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13. Contribution of the case law of the European Court of Human Rights to sustainable development in Europe

Jonathan Verschuuren

1. INTRODUCTION

The European Convention on Human Rights¹ (hereafter: ECHR) can be seen as an instrument that promotes regional integration in two ways. First of all, the Convention is the basic legal instrument within the Council of Europe. The Council of Europe is an international organization that predates, and should not be confused with, the European Union. It is aimed at promoting co-operation between all countries of (the wider) Europe in the areas of human rights, democratic development, protection of biodiversity and landscapes, and cultural co-operation. The Council of Europe (hereafter: CoE) has 47 member states, including such states as Russia, Azerbaijan, Turkey and Georgia,² and six observer states, such as Japan and the United States.³ Besides the ECHR, most CoE member states are also bound by such environmental treaties as the

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Council of Europe Treaty Series No. 5. The ECHR entered into force on 3 September 1953 and was last amended by Protocol No. 14, entering into force on 1 June 2010. For more information on the CoE, see <http://www.coe.int>.

² CoE member states are Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine and the United Kingdom.

³ CoE observer states are Canada, Holy See, Israel, Japan, Mexico and the United States.

Convention on the Conservation of European Wildlife and Natural Habitats⁴ and the European Landscape Convention.⁵ This chapter, however, will focus on the ECHR and especially on the case law by the European Court of Human Rights (hereafter: ECtHR). This Court is an institution of the CoE and is located in Strasbourg, France. Again, it should not be confused with the EU Court of Justice in Luxemburg, which is an institution of the European Union.

Second, the European Union, that other important international organization in Europe (see on the EU extensively, Chapter 11, this volume), recognizes the human rights laid down in the ECHR and currently is in the process of accession to the ECHR. Article 6(3) of the Treaty of the European Union (TEU) states that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the EU member states, shall constitute general principles of the Union's law. Article 6(2) lays down the obligation for the EU to accede to the ECHR. Under Article 6(3), the EU's institutions, including the EU Court of Justice, can apply human rights as laid down in the ECHR according to their own judgment. After accession to the ECHR, the European Court of Human Rights will directly influence law-making within the EU.

The EU also has a human rights document of its own, the Charter of Fundamental Rights from 2000.⁶ As of December 2009, this Charter is legally binding upon the EU member states, through Article 6(1) of the TEU. Three provisions from this Charter are relevant from an environmental human rights perspective. The most important provision is Article 37 of the Charter. This article is on 'environmental protection' and reads: 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. In addition, there is an article on health care (Article 35) and one on consumer protection (Article 38). Although the wording in the Charter, especially that of Article 37, is fairly weak, it is expected that, especially through the combined impact together with the ECHR, the environmental human rights of the Charter may become a benchmark for judicial review by the EU Court of Justice of legislative and executive

⁴ Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, Council of Europe Treaty Series No. 104.

⁵ European Landscape Convention, Florence, 20 October 2000, Council of Europe Treaty Series No. 176.

⁶ Charter of fundamental rights of the European Union of 7 December 2000, latest version (2010) OJ EU C 83/389.

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EU acts as well as national measures implementing EU environmental obligations.⁷

For completeness sake, and in order to avoid confusion, a third regional international organization should be mentioned here: the United Nations Economic Commission for Europe, aimed at pan-European economic integration (hereafter: UNECE). The UNECE has 56 member states in Europe and beyond (including for instance Canada, the United States, Kazakhstan, Uzbekistan and Russia) and is very active in the field of environmental protection. Under its auspices important environmental conventions were signed that had a tremendous impact on the development of environmental legislation within the EU, such as the Convention on Long-range Transboundary Air Pollution,⁸ the Convention on Environmental Impact Assessment in a Transboundary Context,⁹ the Convention on the Protection and Use of Transboundary Watercourses and International Lakes¹⁰ (see also the previous chapter in this volume, Chapter 12), the Convention on the Transboundary Effects of Industrial Accidents,¹¹ and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.¹²

⁷ N de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (2012) 81 *Nordic Journal of International Law* 73. A bit less optimistic about the potential impact of Article 37 of the Charter are Gracia Marín Durán and Elisa Morgera, 'Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection' (2013) 20 *University of Edinburgh School of Law Research Paper Series*, available online through <http://ssrn.com/abstract=2267402>

⁸ Convention on Long-range Transboundary Air Pollution, Geneva, 13 November 1979, (1979) 18 *ILM* 1442.

⁹ Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, (1991) 30 *ILM* 802 plus its Protocol on Strategic Environmental Assessment, Kiev, 21 May 2003, UN Doc. ECE/MP.EIA/2003/2.

¹⁰ Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17 March 1992, (1992) 31 *ILM* 1312, with a Protocol on Water and Health, London, 17 June 1999, (1999) 38 *ILM* 1708.

¹¹ Convention on the Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992, (1992) 31 *ILM* 1330, and a Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, Kiev, 21 May 2003.

¹² Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, (1998) 38 *ILM* 517, with a Protocol on Pollutant Release and Transfer Registers, Kiev, 21 May 2003, UN Doc. MP.PP/2003/1.

