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DO EUROPEANS HAVE A RIGHT TO ENVIRONMENT?

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I. INTRODUCTION

> "From space, we see a small and fragile ball dominated not by human activity and edifice but by a pattern of clouds, oceans, greenery and soils. Humanity's inability to fit its doings into that pattern is changing planetary systems, fundamentally. Many such changes are accompanied by life threatening hazards. This new reality, from which there is no escape, must be recognised - and managed."
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> Our Common Future (Brundtland-report),
> World Commission on Environment and Development

Humans have since time immemorial depended on and struggled against nature. No other species disposes of such an extensive capability to pollute and destroy the environment. At the same time, no other animal is so desperately depending on nature in the pursuit of the good life, vulnerable to all environmental changes that occur. Human beings are to a large extent the cause and the victims of environmental degradation. What we need to realise is that we are also, to some extent, the agents of its conservation and protection.

Wandering through the beautiful Palazzo Ducale in Venice in early December last year, I learnt that the desire to quench environmental pollution is not a recent policy born out of the environmental concerns our present generation is facing. Environmental protection has roots reaching much further back than the origins of modern technology and the heavily industrialised society it has resulted in today. In the 15th century, the state of Venice sanctioned six crimes with capital punishment through execution. The list included crimes one would expect to be punished with such severity in the Middle Ages, such as murder and treason. Quite surprisingly, figuring among these crimes was also the crime of pollution. The city on water had already in those days recognised the crucial importance of clean water for the health and well-being of the population. As a consequence, the sovereigns of the city sought to eliminate every possible threat to the environment emanating from negligent waste disposal and reckless handling of chemicals.

The world has evolved extensively, but the threat to the environment has remained, growing more severe in pace with industrialisation, exploitation and depletion of natural resources. Human activity is endangering and disturbing the fragile ecological balance of nature, and our planet is forced to cope with all these environmental threats posed by us human beings. Pushed to the limits of her capacity to handle these man-made challenges, Mother Nature occasionally cries for help by voice of natural disasters, such as floods, mud slides and avalanches, rising seas and droughts. The careless and selfish behaviour of humankind is certainly not the sole reason for such catastrophes, though one must assume that we and our forefathers have contributed significantly to these events.

We cannot turn back time and undo the damage we have so negligently caused. The quest for economic development and prosperity cannot be halted. Wealthy nations strive to increase their profits by all means, while developing countries are following their footprints on this environmentally unfriendly path, likely to make the very same mistakes. The environment does not have a price-tag, and nature around the world is thus easily abused for economic gain. Long-term well-being and prosperity are sacrificed in order to satisfy short-term needs and interests. But nature's wake-up call must be heard, unless we want to risk becoming the victims of our own -economic- success. While the main profits of environmental exploitation incur to the mighty and powerful in today's world, i.e. developed States and multi-national enterprises, it is the individuals who suffer the negative consequences of environmental degradation. So how do we escape the dilemma we find ourselves in? How can the environment be protected while economic development be simultaneously pursued? We are already by far exceeding the carrying capacity of our planet, and we do not have the time to postpone the issue of environmental degradation.

International environmental law has developed a number of general principles, which aim at relieving the pressures our nature is facing. These principles have been transposed into a vast number of environmental treaties and conventions on both international, regional and national level. But even though international environmental law has the potential to contribute substantially to the improvement of the global environment, it does generally not provide individuals with enforceable rights. Does this mean that human beings are left defenceless in the eve of environmental deterioration? This is where international human rights law -focusing on the well-being of human beings- enters the scene. It is increasingly recognised that, in the spirit of the Universal Declaration of

Human Rights of 1948, a life in dignity also necessitates a satisfactory environment for present and future generations. Consequently, recent years have witnessed a growing number of voices advocating the establishment of a human right to environment. The academic debate has resulted in ample literature, which is applied in this paper to give an overview of the ongoing discussions and possible formulations of a right to environment.

The environment is a transboundary and global concern, and we are faced with complex and intertwined environmental issues that affect us all in one way or the other. However, it is difficult to fully grasp the extent of these global questions, and even more difficult to foresee possible global solutions that satisfy all aspects. While bearing the global dimension in mind, this paper focuses on the existence of an environmental right in the European context. Being a continent that has experienced centuries of massive industrial exploitation, Europe is today seeking to redress and prevent further environmental degradation. Figuring among these efforts are the recent developments on a human right to environment in Europe, which may ultimately serve as impetus for an emerging human right to environment on the global level.

By analysing the European Convention on Human Rights and the emerging environmental case-law, it will be assessed to what extent the European Court of Human Rights acknowledges a human right to environment. Subsequently, the analysis will turn to the other predominant force in Europe, namely the European Union. This organisation finds its origins in economic co-operation, which has considerable implications for the EU's approach to both human rights and the environment. Only limited literature is available on a potential human right to environment within the EU-context, but conversations with officials of the European Commission helped remedy this. Before turning to the analysis of an emerging human right to environment, the general principles of international environmental law will be outlined in order to frame the current state of play of environmental protection.

II. GENERAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

The traditional concept of state responsibility is not suitable in the field of environmental protection. Most of the existing provisions under international law are reactive in the sense that supervisory mechanisms and sanctions are triggered only after damage has already been done. When found responsible of breaching obligations under international law, states are obliged to re-establish, to the extent possible, the situation that existed before the occurrence of the incriminating act.[1] Environmental law, on the other hand, has to deal with the prediction of problems yet to occur and is confronted with issues marked by scientific uncertainty. Damage to the ecosystem may be irreparable and have extremely severe consequences, and it is therefore necessary to anticipate and prevent environmental damage before it even threatens to occur.[2] In addition, environmental degradation also results from entirely lawful activities, such as unsustainable patterns of agriculture and irresponsible use of waterways, which fall outside the scope of conventional state responsibility altogether.[3]

Several principles have emerged in international environmental law, which aim at impeding immediate catastrophes as well as preventing gradual degradation. The precautionary principle foresees that lack of full scientific certainty of cause and effect shall not be used as a reason for postponing measures to prevent environmental degradation.[4] In order to appraise the environmental effects of certain projects, numerous international environmental treaties contain the obligation to carry out environmental impact assessments before activities are commenced, which may lead to the halting of projects if they are deemed to endanger the environment.[5] Should the environment have

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[1] Conventional remedies are restitution in kind, monetary compensation and just satisfaction, including apologies, punitive damages, disciplinary action against responsible individuals, discussed in M. Shaw, International law, p. 554.

[2] S. Prakash, *The Right to the Environment. Emerging implications in Theory and Praxis*, in «Netherlands Quarterly of Human Rights», vol. 13, no. 4, 1995, p. 404.

[3] An attempt to regulate such lawful, but harmful activities is the Draft Articles on Prevention of transboundary harm from hazardous activities (formerly referred to as Draft Articles on International Liability for Injurious Consequences of Acts not Prohibited by International Law), drafted by the International Law Commission at its 53rd session (3 August 2001), submitted to the General Assembly for adoption. http://www.un.org/law/ilc/texts/prevention/preventionfra.htm.

[4] M. Kamminga, *International Environmental Law: A Stocktaking*, in R. Baher, Environmental Law and Policy in the European Union and the United States (1997), p.50.

[5] Compare e.g. European Community Directive 85/337/EEC of 27 June 1985 on the Assessment of Effects of Certain Public and Private Projects on the Environment.

incurred damage in spite of such preventive measures, the polluter-pays-principle foresees that the author of the damage is drawn to responsibility and must redress the harmful consequences.

The temporal dimension of environmental protection is reflected in the concept of intergenerational equality. This signifies that each generation has an obligation towards future generations to pass on the natural resources of the planet in no worse condition than it has received them.[6]

The transboundary effect of environmental pollution makes it extremely difficult to pinpoint the exact author of environmental damage and this is an impediment to holding specific states responsible for environmental deterioration. International environmental law has developed two distinct approaches to counter this problem. The first one sets out a substantive objective, demanding that states shall not cause appreciable transborder environmental harm.[7] This principle has been widely accepted in international instruments, and was incorporated in the Stockholm and Rio Declarations. However, it offers little specific guidance on the extent to which transborder pollution may or may not be permissible in a concrete situation. The second approach is of a procedural nature, and is known as the non-discrimination principle. It signifies that transborder effects of an installation should not be treated differently from what is considered acceptable within the country of origin.[8] This principle is based on reciprocity, and accordingly, its effectiveness depends on the extent of environmental protection in the neighbouring countries. If the level of protection is lower on either side of the border, there is nothing to be gained from the non-discrimination principle.

The environment is vulnerable to, and affected by, activities in various sectors of today's society, such as industry, transport, energy and agriculture. This has led to the emergence of the integration principle, which aims at ensuring that principles of environmental policy and law are taken into account in decisions relating to relevant non-environmental matters.[9]

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[6] M. Kamminga, International Environmental Law: A Stocktaking, p. 49.
[7] compare *Trail Smelter*-case concerning atmospheric pollution (US. v. Canada, 9 ILR 1938-1940).
[8] M. Kamminga, *International Environmental Law: A Stocktaking*, p. 48.
[9] M. Kamminga, *International Environmental Law: A Stocktaking*, p. 50.

The principles discussed above appear promising, but at current state of affairs they are not legally enforceable, neither at domestic nor at international level. As long as the principles have not achieved the status of customary international law, states are free to ignore them by simply not becoming parties to treaties giving effect to these principles.[10] States cling to the traditional concept of sovereignty, openly ignoring the transboundary consequences of their activities and defying the principles of international environmental law. We find ourselves in a race against time, and enhanced co-operation among states is the only viable solution to tackle the problems threatening the global environment.[11] In the meantime, individuals around the world are suffering from environmental degradation, be it through pollution in various forms, soil intoxicated by waste, rivers used as sewers and gradual desertification of land, which in turn lead to diminishing agricultural revenue, poverty, malnutrition, famine and severe health disorders.

[10] M. Kamminga, *International Environmental Law: A Stocktaking*, p. 53.
[11] M. Shaw, *International law*, p. 600.

III. THE EMERGENCE OF A HUMAN RIGHT TO ENVIRONMENT

A. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION

Every living being will agree that preservation of our natural environment is a value we should commit to and strive for. The international community is increasingly becoming aware of and responding to the needs of nature. This is reflected in the rapidly growing corpus of international environmental law, which is regulating various aspects of environmental concerns, even though this is done in a patch-work manner and often through soft-law instruments depending ultimately on the voluntary efforts of states. Given the extensive and increasingly growing environmental legislation on both national and international level, what is the added value of a human rights approach in the field of environmental protection? The following pages aim at giving an overview of the current discussion on the relationship between human rights and the environment, as well as the status of an emerging separate human right to environmental quality.

Human rights and environmental protection are emerging as the basic values of the twenty-first century, and it seems natural to establish a link between these two subject matters.[12] However, the precise relationship between these previously distinct fields is far from clear, and it can actually be perceived in diametrical ways. On the one hand, environmental protection can be viewed as a means of fulfilling human rights standards. Individuals living in degraded physical environments are experiencing infringements of their human rights to life, health and livelihood. Thus, any act leading to environmental degradation may constitute an immediate violation of internationally recognised human rights standards. This environmentalist approach is favouring the creation of a reliable and effective system of environmental protection, which consequently would help to ensure the well-being of future generations as well as the survival of persons living today. According to this environmentalist approach, human beings would be protected indirectly as components of the environment, from which they cannot be isolated.[13]

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[12] A. Kiss, *Concept and Possible Implications of the Right to Environment*, in K. Mahoney & P. Mahoney (eds.), *Human Rights in the 21st century: a global challenge*, The Hague, Kluwer Academic Publishers (1993), p.551.

[13] M. Anderson, *Human Rights approaches to environmental protection: An Overview*, in A. Boyle & M. Anderson (eds.), *Human Rights approaches to environmental protection*, Oxford, Clarendon Press, 1996, p.3, A. Kiss, *Concept and Possible Implications of the Right to Environment*, in Mahoney & Mahoney, p.552.

The second view departs from the angle of human rights, and claims that legal protection and enforcement of human rights effectively achieves conservation and environmental protection as a welcome by-product. The full realisation of a broad spectrum of existing first and second generation rights would ultimately lead to a society and political order in which claims for environmental protection are more likely to be respected. Some proponents of a human rights-approach go even further and claim the existence and necessity of a separate human right to a satisfactory environment, demanding that legal means should be established to enforce such a right in a consistent and effective manner.[14]

Notwithstanding the value and importance of international and national environmental legislation, the advantages of a human rights approach to environmental protection is at the focal point of this thesis, and the possible formulations of a right to environment will be discussed next.

B. Human Rights Approaches to Environmental Protection

1. Greening existing human rights law

A satisfactory environment is a prerequisite for the enjoyment of other, already well established human rights. To illustrate this point, one may think of the right to life, which becomes blank theory when one is forced to breathe heavily polluted air, drink contaminated water or nourish oneself from crops grown in toxic soil. Several authors note that already existing human rights can play an important role in environmental protection. International human rights instruments and national constitutions offer a comprehensive and detailed body of law which could be drawn upon to achieve a satisfactory environment. It may even be argued that existing rights, if fully realised, are so robust in themselves that proposals for new environmental rights are at best superfluous and at worst counter-productive.[15] Following this line of argumentation, "greening" established human rights is sufficient to achieve protection of an environment adequate for human survival.

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[14] M. Anderson, *Approaches,* in Boyle & Anderson, p. 3.
[15] Ibidem p. 4.

a) Civil and political rights

Civil and political rights are protecting individuals from arbitrary governmental interference and are guaranteeing participatory rights in civil society. The main international instrument for the protection of civil and political rights - the International Covenant on Civil and Political Rights of 1966 - does not contain any explicit reference to the environment. Nevertheless, a number of classical civil and political rights - such as the rights to life, association, expression, political participation, personal liberty, equality and judicial redress – can prove to be very valuable in the context of environmental protection. The implementation of the rights guaranteed under the ICCPR is secured by way of State reporting obligations (Article 40 ICCPR), the interstate complaint mechanism (Article 41 ICCPR) as well as the individual complaint procedure under the Optional Protocol to the ICCPR.

Human beings are depending on the environment as the very source of biological and material resources necessary for life. The right to life is the basis and centre from which other human rights flow, and there is widespread consensus on its erga omnes, non-derogable character. The right to life, like no other right, may be directly and dangerously threatened by detrimental environmental measures.[16] By interpreting the right to life as a right to survival, it can come to include the conditions adequate for living and survival. Such a broad interpretation of the right to life thus would entail the necessity to guarantee a healthy environment, and this path has been followed in recent case-law in parts of the world.[17]

The importance of civil and political rights lies in their ability to create an environmentally friendly political order. By enabling concerned groups to voice their objection to environmental damage and to mobilise around environmental issues, civil and political rights can indeed make a considerable contribution to the protection of the

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[16] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities: Final report on Human Rights and the Environment (Ksentini-Report), E/CN.4/Sub.2/1994/9, p. 45.

[17] Compare *Port Hope Environmental Group v. Canada*, brought to the Human Rights Committee under the Optional Protocol, where the dumping of nuclear waste within the boundaries of the town of Port Hope was said to affect lives of present and future generations. The Human Rights Committee observed that the communication raised serious issues with regard to the right to life, but declared the complaint inadmissible because of the failure to exhaust domestic remedies. See also numerous cases in India, discussed in S. Prakash, p. 417.

environment.[18] Civil and political rights are of utmost importance to environmental activists. In many parts of the world, people are being repressed and silenced in their fight against large-scale projects which are detrimental to the environment. Human rights-NGOs, such as Human Rights Watch or the Sierra Club Legal Defence Fund, have on numerous occasions brought international attention to situations in which environmental activists are suffering severe repression and are denied access to relevant information.[19]

Full realisation of civil and political rights may be essential for the survival of the environmental sanity of our planet. As Human Rights Watch puts it, the ability of the international community to address global environmental problems, such as climate change and decline of biological diversity, will depend ultimately upon the empowerment of the citizens in every country to assure that national governments fulfil their international commitments.[20]

b) Economic, social and cultural rights

While civil and political rights provide procedural and participatory guarantees and protect individuals from arbitrary interference by the States, this category of rights contributes mainly through substantive standards of well-being. Economic, social and cultural rights encourage governments to pursue policies which create favourable conditions of life, which are necessary for a life in dignity and the full development of every individual's potential.[21] State Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) are under an obligation to bring about progressive realisation of economic, social and cultural rights, in accordance with the maximum of

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[18] M. Anderson, *Approaches*, in Boyle & Anderson, p. 5.

[19] One example demonstrating this point is the execution by the Nigerian Government of the human rights activist Ken Saro-Wiwa, who had protested against serious environmental damage to the Ogoni homeland of his people that resulted from the petroleum extraction activities of the Shell Petroleum Development Company, cited in G. Maggio & O. J. Lynch, *Human Rights, Environment and Economic Development: Existing and emerging standards*, Centre for International Environmental Law, http://www.ciel.org/Publications/olpaper3.html, 1997.

[20] Human rights watch & Natural Defence Council, *Defending the Earth: Abuses of Human Rights and Environment*, New York, 1992.

[21] A. Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in Boyle & Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Clarendon Press, Oxford, 1996, p. 46, Steiner & Alston, *International Human Rights in Context*, Oxford University Press, Oxford, 2000, p.248f.

their available resources. The obligations under the ICESCR are obligations of result, rather than obligations of conduct.[22]

The ICESCR contains provisions on the right to health, the right to food, the right to decent living conditions and the right to a safe and healthy working environment - all of which depend directly on the quality of environmental conditions.[23] When taken seriously, the realisation of these rights should entail the provision of environmental quality necessary for physical and mental well-being, as well as the requirement to formulate policies preventing environmental degradation. Furthermore, the right to education can be drawn upon to raise environmental awareness and knowledge among the population.

