

## Defending Environmental Defenders

### Caselaw relevant to the protection of environmental journalists

Environmental journalists report on important and sensitive topics, including deforestation, illegal mining, land seizures and pollution. By investigating and uncovering private and state activities that impact adversely on the environment, they provide the public with essential information.

At the same time, they provide this critical service at a cost. In many parts of the world, environmental reporting is considered one of the most dangerous jobs in journalism, surpassed only by reporting on armed conflicts.<sup>1</sup> Environmental journalists are not only confronted with state-imposed restrictions when accessing information, but also face harassment, threats, arbitrary arrests and the criminalisation of their reporting. From 2018 to 2022 RSF documented more than fifty press freedom violations, including ten deaths, linked to environmental journalism.<sup>2</sup> It is estimated that the number of environmental journalists killed between 2009 and 2021 could be as high as thirty.<sup>3</sup>

The legal defence of environmental journalists is critical to ensure they can continue their reporting. This factsheet outlines some of the challenges faced by environmental journalists and highlights selected case law from different jurisdictions.

#### Access to Information

For journalists to effectively report on environmental matters and provide important information to the public, access to places, people and information is essential. However, domestic laws on national security, state secrecy and sedition are often misused to deny journalists and human rights defenders access to environmental and other information.<sup>4</sup>

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<sup>1</sup> GIJN, *Why Covering the Environment Means Risking Your Life in Many Parts of the World* (2 September 2021), available at <https://gijn.org/stories/why-covering-the-environment-means-risking-your-life-in-many-parts-of-the-world/>.

<sup>2</sup> RSF, *Red alert for green journalism – 10 environmental reporters killed in five years* (21 August 2020), available at [https://rsf.org/en/red-alert-green-journalism-10-environmental-reporters-killed-five-years#:~:text=A%20total%20of%2020%20journalists,%20and%20India%20\(4\)](https://rsf.org/en/red-alert-green-journalism-10-environmental-reporters-killed-five-years#:~:text=A%20total%20of%2020%20journalists,%20and%20India%20(4).).

<sup>3</sup> GIJN, *Why Covering the Environment Means Risking Your Life in Many Parts of the World* (2 September 2021), available at <https://gijn.org/stories/why-covering-the-environment-means-risking-your-life-in-many-parts-of-the-world/>.

<sup>4</sup> UN OHCHR, *Comentario a la declaración sobre el derecho y el deber de los individuos, los grupos y las instituciones de promover y proteger los derechos humanos y las libertades fundamentales universalmente reconocidos* (2016) p. 73-74, available at: [https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/ComentDeclDDH\\_WEB.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/ComentDeclDDH_WEB.pdf)

International courts and bodies have repeatedly held that information on activities with a potential environmental impact must be considered matters of public interest<sup>5</sup> and therefore subject to access to information legal requirements. Binding and non-binding international instruments expressly provide that states must facilitate access to information on environmental issues. This includes, for instance, Principle 10 of the Rio Declaration,<sup>6</sup> which stresses the importance of making environmental information widely available to the public and, on a regional level, the Aarhus Convention<sup>7</sup> in Europe, and the Escazú Agreement<sup>8</sup> for its Latin American and Caribbean signatory states.

International case law also supports effective access to environmental information. The Inter-American Court of Human Rights (IACtHR), for instance, held that access to such information enables the exercise of other rights, including public participation, and must therefore be provided in an “affordable, effective and timely” manner and without the need to prove direct interest or personal involvement.<sup>9</sup> Underlining the principle of maximum disclosure, the IACtHR found in the case of *Claude Reyes v. Chile* that the refusal to grant access to state-held environmental information constitutes an interference with freedom of expression and can only be justified if the cumulative conditions of the well-established three part test are met.<sup>10</sup>

Similarly, the European Court of Human Rights (ECtHR) has clarified that Article 10 of the European Convention on Human Rights, which enshrines freedom of expression, encompasses the right of the media and others to access public interest information held by the authorities in order to fulfil their role as public watchdog.<sup>11</sup> In *Guerra and others v Italy*, a case where 150 people suffered acute arsenic poisoning from leaks from a nearby chemical factory, the ECtHR found a violation of the applicants’ right to private and family life due to the state’s failure to provide the local population with essential information about the risks.<sup>12</sup>

In the African context, Article 24 of the African Charter on Human and Peoples’ Rights (Banjul Charter), which stipulates a right to a general satisfactory environment, has been interpreted as entailing the

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<sup>5</sup> IACtHR, *Advisory Opinion OC-23/17: The Environment and Human Rights* (15 November 2017), para 214; see also ECtHR, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 89, ECHR 2005-II and ECtHR, *Mamère v. France*, no. 12697/03, § 20, ECHR 2006-XIII.

