

The development of the right to a healthy environment through the case law of the European Court of Human Rights

What level of environmental protection is offered in the European Convention of Human Rights, and what approaches have been taken to include environmental issues under Article 8 of the Convention?

Candidate number: 501

Submission deadline: 25 November

Number of words: 16 105



Table of contents

1	INTRODUCTION	1
1.1	Introduction to the thesis	1
1.2	The focus and structure of this thesis - environmental rights and the ECHR	1
1.3	Defining terms	4
1.4	Methodology.....	7
1.5	The ECHR and the Council of Europe	8
2	THE LINKAGE BETWEEN HUMAN RIGHTS AND INTERNATIONAL ENVIRONMENTAL LAW	9
2.1	International agreements and other instruments on environmental rights.....	9
2.1.1	International agreements	9
2.1.2	Regional agreements	11
2.1.3	Environmental rights in national constitutions	12
2.1.4	The United Nations Human Rights Council on the right to a healthy Environment.....	13
2.2	The interrelation of human rights and environmental law.....	14
2.2.1	A brief overview	14
2.2.2	Human rights and the environment	16
2.2.3	Environmental rights	16
2.2.4	Substantive versus procedural rights.....	18
2.2.5	Environmental rights derived from existing human rights	19
2.2.6	The freestanding right to a healthy environment	20

3	DEVELOPMENT OF CASE LAW ON ENVIRONMENTAL ISSUES AT THE EUROPEAN COURT OF HUMAN RIGHTS.....	21
3.1	Article 8 and the interpretive principles of the European Court of Human Rights ...	21
3.1.1	Article 8 – Right to respect for private life, family life and the home	21
3.1.2	The dynamic interpretation of the ECHR	23
3.2	Cases dealing with noise pollution	24
3.2.1	Noise interference from airports	24
3.2.2	Noise from entertainment facilities	28
3.3	Cases of industrial pollution and environmental degradation	29
3.3.1	Pollution from waste treatment plants.....	29
3.3.2	Chemical factories and environmental risks	30
3.3.3	Environmental degradation	33
3.3.4	Gold mining and the use of harmful industrial processes	34
3.3.5	Steel plants	35
3.4	The scope of applying Article 8 on environmental issues.....	38
3.4.1	The requirement of being directly affected	39
3.4.2	A required level of severity.....	40
3.4.3	Aspects of State responsibility	42
3.4.4	The balancing of interests	42
3.4.5	The ECtHR on the relevance of domestic legality	43
4	APPROACHES TO ENHANCE ENVIRONMENTAL PROTECTION IN THE ECHR.....	45
4.1	Approaches for applying Article 8 on environmental issues more broadly	45
4.2	The possibility of an additional protocol in the ECHR	47
4.3	The content of the right to a healthy environment as an additional protocol of the ECHR.....	48

5	CONCLUSION	50
6	TABLE OF REFERENCE	52
6.1	Books and book chapters	52
6.2	Articles.....	53
6.3	Reports and Manuals	55
6.4	Internet Sources	56

1 Introduction

1.1 Introduction to the thesis

“Human rights and environmental protection are two of the most fundamental concerns of modern international law. They represent different but overlapping social values with a core of common goals.”¹

Dinah Shelton

When thinking of human rights, it is natural to assume that one is talking about rights that focus on the protection of human beings. In the same way, environmental law may be associated with the protection and preservation of the natural environment; like the protection of natural habitats, or the prevention of environmental pollution. Still, these seemingly two separate fields of public international law interrelate in certain areas. For instance, a certain level of environmental quality is necessary in order for the enjoyment of human rights to be possible. In this way, an adequate environment can be claimed to be a prerequisite for the full enjoyment of human rights.

Another way in which human rights and international environmental law overlap, is when environmental harm is considered to be a violation of certain existing human rights. This is an area of law that has developed a lot in the last decades, and is still undergoing changes as new case law develops in the various international and domestic courts.

1.2 The focus and structure of this thesis - environmental rights and the ECHR

This thesis places focus on environmental rights, or more specifically; the “*right to a healthy environment*”. A different formulation of this right is “the right to live in ecologically clean natural surroundings.”²

¹ Shelton (1991), p.138.

² Proposal by the Ukrainian delegation to the United Nations Commission on Human Rights, 1990. See Shelton (1991), p. 137.

This thesis will be primarily focused on the European Convention for the Protection of Human Rights and Fundamental Freedoms³ (hereafter ECHR or “the Convention”), and case law from the European Court of Human Rights⁴ (hereafter ECtHR or “the Court”). The reason behind my choice of this specific convention and court is two-fold: First of all, the ECtHR has rendered a significant number of judgements relevant in order of answering the problem question. Secondly, the ECtHR has perhaps shown the most willingness out of the various international courts to interpret the existing articles broadly in order to address environmental issues as they have become increasingly important. The Court has long expressed the view that the ECHR is a “living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.”⁵

Even though there is no direct or explicit right to a healthy environment in the ECHR, this right has often been claimed to exist indirectly based on the various decisions in the ECtHR. The main task will be to look at this claim, namely whether the right to a healthy environment is sufficiently developed in the legal framework created by the Council of Europe, and the nature and scope of such a right as developed in the case law of the ECtHR. To achieve this aim, a selection of relevant cases dealt with by the ECtHR will be analysed. The main focus will be on Article 8 of the ECHR⁶, as this article has been recognised by the Court as applicable regarding certain environmental issues. The following sub-questions should service to fulfil the purpose of this thesis:

- a) What does a “right to a healthy environment” imply in legal theory, and how has it been integrated in international law in practice?

³ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950.

⁴ The European Court of Human Rights, Strasbourg.

⁵ *Tyrer v United Kingdom*, no. 5856/72. The European Court of Human Rights, Strasbourg, (25 April 1978) at para. 31.

⁶ First paragraph of Article 8, ECHR: “1. Everyone has the right to respect for his private and family life, his home and his correspondence.”

- b) What limits has the ECtHR established as to a violation of Article 8 in connection with environmental harm, and has there been a shift over time regarding the interpretations of the given article?
- c) Based on the case law; how has the progress been in terms of the development of a substantive right to a healthy environment in the ECHR?
- d) What could be the next step for the Council of Europe in connection with increasing individual protection from environmental harm?

A number of interrelated issues will be addressed in the following sections, such as: does the right to a healthy environment deserve a place in the category of human rights? Is this right on the way of being recognised as a freestanding human right, or has this already happened? What levels of environmental standards are required in order for an environment to be “healthy”? Is the current development connected to environmental rights contributing to increased environmental protection? The focus will be on the right to a healthy environment as a substantive right. Significant development has taken place in terms of procedural rights also, but that will not be the focus of this thesis.

The thesis is divided into *four* parts, with each part divided further into several subsections. Part *one* provides a general introduction; where the background, focus and structure of this thesis will be outlined. Part *two* consists of a very selective and brief introduction into the history of international environmental law, with focus on the integration of environmental issues into human rights law. In part *three*, relevant case law of the ECtHR is analysed and discussed in some detail. At the end of this part, some general conclusions concerning the practice of the Court will be given. Part *four* examines possible approaches with the aim of increased environmental protection in the ECHR. This part assesses the limitations of the existing practice, with the purpose of exploring possibilities to overcome such limitations. In this part it is also argued for the necessity of additional legislation in order to deal with environmental issues in the ECHR, and a suggestion of how this could be drafted.

1.3 Defining terms

Legal definitions of the word ‘*environment*’ are often created around explanations in conventional dictionaries, as most legal dictionaries seem to lack a definition of the term. This is not surprising, as the conceptual understanding of the term has undergone a change over time, influenced by various sciences.⁷ As noted by Phillippe Sands, the term ‘*environment*’ in a *legal* context lacks a “generally accepted usage as a term of art under international law.”⁸ A conventional definition distinguishes between the word ‘environment’ and ‘*the environment*’. ‘Environment’ in general is defined as “the surroundings or conditions in which a person, animal, or plant lives or operates”, while ‘*the environment*’ is explained as “the natural world, as a whole or in a particular geographical area, especially as affected by human activity.”⁹

Principle 2 of the Stockholm declaration from 1972 does not give a clear definition of ‘environment’, but describes the natural resources of the earth as “the air, water, land, flora and fauna and especially representative samples of natural ecosystems”.¹⁰ It also distinguishes between the ‘natural’ environment and the ‘man-made’.¹¹ The United Kingdom’s Environmental Protection Act of 1990 gives a very broad definition of the term ‘environment’ as it states:

The “environment” consists of all, or any, of the following media, namely, the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground.¹²

⁷ L. Godden and J. Peel, *Environmental law: Scientific, Policy and Regulatory Dimensions* (2010), Chapter 2. See also Sands (2012), p. 13.

⁸ Sands (2012), p.14.

⁹ Oxford online dictionary: <http://www.oxforddictionaries.com/definition/english/environment> (last visited 24 November 2011)

¹⁰ Declaration of the United Nations Conference on the Human Environment, Stockholm 16 June 1972, Principle 2.

¹¹ Id. Preamble, Proclamation no. 1.

¹² Environmental Protection Act 1990, United Kingdom, Chapter 43 (1990), Section 1(2) .

An advisory opinion of the International Court of Justice of 1996 on nuclear weapons stated that the ‘environment’ is “not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”¹³ The 1993 Lugano Convention defines environment as 1) “natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors”, 2) “property which forms part of the cultural heritage” and 3) “the characteristic aspects of the landscape”.¹⁴

There is clearly more than one legal understanding of the term ‘environment’, as the word can have different meanings depending on the context. This is not the case for other terms, which are the results of carefully negotiated definitions.¹⁵ As an illustration; ‘environmental pollution’ and ‘environmental damage’ may carry different meanings in international environmental law.¹⁶ Sands seems to argue that ‘environmental damage’ is dependent on having a required level of effect in order to become compensable damage, and illustrates the difference in how the terms are used in Article 8 of the Lugano Convention.¹⁷ The terms may be used more interchangeably in other legal literature, but such use will be avoided in this thesis. The 1979 Convention on Long-range Transboundary Air Pollution gives a definition of air pollution, but this definition can also be used to define other types of environmental pollution. First paragraph of Article 1 defines air pollution as “substances or energy into the air [introduced by humans] resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material prop-

¹³ International Court of Justice, Reports of Judgements, Advisory Opinions and Orders: Legality of the Threat or use of Nuclear Weapons. Advisory Opinion of 8 July, 1996.

¹⁴ Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. Lugano, 21 June 1993, Article 2 (10).

¹⁵ Sands (2012), p.15.

¹⁶ Sands (2012), p. 706.

¹⁷ Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, 21 June 1993, Article 8. See also Sands (2012), p. 707.

erty and impair or interfere with amenities and other legitimate uses of the environment”.¹⁸ In other words, pollution is defined as any substance introduced by humans that has harmful effects on the environment.

