The Greening of Human Rights

Environmental protection under the European Court of Human Rights 1990-2020

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Introduction

> 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.
>
> - Declaration on the Human Environment

In 2015, a Pakistani court made world news by deciding that the government of Pakistan violated the petitioners' human rights by failing to adequately incorporate national climate change policies. The *Leghari* v. *Federation of Pakistan* case is part of an emerging body of pending or determined environmental lawsuits that incorporate human rights-based arguments.[1] Probably the most famous example of this is the *Urgenda* v. *The State of the Netherlands* case. In June 2015, the District Court of The Hague decided that the climate change policy of the Netherlands was insufficient, and obliged the Dutch government to decrease its CO^2 emissions with at least 25% compared to its 1990 levels. On appeal, the European Convention on Human Rights (ECHR) played a decisive role and with the ruling of the Dutch Supreme Court in December 2019, the Dutch climate policy became a human rights issue.[2] According to legal scholars Jaqueline Peel and Hari Osofsky, treating the environment as a human rights issue is part of an emerging strategy to fight environmental degradation.[3] However, despite the abundance of media coverage, the human rights-based approach of the *Urgenda* nor the *Leghari* case is anything new.

When looking at the decisions of various human rights bodies across the world, it quickly becomes clear that the use of human rights to improve environmental protection has been on the rise since the 1980s.[4] Despite the non-recognition of the right to a healthy environment in any declaration of human rights, international courts have produced an abundant case-law regarding environmental issues. According to scholar of environmental law Ole Pedersen, the European Court of Human Rights (ECtHR) has been the most progressive in handling environmental cases. There is no specific reference to the environment or environmental degradation, let alone the right to a healthy environment in the European Convention on Human Rights. In spite of this, the Court has heard numerous cases relating

[1] Jacqueline Peel and Hari M. Osofsky, "A Rights Turn in Climate Change Litigation?," Transnational Environmental Law 7, no. 1 (2017): pp. 37-67, 38.
[2] District Court The Hague. *Urgenda v. The State of the Netherlands*. No. ECLI:NL:RBDHA:2015:7145, 24 June 2015. Court of Appeals The Hague. *Urgenda v. The State of the Netherland*. No. ECLI:NL:GHDHA:2018:2591, 9 Oct. 2018. & Supreme Court The Hague. *Urgenda v. The State of the Netherlands*. No. ECLI:NL:HR:2019:2006, 20 Dec. 2019.
[3] Peel and Osofsky, A Rights Turn in Climate Change Litigation, 42.
[4] Ole W. Pedersen, "The Ties That Bind: The Environment, the European Convention on Human Rights and the Rule of Law," SSRN Electronic Journal, 2010, pp. 2-37, 36.

to the environment and has developed an extensive environmental case-law. Legal scholar Hana Müllerová states that a human rights-based approach to environmental protection is evolving into an important legal instrument, complementing traditional international environmental agreements. She argues that environmental protection ought to have a future in international human rights law and is, therefore, an important subject of research.[5]

Many different views exist on the compatibility of human rights and environmental protection, which will be discussed in more detail later on, but broadly speaking three different perspectives can be distinguished. The first view emphasizes the mutually supportive relationship between human rights and the environment. Scholars that adhere to this view believe that environmental issues may negatively impact the enjoyment of multiple human rights.[6] Furthermore, the legal protection of human rights can offer a strong juridical framework to achieve environmental protection. The second group of scholars rejects the connection between human rights and the environment altogether.[7] They claim that fighting environmental degradation with a human rights-based approach reduces the value of the environment itself and causes an anthropocentric view. Scholars that comply with the third perspective position themselves somewhat in the middle of these contrasting views. They see human rights and the environment as different but overlapping value systems that share a core of common objectives.[8]

This raises the question of how environmental and human rights exactly relate to each other within the context of the European Court of Human Rights. Although much research has been done about the compatibility of environmental protection and human rights in theory, research on how the two fields interrelate in practice is lacking. Because the ECtHR has the most progressive and comprehensive case-law regarding the environment, the ECtHR is at the core of this research. Since the 1990s, the amount of environmental cases that came before the ECtHR accelerated, and that number is still growing today. Since the first official environmental case came before the Court in 1990, the focus will be on the period between 1990 and 2020. By looking into the history of environmental protection under the ECtHR and analysing the environmental case-law of the Court, this research will explain the increased use and centrality of human rights frameworks to fight environmental degradation and disclose its strengths and weaknesses.

[5] Hana Müllerová, "Environment Playing Short-Handed: Margin of Appreciation in Environmental Jurisprudence of the European Court of Human Rights," *Review of European, Comparative & International Environmental Law* 24, no. 1 (May 2014): pp. 83-92, 84.
[6] Alan E. Boyle and M. R. Anderson, *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 2003), 2-10.
[7] David R. Boyd, The Environmental Rights Revolution: a Global Study of Constitutions, Human Rights, and the Environment (Vancouver: UBC Press, 2014), 12.
[8] Donald K. Anton and Dinah Shelton, Environmental Protection and Human Rights (Cambridge: Cambridge University Press, 2012), 101.

Human rights and environmental protection

The numerous interconnections between human rights and the environment are broadly accepted on a global scale. Well established international organizations such as the United Nations have acknowledged the mutually supportive relationship between the environment and human rights. Environmental issues, such as pollution, deforestation, or resource depletion can negatively impact the enjoyment of fundamental human rights, including the right to health, the right to family life, the right to self-determination, and the right to life itself. John Knox, former United Nations Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment articulated the connection between the environment and human rights in his final report to the Human Rights Council in 2018. He stressed the interdependence of the protection of both human rights and the environment. According to Knox, humans' enduring reliance on the environment for livelihood as well as a source of prosperity, means that the protection of the environment underpins the enjoyment of a wide range of human rights. In other words, a healthy environment can be seen as a precondition to the full enjoyment of human rights because these rights are potentially affected by poor environmental conditions.[9] Furthermore, Christopher Weeramantry, former vice president of the International Court of Justice, states that "the protection of the environment is a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments".[10]

According to legal and political science scholar Michael Anderson, the mutually supportive relationship between the environment and human rights may be conceived in two ways. In the first approach, environmental protection is a means to fulfil human rights standards. Since degradation of the physical environment can directly contribute to the infringement of various human rights, acts leading to environmental degradation may constitute an immediate violation of these human rights. The creation of a reliable and effective system of environmental protection would thus help to ensure human rights standards.[11]

Following the second approach, the legal protection of human rights offers a juridical framework to achieve conservation and protection of the environment. In other words, the full realization of human rights standards would help to constitute a political order in which the environment

[9] John Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (Geneva: United Nations General Assembly, 2018).
[10] Mary Ann Glendon, "The Environment as a Human Rights Issue," in *Environmental Protection and Human Rights*, ed. Donald K. Anton and Dinah Shelton (Cambridge: Cambridge University Press, 2011), pp. 118-150, 119.
[11] Boyle and Anderson, *Human Rights Approaches*, 8.

is more likely to be respected. The most ambitious adherents of this view believe that there should be an inalienable human right to a healthy environment. The focus of this right would be the quality of the environment itself instead of the impact of the environment on the enjoyment of other human rights.[12] According to environmental law scholar Bridget Lewis, it is not possible to define a right to a healthy environment in a way that is, at the same time, theoretically cogent, practically useful, legally enforceable, and politically acceptable for states. She argues that studies should be focused on clarifying the environmental dimensions of existing human rights to strengthen the mutually supportive relationship between the environment and human rights.[13]

In neither of these approaches, the environment has an intrinsic right to be protected. Obviously, this is the logical result of deciding to fight environmental degradation with a human rights-based approach. However, it is still noteworthy because it inevitably means that there are limitations to the degree in which the environment will be protected. Some scholars reject the connection between human rights and the environment altogether, seeing incompatibility or even danger in their coupling. Environmental law scholar David Boyd, for example, argues that environmental justice and human rights are based on fundamentally different and irreconcilable value systems.[14] A number of environmental lawyers claim that a human rights focus within environmental justice cases reduces the value of the environment itself. They state that it causes a "human-centered, utilitarian view in which the environment is used to enhance the quality of life and aspects of the ecosystem are reduced to their economic value to humans".[15] Environmentalists voice their concerns about the preservation of biodiversity, especially with regard to species that are not useful for humans, or ecological processes whose significance may not be fully understood or known. They argue that within the human rights agenda the environment will not be protected because of its intrinsic value, but because of its benefits to humans.[16] On the other hand, some human rights activists believe that linking human rights and environmental justice distracts from more immanent human rights concerns, such as extrajudicial killings, arbitrary detention, torture, and genocide.

The international recognition of universal human rights gives an immediate, practical advantage to utilizing international human rights law to fight environmental degradation. The predominant acceptance of human rights preserves them from the ordinary political process. The emplacement of human rights may thus significantly limit the political will to breach those rights by both a democratic majority or a dictatorial minority. Or to use the words of the Dutch Supreme Court: "you cannot outvote a universal human right, not even with the majority of the parliament".[17] Restricting the process of

[12] Boyle and Anderson, *Human Rights Approaches*, 8.
[13] Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Singapore: Springer, 2019), 1.
[14] Boyd, The Environmental Rights Revolution, 18.
[15] Glendon, The Environment as a Human Rights Issue, 121.
[16] Glendon, The Environment as a Human Rights Issue, 119.
[17] Supreme Court The Hague. *Urgenda v. The State of the Netherlands*. No. ECLI:NL:HR:2019:2006, 20 Dec. 2019.

domestic political decision-making is an important aspect of elaborating a right. The high short-term costs involved in implementing many environmental protection measures, often make environmental policies unpopular, especially in economically unstable countries. Recognizing that protecting the environment is a core value and a universal right can be particularly beneficial in countering political reluctance and compelling countries to maintain high environmental standards. This process could help to ensure that the long-term needs of humanity are not sacrificed for short-term interests.

Professor of international law Dinah Shelton has devoted over thirty years of research to the interrelation of human rights and the environment. She has written multiple books about the subject like *Human Rights, Environmental Rights and the Right to Environment* published in 1991 and *Environmental Protection and Human Rights* in 2011. She argues that mankind is part of a global ecosystem. This view may help to reconcile the objectives of environmental protection and human rights. Both ultimately seek to achieve the optimal quality of sustainable life for humanity. However, the broad protection of nature may at times conflict with the enjoyment of individual human rights, such as the right to property, for example. It is not surprising that international environmental law and human rights law have occasionally placed emphasis on different parts of environmental protection and human rights, and therefore conflicting differences of emphasis will exist. In spite of this, the essential concerns of environmental protection and human rights can be compatible. The central interest of human rights law is to protect individuals and groups alive today. Environmental protection adds to the goals of human rights the additional purpose of sustaining the global ecosystem by balancing the preservation of species alive now and in the future.[18]

Dinah Shelton has made a categorization that shows that human rights and environmental protection are sometimes compatible and at other times incompatible. Her view enables a more differentiated and nuanced perspective and, moreover, offers the opportunity to analyse how the two fields interrelate in practice. Furthermore, this categorization provides a theoretical framework to analyse how human rights-based environmental protection has developed historically, and therefore, it will be used in this research. Shelton argues that human rights and environmentalism each represent different, but overlapping, value systems. She notes that the two fields share a common core of overlapping interests and objectives. However, not all human rights violations lead to environmental degradation and environmental issues cannot always effectively be addressed with a human rights-based approach. Environmental protection cannot be wholly incorporated into the human rights framework without deforming the concept of human rights.[19] Shelton outlines three different ways in which human rights law and environmental protection interrelate.

[18] Dinah Shelton, "Human Rights, Environmental Rights, and the Right to Environment," Environmental Rights, May 2017, pp. 509-544, 511.
[19] Shelton, Human Rights, Environmental Rights, 511.

