

## TOWARDS JUDICIAL COORDINATION FOR GOOD WATER GOVERNANCE?

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**Abstract** This article explores the procedural environmental rights practice of regional human rights and environmental protection systems through a comparative lens in order to identify the ways in which existing developments and current trends can inform and enrich the procedural dimension of the right to water. The study suggests that enhanced levels of transparency, public engagement and justiciability in water-related decisions are significant steps towards the achievement of the substantive dimension of the right to water and highlights the potential for cross-fertilization between such regimes towards good water governance.

**Keywords:** Aarhus Convention, commodity, democratic accountability, participation, procedure, public good, regional human rights, right to water.

### 1. INTRODUCTION

Despite ongoing controversies about the nature of the right to water, its scope, and its recognition in international law,<sup>1</sup> it is generally accepted that, in terms of content and structure, the right has both substantive and procedural dimensions.<sup>2</sup> The substantive dimension involves obligations relating to availability, quality and accessibility<sup>3</sup> and generally includes: an obligation to respect, which precludes States from depriving individuals of existing access to water; an obligation to protect, requiring mechanisms to be enacted to prevent violations by non-State entities; and an obligation to fulfil

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<sup>1</sup> On the question of its nature and scope, controversies relate to the right to water as a derivative treaty right, as a customary international law right, as a civil and political right, and as an economic social and cultural right and to the scope and extent of the obligations to which it gives rise. See eg P Thielbörger, 'Re-Conceptualising the Human Right to Water: A Pledge for a Hybrid Approach' (2015) 15 HRLR 225. On its contested recognition in international law, see SC McCaffrey, 'The Human Right to Water: A False Promise?' (2016) 47 University of the Pacific Law Review 221.

<sup>2</sup> See eg J Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment' in N Bhuta (ed), *The Frontiers of Human Rights* (Oxford University Press 2016) 205; E Riedel and P Rothen (eds), *The Human Right to Water* (BW-Verlag 2006) 177. For a recent analysis see M Arden, 'Water for All? Developing a Human Right to Water in National and International Law' (2016) 65(4) ICLQ 771.

<sup>3</sup> Gen Comm No 15: The Right to Water, para 12(a), (b) and (c), Economic Social and Cultural Rights Committee, 2003, Doc E/C.12/2002/11.

the right, which demands its progressive realization.<sup>4</sup> The procedural dimension of the right, however, particularly emphasizes principles of transparency, information, participation and justice.<sup>5</sup> In the environmental context, these principles have gained increased significance over the last 20 years, and they play a prominent role in bridging the gap between human rights law and environmental protection.<sup>6</sup> Tentatively elaborated initially in principle 10 of the Rio Declaration on Environment and Development in 1992, the principles of access to information, public participation and access to justice now constitute a set of sophisticated and widely recognized environmental rights. Such rapid evolution has been aided greatly by the adoption, in 1998, of the Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters, whose innovative non-compliance committee—which receives communications from the public—has developed a rich body of jurisprudence.<sup>7</sup> Concomitantly, human rights law has started to embrace the justiciability of environmental concerns particularly in their procedural dimensions, including in the context of water rights. This evolution is especially true of the European human rights system,<sup>8</sup> but such developments are also found in the African and American systems when they engage with water-related human rights claims. The rise of water-related claims before judicial or quasi-judicial bodies from both human rights and environmental protection systems confirms the hybrid nature of the right to water, being at the intersection of individual and environmental concerns.

The increased prominence of the right to water has been the subject of a recent study in this journal, which surveyed significant water rights developments both in international law and in a number of domestic contexts, and it argued for the broad recognition of a right to an acceptable minimum of water.<sup>9</sup> The present contribution complements this earlier analysis by focussing on the procedural dimension of the right to water. It explores the water- and, more broadly, environment-related, procedural rights practice of regional human rights regimes. The objectives are threefold. First, it aims to identify the ways in which existing developments and current trends in procedural environmental practice in human rights and environmental protection systems can inform and enrich the procedural dimension of the right to water. Second, it

<sup>4</sup> See *Realising the Human Rights to Water and Sanitation: A Handbook*, UN Special Rapporteur de Albuquerque, Booklet 1: Introduction 26–7.

<sup>5</sup> See Viñuales (n 2); Riedel and Rothen (n 2); *Realising the Human Rights to Water and Sanitation* (n 4) Booklet 6: Justice.

<sup>6</sup> See A Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23(3) EJIL 613, 621–6.

<sup>7</sup> As of 1 January 2018, there had been 148 communications from the public.  
<sup>8</sup> Especially in the context of the European Convention on Human Rights (ECHR), although the European Committee on Social Rights and the EU system also have roles to play in this context. The EU’s contribution in particular is fed both by its Member States’ participation in the ECHR and the Aarhus Convention, as well as its own individual participation in the Aarhus Convention. This participation arguably gives rise to a fertile cross-system dialogue to which this article, due to space constraints, could not do justice and is thus beyond the remit of the present contribution.  
<sup>9</sup> Arden (n 2).

investigates whether and how enhanced levels of transparency, public engagement and justiciability in water-related decisions can be significant for the achievement of the substantive dimension of the right to water and enhanced effectiveness of water-related rights more generally. Finally, it seeks to draw lessons from the comparative practice of these judicial and quasi-judicial bodies and endeavours in particular to identify the potential for cross-fertilization of such practices across both regions and systems. To achieve these objectives, section II explores both the features of the procedural dimension of the right to water and its contribution to the right to water debate, including the benefits that can be derived from good water governance. Section III analyses the relevant procedural practices of a number of regimes whose work is particularly helpful for claims relating to the right to water. The section focuses on the practices of the European Court of Human Rights (ECtHR), the inter-American Commission and Court of Human Rights (IACHR) and the African Commission on Human and Peoples' Rights (ACHPR), as well as on that of the Aarhus Convention Compliance Committee and the emerging practice under the 1999 London Protocol on Water and Health.<sup>10</sup> Both the general and specific contributions made by these regimes to the procedural dimension of the right to water are evaluated. In section IV some conclusions are drawn concerning the lessons that can be learned from this practice.

## II. THE PROCEDURAL DIMENSION OF THE RIGHT TO WATER: CONTOURS AND SIGNIFICANCE

### *A. The Contours of the Procedural Dimension of the Right to Water*

When looking for the content and structure of the right to water, one obvious point of reference is General Comment 15 of the Committee on Economic, Social and Cultural Rights.<sup>11</sup> This General Comment, which defines the right to water as emanating from, and as indispensable for, the realization of the right to an adequate standard of living (Article 11 ICESCR) and also as being inextricably related to the right to health (Article 12 ICESCR), delves into both its normative content and the specific obligations to which it gives rise. It says that the right 'entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'<sup>12</sup> and, like any other human right, imposes on States the obligation to respect, protect and fulfil.<sup>13</sup> As many economic and social rights, it is a right of progressive realization and which is subject to the State's available resources. Hence, the right to water mainly imposes relative rather than absolute obligations: obligations of means, to deploy sufficient efforts and undertake necessary steps towards the achievement of the right, rather than obligations of

<sup>10</sup> United Nations, *Treaty Series*, vol 2331 at 202; ECOSOC Doc MP.WAT/AC.1/1999/1 of 24 March 1999. <sup>11</sup> Gen Comm 15 (2002) UN Doc E/C.12/2002/11. <sup>12</sup> *ibid* para 2.

<sup>13</sup> *ibid* paras 20–29.

immediate effect. However, as reasserted in General Comment 15, all covenant rights also give rise to core obligations which are of immediate effect: to ensure the enjoyment of minimum essential levels of the right, such as access to the minimum essential amount of water, in a non-discriminatory manner, and the obligation to take steps towards its fulfilment.<sup>14</sup>

The themes of access to information, public participation, transparency and accountability, which reflect key aspects of procedural rights, run through the document and inform not only the normative content of the right to water but also the obligations of States parties and the recommendations of the committee concerning the implementation of the right at national levels. The procedural dimension of the right to water thus feeds into essential features of its substantive dimension and, in particular, those of water availability, quality and accessibility. Indeed, according to the General Comment, accessibility must include (*inter alia*) the right to seek, receive and impart information concerning water issues.<sup>15</sup> Including women and indigenous communities in participatory decision-making processes is also seen as an element of the States' duties to ensure non-discrimination and equality.<sup>16</sup> Where water services are operated by third parties, in order to prevent abuses, States must establish an effective regulatory system, including genuine public participation.<sup>17</sup> States are also under an obligation to adopt and implement a national water strategy and plan of action, devised on the basis of a participatory and transparent process.<sup>18</sup> Crucially, this last obligation is listed among the core obligations of States, which are of immediate effect, are non-derogable and for which non-compliance is not justifiable.<sup>19</sup> The meaning of this obligation is further elaborated in the section concerning recommendations for national-level implementation. Not only is the strategy to be adopted on the basis of public participation, but there must also be a right to participate in any decision-making process potentially affecting the exercise of the right to water in any policy, programme or strategy concerning water.<sup>20</sup> In addition, individuals and groups should be provided access to information concerning water which is held by public authorities and third parties,<sup>21</sup> and actions interfering with the right to water should only be implemented following genuine opportunities for consultation and full information on the measures have been disclosed and reasonable notice given.<sup>22</sup> Finally, where this has not been the case, and where there has been a denial of the right to water, effective judicial or other remedies should be available.<sup>23</sup> Ultimately, fulfilment of the right to water, as set out in General

<sup>14</sup> For further analysis of the General Comment, see M Fitzmaurice, 'The Human Right to Water' (2007) 18 *FordhamEnvtlLRev.* 537, 549–57; P Thielbörger (n 1) 229–32; A Cahill, 'The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water' (2005) 9 *IJHR* 389, 392–3.

