



International Environmental
Law Research Centre

International Environmental Law in Domestic Courts: Switzerland

Dr Philippe Cullet

IELRC WORKING PAPER
1999 - 1

This paper can be downloaded in PDF format from IELRC's website at
<http://www.ielrc.org/content/w9901.pdf>

Table of Content

I. Introduction	1
II. Domestic Legal Framework	1
A. Basic Constitutional Framework	1
B. Constitutional Provisions for Environmental Protection	2
C. International Law in Switzerland	2
III. Swiss Courts and International Environmental Concerns	3
A. Direct Application of Environmental Conventions	3
B. Incidental Invocation of Environmental Treaties	4
C. Diverging International and Domestic Environmental Standards	4
D. Fundamental Rights	4
E. Domestic Solutions to International Environmental Problems	5
IV. Infrequent Application of International Environmental Law by the Courts: Some Underlying Reasons	6
A. Switzerland's position as a Leader in the Development of Environmental Law	6
B. Preference for Precise Norms	7
B. The Special Situation of Human Rights	9
C. Preference for Negotiated Settlements	9
V. The Way Ahead	9
Footnotes	10

I. Introduction

Switzerland has been known for its comparatively high standards of environmental protection and its progressive environmental legislation. Further, it has also actively participated in the development of environmental legal instruments at the international level. While the judiciary has been actively involved in the progressive development of domestic environmental law, reliance on international environmental instruments has been infrequent.

This paper starts with a brief exposition of the constitutional framework and the relation between domestic and international law in Switzerland. The second part highlights the most significant decisions where international environmental norms have been considered or implicitly referred to while the third part outlines some of the reasons explaining the relatively scarce application of international environmental standards.

II. Domestic Legal Framework

A. Basic Constitutional Framework

The Swiss Confederation is a federal state composed of twenty-six cantons and half-cantons.¹ At the domestic level, the cantons exercise all the rights not entrusted to the federal power but their competences have been drastically reduced over the last century.² Internationally, they do not constitute sovereign entities.³

The Federal Constitution recognises the separation of power between the legislature (Federal Assembly), the executive (Federal Council) and the judiciary (Federal Court) but grants the Federal Assembly a dominant position.⁴ Switzerland follows a system of representative democracy with elements of direct democracy.⁵ These include a compulsory referendum for all revisions of the Constitution, which require the approval of a majority of the cantons and a majority of the voters,⁶ and a facultative referendum for federal legislation.⁷ Further, Swiss citizens entitled to vote can propose partial or total revisions of the Constitution.⁸

The Federal Court has jurisdiction over matters enumerated at articles 189 and 190 of the Constitution. Since Switzerland does not have lower federal courts, most cases start in cantonal courts even when federal law must be applied. Appeal to the Federal Court is only possible after all remedies at the cantonal level have been exhausted. In the rare cases where the Federal Court has sole jurisdiction, no appeal is possible.⁹ Switzerland does not have specialised federal courts and the Federal Court is the supreme judicial authority in all cases, whether criminal, constitutional or civil.¹⁰

Under Swiss law, judicial decisions do not formally constitute a source of law.¹¹ They nevertheless play an extremely important role in the interpretation of the law and thereby acquire a quasi-normative force.¹² The role of the judiciary is particularly important when the legislature uses indeterminate notions. This is a frequent occurrence in the case of environmental protection or town and country planning.¹³ Where indeterminate or vague legal concepts are under scrutiny, the case law starts from the premiss that this is a case of application of the law where the judge's discretion is in principle unlimited. However, a certain margin of appreciation is still given to implementing authorities, especially concerning local, technical and personal circumstances.¹⁴ More generally, the Federal Court always strives to balance the various interests at stake and has intimated that this is part of the application of the law which it can freely review.¹⁵ In practice, the Federal Court examines if all the relevant interests have been taken into account and intervenes only in cases where the weight attributed to each of them is clearly inappropriate.¹⁶

B. Constitutional Provisions for Environmental Protection

A number of environmentally related provisions have been progressively introduced in the Constitution over the past century. A provision adopted as early as 1897 entrusted the Confederation with overall responsibility for forest police. Several other provisions concerning the environment such as the articles on water resource use or nuclear energy were progressively added before a broader environmental mandate was given to the Confederation with the adoption of Article 24^{sexies} concerning the protection of nature and landscape and Article 24^{septies} delimiting the Confederation's mandate concerning the protection of the environment.¹⁷ In the 1999 Constitution, a new provision giving the general framework for the Confederation and cantons' action in the field of the environment and land use has been added. The provision entitled 'sustainable development' enjoins public authorities to promote a sustainable balance between nature and its use by humankind.¹⁸

Article 74 which is substantially similar to the old Article 24^{septies} still constitutes the central provision concerning environmental protection. It adopts an extensive definition of the environment and covers, for instance, air, water, soil, animals, plants and biotopes.¹⁹ The human person constitutes the central object of protection and it is the natural environment as constituting the fundamental basis for human life which is primarily protected.²⁰ The limitations of the mandate of Article 74 are of two kinds. Firstly, it attributes what may be seen as a residual competence for the Confederation to legislate on the protection of the environment since there were already several acts with environmentally related provisions before the adoption of this provision.²¹ Indeed, environmental law remains partly piecemeal with provisions concerning environmental protection scattered in various acts.²² Further, if the Confederation has a right and an obligation to legislate, this mandate is limited by the residual competences of the cantons concerning, for instance, the protection of nature.²³ Secondly, no directly enforceable individual right to environmental protection is contained in this provision.²⁴

The framework Environmental Protection Act, which concretises Article 74, strives to protect human beings, animals and plants and their biotopes from harmful or unpleasant interferences and to preserve soil fertility. The Act is based upon several broad principles. These include the polluter pays principle, the evaluation of interferences both in isolation and jointly, the precautionary principle and the need to avoid interferences.²⁵ Nevertheless, the main focus of the Act is on more specific problems and practical measures which are further concretised in about twenty ordinances promulgated to give effect to the provisions of the Act.²⁶

C. International Law in Switzerland

The Relationship Between International and Domestic Law

International norms have immediate validity, insofar as they are part of the domestic legal order without special procedure when they enter into force for Switzerland.²⁷ This 'automatic' incorporation holds for both customary and treaty law.²⁸ The Federal Court has further stated that international law must be considered as federal law because its nature requires its full application within the country. It must therefore be assimilated to domestic law.²⁹

Switzerland's approach towards international norms is broadly based on the monist theory.³⁰ Indeed, it is acknowledged that the hierarchical superiority of international law stems from its nature.³¹ In practice, the adoption of implementing norms is thus not considered to constitute a transformation but an execution of treaty norms.³² The primacy of international law is all-encompassing and applies to customary and treaty norms. The issue of the direct applicability of the norm does not affect this hierarchy. International norms which are too imprecise to allow direct invocation in court are nonetheless part of Swiss law.

