the existence of several members of the Sawhoyamaxa Community, who were left in legal limbo as a result (paras. 186-194).

## **Commentary**

Again this case emphasizes the relationship between the right to property and cultural rights, in the context of an indigenous community, and takes ILO Convention No. 169 into account. Part of its significance is that, as in the *Saramaka* case below, it found that where an indigenous people have been displaced, this does not end their relationship with ancestral lands. An indigenous people's right to restitution for the loss of property is related to their unique dependency on land and if such relationship exists after a prolonged period of time, restitution should be awarded.

### **Claude-Reyes v. Chile No. 151 (Sept. 19, 2006)**

#### ***Basic Facts***

In 1998, Chile's Foreign Investment Committee refused to provide Marcel Claude-Reyes with information relating to a foreign investment contract signed between the State, two foreign companies and a Chilean company. The information related to the Rio Cóndor Project, a forestry exploitation project, which was controversial due to its potential significant environmental impact. An attempt to challenge the decision in the Chilean domestic courts was unsuccessful. In December 1998, a petition was filed with the Inter-American Commission by Marcel Claude-Reyes, together with representatives of human rights organizations who claimed their requests for this information had also been refused. The Petitioners claimed Chile had violated the right to freedom of expression and free access to information, under Article 13 of the American Convention, by failing to release information about the deforestation project.

In July 2005, the Commission referred the matter to the Inter-American Court. It sought a declaration that Chile had violated American Convention rights under Article 13; it also claimed that the domestic courts' refusal to admit the case against the State constituted a violation of the Article 25 right to judicial protection.

#### ***Key Findings and Holdings***

The Court made detailed factual findings about the foreign investment development and Chile's legislative provisions on access to information (para. 57). The starting point for the Court's legal analysis was that the right to freedom of thought and expression under Article 13 includes the rights of individuals to "seek" and "receive" information from State bodies as long as the appropriate restrictions are maintained (paras. 76-77). The Court also held that the State has a positive obligation to provide public access to information without the need to prove a "direct interest" in the matter, and that the least restrictive measure must be employed in order to minimize the impact on the individuals' right to access information (*id*). The Court then observed there is regional consensus among the States that are member of the Organization of American States (OAS) "about the importance of access to public information and the need to protect it" (para. 78). After referring to the fact that the importance of information is recognized in regional instruments and national legislation (para. 79-82), the Court stressed the close relationship between democracy and freedom of expression (para. 85). It drew a link between access to information and enabling individual participation in democratic control (para. 87). Having taken this into consideration in the context of Article 13, it declined to consider the claim under Article 23 that the Petitioners' right to participate in government had also been violated.

Turning to restrictions on access to information, the Court asserted: "the presumption that all information is accessible, subject to a limited system of exceptions" (para. 92). The Court concluded that the State had violated Article 13, firstly in relation to Marcel Claude-Reyes and one other Petitioner who had requested information, and secondly by not having adopted legislation to make effective the general obligation to adopt domestic legal measures arising from Article 2 of the American Convention. The Court also found a violation of Article 8 (right to a fair trial) and Article 25 (judicial protection) due to the State's failure to provide a simple, prompt and effective domestic legal remedy for their complaint (paras. 142-143).

## Commentary

For the first time in international law, the decision recognizes access to information held by public authorities as a fundamental human right. More recently the approach was followed in *Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*. The Court referred to various regional instruments reflecting the importance of access to information including: the OAS General Assembly Resolution, June 3, 2006; the Inter-American Democratic Charter, Article 4; the Nueva León Declaration, adopted in 2004, and the European Aarhus Convention (paras. 78-81). The European Court has now adopted a similar approach in *Társaság a Szabadságjogokért* (Application no 37374/05) Judgment 14 July 2009 (unreported).

### **Saramaka People v. Suriname** No. 172 (Nov. 28, 2007)

#### **Basic Facts**

The case concerned violations committed by the State of Suriname against the members of the Saramaka people, a tribal community living in the Upper Suriname River region. The Saramaka are a tribe of the Maroons, descendants of African slaves, (brought to Suriname by Dutch colonists), who have occupied inland Suriname since the early 1700s. The Association of Saramaka Authorities and twelve Saramaka captains submitted a petition to the Inter-American Commission in October 2000. They alleged that Suriname had granted logging and mining concessions within the tribal territory without consulting them. They contended that these acts violated the Community's property rights.

In 2006, after failing to secure a friendly settlement, the Inter-American Commission referred the case to the Inter-American Court, claiming a violation of their American Convention right to property (Article 21) due to the State's failure to recognize the Community's right to enjoyment of the lands they had traditionally occupied, and to judicial protection (Article 25) due to the lack of effective access to justice or legislation to secure this right.

#### **Key Findings and Holdings**

The State made a series of preliminary objections, including that the original petitioners did not have standing to bring the claim because they had not consulted the leader of the Saramaka, in disregard of their customs and traditions. The Court dismissed this (and other objections), finding the possibility of filing a petition had been broadly interpreted in its jurisprudence (para. 23).

After noting that the Saramaka people were not indigenous, and considering evidence of their culture and customs, the Court found that they "make up a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with the ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions" (para.84).

Turning to the right to communal property under Article 21, the Court reviewed earlier decisions such as the *Awasi Tigni* and *Yakye Axa* cases which "have all been based upon the special relationship that members of indigenous and tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard [their] physical and cultural survival..." (para 89-90). This placed a positive obligation on States to adopt special measures to guarantee such rights to traditional territories (para. 91).

In interpreting Article 21, the Court referred to Common Article 1 of the ICCPR and ICESCR on self-determination as well as ICCPR, Article 27 on minority rights, and the ILO Convention No. 169 (para. 93). Observing that Suriname was a party to both UN Conventions, the Court invoked American Convention, Article 29(b) which prohibits an interpretation of the Convention which would give its rights a narrower construction than that which appears in other treaties to which the State is a party. The Court concluded that this supported: "an interpretation of Article 21 of the American Convention to the effect of calling for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy the particular spiritual relationship with the territory they have traditionally used and occupied" (para. 95). The State therefore had a duty to take special measures to protect the communal property rights of the Saramaka (para. 96).

The Court roundly rejected the State's argument that it would be discriminatory to pass legislation recognizing communal land ownership: "It is a well-established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination" (para. 103). The Court highlighted the need for domestic legislation to provide formal legal title to land, rather than mere privilege to use it (para. 115).

In relation to the Saramaka peoples' right to use their territory, it was necessary for the Court to consider "the issue of the right to the use and enjoyment of the natural resources that lie on and within the land, including subsoil natural resources" (para. 118). Under the Suriname Constitution, rights to natural resources were owned by the State. After recalling its earlier holdings that the cultural and economic survival of indigenous peoples depends on their ability to use the natural resources linked to their traditions, the Court decided that Article 21 protects the rights of those communities to "those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life" (para. 122).

The Court acknowledged that the American Convention did not preclude the State from ever granting any type of concession for the exploitation of resources in Saramaka territory (para. 126). Outlining the balancing test for property rights, the Court found a State may only restrict the use and enjoyment of an indigenous or tribal group's right to property when it acts according to previously established law, when it is necessary, proportional, and pursuant to a legitimate aim in a democratic society, and when it does not deny a community its traditions and customs in a way that endangers its survival (para. 127). The Court continued that Suriname may restrict property rights by granting concessions for the exploration and extraction of natural resources only if the restriction did not deny the Saramaka's survival as tribal people (para. 128). In this respect, the State must abide by three safeguards: first, effective consultations in every event, as well as free, prior, and informed consent in connection with development and investment projects having major impacts; second, a sharing of benefits derived from development plans; and third, a prior and independent environmental and social impact statement (paras. 129-137). Allied to the obtaining of prior informed consent, the Court found there was a need for benefit-sharing in the form of reasonable equitable compensation resulting from the exploitation of Saramaka lands (para. 140).

The Court held that "the right to have their juridical personality recognized by the State is one of the special measures owed to indigenous and tribal groups in order to ensure that they are able to use and enjoy their territory..." (para. 172). The Court found that this right had been violated by the State in the case of the Saramaka, both in relation to Article 21 and Article 25 (para. 175). The right to property (Article 21) of the Saramaka people was violated in relation to the granting of logging and mining concessions (para. 158); domestic provisions did not provide them with adequate judicial protection, violating Article 25 (para. 185).

### ***Commentary***

The decision acknowledges for the first time the right of a non-indigenous minority group to resources in its ancestral territory. It finds that certain tribal groups have more similarities with indigenous communities than with other ethnic, linguistic or religious minorities in terms of the rights they possess "...the Court's jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human right law in order to guarantee their physical culture and survival" (para. 86).

The ILO Convention No. 169 (to which Suriname is not a party) is the only instrument to define tribal peoples. It defines them as those whose "social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations" (Article 1(1)(a)). The Inter-American Court's jurisprudence suggests that a community's relationship with the land is the basis for distinguishing indigenous and tribal groups; the extent to which that is linked to their culture is the basis for distinguishing indigenous and tribal groups from other minorities. The UN Human Rights Committee has adopted a similar approach.

This case is also important because it defines a State's human rights obligations when it exploits the natural resources found within or beneath an indigenous or tribal people's territory. The Court articulated the elements that would allow the State to make an appropriate determination as to the effects of the restrictions. The Court

explained the difference between the State's duty to seek consent and its duty to consult the indigenous people. It concluded that only projects that directly impact on resources that are essential for the community's survival will require community's consent while other projects concerning non-essential resources may only require the State to consult the community.

**Kawas-Fernández v. Honduras**  
**No. 196 (Apr. 3, 2009)**

***Basic Facts***

In February 2005, Ms. Blanca Kawas Fernández was murdered by gunshot in her home. Shortly thereafter, a police unit arrived at the scene, but did not take measures to apprehend suspects. In the same month, February 2005, the Criminal Tribunal in the city of Tela initiated an investigation of Ms. Kawas' murder. However, a police official actively frustrated the action of justice by threatening witnesses (para. 64) and it was later found that the police unit that arrived at the scene had anticipated the murder (para. 94). By the date of the Court's decision, April 2009, the criminal proceedings were still in their preliminary stage (para. 68).

At the time of her assassination, Ms. Kawas was president of the Foundation for Environmental Protection of Lancetilla, Punta Sal, Punta Izopo and Texiguat, a non-governmental organization in Honduras. This NGO had been working to improve the environment and quality of life in the watershed of the Tela Bay, including through environmental education programs, and it had achieved the creation of the National Park Punta Sal. It had also denounced environmental contamination and illegal logging and forest degradation, as well as several economic development projects that threatened the Punta Sal National Park.