Economic, social and cultural rights are related directly to human well-being and capacity-building, and are hence conceptually closer to environmental matters than first generation rights. However, the system for implementing and monitoring the rights guaranteed under the ICESCR contains no provision for individual or interstate complaints, and relies solely on the submission of regular state reports to the Committee of Economic, Social and Cultural Rights.[24] This relatively weak mechanism, coupled with the progressive nature of obligations under the ICESCR, construes this category of rights rather narrowly. As a consequence, second generation rights continue to approach environmental issues only indirectly and do not offer any justiciable rights to individuals.[25]

c) Solidarity rights

This category of rights generally inheres to groups rather than individuals. Aiming at achieving global equality and solidarity, these rights require governments and international agencies to co-operate with each other and provide financial and technical assistance, resources and skills to those states lacking sufficient means themselves. Solidarity rights thus contain a considerable element of redistributive justice between

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[22] Article 2 ICESCR, CESCR, General Comment No. 3 on the nature of State obligations (Article 2 para 1), 14.12.90, paragraph 1, available at www.unhchr.ch.
[23] compare Articles 7b, 11 and 12 ICESCR.
[24] M. Anderson, *Approaches,* in Boyle & Anderson, p. 5, A. Boyle, *International Human Rights Law*, in Boyle & Anderson, p. 47.
[25] M. Anderson, *Approaches,* in Boyle & Anderson, p. 6.

states, and the main beneficiaries of these rights would consequently be developing states.[26] In international environmental law, this is reflected in the principle of common, but differentiated responsibilities.[27]

The collective right of self-determination is expressed in Article 1 of both International Covenants on Human Rights, and provides that "all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". The right to self-determination has been recognised by the highest judicial organ of the international community as an essential principle of contemporary international law.[28] It signifies that newly independent states emerging from colonial suppression shall retain permanent and exclusive sovereignty over their natural resources. The right to self-determination shall thus safe-guard newly independent states from external exploitation and environmentally degrading foreign investment. However, post-colonial governments have not proved to exercise greater environmental sensitivity than their preceding colonial rulers. Eager to rapidly achieve economic prosperity, they are creating attractive conditions for foreign investment and thus selling out their land to multi-national corporations. This in turn reintroduces severe dependence on external factors and players, and the environment is largely left to its own devices.

Another aspect of the right to self-determination is the right of indigenous peoples to a certain degree of political and economic autonomy within existing state boundaries. Indigenous people are by their definition closely attached to their ancestral territories and natural resources therein, and are as a consequence particularly vulnerable to environmental degradation. The ILO Convention concerning Indigenous and Tribal Peoples[29] recognises the necessity to safeguard the living environment of indigenous

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[26] Not all human rights lawyers favour the recognition of third generation rights, arguing that they devalue the concept of human rights, and divert attention from the need to implement existing civil, political, economic and social rights fully. Others see them as almost devoid of utility. A. Boyle, *International Human Rights Law*, in Boyle & Anderson, p. 46.

[27] Compare Principle 7 Rio Declaration, see Annex I.

[28] compare e.g. ICJ-case *East Timor (Portugal v. Australia)*. In this case, Portugal instituted proceedings against Australia, alleging that Australia's agreement with Indonesia concerning the exploitation of the continental shelf in the Timor Gap had violated the right of the people of East Timor to self-determination and their right to sovereignty over natural resources. ICJ Reports, 1995, pp. 90, 102.

[29] ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, 28 ILM p. 1382 (1989).

peoples and contains a number of provisions that deal expressly with environment. State parties are under an obligation to take special measures, in co-operation with the indigenous people concerned, to protect and preserve the environment.[30] States must consult the indigenous people and allow them to participate in the decision-making concerning programmes and policies affecting them.[31] However, these provisions only impose duties on States to respect the right to self-determination, and do not confer justiciable environmental rights to the indigenous individuals.[32] Unless the right to self-determination is vested with effective procedural remedies, indigenous populations do not dispose of realistic means to protect their particular environment. In addition to this lacuna, the practical impact of the ILO Convention is of limited significance due to its subject matter, but also because only few States are parties to the Convention.[33] At current date, only fifteen States, predominantly South American countries, have ratified the Convention.

A debated collective right with implications for the environment is the right to development. While the general issue of development is clearly on the international agenda in the context of economic issues and general human rights concerns, some authors believe it may be too early to speak of a legal right in international law of peoples or states to development.[34] The inherent link between environment and development is however recognised in the concept of sustainable development, which reflects the interrelationship and synergies between the previously distinct fields of environmental, economic and social considerations. This concept mandates that decision-makers take a more balanced and holistic approach than in the past when dealing with issues concerning human prerogatives, the environment and economic development. Sustainable development has been defined as development that meets the needs of future generations without compromising the ability of future generations to meet their own needs.[35] The inter-relatedness of today's global

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[30] Article 7 para. 4 ILO Convention 169.
[31] Article 6 ILO Convention 169.
[32] This is also reflected in the view of the Human Rights Committee in relation to the ICCPR: in *Lubicon Lake Band v. Canada*, (Decision 167/1984), the Committee stated that the right of individual complaint under the Optional Protocol does not extend to self-determination.
[33] R. Churchill, *Environmental Rights in Existing Human Rights Treaties,* in A. Boyle & M. Anderson (eds.), *Human Rights approaches to environmental protection*, Oxford, Clarendon Press, 1996, p. 108.
[34] M. Shaw, *International law*, 4th edition, Cambridge, Cambridge University Press, 1997, p. 224.
[35] *Our Common Future*, World Commission on Environment and Development, Oxford University Press, Oxford (1987). This definition is also taken up in Principle 3 of the Rio Declaration on Environment and Development 1992, see Annex I.

problems reflected in the concept of sustainable development urges international law to be more creative and cross-sectoral, and a number of international conventions reflect this emerging tripartite approach.[36] However, neither the right to development nor the concept of sustainable development do not as yet offer any explicit justiciable right one could draw upon to protect the environment and individuals living therein.

Environmental protection by way of greening existing human rights has the advantage of avoiding the need to define such notions as "satisfactory" or "decent" environment. Existing human rights institutions are competent and well prepared to deal with established rights, and there is little or no conflict with the competencies of environmental institutions.[37]

2. The right to environment as a separate right of its own

It may be true that full realisation of existing human rights will contribute to global and local protection of the environment. However, it is questionable if conventional human rights ever will lead to comprehensive preservation and protection of our biosphere. Established human rights standards approach environmental questions only in an indirect manner, hence lack the necessary precision and may consequently prove to be inadequate to fully address the needs of the environment and the human beings living therein.[38]

Given the gravity and urgency of many of our environmental problems, which are increasingly threatening human life and well-being, there is an immediate need for an effective legal solution. It is contemplated that a satisfactory solution may be found in the establishment of a right to environment in its own capacity, and there is growing recognition for this approach.[39]

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[36] Inter alia Rio Declaration, Convention on Biological Diversity, Desertification Convention.
[37] A. Boyle, *International Human Rights Law,* in Boyle & Anderson, p. 63.
[38] M. Anderson, *Approaches,* in Boyle & Anderson, p. 8.
[39] Joint UNEP-OHCHR Expert Seminar, Geneva, January 2002, Final text of 16.01.2002, available at www.unhchr.ch/environment/conclusions.html.

The right to environment is by its nature a complex one, cutting across traditional human rights categories and generations. Its implementation and performance involve many different fields, including development policies, economic theory, environmental conservation, market competition for scarce resources and trade regimes as well as traditional human rights institutions and processes. The right to environment thus requires a constant and careful balancing between widely disparate interests.[40]

a) Potential duty-bearers of the right to environment

The environment is facing threats from many sides of human action, be it ineffective implementation of environmental legislation by States, large-scale pollution through private industry, but also every-day activities of individuals, such as generating excessive waste or driving a car. The group of potential duty-holders and violators may thus come to include multiple entities, such as States, companies as well as individuals. Everyone benefits from an environment of good quality, and as a consequence everyone should at the same time contribute to the conservation and protection of the environment.[41] However, it is questionable if and to what extent duties can be imposed on private actors and individuals. Such a concept would be a novelty in the field of human rights protection, which has traditionally been restricted to States' negative duties and positive obligations vis-à-vis individuals. In addition, there may be more suitable methods, such as tort law or national and international criminal law, to hold individuals responsible for environmental pollution.[42]

b) Potential beneficiaries of a right to environment

Linked to the issue of duty-bearers is the question of corresponding rights-holders. The environment has no voice of its own, but depends on human beings taking up its cause and defending its interests. A question to be addressed in this regard is the following: Does

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[40] S. Prakash, *The Right to Environment. Emerging Implications in Theory and Praxis*, in «Netherlands Quarterly of Human Rights», no. 4, 1995, p. 404.
[41] A. Kiss, *Concept and Possible Implications of the Right to Environment*, in Mahoney & Mahoney, p. 556.
[42] In international humanitarian law, large-scale pollution can come to be subsumed under the categories of crime against humanity and/or breaches against the laws and customs of war.

the right to environment protect every person individually or is it a collective right belonging to a defined group of persons? The identity of the rights-holder is crucial for the determination of content of the right. It has been suggested that the right to environment falls within the category of solidarity rights, and should be framed as a collective rights. It holds true that large-scale environmental deterioration affects vast segments of the population collectively. Arising therefrom is the clear need for global co-operation on environmental matters, which is emerging as one of the cornerstones of international environmental law. However, framing the right to environment as a collective right is a rather amorphous concept, which is depending on the identification of the specific collective rights-holder, as well as who exactly is authorised to act on behalf of it.[43] This approach may be unable to adequately give voice to individuals suffering from deficient environmental circumstances. It has been argued that collective rights are only useful if they are constituted in a way to confer tangible rights to individuals.[44] This line of argumentation seems plausible in the context of the right to environment. Although environmental degradation is a matter of global concern and calls for comprehensive and proactive solutions, it is also necessary to protect single human beings in their immediate surroundings.

A further issue under discussion is the concept of right of future generations to environment, which is stipulated in a number of recent instruments and constitutes an element of the concept of sustainable development.[45] The right of future generations appeals to currently living generations to preserve the environment and its precious bio-diversity, and emphasises precaution, prevention and consideration of long-term implications of our current lifestyle. The implementation of duties to future generations requires that present generations determine the appropriate amount of natural as well as technological resources that are to be passed on to the future. Innovative case-law, e.g. in India[46], has demonstrated that claims based on the rights of future generations can be

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[43] J.G. Merrills, *Environmental Protection and Human Rights: Conceptual Aspects,* in Boyle & Anderson (eds.), *Human Rights approaches to environmental protection*, Oxford, Clarendon Press, 1996, p. 32.
[44] K. Hastrup, *Collective Cultural Rights: Part of the Solution of Part of the Problem?*, in Hastrup (ed.), *Legal Cultures and Human Rights - The Challenge of Diversity*, The Hague, Kluwer Law International, 2001.
[45] inter alia Principle 3 Rio Declaration, Convention on Biological Diversity, Desertification Convention.
[46] compare discussion of case-law in F. Du Bois, *Social Justice and Judicial Enforcement*, in A. Boyle & M. Anderson (eds.), *Human Rights approaches to environmental protection*, Oxford, Clarendon Press, 1996, p.153-175. Compare also the Philippines Supreme Court decision in *Minors Oposa v. Secretary of Department of Environment and Natural resources,* 33 ILM (1994), p.173.

successful, but there remains a great deal of controversy about the implications and legal applicability of this concept.[47] To what extent are rights of future generations to be taken into account when managing our present needs? How are conflicting interests, such as economic growth and population explosion versus conservation and protection of nature, to be resolved and balanced? Are we in a position to determine and anticipate the needs and interests of future generations? Can a merely potential person have rights or interests at all?[48]

The determination of rights-holders – the individual, a community collectively, possibly future generations – is relevant for the content and the formal justiciability of the right to environment. However, whatever form the emerging right to environment takes on, it is not dependent on formal justiciability for its existence. Many human rights are not formally justiciable by way of court proceedings, yet this does not mean that they do not exist. This applies to numerous economic, social and cultural rights, which entail obligations of result, rather than directly justiciable obligations of conduct. The human rights system does not consider enforceability or justiciability to be definitive criteria of the existence of a right. Instead, the notions of supervision and implementation have been adopted by international human rights law as constitutive elements, and are considered sufficient for the existence of a right.[49] However, considering that the environment does not have voice of its own, a justiciable right will have the potential of pushing environmental matters forward in a more expeditious pace than vague policy concepts.

c) Possible formulations of the right to environment

Until this date, there is still a great deal of controversy concerning the existence and necessity of a human right to environment. In addition, within the group of proponents, there are differing opinions on the actual formulation and content of such a right. Some argue that the right to environment should be of a procedural nature, whereas others believe in a substantively defined right. Both approaches will be analysed next.

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[47] For further discussion see J.G. Merrills, *Conceptual Aspects,* in Boyle & Anderson, p. 32f.
[48] S. Douglas-Scott, *Environmental Rights: Taking the environment seriously?* in C. Gearty & A. Tomkins (eds.), *Understanding Human Rights,* London, Pinter 1996.
[49] S. Prakash, *Emerging Implications in Theory and Praxis*, p. 430.

i) A procedural human right to environment

Adherents of the procedural approach believe that the right to environment must be interpreted not as a theoretical right to an ideal environment, but as a right protecting the present environment from degradation. The practical meaning of the right to environment is hence the right of every living person to the conservation of his or her particular environment.[50] This can only be realised if individuals are provided with tools and procedures to defend their particular right to environment, securing their own living spheres from hazardous interference. The British constitutional lawyer Dicey in the early 19th century formulated that "practical procedure is worth a thousand pious pronouncements of principle", and that may hold true in connection with environmental protection today.[51]

The procedural or participatory approach seeks to establish environmental protection by way of democracy and informed debate. Individuals need to be notified of the state of the environment in general, and in particular of projects or events which concern their own immediate environment. Once disposing of such information, individuals must be able to participate in the decision-making process on environmental issues at both domestic and international level. Environmental impact assessments should be carried out before commencement of projects in order to anticipate and prevent environmental harm. The right to legal redress is indispensable for ensuring compliance with relevant rules and procedures. Access to justice should be extended beyond individuals, i.e. be granted also to NGOs, to facilitate public interest litigation. The establishment of effective judicial remedies will allow individuals to seek compensation for any environmental damage they have suffered.[52]

The procedural approach is based on the assumption that democratic decision-making will lead to environmentally friendly policies. A government which operates with openness, accountability and civic participation is more likely to promote environmental justice, to balance the needs of present and future generations in the protection of the environment, and to enforce existing environmental standards. If the people making the

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[50] A. Kiss, *Concept and Possible Implications of the Right to Environment*, in Mahoney & Mahoney, p. 557.
[51] cited in M. Anderson, *Approaches*, in Boyle & Anderson, p. 9.
[52] A. Kiss, *Concept and Possible Implications of the Right to Environment*, in Mahoney & Mahoney, p. 557, M. Anderson, *Approaches*, in Boyle & Anderson, p. 9.

decisions are the same as those who pay for and live by the consequences of such decisions, the respect for environment will automatically be enhanced. By creating legal channels for participation, it is possible to redress the unequal distribution of environmental costs and benefits.

Another argument in favour of a procedural right to environment, rather than a substantive one, derives from the difficulty of defining environmental quality. The decision of what constitutes good environment involves a value judgement which is difficult to codify in legal language, and which will vary across cultures, communities and geographical circumstances. It may therefore not be possible to agree upon a universal and precise formulation of a substantive right to environment. Procedural rights, on the other hand, offer a more flexible and context-sensitive approach.[53] As regards legal implementation, procedural environmental rights have the advantage of being immediately applicable, and justiciable obligations can be derived therefrom with ease.[54]

What distinguishes a separate participatory right to environment from comparable existing rights, e.g. in the ICCPR, is its greater specificity and environmental focus, and its emphasis both on participation in decision-making, information and access to justice. Defined in this participatory way, the human right to environment would harbour significant potential to contribute to environmental protection. The general policy of framing the right to environment as a procedural rights has secured extensive international support, and this is also reflected in the Draft Principles on Human Rights and the Environment proposed in the Ksentini-report.[55]

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[53] A. Boyle, *International Human Rights Law,* in Boyle & Anderson, p. 60.
[54] M. Anderson, *Approaches*, in Boyle & Anderson, p.16.
[55] A. Boyle, *International Human Rights Law,* in Boyle & Anderson, p. 61. The procedural rights identified in the Draft Principles on Human Rights and the Environment include the right to receive and disseminate information, the right to participation in planning and decision-making processes, including prior environmental impact assessment, the right to freedom of association for the purpose of protecting the environment or the rights of persons affected by environmental harm, the right to effective remedies and redress for environmental harm in administrative or judicial proceedings. Compare also Principle 10 of the Rio Declaration, see Annex I.

ii) A substantive human right to environment

Advocates of the substantive approach argue that even if procedural rights are fully realised and perfectly distributed throughout civil society, it is entirely possible that a participatory and accountable policy may opt for short-term affluence rather than long-term environmental protection. Democracies are entirely capable of environmental destruction, as has been demonstrated by the industrial nations of the North, who are disproportionately responsible for environmental damage.[56] Hence, procedures alone cannot guarantee environmental protection, and the general articulation of a substantive right to environment may be necessary. It is argued that a substantive right can provide more effective protection, as it explicitly calls for the conservation of environmental quality adequate for human health and survival. A substantive right to environment would serve as guidance for environmental procedures, and ultimately ensure fair, just and sustainable access to environmental resources.[57] A precise and detailed substantive right would clarify the issue of environmental obligations, and this in turn would identify human behaviour and actions that constitute violations of the right to environment.

The main problem with opting for a substantive right to environment is the definition of its scope of protection and applicability. This involves a value judgement, requiring a decision on if we are to focus on the protection of human health and livelihood, ecological sustainability or the inherent beauty and value of nature.[58] Existing provisions on the right to environment refer to a "clean", "healthy", "decent", "satisfactory", "ecologically balanced" or "sustainable" environment. These adjectives are rather vague and indeterminate, and their significance will ultimately depend on the cultural and geographical context. Such an incoherent formulation has the effect of putting the effective implementation of a substantive right to environment at risk.[59] One solution may be to refrain from adding an adjective altogether, and guarantee a right to environment per se. This approach is comparable to the right to life, which is also guaranteed without any qualifying adjective.