The Federal Court and the Application of International Law

According to the Constitution, the Federal Court applies international law.³³ Individuals can directly invoke international law provisions in public law appeals of cantonal decisions taken in violation of international norms.³⁴ However, the Court only applies norms which are sufficiently precise and clear to constitute the basis for a concrete decision.³⁵ As in many other countries, the Federal Court tends to apply primarily domestic law.³⁶ Even in the case of fundamental rights protected by human rights treaties, it may choose to refer to decisions of international tribunals and declare that a proper interpretation of the fundamental constitutional guarantees would bring about the same result.³⁷

The Court's application of international law is influenced by other factors. Firstly, the Constitution establishes a separation of powers which grants the legislature a clear predominance over both the executive and the judiciary. This is reflected in the fact that the Federal Court is barred from reviewing the constitutionality of federal acts. The rationale is that the Federal Court should not supervise the work of the legislature,³⁸ whose acts are at least implicitly accepted by the Swiss people through the facultative referendum.³⁹ Secondly, Article 191 of the Constitution states that the Court applies on a par federal acts and international law. Since international law prevails over domestic law, this may give rise to conflicts between international norms and federal acts. In the relatively few cases where an open conflict arises between an act and a treaty, the situation is still somewhat hazy.⁴⁰ While the Court has applied acts where the legislature consciously adopted rules contravening an international obligation,⁴¹ it has also implicitly suggested that an act may be unconstitutional.⁴² Commentators have noted that, in case of conflict, the Court has to disregard either the act or the treaty and thus violates in any case Article 191 of the Constitution.⁴³ The Court has already acknowledged that, by virtue of the principle of the primacy of international law, it can examine the conformity of domestic law with international obligations.⁴⁴ This, in effect, implies that the Federal Court undertakes a control of 'conventionality' which may lead to the exclusion of a normative act voted by the Federal Assembly.⁴⁵ The recent case law illustrates the willingness of the Court to undertake controls of conventionality.⁴⁶

III. Swiss Courts and International Environmental Concerns

At the outset, the most remarkable feature of the case law is the dearth of decisions applying international environmental norms. While other areas of international law, apart from human rights, are also neglected, this sharply contrasts with a well developed domestic environmental case law.

A. Direct Application of Environmental Conventions

In at least one case, international environmental law has been used as the main basis of a decision. This case is an administrative decision of the Federal Department of Home Affairs concerning an export of hazardous wastes to Russia.⁴⁷ It involved a Swiss manufacturer of batteries containing lead and sulphuric acid which could not be disposed of in dumps. To comply with existing environmental regulations, it had brought into service a recycling plant for old batteries, where usable lead was extracted and sulphur compounds neutralised. Unfavourable economic trends forced the closure of the plant. In January 1993, the entire recycling facility was sold. The plant was to be set up again in Russia and was to allow a local manufacturer of batteries to recycle its own lead according to Swiss emission standards. To start up the plant under good conditions in Russia, the plaintiff argued that it had to send 500 tons of cinders. Permission for this export was denied by the Federal Office for the Environment, Forests and Countryside (Federal Office of the Environment). On appeal, the Department of Home Affairs first noted that Article 4.5 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal prohibits in principle the export of hazardous wastes to non-party states.⁴⁸ It then ascertained that there existed no agreement between Switzerland and Russia according to Article 11 of the Convention. The decision emphasised that the principles governing exports of wastes under domestic law and the basic principles of the Basel Convention are broadly similar.

This was used to state that, even though the Confederation could theoretically sign an agreement with Russia as provided under Article 11 of the Convention, it had no intention of doing so.

This decision is significant in highlighting the existence of loopholes in domestic environmental legislation. While domestic regulation covers exports of wastes, there are no provisions covering the specific situation envisaged by Article 4.5 of the Convention. In this instance, the prohibition to export could thus only be upheld on the basis of international norms.

B. Incidental Invocation of Environmental Treaties

In a few other cases, environmental treaties have been invoked by plaintiffs or considered by the Federal Court to strengthen an argument fundamentally based upon domestic provisions. These are consequently not very significant but may constitute one way through which courts will become acquainted with international environmental law. One such case concerned proposed new constructions and their likely impact upon the biotope of the kingfisher. During the determination of the level of endangerment of the kingfisher, the Federal Court held that it is protected under the Hunting Act as well as under the Convention on the Conservation of European Wildlife and Natural Habitats but carried on its argumentation exclusively on the basis of domestic norms.⁴⁹

C. Diverging International and Domestic Environmental Standards

Diverging environmental standards between the domestic and international levels have given rise to some interesting cases. In the PVC case,⁵⁰ French mineral water producers complained that the introduction of an interdiction to use PVC bottles violated the 1972 agreement between the Confederation and the European Community by introducing new quantitative restrictions.⁵¹ The Court determined that bottled water did not fall within the scope of the agreement and it therefore did not examine whether such measures could be justified under the environmentally related exceptions enumerated at Article 20. It nevertheless clearly indicated that the possibility reserved by Article 20 for domestic restrictions to the free movement of goods, for instance, for reasons of environmental protection, should prevail over the realisation of the former objectives as long as these measures were not taken arbitrarily. It further added that the application of these principles could lead to the conclusion that the measures introduced in the contested ordinance did not institute any distinction or discrimination between Swiss producers and producers in countries of the European Union (EU).⁵² In effect, the Court upheld more stringent environmental regulations seeking to promote PET bottles at home against more lenient standards in the surrounding countries.

The Federal Court does not, however, always uphold more stringent domestic environmental standards against international treaties. A recent case involved the building of a junction road across the border between Germany and Switzerland, whose specifications had been put down in an international treaty in 1977.⁵³ Several years after the signature of the treaty, the Federal Office of the Environment determined that some of the areas where the road was to be built constituted forest areas under the Forest Police Act. Proceedings were brought against the decision of the cantonal government's decision to approve the work-plan submitted by the authorities of Freiburg im Brisgau. The Court held that the 1977 treaty did not contain any provision for domestic environmental assessment and that it could only be modified by the State Parties.⁵⁴ It contended in essence that the implementation of the treaty could not depend upon further developments in domestic law and thus refused to take into account environmental law provisions introduced since the signing of the agreement.⁵⁵

D. Fundamental Rights

Since the coming into force of the European Convention of Human Rights (ECHR) for Switzerland in 1974, the invocation of fundamental rights contained in the Convention has become increasingly frequent.⁵⁶ Until now, the nexus between human rights and environmental protection has only rarely been considered by the Federal

Court. In one instance, the Court had to adjudicate compensation claims for expropriation by residential owners living in close proximity to the Geneva airport.⁵⁷ Article 8 of the ECHR was invoked in this context. The Federal Court dismissed the Article 8 argument by referring to the Powell & Rayner case.⁵⁸ Following the European Court of Human Rights (ECtHR), it stated that major international airports are necessary to the economic well-being of the country and that this falls under the exceptions covered by Article 8.2 of the ECHR. Though the point was bluntly dismissed in this case, the Federal Court did not say that Article 8 was not relevant to the issues at stake and may consider further environmental issues under Article 8 more readily, especially in the wake of the López Ostra case.⁵⁹

Another significant decision, the Balmer-Schafroth case, arose following the request of a nuclear power plant operator for the renewal of its operating licence and an increase of 10% of the permitted output. Despite thousands of objections from Austrian, German and Swiss citizens, the Federal Council granted the company a new operation permit.⁶⁰ The applicants complained in Strasbourg that the decision of the Federal Council, which was final under domestic law, violated their rights under the ECHR, in particular their right of access to court (Article 6) and their right to an effective remedy under domestic law enabling them to complain of a breach of their right to life (Article 2) and of their right to respect for bodily integrity (Article 8).⁶¹ The final decision of the ECtHR indicated, against the opinion of the European Commission of Human Rights, that there had been no violation of articles 6 or 13 of the Convention.⁶² The Court stated that the applicants did not establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that its operation exposed them personally to a danger that was not only serious but also specific and, above all, imminent. It concluded that neither the dangers alleged nor the remedies were established with a degree of probability making the outcome of the proceedings directly decisive for the right relied on by the applicants.