As the term “environment” gives no implications as to levels of environmental quality in itself, certain adjectives are often added to it. These additional words have been referred to by Shelton as “qualifying terms”.¹⁹ Words such as *healthy* and *adequate* are often used in connection with the “right to environment”.²⁰ Examples of other terms are *viable*, *clean*, or *safe*. Regarding what standards these qualifying terms obligate to ensure in practice, Shelton concluded that “no precise standard exists, nor can such a standard be established in human rights treaties.”²¹ The Experts Group on Environmental Law of the World Commission on Environment and Development discussed the term “adequate” in connection with environmental standards.²² It was argued in the report that:

...the determination of the adequacy of the environment [...] will depend to a considerable extent on many regional or local factors, such as the nature of the environment concerned, the kind of use made of it, the means at the disposal of the public authorities and the population, and the expectations of the human beings themselves.²³

In a similar way, Shelton argued that the use of such qualifying terms is beneficial as they will help the content of the right change along with variable standards such as economic indicators, needs and resources:

¹⁸ 1979 Convention on Long-range Transboundary Air Pollution, Geneva, 13 November 1979. Article 1 begins in the following way: “Air Pollution” means the introduction by man, directly or indirectly, of substances...”

¹⁹ Shelton (1991), p. 134.

²⁰ The term “right to environment” has for instance been used by Shelton (1991) p.125. See also Collins (2007).

²¹ Shelton (1991), p.136.

²² Experts Group on Environmental Law of the World Commission on Environment and Development, Principles and Recommendations. R.D. Munro & J.G. Lammers eds. 1987. Hereafter: Munro & Lammers (1987).

²³ Munro & Lammers (1987), p. 39.

Both the threats to humanity and the resulting necessary measures are subject to constant change based on advances in scientific knowledge and models of the environment. Thus, it is impossible for a human rights instrument to specify precisely the products which should not be used or the chemical composition of air which must be maintained. These matters will vary in the same way that the economic situations of communities change. The necessary measures to implement the right to environment will thus be determined by reference to independent environmental findings and regulations capable of rapid amendment.²⁴

The expression chosen to focus on in this thesis is “the right to a *healthy* environment”. This terminology is used in most of the legal literature mentioned in this thesis, as well as several international agreements and national constitutions.²⁵ However, the term “healthy” can be interchanged with other qualifying terms such as the ones previously mentioned.

1.4 Methodology

This is a qualitative legal research²⁶, focusing mainly on the case law of the ECtHR in order to analyse the content and scope of the right to a healthy environment. The primary source of law²⁷ focused on in this thesis is the ECHR, with the focus on Article 8 in connection with environmental issues²⁸. The main secondary source of law is case law of the ECtHR. Legal literature relevant to the subject of this thesis found in books and articles from various law journals is another type of secondary source frequently referred to in this thesis. Relevant reports by international organisations, such as the United Nations Human Rights Council have also been used actively as part of the research process.

²⁴ Shelton (1991), p.136.

²⁵ A few examples will be mentioned in part 2 of this thesis. See Boyd (2012), Chapters 2 and 3 for more examples.

²⁶ McConville, Mike & Wing Hong Chui, *Research Methods for Law*, Edinburgh (Edinburgh University Press) 2007, Ch. 1.

²⁷ The division between primary and secondary sources of law is expressed in Article 38 of the Statute of the International Court of Justice. See also Crawford (2012), pp. 21-23.

1.5 The ECHR and the Council of Europe

At the close of World War II, a great need for international security and the protection of human life was recognised in the field of public international law. The terrible atrocities that the international society witnessed during that war, undoubtedly created a momentum that gave rise to the adoption of the ECHR. The European Convention of Human Rights was drafted in Rome in 1950, at a time when environmental issues were not of great concern if compared to today. As a convention drafted to meet the needs in the period succeeding World War II, all possible future needs in terms of human rights cannot be expected to be met by this treaty.

Additional protocols have been added to the ECHR²⁹, but none of these have consisted of an explicit right to a healthy environment. Environmental issues have become increasingly important in the past decades, and the urge for having a clearly expressed right to a clean environment in the ECHR has been expressed many times. This has been an important issue not only to legal scholars, but also other well-known persons and committees in the field of international environmental law. I will discuss this more thoroughly in the subsequent chapter.

The European Convention of Human Rights is the most important source of law concerning human rights within the Council of Europe. It came into force in 1953, and is today binding upon 47 member states. It is important not to confuse the Council of Europe with the EU³⁰. The ECtHR is the Court of the Council of Europe; it should not be confused with the European Court of Justice³¹ located in Luxembourg, which deals with cases concerning the EU treaties. The ECtHR has its seat in Strasbourg, and has delivered around 16 000 judgements in the period between 1959 and 2012.³²

²⁹ Currently, 14 additional protocols to the ECHR have entered into force.

³⁰ European Union, founded November 1, 1993.

³¹ Court of Justice of the European Union, Luxembourg.

³² http://echr.coe.int/Documents/Overview_19592012_ENG.pdf (last visited 24 November 2013).

2 The linkage between Human Rights and International Environmental Law

2.1 International agreements and other instruments on environmental rights

2.1.1 International agreements

Prior to the Stockholm Declaration, environmental issues had already become a well-discussed topic in the international community. Rachel Carson's book "Silent Spring" from 1962 and other books published in the following years had created a spark in the environmental debate. Along with the media focusing on the environmental crisis, the need for stronger protection of the environment was recognised. New technological development had caused unforeseen environmental threats that needed to be addressed.³³ The grounding of the oil tanker Torrey Canyon in 1967 caused black tides on the coasts of France, England and Belgium.³⁴ This undoubtedly created the momentum necessary for the General Assembly of the United Nations to summon the World Conference on the Human Environment in Stockholm, through a resolution in 1968.³⁵

The *Stockholm Declaration on the Human Environment*³⁶ from 1972 is often recognised as the beginning of modern international environmental law. It consists of a preamble and seven proclamations, followed by 26 principles. Principle 1 of the Stockholm Declaration begins with: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being,

³³ Shelton (2011) p.67.

³⁴ Shelton (2011) p.67.

³⁵ Resolutions Adopted by the United Nations General Assembly, 23rd Session, Resolution 2398 XXIII, 3 December 1968.

³⁶ Declaration of the United Nations Conference on the Human Environment, Stockholm 16 June 1972.

and he bears a solemn responsibility to protect and improve the environment for present and future generations.” For the first time, human rights and environmental issues had been linked so clearly in a widely accepted, international treaty.³⁷ However, this principle should not be understood as a clear, individual right to a healthy environment. Suggestions of having a definite right to a healthy environment were made during the drafting of the Stockholm Declaration, but rejected.³⁸

Reading the other principles in the declaration affirms that the intention of the declaration is to be inspirational concerning environmental protection, and not to make categorical rights that can be enforced.

Another UN Conference on environmental issues, taking place 20 years after the conference in Stockholm, gave rise to the *Rio Declaration*.³⁹ The adoption of these two declarations represents landmark moments in ushering what Phillippe Sands calls the “*modern era*” of international environmental law⁴⁰. When looking at the Rio Declaration from a broad perspective, it can be said to reaffirm many of the principles from the Stockholm Declaration. The Rio Convention is also different in the way that it places focus on sustainable development from the Brundtland Report⁴¹ in terms of environmental protection.⁴²

In connection with the right to a healthy environment, Principle 1 of the Rio declaration states: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” Comparing this

³⁷ See for instance: Turner (2004), p.278, Collins (2007) p.124, and Desagne (1995) p.263.

³⁸ Günther Handl on The Stockholm and Rio Declaration: http://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf p. 3 (last visited 24 November 2013).

³⁹ Rio Declaration on Environment and Development, adopted on 14 June 1992 by the United Nations Conference on Environment and Development.

⁴⁰ Sands (2012) p.33.

⁴¹ Our Common Future, Report of the World Commission on Environment and Development, World Commission on Environment and Development, 1987. Published as Annex to General Assembly document A/42/427, Development and International Co-operation: Environment, 2 August 1987.

⁴² Shelton (2011) p.74.

to Principle 1 of the Stockholm Declaration, some scholars have concluded that Principle 1 of the Rio Declaration was even less suggestive in terms of expressing a clear right to a healthy environment.⁴³ Whatever conclusion one might come to, the importance of a healthy environment is undoubtedly introduced in the first principle of both the declarations mentioned.⁴⁴ They have also inspired to more use of rights language in relation with environmental protection in national constitutions and other international agreements.

2.1.2 Regional agreements

Several international and regional conventions adopted after the Stockholm Declaration have expressed the right to a healthy environment. Article 24 in the African Charter on Human Rights⁴⁵ of 1981 states: “All peoples shall have the right to a general satisfactory environment favourable to their development”. A comparable formulation of the right to a healthy environment can be found in an additional protocol to the American Human Rights Convention on Economic and Social Rights. Article 11 in the protocol of San Salvador from 1988⁴⁶ entitled “*the right to a healthy environment*” is formulated as:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The State Parties shall promote the protection, preservation, and improvement of the environment.

The Aarhus Convention of 1998⁴⁷ uses Principle 1 of the Stockholm Declaration as a foundation in its preamble, but has the main focus on strengthening the procedural envi-

⁴³ Günther Handl on The Stockholm and Rio Declaration: http://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf pp. 3-4 (last visited 24 November 2013).

⁴⁴ The Stockholm Declaration (1972) and the Rio Declaration (1992).

⁴⁵ African Charter on Human and Peoples Rights. Nairobi, Kenya 27 June 1981.

⁴⁶ Additional protocol to the American Convention on Human Rights in the Area of Economical, Social and Cultural Rights. San Salvador, El Salvador, 17 November 1988.

⁴⁷ The United Nations Economic Commission for Europe: Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters. Aarhus, 25 June 1998.

ronmental rights introduced in Principle 10 of the Rio Declaration. Article 1 of the Aarhus Convention illustrates this point as it is stated:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

It is notable that Article 1, instead of declaring a right to a healthy environment, indirectly asserts by calling it “*the*” right, that the substantive right already exists as an obligation upon the member states. Access to information, public participation in decision-making, and access to justice in environmental matters are the central procedural rights in the convention.

Article 38 of the 2004 Arab Charter on Human Rights declares:

Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights.⁴⁸

The ASEAN Human Rights Declaration of 2012, asserting the rights of approximately 600 million human beings in Southeast Asia, includes the “right to a safe, clean and sustainable environment.”⁴⁹

2.1.3 Environmental rights in national constitutions

National constitutions embody the core legal principles upon which the functioning of the state is based. Various legal literatures have emphasised the importance of having the substantive right to a healthy environment in constitutions throughout the world. Several surveys have been done on the matter, showing the trend of an increasingly number of states including environmental rights or responsibilities of the State in their constitutions.

⁴⁸ League of Arab States, Arab Charter on Human Rights, May 22, 2004. Entered into force March 15, 2008.

⁴⁹ Association of Southeast Asian Nations Human Rights Declaration, 18 November 2012, Article 28 (f).

Fatma Ksentini, UN's Special Rapporteur on Human Rights and the Environment, listed 61 countries with such provisions in the well-known Ksentini-report of 1994.⁵⁰

A very recent and in-depth analysis by David Boyd shows that 147 out of 193 national constitutions include explicit references to environmental rights and/or environmental responsibilities.⁵¹ Out of these, a substantive right to a healthy environment is recognised in 92 national constitutions.⁵² As an illustration, the first two sections of Article 110(b) in the Norwegian Constitution states:

- 1) Every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained.
- 2) Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.