First, those primarily interested in protecting the environment utilize or emphasize relevant human rights in drafting international environmental instruments. The first group selects "from the catalogue of human rights" those rights that serve the aim of environmentalism, indifferent to the benefit of this for the enjoyment of other rights.[20] In this approach, human rights are utilized to recognize the broad objectives of environmental protection. The emphasis lies on procedural and participatory rights, such as the right to freedom of association and the right to access to information about potential threats to the environment. These rights may be used to protect the environment but do not necessarily relate to human well-being. Shelton notes that, due to the inefficiency of compliance mechanisms in nearly all international environmental agreements, problems arise about the short-term effectiveness of this method in accomplishing the aim of environmental protection.[21]

The second approach calls upon existing human rights guarantees and institutions, adapting or applying human rights law when their enjoyment is jeopardized by environmental issues. This method is undoubtedly anthropocentric. Its aim is to ensure that the environment does not deteriorate to the point that the enjoyment of human rights is at risk. In other words, the focus lies on the consequences of environmental issues to human rights and human well-being. Environmental protection is in this approach instrumental, not an end in itself. The main advantage of this approach is that it offers a way to address the most serious cases of actual and imminent-threatening environmental degradation. In comparison to the weak compliance mechanisms of the majority of international environmental agreements, the human rights supervisory machinery is better developed. The human rights compliance machinery may be invoked when the lack of environmental protection of states seriously impairs the human rights status of that country. However, Shelton notes that from an environmental perspective this human rights based-approach falls short because it does not address environmental issues related to non-humans or ecological processes.[22]

The goal of the third approach is to fully incorporate environmental protection into the human rights framework by formulating a new human right to a healthy environment. This right should not be defined in solely anthropocentric terms but should construct an environment that is not only healthy for humans but also ecologically-balanced, durable, and sustainable. Although various efforts have been undertaken in this direction, this movement has met some resistance. Despite the inclusion of environmental and ecological concerns in formulations of the right, strict environmentalists prefer a pure ecocentric approach and object to the anthropocentrism inherent in taking a human rights approach to environmental protection.[23] Furthermore, the idea of a human right to a healthy environment has met opposition from legal scholars like Bridget Lewis, who claim that the concept cannot be given content. They note that, due to the inherent variability of environmental conditions, a right to a healthy

[20] Shelton, Human Rights, Environmental Rights, 513.
[21] Shelton, Human Rights, Environmental Rights, 515.
[22] Shelton, Human Rights, Environmental Rights, 515.
[23] Shelton, Human Rights, Environmental Rights, 513.

environment cannot be formulated in a way that is practically useful and at the same time theoretically cogent, and thus no justiciable standards can be developed.[24]

Historical interrelation of human rights and the environment

Environmental law and human rights law have developed rapidly and largely independently of each other in the past decades. In light of the limited length of the thesis, the historical development of rights-based environmental protection is briefly summarized. The emphasis will lie on the grand international developments and on the European continent, as these have strongly influenced the ECtHR. Details are consciously left out and developments in other regions are omitted. This does not make them less interesting, it does, however, make them less important for the development of rights-based environmental protection under the ECHR. Naturally, the history and development of human rights and environmental protection have in part been shaped by national and international political developments. The end of the Second World War led to the emergence of the United Nations and the proclamation of international human rights covenants and conferences which would ultimately influence the field of human rights and environmental protection enormously. Human rights have developed in theory and practice since the proclamation of the Universal Declaration of Human Rights in 1948. The development of contemporary international environmental law was triggered when the United Nations General Assembly decided to convene the United Nations Conference on Human Rights and the Environment in Stockholm in 1972.[25] This was the first big effort to explore the relationship between human rights and environmental protection. This effort culminated in the Stockholm Declaration which recognized that environmental protection is a pre-condition for the enjoyment of many human rights.[26]

Since the Stockholm Conference, it has been broadly recognized by scholars, lawyers and activists alike that human rights law and environmental law overlap.[27] This has been evident, for example, in the way the right to life and the right to private and family life can be negatively affected through air or water pollution. During the Stockholm Conference the United States of America proposed to declare a substantive right to a healthy environment, however, this lacked the support of other states. Therefore, the Stockholm Declaration remained soft law. This led scholars and environmental activists to consider human rights in a more instrumental fashion.[28] They identified those rights whose enjoyment could be considered a necessity for environmental protection. In the first years after the Stockholm

[24] Lewis, *Environmental Human Rights and Climate Change*, 1.
[25] Stephen J. Turner, "Introduction: A Brief History of Environmental Rights and the Development of Standards," in *Environmental Rights: The Development of Standards*, ed. Jona Razzaque et al. (Cambridge: Cambridge University Press, 2019), pp. 1-16, 1.
[26] UNCED, Report of the United Nations Conference on Environment and Development: Rio De Janeiro, 3-14 June 1992 (New York, 1993).
[27] Clarence J. Dias, "Human Rights, Development, and Environment," *The Universal Declaration of Human Rights: Fifty Years and Beyond*, 2018, pp. 395-401, 398.
[28] Dinah Shelton, "Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?," *Denver Journal of International Law and Policy* 35, no. 1 (2006): pp. 128-189, 132.

Conference rights-based environmental protection was mostly based on procedural rights to environmental information, public participation in decision-making processes and remedies in the event of environmental harm.

Even though the Stockholm Declaration fell short of proclaiming the existence of a fundamental environmental right, its authority resonated with governments and the international community. The influence of the Stockholm Declaration is manifested in the manner in which national governments proceeded to consider the rights and obligations included in their national constitutions.[29] Currently, more than a hundred countries guarantee some level of environmental protection in their constitutions. Over half of these constitutions explicitly recognize the right to a clean and healthy environment.[30] Furthermore, 92 constitutions impose a duty on the state to prevent environmental degradation.[31] This is an important development because the way in which the environment is protected by national law influences the way it can be protected by international human rights law, as will be explained in more detail in the first chapter. Although important, without national and international courts that enforce these environmental provisions, the effect on environmental protection is debatable.

During the 1990s, linking environmental protection and human rights gained new momentum with the United Nations Conference on Environment and Development in Rio de Janeiro in 1992.[32] Whereas the Stockholm Declaration proclaimed a relatively strong link between environmental protection and human rights, the Rio Declaration avoided using human rights language in relation to the environment.[33] Nevertheless, the Rio Declaration allocated a major role to procedural rights and emphasized the importance of public participation in environmental protection.[34] Another meaningful event occurred in Europe in 1998 with the signing of the Aarhus Convention by the United Nations Economic Commission for Europe (UNECE), which came into force in 2001. This landmark agreement

[29] Turner, Introduction: A Brief History, 3.
[30] Dinah Shelton, What Specific Environmental Rights, 164.
[31] Andorra, Angola, Argentina, Armenia, Bahrain, Belarus, Benin, Bolivia, Brazil, Bulgaria, Cambodia, Cameroon, Cape Verde, Chad, Chechnya, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Ecuador, El Salvador, Equatorial Guinea, Eritrea (draft), Finland, Georgia, Germany, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Iran, Kazakhstan, Kuwait, Laos, Latvia, Lithuania, Macedonia, Madagascar, Malawi, Mali, Malta, Mexico, Micronesia, Mongolia, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, Niger, Palau, Panama, Papa New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Sao Tome and Principe, Saudi Arabia, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Suriname, Switzerland, Taiwan, Tajikistan, Tanzania, Thailand, Togo, Turkey, Turkmenistan, Uganda, Ukraine, Uzbekistan, Venezuela, Vietnam, Yugoslavia, Zambia.
[32] UNCED, Report of the United Nations Conference on Environment and Development: Rio De Janeiro, 3-14 June 1992 (New York, 1993).
[33] Where the Stockholm Declaration states that "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 Rio Declaration notes that "human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".
[34] Turner, Introduction: A Brief History, 7.

is an elaboration of the Rio Declaration, as it solely addresses procedural and participatory environmental rights.[35]

In 2012, the UN Human Rights Council appointed Professor of International and Human Rights Law John Knox as an Independent Expert in the field of human rights and the environment. He was selected to "study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment".[36] In 2015 his mandate was extended and changed to that of Special Rapporteur, which gave considerably more weight to the position. This appointment increased the attention on the issue of a human rights-based approach to environmental protection and catalysed further work in this field through the facilitation of high-level meetings and dialogues. Knox's work is important because it strengthens and makes the interrelation between the environment and human rights more visible. However, until his ideas are adopted by national and international courts, the theory has not been translated into practice.

Additionally, Special Rapporteur Knox has suggested to the General Assembly that the United Nations should issue a General Resolution that expresses the recognition of the right to live in a "safe, clean, healthy and sustainable environment".[37] Even though the General Assembly does not have any law-making power, a declaration would reaffirm the link between human rights and the environment and significantly underscore the right to a healthy environment. It would put the work of Knox and other advocates of rights-based environmental protection in practice. To this date, the UN General Assembly and most international human rights bodies do not recognize a substantive right to a safe and healthy environment. The Stockholm Declaration came closest to proclaiming a right to the environment. However, the Rio declaration avoided using rights language altogether. A few years later in 1995, the United Nations Human Rights Commission rejected the proposal of an expert sub-commission to draft a declaration on human rights and the environment that recognized the right to a healthy environment.[38]

The likelihood of the UN General Assembly to adopt a declaration stating the right to a healthy environment at this moment is low. The reason why the above mentioned initiatives were unfruitful is that the majority of member states is not necessarily interested in facilitating a right to a healthy environment, binding or non-binding.[39] The most recent example of this was during negotiations surrounding the 2016 Paris Agreement. In the first draft of the agreements the provision stated that states ought to respect human rights while taking action to address climate change. After resistance by

[35] UNECE, *Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)* (Aarhus, 1998).
[36] Turner, Introduction: A Brief History, 13.
[37] Knox, *Report of the Special Rapporteur*, 68.
[38] John H. Knox, Ramin Pejan, and David R. Boyd, *The Human Right to a Healthy Environment* (Cambridge: Cambridge University Press, 2018), 2.
[39] Ole Pedersen, "The European Court of Human Rights and International Environmental Law," in *The Human Right to a Healthy Environment*, ed. John H. Knox, Ramin Pejan, and David R. Boyd (Cambridge: Cambridge University Press, 2018), pp. 86-96, 88.

some states the reference to human rights was moved to the preamble.[40] This reflects the unease of some member states regarding formally expressing the link between human rights and the environment.

The environment as a human rights issue in the European Court of Human Rights

Over the past decades, environmental degradation has become a fundamental issue of justice and human rights. From the moment the Stockholm Conference in 1972 triggered the development of modern environmental law, our understanding of the interrelation between human rights and the environment has become increasingly advanced. Throughout history United Nations agencies have played an important role. The different international conferences on human rights and the environment have provoked dialogue, activism and research. However, efforts from Special Rapporteur Knox and others have mostly been on paper. Although it has surely enhanced the interrelation between the environment and human rights in theory, efforts to declare a substantive right to a healthy environment have been unfruitful because of political reluctance. Furthermore, the rights-based approach to environmental degradation has mostly been based upon participatory and procedural rights. The non-recognition of a right to a healthy and safe environment does not mean that human rights norms relating to the environment have not developed. Over the past decades, UN bodies, regional courts and other human rights mechanisms have applied human rights law to environmental problems. They have done so in a process which has been called the "greening" of human rights, that is applying already recognized human rights to environmental issues and the European Court of Human Rights has been the most progressive in doing so.

The different scholarly perspectives and the historical development of rights-based environmental protection raises the question of how human rights and environmental protection have related to each other in practice. Answering how human rights and environmental protection have interrelated within the framework of the European Court of Human Rights between 1990 and 2020 will be the main aim of this thesis. To analyse the interrelation between the environment and human rights in the context of the ECtHR the following questions will be answered. What have been the implications of dealing with environmental issues from within the framework of the European Court of Human Rights? How have the founding principles and doctrines of the Court influenced the "greening" of the Convention? Which type of human rights are most fertile for reaching environmental protection? And, how has the environment been protected in the environmental case-law of the European Court of Human Rights? The categorization of Dinah Shelton is used throughout the chapters to analyse how human rights and environmental protection interrelate with each other and how this has changed over time.

[40] United Nations Framework Convention on Climate Change, *Paris Agreement* (Paris: United Nations Treaty Collection, 2018), Preamble.

To ultimately answer the main question, the emphasis lies on the contemporary historical development of rights-based environmental protection of the European Court of Human Rights. The first chapter deals with the implications of handling environmental issues from within the framework of the European Court of Human Rights. What are the founding principles of the ECtHR, how does the Court generally proceed and what are the implications of this for environmental cases? As mentioned before, there is no mention of the environment, let alone the right to a healthy environment in the European Convention on Human Rights. Despite this, the ECtHR has heard numerous cases relating to the environment and has developed an extensive and progressive environmental case-law. The Court protects the environment to some extent through the progressive interpretation of certain Convention Rights. Legal scholar Hana Müllerová calls this the "greening" of the Convention. She notes that this has been made possible through three cornerstone interpretative instruments.[41] First, the principle of evolutive and extensive interpretations obliges the Court to interpret the Convention according to present-day conditions. The progressive interpretation of this principle broadens the range of values protected under the Convention, including environmental values. Secondly, the doctrine of positive obligations implies that with certain human rights it is not sufficient for states to solely abstain from violating these rights. States have a positive obligation to facilitate the effective exercise of these human rights. Finally, the doctrine of horizontal effect means that in relation to some Convention rights, states may violate the human right by failing to properly regulate the private sector. The first chapter of this thesis will explain this process in more detail and discusses its strengths and weaknesses in relation to environmental issues. It is important to discuss both the founding principles of the Court and the doctrines that have allowed for the greening of the Convention because they determine the limitations to which the environment can be protected under the Convention. As a consequence, they form important implications to how environmental protection and human rights can relate to each other within the framework of the European Convention of Human Rights.

In the second chapter, the environmental case-law of the ECtHR will be analysed, to answer how the environment has exactly been protected under the European Convention on Human Rights. The focus of this research will be on environmental issues that came before the Court between 1990 and 2020 and that have been fought by claiming a violation to Article 8 (right to private and family life) of the Convention. Because there is no explicit right to a healthy environment environmental protection is solely achieved as a side-effect of the protection of other rights. However, Müllerová argues that "the fact that environmental human rights have no preferential treatment under the Convention does not mean that they do not exist".[42] Severe environmental nuisances have been acknowledged as violations of various human rights. By progressive interpretation of a number of Convention rights certain environmental rights have been derived from the European Convention on Human rights. Article 8,

[41] Müllerová, Environment Playing Short-Handed, 86.
[42] Müllerová, Environment Playing Short-Handed, 87.

which guarantees the right to respect for private and family life, home, and correspondence, stands out as the most important source of environmental protection. Although these implicitly recognized environmental rights are only indirect and limited, they offer the opportunity to protect the environment from severe degradation. The second chapter discusses these limitations and analyses how environmental protection and human rights interrelate in the environmental case-law of the European Court on Human Rights. To keep this research comprehensible, only the environmental case-law where Article 8 of the Convention is invoked will be discussed. In this way a fair comparison can be made between environmental cases, and an equitable historical development of the environmental case-law of the ECtHR can be constructed. The choice fell upon Article 8 because in the majority of environmental cases this right is utilized to fight environmental degradation.