E. Domestic Solutions to International Environmental Problems

The handling of the consequences in Switzerland of the accident which occurred in April 1986 at the Chernobyl nuclear power plant illustrates some of the ways in which domestic environmental law has been used to fill gaps in international environmental law. The accidental fire which broke out at Chernobyl created a toxic cloud which drifted over western Europe in the following days. In Switzerland, various statements by public authorities recommended preventive measures to the population. These announcements insisted in particular on the need to wash salad and green vegetables grown outdoors and recommended that pregnant and nursing women and children under the age of two refrain from consuming these products. Following these declarations, the consumption of salad and greens declined markedly in May 1986 and many producers had to throw away significant quantities of vegetables which they should have been able to sell without problem under normal conditions.⁶³ Further, fishing in Lake Lugano was prohibited for a time.⁶⁴

The Swiss government did not initiate claims against the USSR for any damages related to the Chernobyl incident. However, it decided to voluntarily compensate some of the smallest growers and fishermen whose exploitation had been seriously affected by the drop in sales caused partly by the statements of the federal authorities.⁶⁵ This constituted a purely voluntary measure which was not supposed to settle all the potential claims and which had no relationship with possible claims under the Nuclear Energy Civil Liability Act (NECLA).⁶⁶

In the event, a case was brought against the Confederation by a grower who had been refused compensation under the voluntary scheme. It was based on Article 16.1.d NECLA which states that people suffering harm from nuclear origin in Switzerland which originated in an incident abroad can also be compensated under the Act.⁶⁷ The same provision states that the Confederation only covers such damages if compensation cannot be obtained in the country where the incident happened. The Federal Court ruled that Article 16.1.d did apply to this case and declared that the nexus between the preventive announcements of the federal authorities and the losses suffered by the growers was sufficiently close.⁶⁸ It further noted that the Confederation itself had acknowledged before the cantonal court that the claimant stood no chance of being compensated in the USSR, and also indicated that the obligations of the Confederation under Article 16.1.d could not be lower than if the accident had occurred in Switzerland. The total amount covered by the Confederation was thus also of one billion francs.⁶⁹

No reference to either international conventions or environmental law was made in this case, though the claim arose from the consequences of an environmental emergency. This decision is nevertheless significant. Firstly, none of the states which had indicated their intention to hold the USSR internationally responsible for the consequences of the accident ever started proceedings.⁷⁰ In Switzerland, this forced the Confederation to take on the obligations of the state having caused the environmental emergency, thereby applying the “unusual” victim pays principle.⁷¹ Secondly, the decision of the Federal Court is drafted in such a way that compensation is offered for harm caused by preventive measures suggested by the authorities and not directly for environmental harm. Since the Court found a sufficient nexus between the announcements and the accident, actual nuclear fall-out in Switzerland would have been immaterial. Thirdly, while international environmental law did not give affected individuals any means to seek compensation, the voluntary (though minimal) effort of the Confederation and the possibilities offered under NECLA partly replaced the absence of effective international remedies.

IV. Infrequent Application of International Environmental Law by the Courts: Some Underlying Reasons

The traditionally welcoming attitude of Swiss courts towards international law, the geographical situation of landlocked Switzerland surrounded by three major industrial countries or its position at the source of several major continental rivers, all point towards the possibility of disputes involving the application of international environmental law. The relative absence of relevant case law must thus be attributed to other factors.

At the outset, it must be noted that the lack of application of international environmental law by the courts can be partly explained by the fact that international provisions are rarely invoked by applicants and their counsels. This contributed, for instance, to the unsuccessful outcome of an application to the European Commission of Human Rights. In the Champrenaud case, the applicant complained that her right to a healthy environment, as protected under Article 8 of the Convention had been violated. The Commission noted that, while this was a valid argument, it had not been pursued at the domestic level and could thus not be considered by the Commission.⁷²

A. Switzerland's position as a Leader in the Development of Environmental Law

Switzerland has been among the most progressive countries in the development of domestic environmental protection policies.⁷³ The adoption of measures for the introduction of lead free petrol and catalytic converters by the Federal Assembly at the beginning of the 1980s seems, for instance, to have served as a catalyst for similar measures in other European countries.⁷⁴ At the international level, Switzerland has also played an important role in the development and adoption of several binding instruments for the protection of the environment. It had, for instance, a particularly leading role in the negotiation of the Sulphur Protocol to the Transboundary Air Pollution Convention and the Basel Convention.⁷⁵

Further, the Government only exceptionally recommends the ratification of an international instrument if the legislation is not already, or about to be, in conformity with the provisions of the treaty. In the case of several important environmental treaties, the Messages of the Federal Council to the Federal Assembly clearly indicate that the ratification does not entail changes in the current legislation.⁷⁶ Generally, Switzerland has often followed a policy of pre-implementation of international agreements.⁷⁷ Where adaptation of the legislation is necessary, steps have often been taken before submitting a treaty for approval to the Federal Assembly.⁷⁸

In a number of cases, domestic regulations are more stringent than international treaties. Thus, in the case of the depletion of the ozone layer, domestic regulations seem to have consistently been ahead of developments at the international level.⁷⁹ This allowed the Government to take a leading role in the development of an international

ozone regime. It noted that stringent domestic standards to curb the use of CFCs would only be meaningful if applied internationally and that Switzerland thus had a direct interest in the development of an international treaty providing a framework for such measures.⁸⁰ In the case of civil liability, the government and most commentators have argued that Switzerland cannot ratify the Vienna Convention on Civil Liability for Nuclear Damage and Paris Convention on Third Party Liability in the Field of Nuclear Energy because this would force the Confederation to abandon its standard of unlimited responsibility.⁸¹ While it is doubtful whether the different standards of liability constitute an impediment to the ratification of these conventions,⁸² the Swiss liability regime is indeed much stricter than in most other OECD countries.⁸³

Overall, the leading role played by Switzerland in the environmental field over the last two decades has definitely lessened the relevance of international law domestically. However, Switzerland's position as a leader in the environmental field may however be slowly eroding.⁸⁴ In some areas, such as noise or soil protection, it provides standards which are very comparable to the average OECD country. Further, in some cases such as environmental information, Swiss norms lag in comparison to EU standards. Even after the 1995 revision, the Environmental Protection Act, faithful to the principle of secrecy, still does not incorporate the principle that the public has free access to all environmentally related information which the authorities have in their possession.⁸⁵ Switzerland was also unable to sign the Alpine Convention at the time of its adoption due to pressure from its Alpine cantons. Finally, the distinctiveness of Swiss environmental law may also be jeopardised by harmonisation with European Union environmental law which may lead Swiss environmental standards to converge with international ones.⁸⁶ All these elements provide strong grounds for a more frequent thorough examination of international norms by Swiss courts.