<sup>16</sup> See *ibid* para 16 (a) and (d).

<sup>19</sup> *ibid* para 40.

<sup>23</sup> *ibid* para 55 and 56.

<sup>20</sup> *ibid* para 48.

<sup>17</sup> See *ibid* para 24.

<sup>21</sup> *ibid*.

<sup>15</sup> Gen Comm (n 11) para 22(c)(4).

<sup>18</sup> *ibid* para 37(f).

<sup>22</sup> *ibid* para 56.

Comment 15, is premised upon, and largely depends upon, principles of good governance, transparency, participation and accountability.

According to Morgan, this elaborate procedural framework and in particular the duty to afford full access to information concerning water held by public authorities or third parties goes 'well beyond many domestic legal systems even in developed countries'.<sup>24</sup> Nevertheless, the procedural design found in the General Comment is far from being an isolated example and the provision of participatory rights and procedural safeguards infuse a substantial number of water-related international instruments. Some examples include Chapter 18 of Agenda 21 on freshwater resources, which emphasizes the role of public participation in relation to the supply of drinking water and sanitation and which encourages water development and management based on a participatory approach, involving users, planners and policy makers.<sup>25</sup> The International Law Association's (ILA) Berlin Rules on Water Resources Law require that the right of access to water be subject to periodic review on the basis of a participatory and transparent process.<sup>26</sup> The rules also require a process of public participation for decisions relating to the management of waters. Access to information, which must itself be based on relevant impact assessments, is seen as a prerequisite for meaningful participation.<sup>27</sup> Participatory rights and access to information are also at the heart of the OECD Principles on Water Governance, which pay particular attention to the notions of trust and engagement, and are seen as capable of building public confidence and ensuring the inclusion of stakeholders through democratic legitimacy and fairness.<sup>28</sup> These principles are rooted in 'broader principles of good governance: legitimacy, transparency, accountability, human rights, rule of law and inclusiveness'.<sup>29</sup> Finally, and to return to the right to water, one of the booklets which comprise the United Nations' Special Rapporteur Albuquerque's handbook on the realization of the human rights to water and sanitation is devoted to access to justice, whilst another focuses on key principles, including information and participation. In the Handbook, the operation of the rights of access to information and to participatory decision-making are developed extensively, and the corresponding duties of States and the actions they are to take are elaborated in detail. As far as information is concerned, in addition to their general obligation to disclose information, public bodies should be obliged to disseminate information and respond to requests, the law should stipulate clear processes through which applications for information can be made and provide for independent review bodies, the

<sup>24</sup> B Morgan, 'Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law' (2006) 17 EJIL 215, 228.

<sup>25</sup> UN Doc A/CONF.151/26/Rev.1 (Vol I).

<sup>26</sup> ILA, *Report of the Seventy-First Conference* (2004) 334, art 17.

<sup>27</sup> Art 18.

<sup>28</sup> OECD Ministerial Council (4 June 2015). See in particular principles 5, 7, 8 and 9.

<sup>29</sup> *ibid* 5.

costs of requesting information should not be a deterrent, and the meetings of public bodies should be open to the public.<sup>30</sup> Regarding participation, it recommends that people should be involved in detailing the terms of participation because doing so will determine people's willingness to participate. States must create opportunities for participation, enable people to access participatory processes, guarantee free and safe participation, allow access to information to enable meaningful participation and offer opportunities to influence decision making.<sup>31</sup>

These examples of procedural safeguards and participatory principles confirm that the seemingly sophisticated architecture of the procedural dimension of the right to water found in General Comment 15, and despite what may be found in domestic legislation may well, as McIntyre put it, largely involve:

A codification ... of existing State obligations under general international human rights law and general international environmental and sustainable development law, rather than an attempt at progressive development of participatory principles applying to matters of access to water.<sup>32</sup>

Such an approach is further confirmed by the commentary to the Berlin Rules, in which the ILA, recalling the importance of the Aarhus Convention provisions, as well as those of a number of instruments involving participatory rights, expresses little doubt that 'a right to public participation has now become a general rule of international law regarding environmental management' and adds 'that a right to information exists is now beyond dispute'.<sup>33</sup> It is then rather ironic that whilst there is still controversy regarding the customary status of the substantive dimension of the right to water, its procedural dimensions seem to be firmly established in international law. Perhaps this lack of controversy is due to the nature of the rights involved. Access to information rights, to be meaningfully consulted in decision-making processes and to have some means of redress in order to uphold these rights, are intimately linked to principles of democratic accountability and thus naturally conceptualized as civil and political rights. Although they require the establishment of appropriate regulatory frameworks, they are not particularly burdensome and thus more easily acceptable and accepted. As civil and political rights, however, they are of immediate effect and arguably impose absolute obligations on States. States cannot just 'take steps' to facilitate the circulation of information: information must be imparted. States cannot simply design a policy encouraging public participation: genuine

<sup>30</sup> *Realising the Human Rights to Water and Sanitation* (n 4), Booklet 7, 37–8.

<sup>31</sup> *ibid* Booklet 7, 57–9.

<sup>32</sup> O McIntyre, 'The Role of the Public and the Human Right to Water' in *Public Participation and Water Resources Management. Where Do We Stand in International Law?* (Conference Proceedings, Paris, UNESCO, 2015) 140, 145.

<sup>33</sup> ILA Berlin Conference (2004) *Water Resources Law*, Fourth Report, at 25.

participation must take place. The procedural features of the right to water thus add a clear civil and political dimension to what is primarily an economic and social right, thereby confirming the right's hybrid nature.<sup>34</sup>

*B. The Significance of Procedural Safeguards and Participatory Rights for the Right to Water Discourse*

Procedural and participatory rights thus contribute to the customary recognition of the right to water. However, beyond formal legal recognition, one might wonder what good it is to be able to participate in water-related decisions in practice, when the immediate concerns of the most deprived are unlikely to be the exercise of their democratic or civil and political rights but rather the securing of access to sufficient water to fulfil their basic needs. As Ulrich emphasized, 'it is difficult for individuals to even exercise civil and political rights or participate in democracy if they lack sufficient water to maintain minimum standards of health'.<sup>35</sup> This difficulty calls into question the significance of procedural water rights in contrast to the urgency and critical need for effective water access for all as a matter of survival and decency. This distinction is especially true because those most in need, generally the poor and marginalized, are also those less likely to readily participate in participatory processes, unlike the richer and more educated communities in democratic States. Arguably, however, the significance of procedural rights in the right to water discourse should not be underestimated. Procedural safeguards and participatory rights help to shape the substantive dimension of the right; they can foster efficient water provision solutions, enhance the legitimacy of these solutions and help to ensure the accountability of water actors, thereby contributing to the debate opposing those seeing water as a commodity versus those seeing water as a public good.

Procedural rights contribute to shaping the substantive right to water. It has been argued, in relation to the right to a clean environment, that regardless of how strong this substantive right might appear on paper, it would be meaningless without the procedural rights necessary to pursue its respect, protection and promotion.<sup>36</sup> These remarks are easily transposable to the right to water: what good is it to have a substantive right if this right cannot be vindicated and enforced? Through public participation and enforcement, individuals exercising their procedural rights thus not only contribute to vindicating the right but also to shaping its substantive content. They can help to shape water-related decisions in the participatory process and help to shape the legal contours of the right when seeking its enforcement. The rise

<sup>34</sup> See Thielbörger (n 1).

<sup>35</sup> MR Ulrich, 'The Impact of Law on the Right to Water and Adding Normative Change to the Global Agenda' (2015) 48 *GeoWashIntlLRev* 43, 77–8.

<sup>36</sup> See M Soveroski, 'Environment Rights versus Environmental Wrongs: Forum over Substance' (2007) 16(3) *RECIEL* 261, 261.



in water-related enforcement actions, facilitated by enhanced access to justice tools, also contributes to popularizing the debate about the right to water, thus making judges more comfortable with granting remedies and potentially embracing the right per se.<sup>37</sup> McIntyre thus rightly noted that the public has ‘a significant role to play in the effective enforcement and continuing judicial elaboration of the human right to water concept’<sup>38</sup> and that public participation promotes ‘the substantive values inherent to the human right to water’.<sup>39</sup> These claims are further supported by empirical evidence indicating positive associations of voice and accountability (ie, mechanisms for participatory processes and enforcement) with improved access to water.<sup>40</sup> The linking of procedural and participatory rights to water to its substantive dimension is also the result of the capacity to foster more efficient water-provision solutions through participatory processes.

Effective public participation could well lead to the adoption of more rational policies and solutions since decision makers will be aware of and more likely to understand public concerns when designing policies.<sup>41</sup> McCaffrey and Neville highlighted particularly well the efficiency benefits for water provision derived from inclusive and empowering participatory processes. They underscored that fulfilment of the substantive dimension of the right to water could present challenges to resource-scarce governments, but they postulated that institutionalized forms of participation could constitute a way past these financial barriers and an effective channel through which to develop greater capacity to provide water.<sup>42</sup> Participatory processes could thus be designed to allow for community-based solutions to water provision, premised on a collaborative system of water delivery reflecting the community’s particular needs.<sup>43</sup> More context-appropriate and effective solutions to water access can be developed, as people will have been included in assessing their own needs. This inclusion could, in turn, prevent the construction of facilities ‘that they do not need, do not use properly, do not care for and to which they are not ready to contribute’.<sup>44</sup> In contrast, empowering participatory processes is more likely to encourage communities to participate in the construction of appropriate facilities and enhance their willingness to pay for services from which they benefit,<sup>45</sup> thus assisting the State in fulfilling its water provision duties while partly alleviating the financial and other constraints generally associated with

<sup>37</sup> See Morgan (n 24) 240.

