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FROM THE OTHER SHORE: ECONOMIC, SOCIAL AND CULTURAL RIGHTS FROM AN INTERNATIONAL ENVIRONMENTAL LAW PERSPECTIVE

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Introduction

The relationship between human rights and international environmental law (IEL) is usually approached from the perspective of human rights. The question is how human rights can be used to implement IEL or, more generally, what is the influence of human rights on IEL. The 'dependent variable' is thus IEL whereas human rights are the independent or 'explanatory variable'. For a number of legitimate reasons, including the significant contribution made by human rights' adjudicatory and quasi-adjudicatory bodies to environmental protection,[1] this standpoint is still the prevailing one.[2] This article takes the reverse perspective as

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1 See A. Boyle, M. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Oxford University Press, 1996); A. Boyle 'Human Rights or Environmental Rights ? A Reassessment' (2007) 18 *Fordham Environmental Law Review* 471; F. Francioni 'International Human Rights in an Environmental Horizon' (2010) 21 *European Journal of International Law* 41.

2 For instance, the chapter on the relationship between human rights and IEL written by a distinguished environmental lawyer in a major human rights textbook published in 2010 circumscribes its topic as

its starting point. We focus indeed on how IEL can help implement human rights obligations. Conceptually, such an approach would look at human rights in general, without distinguishing between, on the one hand, civil and political rights (CPR) and, on the other hand, economic, social and cultural rights (ESCR). However, given the specific focus of the present volume, we concentrate on how IEL influences (or could be used to influence) the implementation of ESCR, referring to CPR only incidentally when this appears useful to illustrate our reasoning.

The conclusion that we reach is, admittedly, no surprise to an audience specialised in human rights: the impact of IEL is, essentially, to broaden the scope of human rights, and particularly of ESCR, in a variety of ways. [3] Perhaps more interesting is how this broadening takes place. There are three main avenues through which this happens: IEL broadens the substantive scope of ESCR (I); IEL broadens the way in which we think about ESCR (II); and IEL broadens the palette of enforcement mechanisms available in connection with ESCR (III).

1. IEL broadens the substantive scope of ESCR

It seems today widely accepted that a number of human rights involve environmental components.[4] This is the reason why the development of a 'human rights approach' to environmental protection has attracted much attention in the last two decades.[5] Already in the early 1990s, efforts towards asserting this approach went beyond the use of existing human rights to protect the environment, stressing the need to recognise substantive environmental rights.[6] In addition, some commentators called for further development of procedural (rather

follows : 'the main issue is whether human rights constitute an efficient and practical tool that can be used to combat environmental degradation', see M. Fitzmaurice 'Environmental Degradation', in D. Moeckli, S. Shah, S. Sivakumaran, D. Harris (eds), *International Human Rights Law* (Oxford: Oxford University Press, 2010), p. 622.

3 The relationship between IEL and human rights, even approached from the perspective of IEL, is not necessarily synergistic. In some cases, limitations and even violations of human rights may be the consequence of a rigorist application of IEL. An obvious example would concern the forced relocation (and prohibition of resettlement) of an indigenous people from a natural preserve. See D. Brockington, J. Igoe, 'Eviction for Conservation: A Global Overview' (2006) 4 *Conservation & Society* 424; J. P. Brosius, 'Indigenous Peoples and Protected Areas at the World Parks Congress' (2004) 18 *Conservation Biology* 609.

4 The most relevant case-law in this regard is mentioned below.

5 See D. Shelton 'Human Rights, Environmental Rights and the Right to the Environment' (1991) 28 *Stanford Journal of International Law* 103; A. Boyle, M. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Oxford University Press, 1996); G. Handl, 'Human Rights and Protection of the Environment', in A. Eide, C. Krause, A. Rosas (eds), *Economic, Social and Cultural Rights* (The Hague: Kluwer, 2001) 303-328; A. Kiss, D. Shelton, 'Human Right and the Environment', in *International Environmental Law* (Transnational Publishers, 2004, 3rd edn.), 661-731; M. Fitzmaurice, J. Marshall, 'The Human Right to a Clean Environment – Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases' (2007) 76 *Nordic Journal of International Law* 103.

6 See UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment, Final Report of the Special Rapporteur, 6 July 1994, UN Doc. E/CN.4/Sub.2/1994/9 ('Ksentini Report'). See also M. Anderson 'Human Rights Approaches to Environmental Protection: An Overview', in Boyle, Anderson, *Human Rights Approaches*, above n 1, pp. 4-10.

than substantive) environmental rights, in line with principle 10 of the Rio Declaration on Environment and Development.[7]

With the benefit of hindsight, we know that of the main three strategies ((1) broadening existing rights, (2) asserting substantive environmental rights, (3) asserting procedural environmental rights), only the first and third have found their way through in practice so far.[8] Moreover, the assertion of procedural environmental rights has often been carried out through a broadening of the scope of existing human rights.[9] What could be called, for ease of reference, the 'environmental broadening phenomenon' can be detected in connection with both CPR and ESCR. Illustrations of the first category are provided by the progressive interpretation of provisions such as Article 8 (right to private and family life) of the European Convention on Human Rights (ECHR)[10] or Article 21 (right to property) of the American Convention on Human Rights (ACHR).[11] In the area of

[7] Principle 10 of the Rio Declaration reads: '[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, 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. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided', Report of the United Nations Conference on Environment and Development (Rio de Janeiro 3-14 June 1992), Annex I, Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I) ('Rio Declaration'). See A. Boyle 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle, Anderson, *Human Rights Approaches*, above n 1, pp. 59-63.

[8] A right to a safe environment has been enshrined in some instruments, such as Article 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, 17 November 1988, OAS Treaty Series No. 69 ('Protocol of San Salvador') and Article 24 of the African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) ('African Charter'). But the actual enforcement of these provisions remains limited. Article 11 of the San Salvador Protocol cannot ground a claim before the Commission nor the Court (Protocol of San Salvador, Article 19(6) *a contrario*). Article 21 of the African Charter has been rarely applied by the African Commission. The landmark case in this regard is: The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights/Nigeria, African Commission on Human and Peoples' Rights in its Communication 155/96, done at the 30th Ordinary Session, held in Banjul, from 13 to 27 October 2001 ('Ogoni case').

[9] See G. Triggs 'The Rights of Indigenous Peoples to Participate in Resource Development : An International Legal Perspective', in D. N. Zillman, A. R. Lucas, G. Pring (eds), *Human Rights in Natural Resource Development* (Oxford : Oxford University Press, 2002), pp. 123-154.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Europ.T.S. No. 5, 213 UNTS 221 ('European Convention' or 'ECHR'). The right to private and family life enshrined in Article 8 of the ECHR has been broadened in several cases, including the following: *Powell and Rayner v. the United Kingdom* (Application no. 9310/81), Court (Chamber), Judgment of 21 February 1990, para. 40 (noise pollution); *Case of Lopez-Ostra v. Spain* (Application no. 16798/90), ECtHR, Judgment, 9 December 1994, para. 51 (pollution from tanneries); *Case of Guerra and Others v. Italy* (Application no. 14967/89), ECtHR, Judgment, 19 February 1998, para. 57 (pollution from the operation of a chemical factory); *Case of Hatton et al. v. The United Kingdom* (Application no. 36022/97), ECtHR, Judgment, 8 July 2003, para. 96-104 (noise pollution); *Case of Moreno Gomez v. Spain* (Application no. 4143/02), ECtHR, Judgment, 16 November 2004 (Final 16/02/2005), para. 53-56 (noise pollution); *Case of Taskin and others v. Turkey* (Application no. 46117/99), ECtHR, Judgment, 10 November 2004 (Final 30 March 2005), para. 98-100 (granting of permits to exploit a gold mine); *Case of Ivan Atanasov v. Bulgaria* (Application no. 12853/03), ECtHR, Judgment, 12 December 2010 (Final), para. 55-57 (pollution from a former copper-ore mine).

