

## **Comments by the International Commission of Jurists on the Preliminary Draft Recommendation on human rights and the protection of the environment (CDDH-ENV(2021)R2Addendum)**

17 December 2021

The International Commission of Jurists (ICJ) is pleased to contribute to the work of CDDH-ENV in the drafting of a Recommendation on human rights and the protection of the environment. The Draft Recommendation can make an important contribution to the development of Council of Europe human rights standards that address the urgent threats that environmental damage, biodiversity loss and climate change pose to the protection of human rights.

The present comments highlight the ICJ's main areas of concern and do not prejudice the organization's final view on the whole text.

### **1. Operative Part**

#### **a) The recognition of the right to a safe, clean, healthy and sustainable environment**

The Council of Europe is currently the only human rights regional system not recognizing the right to a healthy environment.

Therefore, the ICJ strongly supports the insertion of paragraph 1 recognizing the right to a clean, healthy and sustainable environment. The organization, however, recommends that CDDH-ENV insert the full reference to "the right to a safe, clean, healthy and sustainable environment", as consistently reflected in the work of the UN Special Rapporteur on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (hereinafter the "Special Rapporteur on human rights and the environment").<sup>1</sup>

The UN Special Rapporteur on the human rights and the environment documented in 2020 that at least 155 UN Member States recognized in law the right to a safe, clean, healthy and sustainable environment.<sup>2</sup> Based on international

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<sup>1</sup> The work of the UN Special Rapporteur is available at <https://www.ohchr.org/en/Issues/environment/SREnvironment/Pages/SREnvironmentIndex.aspx>.

<sup>2</sup> UN Special Rapporteur on human rights and the environment, *Annual Report to the UN General Assembly*, UN Doc. A/74/161, para. 43.

environmental law, this right has been defined as, among other things, the right to “a safe climate, clean air, clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems.”<sup>3</sup> The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) defines it as “the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.”<sup>4</sup>

The explicit recognition of this right has been made necessary to raise “the profile and importance of environmental protection and [has] provided a basis for the enactment of stronger environmental laws”<sup>5</sup> and to allow the judiciary to “provide a safety net to protect against gaps in statutory laws and created opportunities for better access to justice.”<sup>6</sup> Such an explicit recognition further ensures “that human rights norms relating to the environment continue to develop in a coherent and integrated manner.”<sup>7</sup>

### **b) The need to review and examine national legislation and practice**

Article 2 of the operative part calls on States to examine their national laws and practices and to “consider reviewing them if they are not consistent with” the guidance set out in the appendix. The ICJ welcomes the call for a review of national laws and practices with a view to ensuring that human rights be upheld in all matters relating to the environment. However, the wording of this article fails to take account of the fact that many of the standards referred to in the appendix are of a legally binding nature, including under the European Convention on Human Rights, other Council of Europe instruments and under international environmental law. Therefore, the call on Member States should be a more direct one, namely, “to examine and review national legislation and practice to ensure that it is consistent with the recommendations, principles and further guidance set out in the appendix.”

### **c) Reference to international environmental treaties**

Article 7 of the operative part calls on Member States to sign and/or ratify and fully implement the Aarhus Convention and its protocol. This is an important recommendation in terms of the procedural rights related to environmental law. However, as currently formulated, it is not enough. While the Aarhus Convention is central to access to justice, as well as to information and participation, international environmental law requires the use of environmental impact assessments, which the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) indeed promotes.

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<sup>3</sup> *Ibid.*, para. 43.

<sup>4</sup> Article 1.

<sup>5</sup> UN Special Rapporteur on human rights and the environment, *Annual Report to the UN Human Rights Council*, UN Doc. A/HRC/37/59, para. 13.

<sup>6</sup> *Ibid.*, para. 13.

<sup>7</sup> *Ibid.*, para. 16.

It is furthermore unclear why the operative part focuses on the ratification of the Aarhus Convention, but fails to mention other key treaties concluded under the auspices of the UN or the Council of Europe and to which Council of Europe Member States may accede.

With respect to this, the ICJ recommends to include, at minimum, a reference to:

- a) the UN Framework Convention on Climate Change and its Paris Agreement;
- b) the Convention on Biological Diversity and its Protocol;
- c) the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- d) the Council of Europe Convention on the Conservation of European Wildlife and Natural Habitats;
- e) the Vienna Convention for the Protection of the Ozon Layer and its Montreal Protocol;
- f) the Stockholm Convention on Persistent Organic Pollutants;
- g) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;
- h) the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade;
- i) the Convention on Long-range Transboundary Air Pollution and its Protocols;
- j) the Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment;
- k) the Council of Europe Convention on the Protection of the Environment through Criminal Law; and
- l) the United Nations Convention on the Law of the Sea.

Article 7 should recommend that Member States become parties to these instruments. It should also make clear that States party to these instruments should fully implement them, not merely “consider” doing so.

## **2. The Appendix**

Overall, the Appendix’s descriptions of the legal obligations in respect of each right are rather limited and do not sufficiently assist States in their full implementation of these obligations. The ICJ recommends that, in addition to the jurisprudence of the European Court of Human Rights, the appendix refer to the thematic reports of the UN Special Rapporteur on human rights and the environment, as well as to the General Comments/Recommendations and case law of the UN Treaty Bodies.