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[56] M. Anderson, *Approaches,* in Boyle & Anderson, p. 9.
[57] S. Prakash, *Emerging Implications in Theory and Praxis*, p. 413
[58] M. Anderson, *Approaches,* in Boyle & Anderson, p. 11, M. Hertsgaard, *Earth Odyssey,* p. 264f.
[59] A. Boyle, *International Human Rights Law,* in Boyle & Anderson, p. 50.

C. ADVANTAGES AND DISADVANTAGES OF A HUMAN RIGHTS APPROACH

1. Redundancy and anthropocentricity

The substantive and increasingly growing corpus of international environmental law has led to the argument that environmental conservation should better be realised through international environmental conventions and other instruments, and not through human rights. In defence of a human rights approach to the environment, it has to be held that such a right does not aim at substituting, but rather at supplementing the efforts of international environmental law.[60] The environment depends on human beings acting on its behalf, and a broadening of possibilities to defend the environment can only be an advantage. Many instruments of international environmental law have established their own means of enforcement, and proposals for environmental human rights must therefore be carefully defined in order not to conflict with or duplicate the supervisory institutions established under environmental treaties.[61] But States can choose not to become parties to environmental treaties, and even if they do, only few such conventions accord justiciable rights to individuals. The direct impact and protection afforded through international environmental law may thus be rather limited.

The establishment of a human right to environment also confronts criticism of anthropocentricity[62]. Environmentalists argue that such a right will only be for the benefit of human beings, and thus fails to protect the intrinsic value of other species and the environment in general. However, human beings are part of and cannot exist without conserving nature. Besides, one must not forget that the species of mankind is the main source of pollution and environmental degradation. Regulation of human behaviour is thus crucial, and will ultimately have the effect of also protecting the intrinsic value of the entire biosphere. Even if the main focus of a human right to environment remains human benefit, the concept is drawn so broadly as to include protection and preservation of flora and fauna.[63]

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[60] S. Prakash, *Emerging Implications in Theory and Praxis*, p. 412.
[61] A. Boyle, *International Human Rights Law,* in Boyle & Anderson, p. 56.
[62] fur a full discussion see C. Redgwell, *A critique of Anthropocentric rights,* in Boyle & Anderson (eds.), *Human Rights Approaches to Environmental Protection,* Clarendon Press, Oxford (1996), p. 71-87.
[63] "We need, then, to recognise that people do right, not wrong, to have a particular regard for their own kin and their own species. From a practical angle, this recognition does not harm green causes, because the measures needed today to save human race are, by and large, the same measures that are needed to save the rest of the biosphere. There simply is no lifeboat option by which human beings can save themselves alone,

The close link between environmental protection, human rights and long-term human survival might generate a more effective and coherent approach to the enforcement of environmental rights. Environmental NGOs dispose of profound expertise, efficient organisation and many years of experience, and it would be of great advantage to mobilise and take advantage of these assets. One may even imagine joint efforts between environmental and human rights NGOs in their struggle to protect human life in dignity and in harmony with nature. In order to give nature a forceful voice and facilitate public interest litigation, it is of great significance to grant NGOs standing in environmental matters. Explicit rights to environmental protection can lie dormant unless they are actively seized by environmentalists and lawyers. In addition, non-legal strategies (such as campaigning, lobbying, mounting public protests, assisting local communities in voicing complaints) adopted by activists and NGOs prove to be valuable in the effective implementation of legal standards. [64]

2. Opposition from within the human rights community

There is also considerable resistance against the establishment of a right to environment coming from within the human rights community. Opponents believe that a separate right to environment would lead to the proliferation of human rights and rights-holders, multiplying occasions when rights-holders come into conflict with each other and thereby weaken the system of human rights protection as a whole. They argue that there is no need to create such a right, as it only deals with matters which are already sufficiently covered by existing rights. It is maintained that a potential right to environment is not adequately defined or sufficiently distinct from already established human rights for it to be useful or sensible to make a new set of distinctions.[65] As concerns the argument that the right to environment will come into conflict with other rights, there are only a few rights that come into question, such as the right to property. Any collision of rights requires a fair balancing of the rights and interests involved, and such a solution is not a new phenomenon connected solely to an emerging environmental right.

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either as a whole or in particular areas." M. Midgley, *The end of Anthropocentrism,* in Attfield & Belsey (eds.), *Philosophy and the Natural environment,* Royal Institute of Philosophy Suppl. no. 36, 1994, p. 111.

[64] M. Anderson, *Human Rights approaches to environmental protection*, in Boyle & Anderson, p. 20.

[65] J.G. Merrills, *Conceptual Aspects,* in Boyle & Anderson p. 29f.

It is also contested that adding a new right to the agenda of human rights would lead to a fragmentation of efforts and achievements of the relevant actors, and thus lower the degree of protection of established human rights. However, the historical evolution of human rights law depicts a process of gradual expansion of rights, and this in turn has consistently improved and strengthened the degree and extent of the overall protection. The effect of the emerging right to environment is to enhance, and not to restrict or even devalue the protection afforded by the indivisible and interrelated structure of human rights.[66] A right to environment will guarantee a certain minimum core of entitlements and protection, which are in the end vital prerequisites for the provision of most human, and especially economic and social rights. The right to environment can contribute to equality among citizens, as it reduces the discrepancies in their material living conditions, and ensures that disadvantaged poor and marginalized communities do not suffer a disproportionate burden of the environmental costs, while not enjoying an equivalent share of the benefits deriving from its utilisation. As matters stand today, environmental deterioration aggravates the differences between rich and poor, as affluent people can more easily escape degraded conditions of life, while poor and other disadvantaged groups must accept to live in inhuman agglomerations, slums or heavily polluted areas.[67]

3. The right to environment as trump

The explicit recognition of a right to environment would confer highest legal standing to environmental concerns, and elevate environmental interests to the fundamental values of society. A human right to environment would thus serve as guidance for administrative and judicial authorities, and also harbour educational value due to its prominent position within the legal order.[68] A human rights approach to environment constitutes a strong claim and grants absolute entitlement, and is theoretically immune to lobbying and trade-offs which characterise bureaucratic decision-making. Rights can be considered as trumps, which serve as an ultimate safety-net and mobilise redress when other remedies, such as bureaucratic regulation or tort law, have failed.[69] Having

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[66] S. Prakash, *Emerging Implications in Theory and Praxis*, p. 430.
[67] A. Kiss, *Concept and Possible Implications of the Right to Environment*, in Mahoney & Mahoney, p. 553.
[68] ibidem p. 558f.
[69] M. Anderson, *Approaches,* in Boyle & Anderson, p. 21.

environmental rights, incorporated in national constitutions or international law, cannot guarantee that the rights-holder will be successful in every dispute in which the right is relevant. Yet it certainly creates a situation in which not only must the right always be considered, but very good reasons will be needed for denying it effect.[70]

Environmental matters are characterised by complex and technical issues of environmental management, as well as a great deal of scientific uncertainty. Due to the lack of expertise, it is questionable if conventional human rights institutions are adequately prepared to handle environmental cases. However, the general expression of a right allows courts and other human rights institutions to interpret the right to environment creatively as issues and contexts change. A human rights approach thus offers a more flexible tool than rigid environmental regulatory legislation based on technicalities and scientific conclusions.[71] If framed as a procedural right, the issue of the judiciary's lack of technical expertise is avoided altogether, as courts will not need to enter into a discussion of complex environmental issues, but will only have to determine if the relevant procedures were carried out satisfactorily.

D. THE RIGHT TO ENVIRONMENT IN EXISTING HUMAN RIGHTS-TREATIES

In spite of the extensive attention and debate around the right to environment on a policy level, explicit rights to environment in existing human rights instruments have tended to be few and ambiguous. Many of the human rights treaties pre-date the development of the international community's concern with the environment, which emerged only in the late 1960s. A number of human rights instruments do contain references to a right to a decent, healthy or viable environment[72], but the enforcement of these provisions is far from satisfactory due to weak implementation mechanisms and lack of clarity as to scope and meaning of the right.[73] While the Stockholm Declaration of the UN Conference on the Human Environment of 1972 strongly advocated the link between

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[70] J.G. Merrills, *Conceptual Aspects,* in Boyle & Anderson, p. 27.
[71] M. Anderson, *Approaches,* in Boyle & Anderson, p. 22.
[72] Article 24 African Charter on Human Rights 1981, Article 12 UN Covenant on Economic, Social and Cultural Rights, Article 11 European Social Charter, Article 11 Additional Protocol to the Inter American Convention on Human Rights, Article 24(2)c Convention on the Rights of the Child.
[73] R. Churchill, *Environmental Rights in Existing Human Rights Treaties,* in A. Boyle & M. Anderson, p.108

environmental law and human rights[74], the Rio Declaration adopted by the UN Conference on Environment and Development in 1992 contains only limited references to human rights.[75] This is indicative of the continuing uncertainty about the proper place of human rights law in the development of international environmental law.[76]

Nevertheless, there have been strong attempts to connect international environmental law and human rights law. Figuring prominently among such attempts is the Final Report on Human Rights and Environment, presented by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. In 1994, the UN Sub-Commission appointed Mrs. Fatma Ksentini as Special Rapporteur to analyse the connection between human rights and the environment, and her Final Report[77] (often referred to as the Ksentini-Report) came to include a series of Draft Principles on Human Right and the Environment. The Draft Principles proclaim that "human rights, an ecologically sound environment, sustainable development and peace are independent and indivisible". It also states that "all persons have the right to a secure, healthy and ecologically sound environment", and maintains that "this right and other human rights, including civil, cultural, economic, political and social rights are universal, interdependent and indivisible".[78] In addition, a series of more specific manifestations of these rights are spelled out, including both substantive and procedural rights. The Draft Principles represent an extensive and sophisticated statement of environmental rights and obligations at international level, and manage to give environmental rights an autonomous and explicit character which they lack in present international law.[79]

The incorporation of a right to environment may also take place at national level. The Special Rapporteur found that, although national constitutions may not equate environmental rights with human rights, over 60 constitutions contain specific provisions relating to the protection of the environment. An increasing number of constitutions

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[74]compare e.g. Principle 1 Stockholm Declaration: "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, and he bears a solemn responsibility to protect and improve the environment for present and future generations".
[75] Principle 1 Rio Declaration: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".
[76] A. Boyle, *International Human Rights Law,* in Boyle & Anderson, p. 43.
[77] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities: Final report on Human Rights and the Environment, E/CN.4/Sub.2/1994/9.
[78] Part I of the Final report on Human Rights and Environment.
[79] A. Boyle, *International Human Rights Law,* in Boyle & Anderson, p. 44.

explicitly recognise the right to a satisfactory environment and prescribe state duties to protect the environment, but in the most cases this is only of declaratory value.

Adequate protection of the global environment depends on combined efforts of human beings at both international and national level. The transboundary effect of pollution calls for more stringent measures to engage State responsibility, as well as enhanced co-operation. At the same time, the detrimental effects of environmental degradation suffered by individuals require adequate procedures on a more proximate regional, national or local level. The perception of what exactly constitutes good environment is in the end a matter for each society to determine according to its own values and choices, though remaining within the boundaries of internationally agreed rules and policies. It follows therefrom that it is most important to ensure the existence of adequate processes for making this determination, both internally and internationally, rather than to define some global vision of its substantive outcome.

The global inter-relatedness of environmental concerns and policies, such as sustainable development and the protection of bio-diversity, have led to an increasing internationalisation of the domestic environment. The role of human rights law is thus gaining even more significance, as it transposes international environmental law onto the level of affected individuals. Human rights law has the ability of democratising national and international decision-making processes and making them more open, rational and legitimate.[80]

[80] Ibidem p. 64.

IV. THE RIGHT TO ENVIRONMENT IN THE EUROPEAN CONTEXT

The right to environment is a matter of sheer survival in the South, where severe floods and expanding desertification are leading to reduced harvests, poverty, malnutrition, and famine, which in turn bring development efforts to stagnation. Entire island states are doomed to submerge under water due to rapidly rising sea levels deriving from melting polar caps. Struggling with everyday survival, few individuals in the South can mobilise the energy to fight environmental degradation, but are instead forced to focus on the symptoms thereof.

In the affluent countries of the North, ecological degradation is linked to industrialisation and thus to economic benefits. Individuals can indeed afford to engage in environmental matters, and the environment has long been on the political agenda. But where is environmental protection actually at? Taking Europe as an example, it is no secret that numerous environmental problems are threatening the continent: negligent enforcement of safety standards and maladministration of industries lead to accidents, pollution and acid rain, which are causing short- and longterm suffering and environmental degradation. Pollution-related diseases, such as allergies and bronchitis, are on the rise, and aeroplanes, motorways and factories form noise curtains that impair our well-being and quality of life.

The issues of immediate concern may be different from those in the South, but environmental deterioration is affecting human beings in the wealthy countries of the North as well. The environment is a global matter, and it thus requires global efforts, keeping in mind that big targets are met by small steps. Accordingly, every effort to make this world a greener place must be welcomed and supported. The remainder of this thesis will analyse the state of a human right to environmental protection in Europe: firstly by outlining the case-law of the European Court of Human Rights, and secondly by discussing the environmental approach of the European Union.

A. THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE ENVIRONMENT

1. The European Convention of Human Rights and Fundamental Freedoms

The European Convention for the protection of human rights and fundamental freedoms (ECHR) was adopted on the 4th of November 1950 by the Council of Europe. Its purpose was to give effect to the rights guaranteed under the Universal Declaration of Human Rights of 1948 within the European context, a continent ravaged by the widespread atrocities committed during the events of two world wars. The ECHR contains classical civil and political rights, such as the right to life, prohibition of torture, freedom from arrest and arbitrary detention, and freedoms of thought, expression and assembly. A number of protocols have added further rights to the Convention, such as the rights to property, education and elections, as well as the abolition of the death penalty.[81] At current date, forty one European States have signed and ratified the ECHR and its additional protocols.

The Contracting Parties are under the obligation to guarantee the rights of the ECHR vis-à-vis every person falling within their jurisdiction, nationals as well as non-nationals. Compliance with these obligations is ensured through a rather sophisticated system of implementation, which consists of both inter-state complaints and individual applications. Prior to the reorganisation of the enforcement mechanism in 1998 by Protocol 11, the Commission served as a filter, investigating all applications and rejecting the inadmissible ones. As for the admissible applications, the Court would make a final and binding decision concerning the alleged violation of the Convention. Protocol No. 11, which entered into force on 1st of November 1998, led to the abolishment of the Commission, and put the sole competence of enforcement in the hands of the European Court of Human Rights. Located in Strasbourg, the Court is experiencing an increasing flood of individual complaints, and has become a highly respected and influential judiciary instance in Europe.

As for the general standing requirements, The Court may receive applications from any person, NGO or group of individuals claiming to be the victim of a violation by a Contracting Party of a right guaranteed under the ECHR or its Protocols (Article 34

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[81] Protocol No. 1 (1952), Protocol No. 4 (1963), Protocol No. 6 (1983), Protocol No. 7 (1984).

ECHR). Applicants turning to Strasbourg for judicial redress must fulfil the formal admissibility criteria under Article 35, i.e. exhaustion of local remedies and filing of application within 6 months from the final decision, and must present a claim that is not manifestly ill-founded. The Court will then examine if the personally-felt interference of a Convention-right is attributable to the State, either directly or indirectly.

2. The ECHR and the Environment

The ECHR was drafted two decades before environmental concerns emerged on the agenda of the international community. As a consequence, there is not any explicit reference to the environment in the Convention. In 1973, Germany presented a proposal for an additional protocol on environmental rights, but due to lack of support among the Contracting Parties of the Council of Europe, this did not lead to any fruitful result.[82] Nevertheless, the Convention institutions have dealt with environmental matters on several occasions, and thereby drew upon various provisions of the ECHR in a rather creative manner. But in spite of the innovative interpretation of conventional civil and political rights, environmental cases have had only limited success. So far, only few cases have been decided in favour of applicants alleging a breach of the ECHR in connection with environmental harm.

3. Deriving Environmental Rights from the ECHR

In 1976, when faced with a complaint from members of an environmental organisation over the use of marshland for military purposes, the Court held that only the alleged violation of one of the Convention rights could be the subject of a complaint under the Convention.[83] With increasing awareness about the environment in Europe, the Court has however demonstrated some willingness to subsume environmental concerns under

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[82] The Federal Republic of Germany proposed the following text:
"1. No one should be exposed to intolerable damage or threats to his health or to intolerable impairment of his well-being as a result of adverse changes in the natural conditions of life.
2. An impairment of well-being may, however, be deemed to be tolerable if it is necessary for the maintenance and development of the community and if there is no alternative way of making it possible to avoid this impairment."

[83] *X and Y v. Federal Republic of Germany,* 5 Eur Com HR Dec & Rep (1976).

various rights guaranteed under the Convention. An overview of the relevant Articles, case law and conclusions follows next.

a. Articles 2 and 3 ECHR – The right to life and the prohibition of torture

Article 2 ensures the right to life, while Article 3 prohibits torture and inhuman or degrading treatment. The case law thus far does not represent any major use of Articles 2 and 3 in the context of environmental matters. Even where these Articles have been raised by applicants, the Court has not always regarded it necessary to examine the claims, since it found violations given under other Articles.[84]

In a number of cases concerning nuclear tests carried out by the United Kingdom, the Court held that Article 2 not only involves the negative obligation to refrain from the intentional and unlawful taking of life, but also implicates the positive duty to take steps to safeguard the lives of those within its jurisdiction. In *LCB v. United Kingdom*[85], the daughter of a man who had been involved in atmospheric tests of nuclear weapons claimed that the UK authorities had breached Article 2 by not adequately monitoring her father's radiation dose levels. The applicant, herself being diagnosed with leukaemia at the age of four, also alleged that the failure to warn her parents about potential risks to her health caused by the involvement of her father in nuclear testing constituted a breach of Article 2. As to whether the positive duty to safeguard the right to life had been fulfilled in this particular case, the Court concluded that, due to the level of scientific knowledge given at the time, the State could have been reasonably confident that the applicant's father had not been dangerously exposed to radiation. Should it however have appeared likely at the time of the nuclear tests in the 1950s that exposure of a man to radiation would create a real risk to the health of a child subsequently conceived, the State should have provided the applicant's parents with advice and monitored the father's health.[86]

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[84] compare *Guerra v. Italy*, where Article 8 was found to be violated, and the Court thus found it unnecessary to consider the case under Article 2. See further under 3.e.iii.
[85] Judgement of 9 June 1998, 27 EHRR 212.
[86] Compare also *McGinley and Egan v. United Kingdom,* Judgement of 9 June 1998, 27 EHRR 1.