This chapter will address the question of how far the ECtHR, through its case law on the human rights laid down in the ECHR, has contributed to regional integration and sustainable development. The above introduction has, hopefully, made it clear that there are several integration processes going on at the same time: efforts through the Council of Europe, the European Union and the UNECE.

First, in section 2, I will explain that the objective of environmental protection as such has not been included in any way in the ECHR. Other human rights, therefore, have to be applied in cases that deal with environmental harm. Section 3 will give an overview of the most important environmental cases of the ECtHR with the aim of describing the extent to which sustainable development follows as a duty for European states from the ECHR and the extent to which individuals can rely on this before a court of law. In section 4, I will draw some conclusions from the cases described in section 3, before moving to assessing the impact the ECHR has had upon regional integration in the field of sustainable development in Europe.

2. EUROPEAN CONVENTION ON HUMAN RIGHTS: ABSENCE OF A RIGHT TO THE ENVIRONMENT

The ECHR does not refer to the environment or to sustainable development explicitly. Alleged environmental human rights infringements, therefore, have to be tested against other rights that have been laid down in the Convention, such as the right of Article 8 on privacy and family life. This approach is often criticized because it does not only severely restrict the room for courts to manoeuvre, but it also seems to deny the importance of avoiding actions that have a significant negative impact on the environment. In 2003, the ECtHR in one of the environmental cases discussed in section 3 below, made it very clear that:¹³

severe environmental pollution may affect individuals' ... private and family life adversely. ... Yet the crucial element which must be present in determining whether, in the circumstances of the case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment. Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection to the environment as such; to that effect, other

¹³ *Kyrtatos v Greece*, Application No. 41666/98, 22 May 2003.

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international instruments and domestic legislation are more pertinent in dealing with this particular aspect.

In the same year, the Grand Chamber of the ECtHR found that the introduction of a new scheme to allow for noise pollution by aircraft landing and taking off at night at Heathrow airport in London did not infringe the right of Article 8.¹⁴ No less than five judges jointly issued a dissenting opinion in which they stated:

... the close connection between human rights protection and the urgent need for a decontamination of the environment leads us to perceive health as the most basic human need and as pre-eminent. After all, as in this case, what do human rights pertaining to the privacy of the home mean if, day and night, constantly or intermittently, it reverberates with the roar of aircraft engines? It is true that the original text of the Convention does not yet disclose an awareness of the need for the protection of environmental human rights. In the 1950s, the universal need for environmental protection was not yet apparent. Historically, however, environmental considerations are by no means unknown to our unbroken and common legal tradition whilst, thirty-one years ago, the Declaration of the United Nations Conference on the Human Environment stated as its first principle: '... Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being ...'.¹⁵

Not surprisingly, therefore, many attempts have been made to have the Council of Europe adopt a right to environment as part of the ECHR system (through an additional protocol). The first well developed attempt was in 1973, when a German working group proposed a Protocol to the ECHR of which Article 1(1) read as follows: 'No one should be exposed to intolerable damage or threats to his health or to intolerable impairment of his well-being as a result of adverse changes in the natural conditions of life'.¹⁶ Although the whole Protocol was carefully designed so as to neatly fit in the European human rights system, the Committee of Ministers decided that there was no direct need to expand the ECHR with a right to a healthy environment.¹⁷ After that, many scholarly works argued for introduction of a right to environment in the ECHR, often with

¹⁴ *Hatton and others v United Kingdom*, Grand Chamber, 8 July 2003.

¹⁵ *Ibid.*

¹⁶ H Steiger, *The Right to a Humane Environment* (Erich Schmidt Verlag 1973).

¹⁷ W P Gormley, *Human Rights and Environment: The Need for International Cooperation* (Sijthof 1976) 112.

concrete suggestions as to how to formulate such a right.¹⁸ In 1999, 2003 and 2009, the Parliamentary Assembly of the Council of Europe adopted recommendations in which the Assembly called upon the Committee of Ministers to draw up an additional protocol to the European Convention on Human Rights, recognizing the right to a healthy and viable environment.¹⁹ In the latest recommendation, the Parliamentary Assembly ‘considers it not only a fundamental right of citizens to live in a healthy environment but a duty of society as a whole and each individual in particular to pass on a healthy and viable environment to future generations’ and it notes ‘that in spite of the political and legal initiatives taken both nationally and internationally, environmental protection is still very inadequately guaranteed’.²⁰ To date, however, all of these calls and suggestions remained unanswered by the Committee of Ministers.

3. EUROPEAN COURT OF HUMAN RIGHTS CASE LAW IN ENVIRONMENTAL CASES

3.1 Introduction: Applying ‘Other’ Human Rights in Environmental Cases

The ECtHR has a long tradition of testing government actions or inaction in environmental cases against some of the human rights that are protected under the Convention. In the last two to three decades, many dozens of clear environmental cases were decided by the Court under a range of different human rights that have been laid down in the ECHR. Most cases, and certainly the ones that have had the biggest impact, were decided under the right to life (Article 2), the right to a fair trial (Article 6(1)), the right to respect for privacy, home and family life (Article 8), and the right to peaceful enjoyment of one’s possessions (Article 1 of Protocol No. 1 to the ECHR). Other provisions that have been relied

¹⁸ Literature on this topic is massive. By way of example, I mention two recent publications in which the adoption of a human right to a healthy environment is advocated: Alan Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23(3) *European Journal of International Law* 613 and S T Ramnewash-Oemrawsingh, *The Human Right to a Viable Environment* (T.M.C. Asser Press: 2011).