The right to a healthy environment in an increasing number of national constitutions is certainly contributing to the acceptance of this right as an emerging norm in customary international law. Pedersen recognises the influence of the development of environmental rights in national constitutions as he states:

...the vast number of national constitutions holding provisions on substantive as well as procedural environmental rights adds further impetus to the use of rights to provide for environmental protections. As for the substantive norms, the rights in the national constitutions have the potential to influence debates on the status of a substantive environmental norm under international law.⁵³

2.1.4 The United Nations Human Rights Council on the right to a healthy Environment

There has been considerable activity related to the right to a healthy environment in the United Nations Human Rights Council in recent years. An analytical report of the relationship between human rights and the environment was published in 2011, where the im-

⁵⁰ Ksentini, Fatma Zohra. Annex III in: *Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned, Human Rights and the Environment*. 6 July 1994, E/CN.4/Sub.2/1994/9.

⁵¹ Boyd (2012), p.47.

⁵² Boyd (2012), p.59.

⁵³ Pedersen (2008), p. 110.

portance of focusing on international recognition of a right to a healthy environment was expressed.⁵⁴ The report led to the appointment of an Independent Expert on Human Rights and the Environment, who presented a preliminary report concerning his work in December 2012. Regarding the relevance of adding the right to a healthy environment in the Universal Declaration of Human Rights, the report stated: “Were the Universal Declaration to be drafted today, it is easy to imagine that it would include a right recognised in so many national constitutions and regional agreements.”⁵⁵

It was also indicated in the report that certain obligations regarding the right to a healthy environment already existed and should be clarified, as it was stated:

Clarification of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment is necessary in order for States and others to better understand what those obligations require and ensure that they are fully met, at every level from the local to the global.⁵⁶

As the work of the Independent Expert continues, it will be interesting to see what the final recommendations and conclusions will be.

2.2 The interrelation of human rights and environmental law

2.2.1 A brief overview

The debate on environmental rights among legal scholars has progressed alongside the increasing concern for the environment that has taken place since the 1960s. With the linkage between environmental protection and human rights being increasingly recognised internationally since the Stockholm Conference in 1972, the debate on environmental rights has undoubtedly been gaining momentum. David Boyd accurately summed up many of the questions that have been discussed as follows:

⁵⁴ Report of the United Nations High Commissioner for Human Rights: Analytical study on the relationship between human rights and the environment, 16 December 2011. A/HRC/19/34, p.16.

⁵⁵ Knox (2012), p. 6.

⁵⁶ Knox (2012), p. 18.

Does the right to a healthy environment possess the attributes of a universal human right? How does it fit with established civil, political, economic, social, and cultural rights? What is the scope and nature of the right? Is it an individual and/or a collective right? Is it a moral and/or a legal right? Is it a negative (liberty) or a positive (welfare) right? Should the focus be on a substantive environmental right or a set of procedural environmental rights?⁵⁷

For the purpose of this thesis it will be provided only a brief synopsis of a few key issues, so as to place this research within a broader discussion. Ideas on how environmental protection connects with human rights can be classified in various ways, but it is important to mention three different approaches. The aim of this taxonomy is not to regard the approaches as irreconcilable with each other, but to present some essential ideas on the topic in a comprehensive way. Rather, the approaches seem to evolve concurrently as they all share the aim of increasing environmental standards.

The *first* approach regards environmental protection as a pre-condition for human rights to be enjoyed fully.⁵⁸ This approach is based on the argument that certain levels of environmental standards are necessary in order to have an adequate life of good health, peace and security. According to the *second* approach, certain environmental issues are relevant in human rights law, but only as aspects of already existing human rights.⁵⁹ The *third* approach upholds the right to a healthy environment as a separate, independent right in the collection of internationally recognised human rights.⁶⁰

Finally, there is also the viewpoint of environmental issues not being a human rights issue at all. Supporters of this opinion often argue that environmental issues should be addressed through separate environmental policies.

⁵⁷ Boyd (2012), p. 20.

⁵⁸ Report of the United Nations High Commissioner for Human Rights: Analytical study on the relationship between human rights and the environment, 16 December 2011. A/HRC/19/34, p. 4.

⁵⁹ This approach is discussed in part 2.2.5 of the thesis. See for instance: Lee (2000), p.290.

⁶⁰ The right to (a healthy) environment as a freestanding right is discussed in several of the articles discussed in this thesis, see for instance: Collins (2007) p. 131, Lee (2000) p.284, Shelton (1991) p. 125-37, Attapattu (2002) p. 109, Rodriguez (2001)p. 9.

2.2.2 Human rights and the environment

As Dinah Shelton has rightly acknowledged, the creation of rights are mainly results of historical experiences with wrongs.⁶¹ In order to protect individuals from such experienced wrongs in the future, a *right* is thus often agreed upon and incorporated into the law. Human rights are sometimes claimed to be *natural rights*; meaning that they exist independent of legal systems in the tradition of natural law.⁶²

Whether and to which extent human rights can be regarded as *universal* in nature is an actively discussed issue per se. A particular reason for different opinions to arise in legal literature appears to be that human rights are regarded as universal in theory, compared to their more limited effect in practice. At the most fundamental level, a human right can still be said to be a universal right.⁶³ This claim can for instance be based on an interpretation of the Universal Declaration of Human Rights. Regarding the declared rights, the preamble expresses the aim of securing “their universal and effective recognition and observance”.⁶⁴

2.2.3 Environmental rights

“*Environmental rights*” as a term may be interpreted in different ways. As Shelton mentioned, the term may refer to rights *to* a healthy environment, but also to rights *of* the environment.⁶⁵ In 1972, Christopher Stone introduced the conceptual idea of nature being eligible of having certain rights into the field of environmental law.⁶⁶ This idea was put into

⁶¹ Shelton (2011), p.121.

⁶² Id. p. 121.

⁶³ Lee (2000), p.287

⁶⁴ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.

⁶⁵ Shelton (1991), p.117.

⁶⁶ See Christopher D. Stone, *Should Trees Have Standing--Toward Legal Rights for Natural Object*. In: 45 Southern California Law Review (1972).

practice by Ecuador in 2008, when it included a chapter entitled “*Rights of Nature*” into its new constitution.⁶⁷

In this thesis, the interpretation of the words “*environmental rights*” is the same as Shelton’s definition; “the reformulation and expansion of existing human rights and duties in the context of environmental protection.”⁶⁸ An even more comprehensive definition is to understand environmental rights as “rights understood to be related to environmental protection.”⁶⁹

The promotion of environmental rights has been criticised for supporting an *anthropocentric* perspective, regarding human beings as the most important species on the planet. Critics argue in favour of an *ecocentric* view, considering all organisms as being of equal value. The anthropocentric view is claimed to have contributed to the justification for exploiting the natural resources and causing the environmental degradation in the first place. Shelton seems to answer the criticism by distinguishing the anthropocentric view often taken on by supporters of human rights from a utilitarian view by stating:

While the ultimate aim of environmental protection remains anthropocentric, humans are not separable members of the universe. Rather, humans are interlinked and interdependent participants with duties to protect and conserve all elements of nature, whether or not they have known benefits or current economic utility.⁷⁰

Instead of promoting an ecocentric view, Shelton seems to advocate environmental rights based on a combination of anthropocentrism and *intergenerational equity* by stating:

Survival, the most fundamental "common interest" of humanity, underlies all legal and social systems. Survival requires consideration of the needs of future as well as present generations.⁷¹

⁶⁷ Constitution of the Republic of Ecuador, 20 October 2008, Articles 71-74, available at https://www.constituteproject.org/constitution/Ecuador_2008.pdf (last visited 18 November 2013).

⁶⁸ Shelton (1991), p. 117.

⁶⁹ Knox (2012), p.4.

⁷⁰ Shelton (1991), p. 110.

⁷¹ Shelton (1991), p.110.

This view seems to correspond well to Principle 1 of the Stockholm Declaration.

2.2.4 Substantive versus procedural rights

Procedural environmental rights ensure the right to participation in the decision-making process, access to information and to legal retribution. Procedural rights are important in the field of environmental law and human rights law because they provide the apparatus to ensure that the substantive rights are fulfilled.⁷² Article 10 of the Rio Declaration consists of procedural environmental rights. This article provides as follows:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.⁷³

This is an example of clearly expressed procedural environmental rights in an international convention. Boyd argues that procedural environmental rights are “necessary but not sufficient” in themselves to address environmental issues.⁷⁴

A *substantive* right to a healthy environment consists of an assured right to enjoy environmental standards with certain minimum requirements.⁷⁵ Similar to other human rights, a substantive right benefits all individuals and includes an obligation upon the State to protect this right. Depending on the words used in the expression of a substantive right, a certain standard is set in connection with a possible violation of the right. This standard may change over time and the right may thus evolve, depending on the interpretation by the related judicial courts.

⁷² Boyd (2011), p. 25.

⁷³ Rio Declaration on Environment and Development, adopted on 14 June 1992 by the United Nations Conference on Environment and Development, Article 10.

⁷⁴ Boyd (2012), p.27.

⁷⁵ Boyd (2012), p. 25.

2.2.5 Environmental rights derived from existing human rights

Human rights that have the aim of protecting interests such as individual *health, life* or the enjoyment of *private life* clearly have an aspect related to environmental protection within them. As the expectations regarding environmental standards have increased over time, the content of such rights has been interpreted in a way to include protection from environmental harm as well. This development has been characterised as an *expansion* of existing human rights.⁷⁶ It can also be considered as “*environmental components*” of existing rights.⁷⁷ Alan Boyle has chosen to look at the process of environmental rights gaining position in existing human right treaties as a “greening” of human rights law.⁷⁸

Shelton calls the use of existing human rights to address environmental issues “an intermediate step between simple application of existing rights to the goal of environmental protection and recognition of a new full-fledged right to environment.”⁷⁹ The next inevitable step in the view of Shelton and several other legal scholars is undoubtedly a clear recognition of an independent substantive right to a healthy environment on an international level. It seems like we are in the middle of a process where this is happening, but it is difficult to predict how long it will take before such a right is fully recognised.

Recent development and the present situation in the ECtHR regarding environmental protection based on existing rights will be addressed in part three of this thesis. In short; the Court has shown an increased willingness to recognise environmental components in the existing rights in the ECHR over time, particularly in cases related to severe environmental harm.

⁷⁶ Rodriguez-Rivera (2001), p.16. See also Collins (2007), p.127.

⁷⁷ Lee (2000), p.290.

⁷⁸ Boyle (2012), p.614.

⁷⁹ Shelton (1991), p.117.

2.2.6 The freestanding right to a healthy environment

The main characteristic of a freestanding right to a healthy environment is that it is not dependent on violations of existing human rights in order to be claimed. Examples of such a right have already been given in previous parts of the thesis.

