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2010

International Decision: Tatar c. Roumanie, App. No. 67021/01...European Court of Human Rights, Jan. 27, 2009

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Recommended Citation

Dinah L. Shelton, International Decisions: Tatar c. Roumanie, 104 AM. J. INT'L L. 247 (2010).

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This interpretation of the relevant provisions seemingly proceeds on the assumption, or could be interpreted to mean, that the intent and knowledge components of mens rea apply disjunctively. In this writer's opinion, however, that position is mistaken. Guilty knowledge (awareness of the wrongful consequences of one's act) is an essential component of mens rea in the sense of *dolus* (in contradistinction to *culpa*). Furthermore, since the severity of the pain and suffering inflicted is a decisive criterion for distinguishing torture from cruel and inhuman treatment or punishment, it is reasonable to expect that a conviction for acts of torture requires proof of intent *and* knowledge of all the elements of that crime on the part of the accused. "Unless otherwise provided" distinguishes between different manifestations of fault—for example, negligence or special intent—and was not intended to split the definition of intent into segments that, each on their own, do not amount to *dolus* at all.

The ICC Statute upholds universally recognized principles of criminal justice almost to a fault. To cite a representative sample of the Statute's provisions, definitions of crimes within the ICC's jurisdiction must be strictly construed and may not be extended by analogy (Article 22(2)); in the case of ambiguities, the relevant definitions must always be interpreted in favor of the accused (*id.*); mental disease and intoxication are recognized, in appropriate circumstances, as grounds for exculpation (Article 31(1)(a) and (b)); a mistake of law does exclude criminal responsibility if it negates the mental element of the crime (Article 32(2)); the burden of proof is on the prosecutor (Article 66(2)); and in no circumstances can an onus of rebuttal be imposed on the accused (Article 67(1)(i)).

Persons schooled in a criminal justice system that deviates from these principles *in favorum libertatis* may find some of them unacceptable, and analysts from common law countries have frequently attempted to interpret the mens rea provisions of the ICC Statute as conforming to their own national biases. In *Bemba*, the pretrial chamber felt constrained to remind us that one should not "substitute the concept of *de lege lata* [the law as it is] with the concept of *de lege ferenda* [the law as it ought to be] only for the sake of widening the scope of Article 30 of the [ICC] Statute and capturing a broader range of perpetrators" (para. 369).

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Human rights—environmental harm—precautionary principle—causation—just satisfaction

TĂTAR C. ROUMANIE, App. No. 67021/01. *At* http://www.echr.coe.int.
European Court of Human Rights, January 27, 2009.

Vasile Gheorghe Tătar and Paul Tătar, Romanian father and son, asserted that the use of sodium cyanide in the gold-mining processes carried out by S.C. Transgold S.A. Baia Mare (formerly S.C. Aurul S.A. Baia Mare) endangered their lives—in particular, by causing or aggravating the son's asthma. The applicants claimed that the Romanian authorities' failure to halt the harmful activity constituted a breach of Article 2 (right to life) of the European Convention on Human Rights and Fundamental Freedoms[1] (Convention). In a prior phase of the

[1] Nov. 4, 1950, ETS No. 5, 213 UNTS 222. The decisions of, and basic texts relating to, the European Court of Human Rights are available at the Court's Web site, http://www.echr.coe.int.

litigation, in July 2007, the European Court of Human Rights declared the case admissible,[2] ruling that the complaints should be examined under Convention Article 8 (right to respect for private and family life)[3] rather than under Article 2.[4] In this judgment, a chamber of the European Court unanimously held that Romania had violated Article 8 of the Convention in respect to the two applicants.[5]

An Australian mining company obtained a license in 1998 to exploit the Baia Mare gold mine, located in the town where the applicants then lived and in the vicinity of their home. The written evidence submitted and testimony at a public hearing held by the European Court revealed a lack of public information and participation prior to the decision taken by the authorities.