<sup>6</sup> *Rio Declaration on Environment and Development* (12 August 1992), Principle 10, A/CONF.151/26 (Vol); available at <http://www.un-documents.net/rio-dec.htm>;

<sup>7</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (“Aarhus Convention”), Article 4, (25 June 1998), available at <https://unece.org/DAM/env/pp/documents/cep43e.pdf>

<sup>8</sup> *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* (“Escazú Agreement”) (4 March 2018), available at <https://repositorio.cepal.org/server/api/core/bitstreams/7e888972-80c1-48ba-9d92-7712d6e6f1ab/content>.

<sup>9</sup> IACtHR, *Advisory Opinion OC-23/17: The Environment and Human Rights* (15 November 2017), paras 217, 219-220.

<sup>10</sup> IACtHR, *Claude Reyes v. Chile* (19 September 2006), Serie C No. 151, paras 89-92.

<sup>11</sup> ECtHR, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, §§ 26-27, 38, 14 April 2009.

<sup>12</sup> ECtHR, *Guerra and Others v. Italy*, 19 February 1998, §§ 58-60 Reports of Judgments and Decisions 1998-I.

procedural right to access information affecting the environment to enable public participation in decisions with an environmental impact.<sup>13</sup>

### Strategic Lawsuits Against Public Participation

Environmental journalists also commonly face retaliation for their reporting in the form of strategic lawsuits against public participation (SLAPPs).<sup>14</sup> SLAPPs, often filed by powerful individuals or public officials, are meritless and abusive lawsuits intended to silence critical speech on matters of public interest. Taking many different forms, the common denominator of these suits is the attempt to intimidate journalists and divert their attention away from reporting by subjecting them to lengthy and expensive litigation.

Some jurisdictions, such as Canada, the United States and the EU, have adopted or are in the process of adopting so-called anti-SLAPP legislation. With provisions like the early dismissal of manifestly unfounded claims or remedies against abusive court proceedings, these laws must carefully balance the right to access justice with freedom of expression. While such legislative developments generally strengthen the legal protection for journalists, SLAPPs continue to pose a challenge for environmental reporting in many parts of the world.

The abusive nature of SLAPPs and their detrimental effect on the exercise of freedom of expression have been recognised by international and domestic courts. The IACtHR, for example, held that SLAPPs constitute “an abusive use of judicial mechanisms that must be regulated and controlled by the States, with the aim of allowing effective exercise of freedom of expression.”<sup>15</sup>

In a case concerning defamation suits filed by several mining companies against activists and their lawyers in relation to statements critical of their mining operations, the High Court of Cape Town noted the “glaringly obvious” power imbalance and found that suit was not “genuine and *bona fide*, but merely a pretext with the only purpose to silence its opponents and critics.”<sup>16</sup> This judgment was later upheld

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<sup>13</sup> Amechi, Polycarp Emeka, *Enhancing Environmental Protection and Socio-Economic Development in Africa: A Fresh Look at the Right to a General Satisfactory Environment under the African Charter on Human and Peoples’ Rights* (2009), LEAD Journal 5/1, p. 63, available at <https://lead-journal.org/content/09058.pdf>; Lugard, Sunday Bontur, *The human right to a satisfactory environment and the role of the African Court on Human and Peoples’ Rights* (2021) KAS African Law Study Library, p. 404, 410, available at <https://www.nomos-elibrary.de/10.5771/2363-6262-2021-3-402.pdf>.

<sup>14</sup> See for instance European Parliament, *Resolution 2021/2036 on strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society* (11 November 2021), M. and N., available at [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0451\\_EN.html#def\\_1\\_25](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0451_EN.html#def_1_25).

<sup>15</sup> IACtHR, *Palacio Urrutia v. Ecuador* (24 November 2021), Serie C No. 446, para 95.

<sup>16</sup> South African High Court of Cape Town, *Mineral Sands Resources (Pty) Ltd and Another v Reddell and Others*, (7595/2017 and others) [2021] ZAWCHC 22, paras 60, 66.

by the Constitutional Court,<sup>17</sup> and the Pietermaritzburg High Court<sup>18</sup> has recently accepted the SLAPP defence in a criminal case. In Colombia, the Constitutional Court declared a law which facilitated SLAPPs unconstitutional.<sup>19</sup>

### Persecution and criminalisation

Beyond SLAPP suits, environmental journalists also face numerous other types of legal harassment, including the criminalisation of their work. Criminal provisions, such as in defamation laws, are often misused to silence journalists and create a chilling effect on public interest reporting.<sup>20</sup> Criminal defamation laws, particularly when they result in the imposition of a prison sentence, amount to a disproportionate interference with freedom of expression.

