FACULTY OF LAW
University of Lund

Moa Östberg

The role of the European Court of Human Rights in enforcing environmental norms and principles

Master thesis
20 points

Supervisor: Ulf Linderfalk

International Environmental Law and Human Rights Law

Fall 2006

Contents

Summary

Environmental damage has direct effects on the enjoyment of a number of human rights, and conversely, the violation of several human rights is liable of impairing the environment. Several international environmental declarations and resolutions pronounce the link between the enjoyment of human rights and the quality of the environment. Likewise, many international and regional human rights conventions include provisions referring to the environmental quality aspect of the enjoyment of human rights. Nevertheless, the existence of a human right to a clean and healthy environment as a universally recognized and accepted human right remains ambiguous.

The international community has not been successful in enforcing rules of interntional environmental law against deviant states. The increasing understanding of the seriousness of global environmental threats has however generated an escalating criticism of the absence of effective means of enforcing globally the norms of international environmental law. In the absence of petition procedures in international environmental treaties, cases concerning the impact of environmental harm on individuals and groups have been brought to international and regional human rights bodies, such as the ECtHR. Since the ECHR does not provide for a right to environment, environmental issues has to be raised incidentally, through the assertion of protected rights. Environmental concerns have arisen before the ECtHR in two categories of cases. Firstly, environmental damage can result in a violation of a substantive article, such as the right to respect for private and family life. Secondly, protection of the environment can be ensured through procedural rights, such as a right to receive information about activities that may cause environmental harm and the right to access to court and remedies.

The human rights guaranteed in the ECHR have been useful primarily when the environmental harm consists of pollution. Other environmental issues such as biological diversity, nature conservation and resource management are more difficult to bring under a human rights claim. From an environmental perspective, the assertion of substantive rights appears to offer a limited opportunity to promote the protection or improvement of the environment in general. Hence, the ECtHR has logically been looking for the consequences of environmental harms on human beings or their assets, and not for their causes. On the other hand, it can be argued that procedural rights has the potential of providing a more extensive protection of the environment, if based on the goal of conserving the environment and the concept of the environment as a common resource whose quality affects each person. Such reading of the procedural rights in the ECHR would though require that the ECtHR is willing to integrate principles and norms of international environmental law when interpreting the provisions of the ECHR. The ECtHR could for example protect environment-related human

rights more effectively in the future by applying the precautionary techniques, until now applied by the Court when there is a threat to life or limb, to prevent States' actions or inactions towards the environment from infringing on human rights, even if the harmful character of those actions is uncertain. However, as long as the international community is reluctant to recognize a specific right to environment, which is enforceable under the right of individual petition, and the ECtHR remains hesitant to integrate principles and norms of international environmental law more generously, the potential for environmental protection is limited to more extreme cases of environmental degradation.

Abbreviations

ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Communities
ECHRR	European Human Rights Reports
ETS	European Treaty Series
Geo. Wash. J. Int'l L & Econ	The George Washington journal of international law and economics
ICJ	International Court of Justice
ILM	International Legal Materials
Int'l L.J	International Law Journal
ITLOS	International Tribunal for the Law of the Sea
MEAs	Multilateral Environmental Agreements
Montreal Protocol	The Montreal Protocol on Substances that Deplete the Ozone layer
NGOs	Non-Governmental Organizations
PCA	Permanent Court of Arbitration
RECIEL	Review of European Community and International Environmental Law
Rio Declaration	The Rio Declaration on Environment and Development
Stockholm Declaration	Declaration of the United Nations Conference on the Human Environment
UNCED	United Nations Conference on Environment and Development
UNCLOS	The 1982 United Nations Convention on the Law of the Sea
UNTS	United Nations Treaty Series
WTO	World Trade Organization
Y.B. INT'L ENVTL. L	Yearbook of International Environmental Law

Definitions

"Environmental harm":

The term environment emerges from concern about the potential destruction of the natural resources and processes on which life depends. It is difficult to define and restrict such an ambiguous term, and it could be maintained that any definition of the environment will ultimately mean what we want it to mean (or, as Caldwell puts it " it is a term that everyone understands and no one is able to define".)[1] Hence, there is no internationally recognized definition of environment and the ECHR does not contain a definition of the term.

The extraordinary difficulties in defining the environment is demonstrated by the fact that many of the major international treaties and declarations aiming at protecting the environment do not even attempt to define the term. The 1992 Rio Declaration on Environment and Development refers for example at many points to environmental needs, environmental protection, environmental degradation and so on, but does not identify what these include.

International legal instruments that actually include a definition of "environment" generally define the term broadly. According to the definition found in the European Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, "environmental damage" includes harm (which includes loss of life or personal injury, loss of or damage to property, the costs of preventive measures and other loss or damage by impairment of the environment) to flora, fauna, soil, water, air, landscape, cultural heritage, and any interaction between these factors.[2] For the purpose of this thesis the latter definition apply as a point of departure. The difficulties in defining "environment" and "environmental harm" should however be born in mind while reading this thesis.

[1] Caldwell, 170.
[2] Art. 2, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, opened for signature in Lugano June 21, 1993.

1 Introduction

Enforcement is always a controversial issue within the area of International Law. The "shame and blame" doctrine (i.e. that states which are criticized are sufficiently embarrassed to take voluntarily corrective steps) , which to a large extent is the dominant enforcement mechanism, is frequently criticized for not being effective. We are repeatedly reminded of the ineffectiveness of "toothless" international treaties. This is particularly so in the sphere of international environmental law. It can be argued that we have already exceeded the "sustainable" limits of human activity, confronting pressing global environmental problems such as climate change, including global warming, ozone depletion, species extinction and the loss of biodiversity, the contamination of our air and water etc.

The development within international environmental law has gone towards the creation of a system of conventions being enforced by "non-compliance procedures". Most of the conventions are built upon a reporting- or information system. Additionally, there is a trend towards enforcing international environmental law indirectly, through institutions created for other purposes, such as the European Court of Human Rights and the WTO. It is however controversial whether this development is desirable. On the one hand it can be argued that, since environmental issues will be a secondary consideration for institutions having their main interests in other areas of concern, such development is negative, slowing down the establishment of institutions created for enforcing environmental issues. On the other hand it can be argued that integration with other areas of law is necessary for such a crosscutting issue such as the environment.

The human rights community increasingly views environmental protection as an appropriate part of the human rights agenda. The legal protection of human rights through international complaints procedures has become an accepted means to achieve ends of environmental protection. However, advocates of human rights only seem to concern for the environment when it is advantageous for the individual's dignity and well-being.

This thesis seeks to address the question of adopting a human rights approach to environmental protection. The focus will be on the integration of international environmental norms and principles into the European Convention for the Protection of Human Rights and

Fundamental Freedoms[3] and the case-law of its supervisory body, the European Court on Human Rights.[4]

1.1 Background

Today it can hardly be denied that environmental degradation has an adverse impact on the enjoyment of human rights, such as the right to life, health, habitation, culture, equality before the law, and the right to property. Conversely, the failure to protect and promote human rights prevents progress towards environmental protection and sustainable development. For instance, when violations of procedural rights, like the rights of information and access to tribunals, occurs, people affected by the environmental degradation are prevented from continuing their work for securing the level of environmental protection necessary to protect their basic human rights. It is thus an established fact that, in societies where the human rights protection is weak, environmental concerns are not being raised effectively.[5]

In contrary to international environmental law and institutions, the human rights system already provides various courts, commissions, and other bodies where individuals can seek relief for harm caused by violations of their protected human rights. Over the past fifteen years, advocates and activists of international environmental law have increasingly looked at the human rights system as a model for the future legal strategy for protecting the environment.[6]

It can be argued that international environmental law can learn from the human rights based approach of human rights law. The environmental law of today is largely regulatory in its approach, relying on scientific standards and technical considerations. Thus, according to many environmentalists, there is an increasing need of the recognition of "environmental rights", based on the fundamental human needs of clean air and water, a stable climate etc.[7]

1.2 Purpose

The overall purpose of this thesis is to investigate and analyze the integration of international environmental norms and principles into the

[3] Council of Europe, Convention for Protection of Human Rights and Fundamental Freedoms, signed at Rome, 4 Nov. 1950, entered into force 3 Sept. 1953, as amended by Protocols 3, 5, 8 and 11 [hereinafter cited as "ECHR"].
[4] Hereinafter cited as "ECtHR"
[5] Kiss, Shelton, 141-187 and Hunter, Salzman, Zaelke, 1280-1282, 1284-1286.
[6] Hunter et Al, 1284-1286.
[7] Eaton, 266, Kiss, 2.

European convention on human rights. The following questions will form the basis for the discussion:

1) How does the trend of enforcing environmental norms and principles indirectly through an institution like the ECtHR, created for the protection of human rights, affect the establishment of effective international judicial mechanisms, created solely for enforcing globally norms of international environmental law?

2) Should the human rights system be used as a model for future legal strategy for protecting the environment ?

3) Irrespective of the answer of question 1 and 2, how can the ECtHR apply the provisions of the ECHR in the future to protect environment-related human rights more effectively than today?

The first question intends to generate a policy discussion on pros and cons of indirect enforcement of international environmental law and speculations on how it affects the creation of an international environmental court. The main focus of the discussion will though be on indirect enforcement through human rights bodies such as the ECtHR. As the formulation of the question indicates (and as will be further developed in chapter 3.1), I posit the ineffectiveness of existing mechanisms for enforcing norms and principles of international environmental law. The second question aims at investigating if and how a human rights approach could benefit international environmental law. This question should be seen both in the context of adopting the individual approach of the human rights system as such, and in the light of the role taken by ECtHR up to now in enforcing environmental norms and principles. The third question addresses a future outlook for the role of the ECtHR in enforcing principles and norms of international environmental law.

1.3 Method and material

This thesis consists of two main parts. The first part, covering chapters two and three, contains a policy discussion on the general interrelationship of human rights and environmental protection. This introductory part will form the basis for a better understanding of the second part of this thesis. Part two, covering chapters four to six, is thus the central core of this thesis, discussing and analyzing the role of the ECHR and the ECtHR in enforcing environmental norms and principles.

In order to investigate and analyze the consequences of applying the provisions of the ECHR when environmental harm occurs, I intend to depart from the relevant case law of the ECtHR. Both the former European Commission and Court of Human Rights, and the present ECtHR have a long and involved history with environment-related cases. There is no

provision in the ECHR specifically geared for protection of any "environmental rights". However, matters concerning the quality of the environment and assertions of the need for protection against, or information concerning, environmental threats are increasingly appearing in cases before the ECtHR. Environmental issues have been brought up by individuals in principally two diverse situations:

1) individual complaints that environmental damage has resulted in a violation of a substantive article (for example a failure of the State to regulate private industry in a manner securing proper respect for individual substantive rights)

2) individual complaints that environmental harm has resulted in a violation of a procedural right such as the right to access to information about environmental risks, and the right to access to court and remedies.

Instead of giving a brief view of several of the cases having been brought up in this area, I have chosen to take a close look on five cases. These cases are generally referred to in the legal doctrine as the most important cases of integration of environmental norms and principles into the ECHR. Considering the limited amount of cases, it should be underlined that the conclusions to be drawn from these five cases are rather to be seen as vague indications, than as definitive solutions.

The selected cases each demonstrate different aspects of how the ECtHR has dealt with environment issues. *Powell & Raynar* was chosen since most of the early environment-related cases involved noise pollution and many of the unresolved issues were addressed in this case. *Lopez-Ostra* was selected for being the Court's major and ground breaking decision on environmental harm as a breach of the right to private life and the home. *Guerra* is interesting in that it addresses the issue of a State's duty to provide information on environmental matters. Additionally *Guerra* was selected for being annexed with interesting separate opinions, suggesting a more environment-friendly reading of the ECHR. B*almer-Shafroth* was mainly chosen for raising the question of integrating principles of international environmental law into the ECHR. Lastly, *Okyay* was principally selected for demonstrating how of a recognized right to a healthy environment in national law can help safeguard existing human rights. Additionally, *Okyay* is a more recent case, demonstrating the continuous and immediate character of integrating environmental norms and principles into the ECHR.

The material used is first and foremost the case law of the former European Commission and Court of Human Right, and the ECtHR. Information concerning the interrelationship of the protection of the environment and human rights has been found in the doctrine of both international environmental law, and human rights law. Numerous different approaches of the link between those two areas of law are introduced respectively in the human rights literature and in the literature of international environmental law. The fact that the interrelationship of environmental protection and

human rights have been described from that many different angles, demonstrate the elasticity of this issue. However, most of the information found on the issue of linking environmental protection and human rights was found in the doctrine of international environmental law, which indicates that it is principally the environmentalists that are interested in linking these two areas of law. This should be born in mind while reading this thesis.

1.4 Delimitations and disposition

As was already mentioned, chapters two and three are intended to contextualize the subsequent chapters. Chapter two will give an overview of the development of the link between human rights and environmental protection within the past three decades. Hence, the chapter is predominantly descriptive, presenting diverse views on how to interrelate these two different spheres of law. Chapter three addresses whether a human rights approach can benefit international environmental law. Chapters two and three will thus address the first two questions of the questions forming the basis for this thesis.

In chapter four I will, in order to facilitate the understanding of chapter five, give a brief overview of the process and structure of the ECHR. Chapter five then discusses and analyzes the selected case-law of the ECtHR. I have chosen to focus on cases in which individuals have acted for environmental reasons, leaving out claims that rights have been violated when the government has acted for environmental reasons. My study is limited to the selected cases and is not intended being an exhaustive discussion of cases in which the ECtHR has considered environmental matters. The first five chapters are mainly descriptive, even though analytical parts are included throughout the text.