3 Development of case law on environmental issues at the European Court of Human Rights

“Regardless of the European Convention on Human Rights’ silence on the issue, the court’s jurisprudence represents a significant contribution to the status of both a human right to the environment as well as procedural rights.”⁸⁰

Ole Pedersen

3.1 Article 8 and the interpretive principles of the European Court of Human Rights

In the course of its activity the ECtHR has developed certain interpretive approaches. Some of the key principles directly relevant to the cases dealt with in this thesis developed by the ECtHR will be discussed in the following subsections.

3.1.1 Article 8 – Right to respect for private life, family life and the home

In the discussion of the cases in the following chapter, the main focus will be on Article 8 of the ECHR.

Article 8 states:

- 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.

It may be helpful to divide the rights protected under Article 8 into three independent rights, namely the right to respect for *private life*, *family life* and *the home*.⁸¹ Such a division may be helpful and confusing at the same time, as the ECtHR often uses several of

⁸⁰ Pedersen (2008), p. 83.

⁸¹ Van Dijk et al. (2006), pp.663-664.

the mentioned rights together in order to deal with an issue. In the case of *López Ostra v Spain*, the Court discussed whether the State had secured the applicant's right to respect for her "home and her private and family life".⁸² In the case of *Hatton*, the Court stated that Article 8 protects the right to respect for "private and family life, home and correspondence".⁸³

The list of potential issues that can be dealt with under Article 8 can be said to be non-exhaustive. This is similar to the Court's statement regarding the concept of "private life" in the *Pretty* case, a judgement in which the ECtHR discussed extending the Scope of Article 8 in order to include a right to individual self-determination. It was stated that "private life" is a "broad term not susceptible to exhaustive definition."⁸⁴

Regarding the rights protected under Article 8 in general, Heringa & Zwaak conclude that Article 8 is broader than just a mere protection of a "right to privacy".⁸⁵ Moreham talks about *five* categories of rights in connection with Article 8. These, he divides further between rights offering "freedom from" and rights offering "freedom to" certain things. The first three categories include the right to be free; 1) *from* interference with physical and psychological integrity; 2) *from* unwanted access to and collection of information; and 3) *from* serious environmental pollution. The last two categories of rights consist of the right to be free; 4) *to* develop one's identity and; 5) *to* live one's life in the manner of one's choosing.⁸⁶ The third category in Moreham's presentation is the right that will be discussed in this chapter, namely the right to be free *from* serious environmental pollution. The content and scope of this right will be discussed, as well as how this right has developed over time.

⁸² Case of *López Ostra v Spain*, no. 16798/90 Strasbourg, 9 December 1994, para. 58.

⁸³ Case of *Hatton and Others v The United Kingdom*, No. 36022/97, (Grand Chamber Judgement) Strasbourg, 8 July 2003, para. 96.

⁸⁴ Case of *Pretty v The United Kingdom*, no. 2346/02, 29 April 2002, para. 61

⁸⁵ Van Dijk et al. (2006), p.665.

⁸⁶ Moreham (2008) p. 46. See also White & Ovey (2010), p. 357.

3.1.2 The dynamic interpretation of the ECHR

As the practice of the ECtHR has developed, the Court has been resolute in terms of expressing its philosophy on how it should interpret the existing legal framework. The Court has been clear on the fact that it wants the ECHR to evolve; not only by additional protocols, but also through dynamic interpretations of the existing articles in specific cases. The ECtHR has shown an ability to use the ECHR in situations that were unforeseen at the time that the convention was drafted. In the well-known case of *Tyrer v United Kingdom*, the Court stated: “The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.”⁸⁷ This policy of dynamic interpretation is not restricted to a specific article, and is upheld in a series of following cases. In *Loizidou v Turkey* the Court asserted again: “That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court’s case-law.”⁸⁸

Article 8 clearly gives no direct indication of including protected rights regarding environmental harm. Neither were environmental issues of great concern when this article was drafted. As discussed later in this chapter, the ECtHR has gradually included certain cases dealing with environmental issues under Article 8. Heringa & Zwaak argue that the case law of the ECtHR has developed to include protection against “a form of indirect interference with the right to respect for the home which does substantially enlarge the scope of Article 8”.⁸⁹ The dissenting judges commented on the Court’s practice by stating that the “interpretation by the Commission and the Court of various Convention requirements has generally been ‘progressive’, in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention”.⁹⁰

⁸⁷ *Tyrer v United Kingdom*, No.5856/72, Strasbourg (25 April 1978), para. 31

⁸⁸ *Loizidou v Turkey* (Preliminary Objections), no. 15318/89 Strasbourg (23 March 1995), para.71

⁸⁹ Dijk, et al. (2006), p. 725

⁹⁰ *Hatton and Others v The United Kingdom*, 8 July 2003, para. 2 (joint dissenting opinion)

3.2 Cases dealing with noise pollution

3.2.1 Noise interference from airports

Cases raising the issue of environmental rights related to Article 8 of the ECHR started to appear before the ECtHR around the middle of the 1970s. In the case of *Arrondelle v United Kingdom*⁹¹, the issue of noise pollution from a part of Gatwick Airport was addressed. This case was not decided on the merits, as it was settled after being declared admissible by the European Commission of Human Rights. The case of *Baggs v The United Kingdom*⁹² concerned similar issues, only this time in connection with noise from a part of Heathrow Airport. Likewise, this case was also declared admissible by the Commission, but ended with a friendly settlement.

A third case on related issues, *Powell and Rayner v The United Kingdom*⁹³ did reach the Court Chamber. The applicants (M. J. Powell and M. A. Rayner) lived close to parts of Heathrow Airport, and lodged a complaint by invoking Article 8, among others.⁹⁴ Article 8 was recognised by the Court as the material provision, and considered *two* main interests that needed to be weighed against each other. According to the Court, “regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.”⁹⁵ The *first* interest is the right of the applicants regarding protection of their homes and privacy, as derived from the first paragraph of Article 8. *Secondly*, based on the interest of the State, “interference justified in a democratic society in the interests of the economic well-being of the country” may be allowed in certain cases.⁹⁶ After having evaluated both interests, the Court came to the conclusion that the noise pollution was justified according to the second paragraph of Article 8. The *fair*

⁹¹ *Arrondelle v United Kingdom*, No. 7889/77, Commission (plenary), 15 July 1980

⁹² *Baggs v United Kingdom*, No. 9310/81, Commission (Plenary), 14 October 1985

⁹³ *Powell and Rayner v The United Kingdom*, No. 9310/81, 21 February 1990

⁹⁴ Article 6-1 and Art. 13 were also invoked, see *supra* note 31, para.27

⁹⁵ *Powell and Rayner v The United Kingdom*, para. 41

⁹⁶ *Id.* para. 38

balance test applied by the Court in this case is not limited to cases dealing with environmental issues.

Significant weight was given to the interest of the State by the ECtHR, as it was held that “the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance.”⁹⁷ The term “*margin of appreciation*” is frequently used by the ECtHR. Steven Greer explains it as follows:

The term “margin of appreciation” refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention).⁹⁸

In practice, the *margin of appreciation* given to the member States allows the Court to be more adjustable to the specific situation of each case in its task of making sure that the ECHR is being respected. This way, the Court can adjust its assessment in accordance with the varying environmental standards and policies of the specific Member State. Macdonald describes the difficulties connected to the matter by stating:

The dilemma facing the Court, evident in recent cases on the margin of appreciation, is how to remain true to its responsibility to develop a reasonably comprehensive set of review principles appropriate for application across the entire Convention, while at the same time recognizing the diversity of political, economic, cultural and social situations in the societies of the Contracting Parties.⁹⁹

Two factors were emphasised by the Court to support the verdict; the *first* was the importance of the Heathrow Airport as one of the busiest airports in the world. *Secondly*, it valued the measures the State authorities had taken in order to deal with the issues of noise pollution, such as “aircraft noise certification, restrictions on night jet movements, noise monitoring, the introduction of noise preferential routes, runway alternation, noise-related landing charges, the revocation of the licence for the Gatwick/Heathrow helicopter link, a

⁹⁷ Id. para. 41.

⁹⁸ S. Greer. *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe, 2000, p. 5

⁹⁹ Macdonald, et al. (1993), p. 83

noise insulation grant scheme, and a scheme for the purchase of noise-blighted properties close to the Airport.”¹⁰⁰

Based on this, the judgement concluded that neither had the *margin of appreciation* been exceeded, nor had the fair balance between the interests of the individual and the community been upset.

Another case regarding noise from airports, *Hatton and others v United Kingdom*, went all the way to the Grand Chamber of the ECtHR.¹⁰¹ The applicants (Ruth Hatton and seven other UK citizens), living close to parts of Heathrow Airport, complained about noise pollution caused by flights operating at night times. On 2 October 2001, the Chamber of the ECtHR decided (with five votes against two) that there had been a violation of Article 8 in this case.¹⁰² Regarding the striking of balance between the interests of the individual and those of the State, the Court stated that “in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others”.¹⁰³ It seemed like the Court had taken on a more restrictive approach on what could be allowed under the margin of appreciation of the State. The Court also expressed that the State had not taken enough effort to minimise the interference caused by noise from the airport, and that the measures taken to reduce the noise had been rather modest. This introduction of a different approach compared to earlier cases, clearly reduced the scope of the *margin of appreciation* from what the States were used to.

The decision in the case of *Hatton* was appealed by the Government, and was reversed by the majority of the Grand Chamber (12 votes against 5) in 2003. This latter judgement is quite interesting in terms of evaluating the development the ECtHR had un-

¹⁰⁰ Powell and Rayner v The United Kingdom, para. 43.

¹⁰¹ Case of Hatton and Others v The United Kingdom, No. 36022/97, (Grand Chamber Judgement) Strasbourg, 8 July 2003.

¹⁰² Case of Hatton and Others v The United Kingdom, No. 36022/97 (Chamber Judgement) Strasbourg, 2 October 2001

¹⁰³ Id. para. 97.

dergone in connection with noise pollution and Article 8, and also environmental human rights in general. It is important to bear in mind that this judgement was rendered 13 years after the case of *Powell and Rayner v The United Kingdom*. Regarding the right to a healthy environment under Article 8, the Court assessed: “There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8.”¹⁰⁴ The Grand Chamber also made reference to the case of *Powell and Rayner v The United Kingdom*, where Article 8 was considered to be relevant in terms of environmental pollution (noise pollution in this case).

Similar to the cases mentioned earlier, the Court tested whether a fair balance has been struck between the conflicting interests of the State (economic interests) and those of the persons affected. Contrary to the first court decision from 2001, the majority of the Grand Chamber seemed more reluctant in terms of giving more weight to the individual rights of the applicants. It was stated in the judgement that “it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights.”¹⁰⁵ The Grand Chamber concluded that the State had not overstepped the margin of appreciation, and that a fair balance had been struck.