The Inter-American Commission alleged the violation of the right to life, the right to judicial guarantees, and the right to judicial protection, in connection with the obligation to respect rights and the duty to adopt internal measures. The representatives of the victim also alleged a violation of the freedom of association.

***Key Findings and Holdings***

The Court noted that during the decade following Ms. Blanca Kawas' murder, numerous aggressions, threats and executions targeted environmental advocates in Honduras (para. 69), and that the effect of violence against environmentalists has been aggravated by impunity (para. 153). In 2007 the government created a specialized unit to investigate murders of environmentalists, but had not implemented a policy to ensure their safety.

The Court inferred from the various pieces of evidence on record that governmental agents had been involved in the murder and its ineffective investigation (para. 97). The Court found that the State did not undertake a serious, complete and effective investigation of the murder of Ms. Kawas, in violation of the right to life, as required by its duty to guarantee the rights established in the American Convention. The Court also noted that the State had recognized this failure by accepting its responsibility (para. 100).

With respect to freedom of association, the Court recalled that freedom of association also entailed positive duties on behalf of the States. The Court further noted the close linkage between the violation of freedom of association and the work of human rights defenders in the promotion and defense of human rights. In this connection, the Court highlighted the "undeniable linkage" between environmental protection and the realization of other human rights, noting that the ways in which environmental degradation and the adverse effects of climate change have affected the effective enjoyment of human rights had been discussed by the General Assembly of the Organization of American States and the United Nations. It also noted the considerable number of States Parties to the American Convention that have expressly recognized the right to a healthy environment, as well as the inclusion of this right in the Protocol of San Salvador (para. 148). Given these linkages, as well as the pattern of violence against environmentalists, the Court concluded that the State had interfered with freedom of association.

***Commentary***

In *Kawas*, the Inter-American Court took the opportunity to explicitly highlight the close linkages between human rights and the environment. It did so by recalling the connection between environmental protection and the

effective enjoyment of human rights. Notably, the Court explicitly referred to the adverse effects of climate change (para. 48), which have been recognized by the Human Rights Council in a 2008 resolution on the matter, as well as more recently in decisions by the Conference of the Parties of the UN Framework Convention on Climate Change adopted in 2010 in Cancun, Mexico.

The Court also noted a second dimension of the human rights and environment linkage, namely that stemming from the work of environmentalists and NGOs, in connection with freedom of association. In this regard, the Court pointed out that human rights defenders include persons working on rights other than civil and political rights, such as environmentalists, and that their work is key in democratic societies (para. 147). The Court also noted that efforts towards safeguarding the environment and their relation with human rights is particularly important in the region, which has witnessed an increasing number of threats, violence and murder of environmentalists (para. 149). Finally, the Court also took the opportunity to clarify that the State has the duty to create the legal and factual conditions in which environmental defenders may carry out their work (para. 146).

**Xákmok Kásek Indigenous Community v. Paraguay**  
(Ser. C No. 214), Judgment of August 24, 2010

***Basic Facts***

The applicants are members of the Xákmok Kásek Community, an indigenous group that traditionally inhabited the area subsequently occupied by the privately owned Salazar Ranch in the western region of the Paraguayan Chaco (para. 65). In 1990, the Community's leaders unsuccessfully filed an administrative action in order to recover their traditional lands in accordance with Paraguayan Law No. 904/81, the "Indigenous Communities Statute" (para. 67). Upon the failure of the administrative action, leaders of the Committee went directly to the Congress of the Republic in 1999 to request expropriation of the land in question but were rejected by the Paraguayan Senate (paras. 70, 72). Eight years later, the President of the Republic declared the Salazar Ranch a private protected nature reserve, which by law cannot be expropriated. (para. 80) The Community was not consulted, and their claims were not taken into account in the decision making process (para. 81). In 2008, the Community filed an action of unconstitutionality with the Supreme Court of Justice regarding the nature reserve declaration but the case remained suspended (paras. 83, 84).

Over the years, members of the Community residing within Salazar Ranch were allowed only restricted use of the land under private ownership and as a nature reserve (paras. 74, 82). In particular, Community members were prohibited from hunting, growing crops or keeping livestock (para. 74). Private security guards and park agents controlled entrances and exits, limiting mobility of members of the Community and rendering them unable to practice activities such as fishing and gathering for food (para. 75).

On July 3, 2009, the Inter-American Commission on Human Rights submitted an application to the Inter-American Court of Human Rights against the Republic of Paraguay, alleging the State's international responsibility, in violation of Articles 3 (right to juridical personality), 4 (right to life), 8(1) (right to judicial guarantees), 19 (rights of the child), 21 (right to property), and 25 (right to judicial protection) of the American Convention on Human Rights, for failing to ensure the right of the Xákmok Kásek Community to their ancestral property, "because the actions concerning the territorial claims of the Community were being processed since 1990, 'and had not yet been decided satisfactorily'" (para. 2). According to the Commission, "[t]his has meant that, not only has it been impossible for the Community to access their property and take possession of their territory, but also, owing to the characteristics of the Community, that it has been kept in a vulnerable situation with regard to food, medicine, and sanitation that continues to threaten the Community's integrity and the survival of its members" (para. 2).

***Key Findings and Holdings***

In analyzing the alleged violation of the Community's right to communal property under Article 21 of the Convention, the Court noted that, as established in the cases of Yakye Axa and Sawhoyamaxa indigenous communities, Paraguay recognizes "the right of the indigenous peoples to request the return of traditional lands they have lost, even when they are under private ownership and the indigenous peoples do not have full possession of them" (para. 110). As such, the Court held that the Community had the right to recover their ancestral land (para. 111).

Turning to the alleged violation of Articles 8(1), and 25 of the Convention, the Court affirmed that State Parties are obligated to “guarantee to all persons under their jurisdiction an effective legal remedy against acts that violate their fundamental rights” that “must be concluded within a reasonable period of time” (paras. 133, 139). The Court noted that, “throughout the administrative action, which began in 1990, no significant measures have been taken” and none of the limited measures taken by the State were “determining factors for obtaining a definitive solution to the Community’s claim” (paras. 127, 128). Consequently, the Court found that “the actions of the State authorities have not been compatible with the standards of diligence established in Articles 8(1) and 25(1) of the Convention” (para. 131). In addition, the Court found that “this lack of an effective remedy for the recovery of indigenous land represents the State’s failure to comply with its obligation, established in Article 2 of the Convention, to adapt its domestic law to guarantee in the practice the right to communal property” (para. 154).

In the course of the proceeding, evidence was presented that members of the Community lacked water distribution services and available sources of food, access to healthcare, vaccines, emergency transportation, and basic medicines (paras. 205–207). The Court determined that “the situation of the members of the Community is closely tied to its lack of lands. Indeed, the absence of possibilities for the members to provide for and support themselves, according to their ancestral traditions, has led them to depend almost exclusively on State actions and be forced to live not only in a way that is different from their cultural patterns, but in squalor” (para. 215). As a result, the Court found that “the State has not provided the basic services to protect the right to a decent life to a specific group of individuals in these conditions of special, real and immediate risk,” which constitutes a violation of the right to life protected by Article 4 of the Convention (para. 217). Additionally, the Court determined that the sorrow expressed by members of the Community concerning “the failure to restore their original lands, the gradual loss of their culture, and the long wait they have had to endure,” coupled with “the wretched living conditions” experienced and “their general situation of abandonment give rise to sufferings that necessarily violate the mental and moral integrity of all the members of the Community,” constituting a violation of Article 5 of the Convention (para. 244).

With respect to the deaths of individuals receiving inadequate medical attention, the Court found an additional violation of Article 4 because the State “failed to take the required positive measures, within its powers, that could reasonably be expected to prevent or avoid the risk to the right to life (para. 234). The Court especially found it “a matter of concern that 11 of the 13 members of the Community whose death is attributable to the State were children” (paras. 259–260). Recalling that “children possess the same rights as all human beings and have, in addition, special rights derived from their situation...of vulnerability” the Court found the State to be in violation of Article 19 of the Convention (paras. 257, 263, 264). Additionally, the Court noted that several of the Community members who had perished did not possess birth certificates, and death certificates were not issued because they lacked the “essential identity documents for determination of their civil rights,” constituting a violation of Article 3 of the Convention protecting the right to juridical personality (para. 251).

**Kichwa Indigenous People of Sarayaku v. Ecuador**  
Judgment of June 27, 2012: Series C No. 245.

***Basic Facts***

The Kichwa people of Sarayaku [a registered indigenous group, and approximately 1,200 of its members] live in an extremely remote area of the Amazonian region of Ecuador (paras. 52, 55). In 1996, the State Petroleum Company of Ecuador (Petroecuador) entered into a contract with an Argentine oil company, Compañía General de Combustibles’ (CGC), for oil exploration and exploitation of crude oil in a 20,000 hectare area of land in the Amazon region, 65% to which the Sarayaku people has a legal or ancestral claim (paras. 64-65). In 1998, two years after entering into the contract with CGC, Ecuador ratified ILO Convention No. 169 which encompasses the right of indigenous peoples to adequate consultation “whenever consideration is being given to legislative or administrative measures which may affect them directly” or before resource exploration/exploitation activities commence which may prejudice their interests (para. 70).<sup>110</sup>

<sup>110</sup> ILO Convention No. 169, *Indigenous and Tribal Peoples* arts. 6(1)(a), 15(2), June 27, 1989 (entered into force Sep. 5, 1991), available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169).

In 2002, CGC commenced seismic survey activities such as constructing seismic lines, building heliports, destroying water sources of the Sarayaku people, cutting down trees of great cultural and subsistence value to the Sarayaku, and demolishing a site of specific spiritual significance (para. 105). Additionally, members of the Sarayaku people alleged that they were threatened, attacked, and harassed (paras. 107-08). CGC also planted 1400 kilograms of highly-powered explosives throughout the Sarayaku lands (including in sacred and traditional hunting grounds); at the time of the judgment, many of those explosives still remained (paras. 246, 248). In 2003, the Association of the Kichwa People of Sarayaku submitted a petition to the Inter-American Commission on Human Rights (IACHR), which granted precautionary measures that Ecuador did not comply with (paras. 1, 127). Based on the lack of consultation and consent regarding the oil exploration/exploitation activities on Sarayaku land (and the resultant effects of this intrusion such as the explosives), the IACHR asked the Inter-American Court of Human Rights to declare Ecuador in violation of the rights of private property, life, judicial protection/guarantees, freedom of movement, and personal integrity under Articles 4, 5, 8, 21, 22, and 25 of the American Convention on Human Rights and order Ecuador to take specific steps for reparation (para. 3).