B. Preference for Precise Norms

Swiss courts have historically been averse to discussing broad principles and tend to limit themselves to applying precise norms. The Federal Court thus favours the consideration of precise rules and its case law tends to avoid broad pronouncements. The relative preciseness of domestic environmental norms compared to their international counterparts further limits the consideration of international law by judges. Indeed, the search for precise norms disqualifies *ab initio* most norms of customary international law which are usually imprecise, while many treaty norms are also vaguely worded. Given this background, it is not surprising that soft law instruments and general principles of international law are only rarely considered.

The absence of cases where international law principles, such as that of prevention or precaution, are discussed may also partly be linked to the relatively rapid development of domestic environmental law. Thus, the precautionary principle was embodied as early as 1983 in the Environmental Protection Act and further clarified in implementation ordinances.⁸⁷ By the time the negotiations for the Vienna Convention for the Protection of the Ozone Layer took place, the Swiss Government was able to advocate the inclusion of the precautionary principle in the Convention.⁸⁸ Further, when the Federal Council submitted the Convention to the Federal Assembly, it was able to show that specific measures taken to restrict the use of CFCs sprays had already been taken.⁸⁹ In this instance, the earlier development of the principle in domestic law and its greater degree of specificity certainly constitute important factors explaining the absence of reference to the international version. The same seems to be true of the polluter-pays principle which also developed early in domestic law and has attained a degree of sophistication not achieved in binding international norms.⁹⁰

The degree of sophistication of the case law is well illustrated by the Konrad case.⁹¹ This case involved a complaint brought under the Environmental Protection Act (EnPA) in cessation of the noise caused by small children on a playing ground adjacent to the property of the plaintiff. While the Court arrives at the conclusion that the noise caused is too inconsequential to constitute a violation of the EnPA, it only does so after a lengthy investigation of the extent to which children's noise falls under the Act. It first ascertains that the mandate of Article 24^{septies} covers all interferences to the environment having human beings as their origin and that noise constitutes one of the interferences covered by Article 7 of the EnPA. Having acknowledged that noise created by human activities is to be substantially distinguished from road or rail traffic noise whose unpleasant character is immediately apparent, it nevertheless goes on to conclude that children's noise, like adults' noise also falls within the scope of Article 7.⁹² After further considerations to determine whether noise from houses is

also to be included under the EnPA, it analyses the prevailing conditions in the concerned locality to find that the town of Montana is a quiet resort but that there is no necessity for special protection against noise as would be the case near a hospital. It eventually concludes that the noise caused by a dozen children playing only during daytime is not liable to significantly affect the residents' well-being. This decision constitutes a remarkable example of the extent to which the Court will go to balance all the interests at stake in a sophisticated manner so as to provide precise guidance concerning the interpretation of the provisions invoked.

While the case law provides extremely clear guidance in the areas which are analysed, this tends to be detrimental to the consideration of broader trends which inform the whole of environmental law. The following cases illustrate the limits of the technical approach currently followed by the courts. The first case concerned the proposed deforestation that the organisers of the 1987 ski world championships in Crans-Montana wanted to carry out with a view to opening some new pistes and widening some existing ones to improve safety and to meet the International Ski Federation requirements.⁹³ These measures were contested by several environmental non-governmental organisations. In its decision, the Federal Court examined, for instance, whether an increased avalanche risk would ensue from the deforestation but based its main conclusions on other elements. In effect, it balanced the environmental interests protected under the applicable environmental acts against the likely windfall economic gains for the region, canton and country. It did restate that tourism must adapt itself to natural conditions and to the landscape but went on to state that a major competition like the world championship constituted an excellent publicity for Switzerland in general and most specifically for the canton of Valais where tourism constitutes a prime economic activity.⁹⁴ The guarantee offered by both the Valais legislature and the Federal government to partially cover possible losses constituted another important element in the assessment of the importance of the event. Finally, the judges noted that the plaintiffs did not provide any feasible alternative which would not imply any deforestation.

In the second case, an environmental non-governmental organisation (NGO) challenged the authorisation granted in March 1996 for the organisation of a stage of the Offshore Class 1 world championship on Lake Geneva from 6 to 8 September 1996.⁹⁵ Slow proceedings prevented the case from reaching the Federal Court before 29 August. In a decision taken on 2 September 1996, the Court denied suspensive effect. According to the Court, this was the necessary result of a balancing of interests between the considerable damage that would probably ensue for the organisers from an annulment of the race and the less obvious damage that the race could cause to the natural environment given the conditions posed by the cantonal authorities. Subsequently, the NGO stated that it wanted the case to proceed since it feared that the organisers may want to organise another race. In its decision of 20 May 1997, the Court, rejected the claim for lack of present and practical legal interest. However, it went on to give indications concerning the future. It first noted that the Federal Office of the Environment, while acknowledging the legality of the authorisation under federal law had indicated that from the point of view of "opportunity", an interdiction of the race would be welcome.⁹⁶ Further, it went on to openly warn the organisers that a future authorisation should be sought sufficiently ahead of time so that an effective control be possible and end up before the scheduled date for the race. The judges stated that they may otherwise seriously consider giving suspensive effect.⁹⁷

In both cases, the Court balances environmental and economic interests without referring to the broader principles guiding its decisions. The Court seems to hide behind the technicalities of the law rather than discussing underlying principles. In the Crans-Montana case, the Court in effect refuses to balance the interests at stake and bases its decision upon an economic assessment made by others. It clearly does not follow the principle of "integration of environment and development", a cardinal concept of international environmental law which posits that equal consideration should be given to all issues concerning the environment in dealing with any economic and social factors connected with a developmental activity.⁹⁸ The decision apparently starts from the premiss that the planned event had to go ahead. This is clearly visible where the Court states that the plaintiffs have not proposed any viable alternatives. From the outset, the decision only centres on minimising the impact of measures that involve damages to the environment but are seen as necessary for the economic well-being of the country. The decision not to stop the planned powerboat race is even more striking since the Court puts most of the emphasis on the economic losses of the organisers.

Two main elements stand. Firstly, while the case law appears extremely technical on the surface, it does rely on broader principles but these principles are not openly discussed. Secondly, while the notion of sustainable development may be already partly incorporated in domestic law, the two cases just discussed illustrate that a

direct reference to the principle of sustainable development or other principles of international environmental law could help clarifying fundamental issues and most importantly bring them to the fore. Indeed, the introduction of sustainability as a guiding principle of environmental policy in the new Constitution may lead the judges to give further importance to the concept of sustainable development.