[11] American Convention on Human Rights (Pact of San Jose, Costa Rica), 22 November 1969, OAS Treaty Series No. 36 ('American Convention' or 'ACHR'). The right to property (enshrined in articles 21 of the ACHR and XXIII of the American Declaration of Human Rights) has been broadened in several cases, including: *Maya Indigenous Communities of the Toledo District v. Belize*, Case N° 12-053, IACHR,

ESCR, relevant examples include the broadening of the right to adequate food, the right to health or the right to water enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[12] Let us comment briefly on these latter rights.

Regarding, first, the right to adequate food, as defined by Article 11 of the ICESCR and further interpreted by General Comment 12 of the ESCR Committee,[13] reference to IEL is used as a tool for circumscribing the substantive scope of this right. For example, General Comment 12 states that:

> '[t]he notion of sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations. The precise meaning of 'adequacy' is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while 'sustainability' incorporates the notion of long-term availability and accessibility'.[14]

Moreover, according to the ESCR Committee, Article 11:

> 'sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins'.[15]

The reference in General Comment 12 to the concept of sustainability, which in 1999 was already firmly rooted in IEL,[16] plays an important role in expanding the scope of the right to adequate food well beyond access to certain quantities of food to include environmental quality standards and even the preservation of the needs of future generations.

In a similar vein, the outer limits of the right to health enshrined in Article 12 of the ICESCR, and further interpreted in General Comment 14 of the ESCR

Merits, Report N° 40/04, 12 October 2004, para. 27-36 (logging and oil concessions and their impact on the environment); *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Judgment, (Ser. C) No. 79, 31 August 2001, para. 139, 149, 153, and 155 (protection of Nicaraguan forests in lands traditionally owned by the Awas Tingni Community); *Saramaka people v. Surinam*, IACtHR, Judgment, (Ser. C) No. 172, 28 November 2007, para 78-158, 214 (property over traditional lands and obligations to respect, ensure and give domestic legal effect to Article 21).

12 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 ('ICESCR').

13 Committee on Economic, Social and Cultural Rights (ESCR Committee), General Comment 12: The Right to Adequate Food (Art. 11), 12 May 1999, UN Doc. E/C.12/1999/5 ('General Comment 12').

14 *Ibid*., para. 7.

15 *Ibid*., para. 10.

16 The concept of sustainability was referred to in principles 4, 5 and 8 of the 1992 Rio Declaration, as well as in the judgment of the International Court of Justice (ICJ) in the *Gabčikovo-Nagymaros* case: Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 3, para. 140. It was subsequently taken up in many other international instruments, including the 2002 New Delhi Declaration of the International Law Association (New Delhi Declaration of Principles of International Law relating to Sustainable Development, Resolution 3/2002, points 1, 3, 4, and 7), the 2002 Johannesburg Declaration (A/CONF.199/20 para. 5), the WTO Appellate Body *Shrimp Turtle* case (*United States – Import Prohibition of Certain Shrimp and Shrimp Products* (Shrimp Turtle Case), WTO Appellate Body, 1998, para. 153), and, more recently, the judgment of the ICJ in the *Pulp Mills* case (Case concerning Pulp Mills on the River Uruguay (Argentina *v*. Uruguay), Judgment, I.C.J., 20 April 2010, para. 75-77 and 177 especially).

Committee[17], are defined by reference to IEL. General Comment 14 states, for instance, that

> '[t]he Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information […]'.[18]

Referring explicitly to Principle 1 of the 1972 Stockholm Declaration, the ESCR Committee adds that:

> '[t]he improvement of all aspects of environmental and industrial hygiene (art. 12.2 (b)) comprises, inter alia, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health […]'.[19]

Thus, the ESCR Committee seeks support in environmental considerations and principles to define the scope of the right to health. While this is understandable, we must not neglect the fact that environmental standards evolve over time, pulling with them the outer limits of ESCR.

The third illustration of the environmental broadening phenomenon is provided by the right to water, derived as an independent right from Articles 11 and 12 of the ICESCR in General Comment 15 of the ESCR Committee.[20] In assessing the scope of the right to water, General Comment 15 also refers to principles of IEL. Paragraph 11 of General Comment 15 states indeed that '[t]he manner of the realization of the right to water must […] be sustainable, ensuring that the right can be realized for present and future generations'.[21] The legal bases of the concept of sustainable development and of the principle of intergenerational equity referred to in the foregoing quotation are identified in a footnote to paragraph 11 as follows:

> '[f]or a definition of sustainability, see the Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 1992, Declaration on Environment and Development, principles 1, 8, 9, 10, 12 and 15; and Agenda 21, in particular principles 5.3, 7.27, 7.28, 7.35, 7.39, 7.41, 18.3, 18.8, 18.35, 18.40, 18.48, 18.50, 18.59 and 18.68.'

General Comment 15 also seeks support from IEL in connection with the management of water resources. Paragraph 28, devoted to this issue, refers indeed to chapter 5, 7 and 18 of Agenda 21, to the Plan of Implementation adopted at the 2002 World Summit on Sustainable Development, as well as to the 'Convention

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17 ESCR Committee, General Comment 14: The Right to the highest attainable Standard of Health (Art. 12), 11 August 2000, UN Doc. E/c.12/2000/4 ('General Comment 14').

18 *Ibid*., para 11. For a reference to 'nutritiously safe food and potable drinking water' see also para. 36 and 40.

19 *Ibid*., para. 15.

20 ESCR Committee, General Comment 15: The Right to Water, 20 January 2003, UN Doc. E/C.12/2002/11 ('General Comment 15').

21 *Ibid*, para. 11 *in fine*.

on Biological Diversity, the Convention to Combat Desertification, the United Nations Framework Convention on Climate Change, and subsequent protocols'.[22] As the right to water includes complex and diverse legal components, answers provided by IEL seem of particular relevance in the definition of the scope and boundaries of such right.

As suggested by the foregoing remarks, IEL supplements ESCR by pushing and helping define the outer boundaries of the substantive scope of ESC obligations. As we shall see next, IEL could play an even more significant role in the understanding of ESCR. Consideration of the interplay between ESCR and IEL may, indeed, lead to a broadening of the way we normally think about ESCR.

2. IEL broadens the way we think about ESCR

The second mechanism through which IEL broadens ESCR has received less attention, perhaps because the influence of IEL on ESCR at this level seems misleadingly simple. International rules and mechanisms that command the protection of the environment obviously contribute, by this very fact, to the respect and fulfillment of ESCR. As noted by one commentator:

> '[t]he creation of a reliable and effective system of environmental protection would help ensure the well-being of future generations as well as the survival of those persons, often including indigenous or economically marginalized groups, who depend immediately upon natural resources for their livelihoods'.[23]

But this assertion does not fully spell out the implications of the impact of IEL on the implementation of human rights.[24] To explore how the synergies between IEL and ESCR may lead to a substantial broadening of the way in which we think about ESCR, it seems useful to take one example.