Chapter six seeks to examine how the provisions of the ECHR could be interpreted by the ECtHR in the future, in order to promote and enforce environmental norms and principles more effectively than today. I will, for example, investigate the possibility and appropriateness of applying general principles of international environmental law when interpreting the provisions of the ECHR. I have though delimited this discussion by focusing mainly on the precautionary principle. Accordingly, chapter six addresses the third question of the questions forming the basis for this thesis.

In chapter seven I will return to the questions posed under 1.2 and summarize the conclusions that I have reached.

2 The interrelationship of human rights and environmental protection

"Maintaining a rift between environmental and Human Rights protection areas duplicates efforts, thins available resources, and misses the opportunity to strengthen and leverage actions"[8]

Environmental damage has direct effects on the enjoyment of some human rights, and, conversely, the violation of several human rights is liable of impairing the environment. The fact that numerous advocates of human rights and the environment respectively have discussed and analyzed the overlapping character of these two areas of law, indicates an undeniable interrelationship . This chapter (and chapter three), describing the link between human rights and environmental protection, aims at contextualizing the following discussion on integrating international environmental norms and principles into the ECHR.

The interrelationship between human rights and environmental protection is complex and based on the fact that they have both common and different interests, and that in some respects they have conflicting objectives, while in others they share the same objectives. The essential concern of human rights law is to protect individuals and groups alive today, while the purpose of environmental law is to "sustain life globally by balancing the needs and capacities of present generations of all species with those of the future". Hence, in a way they both ultimately seek to "achieve the highest quality of sustainable life for humanity within the existing global ecosystem".[9]

The international protection of human rights and environmental protection are two of the most rapidly developing areas of international law, representing fundamental values and aims of our more and more globalized society. Even if it can be concluded that these two spheres of international law have some common aims, the issue on how to best interrelate them is a controversial one. Advocates of human rights only seem to concern for the environment when it is advantageous for the individual's dignity and well-being. For advocates of the environment, on the other hand, human rights are of interest only to the extent that they may serve as a tool for environmental protection.[10]

[8] Taillant, 8.
[9] Kiss, Shelton, 187.
[10] Craven, 93-98 and Kiss, Shelton, 141-145.

2.1 Human Rights in International Environmental Instruments

The Stockholm Declaration on the Human Environment of 1972[11] was the first international instrument to pronounce the link between the enjoyment of human rights and the quality of the environment.[12] Principle 1 of the Stockholm Declaration thus reads:

> "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"

The wording of Principle 1 does not include a human right to a healthy environment. However, it emphasizes that the protection and improvement of the quality of the environment is a prerequisite for the full enjoyment of human rights.

At the time of the Stockholm Conference, environmental concern had merely emerged as a pressing issue on the international agenda and the international environmental law was poorly developed.[13] It can thus be presumed that, in the absence of other viable options for remedying environmental harm, human rights law was considered as an excellent alternative.

A second global conference on the environment, under the title United Nations Conference on Environment and Development (UNCED), was held in Rio de Janeiro in 1992.[14] The very name of the conference reflects a modified approached since the Stockholm Conference on the Human Environment.

Working Group III of the UNCED Preparatory Committee considered the inclusion of a right to an environment of a specified quality in the Rio Declaration. The participants thus failed to reach consensus on the issue, shifting attention away from this broad approach to one identifying those human rights whose enjoyment could be considered a requirement of the protection and improvement of the quality of the environment.[15] The Rio Declaration, in its avoidance of rights language, proclaims in its Principle 1 that human beings are "entitled to a healthy and productive life in harmony with nature."

---

[11] Declaration of the United Nations Conference on the Human Environment (Stockholm), UN Doc. A/CONF/48/14/REV.1 [hereinafter "the Stockholm Declaration"].
[12] Desgagne, 2.
[13] *See* for example Birnie, Boyle, 37-38.
[14] The Rio Declaration on Environment and Development, A/CONF. 151/26 (Vol. 1). [hereinafter the Rio Declaration]
[15] Kiss, Shelton, 146-147.

Many of the subsequent international environmental instruments has proclaimed the right to live in a balanced, decent, healthy, satisfactory, sound or secure environment. Such provisions have though tended to appear within non-legally binding resolutions and declarations adopted at conferences for environmental co-operation, rather than in legally binding international treaties.[16]

The focus during and after the Rio Declaration has been on articulating procedural rights, especially those of environmental information, public participation, and remedies for environmental harm.[17] Principle 10 of the Rio Declaration accords individuals the rights to appropriate access to environmental information and participation in decision-making and judicial and administrative proceedings.

2.2 Environmental Protection in Human Rights Instruments

The Stockholm Conference coincided with the Teheran Conference on Human Rights, which was the first international conference organized by the United Nations. The Teheran Conference marked the 20th anniversary of the adoption of the Universal Declaration of Human Rights and led to the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. During the Teheran Conference it was proclaimed that all human rights are interdependent and indivisible.[18]

Some of the subsequent international human rights conventions have included provisions referring to the environmental quality aspect of the enjoyment of human rights. The Convention on the Rights of the Child provides, for example, that states are to take appropriate measures "to combat disease and malnutrition… taking into consideration the dangers and risks of environmental pollution."[19] Another example is the 1981 African Charter of Human and People's Rights, which recognizes the rights of "all peoples" to a "generally satisfactory environment favorable to their development." Among the regional human rights protection systems, the Protocol of San Salvador to the American Convention on Human Rights, also grants an individual human "right to live in a healthy environment."[20]

[16] Pevato, 313. See also under 2.3.
[17] Kiss, Shelton, 146-147.
[18] Proclamation of Teheran, proclaimed by the International Conference on Human Rights at Teheran on 13 May 1968, paragraph 13.
[19] Desgagne, 264.
[20] *See* Desgagne, 264 and Pevato, 313.

2.3 The legal status of a human right to a healthy environment

This section is aimed at the discussion of creating an autonomous substantive right to environment, independent from other human rights claims. It should, however be noted that this chapter, being an introductory one, only intends to give a brief view of this complex issue.

The existence of a human right to a clean and healthy environment is controversial both in the doctrine and in the international community debate. Even if various formulation of a right to a healthy environment, evolving from Principle 1 of the Stockholm Declaration, have been included in several international instrument, the status of the "right to environment" in international law is still unclear. The Rio Declaration, which was intended to advance the concept of State's rights and responsibilities with regard to the environment, is one of the few relevant international texts on the right to a healthy environment. Even if the Rio Declaration is not binding per se, it can be argued that it, at least partly, constitutes international customary law. As was explained in section 2.1, the focus of the Rio Declaration is on securing procedural rights for individuals. Principle 10 of the Rio Declaration provides:

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

On 27 June 2003 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1614 (2003) on Environment and Human Rights. The relevant parts of this recommendation read:

"9. The Assembly recommends that the Governments of member States:

i. ensure appropriate protection of the life, health, family and private life, physical integrity and private property of persons in accordance with Articles 2,3 and 8 of the European Convention on Human Rights and by Article 1 of its Additional Protocol, by also taking particular account of the need for environmental protection;
ii. recognize a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level;
iii. safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention;…"

As was mentioned above, on the regional level, the right to a healthy environment is contained in both the African and Inter-American human rights systems. Additionally, numerous national constitutions throughout the

world include a right to a clean and healthy environment and several national tribunals have explicitly recognized this right.[21]

Despite the trend in international law towards creating an autonomous human right to a healthy environment, there is yet no globally-adopted instrument or UN general Assembly Resolution agreeing upon the formulation of such a right. Hence, the recognition of a right to environment ultimately depends upon the willingness of states to give up sovereignty and establish duties to protect the right. In this context it is worth mentioning that the U.S has refused to sign the Protocol of San Salvador, which recognizes the right to a healthy environment. It can also be argued that the definition of a right to environment should include minimum standards for environmental protection, such as substantive environmental standards to restrict harmful emissions.[22]

The concept of a substantive right to environment has generated considerable doctrinal debate. Some authors mean that a right to environment inherently belong to the human rights agenda, simply because human survival depends upon a safe and healthy environment.[23] Such a right would, according to Birnie and Boyle, "legitimize international supervision of the whole range of a state's domestic environmental policies, and not merely of their extraterritorial effects.."[24]

Other writers have underlined the vagueness of terms like "healthy", "decent" and "environment". Another critical opinion is, that by recognizing a *human* right to environment, other aspects, such as ecological balance and respect of other species, would risk being ignored. It has thus been argued that a right to an environment of a certain quality does not belong within the sphere of human rights. The issue is simply too complex, containing both temporal and geographic elements, such as the fact that nature does not respect political boundaries, which are absent from other human rights.[25]

It can be maintained that the current status of a right to a healthy environment as a universally recognized and accepted human right norm remains ambiguous.

Environmental degradation may though, as this thesis intends to address, interfere with an individual's traditional human rights to such an extent as to violate those rights. Individuals living in unhealthy environments may, in other words, be prevented from exercising and enjoying fundamental international human rights. While some writers mean that the recognition of a right to environment would help safeguard existing human rights[26], others

[21] Constitutional guarantees to the right to a healthy environment is, for example, found in Hungary, Ukraine, South Africa, India, Chile, Costa Rica, the Philippines and Turkey. *See* Kiss, Shelton, 174 and Hunter et Al., 1358-136.
[22] Kiss, Shelton, 174.
[23] *See* for example Pevato, 313 and Kiss, Shelton, 174.
[24] Birnie, Boyle, 190-191.
[25] Kiss, Shelton, 174.
[26] Eaton, 268.

argue that such a right would be unnecessary since the ultimate goals of a right to environment are already being encouraged without an expressly recognized right to environment.[27]

On the one hand, I believe it is questionable whether the recognition of a human right to environment would do any good, since the right to environment inherently is a cross-cutting issue that actually might benefit from being integrated with already recognized human rights. On the other hand, as is demonstrated below by the case of Okyay and Others v. Turkey, the establishment of a right to environment in national and international human rights law, can, under certain circumstances, actually help safeguard existing human rights.

However, as Shelton[28] puts it, the proclamation of a right to environment in several instruments does, at least, demonstrate a "general acceptance of the links between human rights and environmental protection."

3 Can a human rights approach benefit international environmental law?

This chapter aims at generally discuss and analyze how a human rights approach in international environmental law can benefit environmental protection. The chapter intends to give an account of some of the pros and cons of using a human rights approach to protect the environment, as opposed to today's regulatory approach, relying on scientific standards and technical considerations. Some of the doctrinal speculations on how indirect enforcement of international environmental norms and principles affect the creation of an international environmental court, will also be introduced. The chapter begins with addressing the absence of effective enforcement mechanisms in international environmental law. This should be seen as a background to why, in the first place, the question of introducing a human rights approach in international environmental law, has been raised.

More precisely, the chapter will address question number one and two of the questions forming the basis for the discussion in this thesis:

1) How does the trend of enforcing environmental norms and principles indirectly through an institution like the ECtHR, created for the protection of human rights, affect the establishment of effective international judicial mechanisms, created solely for enforcing globally norms of international environmental law?

[27] Pevato, 318.
[28] Shelton, *What Happened in Rio to Human Rights*?, 89-90.

2) Should the human rights system be used as a model for future legal strategy for protecting the environment?

3.1 Lack of effective enforcement mechanisms in international environmental law

This section is definitely not an exhaustive description and evaluation of the effectiveness of existing enforcement measures and sanctions of international environmental law, rather it shortly summarizes the views of the critics (i.e. the scholars maintaining that enforcement mechanisms much more powerful than today is needed to make states comply with their obligations under international environmental law).

Considering the limited success of enforcing rules of international environmental law against deviant states in the past, and the increasing understanding of the seriousness of global environmental threats, the escalating criticism of the absence of effective means of enforcing globally the norms of international environmental law, is certainly justified.[29]

The "standard model" when creating international environmental treaties can in general be described as "set commitments first, defer procedures for enforcement until later, and rely on "soft" (or nonexistent) measures for enforcing compliance."[30] Hence, the development within international environmental law has gone towards the creation of a system of conventions being enforced by "non-compliance procedures." The first non-compliance procedure was established as part of the Montreal Protocol on Substances that Deplete the Ozone Layer. It has since served as a model for subsequent multilateral environmental agreements (MEAs). Under the non-compliance procedure of the Montreal Protocol, a party that cannot meet its obligations may "self-report" its compliance problems to the Protocol's Implementation Committee. It the Committee finds that the party will not be able to meet its obligations, the Committee can prescribe additional assistance (including for example technical or financial assistance) to bring the party back into compliance. The Committee may also *recommend* punitive action against a non-complying party. Non-compliance procedures should, however, be seen as a complement to traditional dispute settlement procedures.[31]

Apart from these "non-compliance procedures", there is virtually no judicial mechanism to enforce globally the norms of international environmental law. Even if the ICJ theoretically has jurisdiction over environmental disputes, very few such disputes have been brought up by it over the last

[29] *See* Victor, 1, Murphy, 333 and McCallion, Sharma, 351-365.
[30] Victor, 1.
[31] Hunter, Salzman, Zaelke, 479-483.

forty years.[32] Moreover, only states may be parties in cases before the ICJ, with no standing afforded to individuals, corporations, or other NGOs.[33] As regards the protection of the marine environment, the States Parties to the Law of the Sea Convention (UNCLOS) can submit disputes concerning interpretation and implementation of the regulations to the International Tribunal for the Law of the Sea (ITLOS). According to Article 20 and 21, Annex VI, the Tribunal is opened to entities other than States. However, this regulation only enables a limited jurisdiction in the field of the "Area" (i.e. the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction)[34] Apart from the ICJ and ITLOS, international Courts and institutions such as the Permanent Court of Arbitration (PCA), the International Criminal Court (ICC) and the World Trade Organization, and regional fora such as the ECJ and ECtHR are potentially capable of addressing international environmental disputes. It can though be argued that these existing tribunals are insufficiently sensitive to international environmental law, since the judges or arbitrators of these courts have their main knowledges in other areas of law and are not specially trained in international environmental law. Consequently, it can be argued that there is an increasing demand of an international environmental court capable of issuing binding and enforceable decisions against states violating international environmental law.[35]

3.2 Advantages to using a human rights approach

There are several benefits deriving from the use of a human rights-based approach to environmental protection.