B. The Special Situation of Human Rights

The contrast between the treatment reserved to environmental instruments and human rights treaties by the Federal Court is striking. While hardly any cases have been decided on the basis of the numerous environmental treaties in force for Switzerland, dozens of cases over the last two decades have been judged on the basis of provisions of the ECHR.⁹⁹

Two main factors explain this situation. Firstly, the rights contained in the ECHR are deemed to have the rank of constitutional rights which thus places them above federal acts.¹⁰⁰ Secondly, the existence of the ECtHR has led the Federal Court to take notice of its judgments so as to harmonise its own practice accordingly. In a recent case, the Court indicated, for instance, that the procedure for keeping asylum seekers in airports did not comply with the case law of the ECtHR. It then directed the legislature to modify existing provisions and provided for interim arrangements.¹⁰¹

The lack of cases involving international environmental law is therefore not due to a general suspicion for international law but rather to the fact that it is seen as containing mostly technical standards and no fundamental rights. Further, the existence of international judicial organs in the human rights context has certainly served as an important catalyst for Swiss judges to recognise the importance of international standards in that area.

While international environmental law is indeed replete with vague principles that the Federal Court would be unwilling to apply, the recognised nexus between environmental protection and human rights at the level of the ECtHR may bring the Federal Court to examine in more depth the content of environmental agreements and their links, if any to the realisation of fundamental rights. In this way, international environmental law may indirectly inform the case law of the Federal Court.

C. Preference for Negotiated Settlements

The Swiss practice is known to favour negotiated settlements to court cases.¹⁰² This seems to extend even to situations where disasters have transboundary impacts. One of the most widely discussed case is that of the accidental fire at a Sandoz warehouse in Basel in 1986 which resulted in a significant release of toxic substances directly into the Rhine.¹⁰³ The Swiss authorities do not seem to have taken all the necessary precautions to prevent the accident, for instance, by not exercising sufficient supervision over the Sandoz warehouse, and did furthermore not alert downstream countries in a timely fashion.¹⁰⁴ Despite these serious mishaps, no riparian state ever claimed damages from the Confederation. Further, private claims in all countries were resolved amicably with Sandoz. Even though the indemnity disbursed was the highest ever paid for accidental damages to a river, a settlement was reached quickly because it did not threaten Sandoz's financial viability.¹⁰⁵ The drawback in this case was that damages to the commons were left uncompensated.¹⁰⁶

Another case concerning the Zürich-Kloten airport which lies only 13 kilometres from the German border is also of interest.¹⁰⁷ The opening of a second runway in 1986 led to complaints from residents in southern Germany and a civil suit was lodged in Germany against the canton of Zürich. The parties to the case agreed to suspend the proceedings for a specified period of time to allow the two countries to sign an agreement on measures to be taken to reduce the impact of the operation of the airport on affected German citizens. The arrangement between the Confederation and Germany concerning flights to and from the Zürich airport led to the termination of the case.¹⁰⁸

V. The Way Ahead

Though Switzerland has probably been ahead of international developments in many areas of environmental protection for a long time, several factors militate for a more active consideration of international treaties by the judiciary.

Firstly, even though principles like the principle of sustainable development may have more precise counterparts at the domestic level, most recent international environmental law is fundamentally based on the principle of sustainability which thus merits further consideration. Since, according to Article 113.3 of the Constitution, the Federal Court applies both treaties and federal acts, the Court should at least ascertain whether domestic principles actually go further than their international counterparts. Even if domestic principles are stronger in most areas, the exercise would be worth undertaking. Indeed, the principle of sustainable development is, for instance, being slowly introduced at the domestic level. The Federal Council has taken a first step towards integrating sustainable development more effectively at the domestic level by adopting in 1997 a Strategy for sustainable development in Switzerland.¹⁰⁹ The relevance of international principles at the domestic level is also clearly illustrated by the Crans-Montana and offshore powerboat cases alluded to above. The analysis and consideration of principles of international environmental law would thus not only add coherence to the legal reasoning upon which decisions are based but also reflect current developments in environmental policy making at the domestic level.

Secondly, while domestic legislation may cover more ground than international environmental law in some instances, the case outlined above where the application of the Basel Convention constituted the only available legal basis to judge this case is instructive. Even though the substance of a given provision might be similar in domestic and international law, the two may not cover exactly the same set of situations. It thus becomes extremely important for the Court to at least examine the content of relevant domestic and international legal instruments while preparing a decision.

Finally, the strict division between environmental law conceived as a rather technical branch of the law which does not include individual rights, and human rights which include the core fundamental rights which guide all other action may be slowly disappearing. As noted, international human rights adjudicative organs have already taken note of the nexus between the two fields. The development of instruments like the Convention on Access to Environmental Information and Public Participation in Environmental Decision-Making will further develop directly applicable individual rights which will probably force the federal and cantonal courts to consider international environmental treaties in more details.¹¹⁰

Footnotes

- ¹ See generally Jean-François Aubert, *Traité de droit constitutionnel suisse - Volume I* (1967).
- ² See Art. 3 of the Federal Constitution of the Swiss Confederation of 18 April 1999 (in force 1 Jan. 2000; Unofficial translation by Pierre A. Karrer), *Recueil systématique du droit fédéral* (hereafter RS) 101 [hereafter Federal Constitution]. See also Aubert, *supra* note 1.
- ³ See, e.g., Christophe Wilhelm, *Introduction et force obligatoire des traités internationaux dans l'ordre juridique suisse* (1993).
- ⁴ Art. 148 of the Federal Constitution, *supra* note 2.
- ⁵ See, e.g., Andres Auer, 'Constitutional Justice and Direct Democracy', in *Constitutional Justice and Democracy by Referendum - Proceedings of the UniDem Seminar* 161 (1996).
- ⁶ Art. 140 & 142 of the Federal Constitution, *supra* note 2.
- ⁷ Art. 141 of the Federal Constitution, *supra* note 2. The ratification of some treaties is also subject to facultative or compulsory referendums. See Art. 140 & 141 of the Federal Constitution, *supra* note 2.
- ⁸ Art. 138 & 139 of the Federal Constitution, *supra* note 2. On the popular initiative introduced in 1891, see, e.g., Jean-Claude Favez, 'L'initiative populaire fédérale', in Andreas Auer ed., *Les origines de la démocratie directe en Suisse* 323 (1996).
- ⁹ See the Loi fédérale d'organisation judiciaire, 16 Dec. 1943, RS 173.110.
- ¹⁰ See, e.g., Ernst Brand & Hartwin Bungert, 'Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad', 16 *Harvard Env'tl. L. Rev.* 1 (1992).
- ¹¹ See, e.g., Art. 1.3 of the Code civil suisse, 10 Dec. 1907, RS 210.
- ¹² Pierre Tercier, *La recherche et la rédaction juridiques* (1995).
- ¹³ Alfred Kuttler, 'Protection de l'environnement et aménagement du territoire dans la jurisprudence récente du Tribunal fédéral', 111/3 *La semaine judiciaire (Genève)* 32 (1989).
- ¹⁴ See, e.g., judgment of 9 May 1990, *Fondation suisse pour la protection de l'aménagement du paysage et Société suisse pour la protection de l'environnement contre Municipalité de Corsier-sur-Vevey et Conseil d'Etat du canton de Vaud*, Arrêts du Tribunal fédéral suisse (Judgments of the Federal Court, hereafter ATF) 116 Ib 203, concerning the notion of biotope as defined at article 18.1 of the Loi fédérale sur la protection de la nature et du paysage, 1 July 1966, RS 451.
- ¹⁵ See, e.g., judgment of 17 Dec. 1986, *Lega svizzera per la salvaguardia del patrimonio nazionale c. Consiglio di Stato del Cantone Ticino*, ATF 112 Ib 543.
- ¹⁶ See Kuttler, *supra* note 13.
- ¹⁷ See Art. 24^{bis}, 24^{quinquies}, 24^{sexies} and 24^{septies} of the Federal Constitution of 29 May 1874. See also Stephan Schwager, 'Le droit suisse de l'environnement à la lumière des Actes officiels de la Communauté européenne dans le domaine de la protection de l'environnement - Etude comparative des régimes juridiques', in Stephan Schwager et al., *Droit de l'environnement Suisse-CE* 7 (1989).
- ¹⁸ Art. 73 of the Federal Constitution, *supra* note 2.
- ¹⁹ Th. Fleiner, 'Art. 24^{septies}', in Jean-François Aubert et al. eds., *Commentaire de la Constitution Fédérale de la Confédération Suisse du 29 mai 1874* (1996).
- ²⁰ Fleiner, *supra* note 19.
- ²¹ Anne Petitpierre-Sauvain, 'L'Article 24^{septies} de la Constitution fédérale et la responsabilité