In discussing the formulation of the right to water introduced by the ESCR Committee in its General Comment 15, we have seen that reference to IEL is used to provide more solid grounds to some of the corollaries of the right to water, such as the implications of the right to water with respect to the management of freshwater resources. It may however be particularly challenging to derive, from a right which is not even explicitly formulated in the IESCR, general far-reaching obligations, such as the requirements to adopt integrated water resources management (IWRM) or to assess the impacts of 'climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity'.[25] General Comment 15 seeks to identify specific norms to provide additional grounding to these 'distant corollaries' of the right to water. In doing so, it raises a theoretical question with important practical implications, namely what are the outer limits of a given human right and what legal materials mark its boundaries. In other words,

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22 General Comment 15, para. 28.

23 Anderson, *Human Rights Approaches*, above n 1, p. 3.

24 A more general statement of this relationship is the one given by the Human Rights Council in the Preamble to its Resolution A/HRC/16/L.7 of 18 March 2011, which states that '[…]sustainable development and the protection of the environment can contribute to human well-being and to the enjoyment of human rights'.

25 General Comment 15, para. 28.

what is the 'tissue' of which the legal creature that we call 'the right to water' is made of?

The first part of the answer is quite obvious: the tissue of this legal creature is made of those provisions in human rights and other treaties that provide for a right to water, either explicitly or implicitly.[26] To this first layer of materials we could add a second layer consisting of General Comment 15 as well as other documents prepared by the ESCR Committee as part of its consideration of the reports of State parties.[27] A third layer of materials would include resolutions of an array of international bodies as well as the case-law of international and domestic adjudicatory and quasi-adjudicatory bodies relating to the right to water.

But, is that all? What about regulations governing the quantity and the quality of water that must be made available, or the ways in which water policy must be organised domestically and coordinated internationally? Some of these more 'distant materials' clearly seem to be part of the tissue of the right to water. A good illustration of this point would be the WHO Guidelines for drinking-water quality, to which General Comment 15 explicitly refers.[28] The link with some other distant materials may be less explicit, but that does not mean that it is weaker. As a matter of fact, certain environmental treaties go very far in establishing a system of 'distant corollaries' or obligations that are a logical but distant consequence of respecting, protecting and fulfilling the right to water. A treaty such as the UNECE Water Convention,[29] with its network of some 150 specific treaties,[30] its Protocol on Water and Health,[31] and the implementing domestic (or community) laws,[32] would offer a firmer ground for the obligations of management and quality of water than the distant obligation formulated in General Comment 15 as a corollary to the right to water. There is, indeed, a continuum between the provisions formulated in human rights language and those

[26] The main such provisions are identified in paragraphs 3 and 4 (and their footnotes) of General Comment 15.

[27] See *Ibid*., para. 5.

[28] WHO, Guidelines for drinking-water quality, 2nd edition, vols. 1-3 (Geneva, 1993), referred to in footnote 15 to paragraph 12(a) of General Comment 15.

[29] Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 18 March 1992, 1936 UNTS 269 ('UNECE Water Convention').

[30] Pursuant to Article 9(1) of the UNECE Water Convention: 'The Riparian Parties shall on the basis of equality and reciprocity enter into bilateral or multilateral agreements or other arrangements, where these do not yet exist, or adapt existing ones, where necessary to eliminate the contradictions with the basic principles of this Convention, in order to define their mutual relations and conduct regarding the prevention, control and reduction of transboundary impact. The Riparian Parties shall specify the catchment area, or part(s) thereof, subject to cooperation. These agreements or arrangements shall embrace relevant issues covered by this Convention, as well as any other issues on which the Riparian Parties may deem it necessary to cooperate'. A network of some 150 water treaties, either already existing or concluded afterwards, have come under the umbrella of the UNECE Water Convention. The status of bilateral and multilateral agreements can be followed through the UNECE's website at http://www.unece.org/env/water/partnership/part621.htm (visited on 12 March 2011).

[31] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 June 1999, 2331 UNTS 202 ('Protocol on Water and Health').

[32] For instance, within the European Union, the water management policy has been adjusted in accordance with the Protocol. See in particular: the Water Framework Directive (OJ L 327), the Bathing Water Directive (OJ L 64), the Groundwater Directive (OJ L 372), and the Shellfish Directive (OJ L 376). See also: the Drinking Water Directive (OJ L 330), the Urban Wastewater Treatment Directive (OJ L 135), and the Abstraction Directive (OJ L 194).

other provisions formulated in regulatory language or, in other terms, between the different layers of materials that form the tissue of the right to water. Our understanding of the right to water as consisting only of certain layers must not prevent us from seeing the normative environmental context of this and other rights. The system of the UNECE Water Convention[33] is an important component of this normative context.[34] Within the framework of this Convention, the Protocol on Water and Health provides an apposite illustration of the type of apparently distant materials with a strong link to the right to water.

The Protocol links sustainable water management with the reduction of water-related disease and, thereby, spells out the connection between environmental protection and the promotion of human health. Pursuant to Article 1, the objective of the Protocol is:

> 'to promote at all appropriate levels, nationally as well as in transboundary and international contexts, the protection of human health and well-being, both individual and collective, within a framework of sustainable development, through improving water management, including the protection of water ecosystems, and through preventing, controlling and reducing water-related disease'.

To this end, article 4(1) of the Protocol requires States parties to:

> 'take all appropriate measures to prevent, control and reduce water-related disease within a framework of integrated water-management systems aimed at sustainable use of water resources, ambient water quality which does not endanger human health, and protection of water ecosystems'.

It is worth noting that the integrated water resources management approach (IWRM) is couched here as a component of a binding obligation, by contrast with the reference to soft-law instruments (e.g. Agenda 21) found in paragraph 28 of General Comment 15. This point stresses the idea, discussed above, that environmental treaties may be important for the proper expression and grounding of certain obligations arising from ESCR, such as the right to water. The Protocol on Water and Health offers one of the clearest illustrations of this point. Although

[33] The Convention aims at strengthening national measures for the protection of transboundary surface and ground waters (Article 2). It enjoys a high ratification rate (38 Parties including the European Union), and it was amended in 2003 to allow accession by countries from outside the UNECE region (Article 25(3)). The Convention takes a comprehensive approach in the regulation of freshwater resources, recognizing their fundamental role in both ecosystems and human societies. It sets compulsory minimum standards for the prevention, control and reduction of pollution of transboundary watercourses and international lakes (Article 3(1)(f) and 3(2)), as well as provides States parties with a comprehensive system of assistance, including joint monitoring and assessment programmes, warning and alarms systems, and mutual assistance procedures (Articles 2(6), 5, 6, and 9 to 15). As already noted, the Convention obliges States parties to enter into bilateral or multilateral agreements or to adapt existing ones where necessary to eliminate the contradictions with the basic principles set out by the Convention (Article 9(1)) This has led to the development of a network of some 150 water treaties, which evidences the practical relevance of the Convention in the international order. Moreover, in 2000, an International Water Assessment Centre (IWAC) was established in order to offer scientific and technical support to States parties on questions relating to monitoring and assessment.