First, the recognition of "environmental rights" , based on the fundamental human needs for clean air and water, a stable climate system, and the ozone layer's protection from ultraviolet radiation can be argued to have the strength to combat the individual greed and short-term thinking that to a large extent characterize the inter-state commitments of today's international environmental law. A human rights approach, focusing on the individual, to international environmental law could also inspire more individuals and NGOs to participate in reforming international environmental law.

---

[32] issues of international environmental law was for example raised in the Gabcikovo-Nagymaros case (the case concerned environmental damage from diversion of the Danube River between Hungary and Slovakia). However, the ICJ declined to reach the environmental issue, preferring to resolve the dispute on the basis of a breach of a 1977 treaty between the parties.

[33] *See* Statute of the International Court of Justice, Art. 34(1), "Only States may be parties in cases before the Court."

[34] UNCLOS, Article 1 and Rest, *The Indispensability of an International Environmental Court* (1998), 63.

[35] *See* for example Murphy, 333 and McCallion, Sharma, 364-365 and Rest, 63.

Second, the inclusion of environmental protection in the human rights system can "provide a forum to debate, design, and implement environmentally sustainable national and international policies."[36] Hence, the well-established regional and international institutional instruments for the protection of human rights have been successful in promoting the respect for human rights, nationally as well as globally. National governments have often incorporated their international commitments of human rights in national law, and have devoted important institutional resources to them.

Third, the human rights system provide extensive enforcement mechanisms and remedies that could benefit environmental protection. In contrary to international environmental law and institutions, the human rights system already offer various courts, commissions, and other bodies where individuals can seek relief for harm caused by violations of their protected human rights.

Fourth, the human rights system allows the adoption of precautionary and interim measures in order to guarantee immediate relief in situations of emergency. The human rights system is therefore capable of supplying precautionary remedies for individual victims of environmental abuses.

Lastly, human rights claims are granted significant moral status in international policy-making. The attainment of a clean human rights record is very important in the context of state relationships. Incorporating environmental concerns in the human rights system would thus promote environmental concerns in the international debate.

3.3 Disadvantages to using a human rights approach

There are also possible disadvantages of a human rights approach.

First, it can be argued that human rights and environmental protection are difficult to combine since representing diverge interests: environmental protection is traditionally seen as a collective value, whose purpose is to "sustain life globally by balancing the needs and capacities of present generations of all species with those of the future", while the focus of human rights is to protect individuals alive today.[37]

Second, a simple rights-based approach may not be appropriate for complex environmental threats, which involve political and economic considerations. The present system of international environmental law, which is based on

[36] The World Conservation Union, 12.
[37] *See* for example Reid, 284 and Kiss, Shelton, 187.

inter-state commitments, is perhaps more appropriate for handling the resources and political will for long-term environmental management.

Third, It can be argued that a human rights approach to environmental protection is negative since environmental protection is rather a question of human responsibilities than human rights. Some proponents of this approach mean that instead of discussing a human right to the environment, ecological limitations should be introduced on human rights. "The objective of these limitations is to implement an eco-centric ethic in a manner which imposes responsibilities and duties upon humankind to take intrinsic values and the interests of the natural community into account when exercising its human rights."[38]

Fourth, the sporadic and inconsistent enforcement of international environmental law by institutions created for other purposes, can be seen as an obstacle/excuse for not creating an objective and truly impartial international environmental body to ensure the enforcement of international environmental law.

3.4 Concluding remarks

The problem of lack of effective sanctions for breaches of environmental obligations remains an enormous disadvantage of the present system. Hence, the absence of enforcement mechanisms in international environmental law can be compared to the former problem of impunity in international criminal law. This problem was resolved by the establishment of the International Criminal Court. Similarly, the nature of environmental norms require international cooperation and global enforcement to be effective. There is accordingly an immediate need of establishing effective international judicial mechanisms, whereby nonstate actors can address violations of international environmental law.

The main setback for the creation of an international environmental court is, apart from the general reluctance of sovereign states to subject themselves to sanctions, that there in fact are numerous international and regional institutions theoretically capable of addressing international environmental disputes. Logically, in order to convince states of creating an international environmental court, the inadequacy of existing international, regional and national judicial bodies have to be shown. In addition, it has to be demonstrated that the existing judicial bodies cannot be fixed so as to be made satisfactory, while at the same time the creation of a new tribunal would avoid those inadequacies.[39] Accordingly, chapters 5-7 seek to investigate whether the ECtHR is an appropriate institution for enforcing environmental norms and principles and whether it is possible to improve

[38] Taylor,309-310.
[39] Murphy, 333.

the Court's role in protecting environment-related human rights. For a better understanding of subsequent chapters, chapter 4 shortly describes the structure and process of the ECHR.

4 Structure and process of the ECHR

The ECHR, often referred to as the most effective system of international law for the protection of human rights[40], was drafted in the Council of Europe during 1949 and 1950, in the aftermath of World War II. The Convention was signed on 4 November 1950, and entered into force on 3 September 1953, after being ratified by eight countries: Denmark, the Federal Republic of Germany, Iceland, Ireland, Luxembourg, Norway, Sweden, and the United Kingdom.[41]

The ECHR created both the European Commission and Court of Human Rights. These institutions were established to guarantee the human rights included in the ECHR and its Protocols, the 1965 European Social Charter, and the 1989 European Convention for the Prevention of Torture and Degrading Treatment or Punishment. However, in 1998, the European Commission and Court of Human Rights were fused into one body –the "European Court on Human Rights".[42]

The ECtHR regularly finds nations in breach of their obligations under the ECHR and significantly, sovereign states have generally respected the adverse judgments of the Court.[43]

4.1 The former European Commission and Court of Human Rights

The European Commission and Court of Human Rights, created at the adoption of the ECHR in 1950, was independent bodies, working part-time and consisting of lawyers from the contracting states acting in their personal capacity.[44]

[40] *See* for example Janis, Kay and Bradley, 6.
[41] homepage of the European Court of Human Rights, http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+ratification+of+the+European+Convention+on+Human+Rights+and+Additional+Protocols/
[42] Article 19 of Protocol 11 set up the European Court of Human Rights, replacing the former Commission and Court with a single Court.
[43] Hunter et Al., 1329 and Janis et Al, 70.
[44] Cameron, 39.

The individual complaint procedure worked, until 1998, as follows. The Commission received applications from individuals or groups of individuals complaining that a state party had violated their protected rights. The Commission registered the applications and decided whether they were admissible (in other words, whether there was a *prima facie* case against the state). Approximately 90% of all applications were rejected at the admissibility stage, usually because the Commission considered that the complainant was not a "victim" of a violation of the ECHR, or because the acts complained of did not fall within any of the rights protected under the Convention.[45]

If an application was considered admissible, the Commission proceeded to investigate the facts of the case and the applicable law. At the same time, the Commission tried to secure a friendly settlement between the applicant and the State, which the application concerned. If failing to do so, the Commission submitted a report on the merits of the case, stating its opinion as to whether there had been a violation of the Convention or not. The report was then sent to the Committee of Ministers and within three months, the Commission, or a member state could refer the case to the Court. In 1990, Protocol 9 created a similar right for individuals. This right was, however, conditional upon permission from a panel of three judges. If the case was referred to the Court, the Court's decision was binding upon the respondent state.[46]

The Committee of Ministers was responsible for monitoring the respondent state's compliance with the Court's decision. Thus, if the case was not referred to the Court, the Committee of Ministers determined whether a violation of the ECHR had taken place. Its decision was binding upon the respondent state.[47]

However, in 1998, Protocol 11 replaced the Commission and Court of Human Rights with a single "European Court on Human Rights". This was part of a series of procedural reforms designed to improve the effectiveness of the Convention organs, and speed up the consideration of the ever increasing applications received by the Commission.[48]

4.2 Procedure of the ECtHR

Under the new system, the ECtHR is a full-time body. Individuals submit their applications directly to the Court and no cases may now be referred to the Committee of Ministers for decision (i.e. the jurisdiction of the Court is

[45] Cameron, 39.
[46] Cameron, 39-41.
[47] Cameron, 39-41.
[48] Cameron, 41.

exclusive). The Committee of Ministers will, however, continue to supervise the execution of judgments.[49]

Despite the changes made by Protocol 11, the Court has been overloaded by cases (in 2004 there were for example more than 44 000 applications) and as a consequence, Protocol 14 was adopted in 2004. This protocol was designed to increase the amount of time the judges have available for important cases, by making it easier to dismiss applications and by simplifying treatment of repetitive cases. [50] However, Protocol 14 has not yet entered into force.[51]

The Court's judgments are binding upon the respondent state, but do not as such bind other states.[52] Nevertheless, the judgment may, sooner or later, involve other states, making them change their laws and practices. Consequently, all states have an interest in reviewing the implications for their own laws of cases concerning other states. States may also ask to intervene in such cases, giving the Court their view of the disputed right.[53]

Formally, the Court is not bound by its earlier judgments. However, in reality, the Court seldom overrules or diverges significantly from its earlier decisions. When it does not follow its earlier case law, it normally explains why the two cases differ.[54]

According to Article 41, the Court may not only decide whether the Convention has been violated, it may also award damages to the injured party.[55]

4.2.1 Admissibility

Since the adoption of Protocol 14 in 2004, the Court is organized so that clearly inadmissible applications are dealt with by single judges, routine "repetitive" cases by committees, ordinary cases by the chambers and very important cases by the Grand Chamber. Protocol 14 also codified the Court's practice of deciding both the admissibility and the merits of case at the same time.[56]

---

[49] ECHR, Article 46.
[50] Cameron, 42.
[51] Article 19 of Protocol 14 provides "This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol…"
[52] ECHR, Article 46.
[53] ECHR, Article 36.
[54] Cameron, 61.
[55] Article 41 provides: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."
[56] Cameron, 50-51 and van Dijk et al, 105-106.

According to Article 34, "the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the *victim* of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

The victim requirement imply that the complainant must have suffered personally from the alleged violation. This might be as a direct result of State action, for example, if the applicant personally suffered treatment amounting to torture. Violations may also cause personal harm to the relatives of those whose rights have been directly violated. Here, the relatives would not be the direct victims of the abuse, but would qualify as indirect victims of a violation. For example, parents could claim to be victims if their child were tortured. Anticipated violations may also, under certain circumstances, be declared admissible if the potential victim can provide good evidence that the state will, in the future, violate his or her rights protected under the ECHR.[57]

The admissibility criteria are found in Article 35, which in 35.1 provides that "The Court may only deal with applications after all domestic remedies have been exhausted…and within a period of six months from the date on which the final decision was taken." It should be added that the applicant is only required to exhaust domestic remedies which are adequate or "effective and sufficient", i.e. capable of correcting the alleged breach of the applicant's Convention rights.[58] The exhaustion of local remedies rule respects states' sovereignty in that it gives states the opportunity to redress the matter by own means, before allowing the intervention of another state or of an international or regional tribunal. Non-exhaustion of domestic remedies is the reason for about half of all applications being declared inadmissible.[59]

The grounds of inadmissibility under Article 35 (2) have not proved to be that significant in practice.[60] Article 35 (2) provides that the Court shall not deal with anonymous applications or applications that are "substantially the same as a matter that has already been examined by the Court, or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

Under Article 35 (3)(a), the Court shall consider inadmissible any application which is "incompatible with the provisions of the Convention," "manifestly ill-founded" or which constitutes "an abuse of the right of individual application."

[57] Cameron 56-57. The issue of potential victims will be further discussed below under 6.3.2.
[58] Cameron, 58.
[59] Cameron, 58.
[60] van Dijk et al, 174.

Article 35 (3) (b) was added by Protocol 14 and provides that the Court shall declare inadmissible applications if it considers that "the applicant has not suffered a significant disadvantage, unless respect for human rights… requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal." This ground, moving focus from the objective insignificance of the issue to the subjective disadvantage, will most likely be difficult to apply. However, this criterion will not apply to applications declared admissible before the entry into force of Protocol 14. Moreover, the new admissibility criterion may only be applied by Chambers and the Grand Chamber of the Court.[61]

5 Environmental protection in the ECHR

This chapter intends to analyze the selected case law relating to environmental protection under the ECHR. It aims at examining how the Commission and the Court have envisioned the link between the enjoyment of human rights and the protection of the environment.