du pollueur - La Constitution impose-t-elle au législateur d'instituer une responsabilité civile du pollueur?', in *Présence et actualité de la Constitution dans l'ordre juridique - Mélanges offerts à la Société suisse des juristes pour son Congrès 1991 à Genève* 399 (1991).

- 22 See, e.g., Schwager, *supra* note 17.
- 23 Petitpierre-Sauvain, *supra* note 21.
- 24 See, e.g., judgment of 1 July 1981, Schweiz. Stiftung für Landschaftsschutz und Landschaftspflege, Theiler und Eigenstaz gegen Gemeinde Stansstad, Regierungsrat und Verwaltungsgericht des Kantons Nidwalden, ATF 107 Ib 112. See also Fleiner, *supra* note 19.
- 25 See respectively, Article 2, 8, 11.2 and 11.3 and 20 of the Loi fédérale sur la protection de l'environnement, 7 Oct. 1983, RS 814.01 [hereafter Environmental Protection Act]. See also Hans Rudolf Trüeb, 'Neuere Entwicklungen im schweizerischen Umweltschutzrecht', 7 *Swiss Rev. Int'l & Eur. L.* 177 (1997).
- 26 Several of them are found in subsection 814 of the *Recueil systématique du droit fédéral* (RS).
- 27 See Paul Guggenheim, *Traité de droit international public - Tome I* (2nd ed. 1967).
- 28 Note however that the position of treaties was debated for some time. See, e.g., judgment of 6 June 1956, Royaume de Grèce contre Banque Julius Bär, ATF 82 I 75 and judgment of 17 July 1933, Steenworden contre Société des Auteurs, Compositeurs et Editeurs de musique, ATF 59 II 331. See also Christian Dominicé & François Voeffray, 'Suisse', in Pierre Michel Eisemann ed., *The Integration of International and European Community Law into the National Legal Order - A Study of the Practice in Europe* 529 (1996).
- 29 Judgment of 13 Mar. 1918, Ministère des finances autrichien contre Dreyfus, ATF 44 I 49.
- 30 On the controversy surrounding the relevance of the monist/dualist theories, see, e.g., Ian Brownlie, *Principles of Public International Law* (5th ed. 1998) and Malcolm N. Shaw, *International Law* (4th ed. 1997).
- 31 Office fédéral de la justice & Direction du Droit international public, 'Rapports entre le droit international et le droit interne au sein de l'ordre juridique suisse', 53/IV *Jurisprudence des autorités administratives de la Confédération* 437 (1989) [hereafter Federal Office of Justice report].
- 32 Dominicé & Voeffray, *supra* note 28.
- 33 Art. 191 of the Federal Constitution, *supra* note 2.
- 34 D. Thürer, 'Constitution fédérale et droit international public', in Jean-François Aubert et al. eds., *Commentaire de la Constitution Fédérale de la Confédération Suisse du 29 mai 1874* (1996).
- 35 See, e.g., Judgment of 2 Sept. 1986, Maison G. Sprl contre Direction générale des douanes, ATF 112 Ib 183. Concerning the Covenant on Economic Social and Cultural Rights, see, e.g., Judgment of 24 May 1996, E.M. gegen Kantonale Steuerverwaltung St. Gallen und Verwaltungsgericht St. Gallen, ATF 122 I 101. See also Olivier Jacot-Guillarmod, 'L'applicabilité directe des traités internationaux en Suisse: Histoire d'un détour inutile', XLV *Annuaire suisse de droit int'l (volume anniversaire)* 129 (1989).
- 36 Dominicé & Voeffray, *supra* note 28.
- 37 Luzius Wildhaber, 'Reception of International Law into Domestic Law: Comparative European Approaches', in Luzius Wildhaber, *Wechselspiel Zwischen Innen und Aussen - Schweizer Landesrecht, Rechtsvergleichung, Völkerrecht* 50 (1996).
- 38 Federal Office of Justice report, *supra* note 31.
- 39 Auer, *supra* note 5.
- 40 The Federal Office of Justice report, *supra* note 31, notes that by virtue of the principle of international law primacy, the usual principles of *lex posterior* or *lex specialis* cannot be used to

solve conflicts.