¹⁹ Parliamentary Assembly, Recommendation 1431 of 4 November 1999 and Recommendation 1614 of 27 June 2003, both available through <http://assembly.coe.int>

²⁰ Parliamentary Assembly, Recommendation 1885 of 30 September 2009, available through <http://assembly.coe.int>

upon in environmental cases are the prohibition of torture and inhuman and degrading treatment or punishment (Article 3), the freedom of expression (Article 10), and the prohibition of discrimination (Article 14). The cases cover nearly all thinkable environmental issues, such as noise (airport noise, neighbouring noise from traffic, nightclubs, etc.), air pollution, pollution of soils, groundwater and surface waters, emissions from waste disposal sites, dust pollution, oil pollution in coastal areas, deforestation, urban development, biodiversity conservation, hunting and passive smoking. Cases often revolve around procedural issues, and sometimes focus on substance.

The environmental cases that are brought to the Court's attention are both cases in which the complainants argue that environmental harm is contrary to certain human rights, and cases in which complainants argue that a certain environmental protection measure of the government infringes human rights. In the section below, the description of the most important cases is organized by environmental topic, so both situations (invoking human rights for and against the environment) appear under the same heading.²¹ I will first deal with the procedural rules that follow from environmental case law of the ECtHR (section 3.2), followed by the substantive rules from the same and other cases (sections 3.3–3.6).

3.2 Environmental Procedural Law

It is generally accepted that a right to a viable environment entails both substantive and procedural elements. The clearest and, legally speaking, strongest manifestation of the procedural environmental rights is the UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.²² In the preamble of this convention, it is stated:

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

²¹ The overview presented here is not exhaustive. For a full overview of environmental cases see the Council of Europe, *Manual on Human Rights and the Environment* (2nd edn)(CoE Publishing 2012). All judgments by the ECtHR are available through the HUDOC website of the Court at <http://hudoc.echr.coe.int/>

²² Above note 12.

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights ...

In the legally binding provisions of the Aarhus Convention, these procedural rights have been worked out in detail, and, again, were linked to the right to a healthy environment in Article 1:

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

For these and other reasons, the Aarhus Convention can be qualified as a human rights treaty rather than as ‘merely’ another multilateral environmental agreement.²³ As the Aarhus Convention was signed and ratified by the European Union, as well as all its member states individually, and most other European states (with the exception of Switzerland, Turkey and Russia), procedural rights on information, participation and access to justice in environmental matters are now incorporated in EU environmental law as well as the laws of the EU member states and most other European states across the continent.

The ECHR has one very important general provision on procedural rights, the right of access to an independent and impartial court in case a person’s civil rights and obligations are determined or a criminal charge is made against him (Article 6(1)). This provision was invoked in several cases in which the authorities allowed (potentially) harmful activities to be carried out, without the possibility of redress before a court by local residents or NGOs. In the case of *Zander v Sweden*, the Court declared that the neighbouring landowner, suffering from water pollution from an adjacent waste treatment facility, has to be granted access to a court against the decision to grant an environmental permit to the waste treatment facility.²⁴ In the case of *Zimmermann and Steiner v Switzerland*, the Court held that a claim for damages by persons suffering damage from noise and air pollution from a nearby airport has to be declared admissible by domestic courts under Article 6(1) of the ECHR

²³ Boyle, above note 18 at 622–624.

²⁴ *Zander v Sweden*, Application No. 14282/88, 25 November 1993.

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and, therefore, cannot be dismissed with the argument that non-pecuniary damage cannot be taken into account under domestic legislation.²⁵

Probably the most debated decision by the Court on Article 6(1) in an environmental case, is the case of *Balmer-Schafroth and others v Switzerland*.²⁶ In this case, the Court had to answer the question whether people living near a nuclear power station have to be granted access to domestic courts to challenge the expansion of the nuclear power station. This question was answered in the negative, because the Court found that the operation of the power station did not pose a threat that was serious, specific and imminent. No less than eight dissenting judges proposed different views, many relying on the precautionary principle and on such circumstances of the case that these local inhabitants were offered iodine pills which they should take in case of the release of radioactive materials.²⁷ This approach was upheld in a very similar later case.²⁸ The case of *Taşkin and others v Turkey* presents an example where there is apparently (strangely enough, the Court did not follow the same approach as in the *Balmer-Schafroth* case) an imminent threat to the physical integrity of local inhabitants near a gold mine that caused cyanide pollution.²⁹ In this case, the applicants did have a right to go to a (Turkish) court, but the court's decision was not followed by the administration. The ECtHR considered this to be contrary to the right to fair trial as laid down in Article 6(1). Although the *Balmer Schafroth* case predates the Aarhus Convention, it is interesting to note that both Switzerland and Turkey did not ratify the Aarhus Convention nor are EU member states: citizens from these countries, therefore, can only invoke the procedural rights from the ECHR in cases where they are denied access to justice.