Even though the Court does not enshrine a right to a healthy environment as such, the ECtHR does recognize a specific environmental case-law. Or to put it in their own words "the European Court of Human Rights has been called upon to develop its case-law in environmental matters on account of the fact that the exercise of certain Convention rights may be undermined by the existence of harm to the environment and exposure to environmental risks".[43] In 2006, the Council of Europe published its first *Manual on Human Rights and the Environment*, the second edition appeared in 2012.[44] In this handbook the Council of Europe explains how the environment is protected under the European Convention of Human Rights. Furthermore, every three months the ECtHR updates its factsheet on "the Environment and the European Convention on Human Rights".[45] Here the Court presents its environmental case-law. This document contains all cases, that involve environmental matters that came before the ECtHR, from its foundation to this date, and consist of a total of 57 cases of which 35 include a breach to Article 8 of the Convention. In the second chapter, the ten most influential environmental cases are reviewed in chronological order, to construct the historical development of rights-based environmental protection. Special attention is paid to the influence of the doctrines of the Court on the outcome of environmental cases. The justification for this approach is explained in more detail in the chapter, but generally speaking the choice fell upon these particular cases because they are either landmark cases, which generate doctrinal developments and leave their mark on future cases, or because they are representative of a historical development. Because the ECtHR builds upon previous cases in its jurisprudence, showcasing a number of important cases is the best way to explain developments in their case-law.

Considering that a human rights-based approach to environmental protection is part of an emerging strategy to fight environmental degradation, and environmental protection has a future in

[43] European Court of Human Rights, "Factsheet Environment and the European Convention of Human Rights," accessed December 15, 2020, https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf.
[44] Council of Europe, *Manual on Human Rights and the Environment* (Strasbourg: Council of Europe Publishing, 2012).
[45] European Court of Human Rights, "Factsheet Environment and the European Convention of Human Rights," accessed December 15, 2020, https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf.

international human rights law, it is important to study how these fields relate to each other. What does it mean for the environment to be treated as a human rights issue? And how does a human rights-based approach influence the possible end result of environmental protection. By clarifying the tension between human rights and environmental protection within the framework of the European Court of Human Rights, this thesis has the purpose of contributing to the effort of improving the effectiveness of environmental protection. Scholars of international law, like Dinah Shelton, have already made a huge contribution to this. By applying the theoretical framework of Shelton to analyse the European Court of Human Rights, this thesis will provide new insights into the profound interrelation between human rights and the environment.

Chapter one: The European Court of Human Rights

This chapter discusses the creation of the European Court of Human Rights and its functioning. It deals with the implications of handling environmental issues from within the framework of the European Convention on Human Rights. It is important to discuss both the founding principles of the Court and the doctrines that have allowed for the greening of the Convention because they determine the limitations for environmental protection under the ECHR. As a consequence, they structure the ways in which environmental protection and human rights can relate to each other within the framework of the ECtHR. In other words, the rules of interpretation establish the framework and create the boundaries for human rights-based environmental protection under the Convention. Although different doctrines, such as the doctrine of dynamic interpretation, have allowed environmental issues to come before the Court, others have determined that states are permitted much of room to manoeuvre in environmental cases. This means that the ECtHR is less likely to find a violation of a human right, especially in cases of environmental degradation where the lives of individuals are not directly jeopardized.

European Court of Human Rights and its foundations

1948, Europe had been the theatre of great atrocities, during the Second World War, and the newly created Council of Europe was committed to prevent any recurrence of such events. The Council was created to uphold human rights, democracy and the rule of law in Europe and felt compelled to press for international human rights guarantees as part of Europe's reconstruction.[46] The Council of Europe is a regional intergovernmental organization and is distinct from the European Union, although there exists a big overlap in contracting states. In 1948, the Council decided at the Congress of Europe in The Hague that a regional human rights system could be successful in avoiding future conflict and uphold human rights norms.[47] A year after its foundation, the ten countries of the Council of Europe, self-described as "like-minded and having a common heritage of political traditions, ideals, freedom and the rule of law", agreed to take the first step in reinforcing the rights stated in the Universal Declaration of Human Rights, and signed the *Convention for the Protection of Human Rights and Fundamental Freedoms* in November 1950.[48] Today, adherence to the European Convention on Human Rights and cooperation with its supervisory machinery is a precondition of membership of the Council of Europe.

Considering that the Convention was drafted during the post-war period, it is not surprising that the focus was put on promulgating rights that were fundamental of nature and directly related to

[46] Anthony Lester, "The European Court of Human Rights after 50 Years," *The European Court of Human Rights between Law and Politics*, January 2011, pp. 98-116, 101.
[47] Dinah Shelton, "The Boundaries of Human Rights Jurisdiction in Europe," *Duke Journal of Comparative & International Law* 13, no. 1 (2003): pp. 95-154.
[48] Lester, The European Court of Human Rights after 50 Years, 103.

democracy itself.[49] The Council of Europe stated that they "desire[d] a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition; a Court of Justice with adequate sanctions for the implementation of this Charter".[50] After drafting the European Convention on Human Right, the Council of Europe primarily focused their attention on developing a control machinery to supervise the implementation and to enforce the initially granted human rights under the Convention.[51] With its foundation in 1959, the European Court of Human Rights was the first-ever regional human rights court.

Initially, two institutions were established which had the mandate to ensure engagement with the Convention rights by the contracting states. The European Commission on Human Rights and the European Court of Human Rights. The Commission was abolished in 1998, which made the European Court of Human Rights a full-time court. Until 1998, individuals did not have direct access to the ECtHR, they had to apply to the Commission, who would launch a case in the Court on the individual's behalf, if it found the case to be well-founded. In 1998 Protocol No. 11 was adopted which provided the Court with compulsory jurisdiction over individual and interstate cases, enabling individuals to take cases to the Court.[52] Other protocols and provisions gradually enhanced the position of individuals before the Court. Nowadays, the Court may receive applications from "any person, non-governmental organization or group of individuals claiming to be the victim of a violation of the rights set forth in the Convention or the protocols thereto".[53] Over the past decades the number of member states grew exponentially, and the Council of Europe adopted thirteen additional protocols to the European Convention on Human Rights, broadening the scope of the Convention. The first protocol added, for example, the right to property and Protocol No. 6 abolished the death penalty, except during wartimes.[54]

Human rights are rarely absolute and limitations are often imposed upon individuals. One has, for example, the right to demonstrate, but a government can interfere in the case of a riot. In other words, a violation of a right to an individual may mean the protection of human rights for many. The state is the most important factor in implementing and enforcing human rights, but limitations are inevitable. That is why the state is the biggest protector of and at the same time the biggest danger to human rights. Because of this dual relation, the protection and restriction of human rights cannot be fully left to individual states. Nevertheless, the European Court of Human Rights is of the opinion that it is the primary responsibility of states to provide for effective human rights protection. A distribution of responsibility exists between the Court and the state. The primary responsibility to protect and to

[49] Pedersen, The Ties That Bind, 16.
[50] Council of Europe, *Report of the Control System of the European Convention on Human Rights* (Strasbourg: Council of Europe Press, 1992).
[51] R. St. J. MacDonald, F. Matscher, and H. Petzold, *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993), 10.
[52] Council of Europe, *European Convention*, Protocol No. 11 (entered into force Nov. 1 1998)
[53] Council of Europe, *European Convention*, Article 34.
[54] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Strasbourg: Council of Europe Press, 1950), Protocol No. 1 (entered into force May 18, 1954) & Protocol No. 6 (entered into force March 1, 1985).

regulate human rights lie both with the state. Citizens should be able to go to a national court if their human rights are violated. Only if this proves to be impossible, or if the national court does not comply with international human rights law, an individual can go to the ECtHR. This is called the principle of subsidiarity and is one of the founding principles of the Court.[55]

The European Court of Human Rights adopted some general principles of interpretation that are of great importance because they determine the way in which the environment can be protected under the ECHR. In other words, these rules of interpretation establish the framework and create the boundaries for human rights-based environmental protection under the ECtHR. In the following paragraphs these principles will be set out and their importance for environmental protection explained. First and foremost, the European Court of Human Rights opts for the most effective protection of human rights. This might sound self-evident, but it means that the Court aims to make human rights protection not only theoretical but also practical. The European Convention and other human rights instruments are generally drafted in broad terms, making it hard to determine the original intent. A teleological emphasis on, or instrumental approach to, the object and purpose of the Convention allows for a dynamic and evolving interpretation of the treaty that can move away from the original intent of the drafters.[56]

The ECtHR describes the European Convention on Human Rights as a "living instrument which must be interpreted in the light of present day conditions".[57] This is called the principle of evolutive and dynamic interpretation. This principle of interpretation makes it possible for the Convention to evolve and change together with society and allows the ECtHR to broaden the interpretation of the human right considered. Dinah Shelton states that the Court clearly struggles with questions of uniformity and diversity when judging whether a certain state practice falls below ECtHR standards.[58] The Court has proclaimed that it searches for "common European standards" based upon other international and European human rights instruments, domestic law and the Court's own case law.[59] This is one of the reasons why it is an important development that many states have adopted environmental provisions to their constitutions. If many member states have incorporated environmental law in their national law, it consequently means that a consensus exists among the party states of the Convention. This approach is part of the Court's subsidiary principle. The Court's interpretation cannot be extremely controversial in some of its member states. In its decision, the Court should take the variety of identities within the Convention states into account. The ECtHR will often comply with the judgement of the national court when it finds no general consensus on an issue or no common European approach to a problem.

[55] Pieter van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Deventer, Frankfurt: Kluwer Law and Taxation, 1998), 20.
[56] van Dijk and van Hoof, *Theory and Practice of the European Convention*, 24.
[57] ECtHR. *Tyrer v. United Kingdom*. No. 5856/72, 15 Mar. 1978. & ECtHR. *Loizidou v. Turkey*. No. 15318/89, 18 May 1996.
[58] Shelton, The Boundaries of Human Rights, 127.
[59] van Dijk and van Hoof, *Theory and Practice of the European Convention*, 25.

However, the Court has stated that domestic law and practice cannot remain static when European standards have evolved towards greater human rights protection.[60] The Court has, for example, used this approach to determine the legality of corporal punishment of juveniles and criminalization of homosexuality.[61]

Although it is not stated as a principle of interpretation by the ECtHR, according to Ole Pedersen, the Court gives great weight to its precedents.[62] The Court has stated to follow its precedents "in the interests of legal certainty and the orderly development of the Convention case law".[63] It will only reconsider an earlier decision if the present day Court finds the earlier interpretation erroneous or is not in line with the Court's objective to "ensure that the interpretation of the Convention reflects societal change and remains in line with present day conditions".[64] In other words, it is hard to change the jurisdiction of the Court if the case is not in line with the Court's precedents and the content of the case can be considered controversial in one or more member states. Furthermore, the principle of subsidiarity makes national law guiding.

The greening of the European Convention on Human Rights

The principle of evolutive and dynamic interpretation is one of the cornerstones of what legal scholar Hana Müllerová calls the "greening" of the Convention.[65] This principle of interpretation obliges the Court to interpret the Convention in the light of present-day conditions and according to contemporary norms. The progressive interpretation of this principle broadens the range of values protected under the Convention, including environmental values. When the common European standard about the environment increases, the Court will adjust its jurisdiction accordingly. Furthermore, the Court has looked beyond the explicit language of the original rights to grant rights that can be implied by them. The right to a healthy environment is often seen as implied by the right to private and family life. In other words, as environmental concerns have arisen, the Court has been able to read them into the rights protected by the Convention.[66]

The doctrine of positive state obligations implies that, with certain human rights, it is not sufficient for states to solely abstain from violating these rights. States have a positive obligation to facilitate the effective exercise of these human rights. The ECtHR has adopted that, by allowing pollution and severe environmental harm, states fail their positive obligation to ensure the right to life

[60] ECtHR. *Selmouni v. France*. No. 00025803/94, 28 July 1999.
[61] ECtHR. *Tyrer v. United Kingdom*. No. 5856/72, 15 Mar. 1978. & ECtHR. *Loizidou v. Turkey*. No. 15318/89, 18 May 1996.
[62] Pedersen, The European Court of Human Rights and International Environmental Law, 94.
[63] ECtHR. *Cossey v. United Kingdom*. No. 10843/84, 27 Sept. 1990. Para. 35
[64] ECtHR. *Cossey v. United Kingdom*. No. 10843/84, 27 Sept. 1990. Para. 35
[65] Müllerová, Environment Playing Short-Handed, 94.
[66] Ellen Hey, "The Interaction between Human Rights and the Environment in the European 'Aarhus Space'," in *Research Handbook on Human Rights and the Environment*, ed. Anna Grear and Kotzé Louis J. (Cheltenham, United Kingdom: Edward Elgar Publishing, 2015), pp. 353-376, 363.