By looking at the final verdict, it is easy to consider the judgement to be a setback in the process of developing environmental human rights in the ECHR. However, there are often details in the facts of a case that can make the judgement go in a certain direction. In this case, the Court emphasised the fact that the night noise had not caused significant reduction in the house prices in the area. There was a possibility, in the view of the Court, to move elsewhere without incurring financial loss.¹⁰⁶ This made the situation considerably different from many other cases on environmental pollution, as the nuisance often makes it hard to sell the estate without suffering from financial loss. This way of reasoning seems somewhat unfit, as it will only cause the new residents to inherit the problem. However, the

¹⁰⁴ Case of Hatton and Others v The United Kingdom, No. 36022/97, (Grand Chamber) 8 July 2003, para.96

¹⁰⁵ Id. para.122

¹⁰⁶ Id. Para.127

Court's assessment can still be defended in this situation, as a comprehensive study from 1992 had shown that only a very small part of the population (2-3%) would be disturbed by the noise levels occurring in this specific case.¹⁰⁷ This approach of considering the individual's ability to leave the area was also expressed by referring to the judgement from *Hatton* in the case of *Ashworth and Others v The United Kingdom*¹⁰⁸. The case of Ashworth was declared as inadmissible.

It is also important not to overlook the joint dissenting opinion of five Grand Chamber Judges in the case of *Hatton and Others v The United Kingdom*. The opinion showed that a considerable number of the judges wanted the Court to have a stronger concern for environmental human rights by emphasising the linkage of environmental protection and human rights, and stating: "We believe that this concern for environmental protection shares common ground with the general concern for human rights."¹⁰⁹ The Judges also discussed the "evolutive" approach of the ECtHR, and the aim of gradually increasing the level of protection concerning the rights included under the ECHR. They argued in favour of including environmental rights in the ECHR, and stated that "...Article 8 of the Convention guarantees the right to a healthy environment..."¹¹⁰ Notably, the dissenting judges were concerned that the majority decision was going "against the current" of the development taking place in this field.¹¹¹

3.2.2 Noise from entertainment facilities

Moving to other kinds of noise pollution, the case of *Moreno Gómez v Spain*¹¹² concerned complaints of frequent noise from a large number of bars, pubs and discotheques

¹⁰⁷ Id. Para.127

¹⁰⁸ *Ashworth and Others v The United Kingdom*, no. 39561/98, Strasbourg, 20 January 2004

¹⁰⁹ *Hatton and Others v The United Kingdom*, 8 July 2003, Dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner, para.1

¹¹⁰ Id. Para.4

¹¹¹ Id. Para.5

¹¹² *Moreno Gómez v Spain*, no. 4143/02. Strasbourg, 16 November 2004

in the close vicinity of the applicant's home. In its assessment, the Court unanimously concluded that there had been a violation of Article 8. With reference to article 8, the Court affirmed:

Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference.¹¹³

Two important approaches that can be derived from previous cases were reaffirmed in the case of *Moreno Gómez*. The first is the “*fair balance-test*”, namely assuring that the State has struck a fair balance between the conflicting interests. The second is a “*severity test*”, where the Court determines whether the nuisance caused by the noise attains the minimum level of severity required for it to constitute a violation of Article 8.¹¹⁴

The ECtHR also reaffirmed the positive obligations on the part of the State. Even though the interference was caused by third parties, the State had failed to take action and thus it had failed to protect the rights of the applicant.¹¹⁵

3.3 Cases of industrial pollution and environmental degradation

3.3.1 Pollution from waste treatment plants

*López Ostra v Spain*¹¹⁶ was the first case in which the ECtHR found a violation of Article 8 due to failure by the State to limit harmful industrial pollution. This is a landmark case that has frequently been referred to by the Court in its later decisions.

Mrs Gregoria López Ostra, the applicant, lived with her husband and two daughters in the town of Lorca in Spain. The town had several leather tanneries owned by a private company, and a waste treatment plant for these tanneries located very close to the applicant's home. The applicant complained of “smells, noise and polluting fumes” caused by the plant

¹¹³ Id. Para. 53

¹¹⁴ Id. Para. 58. The severity test is discussed in more detail in part 3.5.2 of this thesis.

¹¹⁵ Id. Para. 57

¹¹⁶ Case of López Ostra v Spain, no. 16798/90 Strasbourg, 9 December 1994

and argued that the Spanish authorities were liable, by having adopted a passive attitude on the matter.¹¹⁷ Mrs López Ostra claimed that the pollution from the plant had caused serious health problems to herself and her family, and that this was an infringement of her right to respect for her home under Article 8.¹¹⁸

Although the judgement implied allowing for a broader use of Article 8 by including environmental harm from industrial pollution, the Court was remarkably concise in arguing its view. The Court succinctly and persuasively concluded that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely”¹¹⁹

As usual, the Court examined whether a fair balance had been struck between the interests of the individual and the community and recalled that the State enjoyed a “*margin of appreciation*”. Regarding the Court’s function in evaluating the duty of the State in this case, the Court stated that its role is to “establish whether the national authorities took the measures necessary for protecting the applicant’s right to respect for her home and for her private and family life under Article 8”.¹²⁰

The judgement in *López Ostra v Spain* is fairly short, and the approach of the Court regarding environmental rights under Article 8 is not discussed in much detail. Neither is there any mention of the level of severity required to consider the nuisance a violation of Article 8. Nevertheless, the judgement marked an important step in the approach of the Court in terms of interpreting the convention with an aim of gradually increasing the protection of individual rights.

3.3.2 Chemical factories and environmental risks

In 1998, the Grand Chamber of the ECtHR delivered another important judgement related to environmental pollution from private industries. The case of *Guerra and Others v*

¹¹⁷ Id. Para. 34

¹¹⁸ Id. Para. 47

¹¹⁹ Id. Para. 51

¹²⁰ Id. Para. 55

*Italy*¹²¹ concerned complaints of industrial pollution from a chemical factory in Manfredonia, Italy. All the applicants lived approximately a kilometre away from the factory. Regarding application of Article 8, the Court decided that “direct effect of the toxic emissions on the applicants’ right to respect for their private and family life means that Article 8 is applicable.”¹²²

Guerra and others v Italy is especially useful in relation to State responsibility. The Court sums up the issue and describes the approach of positive obligations as follows:

...although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life...¹²³

In other words, Article 8 of the ECHR can at first glance be understood as a protective right against unreasonable interference by public authorities. However, the Court held that this not only includes protecting the individual against an act that violates the Convention committed by the State. It also includes a State responsibility of protecting the individuals against violations of Article 8 caused by a *third party*. The concept of *Drittwirkung* is rather complex, as even legal scholars have different views of what it means.¹²⁴ A perspective that is relevant to several of the cases discussed in this thesis is that *Drittwirkung* implies that the relevant human rights also apply to “legal relations between private parties and not only to legal relations between an individual and the public authorities.”¹²⁵ A somewhat different definition of *Drittwirkung* is “the Convention’s application to the private sphere, of relation among individual themselves.”¹²⁶

Regarding this matter, the approach of the Court consists of deciding whether the State authorities took the “necessary steps to ensure effective protection of the applicants’

¹²¹ *Guerra and Others v Italy*, no. 14967/89 Strasbourg, 19 February 1998 (Grand Chamber Judgement)

¹²² *Id.* Para. 57.

¹²³ *Id.* Para.58.

¹²⁴ Van Dijk et al. (2006), p. 28.

¹²⁵ Van Dijk et al. (2006), p. 29.

¹²⁶ Oliver & Fedtke (2007) p. 426.

right to respect for their private and family life as guaranteed by Article 8”.¹²⁷ In practice, this leads to a positive obligation upon the State to protect individuals against interference, also from private parties. The use of the term “positive obligation” means that the State is not only obliged to refrain from interfering with the enjoyment of the protected right, but also to *actively* ensure that the right is being protected.¹²⁸ Based on the facts of the case, the Court concluded that there had been a violation of Article 8 in the case of *Guerra*.

Interestingly, some of the Court’s judges expressed a willingness to include more articles from the ECHR in similar cases. A concurring opinion showed that six judges found Article 2 (the right to life) to be of importance on environmental issues dealing with a risk of major hazardous accidents. This approach was based on the fact that the factory had an accident previously, causing 150 people to be taken to hospital with severe arsenic poisoning.¹²⁹

Guerra and Others v Italy expanded the scope of the indirect right to a healthy environment in Article 8, with parts of the Courts assessment situated around the previously discussed case of *López Ostra v Spain*. In addition to the Courts statements on State responsibility, the extent of environmental protection through Article 8 of the ECHR was developed further. Now this right also includes *failure to provide information* concerning environmental risks caused by living in certain areas. The failure to fulfil the positive obligations of the State in the case of *López Ostra v Spain* was caused by the State’s inaction in terms of enforcing the abatement of the interference. In *Guerra and Others v Italy*, the failure was based on the inability to provide essential information that would have enabled the applicants to assess the environmental risks of continuing to live in Manfredonia.¹³⁰

¹²⁷ *Guerra and Others v Italy*. Para. 58.

¹²⁸ Oliver & Fedtke (2007), p. 433-34.

¹²⁹ *Guerra and Others v Italy* (concurring opinion of Judge Palm, joined by Judges Bernhardt, Russo, MacDonald, Makarczyk and Van Dijk) Strasbourg, 19 February 1998.

¹³⁰ *Guerra and Others v Italy*, para.59.

3.3.3 Environmental degradation

The case of *Kyrtatos v Greece*¹³¹ dealt with complaints of environmental degradation caused on a swamp habitat close to the two applicants' estates by the coast of Ayios Yiannis, Greece. The two applicants complained that urban development allowed by the State authorities had deteriorated the natural habitat of the swamp and thus failed to protect their rights under Article 8 of the ECHR. Furthermore, the applicants argued that noise and night-lights from the developed area caused environmental pollution affecting their properties, and thus also violating their rights under Article 8.¹³²

Regarding the degradation of the swamp, the Court reminded that Article 8 was the relevant statutory provision and referred to the case of *López Ostra v Spain*. However, the Court stated that Article 8 not includes a protection against “general deterioration of the environment.” It also stated that “neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such”,¹³³ and that the pollution must affect the individual or his home directly. The Court held that the damage caused on the swamp was not directly affecting the applicants' rights under Article 8.

Disturbances caused by noises and night lights in the area were not considered to have the “sufficient degree of seriousness” to cause a violation of Article 8 either.¹³⁴

Kyrtatos v Greece illustrates an important limit of applying Article 8 on environmental issues, namely that the pollution must directly affect the applicant's rights under Article 8. Even though the Court found no violation of Article 8 in this case, it made a noticeable remark in the judgment regarding swamps versus other kinds of habitats. It was stated:

¹³¹ The case of *Kyrtatos v Greece*, no. 41666/9822, Strasbourg, 22 May 2003.

¹³² *Id.* para. 51.

¹³³ *Id.* para. 52.

¹³⁴ *Id.* para. 54.