Environmental NGOs can also rely on Article 6(1), as long as they have a clear purpose aimed at protecting their members' environmental

²⁵ *Zimmermann and Steiner v Switzerland*, Application No. 8737/79, 13 July 1983.

²⁶ *Balmer Schafroth and others v Switzerland*, Application No. 22110/93, 26 August 1997. For a detailed discussion, see M Craven, 'Human Rights and the Environment: The Case of Balmer-Schafroth and Others v Switzerland' (1998) 7 Review of European Community and International Environmental Law 93–97.

²⁷ De Sadeleer rightfully qualifies this judgment as 'a missed opportunity from the perspective of the precautionary principle', N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press: 2002) 103.

²⁸ *Athanassoglou and others v Switzerland*, Application No. 27644/95, 6 April 2000.

²⁹ *Taşkin and others v Turkey*, Application No. 46117/99, 10 November 2004.

interests.³⁰ In a case on the construction of a dam in Itoiz, in Spain, which would result in the flooding of three nature reserves and a number of small villages, one of the applicants was the *Coordinadora de Itoiz* association. Its articles of association stated its aim as

to coordinate its members' efforts to oppose construction of the Itoiz dam and to campaign for an alternative way of life on the site, to represent and defend the area affected by the dam and this area's interests before all official bodies at all levels, whether local, provincial, State or international, and to promote public awareness of the impact of the dam.³¹

Since this shows that the NGO is aimed at defending its members' interests, all of whom are potential victims of the human right infringement, the NGO may be considered a victim as well.³² NGOs not representing the environmental interests of their members, but the general interests of environmental protection cannot rely upon the right to fair trial.³³ The Court, therefore, has made a distinction between common interest litigation and general interest litigation.

Environmental NGOs acting as a watchdog against infringements of environmental laws are also protected under the freedom of expression laid down in Article 10 of the ECHR. In the case of *VAK v Latvia*, the Court held that an NGO which published allegations against public authorities, such as the Mayor, of having signed illegal documents and having wilfully omitted to comply with the instructions of the relevant authorities to halt illegal building works, can do so as long as they are able to substantiate their allegations. The Court found that such activities by NGOs are essential in a democratic society. In this case, the Mayor successfully sued the NGO before domestic courts. However, the ECtHR declared these domestic court decisions to be an infringement of the freedom of expression as laid down in the ECHR.³⁴

³⁰ See extensively, R Pavoni, 'Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight' in F Lenzerini, AF Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing forthcoming), paper available online through <http://ssrn.com/abstract=2282202>

³¹ *Gorraiz Lizarraja and others v Spain*, Application No. 62543/00, 27 April 2004, at 10.

³² *Ibid.* at 36.

³³ According to the European Commission of Human Rights in its decision on admissibility in the case of *Greenpeace Schweiz and others v Switzerland*, Application No. 27644/95, 7 April 1997. See also Boyle, *supra* note 18 at 626.

³⁴ *VAK v Latvia*, Application No. 57829/00, 27 May 2009.

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Finally, it should be mentioned here that procedural rights have also been recognized as being part of the right to private and family life of Article 8. In the *Guerra* case, the Court decided that, under Article 8, the authorities have a duty to inform local residents about the risks involved in a nearby fertilizer factory:

In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory. The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention.³⁵

The same approach was followed in several other cases, such as the *Tătar* case, dealt with in the next section, and the *Taşkin* case. In the latter, the Court conveniently sums up the procedural rights that follow from Article 8 in environmental cases:

... whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8.... It is therefore necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available. ... Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process ...³⁶

³⁵ *Guerra and others v Italy*, Application No. 116/1996/735/932, 19 February 1998, § 60.

³⁶ *Taşkin and others v Turkey*, Application No. 46117/99, 10 November 2004, §§ 118–119.

Hence, there should be some kind of environmental impact assessment, access to information, participation in decision-making and access to courts for individuals.

3.3 Industrial Pollution: Water, Groundwater, Air, Soil

Most environmental cases concern severe pollution of water, air and soil by major industrial activities involving mining, the chemical industry, steel plants, waste installations, etc. The case law on polluting industrial activities has been relatively consistent from 1994 until around 2010 when a number of cases show that the Court is expanding the protection offered by the ECHR to local residents.

In 1994, the Court established a fixed line of argumentation for all of the environmental cases brought under Article 8 of the ECHR.³⁷ The *López Ostra* case was brought to court by a family living very close to one of the installations of a leather manufacturing plant. The family suffered various physical and mental health problems because of fumes from the installation. Although the family had won several cases before domestic courts (the company was infringing environmental regulations), the authorities did nothing to improve the living conditions of the family; instead, the authorities even appealed against one of the decisions of the domestic court. The steps that have to be taken in a case like this, are the following. The competent authorities have to establish whether there is an obligation for them to protect human rights. There can be two ways in which such an obligation exists: through a negative obligation or through a positive duty. A negative obligation implies that the authorities themselves should not infringe human rights. A positive duty implies that the authorities have to actively protect individuals' human rights in situations where they can regulate the behaviour of third parties, such as industries. In both cases, the authorities may derogate from these obligations, but only if this is in accordance with the law and necessary for the economic well-being of the state or region as a whole. When the authorities apply the derogation, they have to strike a fair balance between the interests of the individual citizens and the general interests of the state or region. The authorities have a margin of appreciation when assessing such a fair

³⁷ *López Ostra v Spain*, Application 16798/90, 9 December 1994. This test was already more or less present in the Powell and Rayner case of 1990 (*Powell and Rayner v UK*, Application No. 9310/81, 21 February 1990). The *López Ostra* case was the first case in which the applicants' claim was successful.