(Article 2.) and the right to private and family life (Article 8). Positive obligations, as developed by the Court, include the duty to regulate activities by private parties. This is called the doctrine of horizontal effect, and ultimately means that, within some Convention rights, states might violate a human right by failing to properly regulate companies in the private sector.[67]

As mentioned before, the state is the biggest protector of and at the same time the biggest danger for human rights. This is because human rights are rarely absolute and limitations are often imposed upon individuals by states. In the Convention it is stated that some rights offer more possibilities for limitations than others. Only absolute, or non-derogable rights can never be limited. This means that an absolute right can never be limited by state action and authorities have no room to manoeuvre under any circumstance. An example of this is the right against torture. This means that even during a state of emergency authorities are never allowed to use torture. Relative absolute rights can only be restricted in times of emergency, such as in wartime. Most human rights are relative rights and include specific or general limitation clauses. Depending on the right, states get more room to manoeuvre and impose restrictions on the rights of their citizens. An example of such a lawful restriction is the minimum voting age. The right to free elections (Article 3 of Protocol No. 1) includes a right, for everybody, to vote. However, states are allowed to restrict this right on the bases of age. According to human rights law, these limitations must have a legal basis in the national law. Furthermore, the limitation must serve a legitimate aim and the limitation must be necessary and proportional to reach this aim.[68]

The margin of appreciation doctrine is one of the most important concepts of the European Court of Human Rights. It is used to assess the state's justifications of its limitations to human rights. The margin of appreciation determines the scope of judicial review of state action and the degree of leeway allowed to states in their implementation and limitation of the human rights granted by the European Convention.[69] The doctrine reflects and encapsules the principles of effectiveness and subsidiarity.[70] As mentioned before, the Court opts for effective protection of human rights, so it will not easily allow for restrictions. However, the ECtHR has a subsidiary role, so the primary responsibility to protect human rights lies with national states. In some cases the Court reviews the actions of states more closely and in others it gives the state more leeway. This room to manoeuvre is called the margin of appreciation.[71] This chapter explains the margin of appreciation doctrine in more general terms and describes its implications on the functioning of the European Court of Human Rights. The next chapter will analyse the influence of the doctrine on the interrelation between the environmental and human rights within the ECtHR based on the environmental case-law of the Court.

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[67] Müllerová, Environment Playing Short-Handed, 86.
[68] van Dijk and van Hoof, *Theory and Practice of the European Convention*, 24.
[69] Howard Charles. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague: Kluwer, 1996) 32.
[70] Shelton, The Boundaries of Human Rights, 129.
[71] Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 34.

It depends on the content of the case whether the Court grants a state a wide margin of appreciation. In some cases the margin is very narrow, which means that states do not have much room to manoeuvre and make restrictions. The ECtHR will review the justification of the restriction very strictly. In other cases the margin of appreciation is wider and the review will be more lenient.[72] However, the margin of appreciation is not unlimited. The Court is responsible for the supervision of the effective protection of human rights by national authorities. Therefore, the Court is empowered to give the final ruling on whether a restriction on a right is justifiable.[73]

Four main factors exist that influence the width of the margin of appreciation. The first is the common ground factor. In line with the Court's search for 'common European standards', if there is consensus on the content of the case among member states, the Court leaves a very small margin of appreciation to the state. The ECtHR often rules that an emerging evolved standard applies to all states and not just the ones that have moved in that direction already.[74] If there does not exist consensus, the Court usually leaves more leeway to the national institutions, to allow for divergent political opinions. This approach relates to the second factor as well, the one of 'the better placed argument'. The ECtHR has argued that national bodies are often in a better position to make decisions on socio-economic and moral topics.[75] According to the Court, "by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the necessity of a restriction".[76] The Court goes on stating that "it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of necessity".[77] Here the importance of incorporating environmental rights in national laws and constitutions becomes evident again.

The third factor influencing the width of the margin is the prominence of the human right in the European Convention. If the right that was restricted goes to the core of the Convention, the margin of appreciation will be small. When drafting the ECHR, protecting democracy was one of the cornerstone objectives. Because the Convention is so closely related to democracy, restrictions that are limiting democratic practises have a very small margin of appreciation. The final factor is the seriousness of the restriction. If the restriction goes to the heart of the right, the margin will be small as well. There is no right to a healthy environment in the European Convention on Human Rights. The environment can be protected through other human rights, however this means that a restriction of an environmental right can never go to the core of the Convention or the heart of a right. This does not mean that the environment cannot be effectively protected by the ECtHR. It does, however, mean that states usually

[72] Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 35.
[73] Shelton, The Boundaries of Human Rights, 130.
[74] Shelton, The Boundaries of Human Rights, 134.
[75] Shelton, The Boundaries of Human Rights, 130.
[76] ECtHR. *Handyside v. United Kingdom*. No. 5493/72, 7 Dec. 1976. Para. 48.
[77] ECtHR. *Handyside v. United Kingdom*. No. 5493/72, 7 Dec. 1976. Para. 49.

have a broad margin of appreciation when it comes to environmental cases. The next chapter addresses the implications of this for the environmental case-law of the ECtHR.

In 1998 the Aarhus Convention on Access to Information Public Participation in Decision-Making and Access to Justice in Environmental Matters, or short the Aarhus Convention, was signed. The Aarhus Convention came into force in 2001 and addresses procedural and participatory environmental rights.[78] The preamble states 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".[79] Through the Aarhus Convention individuals can comply with the need and aspiration to not only live in a healthy environment but also to be informed and to participate in the preservation of the environment. This has been legally articulated through three environmental rights: the right to information, the right to participation in decision-making and the right to justice.[80] Furthermore, the Aarhus Convention places special emphasis on the role played by nongovernmental organizations (NGOs) in environmental protection.[81] Professor of Law Rodoljub Etinski states that the Aarhus Convention strengthens the mutual supportive relationship between human rights and environmental protection. The Aarhus Convention makes environmental protection more democratic and effective.

The Aarhus Convention was adopted within the framework of the United Nations Commission for Europe (UNECE). The Aarhus Convention and the European Court of Human Rights are not formally linked by institutional arrangements. Even though the contracting states overlap, they consider complaints to parties to the European Convention and the Aarhus Convention, respectively. The relationship between the Aarhus Convention and the ECtHR is formally defined by the fact that the EU and its member states are parties to the Aarhus Convention.[82] This entails that the countries of the European Union are bound to apply EU-law, including both the Aarhus Convention and the European Convention on Human Rights. The ECtHR has used the Aarhus Convention as an instrument to interpret Article 8 of the European Convention on environmental matters. In the *Taşkın and Others v. Turkey* case, the Aarhus Convention was referred to in the reasoning of the Court, despite the fact that Turkey is not a Party to the Aarhus Convention. The great majority of member states of the ECHR are contracting states to the Aarhus Convention. This makes the Aarhus Convention proof of consensus among Convention states.[83]

[78] UNECE, *Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)* (Aarhus, 1998).
[79] UNECE, *Convention on Access to Information*, preamble.
[80] Rodoljub Etinski, "The Interrelationship between the European Convention on Human Rights and the Aarhus Convention," Zbornik Radova Pravnog Fakulteta, Novi Sad 52, no. 1 (2018): pp. 1-15, 6.
[81] Aine Ryal, "The Aarhus Convention: Standards for Access to Justice in Environmental Matters," in *Environmental Rights: The Development of Standards*, ed. Jona Razzaque et al. (Cambridge University Press, 2019), pp. 116-146, 116.
[82] Hey, The Interaction between Human Rights and the Environment in the European 'Aarhus Space, 354.
[83] ECtHR. *Taşkın and Others v. Turkey*. No. 46117/99, 10 Nov. 2004.

Procedural duties are among the positive obligations that states have to comply with under the European Convention of Human Rights. These procedural duties include the duty to provide for accessible environmental information, assure public participation in decision-making and to secure access to justice in environmental matters.[84] The most comprehensive formulation of these positive procedural environmental duties can be found in *Taşkın and Others v. Turkey*, with a clear reference to the Aarhus Convention.[85] By including these duties in its environmental case-law, the European Court of Human Rights has incorporated the three pillars of the Aarhus Convention into its Convention and in particular into Article 8. In the next chapter, the *Taşkın* case and its implications are discussed in more detail. For now, it is important that Turkey is neither a member state of the European Union, nor a party to the Aarhus Convention. So with this ruling the ECtHR has reinforced the status of procedural environmental rights within the European Convention on Human Rights and broadened the scope of the Aarhus Convention.

Interrelation of environmental protection and human rights within the ECtHR

As this chapter has shown, the ECtHR has adopted a set of principles of interpretation that are of great importance because they determine the way in which the environment can be protected under the European Convention on Human Rights. In other words, these rules of interpretation establish the framework and create the boundaries for human rights-based environmental protection under the ECtHR. The doctrine of the margin of appreciation is one of the most important instruments of interpretation of the Court. It is the room for manoeuvre that states have while fulfilling their obligations under the ECHR. With this, the margin of appreciation determines an important demarcation for the interrelation of the environment and human rights within the frameworks of the European Court of Human Rights. Because of the principle of subsidiarity, it is hard to change the jurisdiction of the Court, if the case is not in line with the Court's precedents and the content of the case can be considered controversial in one or more member states. This makes national law guiding if no common European standard can be determined. Furthermore, because there is no right to a healthy environment in the European Convention on Human Rights, a restriction of an environmental right can never go to the core of the Convention or the heart of a right. This means that states usually have a broad margin of appreciation when it comes to environmental cases.

The categorization of Dinah Shelton shows that human rights and environmental protection are sometimes compatible and at other times incompatible. In the same fashion, the principles and doctrines of the ECtHR have caused the greening of the Convention, but also limited environmental protection by the Court. When analysing the functioning of the ECtHR with the theory of Dinah Shelton, the third

[84] Hey, The Interaction between Human Rights and the Environment in the European 'Aarhus Space, 363.
[85] ECtHR. *Taşkın and Others v. Turkey*. No. 46117/99, 10 Nov. 2004.

of Shelton's approaches is the least applicable to the ECtHR. The goal of the third approach is to fully incorporate environmental protection into the human rights framework by formulating a new human right to a healthy environment. Even though the principle of evolutive and dynamic interpretation and the application of positive obligations have allowed for the greening of the Convention, and a right to a healthy environment can to some extent be read into some Convention articles, the subsidiary role restricts the Court from incorporating an ecocentric right to a healthy environment.

States usually get a wide margin of appreciation in environmental cases. Furthermore, human rights law is mostly applied in cases where the enjoyment of human rights is jeopardized by environmental issues. This practice corresponds with the second of Shelton's approaches, which aims to ensure that the environment does not deteriorate to the point that the enjoyment of human rights is at risk. This approach is undoubtedly anthropocentric but can be very effective because of the well established human rights supervisory machinery. The next chapter analyses the environmental case-law of the Court to determine how the environment and human rights interrelate within the framework set by the founding principles and methods of interpretation of the ECtHR.

Within the European Court of Human Rights, procedural and participatory environmental rights are well established. Especially since the Aarhus Convention was drafted, procedural duties have gained prominence amongst the positive obligations that states have to comply with under the European Convention. This means that Shelton's first approach, which emphasizes procedural and participatory rights, in the context of the ECtHR was strengthened by the Aarhus Convention. The ECtHR and the Aarhus Convention have created what Ellen Hey describes as a space in which individuals are able to invoke substantive environmental law before national and international courts through procedural rights.[86] Because of these well-established participatory and procedural rights, the right of individuals and groups in society to protect the environment has been created. Because of external developments, procedural and participatory environmental rights have strengthened within the ECtHR and the first of Shelton's approaches has become most applicable to the Court. This shows that the limitations to human rights-based environmental protection are able to change. The next chapter analyses, through the environmental case-law of the ECtHR, how much these boundaries and limitations have changed since the first environmental case came before the Court in 1990.

[86] Hey, The Interaction between Human Rights and the Environment in the European 'Aarhus Space, 375.

Chapter two: The environmental case-law of the ECtHR

After the first chapter explained the functioning of the European Court of Human Rights, this chapter analyses the environmental case-law of the ECtHR to determine on which grounds the environment has been protected in the environmental case-law of the Court. The focus of this research will be on environmental issues that came before the Court between 1990 and 2020 and that have been fought by claiming a violation of Article 8 of the Convention. The European Court of Human Rights publishes its factsheet on "the Environment and the European Convention on Human Rights" every three months. The factsheet covers of 57 cases over the period 1990-2020.[87] A total of 35 cases include a proclaimed violation of Article 8. The Court found a violation to the ECHR in approximately half of the cases, which displays a willingness to reach environmental protection through human rights.[88] Because there is no explicit right to a healthy environment, environmental protection is solely achieved as a side-effect of the protection of other rights. Severe environmental nuisances have been acknowledged as violations of various human rights. By progressive interpretation of a number of Convention rights, certain environmental rights have been derived from the European Convention on Human rights. This chapter will discuss the limitations of this approach and analyses how environmental protection and human rights interrelate in the environmental case-law of the European Court of Human Rights.