In January 2000, a holding dam at the mine was breached. According to a study undertaken by the United Nations Environment Programme, the incident released into the environment contaminated tailings water containing between fifty and one hundred tons of cyanide, causing environmental damage locally as well as in Hungary and Serbia-Montenegro. Despite this disaster, S.C. Aurul S.A. did not halt its operations, nor did the government adopt measures to mitigate the damage.

After the accident Vasile Gheorghe Tătar filed various administrative complaints in Romania concerning the risk incurred by him and his family as a result of the use of sodium cyanide by the company in its extraction process. He also questioned the validity of the company's operating license. The Ministry of the Environment took no action, responding that the company's activities did not constitute a public health hazard. An effort to initiate criminal proceedings was similarly unsuccessful. No judicial order or decision concerning the other complaints was issued. Local remedies proving unsuccessful, the applicants applied to the European Court within six months of the incident.

On these facts, the Court reiterated earlier holdings[6] that pollution can interfere with a person's private and family life by harming his or her well-being (paras. 85–88). Under Article 8 of the Convention, the state has a duty to ensure the protection of its citizens by regulating the authorizing, setting up, operating, safety, and monitoring of industrial activities, especially activities that are dangerous to the environment and human health.[7]

[2] Tătar c. Roumanie, App. No. 67021/01 (Eur. Ct. H.R, July 5, 2007) (reçevable).

[3] Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Notably, while the reference is to the home, the cases largely concern threats to the health and well-being of persons, and not to property values. Article 8 is invoked much more often in cases of environmental harm than is the right to peaceful enjoyment of property guaranteed by Article 1 of Protocol 1.

[4] Summarized in this judgment, *infra* note 5, at para. 71.

[5] Tătar c. Roumanie, App. No. 67021/01 (Eur. Ct. H.R. Jan. 27, 2009) (final version issued July 6, 2009) (in French).

[6] *See, e.g.*, Lopez Ostra v. Spain, 303-C Eur. Ct. H.R. (ser. A) (1994); Fadeyeva v. Russia, 2005-IV Eur. Ct. H.R; Taskin v. Turkey, 2004-X Eur.Ct. H.R.

[7] Oneryildiz v. Turkey, 2004-XII Eur. Ct. H.R (Grand Chamber).

The Court had no doubts concerning either the medical condition of Paul Tătar, who was diagnosed with asthma in 1996 and who required medical assistance, or the toxicity of sodium cyanide (para. 103). It also accepted that the pollution detected by international organizations in the vicinity of the applicants' home following the environmental accident was in excess of that allowed by law. The Court found, however, that current scientific knowledge was not sufficiently certain to demonstrate a causal link between exposure to sodium cyanide and asthma. It nonetheless concluded that the applicants had demonstrated the existence of a serious and material risk to their health and well-being; this risk engendered, in turn, a duty on the part of the state to undertake an assessment, both at the time that it granted the operating permit and subsequent to the accident, and a duty to take appropriate measures to mitigate the risks revealed (paras. 104–07).

The Court noted that the documentation that the Australian enterprise initially presented to the Romanian authorities did not conform to Romanian legislation. The government thus commissioned its own preliminary impact assessment in 1993. Acknowledging a degree of scientific uncertainty, the study indentified risks for the environment and human health from the mining activity. The Romanian company conducting the assessment could identify no risk of cyanide poisoning in the absence of an accident, assuming that regulations were followed. Given the already heavy industrial pollution in the region and the economic advantages of the mine (approximately $8.8 million per year for the state, along with fifty-four new jobs), the assessment concluded that the proposed mining would have no significant impact on the characteristics of the region (para. 19).

In contrast, the European Court held that, given the risks involved, the operating conditions laid down by the Romanian authorities had been inadequate to preclude the possibility of serious harm (para. 112). In particular, the fact that the company had been able to continue its industrial operations by obtaining further authorizations after the January 2000 accident constituted a breach of the precautionary principle, according to which the absence of certainty with regard to current scientific and technical knowledge could not be used to justify any delay by the state in adopting effective and proportionate measures in response to the risks.