<sup>38</sup> McIntyre (n 32) 142.

<sup>39</sup> *ibid* 146.

<sup>40</sup> See PB Anand, ‘Right to Water and Access to Water: An Assessment’ (2007) 19 *Journal of International Development* 511, 520.

<sup>41</sup> See J Razzaque, ‘Public Participation in Water Governance’ in JW Dellapenna and J Gupta (eds), *The Evolution of the Law and Politics of Water* (Springer Science Business Media BV 2009) 355, 356.

<sup>42</sup> See SC McCaffrey and KJ Neville, ‘Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries’ (2009) 21 *GeoIntEnvtlLRv* 679, 694–5.

<sup>43</sup> *ibid* 698.

<sup>44</sup> World Water Council Report, C Dubreuil, *The Right to Water: From Concept to Implementation* (2006) 30.

<sup>45</sup> See *ibid*.



such duties. McCaffrey and Neville warned, however, that the development of participatory processes and community-based solutions should not lead to governments divesting themselves of the responsibility of water provision.<sup>46</sup> This warning is further supported by Albuquerque, who emphasized the risk that States might delegate service delivery to communities in the name of participation at the expense of their obligation to ensure that services are adequate through support, regulation and oversight.<sup>47</sup>

Another challenge for the development of meaningful participatory processes is ensuring their inclusive character. Albuquerque pointed out that the privileged should not dominate participatory processes and that States must reach out to the disadvantaged and marginalized to encourage their involvement.<sup>48</sup> Provided that such challenges are effectively managed, participatory processes thus potentially offer significant promise for the provision of efficient water solutions and in turn the fulfilment of the right to water. This potential exists because water-provision solutions based on participatory processes enhance the viability of policy initiatives and improve their chances of successful implementation,<sup>49</sup> as these solutions benefit from enhanced legitimacy. Indeed, participatory processes open the system to include the perspectives of those most affected by the decisions, offering them an opportunity to buy into the solution.<sup>50</sup> Ultimately, local participation might also increase compliance with regulations and acceptance of the arrangements in place for water provision.<sup>51</sup>

Finally, well-designed procedural safeguards ensure the accountability of water providers, whether public or private entities. Legal accountability of water providers, in this context, could well also influence the debate between water as a commodity versus water as a public good. Private provision of water services, whether one laments or applauds it, is an inescapable reality. Morgan noted that there was a 7,300 per cent increase in private sector water provision between 1990 and 1997.<sup>52</sup> This increase has led to a hotly contested debate over the status of water as a commodity or a public good. Those in favour of private involvement in water provision argue that such involvement brings efficiency, enhances capital and technical expertise and is thus able to achieve both access and conservation objectives.<sup>53</sup> The liberalization of the water sector has been legitimized by the Dublin Statement and Declaration of the World Water Forum, which reframed water as an economic good.<sup>54</sup> However, those who see water as a

<sup>46</sup> See McCaffrey and Neville (n 42) 699.

<sup>47</sup> See *Realising the Human Rights to Water and Sanitation* (n 4) Booklet 7, 62.

<sup>48</sup> *ibid* 64.

<sup>49</sup> See T Paul, 'Plugging the Democracy Drain in the Struggle for Universal Access to Safe Drinking Water' (2013) 20(1) *Indiana Journal of Global Legal Studies* 469, 496.

<sup>50</sup> See McCaffrey and Neville (n 42) 703. <sup>51</sup> *ibid* 704. <sup>52</sup> See Morgan (n 24) 218.

<sup>53</sup> See McCaffrey and Neville (n 42) 700; J Gupta, R Ahlers and L Ahmed, 'The Human Right to Water: Moving Towards Consensus in a Fragmented World' (2010) 19 *RECIEL* 3 294, 300.

<sup>54</sup> See Gupta, Ahlers and Ahmed *ibid*.

public good and advocate for a human rights approach argue that water sector liberalization disempowers the poor and that a human rights framework is capable of moving the discourse from charity to entitlement. It will require government to prioritize resources for water provision but also provide legal remedies and accountability processes.<sup>55</sup> Private actors, however, have not traditionally operated subject to respect for the rule of law and other democratic principles of accountability commonly applicable in most participatory democracies. Tara Paul perfectly captured the democratic risks associated with water privatization. She argued that ‘the democracy drain in privatization of government resources arises from the exclusion of stakeholders from economic policy decisions that will have immediate effects on their livelihoods’ and added that:

Commodification of a public resource reinforces the loss of democracy, as market forces and market incentives become proxies for public interest. Commoditization of water, if coupled with deregulation and minimal procedures for public input [...] may allow state actors to avoid tough political choices while private actors implement market operations with limited political impunity.<sup>56</sup>

Paul is of the view, however, that privatization could well prove successful if States engage with good governance mechanisms and regulations, including procedural safeguards guaranteeing transparency, public participation and accountability.<sup>57</sup> In other words, private provision of water services could operate within a human rights framework in which private actors are subjected to democratic accountability principles and are unable to elude obligations regarding access to information, transparency, participatory decision-making and other procedural duties traditionally binding public authorities. Subjecting private providers to participatory rights and procedural safeguards obligations does not only carry the inherent benefit of ensuring that private actors respect good governance principles, but it also legitimizes thinking of water in terms of human rights and access to water in terms of entitlement rather than need. Ultimately, despite privatization, the broad reach of procedural and participatory rights further legitimizes the conceptualization of water as a public good, rather than a commodity.

### III. WATER-RELATED PROCEDURAL RIGHTS IN PRACTICE: LESSONS LEARNED FROM SELECTED HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION SYSTEMS

Evidence of water-related procedural practice could arise in a multiplicity of legal contexts and regimes, including domestic-level implementation, international funding institutions’ lending practices and compliance mechanisms (eg, the World Bank Inspection Panel), regional organizations’ legal orders, UN human rights bodies, or international waters or watercourse

<sup>55</sup> *ibid.*

<sup>56</sup> Paul (n 49) 473–4.

<sup>57</sup> *ibid.* 472.

regimes. In this more modest study, the focus is on the practice of regional human rights systems, as well as those of the Compliance Committees to the Aarhus Convention and of the London Protocol on Water and Health, because water issues involve inextricable human rights and environmental concerns. Water is essential to life, health and decent living conditions, but water scarcity or water pollution also poses critical environmental challenges. The sophisticated compliance mechanisms of regional human rights systems thus render them particularly conducive to the development of water-related procedural practices. This is the case not only because of the human rights nature of the right to water but also because of the recent trend in the proceduralization of environmental rights<sup>58</sup> and the increased tendency to bring environmental claims before human rights bodies in the absence of a compulsory environmental dispute-settlement mechanism. The Aarhus Convention and London Protocol offer, for their part, compliance solutions for matters recognized openly at the junction between human rights and environmental concerns and are thus particularly promising for fleshing out the procedural dimension of the right to water.

#### *A. The Contribution of Regional Human Rights Systems*

This section assesses the contours of the ECtHR's, IACHR's and ACHPR's approaches to the procedural dimension of the right to water, and it evaluates the contributions that these bodies make to shaping the right to water's procedural safeguards and participatory rights, as well as any potential cross-fertilization between systems.

##### *1. Water and procedural rights in the ECHR system*

###### a) Procedural framework for environmental and water-related claims

As a civil and political rights instrument, the ECHR does not directly recognize a human right to water, yet this omission does not mean that the Court is not regularly faced with water-related issues. These issues are generally brought as environmental claims and often involve water pollution or water access issues. Most of these claims have a strong procedural dimension and are generally litigated under Article 8, protecting the right to private life, as the most conducive ECHR right for environment-related claims. Water issues are also sometimes raised, but to a lesser extent, in the

<sup>58</sup> See F Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21(1) EJIL 41, 42; Boyle (n 6) 621–6; J Razzaque, 'Human rights to a clean environment: procedural rights' in M Fitzmaurice, D Ong and P Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010) 284.

context of Article 6(1).<sup>59</sup> The ECtHR has read an elaborate set of procedural safeguards into Article 8 in the context of environmental claims, and this framework is readily applicable and has in fact been applied numerous times to issues involving water. The main features of this set of standards can be gleaned from three key cases: *Hatton v UK*, which concerned noise pollution affecting residents in the vicinity of Heathrow Airport; *Guerra v Italy*, concerning the risks affecting residents by the operation of a nearby chemicals factory; and *Taskin v Turkey*, which concerned the granting of permits for the operation of a gold mine.<sup>60</sup> Whilst *Hatton* and *Guerra* did not specifically involve water issues, *Taskin* did, which provides it with increased significance. In essence, this set of cases establishes that, when assessing environmental claims under Article 8, the Court will ensure that a number of requirements have been met. The ECtHR accepts that Article 8 can apply in environmental cases, whether the pollution is directly caused by the State or whether its responsibility arises from the failure to properly regulate private industry.<sup>61</sup> Article 8 thus encompasses positive duties to undertake reasonable and appropriate measures to secure the right, alongside a prohibition of State interference. In either case, the applicable principles are broadly similar.<sup>62</sup> As far as governmental decisions affecting environmental issues are concerned, although the Court can assess both the substantive merits of the decision and the decision-making process,<sup>63</sup> in practice, its scrutiny is mainly focused on the decision-making process, thus particularly emphasizing the procedural dimension of environmental claims.<sup>64</sup> Despite a lack of explicit procedural requirements in Article 8, the Court nevertheless expects the decision-making process to be fair and affords due respect to the interests of the individual.<sup>65</sup> It thus considers ‘all the procedural aspects, including the type of policy or decisions involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available’.<sup>66</sup> The ECtHR further reads into Article 8 the duty to conduct appropriate investigations and studies to evaluate the risks involved for the environment and to duly balance conflicting interests,<sup>67</sup> recognizes the importance of public access to information,<sup>68</sup> and requires that the individuals

<sup>59</sup> See, for example, *Butan and Dragomir v Romania* (4 January 2012) App No 6863/09; *Zander v Sweden* (25 November 1993) App No 14282/88. Further, in the context of access to water issues under art 3 on the prohibition of torture, inhuman and degrading treatment, see eg *MSS v Belgium and Greece* (21 January 2011) [GC], App No 30696/09; *Radu v Romania* (13 October 2009) App No 3036/04.