### ***Key Findings and Holdings***

Looking first at the right to indigenous communal property, the Court highlighted that “Article 21 of the American Convention [the right to use and enjoy one’s property] protects the close relationship between indigenous peoples and their lands, and with the natural resources on their ancestral territories and the intangible elements arising from these. The indigenous peoples have a community-based tradition related to a form of communal collective land ownership; thus, land is not owned by individuals but by the group and their community. These notions of land ownership and possession do not necessarily conform to the classic concept of property, but deserve equal protection under Article 21 of the American Convention” (para. 145). The Court pointed out that it had previously established in the case of *Saramaka v. Suriname*, that “to ensure that the exploration or extraction of natural resources in ancestral territories did not entail a negation of the survival of the indigenous people as such, the State must comply with the following safeguards: (i) conduct an appropriate and participatory process that guarantees the right to consultation, particularly with regard to development or large-scale investment plans; (ii) conduct an environmental impact assessment, and (iii) as appropriate, reasonably share the benefits produced by the exploitation of natural resources (as a form of just compensation required by Article 21 of the Convention), with the community itself determining and deciding who the beneficiaries of this compensation should be, according to its customs and traditions” (para. 157).

Turning to the obligation of Ecuador to guarantee the right to consultation, the Court recognized that ILO No. 169 does not apply retroactively but that it does apply to any decision or action that may affect an indigenous people even if the decision or action (such as the 2002 updated Environmental Impact Study or CGC seismic survey activities) has arisen from a contract that was signed before the ILO Convention entered into force (para. 176). Furthermore, the court noted that even countries that do not recognize the ILO, such as Canada, the U.S., and New Zealand nevertheless have recognized the obligation to consult, demonstrating that “the obligation to consult” denotes “a general principle of international law” (para. 164). These consultations must take place in advance, be executed in good faith (they cannot be contracted out to a third part but must be a “genuine dialogue as part of a process of participation process aimed at reaching an agreement”), adequate and accessible (in accordance with the community’s traditions), and informed (“the indigenous peoples must be aware of the potential risks of the proposed development or investment plan, including the environmental and health risks”) (paras. 177, 180, 185, 200, 201, 208). The Court noted that the Sarayaku People were not consulted by the State before the company carried out oil exploration activities, planted explosives or adversely affected sites of special cultural value” (para. 211). Moreover, the Court “observe[d] that the environmental impact plan: (a) was prepared without the participation of the Sarayaku People; (b) was implemented by a private entity subcontracted by the oil company, without any evidence that it had subsequently been subject to strict control by State monitoring agencies, and (c) did not take into account the social, spiritual and cultural impact that the planned development activities might have on the Sarayaku People. Therefore, the Court concludes that the environmental impact plan was not implemented in accordance with its case law or the relevant international standards” (para. 207).

Turning to the rights to consultation and communal property in relation to the right to cultural identity, the Court highlighted how cultural identity is a “fundamental right” shielded by Article 1(1) of the American Convention and ILO No. 169, Fifth preambular paragraph (paras. 213, 217). The Court considered that “the failure to consult



the Sarayaku People affected their cultural identity, since there is no doubt that the intervention in and destruction of their cultural heritage entailed a significant lack of respect for their social and cultural identity, their customs, traditions, worldview and way of life, which naturally caused great concern, sadness and suffering among them” (para. 220). The Court thus found that Ecuador’s failure to establish regulations for consultations amounted to a violation of Article 2 of the American Convention which obligates states to adopt measures giving effect to human rights protected in the Convention (paras. 221, 227). Additionally, the placement of explosives violated the rights to freedom of movement, life, and physical integrity (paras. 229, 249). Lastly, Ecuador violated its obligations under Articles 5(1), 8(1), 25(1), 25(2)(a), and 25(2)(c) of the American Convention by failing to exercise due diligence in investigating complaints of human rights violations and to provide an effective judicial remedy (paras. 271, 278).

In reparations, the Court ordered that the government remove the explosives and reforest those areas, any future resource extraction projects must be conducted with full consultation, regulations for such consultations must be put into place, and relevant public officials should be trained on the rights of indigenous peoples (paras. 288, 296, 301, 302). Ecuador must also perform a public act on Sarayaku land to acknowledge its international responsibility and pay reparations to the Sarayaku people of USD 90,000 in pecuniary damages and USD 1.25 million in non-pecuniary damages (paras. 303, 317, 323).

### Commentary

The significance of the Sarayaku decision is based on its analysis of the obligation to guarantee proper consultation and on how the Court determined that this right is based not only on ILO 169 but as a general principle of law, stemming from other international instruments, national legislation and on the foundations of democratic states. Rather than focusing on consent, it clearly sets out the elements of a proper consultation process.<sup>111</sup> Additionally, “[t]his sentence will have a far-reaching effect on countries across the region – it makes it crystal clear that states bear a responsibility to carry out special consultation processes before engaging in development projects affecting Indigenous Peoples and their rights,” said Fernanda Doz Costa, Amnesty International’s Researcher on Economic, Social and Cultural Rights in the Americas. ‘It establishes in detail how consultation should be undertaken: in good faith, through culturally appropriate procedures that are aimed at reaching consent. Thus, exploration or extraction of natural resources cannot be done at the expense of an indigenous community’s means of physical or cultural survival on their own land.’<sup>112</sup>

## DECISIONS OF GLOBAL BODIES

The linkage between human rights and the environment has been discussed on the global level, though less frequently than at the regional level. There are few global tribunals and decision-making bodies competent to hear cases involving the human rights and the environment connection. However, when cases do come up at this level, decisions can be significant. This section also includes reports of the World Bank Inspection Panel, which, though not a tribunal, does consider the relationship between environmental degradation and human welfare in a way that can inform a discussion of connections between environmental issues and human rights on the international level.

### Human Rights Committee

The Human Rights Committee is comprised of independent experts who monitor implementation of the International Covenant on Civil and Political Rights. The Committee is authorized to consider inter-state complaints, as well as individual complaints, under article 41 of the ICCPR and its First Optional Protocol.

111 Monica Jimenez Gonzalez & Dani Bryant, *Sarayaku v. Ecuador: Lessons in Free, Prior and Informed Consultation*, CORPORATE SOCIAL RESPONSIBILITY LAW BULLETIN (Oct. 24, 2012), <http://www.fasken.com/sarayaku-v-ecuador-lessons-in-free-prior-and-informed-consultation/#ref17>.

112 Ecuador: Inter-American Court ruling marks key victory for Indigenous Peoples, AMNESTY INTERNATIONAL (July 27, 2012), <http://www.amnesty.org/en/news/ecuador-inter-american-court-ruling-marks-key-victory-indigenous-peoples-2012-07-26>.

**E. H. P. v. Canada,**  
**Communication No. 67/1980, U.N. Doc. CCPR/C/17/D/67/1980 (Oct. 27, 1982)**

***Basic Facts***

A Canadian citizen made this complaint on behalf of the Port Hope Environmental Group and on behalf of “present and future generations of Port Hope, Ontario, Canada, including 129 Port Hope residents who [had] specifically authorized the author to act on her behalf...” She complained that between 1945 and 1952, Eldorado Nuclear Ltd., a uranium refinery, had disposed of nuclear waste in a dumpsite in Port Hope, a town of 10,000 inhabitants. The regulatory authority, the Atomic Energy Control Board initiated a cleaning operation and moved some of the material to other sites. After the cleaning operations stalled in 1980, 200,000 tons of radio-active waste remained in eight temporary disposal sites near the residences. The complainant claimed this was a violation of the Article 6 right to life under the International Covenant on Civil and Political Rights (ICCPR), because of the possibility of contracting cancer and other genetic defects. Members of the Environmental Group had written to the Atomic Energy Control Board and government authorities. She asserted that domestic litigation was not a suitable remedy because it would be lengthy and required evidence of damage.

Canada argued the claim was inadmissible because domestic remedies had not been exhausted as required by Article 2 and Article 5(2)(b) of the Optional Protocol to the ICCPR. It further argued that the disposal of the waste was the responsibility of the owners of the waste site, not the Atomic Energy Control Board. The Committee then asked a series of questions of the Canadian government. In response to these questions the government stated that it had undertaken to clean up the sites and had taken steps to locate a disposal site. The government also asserted that the complainant could seek an injunction against the waste site owners, one of which was an agent for the state. They also referred to the coming into force in domestic law of the Charter of Rights and Freedoms on April 17, 1982 which included an enforceable right to life.

***Key Findings***

The Committee acknowledged that the communication raised serious concerns with regard to the protection of the Article 6(1) right to life. It accepted the author of the communication had standing to submit the complaint on behalf of herself and of the residents of Port Hope who had authorized her to do so. It did not consider it necessary to resolve the question of whether a communication could be submitted on behalf of “future generations”, preferring to simply treat the reference as an expression of the importance of the matter. However, the Committee found the communication inadmissible because domestic remedies had not been exhausted. These included the possibility of an injunction against the private owners of the dump-sites or against the State and remedies under the Charter.

***Commentary***

The decision leaves open the question of standing to bring an environmental complaint to protect the interests of future generations. Although a submission to the Human Rights Committee may publicize an issue, its decisions are not legally enforceable and Port Hope was still affected by the waste sites in the years following the decision.

**Chief Bernard Ominayak and Lubicon Lake Band v. Canada**  
**Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990)**

***Basic Facts***

The Lubicon Lake Band is an indigenous group living in a 10,000 square kilometer area of the Province of Alberta, Canada. The group speaks Cree as their native language and maintains a traditional culture, religion and political structure, with a subsistence economy based on hunting and fishing.

Chief Bernard Ominayak of the Lubicon Lake Band (“the author”) brought a communication under Article 2 of the Optional Protocol of the ICCPR against Canada, a State party to the Protocol. The author alleged that the Band’s right to “self-determination” including the right to “freely dispose of their natural wealth and resources” had been violated contrary to ICCPR, Article 1. This was due to oil and gas development which threatened the environmental

and economic base of the Band thereby curtailing their right to hunt, trap and fish in traditional lands and had caused irreparable damage. The author also asserted that these rights were essential to maintain the subsistence economy underpinning the Band's distinctive culture, spirituality and language. The author referred to the Human Rights Committee's discretion to waive the requirement to exhaust domestic remedies (Article 5, para. 2(b)) of the Optional Protocol) "where the application of the remedies is unreasonably prolonged". The author argued the only effective remedy was an interim injunction to prevent oil exploration and maintain the status quo.