In the Court's view, beyond undertaking risk assessments and adopting responsive measures, the authorities had to ensure public access to the conclusions of the investigations and studies. The state also had a duty to guarantee the right of members of the public to participate in the decision-making process concerning environmental issues. The Court stressed that the failure of the Romanian government to inform the public—in particular, by not making public the 1993 impact assessment on the basis of which the operating license had been granted—had made it impossible for members of the public to challenge the results of that assessment (paras. 115–24). This lack of information had continued after the accident of January 2000.

The Court concluded that the Romanian authorities had failed in their duty to assess the risks that the company's activity might entail, and to take suitable measures in order to protect the rights of those concerned (paras. 112, 125). In particular, Romania had violated the applicants' right to respect for their private lives and homes within the meaning of Article 8 and, more generally, their right to enjoy a healthy and protected environment, as guaranteed by the Romanian Constitution.

The Court awarded the applicants €6266 for costs and expenses. It dismissed, by five votes to two, their claim for other just satisfaction (paras. 126–36).

* * * *

The European Court of Human Rights has found violations of Convention Article 8 in recent years, concluding that governments had failed to take the actions necessary to counter substantial risks of harm to individuals due to pollution. With each case, the Court has given further detail to states' positive obligations to prevent or mitigate the risks of harm from hazardous activities.[8] As the present case illustrates, the Court has increasingly relied on international environmental law as a basis for determining the adequacy of measures taken by the respondent government. It is likely that the Court has done so on the basis of its consistently stated principle that the Convention's guarantees must be made "real and effective." For Article 8 to be an effective guarantee, the Court cannot defer entirely to decisions of states parties concerning the permissibility or conduct of industrial activities. It must also be noted, however, that the Court grants a wide margin of appreciation in relation to economic decisions and that it often refers to its lack of expertise to substitute its judgment for that of the government.[9]

The solution increasingly adopted by the Court is to insist that each government comply with the state's own environmental laws and constitutional guarantees, its international treaty obligations, and accepted norms and principles of international environmental law. Although the Court does not refer to these norms and principles as customary international law, it does refer to Stockholm Principle 21 and Rio Principle 14 in recalling the general obligation ("le devoir général") of authorities to discourage and prevent transboundary environmental harm (para. 111). Although neither Hungary nor Serbia were parties to this litigation against Romania, the transboundary damage that the two states suffered is notably referred to when the Court affirms the duty to prevent transboundary environmental harm as an obligation of international law (*id.*).

In this case, the Court explicitly states that Romanian authorities should have applied, apart from national legislation, existing international environmental norms, including the precautionary principle, which the Court finds has become binding European law (para. 112). The case also continues the Court's line of environmental decisions that rely on international expert bodies rather than national ones to determine safe levels of pollutants. Finally, the judgment is noteworthy because the Court affirms that states that have included a right to a safe and balanced environment in their constitutions, as Romania has done, must give effect to and enforce that right.

Continuing the broad approach to treaty interpretation signalled by *Demir v. Turkey*,[10] the Court makes extensive use of international environmental texts. For the first time, it quotes

[8] In addition to the cases already cited, see *Budayeva v. Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11633/02, & 15343/02 (Eur. Ct. H.R. Mar. 20, 2008).

[9] See paragraph 108, in which the Court describes its inability to substitute its judgment for that of local authorities regarding environmental and industrial policy, with the consequence that it affords a wide margin of appreciation to governments on such matters.

[10] App. No. 34503/97 (Eur. Ct. H.R. Nov. 12, 2008) (Grand Chamber) (reported by Ragnar Nordeide at 103 AJIL 567 (2009)).

many of the principles contained in the 1972 Stockholm Declaration on the Human Environment[11] and the 1992 Rio Declaration on Environment and Development.[12] It reprints Articles 2, 3, and 9 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,[13] which Romania ratified in 2000. Also invoked are the judgment by the International Court of Justice in *Gabčikovo-Nagymaros Project*[14] (p. 24) and Resolution 1430/2005 of the Parliamentary Assembly of the Council of Europe on industrial risks (pp. 24–26).