The most influential environmental cases are reviewed in chronological order, to construct the historical development of rights-based environmental protection. Special attention is paid to the influence of the doctrines of the Court on the outcome of environmental cases. How wide is, for example, the margin of appreciation in environmental cases and thus, how much room do states get to manoeuvre to fulfil their environmental obligations, and did this change between 1990 and 2020? As mentioned before, the ECtHR heard 35 cases with a proclaimed violation of Article 8 founded on environmental matters. In this chapter ten of these cases are discussed. The choice fell upon these particular cases because they are either landmark cases, which generate doctrinal developments and leave their mark on future cases or because they are representative of a historical development. The selection has been based on a review of the primary sources and literature study. An easy but effective way to assess if a case has left its mark on future cases is to indicate the number of references made to the case in subsequent decisions.[89] The *López Ostra*, *Hatton* and *Guerra* cases, which will be discussed further on, have been cited in 60, 40 and 39 subsequent environmental cases, respectively. Other cases have been described by legal scholars like Pierre-Marie Dupuy as important for the development of the environmental case-law of the ECtHR. As one might notice, the ten cases are fought against a

[87] European Court of Human Rights, "Factsheet Environment and the European Convention of Human Rights," accessed December 15, 2020, https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf.
[88] Heta Elena Heiskanen, *Towards Greener Human Rights Protection : Rewriting the Environmental Case Law of the European Court of Human Rights* (Tampere: Tampere University Press, 2018), 15.
[89] Stefan Theil, "Excavating Landmarks—Empirical Contributions to Doctrinal Analysis," *Journal of Environmental Law* 32, no. 2 (December 2019): pp. 221-252, 222.

considerably small number of countries. However, the environmental case-law of the ECtHR includes proclaimed environmental violations against almost all contracting states. Because the ECtHR builds upon previous cases in its jurisprudence, showcasing a number of important cases is the best way to explain the development of law. This chapter will pay special attention to the question of how these cases have influenced each other and the way in which the environment is protected under the European Convention on Human Rights.

Article 8 stands out as the most important source of environmental protection. However, human rights claims founded on environmental matters have been based on other human rights as well. Article 2, the right to life, imposes the positive obligation on states to safeguard the life of its inhabitants. The Court has found that this right can be implied in the context of hazardous activities that could endanger the lives of citizens, such as factories with toxic emissions or waste disposal. Furthermore, under Article 1 of Protocol No. 1 of the Convention, individuals are entitled to the peaceful enjoyment of their possessions. However, the Court has found that authorities are entitled to restrict this right on environmental grounds. Article 10 grants individuals the rights to receive and impart information and ideas. In relation to the environment the Court has stated that a strong public interest exists to make information available for individuals for them to contribute to the public debate.[90] As mentioned in the previous chapter, this has been strengthened by the Aarhus Convention. Furthermore, environmental degradation is fought on grounds of Articles 6 (the right to fair trial) and 13 (the right to effective remedy) of the Convention.[91] However, to keep this research comprehensible, the emphasis will be put on environmental cases where Article 8 of the Convention is invoked. In this way a fair comparison can be made between environmental cases, and an equitable historical development of the environmental case-law of the ECtHR can be constructed. The choice fell upon Article 8 because in most environmental cases this right is utilized to fight environmental degradation.

The 'right to respect for private and family life and the home' implies respect for the quality of private life as well as the enjoyment of the amenities of one's home.[92] This might not seem as the most obvious human right to employ to fight environmental issues, because environmental degradation does not necessarily lead to a violation of the right to private life. For a violation of Article 8, environmental issues must directly and seriously affect the private and family life of an individual. The Court has to determine if a causal link exists between an activity and the environmental issue that caused a negative impact on the individual's private life. Furthermore, this negative impact must have surpassed a certain threshold. This depends on the intensity, duration and the physical and mental effects of the nuisance.[93] The Court has found that severe environmental pollution caused, for example, by fumes and

[90] Council of Europe, *Manual on Human Rights and the Environment*, 18-22.
[91] Malgosia Fitzmaurice and Jill Marshall, "The Human Right to a Clean Environment–Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases," *Nordic Journal of International Law* 76, no. 2-3 (2007): pp. 103-151, 115.
[92] Council of Europe, *Manual on Human Rights and the Environment*, 41.
[93] Council of Europe, *Manual on Human Rights and the Environment*, 45.

contamination from a waste plant, toxic emissions from a factory and excessive noise levels generated by an airport raise a violation of Article 8, even when it has not been proven that the pollution is actually endangering the individual's health.[94]

The environmental case-law of the European Court of Human Rights

The first time a case with environmental elements was brought before the Court was in 1976.[95] The case *X and Y v. Federal Republic of Germany* was fought on the grounds of Articles 2, 3 and 5. The case concerned objections to destructive military activity on marshlands neighbouring the applicants' property. However, the case never came before the ECtHR because the application was manifested as ill-founded because the Convention did not "include a right to nature preservation in its catalogue of rights and freedoms".[96] The Court heard its first case relating to the environment in 1990 in *Powell and Rayner v. United Kingdom* case.[97] The applicants, who lived nearby the Heathrow Airport, regarded the noise of the airport harmful and the measures taken by the authorities to minimize the disturbance insufficient. They disputed noise from the Heathrow Airport on the grounds of Article 8 of the Convention. By using the margin of appreciation doctrine, the Court found no violation of the Convention.[98] The Court ruling did state that the applicants' homes had "been adversely affected by the noise".[99] However, in light of the importance of the Heathrow Airport for the economy of the United Kingdom (UK) and because the government had already taken measures against noise nuisance, the Court granted the UK a wide margin of appreciation and ruled that the authorities had struck a fair balance between the competing interests of the individual and the community as a whole.[100]

In 1994 the *Lopez Ostra v. Spain* case came before the ECtHR, its outcome is considered to be groundbreaking, especially at the time.[101] General environmental and international law scholars such as Pierre-Marie Dupuy and Alan Boyle cite the case as a leading authority, establishing environmental protection under the Convention.[102] The applicant, who lived in close distance to heavy leather industries, complained that the local authorities had not taken measures against smell, noise and pollution nuisance created by the waste-treatment plant closely situated to her home and had violated

[94] For examples see ECtHR. *López Ostra v. Spain*. No. 16798/90, 9 Dec. 1994. & ECtHR. *Guerra and Others v. Italy*. No. 14967/89, 19 Feb. 1998. & ECtHR. *Hatton Et Al. v. United Kingdom*. No. 36022/97, 8 July 2003. ECtHR. *Hatton and Others v. United Kingdom*. No. 36022/97, 8 July 2003.
[95] Philippe Sands et al., *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003), 299.
[96] Fitzmaurice and Marshall, The Human Right to a Clean Environment–Phantom or Reality, 114.
[97] Pedersen, The Ties That Bind, 4.
[98] ECtHR. *Powell and Rayner v. United Kingdom*. No. 9310/81, 21 Feb. 1990.
[99] ECtHR. *Powell and Rayner v. United Kingdom*. No. 9310/81, 21 Feb. 1990.
[100] Pedersen, The Ties That Bind, 4
[101] Fitzmaurice and Marshall, The Human Right to a Clean Environment–Phantom or Reality, 116.
[102] Pierre-Marie Dupuy and Viñuales Jorge E., *International Environmental Law* (Cambridge: Cambridge University, 2015), 307 & Alan Boyle, "Human Rights and the Environment - Where Next?," in *Environmental Law Dimensions of Human Rights*, ed. Ben Boer (Oxford: Oxford University Press, 2015), 204.

Article 8 of the Convention.[103] The company responsible for the pollution had built the treatment plant for liquid and solid wastes with the assistance of municipal subsidies, but without the required licence for activities classified as causing a nuisance.[104] The Court famously observed that:

> Article 8 applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.[105]

The Court found that the Spanish authorities, because of their inaction, did not strike a fair balance between the economic interest of the area and the effective protection of the applicants' human rights. In other words, the authorities failed to comply with their positive obligations to provide for a respected private and family life for the applicant. Although the plant was privately owned, the state could be held accountable for the nuisance because it was subsidized and built on municipality grounds.[106] The *Lopez Ostra v. Spain* case was important because it was the first time the ECtHR clearly recognized an environmental issue within the framework of the European Convention on Human Rights.[107] Furthermore, it was the first time that, even without the existence of an explicit right to a healthy environment, the ECtHR found that Article 8 constituted a sufficient link between human rights and the environment. The case thus established an important interrelation between human rights and environmental protection within the ECtHR. Why the ECtHR decided to find a human rights violation on grounds of an environmental issue at that exact moment remains unclear. The Court merely notes that the environment is important for the full enjoyment of human rights. However, the Court is known to use international human rights law as an interpretive background, as part of its evolutive and dynamic interpretation doctrine, and in the years leading up to the case, multiple conventions relating to rights-based environmental protection were signed. The members of the United Nations Economic Commission for Europe (UNECE) signed the Convention on Long-Range Transboundary Air Pollution in 1983, the Convention on Environmental Impact Assessment in 1991 and the Convention on Transboundary Effects of Industrial Accidents in 1992. Furthermore, the Rio Declaration on Environment and Development was signed in 1992. This could have made the ECtHR decide to read a stronger link between the environment and the Convention into Article 8.

Guerra and Others v. Italy in 1998 was another important case.[108] The applicants all lived in close proximity to a chemical factory producing fertilizers. The case was brought before the Court on the basis of Article 10 (right to freedom of expression and information), but settled on the merits of

[103] *López Ostra v. Spain*. No. 16798/90, 9 Dec. 1994. Para 27.
[104] *López Ostra v. Spain*. No. 16798/90, 9 Dec. 1994. Para 28.
[105] *López Ostra v. Spain*. No. 16798/90, 9 Dec. 1994. Para 5.
[106] *López Ostra v. Spain*. No. 16798/90, 9 Dec. 1994. Para 29.
[107] Fitzmaurice and Marshall, The Human Right to a Clean Environment–Phantom or Reality, 116.
[108] ECtHR. *Guerra and Others v. Italy*. No. 14967/89, 19 Feb. 1998.

Article 8. The applicants criticized the fact that the authorities neglected to inform the local population about the hazardous situation. Accidents due to malfunctioning had already occurred multiple times. In 1976, the scrubbing tower for the ammonia synthesis gases had exploded, releasing tons of potassium carbonate and bicarbonate solution, containing arsenic trioxide. This resulted in the hospitalization of 150 people. However, the Court concluded that it was not the obligation of the state to collect and distribute information about this matter and thus found no violation of Article 10.[109] The ECtHR did find, however, a violation on the basis of Article 8 of the Convention. Using the ruling of the *Lopez Ostra* case, the Court ruled that environmental pollution might affect an individual's private and family life, and concluded that the applicants had the right to have been informed about this.[110]

Hatton and Others v. United Kingdom came before the ECtHR in 2001, and again on appeal in 2003. The *Hatton* cases have been of great importance for the scope of Article 8 in the context of environmental protection.[111] The applicants who lived under the flight path of Heathrow Airport complained that the night flights disturbed their sleep. The Government sought justification on the argument that these flights were necessary for the competitiveness of Heathrow Airport, and for the country's well-being, since the airport constituted an important part of the economy. Furthermore, the local and national authorities had constructed multiple research papers and had issued a consultation paper which found that the disturbance was below the critical mark.[112] The Court observed that the operations of Heathrow Airport were not owned, controlled or operated by the UK, so the state could not have interfered directly with the private life of the applicant. Instead, the Court ruled that the UK would be judged on the fulfilment of its positive duties. The ECtHR decided that it was the duty of the state to take reasonable and appropriate measures to make sure actions of the private sector would not interfere with its citizen's human rights.

The ECtHR explained that the state must always regard a wide range of consideration, but when dealing with environmental protection, mere reference to the economic status of a country was not sufficient.[113] On appeal, the Court added that decisions like these "must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake." However, the Court also ruled that "the applicants and persons in a similar situation had access to the consultation paper, and it would have been open to them to make any representations they felt appropriate. Had any representations not been taken into account, they could have challenged subsequent decisions".[114] In its final ruling the ECtHR stated that:

[109] ECtHR. *Guerra and Others v. Italy*. No. 14967/89, 19 Feb. 1998. Para 57.
[110] ECtHR. *Guerra and Others v. Italy*. No. 14967/89, 19 Feb. 1998. Para 60.
[111] H. Post, 'Hatton and Others: Further Clarification of the 'Indirect' Individual Right to a Healthy Environment', 2.
[112] ECtHR. *Hatton and Others v. United Kingdom*. No. 36022/97, 2 Oct. 2001. Para 44.
[113] ECtHR. *Hatton and Others v. United Kingdom*. No. 36022/97, 3 July 2003. Para 114.
[114] ECtHR. *Hatton and Others v. United Kingdom*. No. 36022/97, 3 July 2003. Para 128.

> 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.[115]

In other words, environmental protection does not deserve a special place within the ECtHR and states usually acquire a wide margin of appreciation in environmental cases. This means that states usually get much room to manoeuvre with environmental matters, and the Court's review of a case is more lenient.