Since the ECHR does not provide for a right to environment, environmental issues has to be raised incidentally, through the assertion of protected rights. Nonetheless, the former Commission and the ECtHR have had a long history with environment-related cases. Environmental concerns have arisen before the Commission and the ECtHR in two categories of cases. Firstly, environmental damage can result in a violation of a substantive article, such as the right to respect for private and family life. Secondly, protection of the environment can be ensured through procedural rights, such as a right to information about activities that may cause environmental harm and the right to access to court and remedies.[62]

5.1 Integration through substantive rights

Substantive rights that have been invoked in connection with environmental concerns are principally those of the right to life, the right to respect for one's private life and home, and the right to the peaceful enjoyment of one's possessions.

[61] *See* Protocol 14, Article 20, and Cameron, 60.
[62] *See* for example Desgagne, 277 and Craven, 93-98.

5.1.1 Powell & Rayner v. United Kingdom[63]

Most of the early European cases concerning environmental norms and principles, involved noise pollution and were invoked under the right to privacy and family life (Article 8). *Powell and Rayner* is one of these cases, addressing many of the unresolved issues of earlier cases. Since the core of the Court's reasoning in this case concerns the application of Article 8 and not Article 13, it has been placed under the rubric of cases on substantive rights, instead of under the rubric of cases on procedural rights.

The applicants in this case, Richard John Powell and Michael Anthony Rayner, both had their homes situated relatively close to Heathrow Airport. Powell's property was situated several miles from the airport, while Rayner's house and farm was located only about one and a third miles west of, and in a direct line with, Heathrow's northern runway.

In their application to the Commission, Powell and Rayner alleged that the aircraft noise violated their right to respect for their private life and their home (Article 8), of their right of property (Article 1 of Protocol No. 1), of their right of access to the courts in civil matters (Article 6 §1) and of their right to an effective remedy under domestic law for alleged breaches of the ECHR (Article 13). The cases were declared admissible under Article 13, but inadmissible for the rest.[64]

The Commission distinguished between the situations of the applicants. It noted that Powell's house was located in an area of low noise, where 500 000 persons were suffering from the same or a higher level of noise. Rayners's house and farm, on the other hand, were situated in a high-noise zone where only 1500 persons were suffering from the same or a higher level of noise. Accordingly, in its report the Commission expressed the opinion that there had been a violation of Article 13 in relation to Rayner's claim under Article 8, but not in relation to any of the other claims.[65]

The Court first concluded that it had no jurisdiction to rule on the grievances under Articles 6 and 8, independently of their relevance within the context of Article 13. Accordingly, the Court was to rule on whether there had been domestic remedies available for the applicants' claims under Articles 6 §1 and 8, as required by Article 13, which reads:

> Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The Court went on concluding that Article 13 has been "consistently interpreted by the Court as requiring a remedy in domestic law only in

[63] Case of Powell and Rayner v. The United Kingdom (Application no. 9310/81), Strasbourg, 21 February 1990 [hereinafter Powell and Rayner].
[64] *Powell and Rayner*, § 25.
[65] *Powell and Rayner*, Report of Commission

respect of grievances which can be regarded as "arguable" in terms of the Convention". The Court meant that the majority of the Commission had acted inconsistent when reaching the conclusion that a substantive claim of violation was at one and the same time "manifestly ill-founded" for the purposes of Article 27 §2 (admissibility) and "arguable" for the purposes of Article 13.

The applicants' claim under Article 6 was directed against the limitation of liability set out in section 76 (1) of the British Civil Aviation Act 1982.[66] The Court pointed out, just like the Commission did in its admissibility decision, that "the effect of section 76(1) is to exclude liability in nuisance with regard to the flight of aircraft in certain circumstances, with the result that the applicants cannot claim to have a substantive right under English law to obtain relief for exposure to aircraft noise in those circumstances." The Court thus concluded that Article 13 "does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority.[67]

As to the claim under Article 8, the applicants insisted they had, as a result of excessive noise generated by air traffic in and out of Heathrow Airport, been victims of an unjustified interference by the United Kingdom with the right set forth in Article 8, which provides:

> "Everyone has the right to respect for his private…life and his home…
> There shall be no interference by public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of…the economic well-being of the country…"

Accordingly, the applicants questioned the noise levels permitted by the English air traffic regulations and the effectiveness of the Government's measures to reduce noise exposure.

In its Article 8 reasoning, the Court first pointed out, that it found it rather irrelevant in this case, whether Article 8 was analyzed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8, or in terms of an interference under paragraph 2, being able to be justified under the same paragraph (i.e. a negative duty on the State). Thus, according to the Court, the most important matter is that a fair balance is struck between the competing interests of the individual and of the community as a whole. Additionally, the Court asserted that the State enjoys a certain margin of appreciation in determining measures to be taken to ensure compliance with the ECHR.

---

[66] Section 76 (1) reads: "No action shall lie in respect of trespass or in respect of nuisance, by reasons only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flights, so long as the provisions of any Air Navigation Order or of any orders under section 62 above have been duly complied with and there has been no breach of section 81 below."

[67] *Powell and Rayner*, § 36.

As to the interests of the applicants, the Court ruled that there had been interference in the applicant's private sphere since "in each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home had been adversely affected by the noise generated by aircraft using Heathrow airport."[68]The Court was nevertheless to decide whether the interests of the community as a whole could justify this interference.

The Court, following the reasoning of the Commission, underlined the importance of international airports for a state's economy, stating that "the existence of large international airport, 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 economic well-being…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." [69]

The Court continued by describing the measures being taken by the responsible authorities to control, decrease and compensate for aircraft noise at and around Heathrow Airport. It concluded that such measures had taken due account of international standards established, development in aircraft technology, and the varying levels of disturbance suffered by those living around Heathrow Airport.[70] The Court also asserted that, even though section 76 (1) of the Civil Act 1982 limits the possibilities of legal redress open to the aggrieved person, the exclusion of liability in nuisance is not absolute. The exclusion only applies in respect of aircraft flying at a reasonable height and in accordance with the relevant regulatory provisions.[71]

Thus, according to the Court, it is not its duty 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 recognized as enjoying a wide margin of appreciation."[72] Consequently, the Court ruled that the United Kingdom had neither exceeded its margin of appreciation nor upset the required balance under Article 8.[73]

It can thus be derived from *Powell and Rayner* that the Court accepts that the economic well-being of a country is an excuse for a certain amount of environmental harm.

---

[68] *Powell and Rayner*, § 40.
[69] *Powell and Rayner* § 38.
[70] *Powell and Rayner*, § 43.
[71] *Powell and Rayner*, § 44.
[72]*Powell and Rayne,* § 45-46.
[73]*Powell and Rayner*, § 45.

5.1.2 Lopez Ostra v. Spain[74]

Lopez Ostra is considered as a ground-breaking decision by the ECtHR, opening the door for a more comprehensive environmental protection of the individual.[75]

The applicant in this case, a Spanish national called Mrs. Gregoria Lopez Ostra, and her daughter suffered serious health problems from the fumes of a tannery waste treatment plant, built with a State subsidy on municipal land, which operated twelve meters away from her home. The plant opened in July 1988 without a required license and without having followed the procedure for obtaining such a license. When it began operating, the plant malfunctioned, releasing gas fumes, pestilential smells and contamination, which immediately caused health problems and nuisance to the people living in the applicant's district. The town council evacuated the local residents and rehoused them free of charge in the town center during the summer. The authorities nevertheless allowed the plant to resume partial operation, and in October 1988, the applicant and her family returned to their flat where there were continued problems (the applicant finally sold her house and moved in 1992). Having attempted in vain to get the municipal authority to find a solution, the applicant turned to the domestic courts, seeking protection of her fundamental right. Thus, after having exhausted the remedies applicable to the enforcement of basic rights in Spain[76], Mrs. Lopez Ostra applied to the Commission on 14 May 1990.

In her application to the Commission, Mrs. Lopez Ostra complained of the municipal authorities' inactivity in respect of the nuisance caused by the waste-treatment plant. She claimed that she was the victim of a violation of the right to respect for her home that made her private and family life impossible (i.e. infringement of Article 8). Additionally, she claimed being victim of degrading treatment (Article 3). In its report of 31 August 1993, the Commission expressed the unanimous opinion that there had been a violation of Article 8 but not of Article 3.

The Spanish Government's preliminary objection was based on failure to exhaust domestic remedies (Article 35). The Government contended that the applicant should, in addition to instituting a proceeding for protection of fundamental rights, have instituted both criminal proceedings and ordinary administrative proceedings. The Court argued that:

> The ordinary administrative proceedings relate in particular to another question, the failure to obtain the municipal authorities' permission to build and operate the plant. The issue of whether SACURSA might be criminally liable for any environmental

[74] *Lopez Ostra v. Spain*, Application No. 16798/90, Strasbourg, 23 November 1994 [hereinafter *Lopez Ostra*].
[75] See for example McCallion, Sharma, 359, Sands, 301and Shelton, *Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, 163,
[76] The Supreme Court of Spain denied her appeal on a suit for infringement of her fundamental rights and her complaint with the Constitutional Court was dismissed as manifestly ill-founded.

health offence is likewise different from that of the town's or other competent authorities' inaction with regard to the nuisance caused by the plant.[77]

Accordingly, the Court concluded that the applicant had exhausted domestic remedies.

As to the alleged violation of Article 8, the Court first asserted, referring to *Powell and Raynar*, that it is not relevant whether the question of infringement is analyzed in terms of a positive duty on the State – to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8-, or in terms of a negative duty on the State – "interference by a public authority" to be justified in accordance with paragraph 2 of Article8 -, since those principles are broadly similar. Accordingly, the Court instead emphasized the importance of striking a fair balance between the competing interests of the individual and of the community as a whole, and the fact that, in any case, the State enjoys a certain margin of appreciation.[78]

Nevertheless, the Court went on concluding that it needs to "establish whether the national authorities took the measures necessary for protecting the applicant's right to respect for her home and for her private and family life under Article 8."

The Court then asserted that, even though the Spanish authorities were theoretically not directly responsible for the emissions in question, the town municipality allowed the plant to be built on its land and the State subsidized the plant's construction. The Court further concluded that the members of the town's council could not have been unaware that the environmental problems continued after the partial shutdown, referring to the fact that the question of the lawfulness of the building and operation of the plant has been pending in the Supreme Court since 1991. The Court noted that the applicant and her family had to bear the nuisance caused by the plant for over three years before they finally decided to move. They moved when they realized that the situation could continue indefinitely and when the applicant's daughter's doctor recommended they do so. Despite the fact that the town council had rehoused the applicant free of charge during the summer of 1988 and had borne the expense of renting a flat in the centre of the town, in which the applicant and her family lived from 1 February 1992 to February 1993, the Court concluded that this could not afford complete redress for the nuisance and inconvenience to which they had been subjected.

Thus, the Court ruled that, "despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being- that of having a waste-treatment plant- and the applicant's effective

[77] *Lopez Ostra*, § 37.
[78] *Lopez Ostra,* § 51.

enjoyment of her right to respect for her home and her private and family life. There has accordingly been a violation of Article 8."

The Court then turned to the alleged violation of Article 3, concluding that "The conditions in which the applicant and her family lived for a number of years were certainly very difficult but did not amount to degrading treatment within the meaning of Article 3."

In accordance with Article 50, the Court awarded Mrs. Lopez Ostra damages, court costs, and attorney's fees.

Lopez Ostra is mainly significant in that it is the Court's major decision on environmental harm as a breach of the right to private life and home. It can, be concluded that the court's concern in this case was less the nature of the damage to the environment and more the immediate effects of that damage upon the applicant. In other words, even if the ECtHR construed the right to privacy as guaranteeing against environmental pollution, it did at no point refer to any standards of international environmental law.

5.1.3 Guerra and others v. Italy[79]

In *Guerra*, the applicants all lived close to a chemical factory which used a process classified as "high risk" according to the criteria set out in a Presidential Decree, transposing into Italian law Directive 82/501/EEC on the major-accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population. The applicants meant that the use of this process could have led to explosive chemical reactions, releasing highly toxic substances. Accidents due to malfunctioning had already occurred in the past (the last one in 1976) and a 1988 report from a committee of technical experts, appointed by the District Council, established that the factory had refused to allow the committee to carry out an inspection. Additionally, results of a study by the factory itself showed that the emission treatment equipment was inadequate and the environmental-impact assessment incomplete.[80]

In 1989 the factory restricted its activity but was still classified as a dangerous factory covered by Directive 82/501. In 1993 the factory was ordered to improve its safety and in 1994 the factory stopped using the disputed process.[81]

The applicants instituted criminal proceedings in Italy, claiming that the air had been polluted by emissions of unknown chemical composition and toxicity from the factory. Thus, criminal proceedings were brought against

[79] Case of *Guerra and others v. Italy* (116/1996/735/932), Strasbourg, 19 February 1998 [hereinafter *Guerra*].
[80] *Guerra*, § 14-16.
[81] *Guerra*, § 17-18.

seven directors of the accused company for offenses relating to pollution caused by emissions from the factory and to non-compliance with a number of environmental protection regulations. On appeal, the Bari Court of Appeal concluded that there was no damage that gave rise to a claim for compensation.

The applicants submitted an application to the Commission on 18 October 1988. Relying on Article 2 of the ECHR, they meant that "the lack of practical measures, in particular to reduce pollution levels and major-accident hazards arising out of the factory's operation, infringed their right to respect for their lives and physical integrity."[82] Additionally, they claimed that the relevant authorities' failure to inform the public about the hazards and about the procedures, which, according to Italian law, should be followed in the event of a major accident, infringed their right to freedom of information as guaranteed by Article 10.[83]

On 6 July 1995 the Commission declared the application admissible as to the complaint under Article 10 and inadmissible as to the other complaints.