<sup>60</sup> Respectively: (8 July 2003) [GC], App No 36022/97, ECHR 2003-VIII; (19 February 1998) *Reports of Judgments and Decisions* 1998-I; (10 November 2004) App No 46117/99, section 115, ECHR 2004-X. <sup>61</sup> See *Hatton v UK*, *ibid* para 98 at 22. <sup>62</sup> *ibid* 23.

<sup>63</sup> *ibid* para 99 at 23.

<sup>64</sup> Exceptions include the case of *Fadeyeva v Russia* (7 July 2005) App No 55723/00, ECHR 2005-IV. <sup>65</sup> See *Taskin v Turkey* (n 60) para 118 at 23.

<sup>66</sup> *Hatton v UK* (n 60) para 104, at 24-25.

<sup>67</sup> See *Taskin v Turkey* (n 60) para 119 at 24.

<sup>68</sup> See *Guerra v Italy* (n 60) para 60 at 228.

concerned be able to appeal to the courts against any decision if their interests or comments have not been given sufficient weight in the decision-making process.<sup>69</sup> Finally, procedural guarantees might be devoid of useful effect if judicial decisions remain unenforced or unduly delayed.<sup>70</sup>

b) Application and development in the water context

*Taskin* played a central role in synthesizing this sophisticated set of procedural principles. The case concerned the granting of permits to operate a goldmine in Ovacık, Turkey, which authorized the use of the cyanide leaching process for gold extraction. Local residents contested the validity of the authorization, and after a process of appeal, the Turkish Supreme Administrative Court found in their favour, holding that the operation of the mine was not in accordance with the general interest due to the risks to the environment and human health. However, following a government-initiated report concluding that the risks referred to by the Supreme Administrative Court had now been removed or reduced to a level lower than the acceptable limits, the operating company was later authorized to perform its mining activities. The applicants alleged that both the decision authorizing the operation of the mine and the decision-making process were in breach of Article 8. Interestingly, the Strasbourg Court took inspiration in this ruling from the Aarhus Convention, which it found to form part of the relevant legal context applicable to the case.<sup>71</sup> The significance of this reference cannot be underestimated since it has been argued that its practical effects have been to effectively incorporate the Aarhus principles into the right to private and family life.<sup>72</sup> *Taskin* is thus testimony to the Court's acceptance that individual participation in environmental decision-making processes is essential for compliance with Article 8 of the ECHR.<sup>73</sup> Crucially, the case also touched on water-related claims, as concern was expressed that the operation of the goldmine would involve the seepage of waste into underground water supplies. In this particular instance, despite the availability of procedural safeguards in domestic law, the Court found that these safeguards were rendered inoperative in light of the delays by the authorities in complying with judicial decisions ordering the closing of the mine.<sup>74</sup>

<sup>69</sup> See *Taskin v Turkey* (n 60) para 119 at 24.

<sup>70</sup> *ibid* para 125 at 25.

<sup>71</sup> *ibid* para 99 at 19–20.

<sup>72</sup> See Boyle (n 6) 623; E Hey, 'The Interaction between Human Rights and the Environment in the European "Aarhus Space"' in A Grear and LJ Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015) 353, 364. Contra: B Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention' (2018) 30(1) JEL 1.

<sup>73</sup> See U Beyerlin, 'Aligning International Environmental Governance with the "Aarhus Principles" and Participatory Human Rights' in Grear and Kotzé (n 72) 333, 344.

<sup>74</sup> See *Taskin v Turkey* (n 60) paras 120–125 at 24–5.

*Tatar v Romania*<sup>75</sup> is another important case for the contours of the procedural requirements under Article 8 in the context of water. It was brought to the ECtHR in the wake of an ecological disaster. A goldmine located in the region where the applicants lived was granted a permit to use sodium cyanide for its operation. A dam breached, causing the release of 100,000m<sup>3</sup> of cyanide-contaminated waters into the environment, thus affecting health, lives and homes. The applicants complained in particular of the failure by the authorities to conduct appropriate studies and to inform the public of the risks posed by the operation of the goldmine. The Court recalled that the decision-making process must be based on appropriate environmental assessments and studies evaluating the risks entailed and the conclusions of such studies being made available to the public. Interestingly, the Court further detailed the contours of these duties and noted that they involve informing the public of the risks to health and the environment entailed by the accident and of any existing preventive and mitigation measures undertaken.<sup>76</sup> Crucially, it also directly derived a right of access to information from Article 8's positive duties,<sup>77</sup> thereby going one step further in its case law, which had limited itself thus far to recognizing the importance of, rather than a right to, access to information.

*Dubetska v Ukraine*<sup>78</sup> concerned water pollution caused by industrial activities, which prevented the applicants from access to drinkable water for several years. While the court found the State in breach of its Article 8 obligation for failure to resettle the applicants, it also took the opportunity to extend its scrutiny over the decision-making process beyond settled case law by stating that 'the Court will likewise examine to what extent the individuals affected by the policy at issue were able to contribute to the decision-making'.<sup>79</sup> Such language potentially demands more than simply considering individuals' views, and it allows for much closer scrutiny of the decision-making process in terms of public participation. In *Di Sarno v Italy*,<sup>80</sup> while the water claim is incidental to the central issue of waste management, the case is of interest because the Court, when discussing the positive duties flowing from Article 8, asserted that 'the fact that the Italian authorities handed over the management of a public service to third parties does not relieve them of the duty of care incumbent upon them under Article 8'.<sup>81</sup> This statement is significant because if States can be held responsible for the failure of private operators to uphold human rights, including procedural standards, then they might well design regulatory processes ensuring that private parties delivering a public service are themselves subject to such procedural requirements. Other cases involving water-related issues involving the

<sup>75</sup> (28 January 2009) App No 67021/01, ECHR 2009.

<sup>76</sup> *ibid* para 101.

<sup>77</sup> See *ibid* para 113, 'Dans le cadre des obligations positives découlant de l'article 8 de la Convention, la Cour tient à souligner l'importance du droit du public à l'information, tel que consacré par sa jurisprudence'.<sup>78</sup> (10 February 2011) *ibid* 30499/03.

<sup>79</sup> *ibid* para 143.

<sup>80</sup> (10 January 2012) App No 30765/08.

<sup>81</sup> *ibid* para 110.

application of the procedural framework designed by the ECtHR include *Giacomelli v Italy*,<sup>82</sup> *Ivan Atanasov v Bulgaria*,<sup>83</sup> *Hardy and Maile v UK*,<sup>84</sup> *Dzemyuk v Ukraine*<sup>85</sup> and *Otgon v Moldova*.<sup>86</sup> In this last case, the court asserted that Article 8's positive obligations include a duty to award compensation,<sup>87</sup> thus arguably making it part of the framework of procedural safeguards.<sup>88</sup> In summary, there is clearly a wealth of litigation involving water issues before the ECtHR, to which the court has readily applied a sophisticated procedural framework derived from the positive obligations contained in Article 8 of the ECHR and partly inspired by the Aarhus principles.

## 2. Water and procedural rights in the inter-American human rights system

In contrast to its European counterpart, the IACHR system does recognize the right of access to safe drinking water that it derives from the right to life, the right to personal integrity, the right to health and—with respect to indigenous communities—the collective right to property.<sup>89</sup> The *Sawhoyamaxa Indigenous Community v Paraguay* case, in which the Court recognized a right to water as a requirement of a dignified life, also involved the resettlement of communities, which, according to the Court, 'will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures'.<sup>90</sup> In fact, it is in the context of indigenous communities' rights that extensive procedural requirements have been developed by both the Commission and the Court, particularly in the context of their right to collective ownership of their ancestral land under Article 21 of the American

<sup>82</sup> (2 November 2006) App No 59909/00.

<sup>83</sup> (2 December 2010) App No 12853/03.

<sup>84</sup> (14 February 2012) App No 31965/07.

<sup>85</sup> (4 September 2014) App No 42488/02.

<sup>86</sup> (25 October 2016) App No 22743/07.

<sup>87</sup> See *ibid* para 17.