The ECtHR decided in *Hatton* that the government of the United Kingdom had acted within their margin of appreciation, so found no violation of Article 8. According to scholars of human rights law Malgosia Fitzmaurice and Jill Marshall, the following conclusion may be drawn from the *Hatton* case: "environmental considerations are only one of the elements taken into account while balancing the interests of the individual against those of the community in order to strike a fair balance, and there is no special status of environmental human rights".[116] The Court did hold that there had been a violation of Article 13 (right to an effective remedy) because it found the scope of the research about the effect of nightlights by the government to be insufficient.[117] The fact that states were found responsible for conducting appropriate scientific research is an important development. Furthermore, although the Court found no violation of Article 8, it did state that authorities are under positive obligation to regulate the private sector, this is also crucial for the development of rights-based environmental protection.

In *Taşkın and Others v. Turkey* (2004) the mutually supportive relation between the European Convention on Human Rights and The Aarhus Convention was established.[118] The applicants lived nearby a goldmine and the Turkish authorities refused to obey judicial decisions ordering the hold of mining activities using sodium cyanide.[119] In its judgment, the Court found a violation of Article 8 by not fulfilling the positive obligations inherent to the right. With a reference to the Aarhus Convention, the ECtHR outlined the duties that states have in environmental matters. In the eyes of the Court, states must collect information about hazardous activities, make such information available so individuals may assess activities that might harm the environment, secure public participation in decision-making and ensure accessible justice.[120] In doing so the ECtHR incorporated articles 4, 5, 6 and 9 of the Aarhus Convention into Article 8 of the ECHR.

In *Taşkın* the ECtHR adds to its *Lopez Ostra* formulation about the applicability of Article 8 to environmental pollution that:

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[115] ECtHR. *Hatton and Others v. United Kingdom*. No. 36022/97, 3 July 2003. Para 122-129.
[116] Fitzmaurice and Marshall, The Human Right to a Clean Environment–Phantom or Reality, 127.
[117] ECtHR. *Hatton and Others v. United Kingdom*. No. 36022/97, 3 July 2003. Para 129.
[118] Etinski, The Interrelationship between the European Convention, 10.
[119] ECtHR. *Taşkın and Others v. Turkey* . No. 46117/99, 10 Nov. 2004.
[120] ECtHR. *Taşkın and Others v. Turkey*. No. 46117/99, 10 Nov. 2004. Para. 99, 118 & 119.

> The same is true where the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life for the purposes of Article 8 of the Convention. If this were not the case, the positive obligation on the State to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 would be set at naught.[121]

The addition is crucial because Article 8 would otherwise only be applicable in verifiable cases of environmental pollution and not, as in *Taşkın*, in cases of less tangible but serious long-term risk. Because of this addition, applicants do not have to show direct harm, the existence of a risk as part of an environmental impact risk assessment is sufficient.

The judgment of the *Taşkın and Others* makes apparent how the ECtHR build's on its previous rulings. Paragraph 119 reads:

> 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.[122]

This is a clear reference to *Hatton and Others v. United Kingdom*, where the Court emphasized the importance of conducting appropriate investigation prior to taking a decision which could affect the environment.[123] The Court goes on explaining 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.[124] Here the ECtHR uses the same line of reasoning as in *Guerra and Others v. Italy*.[125] Lastly, the Court notes that individuals must be able to appeal 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".[126] In this last sentence the Court also draws from *Hatton and Others*, where the possibility of the applicant to participate in the decision-making process was also part of the case. The difference between the cases, however, is striking. In the first case, the state did not fulfil its positive obligation under Article 8 if "any representations [had] not been taken into account".[127] In *Taşkın and*

[121] ECtHR. *Taşkın and Others v. Turkey*. No. 46117/99, 10 Nov. 2004. Para 110.
[122] ECtHR. *Taşkın and Others v. Turkey*. No. 46117/99, 10 Nov. 2004. Para 119.
[123] ECtHR. *Hatton and Others v. United Kingdom*. No. 36022/97, 2 Oct. 2001. Para 128.
[124] ECtHR. *Taşkın and Others v. Turkey*. No. 46117/99, 10 Nov. 2004. Para 119.
[125] ECtHR. *Guerra and Others v. Italy*. No. 14967/89, 19 Feb. 1998. Para 57.
[126] ECtHR. *Taşkın and Others v. Turkey*. No. 46117/99, 10 Nov. 2004. Para 119.
[127] ECtHR. *Hatton and Others v. United Kingdom*. No. 36022/97, 2 Oct. 2001. Para 128.

Others, the concern of the applicants was enough that their comments had not been given "sufficient wight".[128] The content of the Aarhus Convention was important for this decision as it states that "the authority should be able to demonstrate how the comments were considered and why it did not follow the views expressed by the public" and "while it is impossible to accept in substance all the comments submitted … the relevant authority must still seriously consider all the comments received".[129]

In 2005, the case of *Fadeyeva v. Russia* came before the ECtHR.[130] The applicant lived in close proximity to a privately owned steel plant. In the region where the applicant was living, the plant was responsible for over 95 per cent of the industrial emissions. There was no dispute as to the fact that the applicant's home was negatively affected by emissions, nor was it disputed that the main cause of this industrial pollution was the steel plant. The issue that was brought before the ECtHR was if the nuisance was severe enough to raise an issue under Article 8 of the Convention.[131] The Court explained once again that there exists no environmental human right in the catalogue of human rights of the Convention. It observed that Article 8 of the Convention has formed the ground upon which the majority of environmental cases had been build. However, the Court stated that it did not find a breach of Article 8 every time environmental deterioration occurred.[132]

In *Fadeyeva v. Russia,* the ECtHR gave further guidance for disputing human rights claims founded on environmental issues on the ground of Article 8. It did so by drawing on its previous jurisprudence. The Court decided that, in order to raise an issue under Article 8 of the Convention, the environmental issue must directly affect the applicant's private or family life or residence. Furthermore, to fall within the scope of Article 8, nuisance caused by environmental pollution must reach a certain minimum level. The assessment of this threshold depends on the duration and intensity of the industrial pollution and the physical and mental effect of the nuisance.[133] To conclude, the ECtHR summarized that "in order to fall under Article 8, complaints relating to environmental nuisances have to show, first, that there was an actual interference with the Applicant's private sphere, and, second, that a level of severity was attained".[134] Furthermore, the Court observed that in previous environmental cases, failure by the authorities to adhere to national law played a vital role. Because of this, the ECtHR stated that the domestic legal regime should be taken into consideration when assessing whether a fair balance was struck between the individual's rights and the community as a whole.[135] The Court also explained that "the complexity of the issues involved with regard to environmental protection renders the Court's role primarily a subsidiary one".[136] Because domestic authorities are best suited to assess local needs and

[128] ECtHR. *Taşkın and Others v. Turkey*. No. 46117/99, 10 Nov. 2004. Para 119.
[129] Etinski, The Interrelationship between the European Convention, 11.
[130] ECtHR. *Fadeyeva v. Russia*. No. 55723/00, 9 June 2005.
[131] Fitzmaurice and Marshall, The Human Right to a Clean Environment–Phantom or Reality, 128.
[132] ECtHR. *Fadeyeva v. Russia*. No. 55723/00, 9 June 2005. Para 67, 68
[133] ECtHR. Fadeyeva v. Russia. No. 55723/00, 9 June 2005. Para 67-70.
[134] ECtHR. *Fadeyeva v. Russia*. No. 55723/00, 9 June 2005. Para 67-70.
[135] ECtHR. *Fadeyeva v. Russia*. No. 55723/00, 9 June 2005. Para 98.
[136] ECtHR. *Fadeyeva v. Russia*. No. 55723/00, 9 June 2005. Para 105.

conditions, the Court confirmed that states enjoyed a wide margin of appreciation in environmental matters.

The ECtHR found Russia to be in violation of Article 8, as a result of the authority's failure to comply with its national law prescribing a safe zone to protect the health of its citizens living close by industrial plants.[137] According to the Court, "it can be said that the existence of interference with the applicant's private sphere was taken for granted at the domestic level".[138] The ECtHR repeated the statement it made in the *Hatton* case. Although the industrial plant was not owned or operated by the national authorities, in environmental cases an issue can be raised because of the state's failure to regulate the private sector. Therefore, the applicant's complaints were to be analysed in terms of the positive duties of the state to take reasonable and appropriate measures to secure the applicant's rights under Article 8.[139] The *Fadeyeva* case confirmed that the breach of a positive duty is weighted equally to the direct interference with a human right.[140] The ECtHR did not necessarily found quantifiable harm to the health of the applicant. The *Fadeyeva v. Russia* case confirms that the ECtHR will intervene if industrial pollution contravenes national standards.

The *Fadeyeva* and *Hatton* case clarified the relation between Article 8 and the protection of the environment under the European Court of Human Rights. The ECtHR applies a wide margin of appreciation and a strict application of the Convention Article to environmental issues. Foremost, a human right to a clean or healthy environment does not exist in the catalogue of the ECtHR, and environmental breaches can only raise issues under Article 8 if they directly affect the private and family life or the home of the applicant. However, since *Taşkın and Others v. Turkey,* procedural and participatory environmental rights and their corresponding positive obligations have been well established within the ECtHR. Especially when the national authorities are not complying with their domestic legal regime in relation to the environment, environmental issues make a strong case before the ECtHR. This can be traced back to the Court's interpretation of its subsidiary role. The Court argues that national bodies are often in a better position to make decisions on socio-economic and moral topics. The Court has stated that "by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion".[141] This means that national law is guiding in environment cases.

In *Tătar v. Romania,* the applicant complained about the health risk imposed by gold mining activities using sodium cyanide nearby his house.[142] The case came before the ECtHR in 2009. Already in January 2000 an environmental accident had occurred at the site. A breach in a dam released

[137] ECtHR. *Fadeyeva v. Russia*. No. 55723/00, 9 June 2005. Para 90.
[138] ECtHR. *Fadeyeva v. Russia*. No. 55723/00, 9 June 2005. Para 86.
[139] ECtHR. *Fadeyeva v. Russia*. No. 55723/00, 9 June 2005. Para 89.
[140] Philip Leach, "Stay Inside When the Wind Blows Your Way: Engaging Environmental Rights with Human Rights," *Environmental Liability* 4 (2005): pp. 91-97, 96.
[141] ECtHR. *Handyside v. United Kingdom*. No. 5493/72, 7 Dec. 1976. Para. 48.
[142] ECtHR. *Tătar v. Romania*. No. 67021/01, 27 Jan. 2009.

thousands of tons of cyanide-contaminated tailings into the environment. Although the ECtHR ruled that the applicant had failed to prove the causality between severe health risks and the use of sodium cyanide by the mining company, the Court held that there had been a violation of Article 8. The ECtHR ruled that the state had failed to fulfil its duty to assess the risks that the mining activities might entail, and to take suitable measures to ensure that the private sphere of those concerned was protected.[143] The Court found that the hazardous situation created by the gold mine gave rise to a series of positive obligations, requiring the Romanian authorities to regulate licensing, control and monitor hazardous activity and to provide for public surveys and studies enabling the local population to assess the risks created by the mine.[144] In *Tătar v. Romania,* the Court has made extensive references to European Union law. The Court used the precautionary principle as it is stated in the environmental chapter of the Treaty for Functioning of the European Union, also known as the Treaty of Lisbon. The principle of precautionary orders states to take precautionary measures when scientific evidence about an environmental or human health hazard is uncertain.[145] The ECtHR also referred to a document of the EU Commission about the operation of safe mining, which is a policy paper with no legal force on its own.[146]

The reason for the references and reliance on EU and international law is not always easy to discern.[147] The references are often indirect or listed as part of "relevant international materials". The Court rarely explains the relevance of the materials to the particular facts of the case. Legal scholar Ole Pedersen has made the assumption that the references to international law and EU instruments are made to clarify the provisions of the European Convention and the Court's interpretation thereof.[148] Another reason could be that references to developments in international and regional environmental law support the ECtHR in establishing and emphasizing environmental norms. Reference to European or national law could serve the aim of establishing a European consensus on a particular matter. If a certain environmental norm has a strong presence in regional and national law, the Court could rule that consensus on the matter exists, and grant contracting states a small margin of appreciation. The Convention itself is the only binding authority on the Court. This means that the use of other sources can only be complementary. However, the ECtHR has identified the Convention as a living instrument, which means that the Convention should be interpreted in light of present-day conditions. Using international law and EU instruments as an interpretive background serves this goal. The Court has met some criticism because it has not built a clear hierarchical structure of possible sources of

[143] ECtHR. *Tătar v. Romania*. No. 67021/01, 27 Jan. 2009. Para 88.
[144] ECtHR. *Tătar v. Romania*. No. 67021/01, 27 Jan. 2009. Para 88.
[145] Pedersen, The European Court of Human Rights and International Environmental Law, 94.
[146] ECtHR. *Tătar v. Romania*. No. 67021/01, 27 Jan. 2009. Para 69.
[147] Pedersen, The European Court of Human Rights and International Environmental Law, 96.
[148] Pedersen, The European Court of Human Rights and International Environmental Law, 98.

interpretation.[149] This makes it unclear when and for what reason external sources are used to interpret the Convention. Scholar of international law Kanstantsin Dzehtsiarou concludes that the ECtHR has quoted EU law for both informational and persuasive purposes.[150] The Court uses international law and EU instruments to reinforce and support its findings. Furthermore, the existence of international legal documents that support a human rights-based approach to environmental protection act as an indicator of an international norm. The Court itself has emphasized the importance of international legal norms by stating that "the Convention and its Protocols cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part".[151] The Treaty of Lisbon, in its current form, came into force in 2009, just before the *Tătar* ruling. The Court's reference to the treaty could be a way to reinforce it.