[34] Other potential components of the normative environmental context of the right to water include the 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses, 21 May 1997 (GA Res. 51/229, annex, GAOR, 51st session, suppl. no. 49, UN Doc. A/51/49 (not yet in force)) or the 2008 International Law Commission (ILC) Draft Articles on the Law of Transboundary Aquifers (Text adopted by the ILC at its sixtieth session, in 2008, GAOR, 63rd session, suppl. no. 10, UN Doc. A/63/10) as well as a number of water and environmental treaties operating beyond the UNECE system.

it is premised on the need to provide access to water and sanitation 'for everyone',[35] it is not couched in ESCR language.[36] Yet, the significance of the Protocol for the implementation of the right to water must not be underestimated. As noted by one distinguished commentator:

> '[t]he formulation in the Protocol of access to water in terms of basic human needs […] could […] provide a criterion for the review of the legitimacy of state policies which authorize the unsustainable use of water resources in such a way as to deprive affected people of their access to safe drinking and sanitation'.[37]

The two core mechanisms through which the Protocol operates, namely surveillance/early warning mechanisms[38] and a system of water quality targets and implementation deadlines,[39] are among the most ambitious international tools for the preservation of the quality of water bodies. In addition, a sophisticated compliance mechanism, which is open to communications from the public, has been established to monitor the implementation of the obligations of the Protocol. Thus, this system constitutes a detailed binding implementation of some components of the right to water; a system that goes beyond the broad references to water quality and management included in General Comment 15 and provides, among others, for an enforcement mechanism of a kind that is lacking in the ESCR context.

This latter point provides a suitable transition to our third section, namely the broadening of the palette of enforcement mechanisms available for the implementation of ESCR. Indeed, as we shall see next, a broadening of the scope as well as of the way in which we think about ESCR could foster the use of a variety of enforcement mechanisms that are sometimes beyond the radar of human rights activists. From a practical perspective, the use of such mechanisms, initially conceived for the implementation of environmental obligations, is perhaps the most important implication of the environmental broadening phenomenon discussed in the previous sections of this article.

3. IEL broadens the palette of enforcement mechanisms

The third avenue through which IEL influences ESCR is the broadening of the palette of enforcement mechanisms. Until recently, there were few mechanisms available to private parties to bring individual complaints for violation of ESCR (as opposed to those available for CPR).[40] The most promising instrument in this

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35 *Ibid*., art 6(1).

36 The text of the Protocol makes only two explicit references to the right to water in Articles 5(m) and 9(1)(b), respectively.

37 Francioni, *International Human Rights*, above n 1, p. 46.

38 Protocol on Water and Health, Article 8.

39 *Ibid*., art 6(2)(a) to (n). To assist Parties in setting targets, a Task Force on Indicators and Reporting was established in 2007, UN Doc. ECE/MP.WH/2/Add.3, EUR/06/5069385/1/Add.3, 3 July 2007.

40 The main procedures available in this connection focus indeed on the ESC components of CPR or on rights situated at the juncture between ESC and CPR: Optional Protocol to the International Covenant on Civil and Political rights, 16 December 1966, 999 *UNTS* 171; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 6 October 1999, 2131 UNTS 83; Optional Protocol to the Convention on the Rights of Persons with Disabilities 13 December 2006, Doc.A/61/611; and procedure according to Article 14 of the International Convention on the Protection of the Rights of

connection is now the Optional Protocol to the ICESCR.[41] As a supplement to this and other mechanisms, some procedures established by environmental treaties could potentially be used to bring individual complaints for breach of certain ESCR (or some components of such claims). To the extent that, through the broadening process already discussed, certain ESCR have acquired environmental content, questions relating to the implementation of measures and policies relating to such rights may potentially fall within the mandate of some compliance bodies established to deal with environmental questions. Such a development could be seen as a sort of 'reverse mirror' of the treatment of environmental questions by adjudicatory and quasi-adjudicatory human rights bodies.

In what follows, we briefly discuss two types of environmental mechanisms that could be used to enforce ESCR. The first type authorises individuals or NGOs to file communications complaining about a State's failure to implement the environmental measures required by a given treaty (A). These mechanisms will be illustrated by reference to institutional arrangements set out in the North American Agreement for Environmental Cooperation[42] (NAAEC)(1) and in the Protocol on Water and Health (2). The second type of mechanisms consists of using certain procedural rights developed in connection with the implementation of environmental measures, e.g. access to information, participation in decision-making procedures, and access to justice (B). This second type of instrument, which we will illustrate by reference to the Aarhus Convention,[43] is significantly more sophisticated than the first one in that it is fully geared towards increased transparency (1), and it also includes a compliance mechanism open to individuals and NGOs (2). Moreover, the principles of the Aarhus Convention have some influence beyond its member States (3).

A. *Broadening access to environmental compliance procedures*

1. Communications under the NAAEC

The first example of larger access to compliance mechanisms is given by the system of individual communications established by the NAAEC. A side agreement to the North American Free Trade Agreement (NAFTA),[44] the NAAEC aims at enhancing environmental cooperation[45] and compliance with

All Migrant Workers and Members of their Families, 18 December 1990, 2220 UNTS 3. Therefore, until the adoption of the Optional Protocol to the ICESCR there was arguably no specific mechanism for bringing individual complaints for breach of ESCR. See C. Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8 *Human Rights Law Review* 617.

41 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008 (not yet in force**)**. For the text of the Protocol see GA Resolution A/RES/63/117, 5 March 2009.

42 North American Agreement on Environmental Cooperation, 17 December 1992, 32 I.L.M. 1480 (1993) ('NAAEC').

43 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447 ('Aarhus Convention').

44 North American Free Trade Agreement, 17 December 1992, 32 I.L.M. 289 (1993) (table of contents, preamble, parts I-III) and 32 I.L.M. 605 (1993) (parts IV-VII, annexes).

45 NAAEC, Articles 1(b),(c), and (f).

environmental regulations,[46] as well as promoting transparency and public participation.[47] The governing body of the NAAEC is the Council of Ministers, which consists of the environment ministers of the three State parties.[48] The participation of civil society within the framework created by the NAAEC is ensured through the Joint Public Advisory Committee (JPAC) – an advisory committee consisting of fifteen members from civil society[49] – and through the procedure of citizen Submissions on Enforcement Matters (SEM).[50] The SEM procedure is open to claims 'asserting that a Party is failing to effectively enforce its environmental law',[51] an expression that could potentially cover claims relating to laws or measures affecting ESCR.[52]

However, the potential of the system laid out in the NAAEC seems rather limited, to the extent that the JPAC has only an advisory role and, more significantly, that complaints brought under the SEM procedure are subject to very strict conditions.[53] Moreover, transparency is not guaranteed within the SEM procedure. As we shall see later, compared with the approach followed by the Aarhus Convention, the compliance procedure of the NAAEC seems rather weak in terms of transparency, efficiency, and effective public participation.[54]

2. The NCP of the Protocol on Water and Health

The second example of an environmental compliance procedure that could potentially be used to bring claims relating to the violation of ESCR is the mechanism set up by the Protocol on Water and Health. Under Article 15 of the Protocol, the Meeting of the Parties (MP) was mandated to establish a mechanism of a 'non-confrontational, non-judicial and consultative nature' for reviewing compliance with the Protocol by State parties. In January 2007, at the first MP to the Protocol, a 'Decision on review of compliance' was adopted[55] setting out a compliance procedure managed by a Compliance Committee. From the perspective of environmental lawyers, this procedure would be more accurately characterised as a 'non-compliance procedure' ('NCP'), in that it aims at

