

# IN THE AARHUS CONVENTION COMPLIANCE COMMITTEE

in the case of

*Umwelthilfe v. Germany*

Case no. ACCC/C/2023/203

## **AMICUS CURIAE SUBMISSIONS**

**by**

**AGORA INTERNATIONAL HUMAN RIGHTS GROUP and**

**HUMAN RIGHTS LAW NETWORK**

### **A. INTRODUCTION**

1. These submissions are made by Agora International Human Rights Group (Russia) and Human Rights Law Network (India). The organisations are members of the International Network of Civil Liberties' Organizations.<sup>1</sup> The details on individual intervening organizations are provided in the appendix.
2. The intervening organisations have been involved in advocacy and litigation concerning environmental rights and climate change in their respective countries and internationally. Their impact led to the development of domestic and international standards of protection of environmental rights as human rights. Most recently, they made submissions within the framework of advisory proceedings on climate emergency and human rights before the Inter-American Court of Human Rights and had submitted an opinion on States Obligation to Climate Change to the International Court of Justice.
3. The present case concerns the legal requirements for public consultations. It is important for society to engage and consider in the major decision-making process that the public has the right to access the environment and to participate in it. Rather than considering the bureaucratic process of decision-making as a top-down

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<sup>1</sup> [www.inclo.net](http://www.inclo.net)

paradigm, the focus is on consulting the people of society who would be impacted by the choice in order to arrive at a well-informed and inclusive decision. A key component of a sustainable and inclusive environmental, democratic & human rights process is the community's right to participate in decisions on infrastructure, including the removal of significant numbers of trees from urban neighbourhoods, any other developmental projects and other environmental issues.

4. The interveners will deal with the obligation to conduct public consultations and hearings under international law. They will also demonstrate the current state of public consultations vis-a-vis comparative law & municipal law.

## **B. PUBLIC PARTICIPATION IN INTERNATIONAL LAW**

5. Reference to public participation is made in a number of international legal instruments including:
  - UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) which provides for the participation of the public in the areas likely to be affected by a proposal (article 2, paras 2 and 6, and article 4, para 2);
  - The United Nations Framework Convention on Climate Change 1992 (UNFCCC), which requires Parties to promote and facilitate public participation in addressing climate change and its effects and developing adequate responses (article 6 (a) (iii)). At the level of UNFCCC, participation of all can be seen at Conference of Parties (COP) wherein extensive deliberations are facilitated by COP secretaries among the nation states/parties so that climate negotiations can set out desired goals. Thirty two years down the line, the time has now come to assess how public participation on Climate Change has mattered to nation states in their respective domestic settings. Deliberations with all the nation states, participation of all, transparency and consensus based decision making is at the heart of Climate negotiations. Article 6 of the Convention seeks to reduce the impact of climate change by enabling society to be a part of the solution. Furthermore, what also requires assessment is how national parliaments decide on climate targets as well as implementation of the goals as set out in UNFCCC.
  - Principle 10 of the Rio Declaration on Environment and Development (1992) which states that each individual shall have the opportunity to participate in decision-making processes, facilitated by the widespread availability of information; and

- The UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in International Environmental Matters (Aarhus) (1998) is the most comprehensive legal instrument relating to public involvement. It describes how public participation should work in cases of decision-making. The main text indicates that public participation should be effective, adequate, formal, and provide for information, notification, dialogue, consideration and response;
  - The Escazu Agreement went into effect on 22 April 2022, Earth Day, which is a momentous occasion for open and inclusive decision-making in environmental governance. Adopted in 2018 to "promote environmental democracy, cooperation, and capacity-building," the Escazu Agreement, a regional agreement on access to information, public participation, and justice in environmental matters throughout South America and the Caribbean.
6. Inspired by the aforementioned, several international legal instruments establish clear connections between public participation and the accomplishment of environmental law goals. Reiterating the necessity of public engagement in environmental decision-making is the goal of the 1998 Convention on Access to Information, Public engagement in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). States must, among other things, incorporate public involvement in decision-making about a variety of particular development activities.
  7. Public involvement and information access have been highlighted as instruments for sustainable development in Principle 10 of the Rio Declaration of 1992. According to Principle 10, environmental issues are best handled when all concerned citizens participate at the appropriate level. At the national level, every individual should have reasonable access to the environmental information held by public bodies, including information about hazardous materials and activities in their communities, and they should be given the opportunity to participate in decision-making processes. States are to facilitate and encourage public awareness and participation by ensuring that information is easily accessible. The public is to have access to effective legal and administrative procedures, including remedies for recourse and redress.
  8. Even in the Strasbourg Principle of International Environmental Human Rights Law, it has been enumerated in *principle number 7*, that everyone has a right to a safe, clean, healthy and sustainable environment adequate for their health, well-being, dignity, culture and flourishing (right to a safe, clean, healthy and sustainable environment).