In 2012, *Di Sarno and others v. Italy* came before the ECtHR.[152] The case was about the infamous Campania waste crisis, in which the town of Campania was faced with a state of emergency between February 1994 and December 2009 in relation to waste treatment and disposal. The applicants complained that the local authorities omitted to take measures to ensure the functioning of public waste collection, especially during a period of five moths in which rubbish piled up in the streets. Even though the Court granted a wide margin of appreciation, it found a violation of Article 8 of the Convention. The ECtHR ruled that the authorities failed to create a liveable environment since they had not been able to establish a functioning waste disposal service for a long time. Also in the *Di Sarno and others v. Italy* case the ECtHR heavily relied on European Union law. It utilized a series of directives on waste management. To prove that the authorities had failed to execute their positive obligations, the Court relied on the Aarhus Convention. Furthermore, it used the case law of the European Court of Justice, who previously found that Italy had violated EU law.[153]

In *Hardy and Maile v. United Kingdom* (2012), issues arose from environmental risks associated with the operation of liquefied natural gas (LNG) terminals in Pembrokeshire.[154] The applicants argued that the authorities fell short of assessing the risks posed to the environment if a great amount of LNG would be released in case of an accident. The applicants were particularly worried about the shipping, docking, and loading of LNG tankers near a densely populated area. Furthermore, the state had failed to provide the applicants with the necessary environmental information.[155] LNG activities are classified as top tier by the Control of Major Accident Hazards Regulations 1999. Moreover, when an activity is qualified as a risk in an environmental impact assessment it is per definition applicable under Article 8, as stated in *Taşkin and others*. However, the ECtHR found no

[149] Kanstantsin Dzehtsiarou, "What Is Law for the European Court of Human Rights?," *Georgetown Journal of International Law* 49, no. 1 (2017): pp. 89-134, 90.
[150] Dzehtsiarou, What Is Law for the European Court, 118.
[151] ECtHR. *Marguš v. Croatia*. No. 4455/10, 27 May 2014. Para 129.
[152] ECtHR. *Di Sarno and Others v. Italy*. No. 30765/08, 10 Jan. 2012. Para 113.
[153] ECtHR. *Di Sarno and Others v. Italy*. No. 30765/08, 10 Jan. 2012. Para 113.
[154] ECtHR. *Hardy and Maile v. United Kingdom*. No. 31965/07, 14 Feb. 2012.
[155] ECtHR. *Hardy and Maile v. United Kingdom*. No. 31965/07, 14 Feb. 2012. Para 127.

violation of Article 8 because a rather extensive regulatory framework was in place.[156] Furthermore, the Court found the likeliness of an accident to occur with LNG every low. Neither the applicants, the United Kingdom nor the Court was able to assess how big the risk actually was, which makes Ole Pedersen claim that for the ECtHR the risk needs to be "imminent" to the point that it may well be too late to take any effective measures to avoid the risk.[157] This makes the precautionary principle mostly applicable to tangible hazards.

In 2019, a total of 180 applicants brought the *Cordella and others v. Italy* case before the ECtHR. The applicants complained about the negative effects of the toxic emissions from a steel mill in Taranto. They claimed that the authorities had not taken precautionary measures to protect their health and the environment. The Court ruled that Italy had indeed failed to provide the applicants with information concerning the pollution. Furthermore, the Court established that the authorities had not taken necessary administrative and legal measures to de-pollute the affected area, and to provide individuals with an effective domestic remedy.[158] In *Cordella and others v. Italy,* the ECtHR paid special attention to epidemiological evidence. Scientific reports served as evidence to establish the causal link between the environmental pollution from the steel mill and environmental degradation.[159] It was not the first time that the Court used scientific research to support its claims, but it should be noted that the judges in previous cases always excluded it from the official case documents.

The environment and human rights

Over the past decades, some major developments have taken place within the environmental case-law of the European Court of Human Rights that have changed the interrelation between human rights and the environment. First of all, the ECtHR has ruled that when environmental pollution reaches a certain level, it interferes with a person's private sphere.[160] This can trigger a violation of Article 8 of the European Convention on Human Rights, also in a situation where no actual or material harm is manifested, but an applicant is imposed with the risk of harm.[161] Furthermore, states must fulfil both their positive and negative obligations in order to comply with Article 8, and states are under positive obligation to regulate the private sector from polluting the environment. The Court has held that, if citizens are exposed to environmental risks, the authorities have a positive obligation to establish regulatory structures to regulate licensing, operation and control of the hazardous activities.[162] The

[156] ECtHR. *Hardy and Maile v. United Kingdom*. No. 31965/07, 14 Feb. 2012. Para 223.
[157] Ole W. Pedersen, "Environmental Risks, Rights and Black Swans," *SSRN Electronic Journal* 15 (2013): pp. 55-62, 60.
[158] ECtHR. *Cordella and Others v. Italy*. No. 54414/13, 24 Jan. 2019.
[159] ECtHR. Cordella and Others v. Italy. No. 54414/13, 24 Jan. 2019. Para 177-182.
[160] ECtHR. *Fadeyeva v. Russia*. No. 55723/00, 9 June 2005. Para 69–70
[161] ECtHR. *Brânduşe v. Romania*. No. 6586/03, 7 Apr. 2009. & ECtHR. *Di Sarno and Others v. Italy*. No. 30765/08, 10 Jan. 2012.
[162] ECtHR. Taşkin and Others v. Turkey. No. 46117/99, 11 Nov. 2004.

regulatory initiatives must include public access to the conclusions of studies and to information which would enable members of the public to assess the danger to which they are exposed.[163] In addition the Court has concluded that environmental pollutions does not need to be tangible or visible for a violation to occur. The mere inclusion of the subject as a risk factor in an EIA is enough to be applicable to Article 8.[164]

At the same time, some restricting factors can be identified. The Court is more likely to find a violation on the bases of an environmental claim when the state has failed to adhere or implement its own environmental law. When the authorities have established a regulatory system to mitigate environmental hazards, which provides access to information and participation, the ECtHR is not likely to find a violation. While the Court has been willing to extend its environmental case law, once domestic action is taken, it sets a high threshold for applicants.[165] This is reflected in the *Hatton v. United Kingdom* and *Hardy and Maile v. United Kingdom* cases.[166] When comparing *Tătar* with *Hardy and Maile* the Court seems to have taken a step back regarding the precautionary principle.

In environmental cases, the margin of appreciation doctrine helps the Court to determine if a fair balance was struck between the competing interests of the individual and the country as a whole. The margin determines the room for manoeuvre of states in fulfilling their obligations under the European Convention on Human Rights. The doctrine is meant as a tool to define the relation between domestic authorities and the ECtHR. As explained in the first chapter, in environmental cases states are granted a wide margin of appreciation. Furthermore, with the *Hatton* case it became clear that environmental rights have no special status under the Convention and the environment is just one of the elements taken into account when establishing whether a fair balance was struck.[167] In most cases where the ECtHR found that national authorities overstepped their margin, the violation of a right was accompanied by the infringement of a national environmental law. The Convention thus helps to strengthen national environmental norms and reinforces their supervision machinery. However, when the national legislator sets the environmental standards very low, it is unlikely that the Court will find violation of Article 8.[168]

Over the past decades the ECtHR began to reference other international and European law in its case law more often. In *Taşkın and Others v. Turkey* the mutually supportive relation between the European Convention on Human Rights and The Aarhus Convention was established.[169] Also in *Tătar* and *Di Sarno and others* the ECtHR relied heavily on European Union law.[170] Furthermore, in *Cordella*

[163] ECtHR. Taşkin and Others v. Turkey. No. 46117/99, 11 Nov. 2004. Para 119.
[164] ECtHR. Taşkin and Others v. Turkey. No. 46117/99, 11 Nov. 2004. Para. 110.
[165] Pedersen, The European Court of Human Rights and International Environmental Law, 89.
[166] Hardy and Maile v. United Kingdom, No. 31965/07 (2012) & Hatton et al. v. United Kingdom, 2 October 2001
[167] Hatton et al. v. United Kingdom, 2 October 2001 par 114 122-129.
[168] Müllerová, Environment Playing Short-Handed, 90.
[169] ECtHR. Taşkin and Others v. Turkey. No. 46117/99, 11 Nov. 2004.
[170] Di Sarno and others v Italy no. 30765/08 (ECHR 10, January 2012) para 113 & Tătar v. Romania, decision of 27 January 2009 (Appl. No. 67021/01). par 69.

and others v. Italy the ECtHR paid special attention to epidemiological evidence.[171] The ECtHR uses international and EU law for both informational and persuasive purposes.[172] The Court uses external sources to reinforce and support its findings and to determine international human rights norms. This engagement with different types of international and human rights law strengthens the environmental protection of the European Convention in some ways. Inter alia because of the interrelation with the Aarhus Convention, procedural and participatory environmental rights are well established under the European Convention on Human Rights. This process seems to have strengthened the emphasis that the Court puts on procedures. Legal scholars like Müllerová have warned for a situation in which deterioration of the environment is justified by a huge procedural machinery.[173] Or in other words, when it is more important to have all the procedures in place than to avoid an environmental issue.

Scholar of international law Dinah Shelton has argued that environmental protection and human rights each represent different, but overlapping value systems. They place emphasis on different parts of environmental protection and human rights. However, they share the objective of achieving the optimal quality of sustainable life.[174] To ultimately analyse the interrelation between human rights and environmental protection within the ECtHR, the categorization of Shelton functions as a theoretical framework. In the first approach, human rights are utilized to realize environmental protection. The emphasis lies on procedural and participatory rights, these rights may be used to protect the environment but do not necessarily relate to human well-being.[175] The second approach calls upon existing human rights guarantees and institutions and utilizes their well-developed control machinery. Inherent to this approach is applying human rights law to environmental cases when their enjoyment is jeopardized by environmental issues. This method is undoubtedly anthropocentric, the focus lies on the consequences of environmental issues to human rights and human well-being.[176] The goal of the third approach is to fully incorporate environmental protection into the human rights framework by formulating a substantive human right to a healthy environment.[177]

When analysing the environmental case-law of the ECtHR with the framework of Dinah Shelton, the same picture arises as in the previous chapter. Although the environment can be protected by the ECtHR, no substantive human right to a healthy environment can be derived from the Convention. This makes the third approach not fully applicable to the ECtHR. In most environmental cases, the Court was able to ensure that the environment did not deteriorate to the point that the enjoyment of a human right was at risk, which is the goal of the second approach. Overall procedural

[171] Cordella and Others v. Italy, Appl. no. 54414/1 para 177-182.
[172] Dzehtsiarou, What Is Law for the European Court, 118.
[173] Müllerová, Environment Playing Short-Handed, 91.
[174] Shelton, Human Rights, Environmental Rights, 511.
[175] Shelton, Human Rights, Environmental Rights, 513.
[176] Shelton, Human Rights, Environmental Rights, 515.
[177] Shelton, Human Rights, Environmental Rights, 513.

and participatory environmental rights made the strongest case before the ECtHR, which also shows overlap with the first approach.

The same picture arises when looking at the global historical developments, the framework of the ECtHR and the environmental case-law of the Court. In other words, no shifts have occurred between the different approaches of Shelton, however, the contours of the framework have extended and even blurred in some cases. While the environmental case-law of the ECtHR has the strongest connection to the first of Shelton's approaches, it is not true that human rights are solely used to protect the environment and do not relate to human well-being, as the first approach dictates.[178] Procedural and participatory rights are, in the case-law of the ECtHR, well established as improving both the environment and human well-being. This is reflected the most by the fact that the majority of environmental cases on procedural grounds are fought with Article 8 (the right to private and family life) and not through Article 13 (the right to effective remedy). This means that procedural claims require a connection to human suffering. The indicated interrelation between human well-being and procedural and participatory rights becomes stronger through the Court's references to the Aarhus Convention. The Court's willingness to use and rely upon other international law and human rights treaties shows that the scope of the approaches could extend even further.