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46 *Ibid*., art 1(g).
47 *Ibid*., art 1(h).
48 *Ibid*., art 9.
49 *Ibid*., art 16(1).
50 *Ibid*., art 14 and 15.
51 *Ibid*., art. 14(1).
52 See for example the Final Factual Record regarding the *Tarahumara* Submission (SEM-00-006), Commission for Environmental Cooperation, July 2005, Record released 9 January 2006. The case concerned the alleged failure by Mexico to effectively enforce its environmental law by denying access to environmental justice to Indigenous communities in the Sierra Tarahumara in the State of Chihuahua. Section 10 of the Record asserts numerous failures by Mexico (pp. 83-85). Solutions to enhance compliance with Mexico's obligation regarding access to environmental justice are mentioned in Sections 9 (pp. 67-83) and 10 of the Record.
53 NAAEC, Articles 14(1)-(2).
54 For a comparative analysis of both compliance procedures see M. Fitzmaurice 'Environmental justice through international complaint procedures? Comparing the Aarhus Convention and the North-American Agreement on Environmental Cooperation', in J. Ebbesson and P. Okowa (eds), *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2009), pp. 211- 227.
55 'Review of Compliance', Decision I/2, 3 July 2007, UN Doc. ECE/MP.WH/2/Add.3, EUR/06/5069385/1/Add.3 ('Decision I/2').

managing non-compliance[56] rather than operating as a quasi-jurisdictional body.[57] The Compliance Committee can nevertheless 'examine compliance issues and make recommendations or take measures if and as appropriate'.[58]

One major feature of the Protocol's NCP is that the procedure can be initiated not only by States or by the Secretariat, as is usually the case in most other NCPs[59], but also by members of the public. Paragraph 16 of the Annex to Decision I/2 provides that:

> 'communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Protocol, unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years, the consideration of such communications by the Committee'.

Even more interesting is the fact that, as stressed by the Compliance Committee, applicants do not need to be directly affected by a situation of non-compliance to bring a communication[60], a feature that will most likely facilitate the use of the NCP. The 'Guidelines on Communications from the Public', adopted by the Committee at its third meeting, identify the types of non-compliance that a communication may address. The list, which is not exhaustive, mentions *inter alia* '[s]pecific instances of violation of rights of individuals under the Protocol'.[61] This is noteworthy for at least two reasons. First, as discussed above, the Protocol on Water and Health is not specifically couched in human rights language, although it is clearly based on the need to implement the right to water and sanitation. Second, despite the absence of practice, we cannot exclude that this NCP may be used to challenge measures touching upon certain ESCR, including the right to water and sanitation, the right to health, the right to an adequate standard of living, the right to food and even, perhaps, the right to housing. Some of the factual situations that could potentially be covered have already been subject to scrutiny through the lens of Article 8 of the ECHR. For example, a State would be in breach of its obligation under Article 4(1) of the Protocol on Water and Health to 'take all appropriate measures to prevent, control and reduce water-related disease' if it failed to take action to prevent pollution of a water source by an industrial facility. Such inaction may, by the same token, amount to a violation of the rights to health, water and food, depending on the

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[56] See J. E. Viñuales 'Managing Compliance with Standards for the Protection of the Environment', in A. Cassese (ed.), *Towards a Realistic Utopia* (Oxford : Oxford University Press, forthcoming 2011).

[57] As noted in Paragraph 3 of the Annex to Decision I/2: 'The compliance procedure shall be conducted bearing in mind the interests of the Party facing difficulties, of the Parties as a whole and of populations potentially or actually adversely affected by non-compliance.'

[58] *Ibid*., annex, para. 12.

[59] See F. Romanin Jacur 'Triggering Non-Compliance Procedures', in T. Treves, L. Pineschi, A. Tanzi, C. Pitea, C. Ragni, F. Romanin Jacur (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (The Hague: TMC Asser Press, 2009), pp. 373-387.

[60] See Report of the Third Meeting of the Compliance Committee, 30 April 2009, ECE/MP.WH/C.1/2009/2, EUR/09/5086338/6, 30 April 2009 ('Report of the Third Meeting'), para. 19. This point is mentioned in the Report's discussion of the connection between the work of the Compliance Committee and that of the Office of the High Commissioner for Human Rights.

[61] 'Guidelines on communications from the Public', available at: http://www.unece.org/env/water/meetings/documents_CC.htm (visited on 8 April 2011), para. 17(d).

circumstances. The use of such a complaint procedure to challenge some instances of State inaction would in all likelihood strengthen the implementation of ESCR, which are not well endowed in enforcement mechanisms.

The potential of the Protocol's NCP for the implementation of ESCR (and of human rights in general) is further highlighted by the express recognition, since the third meeting of the Compliance Committee, of the connection between the work of the Committee and that of the Office of the High Commissioner for Human Rights, as well as of the potential synergies between the two.[62] Interestingly, the Compliance Committee has also referred to the potential, in this same connection, of the institutional arrangements established by the Aarhus Convention,[63] to which we now turn.

B. *Broadening the scope of 'environmental democracy'*

The Aarhus Convention is relevant for our analysis in several ways. First, the Convention obliges States to implement what could be broadly referred to as 'transparency measures' or 'environmental democracy' measures. Thus States must introduce into their domestic systems three clusters of environmental procedural rights that allow civil society to put pressure on States (and therefore, to some extent, to monitor them) in connection with environmental policies and environment-related activities (1). Second, where States fail to implement such measures, civil society groups can bring a complaint before a compliance committee specifically established by the Convention for this purpose (2). In less than ten years, nearly sixty such complaints have been brought against States parties (or against the European Community). Third, as we shall see, the 'environmental democracy' obligations provided in the Aarhus Convention have received additional recognition in the case-law of the European Court of Human Rights, even in cases involving a State that is not a party to the Aarhus Convention (3).

1. Environmental procedural rights

The main purpose of the Aarhus Convention is '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 wellbeing'.[64] With this aim, the Convention requires States parties to introduce into their domestic legislation three clusters of environmental procedural rights.

The first cluster concerns rights to access environmental information (articles 4 and 5). The term 'environmental information' is expansively defined in Article

[62] See Report of the Fourth Meeting of the Compliance Committee, 15 May 2010, ECE/MP.WH/C.1/2010/2, EUR/10/5086338/VIII, para. 26-31. The Report of the Fifth Meeting does not address the connection between the work of the Compliance Committee and that of the Office of the High Commissioner for Human Rights, but this issue was included in the agenda for the sixth meeting, scheduled for the beginning of March 2011. See 'Annotated Provisional Agenda for the Sixth Meeting', 18 January 2011, ECE/MP.WH/C.1/2011/1, EUR/DHP1003944/4.2/2011/1, point 5. The Report of the Sixth Meeting was not yet available at the time of writing.

[63] See Report of the Third Meeting, para. 21.

[64] Aarhus Convention, Article 1.

2(3)[65] by reference to three categories of what that information could concern, namely '[t]he state of elements of the environment' (letter (a)), '[f]actors, such as substances, energy, noise and radiation, and activities or measures' (letter (b)), and, most importantly for our analysis:

> '[t]he state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above' (letter (c)).