- 41 Michel Hottelier, 'Suisse: Primauté des normes issues du droit international public (arrêt du Tribunal fédéral des assurances du 25 août 1993)', 19 *Revue française de droit constitutionnel* 605 (1993). *See also* Federal Office of Justice report, *supra* note 31 noting that some authors argue that the Court should not leave an act unapplied.
- 42 Federal Office of Justice report, *supra* note 31. When a conflict arises, the Federal Administration may invite implementing authorities to disregard the contested provision until it has been formally abrogated.
- 43 *See, e.g.*, Georges Malinverni, 'L'article 113 al. 3 de la Constitution fédérale et le contrôle de conformité des lois fédérales à la Convention européenne des droits de l'homme', in Francis Cagianut et al. eds., *Aktuelle Probleme des Staats- und Verwaltungsrechts - Festschrift für Otto K. Kaufmann zum 75. Geburtstag* 381 (1989).
- 44 *See, e.g.*, judgment of 26 Jan. 1994, B. contre Caisse cantonale vaudoise de compensation AVS et Tribunal des assurances du canton de Vaud, ATF 120 V 1. *See also* Giorgio Malinverni & Michel Hottelier, 'La pratique suisse relative aux droits de l'homme 1996', 7 *Swiss Rev. Int'l & Eur. L.* 499 (1997).
- 45 Hottelier, *supra* note 41.
- 46 B.M. und M. gegen Direktion des Innern des Kantons Zürich, 7 Nov. 1996, ATF 122 III 414.
- 47 X. gegen Bundesamt für Umwelt, Wald und Landschaft (Entscheid, Eidgenössisches Departement des Innern, 17 Nov. 1993, on file with the author).
- 48 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 Mar. 1989, *reprinted in* 28 *ILM* 657 (1989) [hereafter Basel Convention]. As of 1993, Switzerland was a party to the Convention while Russia had not ratified.
- 49 Judgment of 19 Nov. 1992, Schweizerischer Bund für Naturschutz und Bund für Naturschutz Baselland gegen W. und Mitbeteiligte, Einwohnergemeinde Augst und Regierungsrat des Kantons Basel-Landschaft, ATF 118 Ib 485.
- 50 Judgment of 7 July 1992, Association pour le recyclage du PVC et Communauté des intérêts des producteurs d'eaux minérales françaises contre Conseil d'Etat du canton de Fribourg, ATF 118 Ib 367.
- 51 Art. 13 of the Accord entre la Confédération suisse et la Communauté économique européenne, Brussels, 22 July 1972, *Journal officiel des Communautés européennes*, Vol. L 300 (31 Dec. 1972), p.188.
- 52 ATF 118 Ib 367, *supra* note 50, at 378-9. *See also* Ordonnance sur les emballages pour boisson, 22 Aug. 1990, RS 814.017. *Cf.* Case 302/86, Re Disposable Beer Cans: EC Commission v. Denmark, 20 Sept. 1988, 1988 ECR 4607.
- 53 Accord entre la Confédération suisse et la République fédérale d'Allemagne concernant la route entre Lörrach et Weil am Rhein sur le territoire suisse, 25 Apr. 1977, RS 0.725.122 [hereafter Germany-Switzerland Agreement]
- 54 Art. 22 of the Germany-Switzerland Agreement, *supra* note 53 states that one Party can seek a review of the treaty if its implementation creates serious difficulties.
- 55 Judgment of 27 June 1996, Schweizerischer Bund für Naturschutz et al. gegen Regierungspräsidium Freiburg im Breisgau und Regierungsrat des Kantons Basel-Stadt, ATF 122 II 234.
- 56 *See, e.g.*, Michel Hottelier, *La convention européenne des droits de l'homme dans la jurisprudence du tribunal fédéral - Contribution à l'étude des droits fondamentaux* (1985). *See also* Giorgio Malinverni & Michel Hottelier, 'La pratique suisse relative aux droits de l'homme 1996', 7 *Swiss Rev. Int'l & Eur. L.* 499 (1997).
- 57 Judgment of 12 July 1995, Jeanneret et consorts contre Etat de Genève et Commission fédérale

d'estimation du 1^{er} arrondissement, ATF 121 II 317.

- 58 Powell and Rayner v. United Kingdom, Eur. Ct. H.R., 21 Feb. 1990, Series A N° 172, *reprinted in 12 Eur. Hum. Rts Rep.* 355 (1990).
- 59 See López Ostra v. Spain, Eur. Ct. H.R., 9 Dec. 1994, Series A N° 303-C, *reprinted in 20 Eur. Hum. Rts Rep.* 277 (1995).
- 60 Decision of the Federal Council concerning an application for an extension of the operating licence of the Mühleberg nuclear power station, 14 Dec. 1992 (on file with the author).
- 61 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov. 1950, 213 *UNTS* 221.
- 62 See Balmer-Schafroth and Others v. Switzerland, Eur. Ct. H.R., 26 Aug. 1997, *Rep. Judgments & Dec.* 1346 (1997-IV).
- 63 For a summary of relevant facts, *see* judgment of 21 June 1990, Schweizerische Eidgenossenschaft gegen Kollektivgesellschaft Rey und Leimgruber, Judgment of ATF 116 II 480.
- 64 See Ordonnance sur l'interdiction de la pêche dans le lac de Lugano, 3 Sept. 1986, Recueil officiel des lois fédérales (hereafter RO) 1986 II 1479. See also Pierre Tercier, 'L'indemnisation des préjudices causés par des catastrophes en droit suisse', 131/2 *Revue de droit suisse* 73 (1990).
- 65 See Arrêté fédéral concernant les indemnités allouées par la Confédération à des personnes lésées par la catastrophe de Tchernobyl, 18 Dec. 1987, RO 1988 I 628.
- 66 See, e.g., François Knoepfler & Philippe Schweizer, 'Tchernobyl - Action ouverte en Suisse for et droit applicable', in B. Dutoit et al. eds., *Pollution transfrontière / Grenzüberschreitende Verschmutzung: Tschernobyl / Schweizerhalle* 33 (1989).
- 67 Loi sur la responsabilité civile en matière nucléaire, 18 Mar. 1983, RS 732.44 [hereafter NECLA].
- 68 ATF 116 II 480, *supra* note 63.
- 69 Art. 12 of NECLA, *supra* note 67.
- 70 See, e.g., Alfred Rest, 'Need for an International Court for the Environment? Underdeveloped Legal Protection for the Individual in Transnational Litigation', 24 *Envtl. Pol'y & L.* 173 (1994).
- 71 According to Article 16.3 NECLA, when the Confederation provides compensation, it has a right to seek reimbursement from the person responsible for the incident. In this case, it did not make use of this possibility.
- 72 Application No. 18014/91, Champrenaud contre Suisse, Decision of the Commission on admissibility, 2 Mar. 1994 (on file with the author).
- 73 Schwager, *supra* note 17 notes that this positive comparison may hold more against other European countries than with the US or Japan. See also Astrid Epiney & Peter Knoepfel, *La politique suisse de l'environnement face au défi européen* (1991).
- 74 See Bruno Böhlen & Raymond Cléménçon, 'Die internationale Umweltschutzpolitik der Schweiz', in Alois Riklin et al. eds., *Nouveau manuel de la politique extérieure suisse* 1015 (1992).
- 75 See Protocol to the 1979 Convention on Long-range Transboundary Air Pollution on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at Least 30 per cent, Helsinki, 8 July 1985, *reprinted in, 27 ILM* 707 (1989) and Basel Convention, *supra* note 48. See also Böhlen & Cléménçon, *supra* note 74.
- 76 See, e.g., the 'Message concernant la ratification de la Convention de la CEE-ONU sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontière', 5 Sept. 1995, Feuille fédérale suisse (hereafter FF) 1995 IV 397, the 'Message concernant la Convention-