In addition, while in this brief note the ICJ does not provide drafting suggestions regarding the appendix, below, the organization raises its concerns with respect to certain elements of the text as currently formulated since they fail to comply with international human rights law and international environmental law standards and jurisprudence.

### **a) The right to life**

The recommendation could better capture the obligations under the right to life. Paragraph 10 should not be limited to “steps being taken” but outline States’ obligation “to respect and protect” the right to life. As the jurisprudence of the European Court of Human Rights attests, violations of the right to life due to

adverse environmental impact may arise in connection with States' acts or omissions, as well as those of private actors. In this context, therefore, the right to life under international human rights law, including the European Convention on Human Rights, entails both positive as well as negative obligations on the part of States.<sup>8</sup> Furthermore, obligations to respect and protect life under Article 2 ECHR are not obligations of progressive realisation. The mention to the need to "take appropriate steps" should therefore be deleted.

### **b) The right to access information**

Paragraph 17 should not only contemplate access to information for dangerous activities that Member States "know involve adverse risks", but also that, "they ought to know" do so. This modification would reflect the fact that constructive knowledge, as opposed to actual knowledge, suffices to trigger States' obligations to prevent human rights violations, including under the ECHR.<sup>9</sup>

### **c) Decision-making**

Paragraph 21 limits environmental impact assessment (EIA) to activities proposed by Member States. This limitation is absent in international human rights law, environmental law or in the jurisprudence of the European Court of Human Rights. Indeed, all activities likely to have a significant adverse impact on the environment should undergo an EIA. Whenever human rights may be detrimentally affected as a result of an adverse environmental impact, the obligation to carry out an EIA stems from the duty to prevent and protect from the risks of human rights violations, including of the right to life and the right to private or family life, and is not limited to risks emanating from acts or omissions of public authorities but extends also to those emanating from private parties. This obligation is complementary to their human rights due diligence obligations enshrined in the Guiding Principles of Business and Human Rights and the related Council of Europe Recommendation, including that to set up human rights impact assessments.<sup>10</sup>

### **d) Access to a court**

The requirements set up in paragraph 27 are excessively narrow. Access to courts for environmental law violations must be provided according to States' obligations under the Aarhus Convention and under article 6 ECHR and 13 ECHR. The requirement that access be guaranteed in accordance with national law criteria

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<sup>8</sup> For general reference, see *Guide to the case-law of the European Court of Human Rights – Environment*, Registry of the European Court of Human Rights, updated on 31 August 2021, available at [https://www.echr.coe.int/Documents/Guide\\_Environment\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Environment_ENG.pdf); and *Guide on Article 2 of the European Convention on Human Rights*, Registry of the European Court of Human Rights, updated on 31 August 2021, available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_2\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf).

<sup>9</sup> See *Guide to the case-law of the European Court of Human Rights – Environment*, Registry of the European Court of Human Rights, updated on 31 August 2021, available at [https://www.echr.coe.int/Documents/Guide\\_Environment\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Environment_ENG.pdf)

<sup>10</sup> See articles 15, 17, 18, 19, UN Guiding Principles on Business and Human Rights available at [https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf). Articles 20, 22, Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on human rights and business, available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c1ad4](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4).

may legitimize access restrictions that are inconsistent with international human rights law and international environmental law and should therefore be deleted.

Limiting access to courts to instances of contravention of national law provisions on the environment would similarly be inconsistent with international human rights law and international environmental law and should therefore be omitted. Access to courts must be provided for all breaches of environmental and human rights law, whether under national or international law.

### **e) Right to a Healthy Environment**

Paragraphs 33 and 34 rightly refer to the need to consider environmental harm in relation to health as protected by Article 11 of the Revised European Social Charter, as well as by the right to respect for private life under Article 8 ECHR. However, these paragraphs should likewise refer to measures taken to protect life from threats posed by environmental harm, in light of the obligations under the right to life and to freedom from inhuman or degrading treatment, under Article 2 and 3 ECHR, respectively.

Furthermore, in the present draft the scope of paragraph 34, on precautionary measures, is limited to the effects of “environmental pollution” on human health. To fully encompass the scope of existing international human rights law obligations, paragraph 34 should also refer to the need for precautionary measures against other forms of environmental damage, including biodiversity loss and climate change.

### **f) Business enterprises**

The set of guidelines in paragraphs 40 to 42 is extremely weak and does not reflect the current state of international human rights law in the field of obligations on business enterprises. Under this body of law, including the ECHR, States have an obligation to protect anyone, including anyone affected by harm stemming from their jurisdiction, from abuse of human rights perpetrated by private entities or persons. In this regard, they have a duty to provide an effective legal framework, to set up preventing measures to avoid the occurrence of human rights abuses they know or ought to know may risk taking place, and to provide effective and independent remedies and redress.

This is reflected in terms of businesses’ direct obligations under articles 1, 11 and 12 of the UN Guiding Principles on Business and Human Rights, as well as their article 17 on due diligence.

The “encouragement to States” to do so does not reflect the fact that these obligations are already binding on them, as they stem from the European Convention on Human Rights and other treaties of international human rights law.

The same may be said for the obligation to “take appropriate steps” to provide an effective remedy in paragraph 42, which fails to reflect the immediate and binding obligation under article 13 ECHR to provide effective remedies, as well as the duty to protect all rights under ECHR and which, in turn, require such remedies to be provided.

### **g) Rights of children**

This section is extremely limited. It should be reworked to include at the very least key principles under the Convention on the Rights of the Child, including the best interests of the child.