The link formulated in this latter paragraph between 'human health and safety' or 'conditions of human life' and the environment highlights the importance of broadening the scope of human rights to include environmental components. Through such broadening, this link could become increasingly explicit, extending the right to have access to environmental information to measures and policies relating to ESCR (e.g. measures and policies concerning standards of water quality, the use of communal lands by third parties, health-related zoning requirements, etc.). This link is further clarified by the Implementation Guide of the Aarhus Convention, which refers, for instance, to the fact that 'human health may include a wide range of diseases and health conditions that are directly or indirectly attributable to or affected by changes in environmental conditions'.[66] However, the broadening of the concept of 'environmental information' has limits. Although the Implementation Guide states that the three categories circumscribing the term 'environmental information' are non-exhaustive,[67] it would be difficult to argue that measures presenting no discernible link to the environment are covered. Thus, information relating to measures concerning the right to education or the right to work would not be covered by the term 'environmental information' unless a sufficient link with the 'state of elements of the environment' or with '[f]actors, such as substances, energy, noise and radiation, and activities or measures' can be established.

The second cluster of environmental procedural rights concern public participation in decisions regarding specific activities (article 6), plans, programmes and policies relating to the environment (article 7), as well as public participation during the preparation of executive regulations and/or legally binding instruments of general application (article 8). These rights can be seen as

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[65] Article 2(3) of the Aarhus Convention states: ' 'Environmental information' means any information in written, visual, aural, electronic or any other material form on: (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making; (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above'.

[66] The Aarhus Convention: An Implementation Guide, available at: http://www.unece.org/env/pp/implementation%20guide/english/part2.pdf (visited on 8 April 2011) ('Implementation Guide'), p. 38.

[67] *Ibid*., p. 35.

specific applications of a broader right to participate in public affairs provided, most notably, in Article 25(a) of the ICCPR,[68] which applies also to ESCR.[69] Of the variety of questions raised by this cluster,[70] a particularly relevant one is the identification of the types of activities that require public participation under the Aarhus Convention. Two basic standards are used in this regard. Articles 6(1) and 8 (chapeau) refer to those activities or generally binding rules that 'may have a significant effect on the environment'. This expression is not defined in the Convention, but the Implementation Guide[71] characterise it by reference to paragraph I of appendix III to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context.[72] Among the criteria that must be considered to assess 'significance' (size, location, and effects), the Espoo Convention mentions 'proposed activities in locations where the characteristics of proposed development would be likely to have significant effects on the population'[73] or those 'giving rise to serious effects on humans'.[74] Article 7 uses a slightly lower standard by referring to plans and programmes 'relating to the environment'. According to the Implementation Guide such connection must be 'determined with reference to the implied definition of 'environment' found in the definition of 'environmental information' (article 2, para. 3)'.[75] Thus, in both cases, there is some room for activities, measures, and regulations affecting the situation of human beings and their ESCR to be included among those requiring public participation. Indeed, the activities and measures targeted are those with potentially serious consequences for the environment, a category that overlaps, to a significant degree, with those affecting human health (e.g. through the safety and quality of water, food production, the safety of the working environment, etc.). Thus, the public participation requirements laid out in the Aarhus Convention could operate as an additional layer of protection based on which measures relating to the implementation of ESCR could be further scrutinised by the public. This point will be discussed in more detail in the next section.

The third cluster of environmental procedural rights concerns access to justice in connection with access to environmental information and public participation in environmental decision-making (article 9). Interestingly, this right is extended by Article 9(3) to empower members of the public 'to challenge acts and omissions

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68 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('ICCPR'), Article 25(a).

69 On the scope of Article 25 of the ICCPR see Human Rights Committee, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 5-8 referring to applications of the Article 25(a).

70 One important question concerns the scope of public participation. This is discussed in detail in the Implementation Guide (Implementation Guide, pp. 85-122). For our purpose, it will suffice to note that the requirement of public participation does not mean that the public has a veto on activities, measures or plans (See Aarhus Convention, art 6(8), 7, and 8 *in fine*; Implementation Guide, pp. 109-110).

71 *Ibid*., p. 94.

72 Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, 1989 UNTS 309 ('Espoo Convention').

73 *Ibid*., appendix III, para. 1(b) *in fine*.

74 *Ibid*., appendix III, para. 1(c).

75 Implementation Guide, p. 115. According to the guide, this would include 'land-use and regional development strategies, and sectoral planning in transport, tourism, energy, heavy and light industry, water resources, health and sanitation, etc., at all levels of government'.

by private persons and public authorities which contravene provisions of its national law relating to the environment'. In the language of ESCR, this extension would cover also the obligations 'to protect from deprivation' by third parties.

For all three clusters of rights, the public concerned encompasses 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making […] and meeting any requirements under national law'.[76] Moreover, article 9(b) expressly states that:

> 'the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above [sufficient interest by members of the public]. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above [maintaining impairment of its own right].'

The application of the Aarhus framework is thus facilitated, making the Convention a powerful enforcement tool of States' obligations. In addition, as we shall see next, when a State party fails to implement the obligations arising from the Convention within its domestic system, the affected individuals or groups may resort to the NCP established by the Convention.

2. The NCP of the Aarhus Convention

The State parties to the Aarhus Convention have also established a sophisticated NCP procedure of some relevance for the enforcement of ESCR.[77] The NCP has a number of particular features that deserve attention. First, it is managed by a Compliance Committee consisting of eight members who serve in their personal capacity.[78] NGOs take part in the procedure for the nomination of candidates.[79] Second, as a rule 'no information held by the Committee shall be kept confidential'[80] and the Committee's reports and recommendations are public.[81] Third, as in the NCP of the Protocol on Water and Health, a member of the public (either individuals or NGOs) may bring a complaint before the Compliance Committee of the Aarhus Convention.[82] In such case, the applicant is entitled to participate in the discussions of the Committee[83], even though deliberations are conducted in closed-sessions.[84] Individuals are thus granted a leading role in the procedure. As stated by a distinguished commentator, this procedure 'reflects the procedural human rights-based approach underlying the Aarhus Convention'.[85]

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76 Aarhus Convention, Article 2(5).

77 *Ibid.*, art 15, and 'Review of Compliance', Decision I/7, UN Doc. ECE/MP.PP/2/Add.8, 2 April 2004, Addendum, p.1 ('Decision I/7').

78 *Ibid*., annex, para. 1 and 2.

79 *Ibid*., annex para. 2 and 4.

80 *Ibid*., annex, para. 26.

81 *Ibid*., annex, para. 26-31.

82 *Ibid*., annex, para. 18-24. As in most other NCPs, the procedure can also be triggered by States parties and by the Secretariat of the Aarhus Convention. See *Ibid*., annex, para. 15-17. For an example of a case referred by a State see Doc. ACCC/C/2004/3 (Ukraine). So far, no case has been referred by the Secretariat.

83 *Ibid*., annex, para. 32 and 34.

84 *Ibid*., para. 33, p.6.