The Court finds additional applicable standards in European Union (EU) texts. In particular, the Court concludes that the precautionary principle has evolved from being a philosophical concept to becoming a European legal norm. The Court refers in this context not only to the Treaty of Maastricht, but also to the jurisprudence of the European Court of Justice, one of the rare instances in which it has done so. The chamber cites and summarizes that court's judgments calling the precautionary principle one of the foundations of the EU policy favoring a high level of environmental protection (pp. 27–28).

On the issue of pollution levels, the Court relies extensively on the findings of national and international assessments (paras. 92, 95). In 1990, three years before the mining permit was issued, the Romanian authorities had already found that the soil and underground water were heavily polluted with industrial soot and sulphur dioxide. The level of heavy metals in the soil also exceeded levels viewed as safe at the global level. Rivers were degraded. At least nine other impact studies were done after the accident of 2000. One evaluation in 2001 confirmed the excessive pollution levels in the region, an area of abundant rainfall. Other assessments showed further evidence of polluted soil and water, with excessive cyanide, zinc, and other heavy metals. An evaluation undertaken by the United Nations Environment Programme (UNEP) following the environmental disaster of 2000 described the region where the mine is located as a pollution "hot spot" due to the concentration of industrial activities. The UNEP report was clear in finding the causes of the accident to be inadequate design and regulation of the high-risk mine. One consequence of the study was that UNEP developed in 2002 an international code of conduct for the utilization of cyanide.[15]

As for the impact of the accident on human health, an EU task force found no direct evidence but noted both the poisoning of fish (including the extinction of some species) and the deaths of otters that occurred in a wide, transboundary region. In view of the preexisting pollution of drinking water and soils in the area, scientific uncertainty remained over the specific long-term health consequences of the accident as such, but the report indicated that the pollution in the immediate region of the mine could well have significant effects on the long-term health of the population. In the present case the applicants relied on findings by the World Health Organization and studies by U.S. and UK institutes to assert a causal link between exposure to sodium cyanide and respiratory diseases, despite uncertainty about the dose effect. The Court

[11] Stockholm Declaration on the Human Environment, UN Doc. A/Conf. 48/14/Rev., 11 ILM 1416 (1972).

[12] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I), 31 ILM 874 (1992).

[13] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, July 25, 1998.

[14] Gabcíkovo-Nagymaros Project, 1997 ICJ REP. 7 (Sept. 25).

[15] International Cyanide Management Code, *at* http://www.cyanidecode.org/about_code.php.

found insufficient evidence in these studies, however, to conclude that the asthma was caused by the pollution (para. 106).

Despite the failure of the applicants to prove the causal link, the Romanian government was found to have breached its duties under Article 8. The Court held that the existence of a serious and substantial risk to the health and well-being of the applicants, even if scientific certainty was lacking, is enough to impose on the state the positive obligation to adopt reasonable and adequate measures capable of protecting the rights of those individuals to respect for their private and home life, and, more generally, to enjoy a healthy and protected environment.[16] The latter phrase is more expansive than language in prior judgments and somewhat surprising in its broad scope. While the phrase could be read as alluding to the Romanian Constitutional guarantee of a safe environment, and later cases could limit its impact by reading it in this way, the Court does not mention the Constitution and appears to be stating that Article 8 itself guarantees a healthy and protected environment. It remains to be seen whether this extended incorporation of a right to environmental quality will be adopted as part of the Court's ongoing jurisprudence.

This case not only summarizes the Court's earlier jurisprudence, it gives new details on the scope of the obligations to take all reasonable and adequate measures to protect the rights guaranteed by Article 8. First, the state must put in place a legislative and regulatory framework aimed at effective prevention of harm to the environment and to human health.[17] Dangerous activities must be regulated according to the specifics of the activity and the level of risk involved; the regulations must address the authorization, functioning, security, and control of the activity; and they must impose on all persons involved the duty to take the practical measures necessary to assure that the population is effectively protected against the risk of being exposed to the dangers inherent in the activity. Prior assessment of the risks is essential. Moreover, the public must be informed of the conclusions reached, be given the opportunity to participate in the decision-making process, and have the opportunity to contest before a tribunal any decision reached. In several respects, the Romanian government failed to fulfil its obligations: it failed to make adequate prior assessments and to take the necessary regulatory measures; it failed to inform the public and to allow it to participate in or contest the decision; it failed to inform the public after the industrial accident; and it failed to apply the precautionary principle, which the Court finds an important principle in assuring a high level of protection for health, consumers, and the environment.