Canada argued that the author of the complaint had no standing under Articles 1 and 2 of the Optional Protocol because a communication could only be made by individuals in relation to individual rights, whereas this complaint related to a collective right. In addition the State contended that domestic remedies had not been exhausted, pointing to complex ongoing negotiations about land allocation. The State also suggested that the communication was inadmissible because the right of self-determination applied only to a "people" and the State the Lubicon Lake Band could not be treated as a people within Article 1 of the Convention.

### ***Key Findings***

At the admissibility stage, the Committee considered that the individual author of the Communication could not claim to be a victim of a violation of self-determination; but the complaint was admissible because the facts submitted might raise issues under other Articles of the Covenant, including Article 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". The Committee requested that Canada take interim measures of protection to avoid damage to Chief Ominayak and other members of Lubicon Lake Band.

Canada then provided further information to the Committee including details of settlement negotiations involving offers of land to the Band, and details of three outstanding court actions. The author in response recalled that the Band had been pursuing domestic remedies for 14 years and he anticipated they would continue for another ten. There were a number of areas of factual dispute.

At the merits stage, the Committee slightly modified its initial approach, concluding that a group of individuals who claim to be similarly affected could collectively submit a communication alleging breaches of their rights. They declined to make any finding on the meaning of "people".

The Committee concluded that Canada was in breach of ICCPR: "Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band and constitute a violation of Article 27 so long as they continue" (para. 33). The Committee accepted Canada's offer to rectify the situation with a remedy of a formal offer of land and compensation, which could be challenged in the courts.

### ***Commentary***

The case is significant in finding that Article 27 incorporates socio-economic rights in connection with rights to land and natural resources. It has been interpreted as meaning that a series of adverse events can cumulatively constitute a "historical inequity" violating Article 27.

It was one of a number of decisions concerning the aboriginal rights of the Lubicon Lake Indian Nation. In 2007 a submission was made to the UN's Committee for the Elimination of Racial Discrimination (CERD), alleging that Canada had not complied with the decisions.

## **Länsman et al. v. Finland**

Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994)

### ***Basic Facts***

The persons bringing this case were Ilmari Länsman and forty-seven other reindeer breeders of Sami ethnic origin from the community of Angeli in the Inari municipality in Finland. They alleged that Finland violated Article 27 of the ICCPR because a permit granted to a local stone quarrying company violated their right to enjoy their culture

which was based on reindeer husbandry. They claimed the quarrying violated their right to dispose of their natural wealth and resources, relying on ILO Convention No. 169 and the *Chief Ominayak and Lake Lubicon Band v. Canada* decision (above).

The Central Forestry Board of Finland had allowed a private company to start stone quarrying in and around the area where herding activities were taking place. The Samis said ownership of the land was disputed between them and the government, but the government insisted it owned the land. The applicants contended that this quarrying activity would disturb the complex system of reindeer fences determined by the natural environment. They also contended that the site of the quarry was historically a sacred place of the old Sami religion. They were concerned about a possible expansion of the mining activities.

The State accepted that 'culture' within Article 27 included Sami reindeer herding. It pointed to the limited nature of the quarrying and the strict terms of the quarry permit which included leaving the area "clear and safe", using low-pressure explosives, and limited the quarrying to the summer period when reindeer were not pasturing there. The State pointed to the Committee's views in the decision *Lovelace v. Canada*, which stated "not every interference can be regarded as a denial of rights within the meaning of Article 27...(but) restrictions must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant...".

### **Key Findings**

The Committee limited its consideration to the question of whether the mining which had taken place up to the date of consideration, and that allowed under the permit would violate the authors' rights under Article 27, and rejected the complaint. The Committee accepted that reindeer herding was an essential part of Sami Culture and that economic activities fell within the ambit of Article 27 if they were an essential element of the culture of an ethnic community. They also pointed out that enjoyment of culture was not limited to *traditional* means of livelihood; it could include methods of reindeer herding which had been introduced with the help of modern technology.

The Committee rejected Finland's attempt to introduce the "margin of appreciation" concept used by the European Court of Human Rights to the standard of review of government decisions. The correct test was whether the measures amounted to a denial of the right to culture; those measures that have "a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27". So the question was whether the impact of the quarrying was so substantial that it effectively denied the authors the right to enjoy their right to culture in that region; the Committee found that it was not. The quarrying activity was found to be insignificant both in terms of the amount of extracted stone and the extent of the quarrying area. The Committee decided that the extraction activity did not in any way have negative effects on reindeer husbandry. It also took into account the fact that the authors were consulted prior to the grant of the permit and whilst the quarrying was carried out, and that measures were taken to minimize the impact on reindeer herding activity and on the environment.

In relation to future activities the Committee indicated that if large-scale activities were to be approved, this might constitute a violation of the right to culture under Article 27.

### **Commentary**

Although the communication was unsuccessful on its facts, it develops the interpretation of the ICCPR Article 27 right of indigenous people to maintain and *develop* their culture. The decision sets a relatively low threshold at which state interference with that right becomes unlawful.

## **Apirana Mahuika et al. v. New Zealand** Communication No. 547/1993 U.N. Doc. CCPR/C/70/D/547/1993 (Oct. 27, 2000).

### **Basic Facts**

Apirana Mahuika and eighteen others belonging to the Maori people of New Zealand presented a communication claiming to be victims of ICCPR, Articles 1, 2, 16, 18, 26 and 27. In particular, they claimed that the Treaty of Waitangi (Fisheries Claims) Settlement Act of 1992 confiscated their fishing resources, denied them the right to

freely determine their political status and interfered with their right to freely pursue their economic, social, and cultural development. The authors of the communication added that fishing was one of the main elements of their traditional culture, and that the new legislation removed their right to pursue traditional fishing (other than in the limited sense preserved by the law).

The Treaty of Waitangi (Fisheries Claims) Settlement Act was adopted by the New Zealand Parliament on 14 December 1992. It put an end to negotiations and litigation concerning Maori fishing rights. These rights had been recognized in the Treaty of Waitangi of 1840, and more recently had been affected by the introduction of the quota management system for the conservation of New Zealand's fisheries resources in 1986. The Maori filed an application with the High Court of New Zealand in 1987, claiming that the implementation of the quota system would affect their Treaty rights, and in 1988 the Government started negotiations with the Maori on fisheries-related issues.

The 1992 Settlement Act provides, *inter alia*, for the payment of NZ\$ 150,000,000 to Maori. The Act also settles all claims by Maori in respect of commercial fishing, and expressly removes jurisdiction from courts or tribunals to inquire into the validity of such claims. Further, the Act contemplates that Treaty obligations concerning non-commercial fishing rights shall continue and that regulations shall be made to provide for customary food gathering by Maori (para. 5.12). As a result of the Act, the Maori acquired a 50% interest in Sealords (the major New Zealand fisheries company) (para. 5.13). Finally, the effect of the Settlement Act was that Maori authority and traditional methods of control over the fisheries, as recognized in the Treaty, were replaced by a new control structure, in an entity in which the Maori shared not only the role of safeguarding their interests in fisheries but also the effective control (para. 9.7).

### **Key Findings**

The Committee first observed that the Optional Protocol to the ICCPR provides a procedure under which individuals can claim that their individual rights have been violated. This interpretation allowed the Committee to focus on Article 27 (right to culture) and Article 14 (right to access to court).

On the right to culture, the Committee relied on its decision in the *Kitok* case to recall that economic activities may come within the ambit of Article 27 if they are an essential element of the culture of the community (para. 9.3). The Committee noted that it was undisputed that the use and control of fisheries is an essential element of the Maori culture. The Committee also recalled its general comment on Article 27, according to which, especially in the case of indigenous peoples, the enjoyment of the right to culture may require positive legal measures of protection by the State party and measures to ensure the effective participation of members of minority communities in decisions that affect them (para. 9.5). In this regard, the Committee emphasized that the acceptability of measures that affect culturally significant economic activities of a minority depends on whether its members have had the opportunity to participate in the decision-making process and whether they will continue to benefit from their traditional economy. On this point, the Committee found that the State Party undertook a complicated process of consultation in order to secure broad Maori support to nation-wide regulation of fishing activities. Further, the Committee found that New Zealand had paid specific attention to the sustainability of Maori fishing activities.

With respect to the allegations under Article 14 that the Settlement Act prevents the Maori from bringing claims concerning the extent of their fisheries before the courts, the Committee noted that Article 14(1) encompasses the right to access to a court for the determination of rights and obligations in a suit of law (para. 9.11). However, the Committee observed that the Act is intended to settle the claims that are excluded from the courts' jurisdiction. The Committee ultimately concluded that the facts did not reveal a violation of the ICCPR.

### **Commentary**

The Committee's observations regarding the justiciability under the protocol of individual rights echo its findings in the *Ominayak* case, also decided by the Committee (above). In this connection, the authors of the communication put forth several arguments relating to self-determination. However, the right to self-determination is established in Article 1 of the ICCPR, whereas individual rights are established in Articles 6 to 27. By defining its jurisdiction under the Optional Protocol in this manner, the Committee avoided two thorny questions. First, that of the definition of "peoples" in whom the right to self-determination is vested, and particularly whether indigenous peoples

found within the nation-state can be considered peoples and enjoy said right. This strand of the Committee's jurisprudence can be contrasted with that of the African Commission, which has specifically recognized the rights of indigenous peoples as "peoples" under the African Charter. The second question avoided by the Committee's construct is that of "collective rights." Still, noting the focus of the procedure on individual rights did not stop the Committee from observing that there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of individual rights.

In *Apirana*, the Committee was confronted with a situation where the process of negotiations and settlement with the government contributed to divisions amongst the Maori. The authors argued that they did not agree with the settlement and that their rights as members of the Maori had been overridden. The Committee addressed this situation noting that, "[I]n such circumstances, where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected" (para. 9.6). This led the Committee to an evaluation of the effects of the legislation, and it was ultimately satisfied that the Settlement Act was the result of broad consultations that safeguarded the Maori interests in, and effective control of, the fisheries.

## International Court of Justice

The International Court of Justice (ICJ) was established in 1945 by the Charter of the United Nations as the principal judicial organ of the United Nations. The Court entertains contentious cases submitted by parties and may issue decisions which are binding on the parties to the dispute. While the Court's decisions are non-binding for non-parties to the dispute, each Member of the United Nations "undertakes to comply" with the decisions. The Court can also give advisory opinions at the request of the General Assembly or Security Council, or other UN organs or agencies authorized by the General Assembly.