The Commission was of the opinion that Article 10 was one of the essential means of protecting the well-being and health of the local population in situations in which the environment was at risk. Accordingly, the Commission held that Article 10 imposed on States not just a duty to make available information to the public on environmental matters, but also a positive obligation to collect, process and disseminate such information, which by its nature could not otherwise come to the knowledge of the public. The protection afforded by Article 10 therefore had a preventive function with respect to potential violations of the ECHR in the event of serious damage to the environment and Article 10 came into play even before any direct infringement of other fundamental rights. The Commission referred specifically to the Chernobyl resolution, adopted by the Parliamentary Assembly of the council of Europe, which it said recognized, at least in Europe, a fundamental right to information concerning activities that are dangerous for the environment or human well-being.[84]

Consequently, in its report of 29 June 1996, the Commission expressed the opinion by twenty-one votes to eight that there had been a breach of Article 10.

The Italian Government asked the Court to dismiss the application for failure to exhaust domestic remedies and, in the alternative, to hold that there had been no violation of Article 10. The applicants, on the other hand, asked the Court to hold that there had been a violation of Articles 10, 8 and 2 of the ECHR.[85]

---

[82] *Guerra*, § 35.
[83] *Guerra,* § 35.
[84] *Guerra*, § 52.
[85] *Guerra*, § 37-38.

Having concluded that "a complaint is characterized by the facts alleged in it and not merely by the legal grounds or arguments relied on", the Court held that it had jurisdiction to consider the case under Articles 8 and 2 of the ECHR as well as under Article 10.[86]

The Court first considered the alleged violation of Article 10, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Before considering the merits of the complaint under Article 10, the Court commented on the Government's preliminary objection of failure to exhaust domestic remedies. It asserted that the remedies that the Government claimed that the applicants should have exhausted[87] would not have enabled the applicants to achieve their aim.

The Court then held that it did not agree on the Commission's view of Article 10. Instead, it emphasized, referring to its earlier case law, that freedom to receive information, "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion."[88] The Court consequently held that Article 10 was not applicable.

The Court then turned to the alleged violation of Article 8. Referring to the fact that the factory was classified as being high-risk in 1988 and that an accident, which resulted in 150 people being hospitalized, had occurred in 1976, the Court concluded that the toxic emissions had direct effect on the applicant's right to respect for their private and family life.

---

[86] *Guerra*, § 44-46.
[87] The Government argued that the applicants should have complained to a criminal court about the lack of relevant information from, in particular, the factory, whereas such omissions constituted and offence under Italian law. Additionally it argued that the applicants should have made an application under the Code of Civil Procedure.
[88] *Guerra*, § 53.

The Court went on, explaining that, "although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life."[89] Thus, referring to Lopez-Ostra, the Court contended the need for establishing "whether the national authorities took the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life as guaranteed by Article 8."[90]

The Court emphasized that the applicants had waited until 1994 (that is, until the factory ceased using the disputed process) for essential information that would have enabled them to assess the risks in the event of an accident at the factory.[91]

The Court ruled, therefore, that Italy did not fulfill its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8.

Having found a violation of Article 8, the Court declared it unnecessary to consider the case under Article 2.[92]Five separate opinions were however annexed to the judgment.

The concurring opinion of Judge Palm, joined by 5 other judges, concerned the applicability of Article 10. Judge Palm pointed out that "under different circumstances the State may have a positive obligation to make available information to the public and to disseminate such information which by its nature could not otherwise come to the knowledge of the public."[93]

Similarly, the concurring opinion of Judge Jambrek meant that Article 10 could have been applicable in this case, dependent upon the condition that the applicants had "requested the specific information, evidence, tests, etc., be made public and be communicated to them by a specific government agency." Accordingly, if a government did not comply with such a request, giving no good reasons for the noncompliance, such behavior would be considered equivalent to an act of interference by the government under Article 10.

Hence, although the Court found that Article 10 was not applicable, eight of the twenty judges indicated in separate opinions a willingness to consider positive obligations to collect and disseminate information in some circumstances.

---

[89] *Guerra*, § 58.
[90] *Guerra,* § 58.
[91] *Guerra* §60.
[92] *Guerra*, § 62.
[93] *Guerra,* concurring opinion by Judge Palm.

The concurring opinion of Judge Jambrek is also interesting in that it observes the possible application of Article 2 in this case. Article 2 reads:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save…"

According to Jambrek, the protection of health and physical integrity is "as closely associated with the "right to life" as with the "respect for private and family life".

Judge Jambrek then made an analogy with the Court's case law on Article 3 concerning the existence of "foreseeable consequences". Hence, the Court has held that it will admit a case if *substantial grounds* has been shown for believing that there is a real risk of treatment contrary to Article 3. Jambrek argued that "if information is withheld by a government about circumstances which foresee ably, and on substantial grounds, present a real risk of danger to health and physical integrity, then such a situation may also be protected by Article 2: "No one shall be deprived of his life intentionally""[94]

This analogy made by Judge Jambrek is significant in that it suggests a more extensive application of the precautionary approach taken by the Court concerning potential violations of Article 3. The question of a more wide-ranging application of the precautionary principle will be further observed in chapter six.

Judge Walsh also maintained, in his separate opinion, that there was a violation of Article 2 in the present case. In his view Article 2 also guarantees the protection of the bodily integrity of the applicants. "The wording of Article 3 also clearly indicates that the Convention extends to the protection of bodily integrity."

5.2 Integration through procedural rights

The resistance of the international community to formulate and recognize a human right to environment has resulted in the Rio Declaration and other global instruments identifying procedural rights, especially the right to environmental information, public participation, and remedies for environmental harm. Likewise, protection of the environment may be ensured through procedural rights protected by the ECHR, namely the right to a fair trial, the right to receive information, and the right to an effective remedy.

[94] *Guerra*, concurring opinion of Judge Jambrek.

5.2.1 Balmer-Schafroth and others v. Switzerland[95]

The applicants in Balmer-Schafroth were 10 Swiss nationals, living in a zone within four and five kilometers from the nuclear power station at Muhleberg in the Canton of Berne. The Bernische Kraftwerke AG, a company that had operated the power station since 1971, applied in November 1990 for an extension of its operating license for an indefinite period and for the permission to increase production by 10%. As a response, more than 28 000 objections from people living in Switzerland, Germany and Austria, were sent to the Federal Energy Office, requesting the Federal Council to refuse an extension of the operating license and to order the immediate and permanent closure of the power station. The petitioners argued that the power station did not meet current safety standards. Consequently, they argued, there was an increased risk of an accident occurring, threatening the life and health of the local population. An additional request, that the authorities should obtain further data and in the meantime take certain provisional measures, was rejected by the Federal Department of Transport, Communications and Energy. On 14 December 1992, the Federal Council dismissed all the objections as being unfounded and granted an operating license until 31 December 2002 and a 10% increase in production, both subjected only to compliance with various specified safeguards. The Federal Council argued in its report that, although the power station was 20 years old and no longer met current technical standards, it could be maintained and modernized so that it could continue to operate quite safely.[96]

Thus, the applicants in the present case submitted an application to the Commission, alleging a violation of the ECHR based on the fact that:
1. Since only the Federal Council was competent to entertain their complaints, and since the Federal Council was merely an organ of the Executive, they had not been given access to a "tribunal" within the meaning of Article 6 and because the procedure of the Federal Council had not been fair; and
2. They had not been given an effective remedy in accordance with Article 13, enabling them to complain of a violation of Articles 2 and 8 before a national authority.[97]

The Commission declared the application admissible on 18 October 1995 and, in its report of 18 April 1996, it ruled that there had been a violation of Article 6(1) and that no separate issue arose under Article 13.

The case was then referred to the Court by both the Commission and by Switzerland. Switzerland requested the Court to hold that it had not violated

[95] Case of *Balmer-Schafroth and others v. Switzerland*, Strasbourg, 26 August 1997 [hereinafter *Balmer-Schafroth*).
[96] *Balmer-Schafroth*, § 8-11.
[97] *Balmer-Schafroth*, § 20.

the ECHR in the present case, putting forward three preliminary objections: (i) that the applicants could not be considered victims within the meaning of Article 25, because the consequences of the violations were too remote to affect them directly and personally, (ii) that they had failed to exhaust domestic remedies, and (iii) that Article 6 (1) was, in any case, inapplicable.

The Applicants requested the Court to find a violation of Articles 6 and 13, (basing their claims on the same facts as in theirs application to the Commission), and asked for Switzerland to be given an opportunity to put right that violation by reopening the proceedings.

Regarding Switzerland's first preliminary objection, the Court argued that, according to its case law, the word "victim" in Article 25 means the person directly affected by the act or omission in issue. There is, however, no requirement of the existence of actual prejudice. Accordingly, the applicants were, without having suffered any quantifiable harm, considered victims within the meaning of Article 25.

The focus of the Court was the alleged violation of Article 6 (1), which, in part, provides:

> "In the determination of his civil rights and obligations.., everyone is entitled to a fair…hearing…by a…tribunal…"

According to the Court's established case law, for the element of "civil" in Article 6 (1) to be applicable, there has to be a "dispute over a right that can be said, at least on arguable grounds, to be recognized under domestic law." Additionally, 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."

Switzerland argued that, since the applicants' claims concerned their physical integrity, they did not relate to "civil rights and obligations." The Court agreed that the right, on which the applicants relied, "was the right to have their physical integrity adequately protected from the risks entailed by the use of nuclear energy." It further considered that this right is recognized in Swiss law under section 5 (1) of the Nuclear Energy Act and in the Federal Constitution under the right to life.

The Court went on, considering whether the right concerned had been the subject of a "genuine and serious dispute." Switzerland maintained that there was no "genuine and serious dispute" since the matter was essentially non-justiciable. This was evidenced by the fact that the issue was highly technical and involved a moral and political responsibility that should be upheld by the political authorities and not by the courts. Switzerland lastly added, "…if every decision capable of affecting a person's pecuniary interests had, in the last instance, to be taken by a court, democratic political debate would become meaningless."[98]

[98] *Balmer-Schafroth*, § 35.

The applicants, on the other hand, argued that "judicial evaluation of technical issues was part of the court's ordinary daily work in cases concerning buildings, the environment or sites where hazardous materials were produced." Accordingly, in such cases, the court is expected to seek the assistance of an impartial expert to assess whether a particular risk was inevitable, or whether it could be avoided or minimized.[99]

The Court substantially agreed with the applicants' view on this issue. It argued that the fact that the decision had to be based on highly technical data does not, in itself, prevent application of Article 6. It further noted that the purpose of the data was simply to enable the Federal Council to determine whether the conditions, laid down by law, for the grant of an extension, had been met. Thus, since this was what the Federal Council had done, its decision was "more akin to a judicial act than to a general policy decision."[100]

Having ruled that the dispute was genuine and serious, it remained for the Court to decide whether the outcome of the proceedings were "directly decisive for the right asserted by the applicants and in particular whether the link between the Federal Council's decision and the applicants' right to adequate protection of their physical integrity was sufficiently close to bring Article 6§1 into play, and was not too tenuous or remote."[101]

The Court took the view that, although the applicants did claim in front of the Federal Council that the power station had certain construction defects and did not satisfy current safety standards, "… they failed to show that the operation of Muhlberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent."[102] In other words, the Court meant that the effects on the population of the measures, which the Federal Council could have ordered to be taken, remained hypothetical. It concluded, therefore, that:

> "Neither the dangers nor the remedies were established with a degree of probability that made the outcome of the proceedings directly decisive within the meaning of the Court's case-law for the right relied on by the applicants… the connection between the Federal Council's decision and the right invoked by the applicants was too tenuous and remote."

Having found that Article 6 §1 was not applicable, the Court finally concluded that neither was Article 13 (as has been mentioned above, it takes a violation of the Convention in order to apply Article 13).

However, this decision was only held by a majority of twelve votes to eight. The joint dissenting opinion of Judges Pettiti, Gölcuklu, Walsh, Russo, Valticos, Lopes Rocha and Jambrek took the view that Article 6 § 1 was

[99] *Balmer-Schafroth*, § 36.
[100] *Balmer-Schafroth*, § 37.
[101] *Balmer-Schafroth*, § 39.
[102] *Balmer-Schafroth*, § 40.

applicable and that it had been violated. The minority meant, to begin with, that the majority, when relying on the "directly decisive" test, had gone against the Court's settled case law.

The minority argued that the Court's case law demonstrates that, where the rights of persons in need of protection from danger or harm are contested, any potential victim is entitled to an effective remedy before an independent and impartial tribunal. The minority asserted that there was no need for the applicants to show *a priori* that danger was imminent:

> For Article 6 to be applicable an applicant does not need to prove at the outset that a risk exists or what its consequences are; it suffices if the dispute is genuine and serious and there is a likelihood of risk and damage. It may suffice for finding a violation that there is proof of a link and of the potential danger.

In its reasoning, the minority relied on the case *Klass and Others v. Germany,*[103] in which the Court ruled, in relation to Article 13, that claims need only to be "arguable" in order to establish the existence of a right to an effective remedy. The minority also referred to general environmental principles:

> The majority appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle and the principle of conservation of the common heritage…where the protection of persons in the context of the environment and installations posing a threat to human safety is concerned, all States must adhere to those principles.