9. Advisory Opinion OC-23/17 of the Inter-American Court of Human Rights of 15 November 2017 reiterates the well-established rule in international human rights law that the decision-making in environmental matters should include consultations with the individuals concerned (see paras. 165-166). This obligation extends to decisions made on climate policies.
10. Most recently, in *Kotov and others v. Russia* the European Court of Human Rights accepted that a mere fact of holding consultations would suffice for the State to discharge of its obligations under Article 8 of the European Convention which protects the right to private life (nos. 6142/18 *et al.*, 11 October 2022, para. 132).
11. The Public Participation Directive 2003/35/EC provides for public participation with respect to formulating certain plans and programmes relating to the environment. Provisions for public participation in environmental decision-making are also found in a number of environmental directives, such as the Environmental Impact Assessment Directive 85/337/EEC and the Strategic Environmental Assessment Directive 2001/42/EC. Directive 2003/35/EC Art 2(2) required Member States ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions.

### **C. PUBLIC CONSULTATIONS IN MUNICIPAL LAW**

12. Domestic courts routinely expose a high threshold for the authorities to meet when consulting the communities concerned by its policies. This section will deal with the cases from outside the Aarhus Convention's *espace juridique*, to inform the Committee's interpretation of the Convention in a wider context. The examples of Kenya, South Africa and India will be dealt with in turn.

#### **a. Kenya**

13. An example of stringent domestic requirements for public participation is the Supreme Court of Kenya which in the leading judgment of *British American Tobacco PLC v. Cabinet Secretary for the Minister of Health and others* set out the criteria that the public consultations have to meet to be regarded as genuine (Petition 5 of 2017, [2019] eKLR at para. 96). The criteria are as follows:

(i) Public participation applies to all aspects of governance.

(ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

(iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is a need for both quantitative and qualitative components in public participation.

(v) Public participation is not an abstract notion; it must be purposive and meaningful.

(vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix) Components of meaningful public participation include the following:

- a. clarity of the subject matter for the public to understand;
- b. structures and processes (medium of engagement) of participation that are clear and simple;
- c. opportunity for balanced influence from the public in general;
- d. commitment to the process;
- e. inclusive and effective representation;
- f. integrity and transparency of the process;
- g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

14. Importantly, the Supreme Court of Kenya underscored that the industry that is likely to profit from a governmental decision should be kept at length from the public consultations for the consultations to remain meaningful (*ibid.*, at 107-108). A recent reform was invalidated by the High Court of Kenya at Nairobi for the reason that the public consultations were limited to a half of the proposals of the reform

(*Matindi and others v. President of the Republic of Kenya and others* [2023] KEHC 19534, 3 July 2023, para. 220).