As concerns Article 3, the Court has always sought to reserve the application of the Article for the most severe forms of ill-treatment. The applicants in *Lopez Ostra v. Spain*[87] suffered from the pungent and toxic emissions from a waste treatment plant, and therefore invoked Article 3. The Court recognised that the pollution constituted difficult living conditions for the applicant and her family, but concluded that this did not amount to degrading treatment under Article 3. The Article requires a certain level of severity of interference, and thus only the most severe kind of injury caused by environmental hazards would fall within its ambit[88].

The Courts reasoning in these cases does indicate that there is some potential for relying on these provisions in relation to severe environmental hazards. If the Court can be convinced that the State was directly responsible for a severe and life-threatening environmental hazard, or that it should have taken positive steps to eliminate or warn about such a hazard created by a third party, the Court may be willing to consider the matter under Article 2. There are voices within the Court who would welcome a more proactive interpretation of the right to life. These judges anticipate that the case-law should begin to further develop the respective implied rights and articulate situations of real and serious risk to life. Under the concept of foreseeable consequences[89], where substantial grounds are indicating that individuals are facing a real risk of being subjected to circumstances which endanger their health and physical integrity, Article 2 would come to protect situations of imminent environmental hazard.[90]

b. Article 6 ECHR – The right to a fair trial

The procedural guarantees under Article 6 may come to apply to disputes concerning individual rights within an environmental context, such as planning requirements, licenses or compensation for injuries caused by pollution. In order for Article 6 to be applicable, individuals must prove that their particular civil rights or

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[87] Judgement of 9 December 1993, 20 EHRR 277, discussed in further detail in relation to Article 8.
[88] F. Jarvis & A. Sherlock, *The European Convention on Human Rights and the Environment,* in «European Law Review», No. 24, 1999, p. 18f.
[89] Applied in cases like *Soering v. United Kingdom,* judgement of 7 July 1989, 11 EHRR 439, where the applicant was facing death penalty upon extradition.
[90] Judge Jambrek, concurring opinion in Guerra v. Italy.

obligations are the subject of a dispute, which entitles them to a fair and public hearing by an independent and impartial tribunal. The dispute must be genuine and serious, it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The result of the proceedings must be directly decisive for the right in question. In the case *Zander v. Sweden*[91], the applicants were unable to challenge the decision of a licensing authority, which allowed a waste treatment company to operate without any obligation to take precautionary measures to avoid pollution of the applicants' drinking water. As a consequence of the company's activities, the water contained excessive levels of cyanide, and the applicants' claim thus directly concerned their ability to use the water in their own well for drinking purposes. Being the owners of the land, the applicants' civil right of property, including their entitlement to protection against pollution of their well by the waste treatment company, was infringed by the decision of the licensing board. The Court concluded that there had been a violation of Article 6 paragraph. 1, since the applicants had no possibility to challenge the decision of the licensing board.

As for more general environmental concerns, Article 6 is not of any great significance, since it will be difficult, if not impossible, to demonstrate that one's individual rights are at stake. Applicants relying on Article 6 to challenge a decision taken by an authority must demonstrate an immediate and personal link between the contested decision and an impairment of their individual rights. This may prove to be difficult in environmental matters, where decisions often affect individuals merely indirectly or develop full impact only after a certain lapse of time.

The applicability of Article 6 was denied in the case of *Balmer-Schafroth and others v. Switzerland*[92], where the applicants objected against the extension of the operating licence for a nuclear power station. They argued that the power station failed to meet the relevant safety standards, and demanded that the station be permanently closed in order to protect their right to physical integrity from the risks emanating from the nuclear power plant. The Federal Council (i.e. the Swiss Government) rejected the applicants objections and granted the operating licence, and even permitted an increase of the operation capacity with 10 %. Since only the Federal Council had jurisdiction to decide on

[91] Judgement of 25 November 1993, 18 EHRR 175.
[92] Judgement of 26 August 1997, 25 EHRR 598.

the extension of the operating licence, the applicants had not been able to secure a ruling by an independent tribunal on their objections to the extension. The applicants thus turned to the European Court of Human Rights, claiming that they had suffered a violation of Article 6 (1).

The Court dismissed the applicants' claim, having come to the conclusion that Article 6 was not applicable in their case, since the link between the Federal Council's decision and their right to physical integrity was too remote. The applicants had failed to demonstrate that the operation condition of the power station exposed them personally to a danger that was not only serious but also specific and imminent. The outcome of the proceedings before the Federal Council could thus not be regarded as directly decisive for the right to physical integrity relied upon by the applicants, and consequently they could not claim to have a right to take part in the decision-taking regarding the nuclear power station.

The decision taken by the majority (twelve votes to eight) in Balmer-Schafroth was severely criticised by the minority, who did not share the majority's view that the link between the decision allowing the operation of the nuclear power station and the imminent danger for the applicants' lives was too remote.[93] The minority would have preferred the Court to issue a judgement reinforcing the precautionary principle and granting full judicial remedies to protect the rights of individuals against the interference by authorities. The minority provocatively questioned if the local population first has to be irradiated before they are entitled to be eligible for protection under Article 6. In addition, even though the danger of a violation of the right to life was not *a priori* established, the minority contested that the Federal Council, being the executive branch of the State, could not be considered an independent and impartial tribunal. In spite of the minority's protests against the majority's decision in Balmer-Schafroth, the Court upheld and reaffirmed its position in a similar case a few years later.[94]

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[93] The minority argued that the majority had failed to draw "any distinction between the prerogative act, i.e. the original political decision to use nuclear energy, and the decisions relating to licences, public-works contracts and specifications, which are not sovereign attributes of the State and cannot escape judicial scrutiny. Just like motorways and waste-disposal sites must be supervised and controlled, it is necessary that nuclear energy and the operation of power stations comply with relevant safety standards."

[94] *Athanassoglou and others v. Switzerland,* Judgement of 6 April 2000, 31 EHRR 13.

The procedural guarantees of Article 6 also apply to any claim for compensation for injury suffered from environmental incidents. If no such remedy were available, Article 13 which guarantees the right to an effective remedy would be applicable if the applicants can show that they have an arguable claim that one of their Convention rights has been violated.[95] However, the Court has so far not demonstrated particularly great willingness to expand the procedural guarantees under Article 6.

c. Article 10 – The right to information

Article 10 secures freedom of expression, which not only includes the freedom to impart information, but also protects the freedom to receive information. It is clear that public access to environmental information is a key aspect of environmental protection. Not only does information allow citizens to assess the environmental impact and risks of factories, nuclear power plants, hydrological dams and other projects, but it also permits them to mobilise and take a stand in environmental issues concerning their very immediate living sphere.

In the case *Guerra v. Italy*[96], a high risk chemical factory producing pesticides was at the centre of attention. The applicants alleged a breach of Article 10, since the authorities had failed to ensure that the public was informed of the risks emanating from the factory's operation and of what was to be done in the event of an accident. The Court recognised that provision of information to the public is one of the essential means of protecting the well-being of the population in cases of environmental hazards. However, the Court interpreted Article 10 as a negative obligation on the State not to impede an individual from obtaining access to information that others wish or might be willing to impart to him. The Court held that such freedom to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion.[97] As a consequence, the Court held that the State of Italy had not breached Article 10.[98]

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[95] F. Jarvis & A. Sherlock, *The ECHR and the Environment,* p. 22.
[96] Judgement of 19 February 1998, 26 EHRR 357.
[97] Paragraph 53 of the decision.
[98] The State was however found to be in breach of Article 8, see infra d.

In spite of the dismissive decision on the applicability of the right to information in Guerra, there is potential for future claims under Article 10, since six judges indicated that their decision was strongly linked to the facts of the case. In his concurring opinion, Judge Jambrek noted that a positive obligation of the State would arise if potential victims of an industrial hazard request that specific information, evidence or tests be made public and be communicated to them by a specific government agency. If the government does not comply with such a request, and does not give any specified reason for not doing so, then such failure should be considered equivalent to an act of interference by the government, which is proscribed by Article 10 of the Convention.

d. Article 1 Protocol 1 to the ECHR - Protection of property

Article 1 of Protocol 1 has a twofold function in environmental matters: It can be invoked against a State when external nuisances affect a person's enjoyment of possessions, but it can also be invoked by a State, seeking to protect the environment and thereby restricting the enjoyment of property of individuals.

An individual's peaceful enjoyment of property can be disturbed by negative effects caused by the deterioration of the environment, be it noise, emissions or various forms of pollution. But in order for Article 1 of Protocol 1 to be applicable, the interference must be of such gravity that it amounts to a *de facto* expropriation of the property.[99]

In *Rayner v. UK*[100] the Court accepted in principle that noise can affect the value of property and thereby amount to a partial taking of the property. However, by equating severe environmental interference with de facto confiscation of property, environmental nuisance is not likely to be considered to infringe Article 1 unless the property declines in value. Economic loss then becomes the only criterion for bringing Article 1 into play and puts it exclusively in a materialistic perspective.[101] This does little to provide individuals with a justiciable means to challenge environmental unsound living conditions.

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[99] It was held in *Sporrong and Lönnroth v. Sweden* (Judgement of 23 September 1982, 5 EHRR 35) that deprivation of property covers not only expropriation, but also any measure that amounts to *de facto* confiscation of the property in question.

[100] 9310/81 Eur Com HR Dec & Rep 5 (1986), paragraphs 12-14.

[101] R. Desgagné, *Environmental Values and Human Rights in Europe,* in «*American Journal of International Law*», Vol. 89, 1985, p. 277.

The State's ability to justify restrictions on the enjoyment of property for ends of environmental protection is given through paragraph 2 of Article 1 Protocol 1. A State is entitled to enforce such laws as it deems necessary to control the use of property in accordance with the general interest, which has come to include environmental considerations and policies. In the case of *Fredin v. Sweden*[102], the operation of a gravel pit could not be reconciled with the preservation of the natural environment. The State revoked the applicant's permit licensing the extraction of gravel. Unable to fully dispose of his property as he wished, the applicant turned to the Court, alleging a de facto deprivation of property. The Court held that "in today's society, the protection of the environment is an increasingly important consideration, which is satisfying the requirement that restrictions be in the general interest"[103]. In consideration of the margin of appreciation, the Court held that the Swedish measures had been both lawful and proportionate, and there had thus been no violation of Article 1 of Protocol 1. The *Fredin*-case shows that Article 1 Protocol 1 is not a bar to State measures protecting the environment, even if this entails the limitation of property rights.

e. Article 8 ECHR - The right to respect for private and family life

i) Article 8 and the margin of appreciation

In the case-law of the European Court of Human Rights, Article 8 ECHR has proved to be the most valuable provision in relation to environmental matters. This may seem rather surprising, since Article 8 was originally conceived as guaranteeing the right to privacy, and would not appear to be an obvious Article from which to derive a substantive environmental right. While Article 8 paragraph 1 states that the everyone has the right to respect for private and family life, his home and his correspondence, paragraph 2 spells out the general prohibition of interference by a public authority with this right, as well as the conditions under which the right to privacy may be restricted.

The institutions under the ECHR were long reluctant to recognise that environmental nuisance could amount to an abridgement of the right to privacy. But

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[102] Judgement of 18 February 1991, 13 EHRR 784.
[103] paragraph 48.

considering that pollution, noise and other emissions can lead to unbearable living conditions and cause serious health problems, the Court gradually altered its position. In *Arrondelle v. United Kingdom*[104], the applicant lived between an airport runway and a heavily trafficked road, and claimed that her health had been affected by the noise. The case was settled in accordance with the friendly settlement procedure under Article 38 ECHR, but the Court was prepared to accept that Article 8 was indeed applicable.[105]

Article 8 paragraph 2 explicitly sets out the negative duty of public authorities to refrain from directly interfering with an individual's right to privacy guaranteed under paragraph 1. The Court has come to interpret paragraph 2 as also including a positive obligation of the State to take action to secure those rights against interference by others.[106] This is significant because it means that state responsibility may be engaged even where pollution is caused by a private party.[107]

A restriction of the individual's right to privacy may however be justified under certain circumstances. Article 8 paragraph 2 allows States to interfere with the exercise of the right to privacy if the interference is based on law, and is necessary in a democratic society in the interest of a series of ends, including national security, public safety, the economic well-being of the country and protection of health or morals. However, the interference caused to individual rights in pursuit of a legitimate aim must not be disproportionate.

The Court has developed the concept of margin of appreciation in this regard, leaving discretion to national authorities to determine the necessity for an interference as regards both the legislative framework and the particular measure of implementation. By reason of their direct and continuos contact with the vital forces of their country, the national authorities are in principle better placed than the European Court of Human Rights to evaluate the local needs and conditions, as well as balance conflicting considerations of

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[104] Application 7889/77, 23 YR Eur Com HR D&R 166 (1980).
[105] compare also the more recent case Lopez-Ostra "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, without, however, seriously endangering their health." Paragraph 51.
[106] compare the Commissions position in *Rayner v. United Kingdom*: "Article 8 thus covers not only direct measures taken against a person's home but also indirect intrusions which are unavoidable consequences of measures not at all directed against private individuals."
[107] F. Jarvis & A. Sherlock, *The ECHR and the Environment,* p. 22, compare *Lopez-Ostra v. Spain*, see infra.

the public interest. The scope of margin of appreciation granted to the States is not identical in each case, but will vary according to the context, depending on factors such as the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned.

Although a margin of appreciation is left to the national authorities, their decisions remains subject to review by the Court for conformity with the requirements of the Convention. The Court exercises what it refers to as "European supervision", thereby making the final determination as to whether the interference in question is proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify the interference are relevant and sufficient. It is not for the Court to substitute its own view of what would be the best policy, and accordingly it will restrict itself to verify if the national authorities have managed to strike a fair balance between the competing interests of the individual and of the community as a whole.[108]

For many years, the Court granted States a wide margin of appreciation in areas touching upon environmental concerns, and left them large freedom to determine the appropriate policies and measures.[109] As a consequence, States were able to invoke over-riding economic interest as justification for environmental nuisance that was affecting individuals. In *Powell and Rayner v. United Kingdom*[110], the applicants complained about the negative effects of noise generated by aircraft at Heathrow Airport. The Commission recognised that the quality of the applicant's private life and enjoyment of the amenities of their homes had indeed been adversely affected by the noise. Nevertheless, the Commission dismissed the claim as manifestly unfounded, holding that the running of Heathrow airport was justified under Article 8 (2), being necessary for the economic well-being of the country. As a consequence, the interference with the applicant's rights was not disproportionate to the legitimate aim of running the airport.[111]

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[108] Leander v. Sweden, judgement of 26 March 1987, 9 EHRR 433, paragraph 59; Barthold v. Germany, judgement of 23 March 1985, 7 EHRR 383, paragraph 55; Lawless v. Ireland, judgement of 14 November 1960, 1 EHRR 1.

[109] compare Powell and Rayner v. UK, paragraph 44: "It is certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere. This is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation."

[110] Judgement of 21 February 1990, 12 EHRR 355.

[111] paragraph 42: "...the existence of large international airports, even in densely populated urban areas, and the increasing use of jet aircraft have without question become necessary in the interests of a country's

ii) Lopez Ostra v. Spain

Protection of the environment and human beings celebrated a breakthrough with the Court's decision in *Lopez Ostra v. Spain*[112]. The case concerned a waste-treatment plant in the town of Lorca, which is situated in a region with heavy concentration of leather industry. The plant began to operate without having obtained the license required under the *1961 Regulations for activities classified as causing nuisance and being unhealthy, noxious and dangerous*. Due to malfunctioning, the plant released harmful gas fumes, horrendous smells and contamination, which led to nuisance and health problems among the population. Expert reports described that certain chemicals had been detected in concentrations exceeding the permitted limits, and some toxic chemicals had simply been discharged into a river. Despite a partial shutdown upon the order of the town council, the plant continued to emit fumes, constant noise and repulsive smells.

The applicant and her family lived only twelve metres away from the plant, and were at times even evacuated from their home by the municipal authorities. The applicant's family, in particular her daughter, suffered serious health problems from the pollution. The applicant held the Spanish authorities responsible for the environmental nuisance caused by the waste treatment plant, alleging that the authorities had adopted a passive attitude to these problems. She complained that the unbearable situation had been prolonged by the relevant authorities' failure to act.

The Court held that the Spanish authorities were not directly responsible for the emissions in question, although there had been a state subsidy given for the construction of the plant. The issue was whether the State had taken the measures necessary to protect the applicant's right to respect for her home, private and family life under Article 8. The Court came to the conclusion that a fair balance had not been struck between the economic interest of the town in having a waste-treatment plant and the applicant's effective enjoyment of her rights under Article 8. As a consequence, the State was found to be in breach of Article 8 ECHR.

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economic well-being. According to the uncontested figures supplied by the Government, Heathrow Airport, which is one of the busiest airports in the world, occupies a position of central importance in international trade and communications and in the economy of the United Kingdom."

[112] Judgement of 9 December 1993, 20 EHRR 277.

iii) Guerra v. Italy

The positive obligation under Article 8 also entails a duty of the State to supply individuals with information concerning environmental hazards which might pose a serious threat to their well-being. In *Guerra v. Italy*[113], the Court held that the State of Italy had violated the applicants' rights under Article 8, since it had failed to provide them with information about the risks from a nearby chemical factory and how to proceed in the event of an accident.