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balance.³⁸ Needless to say, in the *López Ostra* case, the Court found that these conditions had not been met.³⁹

Similar cases were decided later, for instance the *Giacomelli* and *Fadeyeva* cases.⁴⁰ In both cases, the industrial activity was not in compliance with the relevant environmental standards at that time, and in both cases the authorities did not sufficiently act to protect Article 8. They should have closed down the factory (*Giacomelli*)⁴¹ or relocated the applicant to a safer area (*Fadeyeva*).⁴²

The cases where the Court declared a violation of Article 8 of the ECHR, all dealt with substantial environmental pollution which contravened domestic environmental laws and lead to obvious and undisputable health impacts. Around 2010, the Court started to shift its focus in environmental cases to the ‘causal relationship’ issue. I will illustrate this using two important cases: the *Tătar* case and the *Dubetska* case. The *Tătar* case involved a huge spill of contaminated waste water into surface waters from a gold mine in Romania following an accident, causing substantial pollution in a large area in Romania and even neighbouring Hungary.⁴³ After the spill, the company did not halt its operations, nor did it inform the public about the pollution. The complainants were persons living close to the mine. According to the ECtHR, their right to private and family life had been violated because the authorities had not applied the precautionary principle after the accident.⁴⁴ They should have halted the operations, published information, such as a 1993 environmental impact assessment that had never been made public, and informed the public about potential health risks, so that the persons living in the vicinity of the mine could have made informed decisions. This is considered to be a landmark decision, especially because the Court, for the first time, relied on the precautionary principle to reach this decision. Although the Court noted that the applicants had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma,⁴⁵ it found that the existence of a serious and material risk for the applicants’ health and well-being entailed a duty on the part of the State

³⁸ § 51.

³⁹ § 58.

⁴⁰ *Giacomelli v Italy*, Application No. 59909/00, 2 November 2006; *Fadeyeva v Russia*, Application No. 55723/00, 9 June 2005.

⁴¹ § 92.

⁴² § 123.

⁴³ *Tătar v Romania*, Application No. 657021/01, 27 January 2009.

⁴⁴ § 120–125.

⁴⁵ § 106.

to assess the risks, both at the time it granted the operating permit and subsequent to the accident, and to take the appropriate measures to address the risks.⁴⁶

The *Dubetska* case is even more remarkable because in this case, the Court even further relaxed the duty to prove a causal relationship between the pollution and the observed health effects.⁴⁷ In this case, a coal processing factory and coal mine had, over a long period of time, severely polluted the groundwater, leading to polluted drinking water supplies and negative health effects for nearby residents. On the causal relationship between health impact and the operations of the factory and mine, the Court held that:

it is often impossible to quantify its [industrial pollution] effects in each individual case. As regards health impairment for instance, it is hard to distinguish the effect of environmental hazards from the influence of other relevant factors, such as age, profession or personal lifestyle.⁴⁸

Nevertheless, the Court found the Ukrainian authorities to have been in breach of Article 8, because it is clear that ‘living in the area marked by pollution in clear excess of applicable safety standards exposed the applicants to an elevated risk to health’.⁴⁹

All of the above cases are based on a violation of Article 8. In cases that are so severe that people died, Article 2, laying down the right to life, comes into play as well. The *Öneryildiz* case was the first environmental case in which the Court found the state to have violated Article 2.⁵⁰ In this case, illegal slum dwellings in Istanbul, built very close to a waste dump were destroyed in a methane explosion on the waste dump, killing 39 people. The Court held the authorities responsible for the deaths, not only because of the ineffective town and country planning, but also for actively tolerating the illegal dwellings. The authorities allowed the illegal dwellings to remain in the dangerous zone; they even provided electricity for the inhabitants and taxed them. The Court, unanimously, found that Article 2 was violated because the State officials and authorities did not do everything within their power to protect the lives of the

⁴⁶ § 107.

⁴⁷ *Dubetska and other v Ukraine*, Application No. 30499/03, 10 February 2011.

⁴⁸ § 106.

⁴⁹ § 111.

⁵⁰ *Öneryildiz v Turkey*, Application No. 48939/99, 30 November 2004.

residents of the slums from the immediate and known risks to which they were exposed.⁵¹

3.4 Noise

The ECtHR has decided quite a number of cases on nuisance caused by noise, mostly aircraft noise, but also neighbouring noise caused by traffic, fireworks, and even offices and a computer club, as will be discussed below. The most famous, and most important, case is the 2001 *Hatton* case on night flights at London's Heathrow airport.⁵² The regime for night flights had changed and caused sleep deprivation and associated problems for local residents. The Court, initially, found an infringement of Article 8.⁵³ What was so remarkable about this decision, was that it did not just apply the steps from the *López Ostra* case (see 3.3 above), instead, the Court argued that a special approach is warranted in environmental cases:

... Further, in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others. ... It considers that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.⁵⁴

According to this new approach, environmental cases under Article 8 have to be treated differently from other cases under Article 8. The exact economic benefits of the activity have to be assessed, disclosed, and weighed against the human rights impact. In the media and in literature, it was immediately announced that the Court now requires a 'human rights impact assessment'. The Court concluded that since the authorities did not critically assess the contribution of night flights to the national economy, or research sleep disturbance and sleep prevention by night flights, they did not strike a fair balance between the economic interests and the human right of Article 8.