This argument of the minority is highly significant in that it suggest that when reading the provisions of the ECHR, the Court should take into account substantive principles of environmental law. In Chapter five, I will further discuss the possibility of applying general principles and rules of international environmental law when interpreting the ECHR.

Finally, the minority opinion meant that, even retaining the "directly decisive" test, the special hazardous nature of nuclear power plants has to be taken into account. It argued that the majority had not done so, with the effect that the majority's position in reality meant that the local population had to be actually irradiated before being entitled to exercise a remedy. According to the minority, this was inconsistent with the Council of Europe's Convention on Civil Liability for Damage resulting from Activities Dangerous to the environment, which stresses that hazardous installations need to be "obviated by new international-law measures and through the exercise of effective remedies."[104] Additionally, the minority pointed out that a number of European national legal systems have

[103] Series A, No. 28 (1978).
[104] *Balmer-Shafroth*, Dissenting opinion of judges Pettiti, Gölcuklu, Walsh, Russo, Valticos, Lopes Rocha and Jambrak.

developed extensive review machineries for dealing with disputes of this type:

> It can be said that the national law of European States has raised the "standard" of court protection to a very high level and that the "standard" of the protection afforded by the European Convention on Human Rights cannot be lower.[105]

While it is fair to question why the Court did not discuss the hazardous nature of the nuclear power plant being licensed, it has to be remembered that, in the present case, the majority simply concluded that Article 6 was not applicable and did not consider whether the applicants had been given a fair hearing.

5.2.2 Okyay and Others v. Turkey[106]

The applicants in this case were all lawyers living in the Turkish city of Izmir, which is situated approximately 250 kilometers from the site of three thermal-power plants. The applicants argued that it was their constitutional right to live in a healthy and balanced environment, and their duty to ensure the protection of the environment and to prevent environmental pollution.

The right to a healthy and balanced environment is found in Article 56 of the Turkish Constitution, which provides:

> "Everyone has the right to live in a healthy, balanced environment. It shall be the duty of the State and the citizens to improve and preserve the environment and to prevent environmental pollution. …The State shall perform this task by utilizing and supervising health and social welfare institutions in both the public and private sectors. …"

The Turkish Supreme Administrative Court had ordered to shut down these power plants in June 1998. Nevertheless, by a decision in September 1998, the Council of Ministers, composed by the Prime Minister and other cabinet ministers, decided that the three power plants should continue to operate. The Council of Ministers ignored the constitutional obligation to comply with court decisions and to enforce them within thirty days following service of the decision, arguing that the closure of the plants would give rise to energy shortages and loss of employment and would thus affect the region's income from tourism.[107]

Relying on Article 6 §1 of the ECHR, the applicants alleged that their right to a fair hearing had been breached on account of the national authorities' failure to implement the administrative courts' judgments.[108]

---

[105] *Balmer-Shafroth*, Dissenting opinion of judges Pettiti, Gölcuklu, Walsh, Russo, Valticos, Lopes Rocha and Jambrak..
[106] Case of *Okyay and Others v. Turkey* (Application no. 36220/97), Judgement, Strasbourg, 12 July 2005, FINAL 12/10/2005 [hereinafter *Okyay*].
[107] *Okyay*, §35-36.
[108] *Okyay*, § 60.

On the applicability of Article 6, Turkey referred to the Court's considerations in *Balmer-Schafroth*, arguing "there was no connection between the impugned power plant's conditions of operation and the alleged infringement of the applicant's civil rights." Accordingly, Turkey meant that the result of the proceeding at issue was not *directly decisive* for any of the applicants' civil rights.[109]

Additionally, Turkey meant that the applicants were not victims within the meaning under Turkish law. The applicants had merely alleged a violation of their "interests" before the domestic courts, whereas Turkish law only recognized as victims those whose "rights" had been violated.[110]

The applicants disputed Turkey's claims, arguing that they had been concerned for the protection of the environment in the Aegan region of Turkey, where they lived. They also asserted that the Government's failure to implement the domestic courts' decision had caused them emotional suffering and contravened the principle of the rule of law.[111]

The Court reiterated, referring to *Balmer-Shafroth*, that for the element of "civil" in Article 6 (1) to be applicable, there has to be a "dispute over a right that can be said, at least on arguable grounds, to be recognized under domestic law." Additionally, 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 outcome of the proceedings must be directly decisive for the right in question."[112]

The Court first asserted that the right to protection against damage to the environment caused by power plants' hazardous activities is clearly recognized in Turkish law. Further, the Court simply stated, "it follows that there existed a genuine and serious dispute."[113]

As to whether the right at issue was a "civil right", the Court referred to the findings of the domestic courts. It simply argued that the environmental pollution caused by the three power plants was established by the domestic courts on the basis of an expert report and that "the outcome of the proceedings… may be considered to relate to the applicants' civil rights."[114] Thus, the Court noted that the concept of "civil right" under Article 6 § 1 couldn't be interpreted as limiting an enforceable right in domestic law within the meaning of Article 53 of the Convention. [115] Accordingly, the Court considered Article 6 applicable.

---

[109] *Okyay*, § 61.
[110] *Okyay*, §62.
[111] *Okyay*, §63.
[112] *Okyay*, § 64.
[113] *Okyay*, § 63.
[114] *Okyay*, §§ 66-67.
[115] Article 53 provides: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

The Court meant that this was why it considered this case as different from *Balmer-Shafroth*, in which the applicants had been unable to secure a ruling by a tribunal on their objections to the extension of the operating permit of the power plant in question.

The Court went on to consider the compliance with Article 6 §1. It noted that the execution of a judgment given by a court has to be regarded as an integral part of the "trial" for the purposes of Article 6, since; otherwise, the right of access to a Court would be rendered illusionary. Accordingly, the Court concluded that, since the Turkish authorities had failed to comply with the national courts' judgments, there had been a violation of Article 6 §1.

5.3 Concluding remarks

The judgment of *Powell and Rayner* demonstrates a reluctance of the ECtHR to allow environmental concerns of a private person to be of stronger interests than the economic concerns of the state, especially as the government in this case was able to point to its compliance with international standards concerning noise from aircraft. Hence, the case of *Powell and Raynar* suggested that a wide margin of appreciation is left to the government when striking the balance between the competing interests of the individual and of the state as a whole.

Since *Powell and Rayner*, however, the ECtHR has been more open to environmental claims, especially in cases concerning claims under Article 8. The Court's most important environment-related case under Article 8 is *Lopez-Ostra*. This case was though different from *Powell and Rayner*, since in *Powell and Rayner* the government was in compliance with international standards, justifying the economic concerns of the state, while in *Lopez-Ostra*, the respondent state could hardly refer to an overriding economic interest, since the polluting activity in question was violating the state's own law. Thus, in *Lopez-Ostra*, the Court found a violation of Article 8 since there was a combination of a clear and significant risk to health and serious impingement on private life and home and a lack of timely and effective steps to deal with the situation. It also confirmed that States bear responsibility for the activities of private companies, where such are subject to regulation from local authorities.[116]

In *Guerra* the Court appears to have strained to avoid overturning its prior case law interpreting Article 10. Despite the fact that the basis of the complaint was the government's failure to provide environmental information, the Court, citing the *Lopez-Ostra* case, relied on article 8.

[116]See Ovey, White, 219 and Reid, 286.

However, there are reasons for maintaining that the Court's statement on Article 10 does not entirely close the door for reading Article 10 as imposing on a state positive obligations to collect and disseminate information concerning activities that are dangerous for the environment and/or human well-being: "…that freedom cannot be construed as imposing on a State, *in circumstances such as those of the present case*, positive obligations to collect and disseminate information of its own motion". The separate opinions of eight of the twenty judges and the Commission's conclusion strengthen this view. Moreover, even if the Court declined to consider whether the right to life guaranteed by Article 2 had been violated, it is significant that the Concurring opinion of Judge Jambrek suggests that the precautionary approach taken by the Court when dealing with potential violations of Article 3, should be extended to include potential violations of Article 2.

The conclusion to be drawn from the majority's decision in Balmer-Schafroth is that the ECHR does not obligate states to submit licensing decisions of nuclear power installations to judicial review, unless there is some immediate and obvious danger to the enjoyment of an individual's civil rights. It can thus be questioned how to establish such a danger; will it be limited to cases where the power station has a history of accidents, or, as argued by the minority, to situations where individuals have already been irradiated? The minority's reference to general principles of international environmental law, such as the precautionary principle, is significant in that it indicates that the court might be open for a more environment-friendly approach in the future.[117] The minority thus meant that application of the precautionary principle in Balmer-Schafroth would have taken into account the particularly hazardous nature of nuclear power plants, resulting in a less rigorous application of the "directly decisive" test.

Okyay demonstrates that failure by governments to take steps to enforce judgments obtained by applicants against polluters may more clearly raise issues under Article 6. The case also shows that the establishment of a right to environment in national and international law, can, under certain circumstances, actually help safeguard existing human rights.

To sum up, the human rights guaranteed in the ECHR have been useful primarily when the environmental harm consists of pollution. Other environmental issues such as biological diversity, nature conservation and resource management are more difficult to bring under a human rights claim. From an environmental perspective, the assertion of substantive rights, such as the right to respect for one's private life, appears to offer a limited opportunity to promote the protection or improvement of the environment in general. Hence, the ECtHR has logically been looking for the *consequences* of environmental harms on human beings or their assets and not for their *causes*. On the other hand, procedural rights, such as the right to a tribunal and the right to information has the potential of providing

[117] The applicability of general international environmental principles will be further discussed in chapter five.

a more wide-ranged oppurtunity to promote protection of the environment in general.[118] This was indicated in the Commission's reasoning in *Guerra*, referring to the Chernobyl Resolution, it argued that the protection afforded by Article 10 have a preventive function with respect to potential violations of the ECHR in the event of serious damage to the environment and Article 10 come into play even before any direct infringement on human rights. However, the Court did not agree on the Commission's view.

The environmental protection derived from the ECHR is limited by the fact that a *direct* link between the environmental harm and the infringement of the applicant's protected right must be established. Additionally, both the victim requirement[119] and the limited applicability of the guaranteed rights to potential interference make it difficult to ensure the prevention of environmental damage through the assertion of protected rights.

6 The future role of the ECtHR in promoting environmental norms

This chapter will address question number three of the questions forming the basis for the discussion in this thesis: how can the ECtHR apply the provisions of the ECHR in the future to protect environment-related human rights more effectively than today?

One way of interpreting the provisions of the ECHR in a more "environment-friendly" manner would be to take into account substantive principles and rules of international environmental law. The following two sections will thus discuss the possibility and appropriateness for the ECtHR to apply general principles of international law when interpreting the ECHR.

6.1 Using environmental principles when interpreting the ECHR

The minority of eight Judges in Balmer-Schafroth was of the opinion that the Court should take into account "general principles of international environmental law" when interpreting the ECHR. The minority referred to European Union and Council of Europe instruments on the environment, the Rio agreements and UNESCO instruments, claiming that environmental principles, such as the precautionary principle, should be taken into account when interpreting the ECHR.

The ECtHR has historically adopted a flexible approach to the interpretation of the ECHR. The Court has for example emphasized that the Convention is

[118] *See* Leroy, 66-81.
[119] See above under 4.2.1 and below under 6.3.2.

a living instrument to be interpreted in the light of present-day condition.[120] Moreover, the Court has stated that the ECHR should be interpreted as far as possible in harmony with other principles of international law.[121] The view that the ECtHR should take into account general principles of international environmental law when interpreting the ECHR is also supported by the rules of treaty interpretation laid down in the the Vienna Convention on the Law of Treaties[122]. According to Articles 31.3 (c), which is considered as reflecting customary international law, when interpreting a treaty, "any relevant rules of international law applicable in the relations between the parties" should be taken into account together with the context.[123]

General principles of international environmental law are general in the sense that they are "potentially applicable to all members of the international community across the range of activities which they carry out or authorize and in respect of the protection of all aspects of the environment."[124] According to Sands, such general principles can be discerned from the large body of international environmental treaties, binding acts of international organizations, state practice, soft law commitments and other acts. General principles and rules have "broad, if not necessarily universal, support and are frequently endorsed in practice."[125] Hence, general principles of international law do not necessarily reflect international customary law. In fact, only the following three principles of international environmental law are generally considered as reflecting international customary law: [126]

1. The obligation that states have sovereignty over their natural resources and the responsibility not to cause transboundary environmental damage[127]
2. The principle of co-operation[128]
3. The precautionary principle

The significance of international customary law lies in the fact that it creates obligations for all states (or all states within a particular region). Article 38(1)(b) of the Statute of the International Court of Justice identifies the two elements of customary international law: state practice and *opinio juris* (i.e.