<sup>88</sup> Two further cases, *Okay v Turkey* (12 July 2005) App No 36220/97, and *Karin Andersson v Sweden* (25 September 2014) App No 29878/09, concerned art 6(1). In the latter, access to justice was denied because the applicants' environmental harm claims could not, according to the court, constitute civil rights.

<sup>89</sup> Inter-American Commission on Human Rights, Annual Report 2015, Ch IV *Access to Water in the Americas: An Introduction to the Human Right to Water in the Inter-American System*, para 149 at 502. See also I/A Court H.R., *Case of the Yakye Axa Indigenous Community v Paraguay*. Interpretation of the Judgment on the Merits, Reparations and Costs. Judgment of February 6, 2006. Series C No. 142, para 161; I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146; I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community v Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010 Series C No. 214, paras 194–217, for the right to water as a requirement for a dignified life and I/A Court H.R. *Case of the Saramaka People v Suriname*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008 Series C No 185 for the right to water deriving from the right to property. For an analysis see J Murillo Chávarro, 'The Right to Water in the Case-Law of the Inter-American Court of Human Rights (2014) 7 *ACDI-Anuario Colombiano de Derecho Internacional* 39.

<sup>90</sup> I/A Court H.R. *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (n 89) para 135.



Convention on Human Rights.<sup>91</sup> Such procedural safeguards arise in the context of development projects occurring on indigenous territory or likely to affect their rights and natural resources, and they are of critical importance in the articulation of the rights of indigenous communities. Thériault indeed pointed out that ‘the capacity of indigenous peoples to control the nature and pace of economic development projects on their territories largely hinges on the relative strength of their right to participate effectively in the relevant decision-making processes’,<sup>92</sup> and Shelton noted that ‘most efforts to develop norms to balance the competing interest of the State and indigenous peoples have focused on procedural rights’.<sup>93</sup>

In many cases, industrial developments or mineral extraction projects are likely to have repercussions for the water resources of the communities and in cases of disputes involve water-related claims. What these procedural safeguards entail is thus instructive for understanding how they might apply to the water-related claims of indigenous communities. In this context, the Court bases itself on the existence of a duty in international law to engage in prior consultation with indigenous peoples regarding situations that affect their territory<sup>94</sup> to posit generally that:

The right to consultation comprises the positive duty of States to provide suitable and effective mechanisms for obtaining prior, free, and informed consent in accordance with the customs and traditions of the indigenous peoples before undertaking activities that may adversely affect their interests or their rights to their lands, territory or natural resources.<sup>95</sup>

The scope of this duty has been distilled in the landmark *Saramaka* case.<sup>96</sup> In essence, whilst the right to property can be restricted, this restriction is subject to certain guarantees, notably that such restrictions do not affect the survival of the indigenous or tribal people concerned in accordance with their traditional ways of life. The State must thus undertake ‘all appropriate measures to ensure the continuance of the relationship of the indigenous people with their land and culture’,<sup>97</sup> including the effective participation of the members of the

<sup>91</sup> See D Shelton, ‘International Law and the Development of the Rights of Indigenous Peoples (Panel 8): The Inter-American Human Rights Law of Indigenous Peoples’ (2013) 35 UHawLRev 937; S Thériault, ‘Environmental Justice and the Inter-American Court of Human Rights’ in Grear and Kotzé (n 72) 309. <sup>92</sup> Thériault (n 91) 326. <sup>93</sup> Shelton (n 91) 973.

<sup>94</sup> I/A Court H.R. *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*. Merits and Reparations. Judgment of 27 June 2012. Series C No 245, para 164; I/A Court H.R., *Case of the Community Garifuna Triunfo de la Cruz & its members v Honduras*. Merits, Reparations and Costs. Judgment of 8 October 2015. Series C No 305 para 154.

<sup>95</sup> I/A Commission Rep No 76/12 Case 12.548 Merits *Garifuna Community of “Triunfo de la Cruz” and Its Members (Honduras)* (2013) para 251. See also Final Merits Rep No 40/04, Case 12.053. *Maya Indigenous Communities of the Toledo District (Belize)* (12 October 2004) para 142.

<sup>96</sup> I/A Court H.R. *Case of the Saramaka People v Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of 28 November 2007 Series C No 172.

<sup>97</sup> I/A Court H.R. *Case of the Saramaka People v Suriname*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs. Judgment of 12 August 2008 Series C No 185, para 29.

community, in conformity with their customs and traditions, regarding any development plan; the granting of reasonable benefits; and subjecting any authorization to prior environmental and social impact assessments.<sup>98</sup> The duty to ensure effective participation entails a right of the tribal peoples to be involved in the processes of design, implementation, and evaluation of development projects undertaken on their lands and ancestral territories and a guarantee that indigenous peoples be consulted on any matters that might affect them;<sup>99</sup> and it must generally be conducted with the goal of reaching agreement. Crucially, in the context of large-scale developments threatening the physical or cultural survival of the community, it imposes an obligation of result, not only to consult but also to obtain the free, prior and informed consent of the community in accordance with its customs and traditions.<sup>100</sup> Here, participatory rights are stretched so far as to include a requirement of prior consent, but they also involve differentiated consultation processes to accommodate the indigenous communities' cultures and traditions, thus in effect guaranteeing an inclusive and effective participation.<sup>101</sup> Although these procedural safeguards are not designed to apply specifically to water claims, they might well do so, as pointed out above, in the context of a development project affecting water resources.

The inter-American system of human rights has thus developed participatory rights arguably further than the ECtHR, at least as far as the roles of members of certain communities within the decision-making process are concerned. However, outside of this context, procedural environmental justice seems to remain less developed in the Americas than in the European system of human rights.<sup>102</sup> Whilst the Inter-American Court does read a right to access information into the right to freedom of thought and expression, it still falls

<sup>98</sup> I/A Court H.R. *Case of the Saramaka People v Suriname* (n 96) para 129. I/A Court H.R. *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (n 94) para 157.

<sup>99</sup> I/A Commission Rep No 76/12 Case 12.548 *Merits Garifuna Community of "Triunfo De La Cruz" and Its Members (Honduras)* (2013) para 256.

<sup>100</sup> See *Saramaka* case (n 96) and *ibid* para 257. See also Shelton (n 91) 959–60. On free, prior and informed consent (FPIC), see further SJ Rombouts, 'The Evolution of Indigenous Peoples' Consultation Rights under the ILO and U.N. Regimes' (2017) 53 *StanJIntL* 169, according to whom 'FPIC is rooted in the overarching right to self-determination, and therefore denotes a right of indigenous peoples to effectively determine the outcome of decision-making processes impacting on them, not a mere right to be involved in such processes' at 223.

<sup>101</sup> See also I/A Court H.R., *Case of the Community Garifuna Triunfo de la Cruz & Its Members v Honduras*. Merits, Reparations and Costs. Judgment of 8 October 2015 Series C No 305, paras 154–161.

<sup>102</sup> This lack of development is, however, not set in stone since there are a number of pending cases before the Commission and the Court involving both water and procedural issues; these cases include the *Yaqui people v Mexico* case IACHR, Rep No 48/15, Petition 79-06; the *People of Quishgue-Tapayrihua community v Peru* case IACHR, Rep No 62/14, Petition 1216-03; the *Diaguíta agricultural communities of the Huasco-Altinos and the members thereof* case, IACHR, Rep No 141/09; the *Communities of the Sipakepense and Mam Mayan People v Guatemala* case, IACHR Rep No 20/14, petition 1566-07; the *Right to access to water of rural communities in Costa Rica* case; and a hearing was held in 2017 on the *Right of access to relevant information for the enforceability of Economic, Social Cultural and Environmental rights*.

short of providing a broader right to participate effectively in environmental decision making per se,<sup>103</sup> in turn restricting the capacity of procedural claims related to water to flourish beyond the context of indigenous communities' collective rights.

### 3. *Water and procedural rights in the African Charter on Human and Peoples Rights' system*

Like the inter-American system, the African system recognizes and protects the right to water. The African Commission on Human and Peoples' Rights has indeed derived it from the right to health.<sup>104</sup> Interestingly, the Commission has read some procedural requirements into this right, as well as into the right to a clean environment,<sup>105</sup> which could also give rise to water-related claims. Thus, in the *Ogoni people* case,<sup>106</sup> which concerned allegedly irresponsible oil developments in which the State of Nigeria participated at the expense of the health and environment of the Ogoni people, the complainants argued that the State had violated both the right to health and the right to a clean environment by directly participating in the contamination of water and failing to provide studies of the risks that these activities entailed. According to the Commission:

Government compliance with the spirit of Article 16 and Article 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising 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.<sup>107</sup>

The procedural safeguards envisaged here thus encompass both access to information and public participation in the decision-making process. However, the Commission seemed to fall short of imposing the obligation to require independent scientific monitoring but only to permit that this monitoring be conducted. It is also notable that, beyond finding violations of Articles 16 and 24, the Commission also concluded that the lack of

<sup>103</sup> See Thériault (n 91) 319–21.

<sup>104</sup> In *Centre on Housing Rights and Evictions (COHRE) v Sudan*, Comm 296/2005, ACHPR/LPROT and 296/05/674.09 African Commission's decision 29 July 2009, a right to water was seen as implicit within the right to health protected in art 16 of the Charter. Further, in Comm 25/89-47/90-56/91-100/93 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter-africaine des Droits de l'Homme, les Témoins de Jehovah v Democratic Republic of the Congo* (4 April 1996) the failure to provide basic services, such as safe drinking water, constituted a violation of the right to health.