⁵¹ § 109.

⁵² *Hatton and others v the United Kingdom*, Application No. 36022/97, 2 October 2001.

⁵³ § 109.

⁵⁴ § 97.

Only two years later, though, the ECtHR Grand Chamber⁵⁵ overturned the 2001 decision.⁵⁶ It did not assess the impact of night flights as being a big problem. It even argued that people can move should they want the noise to cease.⁵⁷ The Grand Chamber also considered that sufficient data was available for the authorities to allow for a new regime of night flights at Heathrow airport. As already stated above (section 2), the Grand Chamber, dismissed the idea of taking a special approach in environmental cases:

Environmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights.⁵⁸

Another remarkable general element in the Grand Chamber's judgment is its observation that, contrary to most other environmental cases before the Court, in this case, all domestic legal rules had been applied correctly:

The Court notes at the outset that in previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime. Thus, in *López Ostra*, the waste-treatment plant at issue was illegal in that it operated without the necessary licence, and was eventually closed down In *Guerra and Others*, the violation was also founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide This element of domestic irregularity is wholly absent in the present case.⁵⁹

⁵⁵ Review by the Grand Chamber is relatively rare. According to Article 43 of the ECHR, a chamber of 17 judges reviews cases that raise a serious question affecting the interpretation or application of the Convention. See Robin C A White, Clare Ovey, *The European Convention on Human Rights* (3rd edn, Oxford University Press 2010) 22–23.

⁵⁶ *Hatton and others v the United Kingdom*, Application No. 36022/97, 8 July 2003. See in more detail J Hyam, 'Hatton v United Kingdom in the Grand Chamber: One Step Forward, Two Steps Back?' (2003) 6 *European Human Rights Law Review* 631–640.

⁵⁷ § 127.

⁵⁸ § 122.

⁵⁹ § 120.

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In the later *Flamenbaum* case, also on aircraft noise, the Court carefully follows the steps from the *López Ostra* case and did not find infringements of Article 8.⁶⁰ From this case it is clear that carrying out an environmental impact assessment and using its conclusions in the decision-making process, helps the authorities to avoid an infringement of Article 8. The EIA provides the information that is needed to show that the foreseen measures to limit the impact of the noise disturbance on local residents are effective in striking a fair balance between the competing interests.⁶¹

On other sources of noise, two successful cases from November 2010 should be mentioned here. In the *Deés* case, the applicant suffered direct and serious nuisance because of excessive noise, vibration and pollution from traffic, after the introduction of a toll by a private motorway company in the Hungarian city of Alsónémedi. Despite many efforts by the authorities to reduce the negative impact (the authorities constructed three bypass roads, introduced a night speed limit of 40 km/h, provided two adjacent intersections with traffic lights and installed road signs prohibiting the access of heavy vehicles and re-orientating traffic), the Court found an infringement of the right to private and family life.⁶² The simple fact that, even after the introduction of mitigating measures, noise levels were still well above statutory norms, seems to be sufficient to declare the authorities to have violated Article 8 of the ECHR.⁶³

In the *Mileva* case, the applicants suffered excessive noise caused by offices and a computer club, after an apartment building had been converted for use as such.⁶⁴ This, too, was considered to be a violation of Article 8, especially because the authorities did not sufficiently act upon the complaints of the residents. Although the authorities ordered the computer club to shut down, this order was not enforced, hence leading to the Court's verdict that Article 8 was infringed.

⁶⁰ *Flamenbaum and others v France*, Application Nos. 3675/04 and 32264/04, on the extension of the runway of Deauville airport in France.

⁶¹ § 153–154.

⁶² *Deés v Hungary*, Application No. 2345/06, 9 November 2010.

⁶³ Similarly in *Oluic v Croatia*, Application No. 61260/08, 20 May 2010 and *Moreno Gómez v Spain*, Application No. 4143/02, 16 November 2004.

⁶⁴ *Mileva and others v Bulgaria*, Application No. 43449/02 and 21475/04, 25 November 2010.