Despite the findings of violations, the Court awarded no pecuniary or nonpecuniary damages, limiting itself to the declaratory judgment and an award of costs and fees. With a constantly rising caseload, the Court appears to be increasingly restrictive in awarding compensation. The two issues are not necessarily related, but the narrow approach of the Court in recent cases, this one included, is notable. In a January 2009 judgment, *Varnava v. Turkey*,[18]

[16] "Elle estime toutefois que malgré l'absence d'une probabilité causale en l'espèce, l'existence d'un risqué sérieux et substantiel pour la santé et pour le bien-être des requérants faisait peser sur l'Etat l'obligation positive d'adopter des mesures raisonnables et adéquate capable a protéger les droits des intéressés au respect de leur vie privée et leur domicile et, plus généralement, à la jouissance d'un environnement sain et protégé." Para. 107.

[17] *See* Budayeva v. Russia.

[18] App. Nos. 16064–66/90 & 16068–73/90 (Eur. Ct. H.R. Jan. 27, 2009).

the Grand Chamber described the Court's approach. Noting that there was no express provision for damages in the Convention,[19] the Grand Chamber distinguished cases where the applicant "has suffered evident trauma" from "those situation where the public vindication of the wrong suffered by the applicant . . . is a powerful form of redress in itself."[20] Only in the former cases, where the violations are of such a nature and degree to have impinged significantly on the applicants' well-being, would damages be appropriate. The Court explicitly states that its function is not "akin to a domestic tort mechanism" in affording compensatory damages. This narrow view of the role of damages is applied in the *Tatar* judgment and provoked a strong dissent by two of the judges involved, who call the denial of moral damages "scandalous," especially given that the government was expressly willing to pay damages and that prior environmental cases all resulted in such awards (p. 49; partial dissent by Zupančič, J., joined by Gyulumyan, J.). The dissent is correct on both counts, and the majority view is difficult to justify except as an application of a newly restrictive approach to damage awards.

DINAH L. SHELTON
Of the Board of Editors

Investor rights—NAFTA Chapter 11—indirect expropriation/regulatory taking—fair and equitable treatment—mining rights—protection of Native American sacred sites—international minimum standard—burden of proof

GLAMIS GOLD, LTD. v. UNITED STATES. Award. *At* <ita.law.uvic.ca/documents/Glamis_Award_001.pdf>.
NAFTA Chapter 11 Arbitral Tribunal, June 8, 2009.

In June 2009, an arbitral tribunal in *Glamis Gold v. United States*[1] dismissed a claim by a Canadian mining company against the United States for breach of Articles 1105 (fair and equitable treatment) and 1110 (expropriation) of the North American Free Trade Agreement.[2] Glamis Gold claimed that the United States, through various acts, wrongfully delayed approval of its open-pit gold-mining project in southeastern California (the "Imperial Project") and that, when federal approval appeared likely, the State of California rendered the project economically unfeasible by introducing a mandatory backfilling requirement in order to protect Native American sacred sites located in the area. The tribunal found that no expropriation had occurred since mining at a profit had not been made impossible, and that the measures did not breach NAFTA Article 1105 since no violation of the customary international law minimum standard, as laid down in the 1926 *Neer* case of the Mexican-U.S. General Claims Commission, had occurred.[3]

[19] Article 41 of the European Convention calls on the Court to award "just satisfaction," a term that, since 1970, has been interpreted to include compensatory damages.

[20] Varnava v. Turkey, para. 224.

[1] Glamis Gold, Ltd. v. United States, Award (NAFTA Ch. 11 Arb. Trib. June 8, 2009).

[2] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 107 Stat. 2006, 32 ILM 289 & 605 (1993).

[3] Neer (United States) v. Mexico, Opinion, Oct. 15, 1926, 4 U.N.R.I.A.A. 61–62.