The factory in question produced fertilisers and other chemicals. It had been classified as "high-risk" according to the criteria set out in the Presidential Decree no. 175 of 18 May 1988, which transposed the "Seveso-Directive"[114] of the European Communities into Italian Law. In the course of its production cycle, the factory released large quantities of inflammable gas and other toxic substances into the atmosphere. The factory had a history of accidents, of which the most severe one occurred in 1976, when large amounts of chemicals escaped and 150 people had to be hospitalised due to acute arsenic poisoning. In addition, a study undertaken by the factory itself showed that the emission treatment equipment was inadequate and the environmental impact assessment incomplete. Given its geographical position, emissions from the factory were often channelled towards Manfredonia, a town thus particularly exposed to danger in case of an accident.

The applicants, who were inhabitants of Manfredonia, had waited in vain to receive essential information that would have enabled them to assess the risks they and their families might run if they continued to live in the vicinity of the factory. They held the State responsible for its failure to supply them with relevant information on the hazards of the industrial activity concerned, the safety measures taken, the plans made for emergencies and the procedure to be followed in the event of an accident.

While the European Court of Human Rights denied that the applicants were entitled to the right to information under Article 10, it recognised that the toxic emissions of the

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[113] Judgement of 19 February 1998, 26 EHRR 357.
[114] Directive 82/501/EEC on major accident hazards of certain industrial activities dangerous to the environment and to the well-being of the local population.

factory affected the applicants' right to respect for their private and family life. Confirming its decision in Lopez-Ostra, the Court recalled that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes, and thus declared that Article 8 was applicable to the case. The Court considered that Italy could not be said to have "interfered" directly with the applicants' private or family life. However, the Court proceeded to examine if the failure of the local authorities to provide the relevant information infringed the positive obligations inherent in Article 8. It was thus necessary to ascertain whether the national authorities had taken the necessary steps to ensure the effective protection of the applicants' right to respect for their private and family life.[115]

Due to the local authorities' omission to provide the applicants with essential information that would have enabled them to assess the risks of living close to the factory, the Court concluded that the respondent State had not fulfilled its obligation to secure the applicants' rights under Article 8 of the Convention.[116] The decision in *Guerra v. Italy* was taken unanimously by the 20 judges acting as the Grand Chamber, which is the Court's forum reserved for the most important cases. This may be an indication for the Court's increasing willingness to examine environmental complaints and its determination to take a stand in environmental matters. The case of *Guerra* also demonstrates that States can be held responsible for pollution caused by private sector companies, as well as for omissions and reluctant behaviour of state agencies.

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[115] Paragraph 58 of the judgement: "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."

[116] Paragraph 60.

iv) Hatton - "minimum interference with human rights-test"

The facts of the case

The most recent environmental case decided by the European Court of Human Rights is the case of *Hatton and others v. United Kingdom.*[117] The issue at stake was aircraft noise from Heathrow airport, which had increased notably since the introduction of a night flight quota scheme in 1993.[118] The applicants and their families suffered from both sleep disturbance and sleep deprivation, which led to various health problems, such as constant fatigue, depressions and ear infections. Some of them even felt forced to move away from the area, as a last resort to escape the aircraft noise that was affecting their mental and physical well-being. Given the great deal of first-hand evidence of the disturbance, distress and ill-health caused by night flights, the applicants claimed that the United Kingdom had interfered with their rights guaranteed under Article 8 ECHR by implementing the 1993 Scheme.

The Government responded that there had not been any violation of the applicants' rights under Article 8, since the interference arising from night flights was justified in the interest of the economic well-being of the country. Being one of the busiest international airports in the world, Heathrow airport is the UK's leading port in terms of visible trade. The Government proceeded to emphasise the substantial economic importance of night flights.[119] The Government stated that a ban on night flights would damage the status of Heathrow airport as a 24-hour international airport and have severe implications for its competitive position in relation to a number of other European airports.[120] These considerations had to be weighed against the noise disturbance caused by night flights,

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[117] Judgement of 2 October 2001, currently under appeal before the Grand Chamber of the Court.

[118] Under this scheme, each aircraft type was assigned a specific noise quota count according to the noise levels it caused. Heathrow was then allotted a certain number of quota points, and all night aircraft movements had to be kept within the permitted points total. Rather than specifying a maximum number of individual aircraft movements, the 1993 Scheme allowed aircraft operators to choose within the noise quota whether to operate a greater number of quieter aeroplanes or a lesser number of noisier aeroplanes. The system was designed to encourage the use of quieter aircraft. However, this resulted in the increase of the total number of movements over the years, which meant that the overall level of noise also increased.

[119] The Government's arguments referred to the importance of night flights in relation to mail and other time-sensitive freight such as newspapers; cargo; airlines depending on high utilisation of their aircraft; strong customer preference for overnight long-haul services in relation to the Asia-Pacific region.

[120] In a report commissioned by the British Air Transport Association, it was held that the economic cost of the currently applicable restrictions on night flights were significant (20-30 Mio £ per a).

diminishing to some degree local people's ability to sleep at nights. The Government claimed that it had succeeded in striking a fair and reasonable balance between the various interests involved and had provided adequate reasons and sufficient justification for the possible interference caused by night flights to local communities. In addition to the restrictions on night flights under the 1993 Scheme, a number of noise mitigation and abatement measures had been implemented at Heathrow airport, which aimed at improving the noise climate around the airport.[121]

The decision of the European Court of Human Rights

Faced with the applicants' allegation of a violation of Article 8, the Court first stated that, when striking a fair balance between the competing interests of the individual and of the community as a whole, States must have regard to the whole range of material considerations. The Court stated that in the particularly sensitive area of environmental protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of individuals. On the contrary, States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights.[122]

Since Heathrow airport and the aircraft using it are not owned, controlled or operated by the Government or any of its agencies, the UK had not interfered directly with the applicants' rights under Article 8, and as a consequence the applicants' complaints had to be analysed in terms of the State's positive duty to take reasonable and appropriate measures to secure the applicants' rights to private and family life. The Court had thus to establish whether the Government had respected its positive obligations in relation to the applicants, given that it had permitted increasing levels of noise over the years since 1993.

Examining the arguments put forward by the Government, the Court concluded that the Government had not carried out any research as to the extent of the economic importance of night flights, but had instead relied solely on information provided by the

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[121] including aircraft noise certification to reduce noise at source; the compulsory phasing out of older, noisier jet aircraft; noise preferential routes and minimum climb gradients for aircraft taking off; limitation of air transport movements; noise related airport charges; noise insulation grant schemes and compensation for noise nuisance under the Land Compensation Act 1973.

[122] Paragraph 97.

industry and commerce. The Court held that while it is likely that night flights to a certain degree contribute to the national economy as a whole, the importance of that contribution had never been assessed critically, whether by the Government directly nor by independent research on their behalf.[123] In addition, the Court noted that only limited research had been carried out into the nature of sleep disturbance and prevention when the 1993 scheme was put in place, and the impact of increased night flights on the applicants had thus never been properly assessed by the Government.

Turning to the adequacy of the measures taken to mitigate the noise nuisance of night flights, the Court noted that the Government had taken some moderate steps, e.g. no flights were exempt from the night restrictions and an overall maximum number of aircraft movements had been set. However, the Court did consider that these modest steps at improving the night noise climate were sufficient to protect the applicants' position guaranteed under Article 8.

In the absence of adequate and complete studies aiming at finding the least onerous solution as regards human rights, the Court concluded that the Government could not have been able to properly weigh the interference against the economic interest of the country – which itself had not even been quantified in explicit figures. Despite the margin of appreciation granted to the respondent State, the Court considered that in implementing the 1993 scheme, the State had failed to strike a fair balance between the United Kingdom's economic well-being and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives. Accordingly, there had been a violation of Article 8.[124]

Dissenting opinion by Judge Kerr

The majority's decision faced disagreement on all points by Sir Brian Kerr, the British judge appointed as *ad hoc* judge for the case according to Article 27 para 2 ECHR.

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[123] Paragraph 102.

[124] In his concurring opinion, Judge Costa explored whether the State could have promoted less drastic solutions, such as subsidies to soundproof the applicants' homes. But this may have opened floodgates to multiple requests, subsidies or compensation of others suffering comparable noise from the night flights. Judge Costa concluded that "either the number of potential victims of night flight noise is limited and the 'beneficiaries' of those flights can compensate them, or it is too high for the level of compensation to be financially viable for the beneficiaries, whereupon night flights need to be reviewed in their entirety". Maintaining night flights at that level meant that the applicants had to pay too high a price for the macroeconomic well-being, of which the real benefit was not apparent.

Judge Kerr challenged that the applicants' claim of sleep disturbance had not been subject of any critical assessment, and accordingly the extent of the claimed disturbance had not been established to any significant degree. In addition, he argued that none of the applicants had been prevented from moving away from the area and the source of inconvenience. He stated that "modern life is beset with inconvenience, and the mere fact that one's private life is interfered with by modern developments is not enough to attract the protection of Article 8". Considering the available evidence, Kerr concluded that a significant interference with the applicants' right to private life had not been established. Judge Kerr moved on to reiterate that the State's inquiry into the effects caused by night flights were by and large sufficient, since a number of studies had been carried out, and noise mitigation and abatement measures had been put in place in addition to the restrictions on night flights.

Judge Kerr also questioned the basis of the majority's decision, which relied on what appears to be a wholly new test for the application of Article 8, namely a rule of strict "minimum interference with fundamental rights". By proclaiming that States are required "to minimise, as far as possible, the interference with Article 8 rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous was as regards human rights", States would be denied any discretion on how they wish to address socio-economic issues. Requiring that all policy decisions must satisfy the test of minimum interference of human rights, the Court would deprive States of their margin of appreciation, and depart from the principle of essential subsidiarity of the Convention system.

As for the particular case, Judge Kerr stated that night flights are of self-evident importance to the national economy, and striking the balance between the applicant's claims and the macro-economic policy also involved rights and freedoms of air carriers and passengers. In Judge Kerr's view it would be difficult to envisage how the Government could strike a balance in any meaningful way if they were to minimise as far as possible the interference with rights. In addition, the consequences of finding a violation in the particular case would lead to an upsurge of claims by other individuals, considering that a substantial portion of the population of south London is in a similar position. Judge Kerr concluded that the decision on night flights should be left to the domestic political sphere and not be decided by the Strasbourg Court.

4. Conclusions

The Court's decision in Hatton enraged the authorities of the United Kingdom, and they subsequently requested that the case be reviewed by the Grand Chamber in accordance with Article 43 ECHR.[125] It remains to be seen what the outcome of this appeal will be: Should the decision be confirmed, protection of the environment by way of applying established rights under the Convention will have gained significant ground. If the Court commences to apply as a general rule the "minimum interference with human rights"-test in its jurisdiction, it will be able to pronounce itself on a vast variety of environmental issues by referring to the applicability of the right to respect for privacy and home. The European Court of Human Rights would thus have taken a firm stand regarding environmental protection, and would advance the emergence of a human right to environment in the European context.

However, if the Court does adhere to its decision, it may risk losing its credibility by exceeding its competence. Numerous projects and policies affect the rights guaranteed under the Convention as well as the environment. By requiring minimal interference with these rights, the Court would come to rule out a large number of decisions taken by the national authorities. In this case, it could be argued that the Court would depart from its role as an independent judicial body, and instead enter into the domain of policy-making, replacing the decisions taken by the national authorities. As a consequence, the balance of power between the institutions would face critical disturbance.

Considering the proactive, but still uncertain outcome of the decision in Hatton, the existence of a right to environment under the Convention is even more ambiguous in the light of what has been established so far in the jurisprudence of the Court. Only a limited number of cases have been successful until now, and the Court has generally been reluctant to pronounce itself on politically sensitive areas involving domestic policy decisions, such as the question of nuclear energy.[126]

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[125] Under Article 43 of the European Convention on Human Rights, any party to the case may, within three months from the date of a Chamber judgement, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its Protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgement.

[126] M. DeMerieux, *Deriving environmental rights from the European Convention for the protection of human rights and fundamental freedom*, in «Oxford Journal of Legal Studies», vol. 21, no. 3, 2001, p.553, compare also *Balmer-Schafroth,* supra p. 33.

The most promising provision of the Convention has proved to be the right to respect for private and family life. The Court established in *Lopez-Ostra* that Article 8 covers situations where severe environmental pollution affects individuals' well-being and enjoyment of their home, private and family life without seriously endangering their health. However, despite the recognition that the enjoyment of a certain quality of environment is covered by the Convention, the protection afforded by Article 8 is not absolute. Prior to Hatton, the Court granted a wide margin of appreciation to the States, allowing them to choose to what degree they would protect the environment, and how to strike a fair balance between individuals' rights and the general interests of the community.

Even if there thus may be potential for using the ECHR as a basis for environmental claims, there are some significant limitations. The Convention is not specialised on environmental matters, and since it only secures individual rights, it is unable to address more global environmental concerns. Only a victim of a violation of a Convention right is entitled to bring an action, and therefore any litigation by an environmental pressure group would have to take the form of an action by that particular individual, focusing on the individual's right rather than on the more general concerns for the environment.[127] Damage to the environment is not in itself a breach of the Convention; it only becomes an issue if it can be shown that one of the rights guaranteed to individuals under the ECHR has been violated in the course of the environmental damage.[128] But the environment is a public good, not a private asset, and the requirement to prove a sufficiently direct link between interference and rights has been the downfall for many claims brought under the Convention. Another setback of the necessity of being a "victim" is that, in most cases, proceedings can only take place *after* a violation has occurred.[129]

A further disadvantage of human rights litigation under the Convention is that it can only grant an individualistic, piecemeal protection of the environment. The environment has an important public facet that cannot be fully translated into an individual perspective.

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[127] The requirement of personally felt interference can have the effect of barring the admissibility of cases brought by NGOs, compare e.g. *X and Y v. Federal Republic of Germany,* 5 Eur Com HR Dec & Rep (1976).
[128] F. Jarvis & A. Sherlock, *The ECHR and the Environment,* p. 15.
[129] see also *Tauira and Eighteen Others v. France,* 83 Dec & Rep 112 (1995), a case concerning nuclear testing that was declared inadmissible. The applicants alleged the existence of continuing risk of pollution from leakage or radioactivity even after the tests had subsumed. The Court stated that "merely invoking risks inherent in the use of nuclear power, whether for civil of military purposes, is insufficient to enable the applicants to claim to be victims of a violation of the Convention, as many human activities generate risks".

Satisfactory protection of the environment requires social choices, so a human rights Court may not be the best forum to further objectives that go beyond individual interests.[130]

For the time being, it is not possible to conclude that any substantive environmental rights have been established under the Convention. There is no express right to an environment of a minimum standard of quality, and the emerging jurisprudence shows an uncoordinated and piecemeal approach. This is perhaps because the protection of the environment is being squeezed into the ambit of other substantive rights, which were not originally conceived to cover environmental concerns.[131] However, the pending decision in Hatton might implicate a change in judicial policy on behalf of the Court: by replacing the concept of the wide margin of appreciation with the much stricter "minimum interference with human rights"-test, the Court may have decided to become more proactive in environmental matters.

Considering that the successful cases before the European Court of Human Rights all had a considerable link to the European Union (*Guerra* concerned the application of the Seveso-Directive, *Lopez-Ostra* and *Hatton* both dealt with economic considerations) one may wonder why the applicants did indeed rely on the ECHR and not on EU-legislation. As will be described below, this is connected to the difficulty of individuals to challenge European Community legislation before national Courts and the European Court of Justice (ECJ). Prior to discussing the relationship between the ECHR and the EU regarding human rights, the environmental rights of individuals in the framework of the EU will be outlined.

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[130] R. Desgagné, *Environmental Values and Human Rights in Europe*, p. 294.
[131] J. Thornton & S. Tromans, *Human Rights and Environmental Wrongs - Incorporating the European Convention on Human Rights: Some Thoughts on the Consequences for UK Environmental Law*, in «Journal of Environmental Law», vol. 11, no. 1, 1999, p. 45.

B. THE EUROPEAN UNION

The European Union[132] is the predominant economic supranational organisation in Western Europe. It was established in 1957 with the aim to stabilise peace in the region by promoting economic co-operation. Over the years, the EU has not only increased its number of Member States, but has also expanded its powers and competencies, and today has a significant impact on almost all areas of European citizens' daily lives.

Conceived for economic purposes, the original Treaties on the European Communities contained no reference to the environment. However, it was soon recognised that the establishment of a common market without economic frontiers gave rise to a corresponding need to protect the environment. In 1972, the Heads of States and Government of the then nine Member States declared that in the pursuit of economic interests, particular attention had to be given to the protection of the environment.[133] Since then, the corpus of European environmental law has evolved quite remarkably.[134] Accordingly, one may speculate if this extensive development also has included the emergence of a citizen's right to environment, but first, a brief introduction to EU environmental law is appropriate.

1. The European Union and the environment

a. Title XIX of the EC Treaty and environmental secondary legislation

The Maastricht Treaty introduced an amendment to Article 2 of the EC-Treaty, which made it one of the Community's objectives to "promote throughout the Community

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[132] A note of clarification for this Chapter: The expression EC refers to the European Economic Community, while the term EU signifies the wider European Union, comprising the three pillars European Communities, Common Foreign and Security Policy and Co-operation in Justice and Home Affairs. Greatest care has been undertaken to always refer to the correct entity, but due to the complex structure of the organisation, mistakes may have occurred, for which case I offer my sincere apologies.

[133] The entire quote from the Commission, Sixth General Report (1972) p. 8 goes as follows: "Economic expansion is not an end in itself. Its first aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all the social partners. It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so progress may really be put at the service of mankind."

[134] For a full account of the development of the inclusion of environmental considerations in the Treaties, see Krämer, *E.C. Treaty and Environmental Law,* 3rd edition, Sweet & Maxwell, London, 1998, pp. 1-6, or Jans, *European Environmental Law*, 2nd edition, Groningen, Europa Law Publishing, 2000, pp.1-10.

... sustainable and non-inflationary growth respecting the environment", and this placed environmental policy on the permanent agenda of the European Community.