It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being.¹³⁵

The statement by the Court implies that environmental degradation of habitats next to an individual's home *might* violate Article 8 in certain cases. This finding was also discussed by Judge Zagrebelsky in his partly dissenting opinion. This Judge argued that the Court should have found a violation of Article 8 in this case, and stressed the importance of recognising the "growing importance of environmental deterioration on people's lives." According to Judge Zagrebelsky, such a recognition would be "perfectly in line with the dynamic interpretation and evolutionary updating of the Convention that the Court currently adopts in many fields."¹³⁶

3.3.4 Gold mining and the use of harmful industrial processes

In 2004, the ECtHR delivered another relevant judgement regarding the right to a healthy environment in the case of *Taşkin and Others v Turkey*.¹³⁷ The case concerned State permits to operate a gold mine in the district of Bergama, Turkey. Living in villages surrounding the mine, the applicants complained of environmental pollution from the mine that they argued violated their rights under Article 8. It was argued by the applicants that the gold was extracted through a process of sodium cyanide leaching, representing a threat to the applicants' living environment. Secondly, the use of explosives in the mining process was claimed to cause noise pollution.¹³⁸

Regarding whether a fair balance had been struck in regards of the interests of the individuals and those of the State, the Court referred to a decision by the Supreme Administrative Court in Turkey from 1997. In this decision, the Court had annulled a permit given to the mine based on reports showing the dangerous effects of sodium cyanide leaching.

¹³⁵ Id. para 53.

¹³⁶ Id. (partly dissenting opinion of Judge Zagrebelsky).

¹³⁷ Case of *Taşkin and Others v Turkey*, no.46117/99, Strasbourg, 10 November 2004.

¹³⁸ Id. paras 104-112.

The Court argued that the Supreme Administrative Court had weighed the conflicting interests and concluded that the permit violated the applicants' "right to a healthy environment"¹³⁹ which is protected under Article 56 of the Turkish Constitution.¹⁴⁰

A large part of the judgment in this case discusses procedural aspects of Article 8. The main point concerns whether the views of individuals were given due consideration throughout the decision-process at the national level. To sum up, the Court held that the authorities had failed to uphold the procedural guarantees of the applicants.¹⁴¹ As a conclusion, the Court found a violation of Article 8.

Taşkin and Others v Turkey is quite important in the sense that it shows the certainty that the Court has gained in using the approaches established through earlier case law. The findings of the Court also shows the positive effect of having environmental rights included in national constitutions, as already emphasised by several scholars.¹⁴²

3.3.5 Steel plants

The case of *Fadeyeva v Russia*¹⁴³ concerned industrial pollution caused by a privately owned steel plant situated near the applicant's residence. Both the applicant and the Government agreed that the steel plant was causing environmental pollution that was affecting the applicant, but the Government disputed the claim that the issue violated Article 8.¹⁴⁴ The Court concluded that there had been a violation of Article 8.

Before specifically examining whether Article 8 was applicable, the Court summed up several principles regarding the scope of Article 8 in terms of environmental rights, un-

¹³⁹ Id. para. 117.

¹⁴⁰ The Constitution of the Republic of Turkey, Article 56.

¹⁴¹ *Taşkin and Others v Turkey*, paras 118-125.

¹⁴² See for instance Boyd (2012), Chapters 5-13. This book focuses on environmental rights in national constitutions.

¹⁴³ Case of *Fadeyeva v Russia*, no. 55723/00, Strasbourg, 9 June 2005.

¹⁴⁴ Id. paras 66-67.

der a chapter heading called “*general principles*”. With reference to *Kyrtatos v Greece*, the Court mentioned that the interference must “directly affect the applicant's home, family or private life.”¹⁴⁵ This finding reaffirms that Article 8 does not include a right to nature preservation. Secondly, the “*severity test*” was recalled, with reference to *López Ostra v Spain*. It was mentioned that factors such as “intensity and duration of the nuisance, and its physical and mental effects” should be considered.¹⁴⁶ In other words, the scope of Article 8 regarding environmental issues must be proven to *directly* interfere with the applicant’s private sphere *and* to reach a certain level of severity.¹⁴⁷

After having concluded that a positive duty rested upon the State, the Court applied the *fair balance principle*. This consisted of an examination of whether the balancing act between the conflicting interests had been struck, in accordance with the “*margin of appreciation*” of the State. The aim of this approach is to decide whether the interference could be justified under the second paragraph of Article 8.

A rather detailed explanation was given by the Court on its approach regarding *state responsibility*. After having affirmed that the State has a positive duty to protect the applicant’s rights under Article 8, the Court added a more detailed explanation of how to assess this. It was stated that the Court needed to assess “whether the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's rights.”¹⁴⁸ The State authorities were held to be aware of the environmental issues, and were therefore in a position to evaluate the nuisance and to take steps to reduce or prevent it.¹⁴⁹

In its assessment on whether the interference could be justified under Article 8 (2), the Court explained that there were several factors to consider.

¹⁴⁵ Id. para 68.

¹⁴⁶ Id. para. 69.

¹⁴⁷ Id. para. 70.

¹⁴⁸ Id. para. 89.

¹⁴⁹ Id. paras 89-92.

First, it is important to consider the aspect of *domestic legality*. In cases dealing with a direct interference by the State, such interference can only be justified under Article 8 (2) if it is in accordance with domestic law. If the interference is a breach of domestic law, the conclusion would be a violation of Article 8.¹⁵⁰ This implies that in such cases, examining whether the interference is “in accordance with the law” can be said to be a *conclusive* test. In cases where the interference is caused by a third party, one must examine whether the Court has struck a fair balance, and if it was required to have taken positive measures to secure the applicant’s rights under Article 8 (1). Examples of such cases are *López Ostra v Spain* and *Guerra and Others v Italy*. Regarding these situations, the Court stated that “domestic legality should be approached not as a separate and conclusive test, but rather as one of many aspects which should be taken into account” in the assessment.¹⁵¹

Secondly, there must be a “*legitimate aim*” behind the resulting environmental pollution, when such pollution interferes with individual rights protected by the ECHR. In this case, the steel plant was contributing to the economic interests of the State. Even if there was a legitimate aim behind the interference, it still needs to be determined whether the relevant State authority, in pursuing this aim, “has struck a fair balance between the interests of the applicant and those of the community as a whole.”¹⁵²

Thirdly, the Court examined whether the interference was “necessary in a democratic society” in order for it to be justified under Article 8 (2).¹⁵³ It was stated by the ECtHR that “environmental pollution has become a matter of growing public concern” in recent decades.¹⁵⁴ Consequently, different measures have been introduced with an aim of reducing the environmental effects of industrial activity.¹⁵⁵ The Court made a reference to *Powell*

¹⁵⁰ Id. para. 95.

¹⁵¹ Id. para. 98.

¹⁵² Id. para. 101.

¹⁵³ Id. paras. 102-134.

¹⁵⁴ Id. para. 102-103.

¹⁵⁵ Id. para. 103.

and *Rayner v The United Kingdom* and stated that it is the role of the national authorities to assess and determine what might be the best domestic environmental policy. It was stated that the role of the Court is to “examine whether the decision-making process was fair and such as to afford due respect to the interests safeguarded to the individual” as protected by Article 8.¹⁵⁶

The interference caused by the steel plant was held to be incompatible with the standards of health and environment in the relevant domestic legislation. In the judgement, the Court pointed to the fact that the State had failed to offer the applicant a solution to help her move away from the polluted area. In conclusion, the Court found that the State had failed the *fair balance*-test.¹⁵⁷

Fadeyeva v Russia shows that the ECtHR has adopted a quite detailed, analytical approach concerning the issue of environmental rights under Article 8. This is clearly the result of case law that has developed over the preceding years that is now being expressed at the level of principles.

3.4 The scope of applying Article 8 on environmental issues

As already mentioned, there is no explicit right to a healthy environment in the ECHR. Environmental rights can be claimed to exist indirectly, as they presuppose a breach of other rights protected by the ECHR. Article 8 has been used to address certain environmental issues, with varying results. However, it is perfectly possible to draw some conclusions as to the content and scope of environmental rights in Article 8 of the ECHR by looking at the practice of the ECtHR.

Pedersen has concluded that the current development points toward an “increased recognition of substantive and procedural environmental rights in Europe.”¹⁵⁸ Still, Pedersen seems disappointed that the progress in recognising a right to a healthy environment in

¹⁵⁶ Id. para. 105.

¹⁵⁷ Id. paras 133-134.

¹⁵⁸ Pedersen (2008), p, 73.

the ECHR has not come as far as many would expect. He states that the “recognition of a substantive human right to the environment on a regional level in Europe is taking place in a cautious and step-by-step process”, which “aids the precarious status of a substantive right under international law.”¹⁵⁹

A short description by Pedersen on the current status of a right to a healthy environment in the ECHR goes as follows: “The closest the convention comes to creating a substantive human right to the environment is primarily through the case law on Article 8, where it has become well established that serious environmental damage may lead to a violation of Article 8.”¹⁶⁰

3.4.1 The requirement of being directly affected

Article 8 is an individual right, and does not include environmental protection in general. The Court affirmed in *Kyrtatos v Greece* that there is no general protection for the environment in Article 8, or any other Article in the ECHR. The environmental pollution is required to *directly* and *seriously* affect a person’s “private or family sphere”.¹⁶¹ This limits the potential of dealing with broader environmental issues under Article 8 significantly, for instance in situations where environmental harm is evident without there being anyone satisfying the criteria for being a victim under Article 8.¹⁶² Sadeleer states:

Article 8 is undeniably framed in anthropocentric terms, according to which the environment deserves to be protected only because it is used by humankind. Accordingly, the destruction of a marshland cannot be analysed as a restriction brought to the private or family life of local residents.¹⁶³

In other words, the current practice of the Court limits its concern to the impact on the individual rather than the environmental in general.¹⁶⁴

¹⁵⁹ Pedersen (2008), p. 111.

¹⁶⁰ Pedersen (2008), p. 91.

¹⁶¹ *Kyrtatos v Greece*, para. 52.

¹⁶² Sadeleer (2012), p. 65.

¹⁶³ Sadeleer (2012), p. 64.

¹⁶⁴ Council of Europe (2012) p. 16.

3.4.2 A required level of severity

As to how serious the interference is required to affect the applicant, the Court has expressed in *Moreno Gomez v Spain* that the interference must attain a minimum level of *severity* in order to constitute a violation of Article 8.¹⁶⁵ In order to assess whether this minimum level is met, the Court examines aspects such as intensity, duration of the nuisance, physical or mental effects, and the general context of the environment.¹⁶⁶ Sadeleer also describes aspects assessed by the Court such as periodicity, repetition, duration, “the ability of authorities to enforce environmental law, the location of the pollution and the level of existing environmental degradation”.¹⁶⁷

The Court has stated that the interference does not have to seriously endanger one’s health in order to attain the required level. It is enough that the individual’s well-being is adversely affected in a way that it “prevents them from enjoying their homes in such a way as to affect their private and family life adversely.”¹⁶⁸ In Sadeleer’s view, it seems like the Court gives weight to the specific situation of the victim by not laying down an absolute criteria of damage to the applicant’s health. Thus he argues:

Although the Court has been condemning states on the grounds that they have interfered illegally with relatively varied aspects of private life (well-being, peace of mind, and so on), in the majority of cases it is the health of the victims that is at issue, most often due to their exposure to hazardous substances. Since the damage may be caused from the anguish and anxiety felt by the victims due to the continuation of unlawful situations, the concept of health is interpreted broadly.¹⁶⁹

As Verschuuren recognised, the development in the ECtHR case law has clearly gone towards greater individual protection. He exemplifies this by pointing out a loosening of the burden of proof, as there is no longer an absolute requirement for the applicant to

¹⁶⁵ *Moreno Gomez v Spain*, para. 58.