85 Fitzmaurice, *Environmental justice*, above n 54, p. 214.

The possibility offered to the public by this procedure has been widely used. In less than six years, the Committee has already received 58 communications from the public (including some communications against the European Community).[86] This remarkable record proves how serious the involvement of the civil society is. The practical impact of the NCP can be illustrated by reference to one recent case brought against Slovakia.[87] The communication was submitted by an Austrian NGO (in collaboration with other NGOs) and alleged failure by Slovakia to provide for public participation in the decision-making procedure leading to the construction of a nuclear power plant, in violation of Slovakia's obligations under Article 6 of the Aarhus Convention.[88] Under the Convention, nuclear power plants are indeed activities requiring public participation in procedures towards the granting of a permit.[89] Of special interest is the fact that at the time the communication was submitted, an appeal of one of the NGOs involved was still pending before a regional court in Bratislava.[90] The Compliance Committee nevertheless decided that since the construction of the nuclear plant was being conducted despite the appeal for judicial review and might be completed before the regional court could render its decision, the Committee would examine the communication without waiting for the decision of the local court.[91] The Committee pragmatically reasoned that:

> 'for a major installation […], when a permit has been granted and the construction is carried out, there may be considerable pressure on a court not to stop the activity and not to annul the permit decision for lack of public participation. Even if it were to do so, the construction in itself is likely to cause significant environmental effects'.[92]

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[86] See ACCC/C/2004/1 (Kazakhstan), ACC/C/2004/2 (Kazakhstan), ACCC/C/2004/3 (Ukraine), ACCC/C/2004/4 (Hungary), ACCC/C/2004/5 (Turkmenistan), ACCC/C/2004/6 (Kazakhstan), ACCC/C/2004/7 (Poland), ACCC/C/2004/8 (Armenia), ACCC/C/2004/9 (Armenia), ACCC/C/2004/10 (Kazakhstan), ACCC/C/2005/11 (Belgium), ACCC/C/2005/12 (Albania), ACCC/C/2005/13 (Hungary), ACCC/C/2005/14 (Poland), ACCC/C/2005/15 (Romania), ACCC/C/2006/16 (Lithuania), ACCC/C/2006/17 (European Community), ACCC/C/2006/18 (Denmark), ACCC/C/2007/19 (United Kingdom), ACCC/C/2007/20 (Kazakhstan), ACCC/C/2007/21 (European Community), ACCC/C/2007/22 (France), ACCC/C/2008/23 (United Kingdom), ACCC/C/2008/24 (Spain), ACCC/C/2008/25 (Albania), ACCC/C/2008/26 (Austria), ACCC/C/2008/27 (United Kingdom), ACCC/C/2008/28 (Denmark), ACCC/C/2008/29 (Poland), ACCC/C/2008/30 (Republic of Moldova), ACCC/C/2008/31 (Germany), ACCC/C/2008/32 (European Community), ACCC/C/2008/33 (United Kingdom), ACCC/C/2008/34 (Spain), ACCC/C/2008/35 (Georgia), ACCC/C/2009/36 (Spain), ACCC/C/2009/37 (Belarus), ACCC/C/2009/38 (United Kingdom), ACCC/C/2009/39 (Austria), ACCC/C/2009/40 (United Kingdom), ACCC/C/2009/41 (Slovakia), ACCC/C/2009/42 (Hungary), ACCC/C/2009/43 (Armenia), ACCC/C/2009/44 (Belarus), ACCC/C/2010/45 (United Kingdom), ACCC/C/2010/46 (United Kingdom), ACCC/C/2010/47 (United Kingdom), ACCC/C/2010/48 (Austria), ACCC/C/2010/49 (United Kingdom), ACCC/C/2010/50 (Czech Republic), ACCC/C/2010/51 (Romania), and ACCC/C/2010/52 (United Kingdom), ACCC/C/2010/53 (United Kingdom), ACCC/C/2010/54 (European Union), ACCC/C/2010/55 (United Kingdom), ACCC/C/2010/56 (United Kingdom), ACCC/C/2011/57 (Denmark), ACCC/C/2011/58 (Bulgaria). 8 April 2011. The Committee's findings are available at: http://www.unece.org/env/pp/pubcom.htm (visited on 8 April 2011).

[87] Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2009/41 concerning compliance by Slovakia, 17 December 2010 ('Committee Findings (Slovakia)') available at http://www.unece.org/env/pp/pubcom.htm (visited on 8 April 2011).

[88] *Ibid*., para. 1 and 2.

[89] Aarhus Convention, Article 6(1)(a) and annex I(1).

[90] Committee Findings (Slovakia), para. 45.

[91] *Ibid*., para. 46.

[92] *Ibid*., para. 46.

Regarding the substance of the communication, the Compliance Committee considered that it was 'not sufficient to provide for public participation only at the stage of the EIA [environmental impact assessment] procedure, unless it [was] also part of the permitting procedure'.[93] On this basis, the Committee concluded that Slovakia had failed to comply with articles 6(4) and 6(10) of the Aarhus Convention[94] and recommended that Slovakia 'review its legal framework so as to ensure that early and effective public participation is provided'. [95] Slovakia was furthermore invited to 'submit to the Committee a progress report on 1 December 2011 and an implementation report on 1 December 2012'.[96] As to the effectiveness of the Committee's recommendations, national implementation reports suggest that they play a significant role in the implementation of participatory rights.[97]

The institutional features of the Aarhus NCP, as well as the progressive stances taken in some cases by the Compliance Committee, highlight the potential of this mechanism as a tool for the enforcement of ESCR. Indeed, the Compliance Committee has acknowledged a violation of the Aarhus Convention in cases presenting a link to certain ESCR, including the right to an adequate standard of living or the right to health. To date, ESCR were directly or indirectly concerned in at least nine cases brought before the Compliance Committee. Among the issues discussed in these cases, one finds the impact on the population of activities such as mining[98], the modification of nuclear plants and equipments[99], an hydropower plant project on a river[100], the storage of cement and coal and the production of cement-based materials in an industrial zone with residences[101], changes in land use in an agricultural area[102], the construction of a navigation

93 *Ibid*., para. 64.
94 *Ibid*., para. 64 and 68.
95 *Ibid*., para. 70.
96 *Ibid*., para. 70.
97 National Implementation Report, available at http://www.unece.org/env/pp/reports%20implementation.htm (visited on 8 April 2011). On the impact of the Compliance Committee's evaluations and recommendations see also Fitzmaurice, *Environmental justice*, above n 54, pp. 217-219.
98 Findings and recommendations with regard to communication ACCC/C/2009/43 concerning compliance by Armenia, Compliance Committee, 17 December 2010, ECE/MP.PP/C.1/2010/8/Add.2. Case concerning the issuance and renewal of licences to a developer for the exploitation of copper and molybdenum deposits in the Lori region of Armenia, link with the right to health and the right to adequate standard of living.
99 Findings and recommendations with regard to communication ACCC/C/2009/41 concerning compliance by Slovakia, Compliance Committee, 17 December 2010, ECE/MP.PP/C.1/2010/8/Add.1. Case concerning public participation in three specific instances of decision-making by the Slovak Nuclear Regulatory Authority concerning the Mochovce Nuclear Power Plant, link with the right to health and the right to adequate standard of living.
100 Findings and recommendations with regard to communication ACCC/C/2009/37 concerning compliance by Belarus, Compliance Committee, 24 September 2010, ECE/MP.PP/C.1/2010/6/Add.4. Case concerning the information available to the public with regard to the hydropower plant project on the Neman River in Belarus, link with the right to health and the right to adequate standard of living.
101 Findings and recommendations with regard to communication ACCC/C/2004/06 concerning compliance by Kazakhstan, Compliance Committee, 16 June 2006, ECE/MP.PP/C.1/4/Add.1. Case concerning the storage of cement and coal and the production of cement-based materials in an industrial zone with residences, link with the right to health and the right to adequate standard of living.
102 Findings and recommendations with regard to communication ACCC/C/2004/08 concerning compliance by Armenia, Compliance Committee, 31 March 2006, ECE/MP.PP/C.1/2006/2/Add.1. Case concerning access to information and public participation in the decision-making on modification of land use

canal in a river[103], the construction of high-voltage overhead electric power lines[104], the import and disposal of radioactive waste[105] as well as the implementation of the right to public association[106]. Although the implementation of ESCR was not the primary object of these complaints, the reasoning of the Committee suggests that there is sufficient room for a more ambitious approach to be explored in connection with the enforcement of ESCR. Moreover, the type of relief that the Compliance Committee may grant,[107] or the measures that may be adopted by the Meeting of the Parties on the basis of the Committee's recommendations,[108] could be sufficiently specific to provide some measure of redress for violations of ESCR.[109] In addition, as we shall see next, the Aarhus Convention is starting to influence the interpretation of human rights provisions in other systems.