The principle of subsidiarity articulated in Article 5 EC Treaty determines that Community action is only to be taken when the objectives can better be attained through regional action than by the individual Member States. Since the environment so often poses problems of a transboundary nature, Community action will very frequently be most appropriate. The competencies of the Community are spelled out in Article 174-176 of the EC Treaty, and foresee that Community environmental policy shall aim at preserving, protecting and improving the quality of the environment, as well as protecting human health. The Community shall also contribute to the prudent and rational utilisation of natural resources, as well as promote measures at international level to deal with regional or world-wide environmental problems.[135] The Treaty of Amsterdam inserted the reference to "balanced and sustainable development of economic activities"[136], which stresses the correlation between economic, environmental and social concerns. This clarifies that Community environmental policy has in fact a dual objective: on the one hand, it aims at attaining a high level of protection of the environment, but on the other hand it seeks to advance the integration and the functioning of the common internal market. Clearly, there is a tension between these objectives, especially when a Member State introduces more stringent environmental measures than endorsed at the Community level.[137]

According to Article 175 (1) EC, the standard decision-making procedure for environmental policy is the co-decision procedure under Article 251. Under this procedure, the European Parliament must be consulted and has the possibility to veto the adoption of proposed measures.[138] According to Article 251 (2), certain matters, such as fiscal

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[135] The role of the Community in the elaboration of international treaties, e.g. the Kyoto Protocol, has been quite proactive. As a party to international environmental treaties, the Community has issued legislation to give effect and to complement its international obligations, thus bringing them within the citizens' reach. Environmental agreements ratified by EU are listed under: www.asser.nl.

[136] Preamble and Article 2 EC-Treaty (Consolidated version of the Treaty establishing the European Community, O.J. C 340, 10.11.1997, pp. 173-308).

[137] Jans, *European Environmental Law*, p. 101, Eleftheriadis, *The Future of Environmental Rights in the European Union,* in *The EU and Human Rights,* Alston (ed.), Oxford, Oxford University Press, 1999, p.539f. The application and enforcement of Community environmental legislation has considerable influence on the functioning of the common internal market: A Member State imposing stricter standards will cause distortions of the common market, since it will rule out competitors that do not comply with such elevated standards. Conversely, a Member State that does not adhere to and enforce the standards set by the EU creates competitive advantages and causes "environmental dumping".

[138] Jans, *European Environmental Law*, p. 44.

provisions and planning issues relating to the environment, will be decided unanimously by the Council.

Most of the Community environmental legislation can be characterised as effecting minimum harmonisation of the national environmental law of the Member States, enabling the Member States to enact more rigorous measures if they wish.[139] The instrument most frequently used to achieve such minimum harmonisation is the directive, which is an instrument addressed to the Member States. Directives are binding on the Member States as concerns the objective and endresult to be achieved, while leaving the national authorities the choice of form and methods of implementation. The Member States are under a duty to fully and accurately transpose the obligations of the directive into their national systems of environmental law within a given timeframe.

Aiming at striking a balance between environmental protection and the functioning of a common market, the European Community has so far enacted more than 400 environmental directives. The environmental acquis communautaire encompasses various fields, such as the protection of birds and animals, the regulation of water and air pollution, toxic waste, as well as nuclear safety. There are also numerous cross-sectoral environmental policies and provisions, including the obligation to carry out environmental impact assessments and the provisions on eco-labelling.

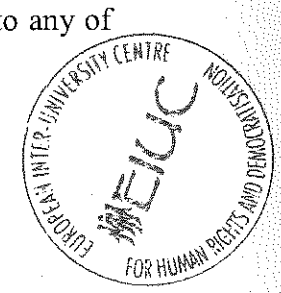
b. Greening the Treaties – attempts to include a citizen's right to environment

The original Treaties of Rome from 1957 have been amended four times to reflect the needs and developments of the economic and political co-operation.[140] In conjunction with the Intergovernmental Conferences leading up to the Maastricht and Amsterdam Treaties respectively, environmental pressure groups actively pursued joint campaigns under the title "Greening the treaties", and thereby lobbied both Member State Governments and EU institutions. The overall result of their efforts was successful, as they

[139] Jans, *European Environmental Law*, p. 112f.
[140] namely the Single European Act, the Maastricht Treaty, the Amsterdam Treaty, as well as the Treaty of Nice, which is yet to be ratified by all the 15 Member States in order to enter into force.

influenced the formulation of important environmental issues incorporated in the Treaty-amendments.[141]

Out of a human rights perspective, it is interesting to note that the environmental pressure groups advocated the inclusion of a citizens' right to environment. Such a right was also envisaged by the Commission during the preparations of the Maastricht Treaty. The proposal followed the Dublin Summit in 1990 and the Dublin Declaration on the Environment of the EC Heads of State and Governments, which declared that "the Community shall guarantee citizens the right to a clean and healthy environment".[142] Despite consistent lobbying, such a right to environment did not make its way into any of the Treaty-amendments.[143]



c. Article 37 EU-Charter

The conclusion of the Nice Summit in December 2000 saw the birth of the Charter of Fundamental Rights of the European Union, a joint proclamation by the Council, the European Parliament and the Commission.[144] The EU-Charter aims at rendering the fundamental rights common to the EU Member States more visible, and thereby contribute to the strengthening of European identity and citizenship.[145]

The EU-Charter draws to a large extent on the ECHR[146], but also adds a number of new rights, including the right to environmental protection under Article 37. According to

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[141] The amendments of the Amsterdam Treaty on sustainable development and the integration principle were substantially influenced by the "Greening the Treaty"-Campaign. Stetter, *Greening the Treaty - Maastricht, Amsterdam and Nice: The Environmental Lobby and Greening the Treaties*, in «European Environmental Law Review», May 2001, p.156.

[142] Stetter, *Greening the Treaty*, p. 154, referring to WWF et al., 1990.

[143] Stetter, *Greening the Treaty*, p. 154, 156, 158, Krämer, *E.C. Treaty and Environmental Law*, p. 4.

[144] *Charter of Fundamental Rights of the European Union*, O.J. C 364, 18.12.2000, p.1-22.

[145] Benoît-Rohmer, *La Charte des droits fondamentaux de l'Union européenne,* in «Le Dalloz»,2001, No. 19, p. 1483.

[146] The EU-Charter acknowledges the ECHR as interpreted by the European Court of Human Rights regarding the determination of the meaning and the scope of the Charter rights which correspond to the rights guaranteed by the ECHR. At the same time, the Charter states that nothing prevents the European Union to provide a more extensive protection in the field of human rights (Article 52 § 3 and 53 EU-Charter). This is compatible with the ECHR, as the ECHR aims at guaranteeing a minimum standard, which the Contracting Parties are free to surpass, individually or by agreement with other States (Article 53 ECHR). Council of Europe, *Accession of the European Union to the ECHR – Reflection paper prepared by the Secretariat,* DG-II (2001) 02, Strasbourg 2001.

this provision, "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". This formulation is based on and strongly resembles Article 6 of the EC Treaty, and the question thus arises as to the actual contribution of Article 37. In addition, since it is framed in rather vague terms, the integration principle does little to promote a substantive right to environment.

At the moment, the EU-Charter is only a declaratory document by the EU institutions, and does not have any formally binding force. The decision on its legal status and possible insertion into the Treaties was postponed to a later date. However, the EU-Charter was drafted with a view to create justiciable rights, and thus only includes right that are sufficiently precise to be applicable and sanctioned by a judge. Given the EU-Charter's political weight, it is already being referred to by the ECJ.[147] In addition, it may also generate a far higher number of references for preliminary rulings than the ECJ receives at present. Notwithstanding the possible impact of the EU-Charter, the environmental right under Article 37 only formulates the integration principle, and it is difficult to see how this could provide individuals with a justiciable right.

Concluding from this brief overview of Community environmental law, it is clear that the EU enjoys extensive competencies in the field of the environment. The EU has demonstrated to be proactive and has issued extensive environmental legislation, including a timid attempt to establish a right to environment under the EU-Charter. But what is the actual state of protection of individuals; does the EU ensure Europeans the enjoyment of environmental rights? The substantive corpus of Community environmental law should be providing better and more focused remedies, but in practice they are being abstained from in favour of the ECHR. As will be described in the following pages, there are only limited remedies available to third parties desiring to challenge decisions of the EU-institutions in environmental matters.[148]

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[147] Benoît-Rohmer, *La Charte des droits fondamentaux de l'Union européenne,* p.1492.
[148] Jans, *European Environmental Law*, p. 23f.

2. Legal protection of individuals in the realm of substantive Community environmental law

a. The implementation of Community environmental law

The European Commission is charged with monitoring and ensuring the implementation of Community law (Article 211 EC Treaty). The most important instrument at the Commission's disposal is the infringement procedure laid down in Article 226, which provides that the Commission may bring a matter before the ECJ if it considers that a Member State has failed to fulfil an obligation under the Treaty or secondary legislation.[149] The decision to commence or to refrain from proceedings under Article 226 is entirely in the hands of the Commission, and individuals or NGOs cannot compel the Commission to initiate infringement proceedings[150]. However, the Commission is willing to involve citizens in its monitoring duties, and is doing so by way of an informal complaints procedure. Individuals can draw the attention of the Commission to alleged infringements they have observed. If the complaint is sufficiently concrete to allow verification, the Commission will further investigate the matter, which can potentially lead to proceedings under Article 226. The Commission receives hundreds of complaints per year from all four corners of Europe[151], and this indicates that there is an urgent need for enforcement of European environmental law. However, the informal complaints procedure will not suffice to meet the demand for legal protection, since the Commission is already facing a heavy work-load, is geographically remote from the issues at stake, and lacks both resources and competence to conduct on-site investigations.[152]

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[149] Referring a case to the ECJ is the last resort in the infringement proceedings: Prior to involving the ECJ, the Commission will engage in a dialogue with the Member State, issuing first a letter of formal notice and then a reasoned opinion. Depending on the response and subsequent action by the Member State in question, the Commission will decide if it is necessary to refer the matter before the ECJ.

[150] ECJ Case 48/65 Lütticke (1966) ECR 19

[151] According to a European Commission official, the Commission has received between 600 and 700 individual complaints in the last three years, of which approximately 10-20% eventually lead to infringement proceedings. Some other cases are settled through Commission letters and meetings between the Commission and the Member State in question. Many other complaints are closed once it is clear that they do not reveal infringements of EC Law. Many of those cases could still be in breach of national laws and procedures, but it this is not in the Commission's competence to pursue.

[152] Jans, *European Environmental Law*, p. 169f.

b. Challenging infringements committed by Member States

Community law contains a general obligation for Member States, essentially based on Article 10 of the EC Treaty, to ensure effective judicial protection of rights conferred on individuals. National law must thus provide the necessary remedies to allow judicial enforcement of directly effective provisions of Community law.[153]

A significant feature of European community law is the immediate applicability of laws and regulations within the national jurisdictions of the Member States. The so called direct effect signifies that EC legislation comes into force without the need of transformation into the domestic legal orders, and thus guarantees a harmonious validity and scope of EU-law in all Member States.[154] The foundation of the doctrine of direct effect was established by the ECJ in the case *Van Gend & Loos*[155]. The Court ruled that Community law in itself, apart from legislation in the Member States, can confer rights on individuals, which are enforceable before national courts. Direct effect of Community law is relevant when Member States have failed to adequately transpose EC-directives into national law within the given time. Individuals may then rely on such directives against the national authorities, provided the conditions of direct effect are fulfilled, i.e. the directive in question must be unconditional and sufficiently precise. However, most of Community environmental directives involve obligations of minimum harmonisation or are in the form of instructions to authorities to take certain steps, and are thus not satisfying the requirement of unconditionality. This leaves only restricted applicability of the doctrine of direct effect in environmental matters, and so far there has only been very limited litigation in this field.[156]

In the absence of direct effect, the principle laid down in the *Francovich*[157]-decision may provide some relief. The ECJ ruled that Member State are obliged to compensate loss and damage caused to individuals as a result of breaches of Community law for which the

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153 Jans, European Environmental Law, p. 207.
154 D. Simon, *Le système juridique communautaire*, Presse Universitaires de France, 1997, pp. 263-269.
155 Case 26/62 Van Gend & Loos (1963), ECR 1.
156 Jans, *European Environmental Law,* p. 173. In addition, environmental directives do not produce any *horizontal* direct effect, i.e. they cannot be invoked in disputes arising between two individual parties, but only by an individual against the national authorities of a Member State. This means that individuals acting in breach of standards set by environmental directives are not acting unlawfully, if these standards have not yet been transposed into national legislation. Jans, *European Environmental Law*, p. 198.
157 Joined cases C-6/90 and C-9/90 *Francovich* (1991) ECR I-5357, refined in subsequent jurisprudence such as joined cases C-46/93 and C-48/93 *Brasserie du pecheur and Factortame* (1996) ECR I-1029.

Member State can be held responsible, including legislative, executive or factual acts. The ECJ has based the liability of Member States on Article 10 of the EC-Treaty, and will engage it under the following conditions: 1) the rule of law infringed must have been intended to confer rights on individuals, 2) the breach must be sufficiently serious[158] and 3) there must be a direct causal link between the breach of Community law by the Member State and the damage suffered by the applicant. A number of questions arise concerning the applicability of the Francovich-decision to individuals who have suffered from environmental damage. For one, it is unclear to what extent reparations other than mere pecuniary damages are covered. In addition, a large amount of EC-legislation, such as Regulation 3093/94 on substances that deplete the ozone layer, will fall outside the scope of Francovich altogether, since it does not directly confer rights on individuals.[159]

In addition, the doctrine of indirect effect of EC law may prove to be useful. It signifies that national law must be interpreted as far as possible in conformity with the relevant provision of EC-law, and can thus be significant for individuals and interest groups in the context of environmental litigation.

However, none of the doctrines mentioned above will be of any use unless the applicant has standing to bring an action in national courts, and the rules of standing differ considerably in the 15 Member States of the EU, which has implications for the level of environmental protection.

c. Challenging acts set by the institutions of the European Union

i) Preliminary reference procedure

While there is an obligation for Member States under Article 10 to provide legal protection of rights conferred on individuals, there is only limited judicial redress against legislation and decisions enacted by the EU-institutions. The Treaty does not offer individuals any form of direct legal protection against deficient directives or regulations. A remedy may be found in the preliminary reference procedure under Article 234: During the

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[158] taking into account factors such as the clarity and precision of the rule breached, the measure of discretion left by the rule to the authorities, whether the infringement and damage were caused intentionally or involuntarily, excusable error of law, Jans, *European Environmental Law*, p. 212.
[159] Jans, *European Environmental Law,* p. 210f.

course of national proceedings, an individual may object to the very substance of (secondary) EC legislation. Since the national court is not competent to judge upon the validity of Community law[160], it may (or must, if it is a court of final resort) refer the question to the ECJ. The ECJ will then give a ruling on the interpretation and validity of the Community measure in question, which will be binding on the national court dealing with the case. This can be an effective way of challenging EC-legislation, but it requires that the applicant has legal standing in the national courts, and that the national Court deems it necessary to refer a question of preliminary ruling to the Court in Luxembourg. In addition, with an average of 36 months until a preliminary ruling is issued by the ECJ, this procedure is very time-consuming and costly, and considerable doubts remain as to its genuine usefulness for the protection of environmental interests.[161]

ii) Annulment of decisions under Article 230 EC-Treaty

Under Article 230, individuals may seek the annulment of a decision taken by the Council or the Commission, which in their view infringes EC environmental law. Although the implementation of EC environmental law is largely carried out by the Member States, the Commission can increasingly be seen to possess discretionary powers in fields touching upon the environment, including such areas as state aid and competition law. The possibility to challenge the Commission's discretionary powers is open not only to the addressees of a decision, but also to third parties, who may appeal if the decision in question is of direct and individual concern to them.[162] However, objecting to a Commission decision not on economic, but on environmental grounds has proven to be a difficult endeavour. Environmental interests are, by their nature, not specified in solely private interests, but on the contrary concern a much broader public interest. Consequently, if the criterion of direct and individual concern is applied strictly, it results in a paradoxical situation: the more serious and large-scaled the infringement and the wider and more open the group of potentially affected persons, the less likely is it that the Court will declare a

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[160] established in *Foto-Frost v. Hauptzollamt Lübeck-Ost*, Case C-314/85 (1987) ECR 4199.
[161] Jans, *European Environmental Law*, p. 214f, Schikhof, *Direct and Individual Concern in Environmental Cases: The Barriers to Prospective Litigants*, in «European Environmental Law Review», Oct. 1998, p. 279.
[162] The conditions for individual concern were laid down in Case C- 52/62 *Plaumann* (1963) ECR 95 at 107: "...if that decision affects them by reason of certain attributes that are peculiar to them or by reasons of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed."

specific individual's claim admissible, since it will be difficult to prove that his or her particular interests are affected directly and individually.[163]

iii) Greenpeace and others v. Commission

The leading case on the admissibility of interested third parties striving to overrule decisions affecting the environment is the case of *Greenpeace and others v. Commission*.[164] The issue at stake was the construction of two power stations on the Canary Islands, for which no environmental impact assessment had been carried out. The applicants (local residents, farmers, fishermen, local environmental groups and Greenpeace) challenged the Commission's decision to allocate funds to the Spanish Governments, which enabled the construction of the power plants in the first place. The Court of First Instance declared the claim inadmissible, since the applicants were no more affected by the decision than any other resident on the Islands. The harm potentially suffered by the applicants was not distinguishable from the harm that might affect, in a general and abstract way, a large number of persons living on the Islands.[165] On appeal against the decision of the Court of First Instance, the applicants attempted to persuade the Court to apply wider standing requirements for environmental matters than for claims concerned with economic interests, but this appeal was to no avail. The ECJ followed the narrow interpretation of the standing requirements, and dismissed the applicants' appeal on the ground that the Commission's decision to grant aid would only affect individuals indirectly. In addition, the Court held that potential direct rights, such as those flowing from the EIA-Directive, were already protected sufficiently well before national courts. In the particular case, the Court was of the opinion that the applicants could have challenged the authorisation granted by the Spanish authorities before the Spanish national courts.