3.5 Water Management and Floods

In the 2012 *Kolyadenko* case, the Court gave its first judgment on water management, in what probably was the first climate change related case before the ECtHR.⁶⁵ A Russian dam operator had to release large quantities of water from a reservoir following unexpected intense rainfall (the amount of rain that fell within 12 hours was the equivalent of a full month's rainfall). As a consequence of the release, a large area was flooded, including the homes of the six applicants and their families. The Court found a violation of the right to life (Article 2), the right to private and family life (Article 8) and the right to peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1 to the ECHR).⁶⁶ The main reason for this infringement was the inaction of the authorities. From reports and letters by several institutions, it had been known for years that the river channel was overgrown with vegetation and cluttered with debris, leading to a risk of flooding in the event of the urgent evacuation of water from the reservoir.⁶⁷ Nevertheless, the authorities did not keep the river channel clear or make sure its throughput capacity was adequate in the event of the release of water from the reservoir. In addition, the authorities did not inform the public of the inherent risks, nor did they restore and maintain an operational emergency warning system. The applicants did not even know that they lived in a flood-prone area. After the flood, the authorities remained passive and failed to take any practical measures to clear the river channel. The Court also found it relevant that the manifest inactivity of the authorities was acknowledged by prosecutors and other State agencies, and hence, was deemed to be illegal under domestic Russian law. The fact that an unusual amount of rainfall was the direct cause of the flood is not relevant: the authorities have to do everything in their power to protect the applicants' rights secured by Articles 2 and 8 of the Convention and Article 1 of Protocol No. 1.⁶⁸

⁶⁵ *Kolyadenko and others v Russia*, Application Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012.

⁶⁶ §§ 187 and 217.

⁶⁷ § 215.

⁶⁸ An increasing occurrence of such extreme weather events because of climate change will probably not change this point of view of the Court: through adaptive water management, the authorities will have to prepare themselves and the local population for the impact of extreme events. See Jonathan Verschuuren, 'Climate Change Adaptation and Water Law' in Jonathan Verschuuren (ed.), *Research Handbook on Climate Change Adaptation Law* (Edward Elgar 2013) 250–272.

3.6 Nature Conservation and Hunting

In the field of nature and biodiversity conservation, there are several relevant judgements. From these judgments, such as the *Kyrtatos* case,⁶⁹ it can be concluded that it is difficult to prove that the destruction of nature close to a person's home leads to an infringement of the right to private and family life because they are not directly affected by the loss of habitat of birds and protected species. In the *Kyrtatos* case, on the destruction of a swamp to allow for urban development adjacent to the property of the complainants, the Court did, however, state:

It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being.⁷⁰

The reasoning of the court seems to be flawed. Why would the destruction of a forest in the vicinity of the applicant's house affect the applicant's well-being more directly than the destruction of other natural habitat types? This seems to reveal a personal preference of the judges for forests over other components of nature.

The other side of the coin is that the authorities are allowed to take environmental and nature conservation measures, even if this infringes human rights, such as the right of Article 1 of Protocol No. 1, as long as legislation is in place that allows for this and rational administrative procedures are followed. In the *Hamer* case, the Belgian authorities demolished an illegally built house on protected forest land.⁷¹ In remarkably straightforward wording, the Court:

... reiterates that while none of the Articles of the Convention is specifically designed to provide general protection of the environment as such ... , in today's society the protection of the environment is an increasingly important consideration The environment is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the

⁶⁹ *Kyrtatos v Greece*, Application No. 41666/98, 22 May 2003.

⁷⁰ § 53.

⁷¹ *Hamer v Belgium*, Application No. 21861/03, 27 November 2007.

statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective.⁷²

Individual land owners can also invoke Article 1 of Protocol No. 1 to defend their property against hunters. In the *Chassagnou* case, the Court found that the obligation to tolerate hunting on their property imposes a disproportionate burden on landowners who are opposed to hunting for ethical reasons.⁷³ In a recent Grand Chamber decision, this view was upheld, even in the instance where hunting is carried out for reasons of general interest, such as the management of game stocks that is compatible with care of the land and with the prevailing cultural conditions, the prevention of damage caused by game, and the prevention of the spread of animal diseases.⁷⁴

4. CONCLUSIONS FROM THE CASE LAW

The above summary of judgments by the ECtHR in important environmental cases shows that human rights have a role to play in achieving sustainable development in Europe, although sustainable development as such is usually not explicitly referred to. Before turning to the question that is central in this contribution, that is, the question of how far the ECtHR, through its case law on the human rights laid down in the ECHR, has contributed to sustainable development, I will first draw some conclusions from the case law review:

1. There is no specific human right to a healthy environment or to protection of the environment in the ECHR. When environmental degradation affects other human rights, such as the right to life or the right to private and family life, these rights can be invoked to force the authorities to act against the degradation of the environment. In some cases, the court did explicitly point to the fact that when the environment is at stake, a special approach is warranted, namely one in which economic development considerations are integrated with environmental considerations. Thus, the court more or less constructed a human right on a healthy environment under

⁷² § 79.

⁷³ *Chassagnou and others v France*, Application Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999. A similar decision was reached in *Schneider v Luxemburg*, Application No. 2113/04, 10 July 2007.

⁷⁴ *Herrmann v Germany*, Application No. 9300/07, 26 June 2012.

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the umbrella of Article 8 with a focus on sustainable development. This line of reasoning, however, later was explicitly revoked,⁷⁵ and, so far, has not been repeated in later judgements.⁷⁶ Nevertheless, we see a clear development in case law towards greater protection for individuals. The best example thereof is the relaxation of the burden of proof regarding the causal relationship between pollution and health effects.