## **b. South Africa**

15. The High Court of South Africa (Eastern Cape Division) at Makhanda struck down licences issued after the public consultations conducted only with the leaders of the communities concerned, but not with members thereof, and without making any proper notice of the proposed industrial activity (*Sustaining the Wild Coast NPC et al. v. Minister of Mineral Resources and Energy et al.*, Case no. 3491/2021, 1 September 2022, at 92 and 99).
16. *Section 24* of the Constitution of South Africa contains the environmental rights of citizens. A requirement for public engagement in environmental decision-making at all levels is implied by which calls for the government to take proactive action through acceptable legislation and other measures. The right to just administrative action (*section 33*) and the right to information access (*section 32*) are two additional constitutional rights that bolster the latter notion.
17. According to *Section 2(4)(f)*, it is mandatory to ensure that vulnerable and disadvantaged individuals have the opportunity to participate in environmental governance and to promote the involvement of all interested and affected parties. Additionally, everyone must have the understanding, skills, and capacity needed to achieve equitable and effective participation. The latter is reinforced by *Section 2(4)(g)*, which declares that all interested and affected parties' interests, needs, and values must be taken into consideration when making decisions. This includes acknowledging all types of knowledge, including customary and common knowledge.
18. Public participation in policy-making must be encouraged, and openness must be promoted by giving the public timely, accurate, and accessible information, according to *Sections 195(e) and (g)*, which outline these two fundamental concepts and values regulating public administration.
19. Other documents that further support the constitutional framework include the *National Environmental Management Act 107 of 1998 (the NEMA)*, the *National Environmental Management: Waste Management Bill of 2007*, the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)*, and the *Promotion of Access to Information Act 2 of 2000 (PAIA)*. These documents are among those that support the *National Environmental Management Act 107 of 1998 (the NEMA)*. Among other things, the NEMA is the main environmental management framework law in South

Africa and it includes several environmental principles. To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.

20. In South Africa, the function of municipalities or local authorities in promoting public participation in decision-making in general is given special attention. Consequently, the constitutional framework is reinforced by the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) and the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act).
21. According to the Integrated Pollution and Waste Management of South Africa of 2000 (*IPWM White Paper*), negotiated rule-making and consensus-based methods will be used to increase public participation. The White Paper lists meeting public needs and promoting public involvement in environmental governance by facilitating a mutual exchange of opinions and concerns between the public and the government as essential elements of good governance and as a unique aspect of the duty of government to implement section 24 environmental rights in the constitution. The South African government made an effort to avoid only establishing a legally imprecise and broadly applicable request for public engagement in the Draft National Policy Framework. A variety of public involvement principles are outlined in the Draft National Policy Framework along with examples of tools and techniques that local governments are expected to use to put them into practice.
22. A public campaign against the construction of a fuel service station and convenience shop on an ecologically vulnerable wetland was to be stopped, but the court rejected the plea in *Petro Props (Pty) Ltd v. Barlow and Another* [2006] ZAGPHC 46; 2006 (5) SA 160 (W). In essence, the respondent's *section 16* constitutional right to freedom of expression was pitted against the applicant's *section 25* constitutional property right. The respondent and her companions behaved in a completely peaceful manner with the intention of promoting balanced public involvement, the court decided, and their motives had been unselfish. The court rightly stated that no decision-making authority or procedure under the *Environment Conservation Act of 1989* could be shielded from public discussion or the filing of representations. It also expressed a desire to avoid creating an environment that would discourage citizens with environmental concerns from taking an active role in their community.

### c. India

23. The Environmental Impact Assessment Notifications (EIA Notifications) from 1994 onwards in India included the obligation for community engagement over projects that will harm them. Public involvement requirements were included in later iterations of the EIA Notification. Furthermore, the innovative Forest Rights Act of 2006 has strong roots that required democratic decision-making. However, these legal tools have seldom demonstrated in practice a willingness to be inclusive in the process of making decisions. Public engagement in large-scale projects with environmental implications is now required under the EIA Notification. However, in many situations, involvement is disregarded and viewed as only a formality. The importance of public participation is examined and highlighted by case laws like *Adivasi Kisan Ekta Sanghatan v Ministry of Environment, APPEAL NO. 3/2011 (T) (NEAA No. 26 of 2009)*, which occurred when the EIA process did not include the effective participation of the relevant parties. The National Green Tribunal (NGT) in *Adivasi Kisan Ekta Sanghatan's case* has ordered the cancellation of the Environmental Clearance ("EC") granted to Jindal Steel and Power Limited ("JSPL") for its Gare- IV/6 Coal Mining Project and Pithead Coal Washery, located at Raigarh District in Chhattisgarh. The NGT concluded that the EC was granted without a proper public hearing being conducted and as a result, the entire environmental impact assessment procedure had been vitiated. In another matter wherein the fishermen have protested the Mumbai coastal road project due to a lack of public participation. The Bombay High Court had to intervene to correct the error since the livelihood and environmental impact on fishermen and the coastal marine environment were not given enough consideration.
24. Another example of the legislation which is ensuring public participation particularly of the forest dwelling community whenever the government proposes any mega projects such as mining and infrastructure expansion, is the The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 popularly known as *Forest Rights Act of 2006*. When a proposed operation has the potential to force a group of people living in forests to relocate or negatively affect them, they have the right to participate in the decision-making process, according to the *Forest Rights Act of 2006*. It recognizes the rights of the forest dwelling tribal communities and other traditional forest dwellers to forest resources, on which these communities were dependent for a variety of needs, including livelihood, habitation and other socio-cultural needs. Any construction of infrastructure or mining operations should adhere to the requirements of the free prior informed consent principle. "Free informed consent of the Local Government in the areas concerned to the proposed resettlement and the package has been obtained in