The decision in *Greenpeace* has harvested extensive criticism due to its rather unsubstantiated basis. The Court stubbornly avoided to pronounce itself on the lawfulness of the Commission's decision. Ignoring that the allocation of funds and the granting of the authorisation were two separate decisions, the Court simply referred the applicants to the

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[163] Jans, *European Environmental Law*, p. 217, Schikhof, *Direct and Individual Concern*, p. 277.
[164] Case T-585/93 *Greenpeace v. Commission* (1998) ECR I-1651.
[165] Regarding the locus standi of an environmental organisation, the Court of First Instance held that it could only be admitted as being directly and individually concerned if the members of the NGO were themselves entitled to bring an action by virtue of direct and individual concern.

national courts. By doing so, the Court implicated that the possibility of challenging decisions of the European institutions depends entirely on the legal protection afforded by national courts. However, given the great disparity in the national rules of standing, access to justice in environmental matters may only be a theoretical remedy for concerned individuals. The decision in Greenpeace rendered practically impossible the chances of a successful challenge of environmental NGOs and individuals against illegal Community acts.[166]

d. Conclusion

It can be concluded from the above that individuals can rely on very limited judicial protection against decisions taken by European institutions. While Member States are required to offer legal protection where rights and obligations under environmental directives are breached, the standard seems to be applied far less strictly to acts and omissions of the Community itself. Furthermore, in its decisions, the Court has failed to recognise that the conventional remedies, designed to protect private economic interests, are inadequate to protect public goods, such as the environment.[167] As concerns protection against Member States' infringements of Community environmental law, it may be difficult to acquire standing before national courts, since the environmental interference may not have a sufficiently direct impact on the individual.

3. Participatory rights – The Aarhus-Convention

Recalling that human rights approaches to environment can be either of substantive or procedural nature, one may wonder if the absence of a substantive, justiciable right to environment in the EU is mitigated by the existence of effective participatory rights.

The general democratic deficit of the EU institutions is a matter of great concern to many citizens, who are feeling that their lives are increasingly being governed by technocrats in Brussels. Democracy requires that holders of delegated power, be it on national or supranational level, can be held accountable for their actions. Hence, the

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[166] Jans, *European Environmental Law*, p. 219, Schikhof, *Direct and Individual Concern*, p. 279.
[167] Jans, *European Environmental Law*, p. 220.

availability of participatory rights for non-state actors in decision-making procedures, as well as the existence of dispute settlement procedures, allow certain observation and review of the exercise of power. The environmental branch of the Commission, DG Environment, has pursued a relatively proactive approach and has long advocated transparency and citizens' participation. As a consequence, Community environmental secondary legislation was enacted on the rights to information and public participation a decade ago. However, these instruments proved to be flawed with shortcomings, and have not been able to offer sufficient protection in practice.

Great hopes are being put into the Aarhus Convention to remedy the current vacuum regarding legal protection of environmental interests in the Community and its Member States. The UN/ECE (United Nations/Economic Commission for Europe) *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* was declared and signed by 35 European countries and the European Community in Aarhus, Denmark, on the 25th of June 1998. Upon receipt of the necessary numbers of ratification, the Aarhus-Convention entered into force on the 30th of October 2001.[168] In its Preamble, the Convention endorses that "adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself". It is the first binding international treaty to recognise the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.[169] The Aarhus Convention was warmly welcomed by the world's leaders in the fields of human rights as well as environment, and this marks an important step towards full recognition of the correlation between human rights and the environment.[170] In his speech before the Contracting Parties, Kofi Annan, Secretary General of the United Nations, referred to the Aarhus Convention as "the most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the UN".

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[168] The Aarhus Convention is open for signature and accession to all European States, but also foresees the accession of any Member State of the United Nations upon approval by the Meeting of the Parties. At current date (July 2002), the following countries have signed and ratified the Aarhus Convention: Albania, Armenia, Azerbaijan, Belarus, Denmark, Estonia, Georgia, Hungary, Italy, Kazakhstan, Kyrgyzstan, Lithuania, Malta, Poland, Republic of Moldova, Romania, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine and United Kingdom.

[169] Preamble, see also Thornton & Tromans, *Human Rights and Environmental Wrongs,* p. 37.

[170] A selection of comments by Kofi Annan, Mary Robinson, Klaus Toepfer and Margot Wallström, found on the UN/ECE-website (www.unece.org/env/pp), is reproduced in Annex IV.

The objective of the Aarhus Convention is to increase public awareness of environmental concerns. To this end, it calls for measures in three areas, also referred to as pillars: developing public access to information held by public authorities; encouraging public participation in decision-making which affects the environment; as well as ensuring access to justice in environmental matters. The Aarhus Convention thus transposes the content of Principle 10 of the Rio Declaration on Environment and Development into the broader European context, and vests it with legally binding force.[171]

Parties to the Convention are under the obligation to take the necessary legislative, regulatory and other measures to give effect to the tripartite objectives of the Convention. Public authorities shall assist the public, promote environmental education and environmental awareness among the public. Thereby, particular recognition and support is to be given to associations, organisations or groups promoting environmental protection.[172] The implementation of the Aarhus Convention is ensured by the reporting obligation of the Contracting Parties under Article 10. In addition, Article 15 foresees the possibility to establish optional arrangements of a non-confrontational, non-judicial and consultative nature for the purpose of reviewing compliance with the Convention.

The European Community signed the Aarhus Convention on the 25th of June 1998, alongside the signatures of the individual Member States. Upon this occasion, the European Community declared that the Convention would not only apply at Community level, but also cover its own institutions. The EU institutions are currently preparing secondary legislation necessary to ratify the Aarhus Convention and give it full effect within both the Member States and the EU-institutions. The preparations for the ratification of the Aarhus Convention are due to be concluded sometime by the end of 2002, beginning of 2003. The following section will discuss the relevant participatory rights in the light of the EU-legislation currently in place, and the main changes envisaged by the Aarhus Convention.

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[171] Principle 10 of the Rio Declaration, see Annex I.
[172] Article 3 paragraphs 1-4.

a. Right to information and transparency

The *Directive on freedom of access to information on the environment*[173] provides that State bodies must make environmental information available to any person who requests it. A request for information does not need to be accompanied by a proof of a legal interest or an explanation why the information is sought. However, the authorities may deny access to information on the basis of national security or commercial confidentiality. The full transposition of the Directive into all Member States' domestic legal orders experienced considerable delay. Even after its completion, doubts remain as to its adequacy, since it is questionable whether the arrangements made so far have been sufficient to create an effective right to information. Taking the United Kingdom as an example, it has been observed that practices vary from authority to authority, and that information is only available at some locations. In addition, short opening hours and heavy photocopying charges may in practice deter the public from seeking to obtain information.[174]

The Directive is about to be replaced by a new *Directive on public access to information*, which will address the shortcomings of Directive 90/313/EEC, fulfil the more stringent requirements set out in the Aarhus Convention, as well as adapt to the developments in information technologies.[175] There are still numerous grounds of refusal, upon which the public authorities can deny disclosure of the requested information.[176] However, there are some important safeguard clauses against any unjustified refusal to hand out information.[177] Article 5 of the Convention introduces positive obligations of the public authorities to collect and update environmental information that is relevant to their function. In case of an imminent threat to human health or the environment, the authorities

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[173] Directive 90/313, 1990 O.J. L 158/56.

[174] Douglas-Scott, *Environmental Rights in the European Union – Participatory Democracy or Democratic Deficit?*, in Boyle & Anderson (eds.), *Human Rights approaches to environmental protection*, Oxford, Clarendon Press, 1996, p.118.

[175] Proposal for Directive COM(2000) 402 final. At the second reading of the European Parliament on 30th of May 2002, a partial agreement was reached. The proposal will now become the subject of a conciliation procedure in order to find an agreement on all points.

[176] Article 4, paragraphs 3 and 4: if the authority does not hold the requested information, if the request is manifestly unfounded or formulated in too general a manner, if the request concerns internal communications of public authorities, or when the request would adversely affect the confidentiality of certain interests (proceedings, international relations, national defence, public security, commercial and industrial activity...).

[177] Article 4 paragraphs 5, 6 and 7: the grounds of refusal shall be interpreted in a restrictive manner; if the information is separable, any information not falling under the restricted access shall be granted; a refusal to a request shall be in writing and contain reasons; overriding public interest in disclosure outweighs the interest served by non-disclosure.

must immediately disseminate all available information that will enable the public to take appropriate measures to prevent or mitigate harm.

State Parties to the Convention must ensure that the information available to the public is transparent and effectively accessible, and within due course of time, information must also be made available on the internet. In addition to disclosing legislation and other relevant environmental information upon request ("passive supply of environmental information"), States must also regularly publish and disseminate a report on the state of the environment, including information on the quality of the environment as well as current pressures on it ("active supply of environmental information"). Furthermore, private operators whose activities have a significant impact on the environment shall be encouraged to inform the public regularly of their activities and products, e.g. through voluntary eco-labelling and eco-auditing schemes. Parties to the Aarhus Convention shall also ensure sufficient product information, as well as maintain a coherent system of pollution inventories or registers.

At the level of the EU institutions, *Regulation 1049/2001 regarding public access to European Parliament, Council and Commission document*s was adopted last year.[178] Recognising that openness contributes to the strengthening of democracy and the respect for fundamental rights, the Regulation aims at ensuring a more transparent conduct of activities within the general institutional framework, including the field of environment.

Access to environmental information is essential for citizens wishing to take a stand and defend their living conditions, since only an informed population can have an opinion and influence decision-makers. A note of caution concerns the quality of the information the public will obtain. Being of rather technical nature, environmental information will often be too complicated to be of any use for lay persons. Public authorities may also find a loophole in the fact that information can be refused if the request is manifestly unreasonable or formulated in too general a manner, which will often be the case when individuals request information.[179] As a consequence, environmental NGOs play a crucial role in this regard, since they dispose of technical expertise and sufficient resources to fully exercise the right to information and can assist individuals in their request for information.

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[178] EC Regulation of 31.5.2001, O.J. L 145/43.
[179] Douglas-Scott, *Environmental Rights in the European Union,* in Boyle & Anderson, *Approaches,* p. 118.

b. Right to participation in decision-making

People contribute to, and suffer from, environmental degradation, and therefore their active participation should be engaged to prevent environmental damage. Decisions concerning the environment should therefore be taken in a transparent manner, and at a level as close as possible to the affected population.

The Aarhus Convention foresees that public participation shall be provided for all decisions on specific activities listed in the annex of the Convention[180], as well as for the decision on whether to release genetically modified organisms into the environment (Article 6). The provisions also apply to the enactment of environmental plans, programmes and policies (Article 7), as well as to executive regulations and generally applicable legally binding rules (Article 8). Public participation entails the obligation of the public authorities to provide the public with relevant information[181] at an early stage in the decision-making procedure, allowing the public sufficient time to prepare and exercise effective participation. Information on the proposed activity shall be made available to the public for examination, granting them insight into the physical and technical characteristics, significant environmental effects and envisaged preventive and harm-reduction measures of the proposed activity. Procedures for public participation must allow the public to submit comments and opinions, and the final decision shall take due account of the outcome of the public participation.

A number of EC-Directives already contain provisions to involve the public, the most prominent among those being the *Directive on Environmental Impact Assessments*.[182] In the course of the past year, the EU has adopted and amended a number of Directives to reflect the more detailed and ambitious standards of the Aarhus Convention.[183]

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[180] Including detailed activities in the following sectors: energy, production and processing of metals, mineral and chemical industries, waste management, industrial plants, transport infrastructure, extraction of petroleum and gas, dams, pipelines, intensive elevation of animals, electrical power lines and other activities.

[181] such as the proposed activity, the nature of possible decisions, the envisaged procedure, time and date of public hearings, as well as an indication on what environmental information relevant to the proposed activity is available.

[182] Directive 85/337/EEC on the assessments of the effects of certain public and private projects on the environment, O.J. 1985 L 175/40. Another Directive containing elementary provisions on public participation is the Directive 96/61 on integrated pollution prevention and control, O.J. 1996 L 257/26.

[183] Commission proposal (COM (2000) 839 final for a *Directive providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337 (EIA-Directive) and 96/61 (IPPC-Directive)*, currently at the stage of 2nd reading by the European Parliament. Details about the state of play of the co-decision procedure can be found at the following address: http://www.europa.eu.int/prelex.

At the institutional level, the EU *White Paper on Good Governance*[184] constitutes an effort to improve public participation in the framework of the institutions. The White Paper stresses the need of reinforcing a culture of consultation and dialogue between the EU and its citizens. It acknowledges that there is currently a lack of clarity about how consultations are run and to whom the institutions listen. The White Paper on Good Governance proposes to open up the policy-making process to get more people and organisations involved in shaping and delivering EU policy. It promotes greater openness, accountability and responsibility for all those involved. In the area of environment, where consultative practices are already established to some degree, the Commission could aim at developing even more extensive partnership agreements. Along with the on-going debate on the *Future of Europe*, the Whitepaper on Governance aims at bringing the EU closer to the citizens, and it remains to be seen if these efforts will bear fruit.

c. Access to justice

As concluded further above, the framework of Community environmental legislation has long been marked with great difficulty for individuals or groups to challenge environmental measures and decisions. The Aarhus Convention has provided a valuable incentive to extend and improve citizens' access to justice.

Access to justice under the Aarhus Convention pursues two main objectives: Firstly, it ensures the consistent and effective implementation of the Convention's provisions on access to information and public participation. Accordingly, all persons whose right to access to information has been impaired (e.g. the request for information was ignored, wrongfully refused or inadequately answered) shall have access to a review procedure before a Court or other independent and impartial body. Access to justice must also be ensured to remedy infringements of the participation procedure guaranteed by the Convention. Individuals and NGOs must have legal means at their disposal to challenge

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Recently adopted legislation already reflects the Aarhus requirements of public participation, such as *Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment* and *Directive 2000/60 establishing a framework for Community action in the field of water policy* (foresees public participation in relation to the preparation of river basin management plans), and *Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms*.

[184] Commission Proposal COM (2001) 428 final.

the substantive or procedural legality of any decision, act or omission during the course of a decision-making procedure requiring public participation.[185] Secondly, the Aarhus Convention calls for enforcement of environmental law in general, by demanding that access to administrative or judicial procedures be given for the settlement of disputes relating to acts and omissions by private persons and public authorities, which contravene provisions of national environmental law.[186] All procedures established in compliance with the Aarhus Convention must provide adequate and effective remedies, and be fair, equitable, timely and not prohibitively expensive.

In response to these requirements, the EU institutions have adapted the provisions on access to justice in the relevant Directives already containing notions of legal remedies, i.e. the Directives on Environmental Impact Assessment and Integrated Pollution Prevention and Control.[187] In addition, the Commission is currently drawing up a proposal that will establish general conditions regarding access to justice. Preparatory studies for this proposal confirmed the existence of great disparities in the Member States concerning legal standing in environmental matters. The conclusion of the studies is that, barred by the requirement to demonstrate "sufficient interests" or impairment of a subjective right, individuals and public interest groups do not have sufficient access to national courts. But the introduction of unlimited standing for the public would critically interfere with the judicial systems of several Member States. The Commission proposal underway therefore aims at enhancing the role of citizen's groupings and environmental NGOs.[188] Individual members of the public will however retain the right to access to justice in case they have a sufficient interest in the subject matter or have suffered an impairment of a right.[189]

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[185] Article 9. In this regard, NGOs promoting environmental protection are considered to have a "sufficient interest", and are thus entitled to exercise the right of participation and access to justice. Article 9 para.2, referring to Article 2 para. 5.

[186] Article 9 paragraph 3.

[187] Compare fn 182.

[188] *Citizen's groupings* are residents of a geographically defined area, established for the primary objective of protecting the environment or special fields of environment. *Recognised environmental NGOs* shall have legal standing if the subject matter falls within the scope of their statutory activities as well as within their geographical area. The proposal will issue guidelines for the recognition of environmental NGOs in order to prevent the occurrence of different standards in the Member States.

[189] Working Document on Access to justice in environmental matters, dating 11.04.2002, available under http://www.europa.eu.int/comm/environment/aarhus/index.htm.

d. Conclusion

Every European is in one way or the other affected by environmental degradation, which has an increasingly deteriorating impact on our daily lives. A recent opinion poll reveals that Europeans are concerned about future trends in the field of environment and health (89% of the 7500 persons surveyed), the use of natural resources and waste generation (86%), nature and wildlife (82%) as well as climate change (72%). The poll also demonstrates that Europeans find that the condition of the environment influences the quality of life to a large extent (73%). Significantly, 75% of the surveyed feel that policy-makers do not take the environmental dimension sufficiently into account when deciding policy in other areas, such as economic and social policy.[190]

By implementing the Aarhus Convention, the EU demonstrates that it takes the concerns of its citizens seriously. This may lead to an even greater environmental awareness, and "environmental democracy" will eventually experience considerable improvement. The institutions will thereby be able to reach out to the individuals and increase their understanding of the benefits of a joint and coherent approach of the EU in the field of environment. In the best case scenario, the implementation of the Aarhus Convention may generally improve citizens' confidence in the EU, and it might pave the way to enhanced democracy, transparency and trust towards the EU in its entirety.

It remains to be seen if the Aarhus Convention will be implemented in a sufficiently conscientious manner by the Contracting Parties, including the EU and its Member States. Once the opportunities under the Aarhus Convention are established, they must also be put into practice by the public. In many cases, there are no private interests corresponding to urgent environmental concerns, and the lack of such private interests thus diminishes individual litigation as a driving force for enforcement of environmental law. In order to prevent the possibilities established under the Aarhus Convention from laying dormant and neglected, environmental NGOs are encouraged to mobilise and nourish public environmental awareness of specific, pressing projects, but also concerning issues of a more general nature.[191]

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[190] Flash Eurobarometer "Sustainable Development and environmental concerns of Europeans", 6-15 April 2002, see http://europe.eu.int/comm/environment/barometer/index.htm.

[191] To this end, the EU established a funding system under *Decision No 466/2002/EC on a Community action programme promoting NGOs primarily active in the field of environmental protection* O.J. 16.3.2002, p.L 75.

C. The European Convention on Human Rights and the European Union

As has been discussed in the previous Chapters, Europe has recently witnessed the establishment of considerable normative links between human rights and the environment. The European Court of Human Rights has taken a firm stand in its most recent case-law to protect individuals from pollution, and the European Union has demonstrated that it is willing to give its citizens a voice in environmental matters by embracing the Aarhus Convention. The following Chapter analyses the relationship between these two entities, and seeks to determine what implications the emerging human rights may have on the interplay between these two important European actors.