The ICJ has decided several cases relevant to the discussion of human rights and the environment, a handful of which are presented here. Though the ICJ has failed to explicitly recognize the link between human rights and the environment in a judgment, it has discussed the relevance and importance of environmental issues and elaborated procedural mechanisms for environmental protection. In addition, separate opinions of individual judges have explicitly addressed the connection between environmental protection and human rights, as well as issues relating to future generations, and principles of international environmental law.

### **Nuclear Tests (New Zealand v. France)** 1974 I.C.J. Rep. 253 (Dec. 20, 1974)

#### *Facts of the case*

New Zealand objected to France's proposal in 1973 to conduct a series of atmospheric nuclear tests in the South Pacific. New Zealand filed applications in the International Court of Justice (ICJ) claiming breach of legal norms in the testing of atmospheric nuclear weapons, unlawful action by allowing radioactive fallout to cause atmospheric and marine pollution in their territories, and interference with maritime and air navigation. The Court issued an interim protection order on June 22, 1973 in favor of New Zealand, which stated that the French government should avoid conducting any nuclear tests in the region until the Court had rendered a decision in the case. At the interim stage, the Court expressly refrained from expressing a view on the merits, in particular on whether radioactive matter from the testing posed a danger to the health of the local populations. France conducted two further tests in July-August 1973 and June-September 1974. But before the Court considered the merits of the case, France announced that it no longer intended to conduct atmospheric tests in the South Pacific. The announcements took the form of public statements made by Ministers and the President of France, including before the United Nations General Assembly and on television, that future tests would be underground.

### ***Key Findings and Holdings***

As a result of France's announcement, the ICJ decided by a majority to dismiss New Zealand's application as a preliminary issue, without considering the substantive claims. The ICJ decided that it had an inherent jurisdiction to examine whether or not there was any dispute. The ICJ took into account that the original and ultimate objective of New Zealand was to obtain a termination of the nuclear tests (paras. 25-31). In deciding to dismiss the case, the ICJ noted that its role was "to resolve existing disputes between States" and that the "circumstances that have since arisen render any adjudication devoid of purpose..." (paras. 58-62). The ICJ decided the claim was moot because although France had refused to give any undertaking to the complainants, it had unilaterally declared its intention to discontinue atmospheric testing. The ICJ found that the unilateral statements made by France were binding as: a) they were made to the world at large and not to any particular State; b) they did not require acceptance or a response; c) they were consistent; and d) they imposed a unilateral obligation on France not to renege on its undertaking not to continue the atmospheric tests. The ICJ suggested that the maxim, *pacta sunt servanda* applied as much to unilateral declarations as it applied to treaties.

### ***Commentary***

This was the first attempt to raise the nuclear testing issue before the ICJ. Although the Court recalled various United Nations General Assembly Committee reports saying that nuclear tests had damaging effects on residents in surrounding areas, it did not make any determination on the effect or legality of nuclear testing. However, the case demonstrates the potential indirect impact of proceedings/interim measures. And in its final order the ICJ stated that its conclusion was "without prejudice to the obligations of States to respect and protect the natural environment" (Order of 22 September 1995, I.C.J. Reports 1995, p306, para.64, cited in the *Nuclear Weapons Advisory Opinion Case* below, at para. 32). Commentators have pointed to the fact that the ICJ took the unusual approach of taking into account documents not submitted to it in the course of litigation, since France did not participate in the proceedings.

New Zealand later attempted to reopen the case when France announced in June 1995 that it would resume nuclear testing underground at the Mururoa and Fangataufa atolls. The ICJ dismissed New Zealand's application because the original decision was based on France's undertaking not to conduct atmospheric tests and underground tests were not in issue. However France reduced the number of planned tests from eight to six. France later accepted a ban on all nuclear testing when it became a party to the Comprehensive Test Ban Treaty in 1998.

Australia filed a similar complaint against France at the same time as New Zealand also sought and was granted provisional measures. The ICJ delivered a final judgment in respect of Australia on the same date as the above judgment, effectively in the same terms (Nuclear Tests Case (Australia v. France) (1974) ICJ.Rep. 253).

## **Legality of the Threat or Use of Nuclear Weapons – Advisory Opinion** General List No. 95 (July 8, 1996)

### ***Facts of the case***

An initial request for an advisory opinion from the International Court of Justice was presented by the World Health Organization (WHO) in 1993, but the ICJ refused to render an opinion, on the basis that WHO was acting outside its legal capacity. Then in 1994 the ICJ was asked by the United Nations General Assembly to provide an Advisory Opinion on the question: "Is the threat or use of nuclear weapons in any circumstances permitted under international law?"

One of the arguments before the ICJ was that provisions relating to the protection and safeguarding of the environment applied in times of war as well as peace, and they would be violated by the widespread and transboundary effects of the use of nuclear weapons (para. 27). Instruments referred to included Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, para. 3 which prohibits "methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment", as well as Principle 21 of the Stockholm Declaration 1972, and Principle 2 of the Rio Declaration 1992. Various counter-arguments were made, in particular that the principal purpose of environmental treaties and norms was the protection of the environment in peacetime (para. 28).

### ***Key Findings and Holdings***

The ICJ noted that in order to apply the rules on the use of force and the law or armed conflict, it needed to take into account the unique characteristics of nuclear weapons, in particular their capacity to cause destruction, “untold human suffering” and damage to future generations (paras. 35-36).

The ICJ recognized that the “environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment” (para. 29). It also recognized that the environment “represents the living space, the quality of life and the very health of human beings, including generations unborn” (*id.*). After referring to the international instruments listed above including Principle 21 of the Stockholm Declaration, and noting the lack of consensus about whether they were binding norms, the ICJ stated: “The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment” (*id.*). The ICJ did not consider that international law deprived a State of its right to self-defense because of an obligation to protect the environment. But, referring to Principle 24 of the Rio Declaration in support, the ICJ stated, “States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives” (para. 30). Together with Article 35, para. 3, and Additional Protocol I, para. 55, the ICJ found the provisions “embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals” (para. 31). In conclusion, the ICJ found that although international environmental law did not prohibit the use of nuclear weapons, it did indicate “important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict” (para. 33).

The ICJ concluded that customary or conventional international law did not specifically authorize the threat or use of nuclear weapons, but neither was there any comprehensive and universal prohibition of the threat or use of nuclear weapons as such (para. 105). The ICJ decided unanimously that a threat or use of force by means of nuclear weapons that was contrary to Article 2, paragraph 4 of the UN Charter, and which failed to meet all the requirements of Article 51 of the Charter was unlawful. Also, a threat or use of nuclear weapons should be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.

The ICJ was split equally in its ultimate conclusion, which was decided by a vote from the President:

“... the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the ICJ cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”

The ICJ reached a unanimous conclusion that States were obliged “to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective control.”

### ***Commentary***

The parts of the Advisory Opinion referring to the environment, in particular the obligation referred to above from para. 31 establish a general basic principle prohibiting widespread, long-term and severe environmental damage which may be applied outside the nuclear weapons context. In the words of the ICJ, “Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality” (para. 30).

In addition, the environment was raised in a number of the separate or dissenting opinions. In his separate opinion, President Bedjaoui referred to the lack of clarity of international law in this field but questioned whether the use of nuclear weapons was justified even in a self-defense context, referring to the “long-term effects of damage to



the human environment, in respect to which the right to life can be exercised". In his 86 page dissenting opinion, Judge Weeramantry dealt with the environmental aspects at length, stating that the use of nuclear weapons "endangers the human environment in a manner which threatens the entirety of life on the planet" (page 433). He gave a number of examples of the ways in which nuclear weapons damage health and the environment. He considered there were international law rules prohibiting States from causing serious and lasting damage to the environment. Judge Koroma's dissent also referred to contamination of the environment as one of the factors leading him to the conclusion that the use of such weapons would be unlawful. In a similar vein, the dissenting opinion of Judge Shahabudden stated that nuclear weapons caused death and destructions, health problems, and would damage the environmental rights of future generations.

**Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)**  
1997 I.C.J. 140 (Sept. 25, 1997)

***Facts of the Case***

Hungary and Czechoslovakia had entered into a treaty in 1977 (Budapest Treaty) to provide electric power, improve navigation, and eliminate flooding along the River Danube. The construction of the Gabčíkovo-Nagymaros System was a large and integrated complex of structures and installations on the territories of both countries along the Danube. It aimed to enhance both countries' economies, increasing shipping and producing hydroelectric power. Article 15 of the Budapest Treaty aimed to reduce the threat it posed to the environment by requiring the parties to ensure water in the Danube would not be impaired by the project. Article 19 provided that the parties should "ensure compliance with the obligations for the protection of nature" in connection with the construction and operation of the locks.

Work on the construction of the project began in 1978, but was suspended and eventually abandoned by Hungary in 1989 following domestic environmental protests. Hungary's research showed that had the original plan gone ahead, there was a risk of the Danube silting up, of significant reduction in groundwater and of extinction of fluvial flora and fauna. In 1992, Hungary notified Slovakia (successor to Czechoslovakia) that it was terminating the 1977 treaty. Slovakia unilaterally constructed and in 1993 implemented Variant C, a modified version of the original proposal, which drastically reduced the amount of water flowing downstream to Hungary.

The parties presented their dispute to the ICJ by means of a Special Agreement in 1993. Hungary argued that in 1989 "a state of ecological necessity" justified the suspension of their treaty obligations, and that Slovakia had breached its obligations by failing to take into account the ecological dangers (para. 40). Slovakia disputed the scientific research stating that a state of ecological necessity existed; it also disputed that any such necessity or risk justified a failure to comply with a treaty obligation in international law (para.44). Slovakia denied Hungary's allegation that it had breached Articles 15 and 19 of the Budapest Treaty.

***Key Findings and Holdings***

The ICJ approached the issue based on the law of treaties, customary international law relating to international watercourses and State responsibility. The ICJ noted that both parties agreed that the existence of a state of necessity must be evaluated "in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading" (para. 50). The ICJ emphasized that the criteria could only be accepted "on an exceptional basis" (para. 51). Although Hungary's concerns for the environment represented an "essential interest", the ICJ did not consider they constituted a "grave and imminent peril", taking into account the scientific uncertainties (paras. 53-54). Also there were steps Hungary could have taken to limit the risk, such as treating the river water. The ICJ therefore decided that Hungary had breached the Budapest Treaty by suspending work on the project and rejected the argument that the breach was justified by a "state of ecological necessity".

Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. The ICJ pointed out that it had already found that Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully so the notification of

termination by Hungary prior to this was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did. But the Court also found that Slovakia's operation of Variant C, substantially interfering with an international watercourse, was in breach of international law. Hungary argued that Variant C did not satisfy the conditions required by international law for countermeasures, in particular the condition of proportionality. The ICJ rejected Slovakia's argument that the unlawful construction of Variant C was a justifiable countermeasure. It decided that by unilaterally assuming control of a shared resource - the Danube - Slovakia had "failed to respect the proportionality which is required by international law" (para. 85).

The ICJ found that the Budapest Treaty was still valid: its object and purpose must be carried out in good faith by both parties. It directed both parties to undertake negotiations in good faith to address the concerns raised in the case. It also highlighted the relevance of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, Article 5(2) on utilization of shared water resources to achieve the treaty's objectives. The ICJ gave some guidance on the approach the parties should take in a key paragraph recognizing the principle of sustainable development in international law (para. 140). The Court indicated that in order to evaluate the environmental risks, current standards must be taken into consideration. It interpreted Articles 14 and 19 of the 1977 Treaty as imposing a "continuing—and thus necessarily evolving—obligation on the parties to maintain the quality of the water of the Danube and to protect nature...". The ICJ found that new norms should be taken into account both in relation to past and future activities. The ICJ also made oblique reference to the concept of inter-generational equity: "Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations...new norms and standards have been developed...". The ICJ said "This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development." Both Hungary and Slovakia had conceded that the principle of sustainable development was applicable to the situation; the ICJ directed them to take it into account in their negotiations (page 75).

In a separate opinion, Judge Weeramantry, provided an analysis of the concept of sustainable development, stating that since it was the first time that the ICJ had addressed the issue, it required more detailed consideration than that provided at para. 140 (see above). He suggested the principle of sustainable development provided an answer to the question of how to balance Slovakia's needs for economic development against Hungary's need for environmental protection. He stressed that the right to development did not exist in the absolute sense, "but is relative always to its tolerance of the environment". This qualified right was part of international law, which was reflected in Principle 11 of the Stockholm Declaration.

### **Commentary**

For the first time, the ICJ was faced with a dispute concerning the conflict between the need for economic development and the need for environmental protection. Faced with an overwhelming amount of conflicting expert evidence on the extent of the environmental impact of the project, the ICJ effectively sidestepped the issue, focusing on the traditional principles of Treaty law by leaving it to the parties to negotiate a mutually acceptable outcome in good faith. However the Court held that newly developed norms of environmental law were relevant for the implementation of the Treaty and that the Parties could, by agreement, incorporate them through the application of several of its articles.

Similarly the ICJ refrained from acknowledging the precautionary principle as such or the legal implications ensuing therefrom. The ICJ took note of Hungary's invocation of the "precautionary principle" (para. 97), and recognized that "both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project" (para. 113).

In his separate opinion, Judge Weeramantry acknowledged the close relationship between environment and human rights (page 114). "[T]he protection of the environment is a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments" (page 92).

**Pulp Mills on the River Uruguay (Argentina v. Uruguay)**  
2010 I.C.J. (20 April 2010)

***Facts of the case***

In 2003 the Uruguayan government granted permission to Spanish and Finnish companies to build two pulp mills along the Uruguay River. The river forms a boundary between Uruguay and Argentina and its use is regulated by the Statute of the Uruguay River, 1975, (hereinafter “the Statute”). The Statute is a bilateral treaty between the two countries, the purpose of which was to establish mechanisms for the optimum and rational utilization of the River.

Argentina brought a complaint before the ICJ in 2006, alleging that the government of Uruguay had violated the Statute. Argentina’s arguments were (1) Uruguay had not complied with the notification and consultation procedure set out in the Statute before authorizing the construction of the two pulp mills and a port on the river; (2) the mills would have a damaging environmental impact on the river and surrounding areas, and would breach Uruguay’s obligation under the Statute to protect the aquatic environment of the river. Uruguay replied saying its only obligation had been procedural: to inform Argentina, which it had done.

At the interim stage, Argentina asked the ICJ for provisional measures ordering Uruguay: a) to stop construction work on the plants; and b) to co-operate with Argentina to protect and preserve the aquatic environment of the River Uruguay. Uruguay then requested provisional measures to order Argentina to prevent demonstrators protesting against the plants from blocking traffic on roads and in particular the bridges linking Uruguay to Argentina which they claimed was causing significant harm to Uruguay’s economy.

***Key Findings and Holdings***

In 2006, the ICJ refused Argentina’s request for provisional measures. The ICJ noted that the power to indicate provisional measures was aimed at preserving the rights of the parties to a case pending the final decision in the judicial proceedings, provided such measures were necessary to prevent irreparable prejudice to the rights that are in dispute. In relation to the first part of the request, the ICJ considered that the rights being pursued by Argentina were procedural in nature and could be addressed at the merits stage. In relation to the second part of the request, the ICJ observed the power was to be exercised only if there was urgency and it did not consider there was evidence of an imminent threat of irreparable damage to the aquatic environment of the River Uruguay or to the economic and social interests of the riparian inhabitants on the Argentine side of the river.

In 2007, the ICJ refused Uruguay’s request for provisional measures. The ICJ noted that construction was continuing despite the protests, so blockades of the bridges and roads linking the two States did not present an imminent risk of irreparable prejudice to the rights of Uruguay in the dispute.

At the merits stage, Argentina won their argument on the procedural point, but lost on the substantive point. The ICJ rejected Argentina’s argument that it had jurisdiction over any kind of environmental damage. It interpreted Article 60 of the Statute as limiting its jurisdiction, so the ICJ could not rule on noise pollution, visual pollution, or air pollution, other than that which affected the river (para. 52). All the claims of pollution were dismissed because the ICJ decided there was insufficient evidence that the pulp mills had caused significant pollution to the river: “there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia) mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007.”

The ICJ was of the view that Uruguay should have informed Argentina about its plans to build the two pulp mills. Uruguay was held to be in breach of the Statute for failing to negotiate or inform the Administrative Commission of River Uruguay (CARU). Notification via third party sources was not enough. Uruguay was obliged to inform Argentina of the full details of the plan. The Environmental Impact Assessment (EIA) must be transmitted to the other party before the granting of an environmental authorization, which Uruguay had failed to do (para. 204). But the ICJ declined to set parameters for the preparation of an EIA: “it is for each state to determine in its domestic

legislation or in the authorization process for each project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment, as well as the need to exercise due diligence in conducting such an assessment". The ICJ did not uphold any of Argentina's criticisms of the contents of Uruguay's EIA.

The majority of the ICJ decided that the procedural deficiencies did not lead to a "no construction obligation" on Uruguay which would have made its construction of the mills unlawful. Judge ad hoc Vinuesa strongly dissented, referring to the status of the River Uruguay as a shared resource (diss. op. para. 25). The ICJ further held that an order for the dismantling of the mill or ordering compensation would not be an appropriate remedy for a breach of procedural nature. Instead it found the declaration of the breach constituted an "appropriate satisfaction for the procedural breach" (para. 282).

### **Commentary**

The ICJ initially put the requirement to carry out an EIA in the context of the Statute, e.g. referring to EIAs as "necessary to reach a decision on any plan that is liable to cause significant transboundary harm to another State" (para. 119). The Court later stated it "may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource..." (para. 214). Again in the context of the Statute, the Court observed: "this notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it..." (para. 120) although it did not elaborate on the scope and content. The ICJ indicated that due diligence required that where a party was planning works liable to affect a river or the quality of its waters, an EIA should cover the potential effects of such works (para. 204). However the Court declined to provide guidance on the scope and content, indicating that this detail was a matter for domestic legislation or bilateral agreement (para. 205).

Second, the case raised questions, likely to arise in other environmental disputes, about the role of courts in settling disputes, involving substantial complex and contradictory scientific evidence. The ICJ expressed concern over the parties' use of experts as counsel because it meant there was no opportunity to cross-examine them (para. 168). Three of the judges strongly objected, suggesting that use should have been made of alternative arrangements such as the appointment of experts by the ICJ under the ICJ Statute, Article 50 (see joint dissenting Opinion, Judges Simma and Al-Khasawneh, para. 6, and dissenting Opinion, Judge ad hoc Vinuesa, para. 69). The debate has led to further calls for a specialist international environmental court.

Whilst concurring with the majority findings, Judge Cançado Trindade's Separate Opinion contains different reasoning, including an extensive analysis on why he considered the precautionary principle to be a "general principle of international environmental law" (paras. 62-96 and 103-113). He regretted that the ICJ had not used the unique opportunity presented by the *Pulp Mills* case to acknowledge the principle. He stated: "the precautionary principle, in my view, is not to be equated with over-regulation, but more properly with reasonable assessment in face of probable risks and scientific uncertainties (supra). This may take the form of carrying out complete environmental impact assessments, and of undertaking further studies on the environmental issues at stake, as well as careful environmental risk analysis, before the issuance of authorizations" (para. 96). The judge pointed out that the existence of the legal principles of prevention and of precaution was admitted and acknowledged by the parties themselves, Uruguay and Argentina (para. 112).

Judge Cançado Trindade also expanded on the principle of inter-generational equity (paras. 114-131), regretting that the ICJ had not expressly linked it to the "principle of sustainable development" which was agreed by the parties (para. 124). He described inter-generational equity as encompassing both past and future generations, citing the Inter-American Court's *Awás Tingni* decision (see above) with approval in this context (para. 125).

The referral to the ICJ was just one of the remedies pursued in the Pulp Mills dispute. The matter was also considered by a Mercosur Arbitral Tribunal, and the Compliance Advisor Ombudsman of the International Finance Corporation. An OECD complaint was made by the Argentine non-governmental organization, CEDHA, through the National Contact Point mechanism in Finland, Norway and Sweden respectively in relation to corporations and financial institutions involved in developing the pulp mills.