¹⁶⁶ *Fadeyeva v Russia*, para. 69.

¹⁶⁷ Sadeleer (2012), p. 66.

¹⁶⁸ *López Ostra v Spain*, para. 51.

¹⁶⁹ Sadeleer (2012), p. 65 (footnote omitted).

present evidence of a link between the pollution and the applicant's health.¹⁷⁰ A loosening of the burden of proof was also implied in the case of *Fadeyeva v Russia*. The Government argued that the applicant had not presented any evidence on the claim that the steel plant had adversely affected her private life or health.¹⁷¹ Regarding this argument, the Court explained that as a general principle, the standard of proof should be "beyond reasonable doubt"¹⁷². However, it is the "Court's practice to allow flexibility in this respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved."¹⁷³ In conclusion, the Court held that "the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the [...] steel plant."¹⁷⁴ In this way, a failure to prove the causal effect of the interference by the applicant did not prevent the Court from declaring a violation of Article 8.

In *Kyrtatos v Greece*, the interference caused by noises and lights at night were held to be beneath the minimum level of severity acquired.¹⁷⁵ Some general comments were made by the Court in the case of *Fadeyeva v Russia* as to the level of severity that has to be attained in order for the interference to fall within the scope of Article 8. It was stated that the standard is *relative*, and depends on all the circumstances of the case. The Court also expressed that:

The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.¹⁷⁶

¹⁷⁰ Verschuuren (forthcoming 2014), p. 14.

¹⁷¹ *Fadeyeva v Russia*, para. 74.

¹⁷² *Fadeyeva v Russia*, para. 79.

¹⁷³ *Fadeyeva v Russia* para. 79.

¹⁷⁴ *Fadeyeva v Russia* paras 79-88.

¹⁷⁵ *Kyrtatos v Greece*, para.54.

¹⁷⁶ *Fadeyeva v Russia*. 69.

This is an interesting statement that describes the factors the Court has to keep in mind in addition to the details of the case. Such factor could for instance be the environmental standard of the State, the State economy, or the possibilities of measures that can be taken based on the technological developments in terms of environmental protection.

3.4.3 Aspects of State responsibility

The approach of the ECtHR regarding State responsibility has already been examined in several of the cases discussed above. As stated by the Grand Chamber in the case of *Hatton and Others v The United Kingdom*, “Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly.”¹⁷⁷ As to interference caused directly by the State, it is naturally implied that the Government can be held liable. The concept of *positive obligations* generates a State duty to protect individuals from violations of Article 8, even when it is caused by a third party.

It is also important to examine how the Court expects the State to fulfil its responsibility to protect the rights of the applicant. In *López Ostra v Spain*, the Court examined whether the State authorities “took the measures necessary for protecting the applicant’s rights”.¹⁷⁸ A similar statement is used in *Guerra and Others v Italy*.¹⁷⁹

3.4.4 The balancing of interests

The principle of *fair balance* has been mentioned frequently in the case law of the ECtHR. It is purely a term the Court has introduced to describe the examining of whether a fair balance has been struck by the State between the interests of the individual affected and those of the community as a whole. This is done in connection with deciding whether the interference can be justified under Article 8 (2). In this regard, the Court has given the State

¹⁷⁷ *Hatton and Others v The United Kingdom* (Grand Chamber), para. 98.

¹⁷⁸ *López Ostra v Spain*, para. 55.

¹⁷⁹ *Guerra and Others v Italy*, para. 58.

a wide *margin of appreciation*, while at the same time reserving the right to examine whether the measures taken were sufficient to secure the applicant's rights.

3.4.5 The ECtHR on the relevance of domestic legality

Cases concerning environmental issues where the ECtHR has concluded that a violation of Article 8 has occurred seem to share the fact that relevant environmental policies under domestic law were breached in some way. As observed by Ovey & White regarding the *Hatton* case, a “distinguishing feature” was that the “domestic regime had been tested in the national legal order and found to be compatible with it.”¹⁸⁰ Macdonald states regarding Article 8 interferences that “the extent to which this protection varies, while maintaining a high threshold, is dependent upon the legitimate aim found to be embodied in national legislation and other relevant legal enactments and the characterization of the essential subject matter covered by the impugned law”.¹⁸¹

In *Fadeyeva v Russia*, the ECtHR stated that violation of domestic law is not a conclusive factor, but one of several aspects in the assessment of the Court.¹⁸² Nevertheless, the practice of the Court seems to indicate that embedding environmental rights in domestic law has a reinforcing effect on Article 8. A judgment concluding a violation of Article 8 without a breach in domestic legality may become a reality in the near future.

Verschuuren is clearly disappointed that the ECtHR has yet to deliver a judgment in favour of the applicant in a case on environmental issues, where there has *not* been any violation of domestic legality. He calls the current practice a “safety net in for European citizens and a stimulus for authorities to implement and enforce existing environmental laws and regulations.” In practice, he claims, the State authorities are only forced to uphold existing domestic environmental standards and policies.¹⁸³ This view seems quite legiti-

¹⁸⁰ Ovey & White (2010), p. 396.

¹⁸¹ Macdonald et al. (1993), p. 99.

¹⁸² *Fadeyeva v Russia*, para 98.

¹⁸³ Verschuuren (Forthcoming 2014), p.14

mate, as this practice would be inconsistent with the Court's aims of progressively increasing the protection of individual rights in the Member States.

4 Approaches to enhance environmental protection in the ECHR

4.1 Approaches for applying Article 8 on environmental issues more broadly

A second edition of the Manual on Human Rights and the Environment was published by the Council of Europe in 2012. The aim of the manual was to increase “the understanding of the relationship between the protection of human rights under the European Convention on Human Rights [...] and the environment and thereby to contribute to strengthening environmental protection at the national level.”¹⁸⁴ This statement describes an approach that is reasonable to expect of the Court as to how it should influence the legislations and policies relating to environmental protection in the member states. As already discussed, the Court has on many occasions reduced its function to being a last resort in cases where the member states have failed to uphold their own legal framework.

The *principle of subsidiarity* is explained by Petzold as the role of the “larger social unit” of assuming “responsibility for functions only insofar as the smaller social unit is unable to do so.”¹⁸⁵ In other words, the principle implies that domestic courts are the primary enforcers in cases dealing with the ECHR as expressed in Article 1, while the ECtHR have a *subsidiary* role in cases where the domestic courts fail to ensure the obligations that are binding upon the states.¹⁸⁶ As a contrast to the subsidiary role of the ECtHR, the principle of *universality* encourages the Court to insist on the “same standard of European pro-

¹⁸⁴ Council of Europe (2012), p. 7.

¹⁸⁵ Macdonald et al. (1993), p. 41. The principle of subsidiarity is also mentioned in White & Ovey (2010), p. 81 and p. 84. For an in-depth discussion on subsidiarity in European human rights law, see Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*. In: *The American Journal of International Law*, Vol. 97, No. 1 (January 2003), pp. 38-79.

¹⁸⁶ Article 1 of the ECHR reads: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” See also Paul McKaskle (2005), p. 51.

tection for everyone, whatever the national community in question.”¹⁸⁷ A tension between these two differing approaches regarding the role and functioning of the ECtHR is impossible to avoid.

Although the case of *Hatton* would have been an exception if the decision had not been reversed in the Grand Chamber, the Court is evidently giving more weight to its subsidiary role in cases dealing with environmental issues so far. However, a change seems to be taking place in the practice of the Court currently. Some more recent cases are showing an inclination by the ECtHR to expand the scope of environmental protection through Article 8 further. The case of *Tatar v Romania*¹⁸⁸ concerned the negative health effects of using sodium cyanide in a gold mine close to the applicants’ homes, similar to the case of *Taskin*. Interestingly, the Court used the *precautionary principle* in its assessment regarding risk of serious irreversible damage to the environment.¹⁸⁹ The fact that the Romanian constitution includes the right to a healthy environment¹⁹⁰ must also have influenced the Court’s approach towards expanding the scope of Article 8. If the Court wants to expand the scope of Article 8 even further, it can argue that the right to a healthy environment is far on its way to become customary international law, at least in the member states of the Council of Europe. This way, the right to a healthy environment can more strongly influence states that currently have no such right in their national constitution.

¹⁸⁷ Mahoney (1997), p. 364.

¹⁸⁸ *Tatar v Romania*, no. 67021/01, 27 January 2009.

¹⁸⁹ *Tatar v Romania*, no. 67021/01, 27 January 2009, Information Note on the Court’s case law No. 115, January 2009. There is currently no official English version of this judgment.

¹⁹⁰ Constitution of Romania. Adopted on 21 November 1991, revised 18 October 2003. Available at: <http://www.cdep.ro/pls/dic/site.page?id=371> (Last visited 24 November 2013). See Article 35 entitled “Right to a Healthy Environment”.

4.2 The possibility of an additional protocol in the ECHR

Several proposals for including a specific, freestanding right to a healthy environment into the ECHR have been received by the Council of Europe since the 1970s.¹⁹¹ Lluís Maria de Puig, President of the Parliamentary Assembly of the Council of Europe, has been active in promoting the right to a healthy environment as an additional protocol into the ECHR since 2008. In 2009, he stated:

Our Parliamentary Assembly, and me personally, we wish to encourage progress in this area by including a right to a healthy environment in the European human rights protection system. I am happy to announce that in September this year, we shall have a parliamentary debate on an Additional Protocol to the European Convention on Human Rights - establishing a right to a healthy and viable environment. We believe that living in a healthy environment is a fundamental human right.¹⁹²

The Parliamentary Assembly of the Council of Europe recommended the drafting of an additional protocol to the ECHR in September 2009 with the aim of recognising the right to a healthy environment. It was stated in the recommendation of the Parliamentary Assembly that the additional protocol would be a “logical extension of the role performed by the Council of Europe in the field of environmental protection.”¹⁹³ The Committee of Ministers rejected the draft proposal on 18 June 2010, mainly based on the argument “the convention system already indirectly contributes to the protection of the environment through existing convention rights and their interpretation in the evolving case law of the European Court of Human Rights.”¹⁹⁴

¹⁹¹ For proposals in the period between 1970 and 1980, see Shelton (1991) p.132.

¹⁹² Address by Lluís Maria de Puig, President of the Parliamentary Assembly of the Council of Europe, Nevsky International Ecological Congress, St Petersburg, 15 May 2009.

<http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=855> (Last visited 24 November 2013)

¹⁹³ Recommendation 1885 by the Parliamentary Assembly of the Council of Europe, 30 September 2009. See <http://assembly.coe.int/Documents/AdoptedText/ta09/EREC1885.htm> (Last visited 24 November 2013)

¹⁹⁴ See CM/AS(2010)Rec1883-1885 final <https://wcd.coe.int/ViewDoc.jsp?id=1638385&Site=COE>, para. 9, (Last visited 24 November 2013)

According to Shelton, the reason for the Council of Europe to reject the early proposals are based a combination of factors such as:

(1) a fear of watering down the European Convention with a series of newly claimed human rights; (2) the belief that the right to environment lacks justiciability; and (3) the fact that each state has serious environmental problems which could be the subject of complaint if the right gained acceptance.¹⁹⁵

Part 4.3 of this thesis will include a draft proposal of the right to a healthy environment with the aim of introducing this right in such a way that the ECtHR should be able to gradually increase the protection offered in the mentioned right.