2. In its case law, the ECtHR relies largely on domestic environmental standards. Usually, applicants are only successful in cases where authorities omitted to adhere to existing environmental standards. Together with its approach to grant the domestic authorities a wide margin of appreciation in balancing overarching economic interests with human rights of individuals, this leads to the conclusion that the European human rights system primarily functions as a safety net for European citizens and a stimulus for authorities to implement and enforce existing environmental laws and regulations. The authorities are under an obligation to apply and enforce domestic environmental standards and to carry out domestic court rulings, in order to protect their citizens from environmental risks.
3. Procedural rights have been widely recognized in the Court's case law as being important in environmental decision-making: individuals have to have access to information, such as impact studies or risk assessments, have to be able to participate in decision-making processes, and have to be able to go to court.

These conclusions are relevant for all 47 member states of the Council of Europe, which includes the 28 member states of the European Union. For the latter, the role of the human rights from the ECHR in environmental issues is becoming more and more intertwined with EU law. First of all, this is a consequence of the role of domestic law in the ECtHR's case law (the second conclusion). There are hardly any areas of environmental policy left that have not been regulated at the EU level. All of these EU laws have either been implemented within the member states or are directly applicable in these states. Therefore, testing government actions or failures under the ECHR, will almost always involve testing these actions against the applicable EU law. Since the level of protection offered by these laws is fairly high, it is safe to assume that states that

⁷⁵ As was the case in the Grand Chamber judgment on the *Hatton* case, see section 3.4.

⁷⁶ The *Hamer* case being somewhat of an exception here, see section 3.6

simply implement and enforce the existing EU standards, will not infringe upon the human rights of the ECHR.

The second reason for an increased interconnectedness between EU law and human rights law is the growing involvement of the Court of Justice of the EU with human rights because of the recognition of the human rights laid down in the ECHR within the EU context, the process of accession to the ECHR and the now binding legal status of the EU's own human rights document, but also because of the impact of the Aarhus Convention on EU environmental law. Although these developments are still unfolding, it can be expected that a direct involvement of the EU Court of Justice with human rights in environmental issues will increase the impact of human rights in environmental cases because the EU Court has traditionally always argued that individual citizens should be able to rely on the EU's environmental standards before courts.

5 CONCLUSIONS: IMPACT OF ECHR ON REGIONAL INTEGRATION AND SUSTAINABLE DEVELOPMENT

Did the ECtHR, through its case law on the human rights laid down in the ECHR, contribute to sustainable development in Europe? Yes, to a certain extent: it has established a continent-wide safety net protecting all Europeans against severe environmental pollution and it has forced the authorities in 47 states to offer their citizens and NGOs procedural rights whenever the environment is at stake, to assess the impact on the environment of their decisions, to implement and enforce existing standards, and to carry out domestic court rulings. The ECtHR case law did not lead to a harmonization of environmental standards across Europe, or to the adoption of progressive environmental policies, or to an explicit recognition of the need to completely integrate economic, social and environmental considerations so as to contribute to a sustainable development.

The main focus of the ECtHR in environmental cases has been on the rights to life, private and family life and property of certain directly affected individuals. Such a focus seems logical from the current ECHR text, although recent scholarship has pleaded for 'a more imaginative and courageous jurisprudence which takes into consideration the collective dimension of human rights affected by environmental degradation and adapts the language and technique of human right discourse to the enhanced risk posed by global environmental crises to society and,

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indeed, to humanity as a whole'.⁷⁷ Pavoni has shown that already now, an individual may well lodge an ECHR complaint relating to environmental deterioration which affects a whole geographical area and associated population, hence dismissing the inadmissibility of public interest environmental litigation under the ECHR system is a false myth.⁷⁸ Nevertheless, the Court's contribution to regional integration and sustainable development has certainly not been major. The adoption of an explicit right to a safe, clean, healthy and sustainable environment could perhaps change this. However, at the moment it is not likely that such a right will be adopted any time soon. Not only is there no political will to include an environmental human right in the ECHR, there also are many unresolved issues as to the design of such a right.⁷⁹

For Europe, therefore, it seems that the EU's approach towards sustainable development is a much more promising road to travel. The EU's impact on the environment has been far greater because it does not merely offer a safety net and some procedural safeguards, but, as is evident from Chapter 10, an all-encompassing set of laws, regulations and policies on every imaginable environmental issue. In addition, the EU's approach has always focused on integrating economic, social and environmental interests, and thus at achieving a sustainable development. Sustainable development is at the core of basic EU law, in particular the EU Treaties. Accession of more European states to the EU can, therefore, be considered a much more fruitful approach to achieving sustainable development across the continent than relying on the work of the ECtHR. Despite its valuable contribution to the development of the human right to a healthy or safe environment, I would not bet all my money on this Court!

⁷⁷ F Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 *European Journal of International Law* 55.

⁷⁸ *Supra* note 30.

⁷⁹ Most of the remaining issues are listed in the 2011 stakeholder input by the Dutch Section of the International Commission of Jurists (NJCM) for the UN Office of the High Commissioner for Human Rights study on Human Rights and the Environment, available online through <http://www.njcm.nl/site/uploads/download/433>. The report (at page 11) concludes that the right to environment is still subject to debate for such reasons as: its added value, the manner in which it fits in with existing rights and approaches, its exact content, formulation, object and purpose of protection, and its legal enforceability.