- cadre des Nations Unies sur les changements climatiques’, 31 Mar. 1993, FF 1993 II 125 and the ‘Message concernant la Convention des Nations Unies sur la diversité biologique’, 25 May 1994, FF 1994 III 189 concerning respectively the ratification of the Convention on Environmental Impact Assessment in a Transboundary Context, the Framework Convention on Climate Change and the Convention on Biological Diversity.
- 77 Stephan Kux, ‘Internationaler Rahmen und innerstaatliche Abstützung der schweizerischen Umweltaussenpolitik’, in M. Jochimsen & G. Kirchgässner eds., *Schweizerische Umweltpolitik im internationalen Kontext* 140 (1995).
- 78 *See, e.g.*, Astrid Epiney & Martin Scheyli, ‘Le rôle de la Suisse dans le développement du droit international de l’environnement’, in Ivo Rens ed., *Le droit international face à l’éthique et à la politique de l’environnement* 183 (1996).
- 79 The relevant regulations can be found in Ordonnance sur la protection de l’air, 16 Dec. 1985, RS 814.318.142.1. *See also* Epiney & Scheyli, *supra* note 78.
- 80 ‘Message concernant la ratification de la Convention de Vienne du 22 mars 1985 pour la protection de la couche d’ozone’, 14 Jan. 1987, FF 1987 I 721 [hereafter Vienna Convention Message].
- 81 *See, e.g.*, ‘Message concernant une loi sur la responsabilité civile en matière nucléaire’, 10 Dec. 1979, FF 1980 I 172. and Tercier, *supra* note 64.
- 82 *See, e.g.*, Yvan Zender, *Les dommages nucléaires en droit suisse et en droit comparé* (doctoral thesis, Faculty of Law and Economic Sciences, University of Neuchâtel, 1995).
- 83 Only Germany seems to have comparable levels of protection. *See, e.g.*, Tercier, *supra* note 64.
- 84 *Cf.* the diverging opinions of Kux, *supra* note 77 and Epiney & Scheyli, *supra* note 78.
- 85 *Cf.* Council Directive 90/313/EEC on the Freedom of Access to Information on the Environment, 7 June 1990, 1990 OJ (L 158) and Articles 46-47 of the Environmental Protection Act, *supra* note 25. *See also* Hans U. Liniger & Isabelle Bodmer, ‘Switzerland’, in Ralph E. Hallo ed., *Access to Environmental Information in Europe - The Implementation of Directive 90/313/EEC* at 317 (1996) and Astrid Epiney et al., *Europäisches Umweltrecht und die Schweiz* (Bern: Stämpfli, 1999).
- 86 Trüb, *supra* note 25.
- 87 Art. 1.2 and 11.2 of the Environmental Protection Act, *supra* note 25. It is understood as covering both precaution and prevention. *See, e.g.*, ‘Message relatif à une loi fédérale sur la protection de l’environnement’, FF 1979 III 741 [hereafter Environmental Protection Act Message].
- 88 Epiney & Scheyli, *supra* note 78.
- 89 *See, e.g.*, ‘Ordonnance sur les substances dangereuses pour l’environnement’, 9 June 1986, RO 1986 II 1254. *See also* Vienna Convention Message, *supra* note 80.
- 90 For the exposition of the rationale for introducing the polluter-pays principle in the Environmental Protection Act, *see*, Environmental Protection Act Message, *supra* note 87. A concretisation of the polluter pays principle could, for instance, already be found in Art. 12 of the Loi fédérale sur la protection des eaux contre la pollution, 16 Mar. 1955, RO 1956 II 1635.
- 91 Judgment of 19 Nov. 1996, Konrad contre Commune de Randogne, Conseil d’Etat et Tribunal cantonal du canton du Valais, ATF 123 II 74.
- 92 *See* Article 7 of the Environmental Protection Act, *supra* note 25.
- 93 Judgment of 19 Mar. 1986, Ligue suisse pour la protection de la nature et World Wildlife Fund Suisse contre Association pour l’organisation des championnats du monde de ski alpin 1987 à Crans-Montana et Département fédéral de l’intérieur, ATF 112 Ib 195.
- 94 ATF 112 Ib 195, *supra* note 93 at 206.

- 95 Association Helvetia Nostra contre Tribunal administratif du canton de Vaud, 20 May 1997, ATF 123 II 285..
- 96 See Association Helvetia Nostra contre Tribunal administratif du canton de Vaud, 20 May 1997 (unpublished section of ATF 123 II 285, on file with the author).
- 97 ATF 123 II 285, *supra* note 95.
- 98 See, e.g., Rio Declaration on Environment and Development, 14 June 1992, Rio de Janeiro, reprinted in 31 *ILM* 874 (1992). See also Philippe Sands, 'International Law in the Field of Sustainable Development', 65 *British Yb. Int'l L.* 303 (1994).
- 99 The Court also applies the Covenant on Civil and Political Rights but the relevant case law is still scanty since it only entered into force for Switzerland on 18 September 1992.
- 100 See, e.g., Rainer J. Schweizer, *Die schweizerischen Gerichte und das europäische Recht* (1994) and Hottelier, *supra* note 56. Cf. Andreas Auer, *La juridiction constitutionnelle en Suisse* (1983).
- 101 See *D. gegen Flughafenpolizei Zürich und Haftrichter des Bezirksgerichts Zürich*, 27 May 1997, ATF 123 II 193. The revised ordinance entered into force on 1 Jan. 1998. See Ordonnance concernant la Commission suisse de recours en matière d'asile, modification du 19 novembre 1997, RO 1997 III 2777.
- 102 Tercier, *supra* note 64.
- 103 See, e.g., Alfred Rest, 'The Sandoz Conflagration and the Rhine Pollution: Liability Issues', 30 *German Yb. Int'l L.* 160 (1987).
- 104 See, e.g., Hans Ulrich Jessurun d'Oliveira, 'The Sandoz Blaze: The Damage and the Public and Private Liabilities', in Francesco Francioni & Tullio Scovazzi eds., *International Responsibility for Environmental Harm* 429 (1991).
- 105 See, e.g., Isabelle Romy, *Litiges de masse - des class actions aux solutions suisses dans les cas de pollutions et de toxiques* (1997) and Henri Smets, 'Le coût des pollutions accidentelles', in *La réparation des dommages catastrophiques - Les risques technologiques majeurs en droit international et en droit communautaire* (1990).
- 106 See, e.g., Jessurun d'Oliveira, *supra* note 104.
- 107 See generally Hansjörg Peter, *Umweltschutz am Hochrhein - Rechtsfragen grenzüberschreitender Umweltbelastungen zwischen Deutschland und der Schweiz* (1987).
- 108 See Réglementation entre la Suisse et la République fédérale d'Allemagne sur les vols d'arrivée et de départ au-dessus du territoire allemand en liaison avec l'aéroport de Zurich, Bonn, 17 Sept. 1984 (in force 22 Nov. 1984), RS 0.748.131.913.6. and Peter, *supra* note 107.
- 109 See Stratégie 'Le développement durable en Suisse', 9 Apr. 1997, FF 1997 III 967.
- 110 See, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Århus, 25 June 1998, UN Doc. ECE/CEP/43.