<sup>105</sup> Art 24 of the Charter.  
<sup>106</sup> Comm 155/96 *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* (27 October 2001).  
<sup>107</sup> *ibid* para 53.

involvement of the Ogoni people in the decisions that affected Ogoniland amounted to a violation of the right of peoples to freely dispose of their wealth and natural resources, protected by Article 21 of the African Charter.<sup>108</sup>

In the *Endorois People* case,<sup>109</sup> procedural requirements were further read into the right to culture<sup>110</sup> and the right to development.<sup>111</sup> The case involved the displacement of Endorois communities from their ancestral lands around Lake Bogoria in Kenya to create a game reserve and operate a ruby mine. According to the complainants, the Endorois people were not adequately consulted in these decisions nor appropriately compensated and suffered notably from reduced access to water resources as a result. For the Commission, the Endorois constitute a people for the purposes of the Charter and are thus endowed with collective rights, such as the right to freely dispose of their natural resources, including water sources.<sup>112</sup> Interestingly, in this case, whilst the Commission did not directly recognize a right to water, it closely integrated water issues into its assessment of the right to development of the Endorois people. Indeed, the Commission noted that the Endorois were relegated to semi-arid lands unsustainable for pastoralism because of strict prohibitions on access to the lake as their traditional water source,<sup>113</sup> and it acknowledged that ‘access to clean drinking water was severely undermined as a result of loss of [...] ancestral land’.<sup>114</sup> Taking this into account in its evaluation of a potential breach of the right to development of the Endorois people, it also remarked that the right to development is both constitutive and instrumental and thus entails the respect of some procedural safeguards.<sup>115</sup> In this light, peoples must be able to participate in the development process and express their choices.<sup>116</sup> Borrowing from the Inter-American Court’s case law and the *Saramaka* case, the Commission posited that respect for these safeguards involves a duty to consult with the affected communities, and ‘this requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.’<sup>117</sup> In addition, the Commission was of the view that for ‘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’,<sup>118</sup> thus following in the footsteps of its inter-American counterpart.<sup>119</sup> There is little doubt that

<sup>108</sup> *ibid* para 55.

<sup>109</sup> Comm 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (25 November 2009).

<sup>110</sup> Art 27, see *ibid* para 243.

<sup>112</sup> *Endorois people* case (n 109); see paras 162 and 251–268.

<sup>111</sup> Art 22.

<sup>113</sup> *ibid* para 286.

<sup>114</sup> *ibid* para 288. <sup>115</sup> *ibid* para 277. <sup>116</sup> *ibid*. <sup>117</sup> *ibid* para 289. <sup>118</sup> *ibid* para 291.

<sup>119</sup> This borrowing from the Inter-American Court is in contrast, according to Inman, to the African system’s usual reluctance to refer to external sources relating to indigenous peoples. See

inadequate access to water resources weighed on the Commission's evaluation of the significance of the impact of the development project within the Endorois territory, triggering the duty to obtain free, prior and informed consent. In the Commission's view, the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of the utmost importance to their life as a people,<sup>120</sup> and ultimately, the failure to provide suitable land for grazing (which would include adequate sources of water) indicated that Kenya did not adequately provide for the Endorois in the development process.<sup>121</sup>

#### 4. Conclusions

In all three systems, water-related claims are subject to some procedural requirements, but the features of these procedural safeguards vary significantly from one system to the other. Whereas the European human rights regime affords equivalent importance to all three aspects of procedural rights, namely, access to information, public participation and access to justice, the inter-American and African systems place particular emphasis on the participatory rights of indigenous communities. In this context, the IACHR, followed by the African Commission, has built an elaborate regime of effective participation, which can in fact go beyond mere participation and effectively require the prior informed consent of indigenous communities regarding development activities occurring within their ancestral lands in cases where such activities have the potential to threaten their survival. This stipulation goes further than even the Aarhus Convention's requirements thus far. In addition, whereas the ECtHR is mainly concerned with the procedural rights of individuals and is strongly focused on civil and political rights,<sup>122</sup> its American and African counterparts more readily bestow upon water rights and procedural safeguards a collective dimension.

Francioni rightly criticized the ECtHR's primarily individualistic focus as being too reductionist with respect to environmental values and thus 'adulterating their inherent nature of public goods',<sup>123</sup> whilst pleading for 'a more imaginative and courageous jurisprudence which takes into consideration the collective dimension of human rights affected by environmental degradation'.<sup>124</sup> In contrast, the practices of the IACHR and African Commission in relation to indigenous communities represent clear steps towards the recognition of a common interest in environmental values through the prism of these communities' rights over their natural

DK Inman, 'The Cross-Fertilization of Human Rights Norms and Indigenous Peoples in Africa: From Endorois and Beyond' (2014) 5(4) *The International Indigenous Policy Journal* 2–3.

<sup>120</sup> See (n 109) para 297.

<sup>121</sup> See *ibid* para 298. For commentary see J Murphy, 'Extending Indigenous Rights by Way of the African Charter' (2012) 24 *PaceIntlLRev* 158.

<sup>122</sup> Although cases such as *Tatar v Romania* or *Taskin v Turkey* refer to the wider community and residents beyond the applicants. <sup>123</sup> Francioni (n 58) 55. <sup>124</sup> *ibid*.

resources.<sup>125</sup> Moreover, as far as water is concerned, examining procedural rights through a collective lens and in particular through the lens of indigenous peoples' collective ownership of their land and natural resources—including water resources—further the conceptualization of water as a common, if not a public, good. Finally, while the Inter-American Court and Commission and the African Commission cross-refer to each other's jurisprudence,<sup>126</sup> this is not the case for the ECtHR, at least in so far as water-related procedural claims are concerned. The ECtHR, however, makes frequent reference to, and draws inspiration from, the Aarhus Convention system,<sup>127</sup> which serves as a reference point in the design of procedural rights.

## B. Systems Integrating Human Rights and Environmental Concerns

### 1. The Aarhus Convention's contribution to water-related claims

That the ECtHR and IACHR<sup>128</sup> have not hesitated to refer to the procedural framework designed under the Aarhus Convention is testimony to the latter's participatory rights regime having a broad impact beyond the Aarhus system. In the European context, Hey argued that the procedural environmental rights that Aarhus has introduced have 'shaped a "space" in which human rights and the environment are able to interact'.<sup>129</sup> For Lador, it also provides 'a solid reference point for the diverse collection of instruments in the water sector to develop genuine public participation mechanisms',<sup>130</sup> and from this standpoint, it is perfectly well placed to inform and feed into the procedural dimension of the right to water, especially because this Convention on access to information, public participation in decision making and access to justice in environmental matters adopts a rights-based approach.<sup>131</sup>

<sup>125</sup> See R Pavoni, 'Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights' in B Boer (ed), *The Environmental Dimension of Human Rights* (Oxford University Press 2015) 31; E Grant, 'International Courts and Environmental Human Rights: Re-imagining Adjudicative Paradigms' in Grear and Kotzé (n 72) 379, 389.

<sup>126</sup> The ACHPR *Endorois* case refers to the IACHR *Saramaka* and *Yakye Axa* cases. The IACHR *Maya Indigenous Communities* case refers to the ACHPR *Ogoni people* case.

<sup>127</sup> This is notably the case in *Tatar v Romania*, *Di Sarno v Italy*, *Taskin v Turkey* and *Ivan Atanasov v Bulgaria*, and in *Tatar v Romania* and *Di Sarno v Italy* reference to the Convention features in the court's assessment rather than only in the section on relevant international instruments. See also Boyle (n 6) 623 and Hey (n 72) 364.

<sup>128</sup> See Order of the Inter-American Court of Human Rights Case of *Claude-Reyes et al. v Chile*, Judgment of 19 September 2006. Merits, Reparations and Costs. <sup>129</sup> Hey (n 72) 353.

<sup>130</sup> Y Lador, 'Access to Justice and Public Participation in the Water Sector: A Promising Legal Development' in *Public Participation and Water Resources Management* (n 32) 148, 152.

<sup>131</sup> See Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) 2161 UNTS 447, art 1. On the human rights dimension of the Convention, see Boyle (n 6) 621–6.

Beyond detailing the minimum procedural safeguards that States must abide by in the context of environmental decision making and environmental matters, it does address water issues within its text. The definition of what constitutes environmental information in Article 2(3)(a) encompasses any information on the State and elements of the environment, including, as specifically mentioned, its aspects relating to water. This requirement means that water-related information comes within the scope of Article 4 on the right to request access to environmental information and Article 5 on the duty for public authorities to collect and disseminate environmental information. Under Article 6, the public has a right to participate in decisions on whether to permit a range of activities, and water matters feature prominently among these, including waste-water treatment plants,<sup>132</sup> inland waterways and ports,<sup>133</sup> groundwater abstraction or artificial groundwater recharge schemes,<sup>134</sup> works for the transfer of water resources between river basins,<sup>135</sup> and dams and other installations designed for the holding back or permanent storage of water.<sup>136</sup> Public participation will also generally be required for procedures providing for an environmental impact assessment or any other activity that could have a significant effect on the environment.<sup>137</sup> Under Article 6, public participation must occur early to ensure that all options are still open and that public participation is effective.<sup>138</sup> This article in turn requires early identification of the public concerned and notice of the proposed decision-making procedure being given including adequate, timely and effective information on the proposed activity, the nature of possible decisions, the public authority responsible for the decision and the participation procedure envisaged.<sup>139</sup> In addition the procedure must be subject to reasonable time frames,<sup>140</sup> and all relevant information must be imparted free of charge as soon as it becomes available.<sup>141</sup> The public should be entitled to submit comments at a public hearing or enquiry.<sup>142</sup> These comments must be duly considered and the public informed promptly of the decision, as well as of the reasons on which it is based.<sup>143</sup> Finally, these provisions on access to information and public participation, as well as any other act or omission by a public authority or a private person that contravenes national law regarding the environment, are subject to the Convention's provisions on access to justice.<sup>144</sup>

The Aarhus Convention's text alone thus offers a sophisticated procedural framework that can be readily transposed to water rights and on which the procedural dimension of the right to water can be modelled. By adopting a rights-based approach, it also further legitimizes the recognition of the right to water as a binding legal right, at least in its procedural dimension. This is

<sup>132</sup> See *ibid* Annex 1 para 6.