4.3 The content of the right to a healthy environment as an additional protocol of the ECHR

A freestanding right to a healthy environment and its content in general has been discussed to a certain degree in the first two parts of this thesis. It is perfectly possible to develop the exact content of the right through the interpretation of the Court as to what environmental standards it seems fit to apply based on the details of each case.¹⁹⁶

The following proposal of a right to a healthy environment by this author is based on works by other authors that have already drafted proposals for such a right in various contexts.¹⁹⁷ Language and terminology used in the following proposal is based on the existing language in the ECHR, with emphasis on Article 8, in order to make it fit neatly in with the existing Articles. The proposal goes as follows:

- 1) Everyone has the fundamental right to an environment favourable to their health and well-being.

¹⁹⁵ Shelton (1991), p.133.

¹⁹⁶ This has been discussed more broadly in point 1.3 of this thesis. For a more specific discussion in relation to the ECHR, see: Report of the Committee on Environment, Agriculture and Local and Regional Affairs. Bota, J.Mendes (Rapporteur), 11 September 2009, Doc. 12003. See especially part IV, para. 21

¹⁹⁷ See especially Munro & Lammers (1987), p. 25; Van Dyke (1994), p. 337; Turner (2004), p. 278.

- 2) There shall be no interference with the exercise of this right except what is absolutely necessary for the preservation and development of the economic conditions of the community, and if there is no alternative way of making it possible to avoid such an interference.

In the first paragraph, the substantive right to a healthy environment is expressed in a way that allows the exact content of the right to be developed through the interpretation of the Court on a case-to-case basis. The second paragraph allows for exceptions from the right to a healthy environment, while at the same time limiting these exceptions compared to the current practice of the ECtHR.

In some ways, the proposed protocol resembles Article 8 as it allows the Court to adopt a practice on environmental issues with basis on some of the principles discussed in this thesis. For instance, the Court will probably find it natural to carry out a weighing of the interests similar to the *fair balance principle*, except that the “margin of appreciation” will be significantly narrower on the part of the State. The requirement of being directly affected would also be applicable, but a violation would not be limited to having an effect on the home or “private sphere”¹⁹⁸ the same way as in Article 8.

The proposed protocol would allow the Court to decide the level of environmental protection that is practicable to ensure based on the facts of each case. Factors such as economic and technological development would allow for an evolutive interpretation of the protocol, with the aim of progressively increasing the level of protection offered. This would coincide with the approach of the Court regarding the protection of other rights in the ECHR, as described by the dissenting judges in the *Hatton* case.¹⁹⁹

¹⁹⁸ The term “private sphere” is for instance used in *Fadeyeva v Russia*, para. 70.

¹⁹⁹ *Hatton and Others v The United Kingdom*, 8 July 2003, Dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner, para. 2.

5 Conclusion

Evidently, there has been a progressive development of the connection between environmental law and human rights in the field of public international law during the last decades. This process has consisted of numerous smaller changes in the legal framework concurrently on an international, regional and national level. At the international level, the use of soft-law instruments seems to have made significant impact, for instance by contributing to the development of general principles of international law. These international instruments have contributed to the integration of environmental rights into other important instruments such as regional treaties and national constitutions. A wide range of legal literature has been published on the topic of environmental rights and many suggestions and attempts of developing and recognising a freestanding right to a healthy environment have been made by both legal scholars and representatives of various committees and delegations.

The ECtHR broadened the scope of Article 8 considerably around the 1990s by including under it environmental issues of a certain degree of seriousness. Subsequently, the development has generally been going in the direction of an increased level of environmental protection offered under Article 8 (1). However, this development has not been a consistent and straightforward process. The *Hatton* case stands out in particular as an expression of the uncertainty regarding the Court's assessment on certain issues. Both fields of international environmental law and human rights law are evidently undergoing rapid development, and the ECtHR appears to be on a learning curve as to where it should set the limits of including environmental issues under Article 8.

A clear boundary seems to have expressed in the case of *Kyrtatos* by excluding a general protection of the environment. However, a confusing statement in *Kyrtatos* considering the distinction between a swamp and a forest could be taken to suggest an expansion of the scope of Article 8. Much of the progress considering the level of environmental standards offered under Article 8 is also a result of an improvement in the domestic envi-

ronmental legislation and policies, and not necessarily something the ECtHR has managed by itself. The ECtHR has undoubtedly been somewhat hesitant in broadening the scope of Article 8 on environmental issues, as discussed in the cases of *Hatton* and *Kyrtatos*.

The tendency and general emphasis on environmental issues, despite certain setbacks, seems to point clearly towards a strengthening of environmental rights. This is especially important when considering the current issues of climate change.²⁰⁰ This author recommends an additional protocol added into the ECHR, containing an explicit right to a healthy environment. The inclusion of such a right would, in the opinion of this author, be consistent with the current development that is already taking place in the fields of international environmental law and human rights law.

²⁰⁰ See for instance: Working Group I, *Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change: Summary for Policymakers*. Published 11 November 2013. Available at: http://www.climatechange2013.org/images/uploads/WGI_AR5_SPM_brochure.pdf (last visited 24 November 2013) or <http://www.ipcc.ch/>

6 Table of reference

6.1 Books and book chapters

Bell, Stuart, Donald McGillivray and Ole W. Pedersen. *Environmental Law*. 8th edition. Oxford (Oxford University Press), 2013.

Boyd, David R. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*. Vancouver, (UBC Press) 2012.

Crawford, James. *Brownlie's Principles of Public International Law*. 8th Edition, Oxford (Oxford University Press) 2012. Chapter 2, pp. 20-48.

Fitzmaurice, Malgosia. *The European Convention on Human Rights and the Human Right to a Clean Environment*. In: *Contemporary Issues in International Environmental Law*. Edward Elgar Publishing 2009. pp.170-207.

Oliver, Dawn & Jorg Fedtke. *Human Rights and the Private Sphere*. London (Routledge Cavendish) 2007.

Pieter Van Dijk ... [et al.] *Theory and Prctice of the European Convention on Human Rights*. 4th edition. Oxford (Intersentia) 2006.

R. St. J. Macdonald ... [et al.]. *The European System for the Protection of Human Rights*. Netherlands (Martin Nijhoff Publishers) 1993.

Sands, Phillippe. *Principles of International Environmental Law*. 3rd edition. Cambridge, (Cambridge University Press) 2012.

Shelton, Dinah L. and Donald K. Anton. *Environmental Protection and Human Rights*. New York, (Cambridge University Press) 2011.

White, Robin & Clare Ovey. *The European Convention on Human Rights*. 5th edition. Oxford (University Press) 2010.

6.2 Articles

Atapattu, Sumudu. *The Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment Under International Law*. In: 16 Tulane Environmental Law Journal 65, pp. 65-126.

Boyle, Alan. *Human Rights and the Environment: Where Next?* In: The European Journal of International Law Vol. 23 no. 3 (2012) pp. 614-642.

Carozza, Paolo G. *Subsidiarity as a Structural Principle of International Human Rights Law*, The American Journal of International Law, Vol. 97, No. 1 (January 2003), pp. 38-79.

Collins, Lynda. *Are We There Yet? The Right to Environment in International and European Law*. In: McGill Int'l Journal on Sustainable Development Law and Policy (2007), pp.119-153

Desgagne, Richard. *Integrating Environmental Values into the European Convention on Human Rights*. In: The American Journal of International Law, Vol.89, No. 2 (1995), pp. 263-294

Fitzmaurice, Malgosia and Jill Marshall. *The Human Right to a Clean Environment- Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases*. In: Nordic Journal of International Law 76 (2007) pp. 103-151.

Lee, John. *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*. In: 25 Columbia Journal of Environmental Law (2000), pp. 283-346.

Mahoney, Paul. *Universality versus subsidiarity in the Strasbourg case law on free speech: explaining some recent judgments*. In: European Human Rights Law Review, No. 4(1997), pp. 364-379.

McKaskle, Paul L. *The European Court of Human Rights: What It Is, How It Works, and Its Future*. In: 40 University of San Francisco Law Review 1 (2005).

Moreham, N. A. *The right to respect for private life in the European Convention on Human Rights: a re-examination*. In: European Human Rights Law Review No.1 (2008), Pages 44-79 Article.

Kravchenko, Svitlana and John E. Bonine. *Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights*. In: Law Symposium on the Global Impact and Implementation of Human Rights Norms (McGeorge School of Law) March 2011.

Pedersen, Ole W. *European Environmental Human Rights and Environmental Rights: A Long Time Coming?* In: 21 Georgetown International Environmental Law Review (2008), pp. 73-111.

Rodriguez-Rivera, Luis E. *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*. In: 12 Colorado Journal of International Law 1 (2001) pp. 1-45.

Sadeleer, Nicolas. *Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases*. In: Nordic Journal of International Law 81 (2012) pp. 39–74.

Shelton, Dinah. *Human Rights, Environmental Rights, and the Right to Environment*. In: 28 Stanford Journal of International Law (1991), pp. 103-138.

Shelton, Dinah. *Human Rights, Health and Environmental Protection: Linkages in Law and Practice*. In: 1 Human Rights & International Legal Discourse 9, 2007

Turner, Steve. *The Human Right to a Good Environment – The Sword in the Stone*. In: Non-State Actors and International Law 4 (2004), pp.277-301.

Van Dyke, Brennan. *A Proposal to Introduce the Right to a Healthy Environment into the European Convention Regime*. In: 13 Virginia Environmental Law Journal 323 (1994), pp. 323-373.

6.3 Reports and Manuals

Council of Europe. *Manual on Human Rights and the Environment: Principles Emerging from the Case-Law of the European Court of Human Rights*. 2nd edition. Strasbourg, (Council of Europe Publishing) 2012.

Report of the United Nations High Commissioner for Human Rights. *Analytical study on the relationship between human rights and the environment*. 16 December 2011, A/HRC/19/34.

United Nations Human Rights Council. *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (Preliminary Report) 24 December 2012. By John H. Knox. A/HRC/22/43.

Ksentini, Fatma Zohra. *Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned, Human Rights and the Environment*. 6 July 1994. E/CN.4/Sub.2/1994/9.

6.4 Internet Sources

Verschuuren, Jonathan. *Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe*. Accepted for publication in: W. Scholtz and J. Verschuuren. *Regional Integration and Sustainable Development in a Globalised World*. Edward Elgars Publishers, forthcoming 2014.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321663

United Nations Mandate on Human Rights and the Environment:

<http://ieenvironment.org/> (Last visited 24 November 2013).

Factsheet of the ECtHR on the environment:

http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf (Last Visited 24 November 2013).

Statistics of ECtHR judgements in the period 1959-2012:

http://echr.coe.int/Documents/Overview_19592012_ENG.pdf (Last visited 24 November 2013).