This view is shared by numerous international courts and bodies. For instance, the UN Human Rights Committee, finds imprisonment to never be an appropriate penalty for defamation and advocates for the decriminalisation of defamation.<sup>21</sup> The ECtHR also generally considers prison sentences for exercising freedom of expression to be disproportionate.<sup>22</sup> It has also described the imposition other sanctions, including a fine, as “a kind of censure”, deterring both the convicted journalist as well as others from contributing to public interest debates.<sup>23</sup>

In the context of defamation laws, the IACtHR recognised the chilling effect that both criminal convictions and civil sanctions have on the work of journalists.<sup>24</sup> It also found that the conviction with a one-year suspended prison sentence and the imposition of a fine over critical comments about a judicial investigation were disproportionate and constituted an unjustified interference with freedom of expression.<sup>25</sup> The Inter-American Commission recently also condemned the criminalisation of environmental defenders through the misuse of criminal laws more generally and underlined the states’

<sup>17</sup> South African Constitutional Court, *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* (CCT 66/21) [2022] ZACC 37 (14 November 2022).

<sup>18</sup> South Africa, Pietermaritzburg High Court, *Maughan v. Zuma* (7 June 20223), case 12770/22P.

<sup>19</sup> Colombian Constitutional Court, Case C-135/21 (13 May 2021).

<sup>20</sup> See for instance: PACE, *Towards decriminalisation of defamation*, Resolution 1577 (4 October 2007), available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>.

<sup>21</sup> UN Human Rights Committee (HRC), *General Comment No 34: Article 19: Freedoms of opinion and expression* UN Doc CCPR/C/GC/34 (12 September 2011), para 47; see also UN HRC, *Concluding Observations on Italy*, 24 April 2006 CCPR/C/ITA/CO/5 par. 19 and UN HRC, *Communication No. 1815/2008, Adonis v The Philippines*, Views adopted by the Committee at its 103rd session (17 October–4 November 2011), par. 7.9-10.

<sup>22</sup> ECtHR, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 115-116 ECHR 2004-XI; *Paraskevopoulos v. Greece*, no. 64184/11, §§ 42-43, 28 June 2018; *Sallusti v. Italy*, no. 22350/13, §§ 59, 62, 7 March 2019.

<sup>23</sup> ECtHR, *Lingens v. Austria*, 8 July 1986, § 44, Series A no. 103.

<sup>24</sup> IACtHR, *Palacio Urrutia v. Ecuador* (24 November 2021), Serie C No. 446, paras 124-125, 160.

<sup>25</sup> IACtHR, *Kimel v. Argentina* (2 May 2008), Serie C. No. 177, para 94.

obligations to respect the rights of environmental defenders, prevent acts of violence against them, protect their rights and investigate, and prosecute and punish crimes committed against them.<sup>26</sup>

In a similar approach, the African Commission on Human and Peoples' Rights has made it clear that no one should be subjected to sanctions or other harm for publishing information on wrongdoing or serious threats for, *inter alia*, the environment in good faith.<sup>27</sup> Both, the Commission<sup>28</sup> and the African Court<sup>29</sup> recognised the detrimental effect criminal defamation laws have on freedom of expression. Similar positions were taken by regional and national courts, including the ECOWAS Court,<sup>30</sup> the High Court of Kenya<sup>31</sup> and the Constitutional Court of Zimbabwe.<sup>32</sup>

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<sup>26</sup> OAS, *IACHR Publishes Report on Situation of Environmental Defenders in Northern Central American Countries* (25 April 2023), available at [https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media\\_center/preleases/2023/076.asp](https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/076.asp).

<sup>27</sup> ACHPR, *Declaration of Principles on Freedom of Expression and Access to Information in Africa* (10 November 2019), Principle 35(1), available at <https://achpr.au.int/en/node/902>.

<sup>28</sup> ACHPR, *Resolution on Repealing Criminal Defamation Laws in Africa* (10–24 November 2010), available at <https://achpr.au.int/en/adopted-resolutions/169-resolution-repealing-criminal-defamation-laws-africa-achpres169xlvii>.

<sup>29</sup> ACtHPR, *Lohe Issa Konaté v Burkina Faso* (5 December 2014) App. No. 004/2013.

<sup>30</sup> ECOWAS Court, *Federation of African Journalists and Others v. The Gambia* (13 February 2018), ECW/CCJ/APP/36/15.

<sup>31</sup> High Court of Kenya, *Okuta v. Attorney General* (6 February 2017), [2017] eKLR (Petition No. 397 of 2016).

<sup>32</sup> Constitutional Court of Zimbabwe, *Madanhire v. Attorney-General* (12 June 2014), Judgment No. CCZ 2/14.