1. The European Union and Human Rights

From the outset, the Treaties of the European Community were not concerned with fundamental rights in the broader sense, and contained only limited reference to those human rights that related to the activities of the European Community, namely non-discrimination and freedom of movement. Soon it was recognised that economic objectives had considerable repercussions on human rights, and due to the strong reactions of national courts the ECJ was compelled to gradually develop jurisprudence on the European Community's respect for fundamental rights.[192] Recognising that "fundamental rights form an integral part of the general principles of EC-law", the ECJ declared that it would draw inspiration from constitutional traditions common to the Member States and international human rights Treaties signed by the Member States. The principles emerging from the ECJ's case-law were codified in Article 6 of the Amsterdam Treaty in 1997.[193] Whereas the predecessor of Article 6 (Article F EU Treaty) was excluded from the jurisdiction of the ECJ, the Amsterdam Treaty formally empowered the ECJ to ensure the respect of fundamental rights and freedoms by the European institutions and also introduced mechanisms to ensure Member States' compliance with human rights. The ECJ has so far restricted itself to judging upon human rights issues that arise within the existing areas of Community competence, and has refrained from exercising a general review of Member States' compliance with human rights.[194]

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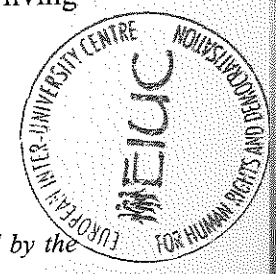
[192] Case 29/69 Stauder (1969) ECR 419, Case 11/70 Internationale Handelsgesellschaft (1970) ECR 1125, Case 4/73 Nold (1974) ECR 491.
[193] Article 6 EU-Treaty.
[194] Eleftheriadis, *The Future of Environmental Rights in the European Union*, p. 538.

For a long time, the accession of the EU to the ECHR was perceived to be the only viable solution to ensure the EU institutions' respect for fundamental rights. While the Council of Europe in Strasbourg still deems an accession both desirable and necessary[195], the EU has on the political level decided that it will not become a Contracting Party to the ECHR. According to the ECJ[196], an accession would surpass the powers of the European Community provided for in Article 308 EC Treaty. Consequently, a Treaty amendment would be necessary to accommodate the competence for an accession to the ECHR. An accession would also entail the integration of all provisions guaranteed under the ECHR into the Community legal order. In addition and more importantly, the EU would then enter into and become part of a distinct international system, and it appears that the EU is reluctant to submit itself and its activities to the scrutiny and jurisdiction of an external Court. However, in light of the adoption of the EU-Charter on Fundamental Rights, an accession appears to be more desirable than ever, since this would secure the coherent interpretation and application of human rights in Europe.

Turning to the establishment of a human right to environment within the framework of the EU, it must be retained that Article 6 EU-Treaty is not a successful basis: Applying the ECHR will not be helpful, as it does not contain a specific right to environment. The reference to the national constitutions of the Member States would then appear to be more promising, since a number of them actually comprise provisions on environmental rights. However, such constitutional provisions do not provide adequate protection, since they are not always enforceable by individuals by way of constitutional complaint (e.g. Spain). In other Member States, provisions relating to the environment can at best be seen as general mandates to the legislatures to enact legislation on environmental protection (e.g. Austria, the Netherlands and Greece).[197] The most promising constitutional provision is found in Finland, where protection of the environment is made the responsibility of everyone, and where public authorities shall aim at guaranteeing the right to a healthy environment and shall grant everyone the possibility to influence the decisions that concern their own living environment.



[195] Council of Europe, *Accession of the European Union to the ECHR – Reflection paper prepared by the Secretariat,* DG-II (2001) 02, Strasbourg 2001.
[196] Opinion of the ECJ 2/94 (28 March 1996, ECR 36/75).
[197] Douglas-Scott, *Environmental Rights in the European Union,* in Boyle & Anderson, *Approaches,* p.109f.

Fortunately, the establishment of a human right within the EU does not depend solely on Article 6 of the EU Treaty: The signature and pending ratification of the Aarhus Convention by the European Community implies that a procedural right to environment is about to be incorporated and established in the Community legal order. In addition, future developments concerning Article 37 of the EU-Charter may enhance the applicability of the integration principle, but it is doubtful that this will provide individuals with a directly justiciable right.

2. The European Court of Human Rights and European Community legislation

Since the EU is not a Contracting Party of the ECHR, the conduct and actions of its institutions do not fall within the ambit of jurisdiction of the European Court of Human Rights. However, the Strasbourg-Court can indirectly pass judgement over EU-legislation by way of examining the Member States' implementing legislation. In the case *Matthews v. United Kingdom*[198], the Court held that EU Member States remain answerable for the effects of Community law in their domestic legal orders. The transfer of competences to international organisations is compatible with the ECHR, provided that the rights guaranteed under the ECHR continue to be secured. As a consequence, States retain responsibility for the enjoyment of rights even after such a transfer of competences to a supranational organisation.[199] The Court held that the ECHR is "intended to guarantee rights that are not theoretical or illusory, but practical and effective".[200] Legislation emanating from the European Communities is valid alongside and has precedence over domestic law of the Member States. This signifies that EC-law is inherently part of the Member States' legal order, and accordingly justifies control by the European Court of Human Rights.[201]

The European Court of Human Rights has had the possibility to pronounce itself on EC-legislation on a number of occasions, and has to some extent served as a safetynet. The case of *Guerra v. Italy*, is a significant example: The Commission was content that Italy

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[198] Judgement of 18 February 1999, 28 EHRR 361, concerning elections to the European Parliament in Gibraltar.
[199] *Ibid* paragraph. 32.
[200] *Ibid* paragraph 34.
[201] The primacy of EC-law over domestic law has been recognised by the ECJ as an inherent aspect of EC-law, see Case 6/64 Costa v. ENEL (1964) ECR 585, and Case 106/77 Simmenthal SpA, (1978) ECR 629.

had fulfilled all requirements under the Seveso-Directive[202], and did not commence any infringement procedure. The European Court of Human Rights, however, found that the careless handling of the high risk chemical factory constituted a breach of Article 8 ECHR.[203] The European Court of Human Rights has also served as a last resort to supervise the implementation of decisions taken by the ECJ.[204] Due to the comprehensive and increasingly expanding portion of national legislation deriving from Community law, the European Court of Human Rights will have ample opportunity to examine potential violations under the ECHR.

3. The suitable forum for environmental claims - Conclusions

The relation between the Courts in Strasbourg and Luxembourg will be substantially influenced by the developments as to the status and possible legally binding effects of the EU-Charter. At current date, it is questionable if the EU-Charter will offer any added value and genuine protection. Adding yet another human rights treaty to the European context, the EU-Charter will increase the risk of divergent interpretations between the ECJ and the European Court of Human Rights.[205] The uncoordinated, parallel implementation of the EU-Charter and the ECHR may create a situation of competing catalogues and thus varying human rights standards in Europe, and this threatens to weaken the overall protection of individuals and human rights. The best solution would be the accession of the EU to the ECHR, since this would ensure coherent development of human rights protection in Europe. Hence, legal certainty would increase, and harmony and coherence of the jurisprudence of the Courts in Luxembourg and Strasbourg would be ensured.

Should the EU-Charter come to attain the status of a legally binding instrument, the Luxembourg Court may be better suited to deal with an emerging human right to

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[202] Directive 82/501/EEC on major accident hazards of certain industrial activities dangerous to the environment, O.J. L 230, 05.08.1982, p. 1-18.

[203] Jarvis & Sherlock, *The European Convention on Human Rights and the Environment,* in «European Law Review», No. 24, 1999, p.25.

[204] compare *Hornsby v. Greece,* Judgement of 19 March 1997, 24 EHRR 250, which concerned a successful case before the ECJ. The Greek Government failed to fulfil the Court's ruling, and the individuals then invoked Article 6 ECHR to remedy the Community's reluctance to supervise and enforce the ECJ-judgement.

[205] This is already the case today, e.g. in regard to Article 8 (right to privacy), where the European Court of Human Rights applies a wider understanding of the term "home" than the ECJ.

environment. Given that the ECHR does not contain an explicit right to environment, the EU-Charter may develop a whole new set of standards, relying on the abundance of substantive Community environmental law, and in particular on the implementing legislation of the Aarhus Convention. However, this remains purely speculative and hypothetical, as the status and future of the EU-Charter is still uncertain. Moreover, as mentioned before, Article 37 embodies the integration principle, and does not confer a genuine justiciable right to individuals.

The European Court of Human Rights has in its recent legislation demonstrated an increasing willingness to take a stand in environmental matters. In Hatton, the Court included environmental concerns in the realm of human rights, and required that "minimum interference with human rights" should be the yardstick for State action. Accordingly, individuals' environmental interests will fall within the scope of and be protected by the ECHR. Given that Hatton is currently under appeal before the Grand Chamber, the persistence of this new test of minimum interference is uncertain. It remains to be seen if the Court will continue on the path it has just entered, or if it will revise its decision and thereby retain a position of rather limited impact on environmental protection.

If the European Court of Human Rights adheres to the judgement in Hatton, it will have the potential to a path of extensive environmental protection. In this case, the jurisdiction risks coming into conflict with that of the ECJ. The ECJ, originating from an economic organisation, is predetermined to take a stand for economic development, trade and business, and may not pay full respect to environmental considerations, or human rights for that matter. In the context of the EU, a rule of minimum interference with trade has long been predominant in the jurisdiction of the ECJ.[206] A Court that positions itself on the side of economic interests and seeks to abolish all restrictions on the free movement of goods and services[207], may not be a suitable forum for the protection of environmental human rights. This would lead to a situation of forum-shopping, where persons concerned with business interests would turn to Luxembourg, and individuals seeking to protect the environment would seek redress in Strasbourg.

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[206] Compare e.g. Case 104/75 De Peijper (1976) ECR 613.

[207] Customs and charges of equivalent effect are prohibited, even if they are not imposed for the benefit of the State, are not discriminatory or protective in effect, compare Case 24/68 Commission v. Italy, (1969) ECR 193. The justification of a restriction on environmental grounds under Article 30 requires that there must be a real and actual danger threatening an interest, life or public health.

However, the EU has consistently expanded its activities into non-economic fields, and due to the increasing pressure to take the citizen's concerns seriously, the EU institutions, including the Court, have demonstrated willingness to depart from a path pursuing solely economic interests. The environment has become one of the Community's most important objectives, and environmental protection may now justify that Member States impose certain limitations on the free movement of goods.[208] The ECJ must also depart from its approach of subordinating human rights to the end of closer economic integration, and instead promote a balance between a number of different priorities, including economic growth, human rights and environment. The emphasis on sustainable development and the ratification of the Aarhus Convention puts human beings in the centre of attention, and these developments significantly diminish the risk that a situation arises in which different interests are protected by the European Court of Justice and the European Court of Human Rights respectively.

It remains to be seen if the Aarhus Convention will be implemented in such a manner to confer genuine participatory rights on individuals. As concerns enforcement, the European Court of Human Rights will be in a position to verify the Member States' compliance with the Aarhus Convention, since it will become part of their national legislation and thus falls under the jurisdiction of the Human Rights Court.

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[208] Compare Case 302/86 "Danish Bottles" Commission v. Denmark (1988) ECR 4607, Case C-2/90 "Walloon Waste" Commission v. Belgium (1992) ECR I-4431.

V. CONCLUSIONS

The survival of human beings depends on the environment, and it is time for us to realise that we cannot continue to forcibly submit nature to our own economic benefit, but must instead begin to accommodate our needs within the parameters of environment. The extensive and increasingly expanding corpus of international environmental law seeks to address and remedy man-made threats to nature, but these treaties and conventions do generally not confer rights on individuals. Consequently, the added value of a human rights approach is to provide human beings with a voice in environmental matters.

The avenue of human rights pursues the objective of guaranteeing every living person a life in dignity, and this ultimately also includes the right to live in harmony with nature. A satisfactory environment can even be perceived as the precondition for many other human rights, including the right to life. Growing recognition of the interdependence between human rights and environment has led to a global debate on the establishment of a right to environment. However, consensus on the appropriateness of such a right is still looming, with opponents to the establishment of a separate right to environment bringing forward arguments ranging from redundancy to anthropocentrism. Even among the proponents, there are differing opinions as to the adequate formulation of an emerging right to environment, departing from a substantive or a procedural view respectively.

At the global level, an important indication for growing recognition of a right to environment emanates from the United Nations, where the United Nations High Commissioner for Human Rights and the United Nations Environment Programme are seeking to establish enhanced co-operation between their fields of competence. At a joint UNHCHR/UNEP expert meeting in January 2002, the experts recognised that respect for human rights is a precondition for sustainable development, and that environmental protection constitutes a precondition for the effective enjoyment of human rights. Given the authority of these two organisations, this clear statement on the interdependence between human rights and the environment indicates that the right to environment is about

to be attributed its proper place in the international legal order.[209] The relation between human rights, the environment, sustainable development and poverty will need further analysis and co-operation at the global level, and these issues will be addressed during the World Summit on Sustainable Development in Johannesburg.

While thinking globally and acting locally, there are convincing indications that the relevant actors on the European continent have increased their willingness to ascertain a human right to environment. The European Court of Human Rights in Strasbourg has demonstrated that environmental protection can to some extent be achieved by greening existing human rights. In particular, a clear connection has been made between a violation of the right to privacy and home guaranteed under Article 8 of the ECHR and the right not to be subjected to pollution. The European Court of Human Rights has with its most recent case-law in *Hatton* taken a clear stand for environmental protection, and has pronounced itself on the relationship between human rights, the environment and economic interests. The Court has thereby clarified that balancing environmental protection with a general, collective right to economic development falls into the function and task of its jurisdiction. For the future, it is important that the Court pursues a coherent approach to environmental protection, careful of not overstepping the borders of its competencies, since this would severely disturb the balance of power between the legislative, executive and judiciary branches.

Notwithstanding the advantages of greening existing human rights, it can only offer piecemeal protection, being limited to litigated issues covered by existing human rights instruments. Leaving it entirely in the hands and goodwill of the Courts to subsume environmental protection under existing human rights norms would naturally lead to a fragmentary picture, not able to fully cover the needs of individuals or the environment. The introduction of a separate right to environment therefore seems indispensable, in order to strengthen the normative links between human rights and the environment and ensure a coherent approach to the protection of individuals in their living environment. As has been discussed, the formulation of such a right can be of substantive or procedural nature.

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[209] UNEP-OHCHR Expert Seminar January 2002, Final text of 16.01.2002, available at http://www.unhchr.ch/environment/conclusions.html.

In 1973, the attempt to amend the ECHR by adding a substantive right to environment failed due to the reluctance of States to introduce such a right. Being the ones who decide on amendments to the ECHR in the Council of Europe, the States feared that a right to environment would impede their legislative and executive decision-making. They predicted that such a right would lead to an influx of cases challenging State action and omission concerning exposure to both actual damage and potential threats. It is true that States are faced with difficult choices relating to what society deems to be valuable in both an intra-generational and inter-generational context. In the past, economic interests enjoyed prevalence at the expense of the environment, deriving from the fact that no -economic- value was attributed to the environment. But States and other relevant actors have come to realise that environmental degradation can indeed be very costly, entailing expenses in the public health sector and invoking large expenditures to redress destruction caused by environmental catastrophes. This awareness combined with the urgency of environmental issues suggests that the time has come to enrich the catalogue of human rights with an explicit right to environment.

A procedural right to environment has the best prospects of obtaining broad consensus, which is demonstrated by the coming into force of the *Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*. Implementing Principle 10 of the Rio Declaration in the European context, the Aarhus Convention establishes a clear connection between human rights and the environment, and provides effective means for the exercise of procedural rights in the field of the environment.

The establishment and application of participatory rights, such as deriving from the Aarhus Convention, will aid legislatures in their determination and pursuit of the common good life. By incorporating the opinion of civil society and promoting greater accountability of State actors, environmental democracy has the capacity to significantly improve the way we approach environmental protection. However, democracies are perfectly capable of environmental destruction if they decide to prioritise economic interests. Consequently, it is crucial to increase general awareness of environmental problems among the population, as well as enhance the knowledge of the available possibilities to defend the environment. Environmental NGOs play a crucial role when it

comes to mobilising civil society, and it is with their help and guidance that the Aarhus Convention can develop its fullest effect.

Environmental democracy has the potential to improve good governance in the field of environment, and hence Governments will be encouraged in their active pursuit of environmental policies. It is high time to adopt a more proactive approach to environmental issues, and place greater emphasis on prevention and precaution. The recognition of the environmental dimension in the effective enjoyment of human rights and the development of a human rights-based approach to environmental protection will give the environment the attention and weight it deserves.

In the pursuit of environmental interests, it is also important to remember that the environment is a global asset, and the search for environmental solutions can therefore not remain confined to our own immediate living sphere and influence. It is inevitable to look across the European borders, and assist and promote efforts of environmental protection elsewhere on the planet. Balancing environmental interests with human needs are at the heart of the concept of sustainable development, and the Earth Summit taking place in Johannesburg later this summer aims at giving binding effect to this global aspiration of environmental protection. In time, we may even witness the development of a substantive right to environment, guaranteeing a minimum core content of a life in environmental quality for human beings around the world.

Even though we are still far away from living in harmony with nature, it is encouraging that the efforts on the European continent to advance environmental protection are beginning to bear fruit. The European Court of Human Rights' decision in Hatton and the Aarhus Convention constitute landmarks on the path to a greener Europe, and hopefully we will begin to leave lighter footprints on our planet.

> "This we know, the Earth does not belong to man; man belongs to Earth. This we know, all things are connected, like the blood which unites one family. Whatever befalls the Earth, befalls the sons of the Earth. Man did not weave the thread of life; he is merely a strand in it. Whatever he does to the web, he does to himself."
>
> Chief Seattle,
> patriarch of the Duwamish and Squamish tribes
> of Puget Sound, 1855

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