## Aerial Herbicide Spraying (Ecuador v. Colombia) Order (September 13, 2013)

### **Basic Facts**

As part of “Plan Colombia” (Colombia’s broad policy, largely funded by the U.S., for combating armed guerrilla groups),<sup>113</sup> beginning in 2000, aerial fumigations of a strong herbicide containing glyphosate were sprayed across the Colombian countryside for several contiguous days at a time, for ten hours each day.<sup>114</sup> While the objective was to eradicate Colombian coca and poppy plantations, Ecuador’s application asserts that the herbicide was carried by the wind onto not only Colombian houses and other types of crops but also across the border into Ecuador and the San Miguel River, which lies between the two states.<sup>115</sup> Additionally, Ecuador argued that Colombian planes intentionally sprayed herbicide directly onto the border (where lies the San Miguel River) and entered Ecuadorean air space to turn around, thus permitting herbicide to fall indiscriminately on Ecuadorean soil.<sup>116</sup>

Closely following the sprayings, Ecuadorean citizens reported severe adverse health reactions, including “burning, itching eyes, skin sores, intestinal bleeding and even death.”<sup>117</sup> Sustenance crops, such as yucca, rice, plantains, and coffee, were eradicated by the sprayed herbicide.<sup>118</sup> In 2008, Ecuador submitted an Application Instituting Proceedings to the ICJ, requesting that Colombia’s actions be deemed internationally wrongful acts and that Colombia be compelled to compensate the government and citizens of Ecuador for their losses suffered.<sup>119</sup>

### **Key Findings and Holdings**

On September 13, 2013, the case was removed from the ICJ’s case list after Ecuador submitted a letter delineating that the parties had reached an agreement “that fully and finally resolves all of Ecuador’s claims against Colombia” and requesting that case proceedings be discontinued (p. 2). The agreement “establishes, inter alia, an exclusion zone, in which Colombia will not conduct aerial spraying operations, creates a Joint Commission to ensure that spraying operations outside that zone have not caused herbicides to drift into Ecuador and, so long as they have not, provides a mechanism for the gradual reduction in the width of the said zone; and whereas, according to the letters, the Agreement sets out operational parameters for Colombia’s spraying programme, records the agreement of the two Governments to ongoing exchanges of information in that regard, and establishes a dispute settlement mechanism” (p. 2).

### **Commentary**

Human rights scholars and activists had hoped that the ICJ would reach a decision addressing extraterritorial application of human rights treaties, whether Colombia had acted with due diligence, and the doctrine of necessity defense.<sup>120</sup> While the ICJ is not bound by precedent, it tends to follow it.<sup>121</sup> However, this agreement is not an ICJ decision and thus will not constitute ICJ precedent.

113 Jessica L. Rutledge, *Comment: Wait a Second—Is That Rain or Herbicide? The ICJ’s Potential Analysis in Aerial Herbicide Spraying and an Epic Choice Between the Environment and Human Rights*, 46 WAKE FOREST L. REV. 1079, 1080 (2011), available at [http://wakeforestlawreview.com/comment-wait-a-second%E2%80%94is-that-rain-or-herbicide-the-icj%E2%80%99s-potential-analysis-in-aerial-herbicide-spraying-and-an-epic-choice-between-the-environment-and-human-rights#\\_ftn8](http://wakeforestlawreview.com/comment-wait-a-second%E2%80%94is-that-rain-or-herbicide-the-icj%E2%80%99s-potential-analysis-in-aerial-herbicide-spraying-and-an-epic-choice-between-the-environment-and-human-rights#_ftn8).

114 Application Instituting Proceedings, *Aerial Herbicide Spraying (Ecuador v. Colom.)*, 2008 I.C.J. Pleadings 10, ¶13 (Mar. 31, 2008) [hereinafter *Aerial Herbicide Spraying Application*], available at [www.icj-cij.org/docket/files/138/14474.pdf](http://www.icj-cij.org/docket/files/138/14474.pdf).

115 *Id.* at ¶3.

116 *Id.*

117 *Id.* at ¶4.

118 *Id.*

119 *Id.* at ¶5.

120 *Id.* at 1081, 1083; Marko Milanovic, *Aerial Herbicide Spraying Case Dead in the Air*, EJIL: TALK! (Sep. 17, 2013), <http://www.ejiltalk.org/aerial-herbicide-spraying-case-dead-in-the-air/>.

121 Rutledge, *supra* note 19, at 1105.

## World Bank Inspection Panel

The World Bank Inspection Panel was set up in 1993 as an independent accountability mechanism to ensure compliance of World Bank Projects with its own policies and procedures. The Panel consists of three Members who independently investigate and report on problems raised by groups of private stakeholders who believe their interests are or will be harmed by particular projects.

The Panel follows a specific procedure in processing requests. After a preliminary determination of eligibility, the Panel sends the Project Management a copy of the request, and gives them 21 days to respond. After receiving Management's response, the Panel conducts another assessment of the request, and makes a recommendation to the Board of Executive Directors of the World Bank on whether an investigation is warranted. If the Board approves an investigation, with or against the Panel's recommendation, the Panel proceeds to conduct a full investigation, which includes consultation with experts, a visit to the site, and meetings with complainants. The Panel then issues a full investigation report, which it sends to the Board and to Management, which has six weeks to respond. Every documented step of the process is made public on the World Bank's website shortly after it is complete, in the interest of full transparency and accountability.

In its investigation, the Panel assesses compliance with World Bank operational directives, policies and procedures. Recently, the Operational Directives (OD) have been updated and converted to Operational Policies (OP) and Bank Procedures (BP). Relevant Policies include OP/BP 4.01 (formerly OD 4.01) on environmental assessment, OP/BP 4.04 on natural habitats, and OP 4.30 (formerly OD 4.20) on indigenous people. In evaluating compliance with these policies, the Inspection Panel has specifically addressed human rights issues arising out of environmental effects of World Bank Projects.

### **Chad-Cameroon Petroleum and Pipeline Project (Credit No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No. 3373-CD); and Management of the Petroleum Economy (Credit No. 3316-CD)**

Inspection Report (July 17, 2002)<sup>122</sup>

#### *Facts*

The Chad-Cameroon Oil Pipeline Project involves the drilling of 300 oil wells in the oil fields in the Doba region of southern Chad and the construction of a 1,100 km long export pipeline through Cameroon to an offshore loading facility. The cost is estimated at about \$3.7 billion, financed mainly by private industry (Exxon Mobil, Petronas and Chevron). It is expected to yield about US\$2 billion in revenues in the twenty-eight year operating period. The World Bank and the International Financial Corporation are project participants as donors, providing \$39.5 million and \$100million respectively. Two complementary projects relating to capacity building of the Chad government were supported by the International Development Association (IDA) of the World Bank Group: the Petroleum Sector Management Capacity Building Project (\$23.3 million) and the Management of the Petroleum Economy (\$17.5 million).

The request for inspection was submitted to the World Bank Inspection Panel by an opposition member of Parliament, on behalf of himself and more than 100 residents in the vicinity of three fields of the pipeline project area. The "requesters" alleged that the pipeline project was a threat to local communities, their cultural property and the environment and that the people in the oil field region were being harmed, or were likely to be harmed, because of absence or inadequacy of an environmental impact assessment (EIA), non-disclosure of information, inadequacy of consultation, and lack of compensation.

#### *Panel's Report*

The Inspection Panel initially recommended an investigation to the Board of Executive Directors because the allegations raised possible violations of a number of Bank policies and procedures. The Board approved the Panel's recommendation.

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122 All World Bank Inspection Panel Reports are available at: [www.worldbank.org/inspectionpanel](http://www.worldbank.org/inspectionpanel)

After conducting its investigation, the Panel found that the Project was not in compliance with various aspects of Operational Directive (OD) 4.01, which addresses environmental assessment. There was no spatial assessment of the extent of the physical area which could be affected by project development, or of its cumulative effect. Nor was there any Regional Environmental Impact Assessment to adequately assess the nature, and extent of broader environmental and social concerns of the project as required by OD 4.01, para 5. The Panel was concerned that whilst OD 4.01 recommended an international advisory panel of independent experts “for major, high risk or contentious projects with serious multidimensional concerns,” there were no records available of the experts which the Chad government said it had retained. The environmental impact assessment process was flawed because baseline site-specific data was not taken into account in assessing and mitigating impact. The Panel criticized the economic assessment because it failed to quantify environmental costs and benefits and attach economic values where feasible, so as to comply with OD 4.01 on the cost-benefit analysis of Project alternatives.

Overall the Panel concluded that the Chad government and institutions lacked capacity to manage and monitor the project in an environmentally and socially sound manner. The Committee for Monitoring and Evaluation of the Pipeline Project did not comply with the institutional and capacity requirements of OD 4.01. The Panel found that the policy on Indigenous Peoples (OD 4.20) did not apply because of the different ethnic groups present; and the policy on Management of Cultural Property in Bank-Financed Projects (OPN 11.03) had been complied with. The Panel found that its policy on involuntary resettlement, and on compensating displaced people (OD 4.30) had been complied with, but they recommended further monitoring.

Although the Panel stressed that Chad’s general governance and human rights standards were outside its remit, it considered it appropriate to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank’s “social policies”. The Panel rejected management’s narrow view that human rights were only relevant if they had direct economic effect (para. 214). It referred to the Universal Declaration of Human Rights, and to a statement by the World Bank that human rights were central to achieving its development goals. The Panel noted reports of the arrest and beating of the Principal requester, an opposition politician in 2001 by government forces. In its conclusions, the Panel found that the human rights situation in Chad raised serious questions about the Bank’s compliance with its policies on informed and open consultation, warranting further monitoring (para. 217).

### ***Commentary***

The report is significant in its acknowledgement of the relevance of human rights to World Bank decision-making and development, addressed by Section 20, “Governance and Human Rights”. Whilst acknowledging that human rights was an evolving area in the African context and that other UN bodies were responsible for addressing the issue, the Panel did not shrink from reaching the conclusions on human rights and governance referred to above. The case exemplifies another remedy available to challenge large-scale international development projects which fall below environmentally acceptable guidelines. The inspection request did not succeed in compelling a review of the project or its funding, but it resulted in a management action plan focused on environmental and social compliance with the Bank’s policies and procedures, economic issues, poverty reduction issues, and monitoring and supervision. On environmental and social compliance, the Bank agreed to work with Chadian agencies to prepare a Regional Development Plan, an extension of the Environmental Assessment and Environmental Management Plans that were written as part of the project’s preparation.

## **Honduras Land Administration Project (IDA Credit No. 3858-HO) Report No. 39933 Investigation Report (June 12, 2007)**

### ***Facts***

In 2006, the Inspection Panel received a request for Inspection related to the Honduras Land Administration Project. The request was submitted by OFRANEH, a non-governmental organization on behalf of the indigenous Garifuna population of Honduras (“the Requesters”). The objective of the \$25 million project was to support the government’s land reform program through an integrated and decentralized land administration system. In particular, it provided for titling and registration of land. The Requesters claimed that the design and implementation

of the Project did not take into account the rights of the Garifuna community, damaging their claims to their ancestral lands.