<sup>135</sup> Annex 1 para 11(a) and 11(b).

<sup>137</sup> See Annex 1 para 20 and art 6(1)(b).

<sup>141</sup> Art 6(6).

<sup>133</sup> Annex 1 para 9(a).

<sup>138</sup> Art 6(4).

<sup>143</sup> Art 6(8) and (9).

<sup>134</sup> Annex 1 para 10.

<sup>136</sup> Annex 1 para 13.

<sup>139</sup> Art 6(2).

<sup>140</sup> Art 6(3).

<sup>144</sup> Art 9.



all the more so as the Compliance Committee to the Aarhus Convention has had occasion to contribute to further developing these requirements in the context of water-related claims. The Compliance Committee has received communications involving water claims in a number of cases, and three of these are particularly worth mentioning.<sup>145</sup> The first one found that the standing requirements built into the Austrian Water Act were too restrictive and did not meet the test of Article 9(3) of the Convention,<sup>146</sup> thereby vindicating procedural water rights in an international forum. This reading of the Austrian Water Act was recently confirmed by the Court of Justice of the European Union (CJEU) on the basis of its interpretation of Article 9(3) of the Aarhus Convention.<sup>147</sup> The *Protect Natur* case originated in a private company's application for a permit to draw water from a river to assist the production of snow for a ski resort, to which the NGO Protect objected. The Austrian courts referred the case to the CJEU to enquire about the project's standing under the Aarhus Convention and EU law.<sup>148</sup> The EU Court, drawing extensively from the Aarhus Convention, found that Article 9(3) of that Convention, read in conjunction with Article 47 of the Charter of Fundamental Rights (right to an effective remedy), requires environmental NGOs to be granted standing to contest a decision permitting 'a project that may be contrary to the obligation to prevent the deterioration of the status of bodies of water' under the EU Water Framework Directive.<sup>149</sup> This case brought to the fore the capacity of the Aarhus Convention to weigh on the recognition of procedural water rights beyond its own case law through other judicial fora, in jurisdictions—domestic and international—in which the Aarhus Convention applies.

The other two communications before the Compliance Committee usefully feed into the debate on the privatization of water services and more broadly on water as a commodity versus water as a public good. As discussed above, the privatization of water services and commodification of water can hamper the applicability of democratic accountability principles, participatory rights and procedural safeguards since private water contractors can be seen as primarily accountable to their shareholders and can argue that they are

<sup>145</sup> ACCC/C/2008/24 Spain 2011; A/CCC/C/2009/6/ Spain 2009; A/CCC/C/2010/48 Austria 2012; A/CCC/C/2010/51 Romania 2014; A/CCC/C/2011/63 Austria 2014; A/CCC/C/2012/71 Czechia 2016; A/CCC/C/2009/37 Belarus 2010 and A/CCC/C/2010/55 UK. On the dual contribution of the Compliance Committee to human rights and the environment, see C Pitea, 'The Non-Compliance Procedure of the Aarhus Convention: Between Environmental and Human Rights Control Mechanisms' (2006) 16(1) *ItalYBIntL* 85.

<sup>146</sup> A/CCC/C/2010/48 Austria. Art 9(3) requests that parties ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities that contravene national law provisions relating to the environment

<sup>147</sup> Case C-664/15 (17 December 2017).

<sup>148</sup> Because the EU is a party to the Aarhus Convention and operates on the basis of an automatic treaty incorporation model, the Aarhus Convention forms an integral part of EU Law. On the legal effects of EU Agreements, see generally M Mendez, *The Legal Effects of EU Agreements* (Oxford University Press 2013) 61–76.

<sup>149</sup> Case C-664/15 (n 147) para 58.

immune to the international human rights framework, including in its participatory and procedural dimensions.<sup>150</sup> Should water be considered a commodity rather than a public good, then such a position might well be justified. In contrast, conceptualizing water as a public good would assist in concluding that private water providers are delivering a public service and, as such, are subject to the same procedural safeguards as any other public authority delivering public services. In this context, the Aarhus Convention text already posits that its obligations fall on public authorities, as well as any natural or legal person performing public administrative functions under national law, having public responsibilities or functions, or providing public services provided that they are under the control of a public authority.<sup>151</sup> Arguably then, water utilities companies fall under this definition and are thus expected to comply with all of the procedural safeguards laid out in the Convention, unless water provision is not itself defined as a public service. This very issue arose in a communication concerning the UK in connection with access to information held by privatized water companies, although it was then withdrawn further to a domestic court decision.<sup>152</sup> The matter was indeed concomitantly brought before the British courts, the water companies denying that they were under a duty to provide information because they did not fall under the category of public authorities for the purposes of these requests.<sup>153</sup> Following a preliminary ruling from the CJEU, the British Upper Tribunal, however, concluded that the water companies were public authorities for the purposes of the Aarhus Convention, and they thus had a duty to comply with access to information requests.<sup>154</sup> This decision was welcome, confirming that private water contractors are subject to the requirements of the Aarhus Convention and must abide by the procedural safeguards built into the right to water, thereby also supporting the conceptualization of water as a public good. In the same context, in a communication against Belarus, the communicants alleged that Belarus had failed to make information available and to consult adequately with the public in relation to the development of a hydropower plant project involving the construction of a dam. Under Belarus law, it is the project developers' responsibility to conduct environmental impact assessments, inform the public about the project and conduct the public participation process.<sup>155</sup> In this respect, the committee recognizes that functions related to public participation can be delegated to various bodies or private persons, but these bodies should be treated as public authorities in the performance of these duties.<sup>156</sup> It nevertheless was of the view that

<sup>150</sup> See Gupta, Ahlers and Ahmed (n 53) 300.

<sup>151</sup> See art 2(2).

<sup>152</sup> A/CCC/C/2010/55 UK.

<sup>153</sup> *Fish Legal v Information Commissioner and others* [2015] UKUT 52 (AAC).

<sup>154</sup> *ibid.*

<sup>155</sup> Findings and Recommendation with regard to Comm A/CCC/C/2009/37 concerning compliance by Belarus (adopted 24 September 2010), ECE/MP.PP/2011/11/Add.2 paras 22–23.

<sup>156</sup> *ibid* para 78.

the developers cannot ensure the degree of impartiality necessary to guarantee proper conduct of the participation procedure, and reliance on providing public participation cannot be solely placed on the developer.<sup>157</sup> If developers are involved in the process, it must be under the control of the public authorities, but their role must be supplementary to those of public authorities.<sup>158</sup> In short, where private parties are responsible for conducting public participation duties, they are public authorities in the performing of such functions but must in any case remain under the supervision of public authorities to guarantee impartiality. Public authorities and the State more generally can thus not relinquish their responsibilities regarding procedural safeguards and participatory rights onto private providers or the community.<sup>159</sup>

The sophisticated participatory rights framework set out by the Aarhus Convention thus makes it an obvious reference point for the development of procedural water rights. This suitability does not only stem from the Convention's provisions, which make direct references to participatory rights in water contexts but also from the jurisprudence of its Compliance Committee, which has involved water-related issues. As in other human rights systems, the Convention generally requires respect for procedural rights in relation to the development of projects, plans and policies impacting natural resources, including water resources. The Compliance Committee's jurisprudence has, for its own part, contributed to strengthening access to justice in the context of water claims and has confirmed the participatory transparency and accountability duties of private water providers, thus feeding into the commodity versus public good debate. The resonance of the Aarhus framework for participatory water rights also extends to wider legal contexts through the intended universal reach of the Convention and through its influence on other legal systems, such as that of the EU. The CJEU's progressive decisions related to the procedural dimension of water claims have indeed been grounded in the requirements of the Aarhus Convention. The Convention could also influence the interpretation of other water-related conventions, and it was argued that the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes 'is nowadays increasingly interpreted and applied in the light of the concepts and principles of the Aarhus Convention'.<sup>160</sup> Equally, it is a natural point of reference for the interpretation of the London Protocol on Water and Health to the same Convention.

<sup>157</sup> *ibid* para 80.

<sup>158</sup> *ibid* para 81.

<sup>159</sup> On the issue of privatization in the Aarhus context, see J Ebbesson, 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' (2011) 4 *Erasmus Law Review* 71.

<sup>160</sup> S Vykhryst, 'Public Information and Participation under the Water Convention' in A Tanzi *et al.* (eds), *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (Brill 2015) 268, 268.