[120] *Loizidou v. Turkey*, 1995, paragraph 71.
[121] Al-Adsani v. United Kingdom, Judgement of 21 November 2001, paragraph 60.
[122] Vienna Convention on the Law of Treaties, signed in Vienna on 23 May 1969. Entered into force on 29 January 1980.
[123] Shaw 323, 838-839.
[124] Sands, 231.
[125] Sands, 231.
[126] Sands, 279. *See* also Abouchar, Cameron, 51-52
[127] This obligation is for example reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.
[128] This principle is for example found in Principle 24 of the Stockholm Declaration, which reflects a general political commitment to international cooperation in matters concerning the protection of the environment, and in Principle 27 of the Rio Declaration, which provides "States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development."

evidence that a state has acted in a particular way because it believes that it is required to do so by law). However, the existence of a customary rule is difficult to prove and, as Sands puts it "the process of developing rules of customary law cannot really be considered as part of a formal legislative process"[129]. There are thus disagreements as to the value of international customary law as a source of law. Some writers mean than custom is developing too slowly to accommodate the evolution of international law, while other writers are of the opinion that custom is a dynamic process of law creation and more important than treaties since it is of universal application.[130] My personal opinion is that the lack of enforcement mechanisms in the sphere of international law often undermines the significance of international customary law. The existence of a customary rule is however of great interest for the question of integrating principles of international environmental law into the ECHR, since a customary rule may exist alongside a conventional rule and can inform the content and effect of a conventional rule.[131]

The predominant view in the doctrine of international environmental law is that the precautionary principle has reached the legal status of a principle of international customary law. Additionally, both the minority in Balmer-Shafroth and the concurring opinion of Judge Jambrek in Guerra and Others refer to the precautionary principle. For those reasons I have chosen to take a closer look on how the ECtHR can use the precautionary principle to protect environment-related human rights.

6.2 The Precautionary Principle

Modern international environmental law recognizes not only duties to prevent harm or risk when concrete danger is suspected, but also in case of potential of risks. The precautionary principle appears in almost all the international instruments related to environmental protection adopted since 1990.[132] Principle 15 of the Rio Declaration provides for example:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.

The precautionary principle ensures that a substance or activity posing a threat to the environment is prevented from adversely affecting the environment, even if there is no conclusive scientific proof linking that particular substance or activity to environmental damage. Most environmental issues involve complex analyses of scientific, technical and economic factors. Hence, the precautionary principle reflects the fact that scientific certainty often comes too late to design effective legal and policy

[129] Sands, 144.
[130] Shaw, 69.
[131] *See* for example Shaw, 68-72, 88-92.
[132] Kiss, Shelton, 264-265.

responses for preventing many potential environmental threats. Even if there is a growing recognition that the precautionary principle reflects international customary law, some critics contend that the principle is "too vague" to constitute a principle of international customary law.[133] It should also be recognized that international courts and tribunals have been reluctant to accept that the precautionary principle has a legal status of international customary law.[134]

6.3 The ECtHR and the precautionary approach

This section argues the ECtHR can protect environment-related human rights more effectively in the future by applying its well established precautionary techniques in cases involving environmental issues.

The precautionary principle is generally known as a principle of international environmental law. However, international and regional human rights bodies have a long history of applying a precautionary approach. The ECtHR has considerable experience in coping with uncertainty and assessing risks when there is a threat to life or limb. As in the sphere of international environmental law, the underlying idea of applying the precautionary principle in international human rights complaints procedures, is that circumstances of lack of absolute proof should not prevent necessary action from being taken. This chapter will argue that the environment may benefit from the precautionary techniques developed by the ECtHR, if the ECtHR can be convinced to apply the precautionary principle for environmental purposes.

6.3.1 Coping with uncertainty

This section aims at exemplify how the ECtHR has dealt with uncertainty in the past. Generally, in international human rights complaints procedures a precautionary approach is being followed "when there is a situation of uncertainty in the face of a threat of serious, irreparable harm".[135]

States that have become parties to the ECHR have specifically agreed to co-operate with the ECtHR. Rule 44 A of the Rules of Court provides:

> "The parties have a duty to cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice…"

Hence, the parties are obliged to supply evidence that may be used against them. However, governments often fail to reach the required degree of co-

[133] *See* for example Abouchar, Cameron, 30-37.
[134] Sands, 279.
[135] Kamminga, 184.

operation in response to applications submitted against them under the individual complaints procedure. Even if the Court has the right to rely on information received from sources other than the parties, the nature of the required information is often such, that only the accused State has access to the information.[136] This was demonstrated in the *Timurtas case*, in which the Court held that:

> "It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligation under Article 38 para. 1(a) of the Convention, but may also give rise to the drawing of inferences as to the well-foundedness of the allegations. In this respect, the Court reiterates that the conduct of the parties may be taken into account when evidence is being obtained."

The reluctance of a respondent State to supply information might in other words benefit the applicant. It can thus be concluded that the ECtHR has experience in coping with uncertainty, since it occasionally have to decide whether a violation has occurred on the basis of incomplete information supplied by the applicant.

6.3.2 Assessing risks

A specific type of precautionary approach has been adopted by the ECtHR in case of violations of human rights that have not yet occurred and in which no actual harm has yet been caused. Most applications of this sort are declared inadmissible on the ground that the applicant does not qualify as being a victim of violations of the human rights protected by the ECHR. However, there are, under rare circumstances, exceptions to this rule when the potential victim can provide good evidence that the state will, in the future, violate his or her rights protected under the ECHR.[137]

Cases of anticipated violations have in principle been brought up by the ECtHR in two broad categories of cases. The first category cover complaints in which the applicants have alleged running a risk of becoming a victim of the application of the existing legislation. Such complaints have for example been directed against laws discriminating against homosexuals, illegitimate children and unmarried mothers. In this category of cases the ECtHR has admitted the complaints if the applicants could show that they "ran the risk of being affected" by the laws in question.[138]

The second category concerns cases in which the applicants claim to be risking cruel, inhuman or degrading treatment if they are deported,

[136] Van Dijk et al., 216-220.
[137] Cameron, 56-57, Kamminga, 180-184 and Article 34 of the ECHR.
[138] Cameron, 56-57, Kamminga, 180-184.

extradited or expelled to another state. The Court has held that in cases of such potential violations of the Convention, it will only admit the case if "substantial grounds have been shown for believing that there is a real risk of treatment contrary to Article 3."[139] This category of cases involves sensitive assessments of the likely future behavior of governments.

In *Soering*[140], the Court had to decide whether there were substantial grounds for believing that the applicant faced a real risk of being sentenced to death if extradited to the United States. Hence, the Court had to predict the findings that might be reached of the American Court. Soering's main argument was that in regard to the "death row phenomenon", he would be subjected to inhuman and degrading treatment and punishment contrary to Article 3 if extradited to the United States. A determining fact of the case was that the American prosecutor himself had stated that the death penalty should be imposed. The only undertaking the American prosecutor had been willing to accept was that at the time of sentencing, an inquiry would be made to the judge that it was the wish of the United Kingdom that the death penalty should not be imposed. The Court concluded that there were substantial grounds for believing that Soering faced a real risk of being sentenced to death if extradited to the United States.[141]

The problem of assessing risks certainly arises before the Court when there is a request that the Court should adopt interim measures (also called precautionary or provisional measures) to prevent State's action or inactions from causing irreparable damage or irreversible harm. This means that the Court has to assess risks quickly. Rule 39 of the Rules of Court provides:

> "The Chamber, or where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interest of the parties or of the proper conduct of the proceedings before it."

The purpose of interim measures in international human rights law is "to preserve the rights of the parties, and to safeguard the general interest, until a final decision has been taken."[142] The Court has held that its interim measures under Rule 39 of the Rules of Court are legally binding.[143] The ECtHR has though made a restrictive use of the indication of interim measures, requiring that:

- The case is of extreme urgency
- The facts must prima facie point to a violation of the ECHR
- The omission to take the proposed measures must result or threaten to result in irreparable injury to certain vital interests of the parties or to the progress of the examination.

---

[139] Cameron, 80.
[140] Soering v. United Kingdom, (1989) 11 EHRR 439
[141] *Soering*, paragraphs 36-39.
[142] Kamminga, 182.
[143] Van Dijk et al., 111.

Almost all cases in which interim measures have been requested concern expulsions to countries where there is a high degree of probability that the applicant will be subjected to torture or inhuman treatment or punishment (i.e. threatened violations of Article 3). Interim measures were for example indicated in *Soering*.[144]

Threatened violations of provisions other than Article 3 have thus until now in principle not generated indication of interim measures. However, it can be argued that there is no objective reasons for this, since Rule 39 of the Rules of Court does not limit the indication of interim measures to certain categories of rights. In other words, "when harm to human rights is uncertain, the level of protection offered by interim measures depends mainly on human rights bodies' willingness to adopt the precautionary principle."[145]

It is worth mentioning that the United Nations Convention on the Law of the Sea (UNCLOS) contains a provision for interim measures, which states that such measures may be prescribed not only to "preserve the rights of the respective parties' but also and alternatively to "prevent serious harm to the marine environment."[146]

I contend that The ECtHR can protect environment-related human rights more effectively in the future by applying the precautionary techniques, until now applied by the Court when there is a threat to life or limb, to prevent States' actions or inactions towards the environment from infringing on human rights, even if the harmful character of those actions is uncertain.

7 Conclusions

This thesis has, on the basis of three questions, addressed some aspects of the complex interrelationship of human rights and environmental protection. The first question, being of a more general character, concerned how the trend of enforcing environmental norms and principles indirectly through an institution like the ECtHR, created for the protection of human rights, affect the establishment of effective international judicial mechanisms, created solely for enforcing globally norms of international environmental law?

Given that there is no environmental treaty providing mechanisms for individuals to enforce the parties' environmental obligations or seek vindication when those obligations are violated, it is hardly surprising that environmental activists ask them self how they can use the human rights

[144] Van Dijk et al, 114.
[145] Leroy, 72.
[146] UNCLOS, Article 290(1).

machinery in order to enable victims of environmental degradation to obtain remedy in a similar manner.

As was concluded in chapter 3, indirect and incidental enforcement of environmental norms and principles might to some extent hinder the establishment of more adequate fora, since the inadequacy of existing international, regional and national judicial bodies logically have to be shown in order to convince states of creating an international environmental court. In addition, it has to be demonstrated that the existing judicial bodies cannot be fixed so as to be made satisfactory. This thesis has on the basis of five cases investigated the adequacy of the ECtHR enforcing environmental norms and principles. [147]

Since the ECHR does not provide for a right to environment, environmental issues have been raised through the assertion of protected rights. As was demonstrated by the selected case law of the ECtHR, the environment will never be the substantive matter in disputes where the protection of the environment has been derived from conventional human rights. The ECtHR rather considers environmental issues accidentally. Moreover, the ECtHR can only be expected to apply existing human rights guarantees as to the *consequences* of environmental harms on human beings or their assets, but not for the *causes* of environmental harms. Today environmental matters such as the protection of biological diversity, flora and fauna, are excluded from the recognized human rights agenda. Additionally, environmental issues are often very complex, involving underlying issues of political economy. The conclusion to be drawn from the selected case law is that the role of the ECtHR in enforcing norms and principles of international environmental law is rather limited and that it might not be the most adequate institution to enforce international environmental law. Hence, in the long run, the development towards indirect enforcement of environmental concerns could work as an excuse for not establishing effective enforcement mechanisms for environmental protection.

On the other hand it can be argued that very few disputes are solely environmental in nature. Other matters are inevitably at issue, whether they relate to human rights, trade, intellectual property or other areas of international law. It can be maintained that integration with other areas of law is necessary for such a crosscutting issue such as the environment. Additionally it can be held that enforcing international environmental norms and principles through existing fora promotes the respect for global protection of the environment and in fact accelerates the establishment of more adequate enforcement mechanisms. Moreover, as was addressed in chapter 6 (and as will be further discussed below under question 3), there are satisfactory possibilities that the inadequacies of the existing role of the ECtHR in enforcing environmental norms and principles can be fixed.

[147] Considering the limited amount of cases, it should be underlined that the conclusions to be drawn from these five cases are rather to be seen as vague indications, than as definitive solutions.

The second question addressed in this thesis was whether the human rights system should be used as a model for future legal strategy for protecting the environment ?

As was described in chapter three, there are both advantages and disadvantages deriving from the use of a human rights-based approach to environmental protection. The strongest argument for a human rights approach is that the human rights system already offer various courts, commissions, and other bodies where individuals can seek relief for harm caused by violations of their protected human rights. Hence, the recognition of "environmental rights" might have the strength to combat the individual greed and short-term thinking that dominates and characterize the inter-state commitments of existing international environmental law. The strongest argument against a human rights approach is that a simple human rights approach is not appropriate for complex environmental threats involving scientific, as well as political and economic considerations.

International environmental law can certainly find inspiration in the individual approach of human rights law. It should however be acknowledge that environmental protection has both collective and individual aspects that are difficult to translate into an individual human rights perspective. Issues such as resource management, nature conservation or biological diversity are difficult to bring under a human rights claim and it can be argued that human rights litigation presents limited opportunities to foster the protection of the environment in general.

In order to integrate environmental protection as a collective value, human rights bodies would probably have to establish minimum standards of environmental quality that should take into account not only the negative effects of environmental degradation on health, but also the nonmonetary value that individuals attach to the quality of their surroundings.[148] Yet, there is no indications that human rights bodies would be willing to adopt such minimum environmental standards. Accordingly, the development towards a more individual approach within international environmental law should be seen as complementary to the wider protection of the environment.

Whether the human rights system should be used as a model for future legal strategy for protecting the environment, ought also to be analyzed in the light of the role taken by ECtHR up to now in enforcing environmental norms and principles. The ECtHR, like other human rights courts, requires that cases be brought against a government. Accordingly, the environment-related case law of the Court focuses not on the environmental harm itself, but on the duty of the State to protect its citizens from environmental harm. One of the main problems with enforcement through the ECtHR is, however, the victim requirement and the issue of direct access to the ECtHR. An individual has to exhaust all local remedies, i.e. all stages of

[148] *See*, Desgagne, 277.

jurisdiction of his home state, before being granted access to the Court. This procedure is extremely time-consuming, preventing effective protection of environmental human rights.