writing," according to *Section 4(2)(e) of the Forest Rights Act, 2006*, is stipulated. A higher degree of participation is weighed in by the Local Government, which constitute the legally recognized village unit and are made up of every member of the electorate.

25. The Supreme Court had to step in the *Orissa Mining Corporation Ltd vs Ministry Of Environment & Forest & Ors* [2013] 6 S.C.R. 881 also known as *Niyamagiri case* to protect the Dongria Kondh community's right to free and prior informed consent and to oppose a proposed mining extraction project that would have an adverse effect on their way of life and culture. The issue in the aforementioned case involved the Orissa Mining Corporation (OMC), a State of Orissa Undertaking, which had approached the Supreme Court for seeking quashing of the order passed by the Ministry of Environment and Forests (MOEF) dated 24.8.2010 rejecting the Stage-II forest clearance for diversion of 660.749 hectares of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in Kalahandi and Rayagada Districts of Orissa and for other consequential reliefs. The submission before the apex court of India was also concerning the issue of inadequate hearing to the public at large, which were the Scheduled Tribes and forest tribes of the said area, which was done just as a box-ticking exercise. The Ministry of Tribal Affairs, Government of India submitted in Court that, in Paragraph 49 (VI) (c) in order to generate awareness about the various provisions of the Act and the Rules, especially the process of filing petitions, the State Government should organize public hearings on local bazaar days or at other appropriate locations on a quarterly basis till the process of recognition is complete. It will be helpful if some members of the Sub Divisional Level Committee are present in the public hearings. The Gram Sabhas also need to be actively involved in the task of awareness raising. Considering the submissions, the aforementioned court passed the following directions:

60. We are, therefore, inclined to give a direction to the State of Orissa to place these issues before the Gram Sabha with notice to the Ministry of Tribal Affairs, Government of India and the Gram Sabha would take a decision on them within three months and communicate the same to the MOEF, through the State Government. On the conclusion of the proceeding before the Gram Sabha determining the claims submitted before it, the MoEF shall take a final decision on the grant of Stage II clearance for the Bauxite Mining Project in the light of the decisions of the Gram Sabha within two months thereafter.

62. The proceedings of the Gram Sabha shall be attended as an observer by a judicial officer of the rank of the District Judge, nominated by the Chief Justice of the High Court of Orissa who shall sign the minutes of the proceedings, certifying that the proceedings of the Gram Sabha took place independently and completely

uninfluenced either by the Project proponents or the Central Government or the State Government.

Thus, from the mere perusal of the operative part of the judgement highlights the importance of public hearings in the true sense and not just as a box-ticking, but in a manner wherein the public at large can make an informed decision.