Shortly after the Project was approved, the Honduras Property Law 2004 came into force to regularize ancestral lands in favor of indigenous and Afro-Honduran populations. The requesters believed this law was detrimental to them because it recognized individual rather than communal land rights. They argued that by financing the reform, the World Bank would be depriving them of communal property, transferring it to non-Garifuna.

The Requesters feared that the land titling and procedures provided under the Project would adversely affect collective property in favor of individual property, which was the opposite of the land tenure system they preferred, and could endanger their culture and survival. They also alleged that they were not properly consulted because the government had failed to consult their organization, OFRANEH, instead imposing an alternative organization on them, *Mesa Regional*. They claimed the Project did not comply with OP/BP 4.01 on Environmental Assessment because it did not allow them to restore their control over the “functional habitat” they had preserved for centuries. Similarly, because it did not take into account the importance of natural habitats for their livelihood, it violated OP/BP 4.04 on Natural Habitats. They also opposed both the Project’s conflict resolution plan and the one in the Property Law, which was different.

The Requesters also relied on ILO Convention No. 169, the Indigenous and Tribal Peoples Convention (1989), to which the Honduras is a party, which recognizes and protects indigenous and tribal people’s rights to own and possess land they have traditionally occupied.

### ***Panel’s Report***

In its investigation, the Panel assessed whether the Bank had complied with its operational policies and procedures as follows: OP/BP 4.01 Environmental Assessment; OP/BP 4.04 Natural Habitats; OD 4.20 Indigenous Peoples; and OP/BP 13.05 Project Supervision.

The Panel referred to the OD 4.20 provision that the Bank’s strategy to address issues related to indigenous people “must be based on the informed participation of the indigenous peoples themselves”. It noted that OD 4.20 provided for the incorporation of indigenous knowledge into the consultation and planning process, highlighting the role of indigenous people’s representative organizations and traditional leaders. The Panel acknowledged there had been some consultation with OFRANEH and found that establishing *Mesa Regional* as an attempt to consult all communities was not inconsistent with OD 4.20. But ultimately the Bank’s endorsement of a parallel system was divisive: “a consultation framework for Garifuna people in which their leading representative body [is] not part... cannot ensure genuine representation...as required by OD 4.20”. The Panel recommended closer supervision of *Mesa Regional* by Bank staff, including social experts under OP/BP 13.05.

The consultation requirements were strengthened by OP 4.01: “The policy calls for meaningful consultations which may occur only when people receive relevant information about the project in a timely manner before consultations take place and in a language and form understandable and accessible to those consulted”. The Panel referred to the OD 4.20 requirement of an Indigenous Peoples Development Plan for projects that affect indigenous peoples, but found that requirement was complied with.

The Panel found that the Project’s measures to protect indigenous land rights were insufficient to comply with OD 4.20, in the light of the new Property Law giving rights to non-indigenous occupants of Ethnic Lands. The Panel also found a need to clarify the conflict resolution procedures.

When considering the effect of ILO Convention No. 169, the Panel referred to the Operational Manual Statement (OMS) 2.20 (Project Appraisal) concerning the Bank’s obligations not to finance projects inconsistent with the Borrower’s international obligations. The Panel rejected the opinion of the Bank’s General Counsel stating that this provision only applied to projects which were “essentially of an environmental nature”. It also rejected the General Counsel’s suggestion that the relevant part of the OMS 2.20 had been superseded by OP 4.01, which focuses on environmental treaties and agreements. Rather, the Panel endorsed the OMS 2.20 wording that a “project’s possible effects on the country’s environment and on the health and wellbeing of its people must be considered



at an early stage.” The Panel observed “OD 4.20 broadly reflects the spirit and provisions of ILO Convention No. 169” (para. 256), having noted that Honduras was a party to that Convention. In addition, it was concerned that, taking into account OMS 2.20, the Bank had not considered whether the Project plan would be consistent with the Convention.

In its final comments, the Panel took into account the economic and political vulnerability of indigenous peoples in concluding that the Project did not provide the Garifuna with adequate safeguards to protect their land rights.

### **Commentary**

This was the first time that the Panel had explicitly addressed the merits of a claim based on international human rights law. Whilst recognizing that its mandate was limited to questions of compliance with the Bank’s operational policies, wherefore it could not comment on the State’s implementation of its ILO obligations, the Panel applied the ILO Convention provisions to the Bank through the Bank’s operational policy on project appraisal (OMS 2.20), which requires the Bank to ensure that financed activities are consistent with a borrower’s international agreements regarding its environment and the health and well-being of its citizens. OMS 2.20 thus creates an independent obligation for the Bank to “consider whether the proposed Project plan and its implementation would be consistent with ILO Convention No. 169.” Invariably a borrower’s international human rights commitments engage the “health and well-being of its people,” so the Panel’s reasoning is applicable to their human rights obligations. The decision provides a clear basis for indigenous peoples affected by environmental issues to raise a wide array of human rights claims.

More specifically the decision highlighted the inconsistency between the 2004 Property Law, providing a legal basis for the land dispute resolution system in Honduras, and the World Bank land titling project, with its own guidelines and procedures for land dispute resolution. It drew attention to the World Bank policies underlining the duty to conduct meaningful consultation with indigenous communities, and to recognize their own accountable, representative organizations.

### **Kenya: Natural Resource Management Project (P095050) Eligibility Report (May 29, 2013) and Initial Investigation Plan (August 2013)**

#### **Basic Facts**

The Natural Resource Management Project addresses, *inter alia*, forest resource management in the Kapolet and Empoput forests where water scarcity is a significant issue; among the subcomponents [of the National Resource Management Project] were: supporting activities to transform the Forest Department into an accountable and semi-autonomous Kenya Forest Service with training, sensitization, equipment etc.; identifying partnership models for community participation and benefit sharing in the forest sector; realigning and demarcating boundaries in selected gazetted forests; supporting the effective implementation of the Resettlement Policy Framework and developing and implementing Resettlement Action Plans. An Indigenous Peoples Planning Framework was developed because of the presence of Ogiek and Sengwer Indigenous Peoples in the Project areas (Mount Elgon and the Cherangany Hills, respectively) to ensure that they would not be adversely affected by the Project and measures would be developed to mitigate potential impacts” (Eligibility Report 7-8). In January 2013, a group of anonymous persons submitted a Request for Inspection to the World Bank Inspection Panel regarding this Project based on its allegations that “the Kenyan Forestry Service has burned over 500 houses and property in Empoput forest since 2007 in the process of carrying out forceful evictions. The Requesters state that the Empoput forest is part of the ancestral land of the Sengwer people as an ethnic minority hunter-gatherer people. They state that the Government planned to resettle the Sengwer from Empoput forest without carrying out free, prior informed consultations and that these resettlement plans ‘go against World Bank Operational Policy 4.12 on involuntary resettlement’. . . The Requesters also argue that the Bank violated its policies by adopting the use of the term ‘Vulnerable and Marginalized Groups’ instead of ‘Indigenous Peoples’ without carrying out free, prior informed consultations with the people. This, they claim, is a violation of the indigenous people’s rights as stipulated in international treaties and in the Bank policy on Indigenous Peoples, OP 4.10” (Eligibility Report ¶¶3, 15, 18). Moreover, they allege that “[a]ctions taken during project implementation have failed to safeguard the Sengwers’ customary rights to the forests. The Project does not recognize the rights of the Sengwers to live, use and access the forest and its natural resources in their ancestral forest” (Investigation Plan III(2)(a)(i)).

Regarding the initial observations of three Panel members who went to Kenya in May 2013 to determine the eligibility of the request for inspection, the Panel noted “plausible linkages” between evictions and the Project (Eligibility Report ¶¶44, 59, 72). Additionally, “[t]he Panel notes that the issue of indigenous peoples’ customary rights is a subject of Bank policy under OP 4.10. (Eligibility Report ¶ 21). Paragraph 21 of OP 4.10 spells out World Bank requirements pertaining to situations such as protection of gazetted forest areas:

“In many countries, the lands set aside as legally designated parks and protected areas may overlap with lands and territories that Indigenous Peoples traditionally owned, or customarily used or occupied. The Bank recognizes the significance of these rights of ownership, occupation, or usage, as well as the need for long-term sustainable management of critical ecosystems. Therefore, involuntary restrictions on Indigenous Peoples’ access to legally designated parks and protected areas, in particular access to their sacred sites, should be avoided. In exceptional circumstances, where it is not feasible to avoid restricting access, the borrower prepares, with the free, prior, and informed consultation of the affected Indigenous Peoples’ communities, a process framework in accordance with the provisions of OP 4.12 [governing involuntary settlement under development projects]. The process framework provides guidelines for preparation, during project implementation, of an individual park and protected areas’ management plan, and ensures that the Indigenous Peoples participate in the design, implementation, monitoring, and evaluation of the management plan, and share equitably in the benefits of the park’s and protected areas. The management plan should give priority to collaborative arrangements that enable the Indigenous, as the custodians of the resources, to continue to use them in an ecologically sustainable manner.”

When Panel members met with persons presently living in the Empoput forest (which they depend upon for both their livelihoods and the sustainability of their culture), they emphasized that no one had consulted with them on co-management of the forest areas that they claim customary rights to; they also expressed their fervent desire to remain in their ancestral home, but “if they had to be resettled, their preference is to remain together as a community and be settled in an area adjacent to the forest” (Eligibility Report ¶¶80, 86). The Panel noted that OP 4.10 “sets a high standard for consultation, requiring a process of free, prior and informed consultation with the affected Indigenous Peoples’ communities at each stage of the project (particularly at Project preparation) to fully identify their views and ascertain whether there is broad community support for the Project;” after meeting with community members, the Panel stressed “that important questions remain as to whether Management has complied with the requirements of OP 4.10 to ensure that there is ‘broad community support’ for the approach taken to avoid or mitigate adverse impacts on Sengwer communities with customary rights to land and resources inside the project area (Eligibility Report ¶¶92-93).

Thus, “the Panel recommends that an investigation be carried out on the issues raised by the Request that relate to allegations of harm and related non-compliance with World Bank operational policies and procedures under the Project with respect to a) the application of policies in relation to evictions and issues of resettlement of affected Sengwer people, and b) the consideration of customary rights of the affected Sengwer people, including consultations on this issue. The Panel’s investigation will also report on any steps and actions taken by Management during the course of the investigation to address the issues of compliance and the concerns raised by the Requesters” (Eligibility Report ¶99). The Panel expects to submit an Investigation Report to the Board of Directors in early 2014, following a field visit. The Panel’s Investigation Report, along with the Management Report and Action plan will be made public following the Boards consideration of both reports (Investigation Plan V).

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