3. The broader influence of the Aarhus Convention

In the last several years, the Aarhus Convention has played a significant role in broadening the scope of some human rights provisions, particularly Article 8 of the European Convention on Human Rights. In a number of cases, the ECtHR has indeed resorted to the principles laid out in the Aarhus Convention to interpret the contents of Article 8.

In *Taşkın and Others v. Turkey*, the Court grounded the environmental components of Article 8 of the European Convention by reference *inter alia* to principles enshrined in the Aarhus Convention. The Court mentioned indeed the Aarhus Convention as part of the 'relevant international texts on the right to a

designation and zoning as well as on the leasing of certain plots in an agricultural area of Dalma Orchards, link with the right to adequate standard of living and the right to food.

[103] Findings and recommendations with regard to communications ACCC/C/2004/01 and 03 concerning compliance by Ukraine, Compliance Committee, 18 February 2005, ECE/MP.PP/C.1/2005/2/Add.3. Case concerning public participation in the decision-making process regarding the construction of a navigation canal in the Danube Delta passing through an internationally recognized wetland, link with the right to adequate standard of living and the right to water.

[104] Findings and recommendations with regard to communication ACCC/C/2004/02 concerning compliance by Kazakhstan, Compliance Committee, 18 February 2005, ECE/MP.PP/C.1/2005/Add.2. Case concerning the permit procedure for the construction of high-voltage overhead electric power lines in the Gornyi Gigant district in Almaty, link with the right to health and the right to adequate standard of living.

[105] Findings and recommendations with regard to communication ACCC/C/2004/01 concerning compliance by Kazakhstan, Compliance Committee, 18 February 2005, ECE/MP.PP/C.1/2005/2/Add.1. Case concerning access to information related to the proposed draft act on the import and disposal of radioactive waste in Kazakhstan held by the National Atomic Company Kazatomprom, link with the right to health and the right to adequate standard of living.

[106] Findings and Recommendations adopted by the Compliance Committee with regard to compliance by Turkmenistan with the obligations under the Aarhus Convention in the case of the Act on Public Associations, Communication ACCC/C/2004/05, Compliance Committee, 18 February 2005, ECE/MP.PP/C.1/2005/2/Add.5: Newly adopted Act of Turkmenistan on Public Associations deteriorating the legal situation of NGOs, link with Article 25(a) ICCPR (right to participate in public affairs).

[107] Decision I/7, annex, para. 36.

[108] *Ibid*., annex, para. 37.

[109] See, in particular, *Ibid*., paragraph 37(d), stating that: '[i]n cases of communications from the public, [the Committee may] make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public'.

healthy environment'.[110] The case concerned the granting of permits to exploit a gold mine in the district of Bergama (Turkey). Interestingly, the fact that Turkey was not (and is still not) a Party to the Aarhus Convention did not prevent the Court from referring to this instrument. This could be seen as an indication that the Court considers some provisions of the Aarhus Convention as part of customary international law. This latter view is strengthened by the reasoning of the Court in *Okyay and Others v. Turkey*, a case concerning the failure by Turkish authorities to implement an order from a domestic court to shut down three thermal power plants causing pollution in the province of Muğla,[111] as well as in *Demir and Baykara v. Turkey*, a case relating to the right of municipal civil servants to form a trade union.[112]

More recently, the principles of the Aarhus Convention (more specifically articles 3, 4 and 9) have also been referred to in connection with the interpretation of Article 8 of the European Convention in *Tătar v. Romania*, a case concerning environmental degradation caused by the exploitation of a gold mine, as relevant international law for the interpretation of Article 8 of the European Convention.[113] Similarly, in *Ivan Atanasov v. Bulgaria*, the Aarhus Convention was also considered as part of the 'relevant international materials' for the interpretation of Article 8 of the European Convention.[114]

These developments illustrate the impact that the Aarhus Convention is having not only at the domestic level, but also in the interpretation of international human rights provisions.

Concluding remarks

The three avenues through which IEL influences ESCR have the overall effect of broadening ESCR as well as their means of enforcement. In this article, we have endeavoured to spell out the main mechanisms by which the environmental broadening phenomenon takes place.

The exploratory analysis conducted here would need to be extended to several ESCR (right to housing, right to health, right to food, right to an adequate standard of living, right to water, cultural rights and, perhaps also the right to education) as well as to a wide variety of environmental treaties and mechanisms potentially useful for their enforcement. In this latter regard, one must take into

[110] *Taskin and others v. Turkey* (Application no. 46117/99), ECtHR, Judgment, 10 November 2004 (Final 30 March 2005), para. 99 and 100. Principle 10 of the Rio Declaration as well as Parliamentary Assembly of the Council of Europe Recommendation 1614 (2003) on environment and human rights were also quoted (para. 98 and 100). For a discussion of the *Taskin* case, see Boyle, *Human Rights or Environmental Rights?*, above n 1, pp. 487-490.

[111] *Okyay and Others v. Turkey* (Application no. 36220/97), ECtHR, Judgment, 12 July 2005 (Final), para. 51-52.

[112] *Demir and Baykara v. Turkey* (Application no. 34503/97), ECtHR, Judgment, 12 November 2008 (Final), para. 83.

[113] *Tătar c. Romania* (Application n° 67021/01), ECtHR, Judgment, 27 Janvier 2009 (Final 06/07/09), para. 69 (in french only). The Court further noted that, at the international level 'l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement sont consacrés par la Convention d'Aarhus du 25 juin 1998', para. 118.

[114] *Ivan Atanasov v. Bulgaria* (Application no. 12853/03), ECtHR, Judgment, 12 December 2010 (Final), para. 55-57.

account that some NCPs that, technically, cannot be triggered by individuals or NGOs are, in practice, more open than they seem, to the extent that such individuals or NGOs may informally submit information to the secretariat of the relevant convention, which in turn is entitled to launch the procedure. Thus, the room for synergies is wider than our brief survey of mechanisms would suggest.

More fundamentally, the analysis conducted in this article also seeks to highlight one important point often neglected in studies of the relationship between human rights and IEL, namely that this relationship must not be limited to the use of human rights approaches to environmental protection. Human rights have, of course, much to offer to IEL, but the opposite is also true. This is only natural, as IEL is by now a mature branch of international law, with its own approaches and mechanisms. We submit that looking at human rights from the environmental shore provides a number of insights which are potentially useful not only for a broader understanding of human rights and their normative context but also, and more importantly, for the continuing quest for their implementation.