26. In the case of *Hanuman Laxman Aroskar v. Union of India* AIR ONLINE 2020 SC 32 the environmental approval for an airport in the State of Goa was suspended by the Supreme Court of India, which also mandated that the clearance be reviewed by the government. In the Supreme Court, petitioners contested the approval because the government neglected to consider environmental concerns that were essential to the environmental assessment process, and the Court suspended the airport's environmental clearance. The Supreme Court argued that fundamental to the outcome of this case is a quest for environmental governance within a rule of law paradigm. The Paris Agreement and India's Nationally Determined Contribution to the Paris Agreement were highlighted by the Court as important components of India's environmental rule of law and as justifications for the government's need to appropriately strike a balance between environmental concerns and airport development objectives. The Supreme Court removed its suspension of the environmental clearance on January 16, 2020, following more representations from the proponents of the airport project, thus enabling the airport project to proceed. In response to the additional environmental impact information submitted, which included a pledge to turn the airport into a "zero carbon airport operation," the government increased the environmental restrictions placed on the project. The Court reasoned that the issues raised in its 2019 ruling had been sufficiently resolved by the administration. This shows acknowledgement of environmental concerns in India but fails to give the public an efficient say in the process.

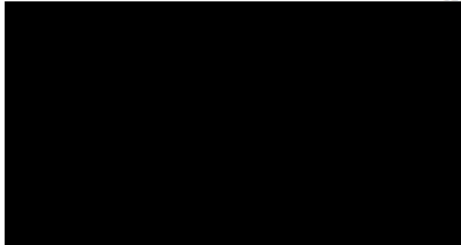
#### **D. CONCLUSION**

27. Public participation stands as a cornerstone in environmental governance, serving as a vital mechanism to foster transparency, inclusivity, and accountability in decision-making processes. By actively engaging citizens, communities, and stakeholders in environmental matters, governments can harness diverse perspectives, local knowledge, and collective wisdom to formulate more effective policies, mitigate adverse impacts, and ensure sustainable development. Empowering individuals with access to information, avenues for meaningful engagement, and opportunities for redress not only strengthens environmental

stewardship but also upholds democratic principles and reinforces the fundamental right to a healthy and sustainable environment. In essence, public participation not only enhances the quality and legitimacy of environmental decisions but also cultivates a sense of ownership and responsibility among citizens towards protecting and preserving the planet for current and future generations.

28. This needs to be ensured by the government in a real sense and not just superficially. Real consent and participation of the people need to be ensured by the government. In addition special measures need to be taken to ensure effective public participation from the marginal section of the society because they are directly dependent and connected with the environment for their existence.

Respectfully submitted,  
this 3rd of July 2024

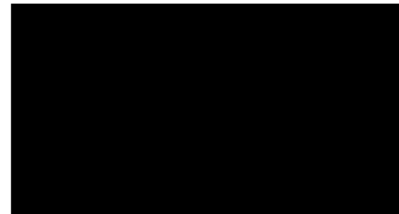


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## **ANNEX: Information on the interveners**

### **Agora International Human Rights Group**

Agora is an association of more than 100 lawyers and other legal professionals working on landmark human rights cases domestically and internationally. Agora permanent legal teams working in Moscow, Saint Petersburg, Sochi, Kazan, Nizhniy Novgorod, Stavropol, Yekaterinburg, Chelyabinsk, Lipetsk, Chita, and other cities in Russia and abroad. A response unit that handles incidents involving human rights violations operates across the entire European part of Russia. Agora is currently representing applicants in several hundred applications brought before the European Court of Human Rights (ECHR). They also provide support to political immigrants, persons who have been forced to leave Russia due to persecution by the authorities and asylum seekers. Agora is also active across post-Soviet States where the negative impact of Russian authorities on the human rights situation is strongly felt.

### **Human Rights Law Network (HRLN)**

HRLN is a collective of lawyers and social activists dedicated to the use of the legal system to advance human rights, struggle against violations, and ensure access to justice for all in India. Today, the HRLN has evolved into a nationwide network of more than 200 lawyers, paralegals, and social activists spread across 26 states/union territories working on access to justice for marginalised individuals and communities. In collaboration with effective communities, NGOs and the judiciary HRLN provides pro-bono legal services to those with little or no access to the justice system, conducts litigation in the public interest, engages in advocacy, runs help-lines, conducts legal awareness programs, sensitizes the judiciary, investigates violations and deploys crisis-intervention teams, plans People's Tribunals, publishes 'know your rights' materials, participates in campaigns, and proposes solutions to some of India's foremost social problems.