Even though there does not exist a human right to a healthy or clean environment under the European Convention on Human Rights, many scholars have claimed that a right as such can be read into the Convention. Drawing from the environmental case-law of the ECtHR, the conclusion can be derived that the environment has been gaining momentum. Much has changed since the ECtHR stated in 1976 that the Convention did not include a right to nature preservation in its catalogue of rights and freedoms and the Court has built an extensive environmental case-law.[179] However, stating that there exists a right to a healthy environment would be too strong of a claim. The environmental case-law of the Court still has a strong anthropocentric component, as evidenced by the fact that most environmental cases are fought on the grounds of Article 8 and thus some kind of link must exist between environmental degradation and human suffering. Nonetheless, environmental protection is also not merely instrumental in achieving human rights protection. In other words, the lines between the first and second approach seem to be blurring. After three decades of development, the environmental case-law of the European Court of Human Rights is still anthropocentric, but the human rights-based approach to environmental protection does more than make sure that the environment does not deteriorate to the point that the enjoyment of human rights is at risk. This is reflected by the fact that states are under positive obligation to put in place regulatory initiatives when individuals are exposed to environmental pollution.[180] In other words, the application of human rights law in environmental cases is not only reactive. This means that the environment cannot only be protected after the

[178] Shelton, Human Rights, Environmental Rights, 513.
[179] Fitzmaurice and Marshall, The Human Right to a Clean Environment–Phantom or Reality, 114.
[180] ECtHR. Taşkin and Others v. Turkey. No. 46117/99, 11 Nov. 2004. Para 88.

environment is deteriorating and human suffering has occurred, but human rights law has the power to prevent any of this from taking place.

Climate change and human rights

The introduction of this thesis started with a reference to the *Urgenda v. The State Netherlands* case. Because the Dutch supreme Court proved Urgenda to be right, the case never came before the European Court of Human Rights, so it was not part of the research. Until recently no claim on the bases of climate change had been made to the European Court of Human Rights. However, while writing this thesis, six Portuguese young adults issued an application to the ECtHR against all 33 Council of Europe Member States.[181] The applicants claim a violation of Article 2 and 8 because of the ongoing and worsening suffering and the suffering that they will endure in the future because of the effects of climate change. The applicants state that the responding states are failing to sufficiently reduce their territorial emissions and are not taking responsibility for their extraterritorial emissions by extracting fossil fuels and participation in other activities that are carbon intensive.[182]

Before climate change related issues can successfully fought before the ECtHR, many of the Courts' doctrines have to be changed or interpreted differently than in its jurisprudence. For example, the doctrines of extraterritoriality and shared responsibility. Extraterritoriality is the legal ability of a government to exercise authority beyond its normal boundaries. Shared responsibility refers to situations in which two or more states share responsibility for their contribution to a human rights violation of a person. The applicants base their argument on a general principle of law which provides that where causal certainty arises as the result of the existence of multiple potential contributors to a harm, each of them is presumptively responsible. Meaning that, when a number of potential violations have caused a particular harm, but it is uncertain as to which of them caused which harm, then each of those potential wrongdoers is presumptively responsible.[183] The shared responsibility doctrine as well as the doctrine of extraterritoriality have been developed by the ECtHR in the context of other human right violations such as slavery and human trafficking but not in relation to the environment, because of this, the doctrines have not been discussed yet in this study. However, to legally address climate change these are amongst the doctrines that the Court has to expand on.

Furthermore, the applicants claim that states should not be allowed a broad margin of appreciation in relation to climate change mitigation. The Court has stated that "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion".[184] Given the transboundary nature of

[181] Duarte Agostinho and Others v. Portugal and 32 Other States (no. 39371/20)
[182] Duarte Agostinho and Others v. Portugal and 32 Other States (no. 39371/20)
[183] Oil Platforms case: Islamic Republic of Iran v. United States of America
[184] *Handyside v. The United Kingdom*, judgment of 7.12.1976, para 48-49.

climate change, the applicants argue that the state does not have the better placed argument.[185] The contact with local authorities is of limited relevance when it comes to dealing with the obligation to mitigate the global problem of climate change. An international court may very well be in the best position to oversee if the mitigation efforts comply with the positive obligations of a state. For climate change litigation it is important that the Court continuous to adhere value to epidemiological evidence like it did in the *Cordella* case.[186]

The Court envisions the Convention as a living instrument, in theory this means that the law can develop as far as the imagination of the judges goes. In practice, however, the Court takes into account the predictability of the case-law in light of its well established doctrines as well as its primary mandate and its overall legitimacy. The discussions in the area of human rights and the environment that are going on right now have the power to challenge the existing doctrines and to break down the contours of Shelton's framework. The outcome of the case is still undermined, but if the Court agrees with the applicants, it would be the first time that an environmental case gets a narrow margin of appreciation. This would change the way the Court exercises its subsidiary role. Furthermore, shared liability doctrine would be extended to environmental cases which could help combat the cross border effects of environmental pollution. But maybe most importantly, the connection between human well-being and environmental protection has never been as strong as in this case. The ECtHR has granted the application priority on the basis of the urgency and the importance of the issues.

[185] Duarte Agostinho and Others v. Portugal and 32 Other States (no. 39371/20)
[186] Cordella and Others v. Italy, Appl. no. 54414/1 para 177-182.

Conclusion

You cannot outvote a universal human right
-Dutch Supreme Court

When looking at the historical development of human rights-based environmental protection, it becomes clear that the use of human rights to improve environmental protection has been on the rise. Since the 1972 Stockholm Conference, it has been broadly recognized by scholars, lawyers and activists alike that human rights law and environmental law overlap. Despite the non-recognition of the right to a healthy environment in any declaration of human rights, international courts have produced an abundant case-law regarding environmental issues and the European Court of Human Rights has been the most progressive in doing so. There is no specific reference to the environment or environmental degradation, let alone the right to a healthy environment in the European Convention on Human Rights. In spite of this, the Court has heard numerous cases relating to the environment and has developed an extensive environmental case-law.

From the 1970s onwards, our understanding of the interrelation between human rights and the environment has become increasingly advanced. Throughout history, United Nations agencies have played an important role. The different international conferences on human rights and the environment, the appointment of a Special Rapporteur in the field of human rights and the environment, the UNECE conventions and the UNEP have provoked dialogue, activism and research. However, efforts from Special Rapporteur Knox and others have mostly been on paper. Although it has surely enhanced the interrelation between the environment and human rights in theory, and many countries adopted environmental provisions to their constitutions, international efforts to declare a substantive right to a healthy environment have been unfruitful because of political reluctance.

The fact that the European Convention on Human Rights does not include a right to a healthy environment does not mean that the environment cannot be protected by the Court. Through the progressive interpretation of a number of principles and doctrines, the ECtHR has managed to include environmental norms to the Convention. However, the doctrines and founding principles of the ECtHR structure the ways in which environmental protection and human rights can relate to each other within the framework of the European Convention of Human Rights, as they create the boundaries for human rights-based environmental protection under the ECtHR. Because of its subsidiary role, the Court usually grands states a wide margin of appreciation and makes national law guiding in environmental matters. This means that the court is more likely to find a violation on the bases of an environmental claim when the state has failed to adhere or implement its own environmental law. When the authorities have established a regulatory system to mitigate environmental hazards, which provides access to information and participation, the ECtHR is not likely to find a violation.

An extensive reading of the environmental case-law of the ECtHR has shown that some major developments have taken place within the field of rights-based environmental protection. The Court has ruled that environmental pollution can trigger a violation of Article 8 of the Convention, if it reaches a certain level. For a violation to occur, the applicant does not need to demonstrate actual harm; demonstrating the risk of harm is sufficient. Furthermore, states must fulfil both their positive and negative obligations in order to comply with Article 8. The ECtHR has held that, states are under positive obligation to inform their citizens about environmental hazards and put in place an advanced procedural machinery. Besides that, states are under positive obligation to regulate the private sector from polluting the environment. Over the years the ECtHR has started to engage more and more with other international and EU documents. Using international human rights law and EU law as an interpretive background has strengthened the place of the environment under the Convention. Especially the Aarhus Convention has enhanced the importance of procedural and participatory rights. This process seems to have strengthened the emphasis the Court puts on procedures. The ECtHR thus helps to strengthen national environmental norms and reinforces their supervision machinery. However, when the national legislator sets the environmental standards very low it is unlikely that the Court will find violation of Article 8.

Scholar of human rights law Dinah Shelton argues that human rights and environmental protection have different but overlapping value systems that share a core of common objectives. She has rightfully argued that, the fact that human survival depends upon a safe and healthy environment, places the environment on the human rights agenda. However, the broad protection of nature may at times conflict with the enjoyment of individual human rights, and it is not surprising that international environmental law and human rights law have occasionally placed emphasis on different parts of environmental protection and human rights and therefore potentially conflicting differences of emphasis will exist. The theoretical framework of Shelton offered the possibility to show that human rights and environmental protection are sometimes compatible and at other times incompatible.

In the first approach, human rights are utilized to recognize the broad objectives of environmental protection. The first group selects from the catalogue of human rights those rights that serve the aim of environmentalism, indifferent to the benefit of this for the enjoyment of other rights. The emphasis lies on procedural and participatory rights, and they may be used to protect the environment but do not necessarily relate to human well-being. Globally, the period between the Stockholm Conference and the turn of the century, with its emphasis on procedural and participatory rights, fits Shelton's first category. The Rio Conference and the Aarhus Convention are successful examples of this. In terms of the European Court of Human Rights, procedural and participatory rights make the strongest case before the Court. However, it is not true that human rights are solely used to protect the environment and do not relate to human well-being, as the first approach dictates. Procedural and participatory rights are, in the case-law of the ECtHR, well established as improving both the environment and human well-being. This is reflected by the fact that procedural and participatory rights

are best protected under Article 8 of the Convention what evidently means that some connection with human suffering has to exist.

The second approach calls upon existing human rights guarantees and institutions, adapting or applying human rights law when their enjoyment is jeopardized by environmental issues. This method is undoubtedly anthropocentric, the focus lies on the consequences of environmental issues to human rights and human well-being. Its aim is to ensure that the environment does not deteriorate to the point that the enjoyment of human rights is at risk. In this approach, the well-developed human rights compliance machinery is invoked when the lack of environmental protection of states seriously impairs the human rights status of that country. Starting in 1990, the ECtHR began to develop an environmental case-law in which a number of convention rights gradually became grounds upon which environmental problems could be fought. The "greening" of already recognized rights fits into this approach. In most environmental cases the Court was able to ensure that the environment did not deteriorate to the point that the enjoyment of a human right was at risk. However, environmental protection is not merely instrumental in upholding human rights standards. States are under positive obligation to put in place regulatory initiatives in situations where environmental degradation could occur. Which makes the application of human rights law in environmental cases not only reactive but also creates a situation in which the environment can be protected beforehand.

The goal of the third approach is to fully incorporate environmental protection into the human rights framework by formulating a new human right to a healthy environment. This right should encompass all elements of ecologically balanced nature protection, areas that are generally not protected under human rights law because of its anthropocentric nature. Efforts to draft a substantive universal human right to a healthy and safe environment have proved to be rather unsuccessful. At a national level many countries have adopted some kind of environmental right to their constitutions but the declaration of a substantive human right to a healthy environment has run into strong political opposition. Some scholars have claimed that a right to a healthy environment can be read into the European Convention on Human Rights. However, stating that there exists a right to a healthy environment would be too strong of a claim. Although the ECtHR has built an extensive environmental case-law, it has a strong anthropocentric component, as evidenced by the fact that most environmental cases are fought on the grounds of Article 8 and thus there must exist some kind of link between environmental degradation and human suffering.

The contours of Shelton's framework have extended and have blurred to some extent. The Court's growing interest in using international law and EU instruments as an interpretive background, shows that developments in the environmental case-law of the ECtHR do not stand alone and international developments can alter the Court's perspective. The discussions in the area of human rights and the environment that are going on right now have the power to challenge the existing doctrines of the ECtHR and to break down the contours of Shelton's framework even further. If the Portuguese youths are proven right by the Court, the way in which the environment interrelates with human rights

would change for ever. It would be the first time that an environmental case got a narrow margin of appreciation, which will change the way the Court exercises its subsidiary role substantially. The interpretation of other doctrines would have to change as well, making room for the environment and human rights to interrelate in different and unprecedented ways.

Since a human rights-based approach to environmental protection is part of an emerging strategy to fight environmental degradation, analysing how the two fields interrelate in practice is of great importance. Much research has been done about the theoretical relation between the environment and human rights. Also, the specific environmental landmark cases of the ECtHR have been subject of in-depth study. By applying the categorization of Shelton to the environmental jurisprudence of the European Court of Human Rights, this thesis has exposed the tension between the environmental and human rights and shown that the interrelation between the two fields has undergone some major changes and, is still changing today. This approach has allowed to clarify the limitations to human rights-based environmental protection. The in-depth reading of the environmental case-law of the ECtHR has shown which doctrines serve the aim of environmental protection, which principles of interpretation restrict right-based environmental protection and which procedures are still developing. The analysis of the *Duarte Agostinho and Others v. Portugal and 32 Other States* case hinted to the fact that some crucial doctrinal changes have to be made before climate change related cases can successfully be fought before the ECtHR. However, these doctrinal changes have the power to fundamentally change the interrelation between human rights and environmental protection, and are destined to be subject to further research. As mentioned before, the international recognition of human rights has an immediate, practical advantage. The predominant acceptance of human rights preserves them from the ordinary political process and limits the political will to breach those rights. The high short-term costs involved in implementing climate change mitigation policies often make states hesitant to implement them. If climate change becomes a human rights issue this could significantly lower political resistance because "you cannot outvote a universal human right, not even with the majority of the parliament".[187]

[187] Supreme Court The Hague. *Urgenda v. The State of the Netherlands*. No. ECLI:NL:HR:2019:2006, 20 Dec. 2019.

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