As was described in chapter five, environmental concerns have arisen before the ECtHR in relation to two types of cases. In the first category of cases, those in which environmental damage has resulted in a violation of a substantive article, the ECtHR has, rather than concentrating on the nature of the damage to the environment, focused on the *immediate* effects of the environmental damage upon the applicant. In such cases, the threshold for finding a violation of the ECHR on environmental grounds has been high. Hence, both *Lopez-Ostra* and *Guerra* indicates that environmental harm attributable to State action or inaction that has *significant* injurious effect on a person's home or private and family life constitutes a breach of Article 8(1). Additionally, the environmental harm may be excused under Article 8(2) if it results from an authorized activity of economic benefit to the community as a whole, that can justify the interference.[149]On the other hand, before Lopez-Ostra, the Court had only found violations of protected rights in cases involving noise emissions and radiation. Accordingly, it can be argued that by *Lopez-Ostra,* the Court has opened the door for the protection of human rights against nearly all sources of environmental pollution.

Protection of the environment may also be ensured through procedural rights protected by the ECHR, such as the right to a fair trial (Article 6) and the right to receive information (Article 10). The Court has though been cautious about overturning its prior case law, avoiding too environmental-friendly interpretations of these provisions. *Balmer-Shafroth* demonstrates that some environmental threats have been deemed too remote to give rise to a claim under the right to a fair trial. However, this case was only decided by a majority of twelve votes to eight, the minority holding that Article 6 was applicable and had been violated.

As was demonstrated by *Guerra*, the Court has been reluctant to read the right to receive information in Article 10 as imposing on States a positive duty to collect and disseminate information on environmental issues, which would otherwise not be directly accessible to the public or brought to the public's attention. However, eight of the twenty judges in *Guerra* did in fact suggest in separate opinions that positive obligations to collect and disseminate information might exist in some circumstances. Additionally, the Commission was of the opinion that Article 10 is one of the essential means of protecting the well-being and health of the population in situations in which the environment is at risk. Accordingly the Commission held that Article 10 imposes on States a positive duty to collect and disseminate information on environmental issue.

[149] *See* the Court's reasoning in Powell and Rayner.

It can though be argued that procedural rights in the ECtHR has the potential of providing more extensive protection of the environment, if based on the goal of conserving the environment and the concept of the environment as a common resource whose quality affects each person. These rights should include a right to information about activities that may cause environmental harm for persons likely to be affected, a right to participate in the decision-making process when actions are likely to cause environmental harm, and a right of recourse before administrative or judicial agencies.[150] Such reading of the procedural rights in the ECtHR would though require that the ECtHR is willing to integrate principles and norms of international environmental law. This is addressed in question three.

As was concluded in chapter three it is neither likely, nor desirable, that human rights institutions like the ECtHR play a central role in the conservation or the protection of the environment. Nevertheless, the ECtHR can play an important, desirable and complementary role in enforcing environmental issues. Considering the undeniable relationship between the enjoyment of human rights and environmental protection, it is important to address how the conflicting values and interests of human rights and the environment are to be reconciled and to what extent norms are transferable from one context to another. Adopting a human rights approach in international environmental law is not a revolutionary suggestion, solving the problem of enforcing international environmental law. It is rather a new way of thinking about these two different spheres of law, acknowledging the environmental dimension implicit in existing human rights. It can though be concluded that until some more specific and acceptable means is found to unify the diverse interests and values of international environmental law and human rights, the relationship between these two spheres of law will remain highly accidental.

The third question of the questions forming the basis for this thesis was how the ECtHR can apply the provisions of the ECHR in the future to protect environment-related human rights more effectively than today?

Considering the lack of effective enforcement mechanisms within international environmental law, including individual petitions procedure, and the undeniable link between human rights and environmental protection, it is certainly of importance to contemplate the "ultimate role" of the ECtHR in enforcing norms and principles of international environmental law.

As was held by the minority in Balmer-Shafroth, the ECtHR could promote environmental protection by harmonizing its interpretation of the human rights protected by the ECHR with obligations and principles of international environmental law. This view is strengthen by the separate opinion of Judge Jambrek in *Guerra*, which suggests a more extensive application of the precautionary approach taken by the Court concerning

[150] Desgagne, 277.

potential violations of Article 3.[151] Additionally, in *Guerra*, the Commission argued that the protection afforded by Article 10 has a preventive function with respect to potential violations of the ECHR in the event of serious damage to the environment.[152]

As was discussed in chapter 6, it is technically possible for the ECtHR to apply the precautionary principle in case of violations of environment-related human rights. A problem is though that human rights bodies probably would find individual claims inadmissible if the environment is the initial subject matter of the dispute.

The Court has considerable experience in coping with uncertainty and assessing risks when there is a threat to life or limb. Likewise, in situations where potential violations of the ECHR flow from uncertain harm to the environment, the precautionary principle should apply. In other words,

"The ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today's problems in this field the standard of yesterday"[153]

One way for the ECtHR to implement the precautionary principle in environment-related cases is to produce interim measures to prevent States' actions or inactions towards the environment from infringing on human rights. The stronger the causal link between environmental harms and harms to human beings, the higher the incentive for applying an precautionary approach, and the higher the possibility of obtaining interim measures.[154]

Lastly, it can be held that as long as the international community is reluctant to recognize a specific right to environment, which is enforceable under the right of individual petition, and the ECtHR remains hesitant to integrate principles and norms of international environmental law more generously, the potential for environmental protection is limited to more extreme cases of environmental degradation.

[151] Jambrek argued that "if information is withheld by a government about circumstances which foresee ably, and on substantial grounds, present a real risk of danger to health and physical integrity, then such a situation may also be protected by Article 2: No one shall be deprived of his life intentionally."
[152] *See*, *Guerra*, § 52.
[153] Hungary v. Slovakia,, ICJ 25 September 1997 (Gabcikovo-Nagymaros Case), separate opinion of Judge Weeramantry, paragraph 215.
[154] *See* Pasqualucci, 16-19, Kamminga, 171-186 and Leroy, 72-74.

Bibliography

Abouchar, Juli, Cameron, James, *The Status of the Precautionary Principle in International Law*, in Freestone, David, Hey, Ellen (eds.), *The Precautionary Principle and International Law*, Kluwer Law International, The Hague (1996), 29-52.

Birnie, Patricia, Boyle, Alan, *International Law & The Environment*, 2nd Ed., Oxford University Press, Oxford (2002)

Caldwell LK, *International environmental policy and law*, Duke University Press, Durham (1980).

Cameron, Iain, *An Introduction to the European Convention on Human Rights*, 5th, Ed., Iustus Förlag, Uppsala (2006)

Craven, Matthew, *Human Rights and the Environment: The Case of Balmer-Shafroth and Others v. Switzerland*, Volume 7 Issue 1 (1998).

Desgagne, Richard, *Integrating Environmental Values into the European Convention on Human Rights*, The American Society of International Law American Journal of International Law, Volume 89 p. 263, April, 1995.

Eaton, Joshua P., *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, Boston University International Law Journal, Volume 15 p. 261(1997).

Freestone, David, Hey, Ellen (eds.) *The Precautionary Principle and International Law*, Kluwer Law International, The Hague (1996)
Henkin, Louis, Neuman, Gerald L, Orentlicher, Diane F, Leegron, David W, *Human Rights*, Foundation Press, New York (1999)

Hohmann, Harald, *Precautionary Legal Duties and Principles of Modern International Environmental Law*, Graham & Trotman/Martinus Nijohoff, London (1994)

Hunter, David, Salzman, James, Zaelke, Durwood, *International Environmental Law and Policy*, 2nd Ed., Foundation Press, New York (2002)

Janis, Mark W., Kay, Richard S., and Bradley, Anthony W, *European Human Rights Law – text and materials*, 2nd Ed., Oxford University Press, Oxford, 6 (2000).

Kamminga, Menno T, *The Precautionary Approach in International Human Rights Law: How It can Benefit the Environment*, in Freestone, David, Hey,

Ellen (eds.) *The Precautionary Principle and International Law*, Kluwer Law International, The Hague (1996).

Kiss, Alexandre, *International Human Rights Law and Environmental Problems* in Weiss, Edith Brown, *Environmental Change and International Law: New Challenges and Dimensions*, United Nations University Press, Tokyo (1992).

Kiss, Alexandre, Shelton, Dinah, *International Environmental Law*, 2nd Ed., Transnational Publishers, New York (2000)

Leroy, Fiorletta Séverine, *Can the Human Rights Bodies be Used to Produce Interim Measures to Protect Environment-Related Human Rights?*, Review of European Community and International Environmental Law, 15(1) 2006.

McCallion, Kenneth F, Sharma, Rajan H, *Environmental Justice without Borders: The Need for an International Court of the Environment to protect Fundamental Environmental Rights*, The George Washington journal of International Law and Economics, Vol. 32, 2000, 351-365.

Murphy, Sean D, *Does the World Need a New International Environmental Court?*, The George Washington journal of International Law and Economics, Vol. 32, 333-349.

Ovey, Clare, White, Robin C.A., *European Convention on Human Rights*, 3rd Ed., Oxford University Press, Oxford (2002)

Pasqualucci, Jo M, *Interim Measures in International Human Rights: Evolution and Harmonization*, Vanderbilt Journal of Transnational Law, Volume 38 Number 1, January (2005).

Pevato, Paula M., *A Right to Environment in International Law: Current Status and Future Outlook*, RECIEL: Review of European Community and International Environmental Law, volume 78 Issue 3 (1998).

Reid, Karen, *A Practioner's Guide to the European Convention on Human Rights*, 2nd Ed., Sweet & Maxwell, London (2004)

Rest, Alfred, *The Indispensability of an International Environmental Court, Review of European Community and International Environmental Law,* Volume 7 Issue 1 (1998).

Sands, Philippe, *Principles of International Environmental Law*, 2nd Ed., Cambridge University Press, Cambridge (2003)

Shaw, Malcolm N, *International Law*, 5th Ed., Cambridge University Press, Cambridge (2004)

Shelton, Dinah, Human *Rights and the Environment: Jurisprudence of Human Rights Bodies*, Environmental Policy and Law, 32/3-4 (2002).

Shelton, Dinah, *What Happened in Rio to Human Rights*?, 3 Yearbook of International Environmental Law, 75-93 (1992).

Taillant, Jorge Daniel, *Environmental Advocacy and the Inter-American Human Rights System*, (February, 2001), 8, available at: http://www.cedha.org.ar/docs/doc27.doc

Taylor, Prudence, *From Environmental to Ecological Human Rights: A New Dynamic in International Law*, 10 Georgetown International Environmental Review, Volume 10 p. 309 (1998).

The World Conservation Union, *Human Rights and Environment: Overlapping Issues*, available at: http://www.iucn.org/themes/law/pdfdocuments/DEV14_HR%20and%20Env%20NEW%20VERSION_MSM.pdf

Van Dijk, Pieter, van Hoof, Fried, van Rijn, Arjen, Zwaak, Leo (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th Ed., Intersentia, Antwerpen-Oxford (2006)

Victor, David G, *Enforcing International Law: Implications for an Effective Global Warming Regime*, Duke Environmental Law & Policy Forum, September (1999).

Weiss, Edith Brown, *Environmental Change and International Law: New Challenges and Dimensions*, United Nations University Press, Tokyo (1992)

Wilde, Mark, *Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence*, Review of European Community and International Environmental Law, 12(3) 2003.

Treaties and Declarations

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome) 4 November 1950, in force 3 September 1953, UNTS, volume 213, p. 221.

Proclamation of Teheran, proclaimed by the International Conference on Human Rights at Teheran on 13 May 1968.

Stockholm Declaration on the Human Environment, adopted at the United Nations Conference on the Human Environment in Stockholm on 16 June 1972.

Vienna Convention on the Law of Treaties, open for signature in Vienna on 23 May 1969. Entered into force on 27 Januari 1980, UNTS, volume 115 p. 331.

United Nations Convention on the Law of the Sea, opened for signature in Montego Bay (Jamaica) 10 December 1982. Entered into force on 16 November 1994.

Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, in Rio de Janeiro on 14 June 1992.

Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, opened for signature in Lugano on 21 June 1993, ETS No. 150.

Table of Cases

ECHR

Soering v. United Kingdom (Application no. 14038/88), Judgement of the 7 July 1989.

Powell and Rayner v. United Kingdom (Application no. 9310/81), Judgement of the 21 February 1990.

Lopez Ostra v. Spain (Application no. 41/1993/436/515), Judgement of the 23 November 1994.

Loizidou v. Turkey (Application no. 40/1993/435/514), Judgement on the preliminary objections of the 23 February 1995.

Balmer-Schafroth v. Switzerland (Application no. 67/1996/686/876), Judgement of 26 Augusti 1997.

Guerra and Others v. Italy (Application no. 116/1996/735/932), Judgement of 19 February 1998.

Timurtas v. Turkey, (Application no. 23531/94), Judgement of the 13 June 2000.

Al-Adsani v. United Kingdom (Application no. 35763/97), Judgement of 21 November 2001.

Okyay and Others v. Turkey (Application no. 36220/97), Judgement of the 12 July 2005.

The judgements are available at the European Court of Human Rights Portal: http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=11300715&skin=hudoc-en

ICJ

Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgement of 25 September 1997. Available at: http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925.html