## 2. The promise offered by the London Protocol on Water and Health to procedural water rights

The 1999 Protocol to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes offers great promise for the further development of procedural water rights. It sets itself as an objective the protection of human health and well-being through improving water management and the tackling of water-related diseases,<sup>161</sup> to be achieved by aiming to provide access to drinking water and sanitation to everyone.<sup>162</sup> While it does not explicitly refer to the right to water,<sup>163</sup> it has been argued that it implicitly accepts the obligations of States in this regard<sup>164</sup> and in fact ‘translates into binding treaty law pertaining to water law most, if not all, of the regulatory features emerging from the various instruments making up the human rights process in the matter in hand’.<sup>165</sup> From the point of view of the procedural rights features of the Protocol, McIntyre noted that ‘it is difficult to imagine a clearer statement in support of a perspective which views the human right to water concept largely in terms of increasingly pervasive good governance values’.<sup>166</sup> According to Tanzi and Iapichino, the participatory requirements set out in General Comment 15 are indeed incorporated in the Protocol,<sup>167</sup> especially in the context of the targets developed by States that must be devised on the basis of a process of public participation.<sup>168</sup> This opinion is supplemented by a due diligence obligation to:

Make available to the public such information as is held by public authorities and is reasonably needed to inform public discussion of: (a) The establishment of targets [...] 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 ...<sup>169</sup>

The information must be made available within a reasonable time, and its access must be free of charge.<sup>170</sup> Paragraphs 4 and 5 of Article 10, however, provide for a long list of exceptions to the obligation to provide access to information, including to protect the confidentiality of commercial or industrial

<sup>161</sup> UN Doc MP.WAT/AC.1/1999/1, art 1.

<sup>162</sup> See art 6(1).

<sup>163</sup> Aside from an incidental reference in art 5(2)(m).

<sup>164</sup> Gupta, Ahlers and Ahmed (n 53) 295.

<sup>165</sup> A Tanzi and L Iapichino, ‘The Added Value of the UNECE Protocol on Water and Health for the Implementation of the Right to Drinking Water and Sanitation’ in H Smets (ed), *The Implementation of the Right to Safe Drinking Water and Sanitation in Europe* (Académie de l’eau France 2011) 115, 117. For another useful analysis, see E Hey, ‘Distributive Justice and procedural Fairness in Global Water Law’ in J Ebbesson and P Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press 2009) 351, 355–8.

<sup>166</sup> O McIntyre, ‘The UNECE Water Convention and the Human Right to Access to Water: The Protocol on Water and Health’ in Tanzi *et al.* (n 160) 345, 365.

<sup>167</sup> See Tanzi and Iapichino (n 165) 118.

<sup>168</sup> See art 6 (2) and (5).

<sup>169</sup> Art 10(1).

<sup>170</sup> See art 10 (2) and (3).

information.<sup>171</sup> Despite these restrictions, beyond catering to participatory rights, the Protocol also promotes transparency via access to information. Finally, accountability and justiciability are ensured by the establishment, in addition to traditional dispute settlement options,<sup>172</sup> of a compliance mechanism modelled on that of the Aarhus Convention.<sup>173</sup> Like its Aarhus counterpart, the Compliance Committee under the London Protocol<sup>174</sup> can hear communications from the public irrespective of whether the communicant has been a direct victim of the facts complained of in the communication.<sup>175</sup> The very existence of the Compliance Committee, combined with these flexible standing requirements, thus make it a promising forum for the vindication of the water-related transparency and participatory provisions of the Protocol and, in turn, the consolidation of the procedural dimension of the right to water.<sup>176</sup>

#### IV. CONCLUSIONS: JUDICIAL CROSS-FERTILIZATION AND THE CONCEPTUALIZATION OF WATER AS A PUBLIC GOOD

While we await case law from the London Protocol Compliance Committee, the practice of regional human rights regimes and of the Aarhus Convention Compliance Committee show that water-related claims frequently arise in the context of procedural rights litigation, or they are at least often addressed from the angle of their procedural dimensions. Arguably, the civil and political nature of the procedural dimension of the right to water makes it more readily justiciable. The legally binding nature of procedural rights is indeed less contested, and procedural safeguards built into the right to water can be seen as less burdensome to comply with than their substantive counterpart of providing access to safe drinking water to all. The rise in the justiciability of water claims through the medium of their procedural dimension contributes to legitimizing a judicial discourse and, to some extent, a judicial dialogue on the right to water.<sup>177</sup> As judges become more acquainted with water rights claims, they become more comfortable with recognizing a human right to water and fleshing out both its procedural and its substantive features.

The combined case law of regional human rights systems and the Aarhus Compliance Committee contributes to wide judicial recognition of the applicability of principles of transparency, participation and accountability to water issues. Although it might still be too early to speak of a coherent approach,<sup>178</sup> the seeds for constructive cross-fertilization towards coherence

<sup>171</sup> See art 10(5)(d).

<sup>172</sup> See art 20.

<sup>173</sup> See art 15.

<sup>174</sup> See Decision 1/2 on Review of Compliance, Doc ECE/MP.WH/2/Add.3 – EUR/06/5069385/1/Add.3.

<sup>175</sup> See Tanzi and Iapichino (n 165) 120.

<sup>176</sup> It has so far received one communication only relating to Portugal's reporting obligations.

<sup>177</sup> For a study on international judicial dialogue, see C Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2009) 41 NYUJIntL&Pol 755.

<sup>178</sup> See Lador (n 130) 149.

have been sown. Each regime's practice relating to the procedural dimension of water-related claims offers a fertile ground from which other systems can borrow to complement their own. Whilst the African Commission is opening up to cross-regional dialogue, the Inter-American Court has not shied away from using the ECHR as a point of reference.<sup>179</sup> The set of procedural environmental safeguards developed by the Strasbourg Court via the incorporation of the Aarhus Convention principles into its Article 8 could thus legitimately provide a model upon which both the American and African systems of human rights could expand participatory rights beyond the indigenous communities context and broaden the reach of procedural safeguards to other water-related claims. That the Aarhus Convention principles are not intended to be limited to the European sphere but rather to project their influence globally could further bolster this cross-system influence.<sup>180</sup> Conversely, the ECtHR could take inspiration from its American and African counterparts and contribute further to the conceptualization of water as a common good.

In the inter-American and African regimes, participatory water rights take on a collective dimension, since it is through the prism of group rights over their natural resources that participatory and procedural safeguards are activated. It is water as a common resource of the group—ie, as a common good—that triggers the applicability of the set of participatory rights granted to indigenous communities. The collective dimension of participatory rights makes sense since the right to be informed or to participate in decision making concerning plans, projects or activities that have a potential environmental or water-related impact is not in the sole interest of individuals but rather is in the interest of whole communities that might be affected by these projects and activities. These communities have a common interest in water-related decisions, and in this sense, the collective features of procedural water rights further cement a conceptualization of water as a public good. Ironically, the IACHR's interpretation of the right to property also consolidates a vision of water as a collective good.<sup>181</sup> The 'porosity'<sup>182</sup> of the notion of property has indeed allowed the Inter-American Court to infer a right to the collective property of indigenous communities over their water resources. By extension and beyond the indigenous communities' context, even when the distribution of water is in private hands, water might thus still be perceived as collectively owned by communities.

<sup>179</sup> See A Di Stasi, 'The Inter-American Court of Human Rights and the European Court of Human Rights: Towards a 'Cross Fertilization?'' (2014) *Ordine internazionale e diritti umani* 97. For Higgins, these two regional human rights courts often adopt a coordinated approach. See R Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *ICLQ* 4 791, 798.

<sup>180</sup> Although the Convention has been concluded under the auspices of the UN Economic Commission for Europe (ECE) and currently has 47 parties, it is open to accession by any non-ECE countries.

<sup>181</sup> See section III.A.2.  
<sup>182</sup> Borrowed from A Gear, 'Human Rights, Property and the Search for "Worlds Other"' (2012) 3(2) *JHRE* 173, 184–5.

Further coherence might yet be infused into the nascent regime of procedural water rights through the diffusion of the Aarhus Convention's generous practice regarding the definition of public authorities and their related responsibilities. The broad scope granted to the notion of public authority limits the capacity of private providers to escape democratic safeguards and ensures the effective guarantee of procedural and participatory rights in light of the public interest in the 'good'—ie, water—that they are distributing. Modelling the human rights regimes' case law for public authorities on the expansive interpretation offered by the Aarhus system would thus usefully complement the conceptualization of water as a public good. Beyond the potential systematization of the perception of water as a public good, increased convergence across the regional human rights and Aarhus systems undeniably contributes to the construction of a common and coherent regime of good water governance.<sup>183</sup>

Finally, the judicial practice of all of the regimes reviewed also clearly confirms, beyond the human rights dimension, the environmental dimension of the right to water. Water-related issues are indeed constantly examined as environmental claims in the ECHR context. The Aarhus and London Protocol systems explicitly link human rights and the environment. Further, as far as the ACHPR and IACHR are concerned, indigenous peoples' water claims in relation to their lands often involve not only access issues but also depletion as a natural resource or water pollution.<sup>184</sup> Ultimately, this strengthening of the procedural dimension of the right to water and the recognition of its close connection to environmental issues provide the potential to strongly influence the development of another closely connected area of law, that of international water management.<sup>185</sup>

<sup>183</sup> As Beyerlin rightly pointed out, 'The more the Aarhus principles and the participatory human rights are aligned with each other in essence, the greater the chance that in future both features may grow into a double-tracked concept that may be named "participatory equity".' See Beyerlin (n 73) 352.

<sup>184</sup> See in particular the *Ogoni people* case (n 105).

<sup>185</sup> O McIntyre, 'The Proceduralisation and Growing Maturity of International Water' (2010) 22 (3) JEL 475.